1949

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
1950

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. THIBAUDEAU RINFRET C.J.C.
" Hon. PATRICK KERWIN J.
" " ROBERT TASCHEREAU J.
" " IVAN CLEVELAND RAND J.
" " ROY LINDSAY KELLOCK J.
" " JAMES WILFRED ESTEY J.
" " CHARLES HOLLAND LOCKE J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Stuart Sinclair Garson K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

The Honourable Joseph Jean K.C.
The Honourable Hugues Lapointe.

MEMORANDA

On the twenty-second day of December, 1949, John Robert Cartwright, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada.

On the twenty-second day of December, 1949, the Honourable Joseph Honoré Gerald Fauteux, one of the Puisne Judges of the Superior Court of the province of Quebec, was appointed a Puisne Judge of the Supreme Court of Canada.

ERRATA

in Volume 1949

Page 140, at line 9 of head note, for "25 C.C.C. 24" read "24 C.C.C. 25".

Page 145, at line 37, for "1925" read "1915".

Page 145, fn. (2) read "24 C.C.C. 25".

Page 153, fn. (1) read "2 W.W.R."

Page 230, fn. (1) read "1 K.B. 709".

Page 239, at line 3 of caption, for "R.S.C." read "R.S.B.C.".

Page 397, at line 3 of caption, for "R.S.O. 1939" read "R.S.O. 1937".

Page 515, following line 37 add: "The judgment of Taschereau and Kellock JJ. was delivered by:".

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.

Attorney General of British Columbia v. *Esquimalt* [1948] S.C.R. 329. Petition for special leave to appeal granted., 18th March, 1949.

Canadian Federation of Agriculture v. *Attorney General of Quebec* [1949] S.C.R. 1. Petition for special leave to appeal granted, 26th July, 1949.

Canadian Pacific Railway v. *Attorney General of British Columbia* [1948] S.C.R. 373. Appeal dismissed., 21st November, 1949.

Glover v. *Glover* (not reported). Petition for special leave to appeal granted, 12th December, 1949.

May v. *Hartin* (not reported). Petition for special leave to appeal dismissed, 11th January, 1949.

May v. *Hartin* (not reported). Petition to rescind Order in Council and to give special leave to appeal *in forma pauperis* dismissed, 14th June, 1949.

Minister of National Revenue v. *Great Western Garment Co.* [1948] S.C.R. 585. Petition for special leave to appeal granted, 18th March, 1949.

Minister of National Revenue v. *Great Western Garment Co.* [1948] S.C.R. 585. Appeal withdrawn, 3rd October, 1949.

Oivind Lorentzen v. *Ship "Alcoa Rambler"* (not reported). Appeal dismissed with costs, 14th February, 1949.

Reeder v. *Schnier* (not reported). Petition for special leave to appeal granted, 12th December, 1949.

Yachuk v. *Oliver Blais Co.* [1946] S.C.R. 1. Appeal allowed with costs of appeal and cross appeal, 11th April, 1949.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between the 12th of December, 1948, and the 1st of December, 1949, delivered the following judgments, which will not be reported in this publication:—

Canada Steamship Lines v. *Canadian National Railways* [1948] O.R. 311. Appeal dismissed with costs, 18th March, 1949.

Catellier v. *Leclerc* 56 Man. R. 272. Appeal dismissed with costs, 24th June, 1949.

Central Manufacturers' Mutual Insurance Co. v. *The King* [1948] Ex. C.R. 1. Appeal dismissed with costs, 1st February, 1949.

Chisholm v. *The King* [1948] Ex. C.R. 370. Appeal dismissed with costs, 15th March, 1949.

Coaticook, Town of v. *A. Hopkins et al* Q.R. [1947] K.B. 78. Judgment of the Court of Appeal modified in accordance with agreement reached by counsel for both parties. The appellant to pay the costs in the Superior Court subsequent to the fyling of the "confession de jugement", and also the costs in the Court of King's Bench (Appeal Side). The appellant is entitled to one-half its costs in the Supreme Court, 28th February, 1949.

Coté v. *Chassé et al* Q.R. [1948] K.B. 487. Appeal dismissed with costs, 24th June, 1949.

Durand v. *Merritt* (N.S.): Not reported. Appeal dismissed with costs, 31st October, 1949.

Giroux Motor Sales v. *Lemieux* Q.R. [1948] K.B. 490. Appeal dismissed with costs, 24th June, 1949.

Glover v. *Glover* (Ont.): Not reported. Appeal allowed with costs in the Supreme Court and in the Court of Appeal and judgment at the trial restored, The Chief Justice and Kerwin J. dissenting, 24th June, 1949.

King, The v. *Maracle et al* [1948] 2 D.L.R. 90. Appeal dismissed with costs, 14th December, 1948.

Marko v. *Bristow* [1949] 1 D.L.R. 693. Appeal allowed with costs in the Supreme Court and in the Court of Appeal and judgment at trial restored, 24th June, 1949.

Molnar v. *Shockey* [1949] 1 D.L.R. 328. Appeal dismissed with costs, 24th June, 1949.

Montreal, City of v. *Uguccioni* Q.R. [1948] K.B. 435. Appeal dismissed with costs, 21st February, 1949.

Paquette v. *Consolidated Theatres* Q.R. [1948] K.B. 407. Appeal dismissed with costs, 9th February, 1949.

Powles Engineering v. *Reliable Toy* (Ont.): Not reported. Appeal dismissed with costs, 9th June, 1949.

Reeder v. *Shnier* [1948] O.W.N. 501. Appeal dismissed with costs, the Chief Justice and Rand J. dissenting, 2nd June, 1949.

Servos v. *Town of Niagara et al* (Ont.): Not reported. Appeal dismissed with costs, 18th March, 1949.

Waterfield v. *Tazzman* (Ont.): Not reported. Appeal dismissed with costs, Taschereau J. dissenting, 7th January, 1949.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

A TABLE

OF THE

NAMES OF THE CASES CITED

IN THIS VOLUME

A

B

C

C

D

E

E

F

G

H

H

I

J

K

L

L

M

Mc

N

O

P

Q

R

R

S

T

U

V

W

Y

Z

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF SECTION 5(A) OF THE DAIRY INDUSTRY ACT, R.S.C. 1927, CHAPTER 45.

1948

*Oct. 5, 6, 7, 8
*Dec. 14

Constitutional law—Whether section 5(a) of Dairy Industry Act, R.S.C. 1927, c. 45 is ultra vires of Parliament—Constitutional validity—Criminal law—Trade and Commerce—Agriculture—Property and Civil Rights—Importation—B.N.A. Act, ss. 91, 92, 95.

Subsection *a* of Section 5 of the Dairy Industry Act provides that "no person shall manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream."

The Governor-in-Council referred to this Court under section 55 of the Supreme Court Act the following question: Is section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, c. 45, *ultra vires* of the Parliament of Canada in whole or in part and if so in what particular or particulars and to what extent?

Held that the prohibition of importation of the goods mentioned in the section is *intra vires* of Parliament as legislation in relation to foreign trade. Locke J. finds the whole section to be *ultra vires* while expressing no opinion as to the power of Parliament to ban importation by appropriate legislation, the prohibition of importation being merely ancillary to the other prohibitions.

Held, The Chief Justice and Kerwin J. dissenting, that the prohibition of manufacture, offer, sale or possession for sale of the goods mentioned is *ultra vires* of Parliament. It is legislation in relation to property

---

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

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(*a*) OF THE DAIRY INDUSTRY ACT

and civil rights which cannot be supported under any head of section 91. Nor can it be supported as legislation for the peace, order and good government of Canada.

Per The Chief Justice (dissenting): The Dairy Industry Act is within the domain of the Dominion as a law in relation to agriculture and this cannot be discarded on the ground that the products here in question are articles of trade or commodities which are not directly the product of agriculture. (Eastern Terminal Elevators not applicable). Therefore the insertion of section 5(*a*) being an insertion in the Dairy Industry Act is nothing more than the direct exercise of Parliament's jurisdiction over agricultural matters or at least necessarily incidental and necessary for the effective control of agricultural matters in respect of milk and its by-products; and the mere contention that they are not natural products but rather manufactured articles is not sufficient to remove them from the domain of the federal government in respect of agriculture.

The legislation deals with trade and commerce and is not limited to the regulation of one particular trade or of one particular commodity, nor to one, or more than one, province; it is an Act embracing the whole Dominion. Furthermore, the so-called prohibition in section 5(*a*), when read in conjunction with the whole Act, is not a prohibition at all, but a regulation of trade and commerce, for in regulating, one may prohibit things which are not in accordance with those regulations.

It would seem to me that the manufacture, import or sale of these goods, if thought injurious to the manufacture and sale of butter which concerns such a large and important section of Canada, can hardly be said not to be of national concern.

Per The Chief Justice and Kerwin J. (dissenting): There is no ground on which it may be held that the legislation here in question, on its true construction, is not what it professes to be, that is, an enactment creating a criminal offence in exercise of the powers vested in Parliament by head 27 of section 91. (Proprietary Trade Articles case).

Reciprocal Insurers case [1924] A.C. 328; *King* v. *Eastern Terminal Elevators* [1925] S.C.R. 457; *Lower Mainland Dairy* case [1933] A.C. 168; *Natural Products Reference* [1936] S.C.R. 410; *Canada Temperance Federation* case [1946] A.C. 193 and *Proprietary Trade Articles* case [1931] A.C. 310 referred to.

REFERENCE by His Excellency the Governor General in Council (P.C. 3365, dated July 27, 1948) 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: Is section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, c. 45, *ultra vires* of the Parliament of Canada in whole or in part and if so in what particular or particulars and to what extent?

The Order in Council referring this question to the Court is as follows:

WHEREAS there has been laid before His Excellency the Governor General in Council a report of the Acting Minister of Justice, as follows:

"1. On June 10, 1948, the Senate agreed to the following motion:

'That, in the opinion of this House, the Government should, immediately after prorogation of the present session of Parliament, refer to the Supreme Court of Canada for the opinion of that Court the question of the constitutional validity of that part of the Dairy Industry Act, Chapter 45 of the Revised Statutes of Canada, 1927, which prohibits the manufacture or sale, or having in possession for sale, or offering for sale, oleomargarine, margarine, butterine or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.'

2. The undersigned further reports that according to information furnished by the Department of Agriculture the history of margarine or oleomargarine dates back to about the year 1867 when the original formula for its manufacture was worked out by a French chemist. While the terms margarine and oleomargarine are commonly used interchangeably, there is a distinction between these products in this respect that margarine is a straight vegetable oil compound while oleomargarine contains in addition an animal fat, usually beef fat. The principal vegetable oils used are coconut, cotton-seed, peanut, soya bean and sunflower seed. None of these vegetables is produced in Canada in any considerable volume. Margarine was introduced as a food product in Europe and the United States about 1867.

3. The undersigned further reports that, according to information furnished by the Department of Agriculture, the process of manufacture is as follows:

The vegetable oil is refined and bleached and hydrogenated to the end that the melting point is controlled to meet seasonal requirements. The oil is then deodorized and a sterile, bland, neutral, flavourless oil produced which is mixed with fresh skim milk to which has been added a

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

lactic acid culture, to impart a butter flavour. The mixture is then emulsified and salt and Vitamin A are added. The mixture is then tempered and again emulsified and crystallized by chilling to produce a product of uniform texture. The finished product is then moulded and wrapped for use. In the case of oleomargarine, animal fat is introduced and the process carried out as outlined.

4. The undersigned further reports that the Department of National Health and Welfare submits with its approval the following extract from an article contained in the Canadian Medical Association Journal of August, 1947, respecting margarine:

> 'One factor absent in vegetable oils is Vitamin A, and if the lack of this could not be remedied it would seriously weaken the value of margarine. But it is quite easy to add as much Vitamin A as is needed, and so make margarine contain more of this Vitamin than the richest butter. Even butter is liable to show seasonal variations in its content of Vitamin A. Other vitamins too could be added to margarine such as Vitamin D, for example, of which butter contains very little. As a source of energy, margarine and butter are exactly equal.
>
> 'Perhaps one of the main difficulties encountered with margarine in the early days of its development was that of its taste. That has now been so completely overcome that it is difficult to distinguish between butter and margarine. Even if it was making a virtue of wartime necessity, Britain found no difficulty in learning to like as well as depend on margarine during the war period.
>
> 'A typical margarine today, as made in the United States, consists of 80 per cent refined vegetable oils, together with 16·5 per cent pasteurized non-fat milk for flavour, plus small amounts of glycerin derivative to prevent spattering in frying, vegetable lecithin to prevent burning and sticking to the pan, sometimes benzoate of soda as a preservative, salt and Vitamin A concentrate up to a minimum of 9,000 U.S.P. units per pound; some brands go as high as 15,000 units per pound.'

5. The undersigned has the honour further to report that in 1886 Parliament enacted "An Act to Prohibit the Manufacture and Sale of Certain Substitutes for Butter",

namely, oleomargarine, butterine or other substitute for butter, being Chapter 42 of 49 Victoria. The preamble to this Act read as follows:

'Whereas the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health; and it is expedient to prohibit the manufacture and sale thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:'

This Act was reproduced as Chapter 100 of the Revised Statutes of Canada 1886, the preamble thereto being omitted as is usual in the case of such a revision.

In 1903 the Butter Act was enacted, being Chapter 6 of 3 Edward VII, which prohibited the manufacture, import or sale of oleomargarine or other substitutes for butter. This Act was incorporated into the Inspection and Sale Act, Chapter 85 of the Revised Statutes of 1906, as Part VIII thereof entitled "Dairy Products".

In 1914 the Dairy Industry Act was enacted as Chapter 7 of 4-5 George V. This repealed Part VIII of the Inspection and Sale Act and prohibited the manufacture, import or sale of oleomargarine or other butter substitutes. In the Revised Statutes of 1927, the Dairy Industry Act appears in its present form as Chapter 45 thereof.

Section 5 paragraph (*a*) of the Dairy Industry Act provides as follows:

'5. No person shall

(*a*) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.'

6. The undersigned further reports that by Order in Council P.C. 3044 dated October 23, 1917, made under the War Measures Act the operation of Section 5(*a*) of the Dairy Industry Act was suspended and by Chapter 24 of the Statutes of Canada 1919 (2nd Session) provision was made for the manufacture and importation of oleomargarine until 31st August, 1920, and sale thereof until 1st day of March, 1921. By annual amendments the per-

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

missions contained in the Oleomargarine Act were extended to August 31, 1923, in the case of manufacture and importation, and to March 1, 1924, in the case of sale.

7. The undersigned further reports that according to information furnished by the Department of Agriculture during the period December 1, 1917 to September 30, 1923, oleomargarine and butter were manufactured and imported as follows:

Oleomargarine	Manufactured lbs.	Imported lbs.	Total lbs.
Dec. 1, 1917 to Mar. 31, 1919	10,483,179	6,480,430	16,963,609
Year ended Mar. 31, 1920	6,450,902	6,497,031	12,947,933
Year ended Mar. 31, 1921	6,224,422	4,660,747	10,855,169
Year ended Mar. 31, 1922	1,902,629	1,339,748	3,242,377
Year ended Mar. 31, 1923	2,122,029	1,165,440	3,287,469
6 months ended Sept. 1923	‡1,880,678	745,015	2,625,693
Total	31,063,839	20,858,411	51,922,250

‡Manufactured covers five months ended August 1923.

Butter	Manufactured Million lbs.	Imported Million lbs.	Total Million lbs.
1918	‡193·3	0·4	193·7
1919	‡203·9	1·9	205·8
1920	215·1	0·4	215·5
1921	228·7	3·7	232·4
1922	252·5	6·0	258·5
1923	262·8	3·7	266·5
Total	1356·3	16·1	1372·4

‡Includes estimated dairy butter production of approximately 100 million pounds per year. Statistics on dairy butter production are not available for the years previous to 1920.

8. The undersigned further reports, according to information furnished by the Department of Agriculture, that milk production is an essential basic part of agriculture as certain large areas of Canada, particularly in Ontario and Quebec and the Maritime Provinces are best suited for hay and pasture crops. Consequently, milk production is the branch of agriculture which is best suited to these regions of Eastern Canada. The marginal land farmer produces much of the milk in these areas that finds its way into butter. He is able to produce milk with reasonable profit only by raising hogs and poultry which is a natural side line of the smaller farmer who keeps a few cows. Canadian

dairy products have a value of approximately $400,000,000 per annum of which the butter industry produces about $150,000,000. Approximately 50 per cent of all the milk produced in Canada goes into butter and at one time or another during the production season practically all dairy farmers depend on butter as an outlet for their surplus milk, and without this outlet their operations as milk producers would be seriously affected. Butter is the largest user of milk, of which there is produced annually in Canada approximately 17 billion pounds. Approximately 400,000 farmers are producing milk for butter manufacture and about 85 per cent of the manufacturer's price is returned to the dairy farmers. In addition to the 400,000 farmers involved, there are approximately 1,200 plants engaged in the manufacture of butter with thousands of other individuals depending for their livelihood on the butter industry.

9. The undersigned further reports that information concerning production, composition and consumption of butter and margarine in most of the important countries of the world in 1939 has been furnished to him and is contained in Schedule A hereto.

THEREFORE His Excellency the Governor General in Council, on the recommendation of the Acting Minister of Justice, is pleased, in view of the resolution of the Senate that the opinion of the highest judicial authority in Canada be obtained with the least possible delay, to refer and doth hereby refer the following question to the Supreme Court of Canada for hearing and consideration pursuant to the authority of Section 55 of the Supreme Court Act:

Question

Is Section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, Chapter 45 *ultra vires* of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent?

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

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Saskatchewan and the Canadian Federation of Agriculture, the National Dairy Council of Canada, the Canadian Association of Consumers, the Canadian Manufacturers Association and Mr. Salter Hayden, K.C., counsel for the Honourable W. D. Euler and others were, pursuant to order of the Honourable Mr. Justice Kerwin, notified of the hearing of the Reference.

F. P. Varcoe K.C., W. R. Jackett and *A. J. MacLeod* for the Attorney-General of Canada.

L. E. Beaulieu K.C. for the Attorney-General of Quebec.

M. P. Hyndman K.C. for the Canadian Association of Consumers.

R. H. Milliken K.C. for the Canadian Federation of Agriculture.

S. A. Hayden K.C. and *J. W. Blain* for the Hon. W. D. Euler and others.

J. M. Nadeau for l'Association Canadienne des Électrices and others.

THE CHIEF JUSTICE:—His Excellency the Governor General in Council on the recommendation of the Acting Minister of Justice has been pleased, in view of the resolution of the Senate that the opinion of the highest judicial authority in Canada be obtained, to refer the following question to the Supreme Court of Canada for hearing and consideration pursuant to the authority of Section 55 of the *Supreme Court Act*:—

> Is Section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, Chapter 45 *ultra vires* of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent?

The Order of Reference by His Excellency the Governor General in Council, dated July 27th, 1948, (P.C. 3365) first requires our attention.

The opening paragraph refers to a motion of the Senate adopted on the 10th of June, 1948. Then it proceeds to state that according to information furnished by the Department of Agriculture the history of margarine or oleomargarine dates back to about the year 1867 when the original formula for its manufacture was worked out by a French

chemist, but that while the terms margarine and oleomargarine are commonly used interchangeably, there is a distinction between these products in this respect that margarine is a straight vegetable oil compound while oleomargarine contains in addition an animal fat, usually beef fat. The principal vegetable oils used are cocoanut, cottonseed, peanut, soya bean and sunflower seed. None of these vegetables are produced in Canada in any considerable volume. Margarine was introduced as a food product in Europe and the United States about 1867.

The Order of Reference continues by saying that, according to information furnished by the Department of Agriculture, the process of manufacture is as follows:—

The vegetable oil is refined and bleached and hydrogenated to the end that the melting point is controlled to meet seasonal requirements. The oil is then deodorized and a sterile, bland, neutral, flavourless oil produced which is mixed with fresh skim milk to which has been added a lactic acid culture, to impart a butter flavour. The mixture is then emulsified and salt and Vitamin A are added. The mixture is then tempered and again emulsified and crystallized by chilling to produce a product of uniform texture. The finished product is then moulded and wrapped for use. In the case of oleomargarine, animal fat is introduced and the process carried out as outlined.

The Order of Reference goes on to say that the Department of National Health and Welfare submitted with its approval the following extract from an article contained in the Canadian Medical Association Journal of August, 1947, respecting margarine:—

> One factor absent in vegetable oils is Vitamin A, and if the lack of this could not be remedied it would seriously weaken the value of margarine. But it is quite easy to add as much Vitamin A as is needed, and so make margarine contain more of this Vitamin than the richest butter. Even butter is liable to show seasonal variations in its content of Vitamin A. Other vitamins too could be added to margarine such as Vitamin D, for example, of which butter contains very little. As a source of energy, margarine and butter are exactly equal.
>
> Perhaps one of the main difficulties encountered with margarine in the early days of its development was that of its taste. That has now been so completely overcome that it is difficult to distinguish between butter and margarine. Even if it was making a virtue of wartime necessity, Britain found no difficulty in learning to like as well as depend on margarine during the war period.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

A typical margarine today, as made in the United States, consists of 80 per cent refined vegetable oils, together with 16·5 per cent pasteurized non-fat milk for flavour, plus small amounts of glycerin derivative to prevent spattering in frying, vegetable lecithin to prevent burning and sticking to the pan, sometimes benzoate of soda as a preservative, salt and Vitamin A concentrate up to a minimum of 9,000 U.S.P. units per pound; some brands go as high as 15,000 units per pound.

According to the Order of Reference it was in 1885 that the Parliament of Canada enacted "An Act to Prohibit the Manufacture and Sale of Certain Substitutes for Butter", namely, oleomargarine, butterine or other substitute for butter, being Chapter 42 of 49 Victoria. The preamble to this Act reads as follows:—

> Whereas the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health; and it is expedient to prohibit the manufacture and sale thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

This Act was reproduced as Chapter 100 of the Revised Statutes of Canada 1886, the preamble thereto being omitted "as is usual in the case of such a revision", so the Order of Reference states.

In 1903 the Butter Act was enacted, being Chapter 6 of 3 Edward VII, which prohibited the manufacture, import or sale of oleomargarine or other substitutes for butter. This Act was incorporated into the Inspection and Sale Act, Chapter 85 of the Revised Statutes of 1906, as Part VIII thereof entitled "Dairy Products".

In 1914 the Dairy Industry Act was enacted as Chapter 7 of 4-5 George V. This repealed Part VIII of the Inspection and Sale Act and prohibited the manufacture, import or sale of oleomargarine or other butter substitutes. In the Revised Statutes of 1927, the Dairy Industry Act appears in its present form as Chapter 45 thereof.

Section 5, paragraph (*a*), of the *Dairy Industry Act* provides as follows:—

> 5. No person shall
>
> (*a*) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

By Order in Council P.C. 3044, dated October 23rd, 1917, made under the War Measures Act, the operation of Section 5(*a*) of the Dairy Industry Act was suspended

and by Chapter 24 of the Statutes of Canada 1919 (2nd Session) provision was made for the manufacture and importation of oleomargarine until 31st August, 1920, and sale thereof until the 1st day of March, 1921. By annual amendments the permissions contained in the Oleomargarine Act were extended to August 31st, 1923, in the case of manufacture and importation, and to March 1st, 1924, in the case of sale.

According to information furnished by the Department of Agriculture, during the period December 1st, 1917 to September 30th, 1923, oleomargarine was manufactured and imported to amounts totalling almost 17,000,000 lbs. from December 1, 1917 to March 31st, 1919, almost 15,000,000 lbs. for the year ending March 31st, 1920, almost 11,000,000 lbs. for the year ending March 31st, 1921, somewhat more than 3,240,000 lbs. in the year ending March 31st, 1922, slightly more than 3,280,000 lbs. for the year ending March 31st, 1923, and 2,625,693 lbs. for the six months ending September, 1923.

During the same period of time the manufacture and importation of butter appears to have been more than 193,000,000 lbs. for the year 1918, more than 205,000,000 lbs. for the year 1919, more than 215,000,000 lbs. for the year 1920, more than 232,000,000 lbs. for the year 1922, and more than 266,000,000 lbs. for the year 1923.

During the six years in question, 1918 to 1923, the importation of butter was almost negligible, amounting to only 16,000,000 lbs. 1922 was the only year in which the figures were at all worthy of consideration, the importation of butter in that year reaching 6,000,000 lbs.

The Order of Reference goes on to say that, according to information furnished by the Department of Agriculture, milk production is an essential basic part of agriculture as certain large areas of Canada, particularly in Ontario and Quebec and the Maritime Provinces, are best suited for hay and pasture crops. Consequently, milk production is the branch of agriculture which is best suited to these regions of Eastern Canada. The marginal land farmer produces much of the milk in these areas that finds its way into butter. He is able to produce milk with reasonable profit only by raising hogs and poultry, which is a natural side

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

line of the smaller farmer who keeps a few cows. Canadian dairy products have a value of approximately $400,000,000 per annum, of which the butter industry produces about $150,000,000. Approximately 50 per cent of all the milk produced in Canada goes into butter, and at one time or another, during the production season, practically all dairy farmers depend on butter as an outlet for their surplus milk, and without this outlet their operations as milk producers would be seriously affected. Butter is the largest user of milk, of which there is produced annually in Canada approximately 17 billion pounds. Approximately 400,000 farmers are producing milk for butter manufacture and about 85 per cent of the manufacturer's price is returned to the dairy farmers. In addition to the 400,000 farmers involved, there are approximately 1,200 plants engaged in the manufacture of butter with thousands of other individuals depending for their livelihood on the butter industry.

Information concerning the production, composition and consumption of butter and margarine in most of the important countries of the world in 1939 is contained in Schedule A, appended to the Order of Reference. This schedule discloses the world production of margarine plus butter production in listed countries for the year 1939. In the United States more than 354,000,000 pounds of margarine were produced, in the United Kingdom more than 423,000,000 pounds, in Germany more than 815,000,000 pounds.

The countries listed in Schedule A are as follows:—

United States	Germany
Canada	Netherlands
United Kingdom	Norway
Ireland	Portugal
Belgium	Sweden
Czecho-Slovakia	Japan
Denmark	Australia
Finland	New Zealand
France	

Canada alone, of all these important countries of the world, prohibits the importation, production and consumption of margarine.

The same Schedule sets out a comparison of the food values per 100 grams between butter and oleomargarine. These values are practically the same with respect to calories, protein grams, fat grams, carbohydrate grams, phosphorous grams and iron milligrams. As regards calcium grams the table states that with respect to butter the food value, both in winter and summer, amounts to ·016 and with respect to oleomargarine ·002 and as to Vitamin A International Units it is stated that the percentage for butter in summer is 3970 and in winter 2200 and for oleomargarine it is 1980 units.

It should be noted that no mention of Vitamin D is made in Schedule A, although in the article contained in the Canadian Medical Association Journal of August, 1947, respecting margarine which forms part of the Order of Reference and which is quoted above, it is stated:—

> One factor absent in vegetable oils is Vitamin A, and if the lack of this could not be remedied it would seriously weaken the value of margarine. But it is quite easy to add as much Vitamin A as is needed, and so make margarine contain more of this Vitamin than the richest butter. Even butter is liable to show seasonal variations in its content of Vitamin A. Other vitamins too could be added to margarine such as Vitamin D, for example, of which butter contains very little. As a source of energy, margarine and butter are exactly equal.
>
> Perhaps one of the main difficulties encountered with margarine in the early days of its development was that of its taste. That has now been so completely overcome that it is difficult to distinguish between butter and margarine...

This Court ordered that notification of the hearing of the argument upon the Reference be sent to the respective Attorneys General for the several Provinces of Canada, the Canadian Federation of Agriculture, the National Dairy Council of Canada, the Canadian Association of Consumers, the Canadian Manufacturers Association and Hon. Salter Hayden, K.C., counsel for the Hon. W. D. Euler and others.

At the hearing, in addition to the Attorney General of Canada, the Canadian Federation of Agriculture appeared in support of the validity of Section 5(*a*) of the Dairy Industry Act. Hon. Salter Hayden, K.C., representing Hon. W. D. Euler and others; Mr. L. E. Beaulieu, K.C., representing the Attorney General of Quebec, Miss M. P. Hyndman, K.C., representing The Canadian Association of Consumers, and Mr. Jean-Marie Nadeau, K.C., representing l'Association Canadienne des Électrices et autres, appeared

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

in support of the contention that the subject matter of Section 5(*a*) was exclusively within provincial jurisdiction and competence and that, therefore, its insertion in the Dairy Industry Act was *ultra vires*.

It now becomes our duty to give our answer to the question referred to this Court by His Excellency the Governor General in Council.

In order to understand properly the exact purport of Section 5 (*a*) it is essential, in my opinion, to begin by an analysis of the *Dairy Industry Act,* which, it is stated in the Order of Reference, came into force in 1914 (Chapter 7 of 4-5 George V), the constitutional validity of which (except for Section 5(*a*)) has not been challenged before this Court.

Part I deals with the manufacture and sale of dairy products and butter substitutes. The Interpretation Section defines "butter", "creamery", "creamery butter", "dairy", "dairy butter", "dairy product", "fat", "foreign substance", "homogenized milk", "illegal dairy product", "oleomargarine", "package", "renovated butter" and "whey butter". The definition of oleomargarine in this Interpretation Section is as follows:—

> (*n*) "oleomargarine" means any food substance other than butter, of whatever origin, source or composition which has the appearance of and is prepared for the same uses as butter.

The next section deals with the regulations the Governor in Council may make as he deems necessary. The following paragraphs are pertinent:—

> (*c*) the seizure and confiscation of apparatus and materials used in the manufacture of any butter, cheese or other dairy product or imitations thereof in contravention of any of the provisions of this Part or of any regulation made hereunder;
>
> . . . . .
>
> (*e*) the seizure and confiscation of any illegal dairy product as defined in this Part;
>
> . . . . .
>
> (*g*) the imposition upon summary conviction of penalties not exceeding fifty dollars and costs upon any person violating any regulation made under the provisions of this Part;

Section 4 deals with the quality of milk for manufacturers and reads as follows:—

> 4. No person shall sell, supply or send to any cheese or butter or condensed milk or milk powder or casein manufactory, or to a milk or cream shipping station, or to a milk bottling establishment or other

premises where milk or cream is collected for sale or shipment, or to the owner or manager thereof, or to any maker of butter, cheese, condensed milk or milk powder or casein to be manufactured:

(a) milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as skim-milk, or any milk to which cream has been added, or any milk or cream to which any foreign fat, colouring matter, preservative or other chemical substance of any kind has been added;

(b) milk from which any portion of that part of the milk known as strippings has been retained;

(c) any milk taken or drawn from a cow that he knows to be diseased at the time the milk is so taken or drawn from her.

Section 5 deals with "Butter" and sub-section (a) of that section forms the question referred to this Court for consideration. As it has already been quoted above it is not necessary to repeat it here. It is sufficient to state that it is prohibited to manufacture, import into Canada, or offer, sell or have in one's possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

It should be noticed at once that in Section 5(a) oleomargarine, margarine and butterine are placed on the same footing as any other substitute for butter and that oleomargarine and margarine are characterized as being substitutes for butter.

The only other sub-section of Section 5 that need be referred to is sub-section (e) which states:—

5. No person shall

(e) have upon premises occupied by him where any dairy produce is treated, manipulated, manufactured, or re-worked, any substance that might be used for the adulteration of any such product and the presence upon any such premises of any fat or oil capable of being used for such adulteration shall be *prima facie* proof of intent so to use it.

Section 6 prohibits the importation into Canada, or the offering, selling or having in one's possession for sale (a) any butter containing over sixteen per centum of water, or less than eighty per centum of milk fat; or (b) any process or renovated butter. The other sub-sections of Section 6 deal with the character and weight of butter.

Section 7 is as follows:—

7. No person shall manufacture, import into Canada, sell, offer, or have in possession for sale, any cheese which contains any fat or oil other than that of milk or cream.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

Section 8 deals with the adulteration of cheese.

Then follow some miscellaneous provisions providing for penalties in the case of the violation of any of the provisions of Sections 4, 6 and 8 of the *Act*. In this respect Section 9 states:—

> 9. Any person, firm or corporation who violates any of the provisions of sections four, six or eight of this Act, shall for each offence, upon summary conviction, be liable to a fine not exceeding fifty dollars and not less than ten dollars, together with the costs of prosecution, and in default of payment of such penalty and costs shall be liable to imprisonment with or without hard labour, for a term not exceeding six months, unless such penalty and costs and the costs of enforcing the same are sooner paid.

Section 10, dealing with penalties in the case of violations of Sections 5 and 7, reads:—

> 10. Any person who violates any provision of sections five or seven of this Act shall be guilty of an offence and upon summary conviction, shall be liable
>
> (*a*) in the case of a first offence to a fine not exceeding one thousand dollars and not less than five hundred dollars;
>
> (*b*) in the case of a second offense to a fine not exceeding two thousand dollars and not less than one thousand dollars; in each case together with the costs of prosecution and in default of payment of such penalty and costs, to imprisonment for a term not exceeding six months with or without hard labour, unless the said penalty and costs, with costs of enforcing the same, are sooner paid;
>
> (*c*) in the case of a third or subsequent offence to imprisonment for a term not exceeding six months with or without hard labour.

This Section 10 was repealed and re-enacted by Chapter 40, 1925 S.C., in the form just quoted.

It should be noted in the case of a third or subsequent offence, imprisonment is provided for without the alternative of a fine.

Sections 11 and 12 deal with the persons liable for violating those sections of the Act relating to milk, cheese, butter or other dairy product.

There are other sections of the *Act* providing for penalties for obstructing persons enforcing the *Act*, for the appointment of inspectors and permitting them access to all places where dairy products are manufactured, or stored or dealt in, or held for transport or delivery, and for employees assisting the inspectors.

The closing sections of Part 1 of the *Act* (16 to 20 inclusive) deal with procedure, proof in deteriorated milk prosecutions, venue, evidence, establishment of guilt for

violation of the Act, summary prosecution, etc. With respect to summary prosecution it is stated:—

> In all respects not provided for in this Part, the procedure under the provisions of the Criminal Code, relating to summary convictions, shall, so far as applicable, apply to all prosecutions brought under this Part.

Part II of the *Act* deals with the grading of dairy produce. It defines "dairy produce", "grader", "inspector", "grading store", "package" and it states that the Minister to whom the administration of that Part of the Act is entrusted is the Minister of Agriculture.

The Governor in Council is authorized to make regulations not inconsistent with the *Act* and *inter alia* to provide for the establishment of standards, definitions and grades for dairy produce; and it should be remembered that the definition of "dairy produce" includes butter, cheese and other food products manufactured from milk.

Section 25 provides for penalties against any person who, not being a dairy produce grader, alters, effaces, or obliterates wholly or partially, or causes to be altered, effaced or obliterated, any dairy produce grader's brands or marks on any dairy produce which has undergone grading, or on any package containing such dairy produce.

Part III deals with the testing of glassware used in connection with milk tests and prohibits the marking of such glassware that has not been tested. The sale of glassware not marked is prohibited and so is its use. Section 30, dealing with regulations, fees and penalties reads as follows:—

> 30. The Governor in Council may make regulations for the operation and enforcement of this Part, and may, by such regulations, establish fees for the verification of the apparatus therein referred to and also provide for the imposition of penalties not exceeding fifty dollars for each offence against this Part or against any regulation made hereunder . . .

Section 1 of the Regulations made under Part I of the *Dairy Industry Act,* R.S.C. 1927, Chapter 45, and amendments thereto, deals with definitions. Sub-section (*c*) defines "butter" as "meaning the food product, commonly known as butter, manufactured exclusively from milk or cream or both, with or without colouring matter, salt or other harmless preservatives". "Cheese", "creamery", "creamery butter", "dairy", "dairy butter", "dairy product", "grader", "package", "cream cheese", "process cheese", "skim-milk cheese", "whey", "whey butter", "ice cream", "sherbet" and "milk products" are all defined.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

"Dairy product" or "dairy products" are defined as meaning "any milk, cream, condensed milk, evaporated milk, milk powder, butter, cheese, ice cream, or any other product manufactured from milk and all imitations thereof". Again the "Minister" to whom the administration of the Act is entrusted is the Minister of Agriculture.

Section 2 deals with compulsory branding. It is stated that "all brands required by these regulations to be placed on a cheese, and on a package containing cheese or butter of a net weight of more than twenty-five pounds shall be legible and indelible. . . ." Sub-section (*e*) (1) refers to the branding of cheese, creamery butter or whey butter and the packages for those articles.

Section 3 deals with prohibited branding and Section 4 with the sale of dairy products, which include butter, dairy butter,whey butter, skim-milk, cheese, creamery butter. It also refers to the branding of packages for these dairy products and provides for penalties for the infringement of the regulations concerning the sale of those products.

Sub-sections 2, 3 and 4 of Section 4 prohibit the manufacture, import into Canada, sale, offer or having in one's possession for sale ice cream, sherbet, ice cream cakes, chocolate-coated ice cream bars, ice cream moulded into special shapes or any other ice cream specialty or novelty of which ice cream is a part, or any frozen or semi-frozen milk product, unless the product conforms with the specifications therein mentioned. There are also elaborate provisions concerning ice cream and sherbet and for the containers or cabinets used for their storage.

Section 6 of the Regulations deals with the seizure and confiscation of apparatus or materials used or intended to be used in the manufacture of any butter, cheese, or other dairy product or imitation thereof in contravention of any of the provisions of the Act or of any regulations made thereunder. It also refers to the disposal of seized products and provides for the keeping of record books and registers.

Then follow Schedule No. 1 and Schedule No. 2. The former is a form for "application for registration of a cheese factory, a creamery, a combined factory or a factory where cheese is processed or butter is re-worked", and Schedule No. 2 illustrates the form and size of type number on a cheese, and on packages containing cheese or butter of a net weight of more than twenty-five pounds.

Regulations under Part II of the *Act* deal with cheddar cheese and creamery butter of Canadian origin intended for export. It refers to standards for grades of cheese, these standards being divided into first, second and third grade cheese and below third grade cheese. There are also standards for grading washed curd cheese and for grades of creamery butter.

There are also regulations under Part III of the *Act* dealing with the duty of verifying the glassware which comes under the provisions of that Part and which is assigned to the Weights and Measures Standards Branch, Department of Trade and Commerce, Ottawa.

In my opinion, it follows, from the analysis just made of the *Dairy Industry Act,* that, in addition to being legislation under Section 95 of the *British North America Act* dealing with agriculture, so far as it relates to that subject matter, the *Act* has effect, notwithstanding any law of the legislature of a Province relating to agriculture which may be repugnant to it. It also falls within the ambit of Head 27 of Section 91 of the *British North America Act* extending to "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters", because it meets the definition as stated in the decision of the Judicial Committee of the Privy Council in *Proprietary Articles Trade Association et al* v. *Attorney-General for Canada et al* (1). Section 5(*a*) of the *Dairy Industry Act* deals truly with "acts prohibited with penal consequences" and it cannot be contended that it is colourable legislation on the part of Parliament. My brother Kerwin has satisfactorily dealt with this point in his answer to the question submitted in the Order of Reference. I agree with what he has said and do not find it necessary to add anything further on that point.

But I wish to state also that, to my mind, Section 5(*a*) of the Act can be supported in favour of the Dominion's contention both on the grounds that it is Agriculture (Section 95 of the B.N.A.A.) and Head 2 of Section 91 of the same Act (B.N.A.A.), the Regulation of Trade and Commerce.

It was not contended at bar—and I think it could hardly be contended—that the Dairy Industry Act and regulations thereunder are not within the domain of the federal parlia-

(1) [1931] A.C. 310 at 324 and 325.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

ment by force of Section 95 of our constitution. It is a law in relation to agriculture which the Parliament of Canada from time to time is empowered to make in relation to agriculture, and it is not within the competence of the respective provincial legislatures to enact legislation in this regard when Parliament has already covered the field, in view of the following words of Section 95:—

> and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

That point of view cannot be discarded on the ground that oleomargarine or margarine are supposedly articles of trade, or commodities which are not directly the product of agriculture. In support of that suggestion a passage in the judgment of Mignault J. in *The King* v. *Eastern Terminal Elevator Co.* (1) was largely relied on. In that passage Mignault J. said:—

> I have not overlooked the appellant's contention that the statute can be supported under section 95 of the British North America Act as being legislation concerning agriculture. It suffices to answer that the subject matter of the Act is not agriculture but a product of agriculture considered as an article of trade. The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products. What we have here is trade legislation and not a law for the encouragement or support of agriculture, however wide a meaning may be given to the latter term.

It should be noted that the passage just quoted was only the expression of one judge, about which the majority of the Court said absolutely nothing. The judgment of this Court did not in any way uphold that view and it ought to be taken as a mere *obiter* which cannot stand as a judgment of this Court. To the appellant's contention that the statute could be supported under Section 95 of the *British North America Act* as being legislation concerning agriculture, Mignault J. cursorily said: "It suffices to answer that the subject matter of the Act is not agriculture but a product of agriculture considered as an article of trade." And he added:—

> The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products. What we have here is trade legislation and not a law for the encouragement or support of agriculture, however wide a meaning may be given to the latter term.

(1) [1925] S.C.R. 434 at 457.

I shall deal later with the contention that the legislation under consideration in this Reference can be regarded as a regulation of trade and commerce, but I think it proper to observe at this point that we cannot rest our answer to the question in the Order of Reference on the above passage from a judgment of one member of this Court, not concurred in by the majority who delivered judgment, and which has all the characteristics of a mere *obiter* and which I consider was quite unnecessary for the purpose of the judgment of the learned judge in that particular case.

I cannot agree, therefore, with the argument that the constitutional validity of the *Dairy Industry Act* is not supported under Section 95 of the *British North America Act*. Indeed, if Parliament does not derive its authority from Section 95 to pass such an *Act*, I am at a loss to perceive upon what other Head of Section 91 it could be held to have been competently adopted. I repeat, that it was in no way challenged in the course of the argument before the Court. In these circumstances the insertion of Section 5(*a*) of the *Dairy Industry Act*, dealing with the "manufacture, import into Canada, or offer for sale or have in one's possession for sale, oleomargarine, margarine, butterine, or *other substitute for butter, manufactured* wholly or in part from any fat other than that of milk or cream", being an insertion in the *Dairy Industry Act* and adopted by Parliament by virtue of its power to deal with "laws in relation to agriculture in the provinces", is, in my opinion, nothing more than the direct exercise of Parliament's jurisdiction over agricultural matters, or at least necessarily incidental and necessary for the effective control of agricultural matters in respect of milk and its by-products.

It should be observed that the *Dairy Industry Act*, as I have illustrated in the opening paragraphs of this judgment, deals not only with milk, but also with butter, several varieties of cheese, ice cream, sherbet, etc., all coming within the special definition contained in the *Act* of "dairy product", or "dairy products", or "dairy produce", and, according to the definition, meaning "any milk, cream, condensed milk, evaporated milk, milk powder, butter, cheese, ice cream or any other article *manufactured* from milk and all imitations thereof". It seems, in my

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

opinion, impossible to distinguish oleomargarine or margarine from any of these other articles included in the definition of dairy products, particularly when, as set out in Section 5(*a*), they are likened to "butterine, or other substitute for butter".

The fact that oleomargarine and margarine do not come directly from the cows (of course they do not) and the mere contention that they are not natural products but rather manufactured articles is not sufficient to remove them from the domain of the federal government in respect of agriculture. If this argument were sound, the same thing could be said with as much force about butter, cheese, ice cream, or, in the words of the definition of "dairy product" in the Act, "any other article manufactured from milk and all imitations thereof". From that point of view oleomargarine and margarine are strictly on a par with these commodities just mentioned; and, if the manufacture of butter, cheese, ice cream, or any other commodity manufactured from milk and all imitations thereof are properly regulated and, in many cases, prohibited by force of the *Dairy Industry Act,* it does not seem possible to say that oleomargarine and margarine cannot be competently dealt with by Parilament under the provisions of that *Act* on the mere pretense that they are "manufactured articles". They are just as much a dairy product as butter, cheese, ice cream, or other articles *"manufactured"* from milk. They are, therefore, proper subject matters of an Act adopted by Parliament in virtue of its powers under Section 95 of the *British North America* Act and Section 5(*a*) was competently inserted in the *Dairy Industry Act,* just as much as all the other sections of the Act dealing with butter, cheese, ice cream, or other commodities manufactured from milk. In fact, the definition of "dairy product", or "dairy produce" in Section 2 of Part I of the *Act* indicates conclusively that Parliament intended to include as a dairy product articles manufactured from milk and, if oleomargarine and margarine had not been specifically mentioned in the Act, they would come under the definition as being "any other article manufactured from milk".

For these reasons I would answer the question put to the Court in the Order of Reference by declaring that Section 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, chapter 45, is *intra vires* the Parliament of Canada in whole on the ground that it has constitutional validity as a proper exercise of the powers of Parliament by virtue of Section 95 of the *British North America Act*.

But there is yet another reason for stating that the validity of Section 5(*a*) must be upheld. By Head 2 of Section 91 of the *British North America Act* the regulation of trade and commerce has been entrusted to Parliament. It has not been disputed that the legislation submitted to us deals with trade and commerce. Indeed the contention of those who pretend that Section 5(*a*) is invalid from a constitutional point of view, as not being within the proper domain of the federal parliament, is that it cannot be regarded as coming within Section 95, dealing with agriculture, for the reason, they say, that oleomargarine and margarine are not products of agriculture but that they are "articles of trade". Following this contention to its necessary consequence, they say that it cannot come under federal jurisdiction because then it would be regulation of a particular trade and, as a result of numerous decisions of the Judicial Committee of the Privy Council, it does not come within Head 2 of Section 91 of the *British North America Act*, and the decision of the Judicial Committee in *Citizens Insurance Co. of Canada* v. *Parsons* (1) was cited, where Sir Montague Smith, delivering the judgment of the Board, said:—

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and *it may be* that they would include general regulations of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sec. 92.

(1) (1881-82) 7 A.C. 96 at 113.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

Subsequent pronouncements of the Judicial Committee on the same subject were summarized by Sir Lyman Duff, C.J.C., in *The Natural Products Reference* (1):—

> It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

It is scarcely necessary to add that Chief Justice Duff's views were commended by the Judicial Committee in the words of Lord Atkin: (2)

> The few pages of the Chief Justice's judgment will, it is to be hoped, form the *locus classicus* of the law on this point, and preclude further disputes.

I should like to point out, however, that the *Dairy Industry Act* does not deal with a particular trade, or with a particular commodity. We have seen that it deals with milk, cream, condensed milk, evaporated milk, milk powder, butter, cheese, ice cream or any other article manufactured from milk and all imitations thereof; and Part II of the *Act* deals with the grading of dairy produce, grading store, the powers of the Governor in Council to make regulations for the establishment of standards, definitions and grades for dairy produce and for the maturing, storing, packaging, handling and transporting of dairy produce. Then Part III deals with the testing of glassware used in connection with milk tests.

The regulations, which have not been attacked, define butter as "the food product, commonly known as butter, *manufactured* exclusively from milk or cream or both, with or without colouring matter, salt or other harmless preservatives". Cheese is defined as "the product made from curd obtained from milk, skim-milk, cream or any mixture of these by coagulating the casein thereof with rennet, lactic acid or any suitable enzyme or acid, and with or without further processing or the addition of other wholesome ingredients, such as fresh milk solids, ripening, ferments, special moulds, emulsifying agents, seasoning or colouring matter, and may not contain any preservative other than salt (sodium chloride)". "Dairy product" is

(1) [1936] S.C.R. 398 at 410. (2) [1937] A.C. 326 at 353.

defined as "any milk, cream, condensed milk, evaporated milk, milk powder, butter, cheese, ice cream, or any other product *manufactured* from milk and all imitations thereof". Then the regulations deal with whey, whey cream, whey butter, ice cream, sherbet and, in fact, all milk products.

Reference has already been made to the fact that the regulations deal with compulsory branding, prohibited branding, the sale of dairy products, and that "every person who manufactures or intends to manufacture cheese, creamery butter or whey butter, or processes, or intends to process cheese, or reworks or intends to rework butter, shall register with and obtain a certificate of registration with a registration number from the Department, Ottawa, for each such factory owned or operated by him".

Regulations under Part II as I have mentioned above, divides cheese into first, second, third grade and below third grade cheese and contains elaborate provisions for the scores and definitions for grades of butter.

Regulations under Part III provide for the verification of glassware and it is stated:—

> 34. All test bottles and pipettes used in connection with the testing of milk or cream, except skim-milk bottles and the tubes used in connection with the apparatus known as the "Oil Test Churn" shall be forwarded, charges prepaid, to the Weights and Measures Standards Branch, Department of Trade and Commerce, Ottawa, Canada, for the purpose of verification.

Clearly such an Act is not limited to the regulation of one particular trade or of one particular commodity, nor to one, or more than one province; it is an Act embracing the whole Dominion.

It was also argued that the power to regulate under Head 2 of Section 91 does not mean the power to prohibit, that prohibition is not regulation, that, in fact, from the moment you prohibit you exclude regulation. In my opinion such a contention cannot be supported. In the process of regulating these different commodities, or the trading in these different commodities, the *Dairy Industry Act* prescribes extensive regulations, in the course of which certain prohibitions are included. It stands to reason that, if you regulate, you may prohibit things that are not in accordance with those regulations. Section 5(*a*) deals with "the manufacture, import into Canada, or offer, sale or having in one's possession for sale, any oleomargarine, mar-

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

garine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream" and it does not amount to absolute prohibition. In the precise words of the Section it prohibits only those commodities which are "manufactured wholly or in part from any fat other than that of milk or cream". Therefore, it is unnecessary to reiterate that the effect of the section is that no person shall "manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream". The prohibitions which flow from this Section 5(*a*) are enumerated in the sub-sections that follow, i.e., (*b*), (*c*), (*d*) and (*e*). For instance, sub-section (*b*) provides that:—

> 5. (*b*) No person shall mix with or incorporate with butter, by any process of heating, soaking, rechurning, reworking, or otherwise, any cream, milk, skim-milk, butter-milk or water to cause such butter when so treated to contain over sixteen per centum of water or less than eighty per centum of milk fat.

The particular "mixing" or "processing" is prohibited but butter itself is not prohibited.

Sub-sections 5 (*c*), (*d*) and (*e*) read as follows:—

> 5. No person shall
>
> (*c*) melt, clarify, refine, rechurn, or otherwise treat butter to produce "process" or "renovated" butter;
>
> (*d*) manufacture, import into Canada, or sell, offer, expose or have in possession for sale, any milk or cream or substitute therefor which contains any fat or oil other than that of milk;
>
> (*e*) have upon premises occupied by him where any dairy produce is treated, manipulated, manufactured, or reworked, any substance that might be used for the adulteration of any such product and the presence upon any such premises of any fat or oil capable of being used for such adulteration shall be *prima facie* proof of intent so to use it.

It can be seen very clearly that the whole of Section 5 does not prohibit the dairy product therein mentioned; it only prohibits certain methods of manufacturing it and, if one considers all the sections of the *Dairy Industry Act,* it is apparent that oleomargarine and margarine are treated exactly on a par with all the other products. To illustrate what I have just said it is only necessary to refer to sub-section (2) of Section 4 of the regulations made under Part I of the *Act,* dealing with ice cream and sherbert. In that sub-section certain kinds of ice cream and sherbet which

do not come up to the standards therein prescribed are prohibited, but no one would contend that that is prohibition within the meaning of Head 2 of Section 91 of the *British North America Act*. It is very proper regulation prohibiting "the manufacture, import into Canada, sale, offer or having in one's possession for sale" ice cream or sherbet which do not come up to standards established by the regulations and, at the same time, allowing the manufacture, import into Canada and sale of ice cream or sherbet which come up to the established standards.

My conclusion is, therefore, that the so-called prohibition in Section 5(*a*) is not prohibition at all, but a regulation of trade and commerce and properly within the competence of Parliament in virtue of Head 2 of Section 91 of the *British North America Act*. In my opinion, when that Section 5(*a*) is read in conjunction with the whole of the *Act*, there is no real prohibition. It is truly a "regulation of trade and commerce"; or that Section 5(*a*) is only a necessary incidental part of an Act which Parliament had full power to adopt by virtue of Section 95 of the *British North America Act* and, moreover, in view of the form given to it, it also comes within Head 27 of Section 91 (Criminal Law).

Of course, it may be said that the whole Act is unquestionably of national interest and importance and that the legislation as originally enacted was for the purpose of safeguarding the whole of the public generally. In this regard I think it proper to quote a passage from the decision of the Judicial Committee of the Privy Council, *Attorney General for Ontario* v. *Canada Temperance Federation* (1), where Viscount Simon said:—

> It was not contended that if the Act of 1878 was valid when it was enacted it would have become invalid later on by a change of circumstances . . . Their Lordships do not find it necessary to consider the true effect either of s. 5 or s. 8 of the Act of 1924 for the revision of the Statutes of Canada, for they cannot agree that if the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could be successfully contended that the Act of 1927 which replaced it was *ultra vires*.

It was stated that the purpose of the *Dairy Industry Act* was to give trade protection to the dairy industry in the

(1) [1946] A.C. 193 at 207.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rinfret C.J.

production and sale of butter as against substitutes. In this connection the Order of Reference specifically stated (sec. 8):—

> Milk production is an essential basic part of agriculture as certain large areas of Canada, particularly in Ontario and Quebec and the Maritime Provinces are best suited for hay and pasture crops. Consequently, milk production is the branch of agriculture which is best suited to these regions of Eastern Canada. The marginal land farmer produces much of the milk in these areas that finds its way into butter. He is able to produce milk with reasonable profit only by raising hogs and poultry which is a natural side line of the smaller farmer who keeps a few cows. Canadian dairy products have a value of approximately $400,000,000 per annum of which the butter industry produces about $150,000,000. Approximately 50 per cent of all the milk produced in Canada goes into butter and at one time or another during the production season practically all dairy farmers depend on butter as an outlet for their surplus milk, and without this outlet their operations as milk producers would be seriously affected. Butter is the largest user of milk, of which there is produced annually in Canada approximately 17 billion pounds. Approximately 400,000 farmers are producing milk for butter manufacture and about 85 per cent of the manufacturer's price is returned to the dairy farmers. In addition to the 400,000 farmers involved, there are approximately 1,200 plants engaged in the manufacture of butter with thousands of other individuals depending for their livelihood on the butter industry.

It would seem to me that the manufacture, import or sale of oleomargarine or margarine, or other substitutes for butter, manufactured wholly or in part from any fat other than that of milk or cream, if thought injurious to the manufacture and sale of butter which concerns such a large and important section of Canada, can hardly be said not to be of national concern. That consideration, however, goes only to the motive of Parliament in dealing with this matter by legislation. It is possible that Parliament could invoke the opening part of Section 91 as a sufficient reason for dealing with this matter in the way it has been dealt with in Section 5(*a*) of the *Dairy Industry Act*. But, in addition, it emphasizes very clearly the fact that such a situation does come under Head 2 of Section 91, the regulation of trade and commerce, and also under section 95, agriculture.

I need hardly add that whatever may be said of the local manufacture or sale of oleomargarine and margarine, no question can be raised as to the competence of Parliament to deal with the "import into Canada". That is, of course, essentially a matter within the competence of Parliament, as also would be the interprovincial trade in those com-

modities. The argument of those who opposed the constitutional jurisdiction of Parliament with regard to Section 5(*a*) was limited to Parliament's power to deal with local manufacture or sale within each province; and, in my opinion, even in this respect Section 5(*a*) was competently enacted by Parliament.

My answer to the question submitted in the Order of Reference is, therefore, that Section 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, chapter 45, is not *ultra vires* the Parliament of Canada in whole or in part.

KERWIN J.: Section 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, chapter 45, with which we are concerned, reads as follows:—

> 5. No person shall
>
> (*a*) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream;

The Order of reference explains that while the terms margarine and oleomargarine are commonly used interchangeably, margarine is a straight vegetable oil compound and oleomargarine contains in addition an animal fat, usually beef fat. It also gives us the process of manufacture as follows:—

> The vegetable oil is refined and bleached and hydrogenated to the end that the melting point is controlled to meet seasonal requirements. The oil is then deodorized and a sterile, bland, neutral, flavourless oil produced which is mixed with fresh skim milk to which has been added a lactic acid culture, to impart a butter flavour. The mixture is then emulsified and salt and Vitamin A are added. The mixture is then tempered and again emulsified and crystallized by chilling to produce a product of uniform texture. The finished product is then moulded and wrapped for use. In the case of oleomargarine, animal fat is introduced and the process carried out as outlined.

With these definitions and explanations in mind we might now turn to the history of the legislation.

By chapter 42 of the Statutes of 1886, Parliament enacted "An Act to prohibit the Manufacture and Sale of certain substitutes for Butter". After this recital:—

> WHEREAS the use of certain substitutes for butter, heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof:

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Kerwin J.

the only section of the Act provides:—

1. No oleomargarine, butterine or other substitute for butter, manufactured from any animal substance other than milk, shall be manufactured in Canada, or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months.

This Act was reproduced as chapter 100 of the Revised Statutes of Canada, 1866, without the preamble. In 1903, The Butter Act was enacted by chapter 6 of 3 Edward VII and section 5 provided:—

5. No person shall manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

Section 10 provided for a fine of not less than two hundred dollars and not more than four hundred dollars for every one convicted of a violation of this provision, together with the costs of prosecution, and in default of payment of such fine and costs such person was liable to imprisonment with or without hard labour for a term not exceeding three months. In the Revised Statutes of 1906, these provisions were incorporated in Part VIII of chapter 85, the Inspection and Sale Act, as sections 298 and 309.

By chapter 7 of the Statutes of 1914, Part VIII of the Inspection and Sale Act was repealed. Section 5 provided:—

5. No person shall

(a) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

Here, for the first time, margarine was mentioned as well as oleomargarine. By section 10, the penalty was the same as that previously provided, except that the possible term of imprisonment for non-payment of the fine or costs was made six months.

In the Revised Statutes of 1927, the *Dairy Industry Act* appears in its present form as chapter 45 and section 5(a) has been inserted in Part I thereof. In the same Part are other provisions as to procedure and evidence in

any complaint or information relating to the sale or supply of milk, and subsection 4 of section 19 enacts:—

In all respects not provided for in this Part, the procedure under the provisions of the Criminal Code, relating to summary convictions, shall, so far as applicable, apply to all prosecutions brought under this Part.

Subsection 1 of section 20, also in Part I, provides for the application of fines imposed under the foregoing sections of the Act relating to the sale or supply of milk and subsection 2 enacts:—

2. Any pecuniary penalty imposed under any of the other sections of this Part shall, when recovered, be payable one-half to the informant or complainant, and the other half to His Majesty.

We were told that margarine was introduced as a food product in Europe and the United States about 1867 and it is stated that the principal vegetable oils used are coconut, cotton-seed, peanut, soy bean and sun-flower seed, none of which is produced in Canada in any considerable value. By Order in Council P.C. 3044, dated October 23rd, 1917, made under the War Measures Act, the operation of section 5(*a*) of the *Dairy Industry Act* (which was then chapter 7 of the 1914 Statutes) was suspended and by chapter 34 of the 1919 (second session) Statutes provision was made for the manufacture and importation of oleomargarine until October 31st, 1920, and the sale thereof until March 1st, 1921. By annual amendments, these permissions were extended to August 31st, 1923, in the case of manufacture and importation, and to March 1st, 1924, in the case of sale.

In addition to these relaxations, the Department of National Health and Welfare now approves a statement contained in the Canadian Medical Association Journal of August, 1947, that "as a source of energy, margarine and butter are exactly equal". During the years when by order in council and statute the manufacture and importation of oleomargarine was permitted, the annual total, in both categories, never exceeded 17,000,000 pounds. The total quantity of butter imported and manufactured in Canada during the same period varied from approximately 193,000,000 pounds to about 226,000,000 pounds per year.

In the Order of reference, the Acting Minister of Justice also reported: Milk production is an essential basic part

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Kerwin J.

of agriculture as certain large areas of Canada, particularly in Ontario and Quebec and the Maritime Provinces are best suited for hay and pasture crops. Approximately 400,000 farmers are producing milk for butter manufacture, in addition to which there are about 1,200 plants engaged in the manufacture of butter while thousands of other individuals depend for their livelihood on the butter industry.

The power of Parliament to enact the prohibition contained in section 5(*a*) of the *Dairy Industry Act* was rested by counsel for the Dominion upon several provisions of the *British North America Act,* to only one of which it is necessary to refer: head 27 of section 91, "Criminal Law". It may be granted that, although Parliament alone could deal with the importation into Canada of oleomargarine or margarine, it could not necessarily assume authority to regulate a particular trade in a province. However, if it be found in any particular case that Parliament is not using the cloak of "Criminal Law" to cover a foray into the regulation of a particular local trade, the matter is settled by the decision of the Judicial Committee in Proprietary Trade Association v. Attorney General of Canada (1), followed in In the matter of a Reference re section 498 of the Criminal Code (2). Adopting the principle set forth in these decisions, there is no ground on which it may be held that the legislation here in question, on its true construction, is not what it professes to be, that is, an enactment creating a criminal offence in exercise of the powers vested in Parliament in virtue of the 27th head of section 91 of the *British North America Act.*

It was argued that the approval by the Department of National Health and Welfare of the statement in the Canadian Medical Association Journal shows that the recital in the original Act of 1886 no longer states correctly the present position of margarine or oleomargarine. Granting this to be so and presuming that, by force of the several Acts dealing with the various revisions of the Dominion statutes, the recital is no longer in force, other reasons may have influenced Parliament in enacting the other Acts set

(1) [1931] A.C. 310.

(2) [1936] S.C.R. 363; [1937] A.C. 368.

out in the legislative history above, including the section before us. That consideration was considered sufficient in Attorney General for Ontario v. Canada Temperance Federation (1). The actual decision in that case is not of assistance on the particular point we are now at but once it be concluded that this is true criminal legislation, the Privy Council decision does show that the incorrectness of the recital in the original statute has no bearing.

My answer to the question is that section 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, chapter 45, is not ultra vires the Parliament of Canada either in whole or in part.

TASCHEREAU, J.—Par arrêté ministériel en date du 27 juillet 1948, il a plu à Son Excellence le Gouverneur général en Conseil de soumettre à cette Cour la question suivante:

L'article 5 (*a*) de la Loi concernant l'Industrie Laitière (S.R.C. 1927, chap. 45) est-il ultra vires des pouvoirs du Parlement du Canada, en tout ou en partie, et dans l'affirmative de quelle façon, et jusqu'à quel point?

Cet article qui fait l'objet de la présente soumission ce lit ainsi:

Nul ne peut:—

fabriquer, importer au Canada, ou offrir, vendre ou avoir en sa possession pour la vente, de l'oléomargarine, de la margarine ou autres beurres artificiels ou succédanés du beurre, provenant en tout ou en partie de matière grasse autre que celle du lait ou de la crème.

L'origine de cet article remonte à 1886 alors que le Parlement du Canada adopta la loi 49 Victoria, chap. 42, intitulée "LOI À L'EFFET DE PROHIBER LA FABRICATION ET VENTE DE CERTAINS SUBSTITUTS DU BEURRE", et dont le préambule se lisait ainsi:

Considérant que l'usage de certains substituts du beurre, ci-devant fabriqués et mis en vente en Canada, *est nuisible à la santé*, et qu'il est à propos d'en interdire la fabrication et la vente: A ces causes, Sa Majesté, par et avec l'avis et le consentement du Sénat et de la Chambre des communes du Canada décrète ce qui suit:

La loi elle-même était rédigée dans les termes suivants:

1. Nulle oléomargarine, butterine ou autre matière substituée au beurre, fabriquée avec toute substance animale autre que le lait, ne sera fabriquée en Canada ou n'y sera vendue; et quiconque enfreindra les dispositions du présent acte en quelque manière que ce soit encourra une amende n'excédant pas quatre cents piastres, ni de moins de deux cents piastres, et à défaut de paiement sera passible d'emprisonnement pendant douze mois au plus et trois mois au moins.

(1) [1946] A C. 193.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Taschereau J.

Lors de la révision des statuts fédéraux en 1886, cette loi y fut incorporée au chap. 100, mais amputée de son préambule qui, comme nous l'avons vu, était à l'effet que certains substituts du beurre étaient *nuisibles à la santé*. Il est bon de remarquer que la prohibition s'applique seulement à la manufacture et à la vente des substituts du beurre et non pas à leur importation, et de souligner également que ce n'est que plus tard qu'il sera spécifiquement question de margarine. La différence qui existe entre les deux produits, mais qui n'est pas importante pour les fins de la présente soumission, est que la margarine est un produit d'huile végétale tandis que l'oléomargarine contient, en outre, un gras animal.

En 1903, le Parlement du Canada adopta une loi intitulée "LOI PROHIBANT L'IMPORTATION, LA FABRICATION ET LA VENTE DU BEURRE FALSIFIÉ, DU BEURRE REFAIT, DE L'OLÉOMARGARINE, DE LA 'BUTTERINE' OU AUTRE PRÉTENDU SUCCÉDANÉ DU BEURRE, ET À L'EFFET DE PRÉVENIR LE MARQUAGE FRAUDULEUX DE CE DERNIER PRODUIT". L'article 5 de cette loi était ainsi conçu:

> Personne ne fabriquera, n'importera en Canada, ne tiendra, ne vendra ou n'aura en sa possession pour la vente, de l'oléomargarine, de la butterine ou autre prétendu succédané du beurre, fabriqués en tout ou en partie avec des matières grasses autres que celle du lait ou de la crème.

Cette loi a été incorporée à la "LOI CONCERNANT L'INSPECTION ET LA VENTE DE CERTAINES DENRÉES ET AUTRES PRODUITS" au chap. 85 des Statuts Revisés de 1906 et en constituait la partie 8, qui avait pour titre "PRODUITS DE LA LAITERIE". L'article 5 cité plus haut devint l'article 298 de cette loi.

En 1914, la partie 8 de la "LOI CONCERNANT L'INSPECTION ET LA VENTE" a été rappelée et la "LOI DE L'INDUSTRIE LAITIÈRE" a été adoptée et devint le chap. 7 de 4-5 Geo. V. La prohibition mentionnait spécialement la margarine, et la "LOI DE L'INDUSTRIE LAITIÈRE" se trouve maintenant dans les Statuts Revisés du Canada, 1927, chap. 45. C'est l'article 5 de cette loi qui fait l'objet du présent litige.

L'arrêté ministériel qui autorise la référence à cette Cour explique le procédé de manufacture de la margarine,

de l'oléomargarine, et les différences qui existent entre les deux produits. Il fait voir également comment on a réussi à faire disparaître le goût désagréable de ces produits et de quelle façon on a réussi à remédier au manque de vitamine "A" dans les huiles végétales, de telle façon que le beurre et la margarine ont maintenant une égale source d'énergie. Il est aussi mentionné dans cet arrêté ministériel que depuis le 1er septembre 1917, au 30 mars 1923, quand l'opération de l'article 5 *a*) de la "LOI DE L'INDUSTRIE LAITIÈRE" fut suspendue en vertu de la Loi des Mesures de Guerre, de grandes quantités d'oléomargarine ont été manufacturées et importées au Canada, et que la consommation de l'oléomargarine atteint actuellement un chiffre très élevé dans plusieurs pays du monde, dont les États-Unis d'Amérique et la Grande-Bretagne. Il est de plus révélé aux exhibits qui ont été produits, que la plupart des pays du monde manufacturent la margarine et l'oléomargarine, que la vente en est permise, et la Cour a même été informée qu'au cours de la première et de la deuxième grandes guerres, les soldats canadiens en faisaient un usage quotidien.

Le Procureur Général du Canada, appuyé par la Fédération Canadienne d'Agriculture, soutient que cet article 5(*a*) de la "LOI DES PRODUITS LAITIERS", n'est pas du domaine provincial, mais relève du Parlement du Canada, qui seul a le pouvoir de faire des lois "pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par le présent Acte exclusivement assignés aux Législatures des provinces." Il soutient également que la législation est valide parce qu'elle se rapporte au droit criminel, à l'agriculture, qu'elle règlemente le commerce, domaines qui, en vertu de l'article 91 de l'Acte de l'Amérique Britannique du Nord, sont de la compétence du Parlement Fédéral.

Le Procureur Général de la province de Québec, l'honorable W. D. Euler, l'Association Canadienne des Électrices et l'Association Canadienne des Consommateurs, prétendent au contraire que cette question relève exclusivement des provinces qui, en vertu de l'article 92 de l'Acte de l'Amé-

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Taschereau J.

rique Britannique du Nord, para. 13, ont seules le droit de légiférer sur "la propriété et les droits civils dans la province", et en vertu de la section 16, sur toutes les matières d'une "nature purement locale ou privée dans la province".

Il me semble indiscutable que la manufacture, la possession ou la vente de la margarine et de l'oléomargarine, sont l'exercice de droits civils bien définis, et dont la réglementation a été laissée aux provinces par les Pères de la Confédération. Il ne fait pas de doute non plus que les mots "propriété et droits civils" doivent être employés dans leur sens le plus large, et comprennent dans leur sens ordinaire certainement le mot "contrat", qui est un acte d'une nature essentiellement civile. (*Citizens Insurance v. Parsons* (1); *Natural Products Marketing Act* (2).

Mais si "les droits civils et la propriété" sont du ressort provincial, il est maintenant établi qu'il peut arriver parfois que l'autorité fédérale devienne compétente pour légiférer sur ce qui normalement n'est pas de son domaine. Des cas en effet se présentent où, par suite de l'existence de certaines conditions, et à cause des dimensions qu'elles prennent et des proportions nationales qu'elles atteignent, certaines matières deviennent du ressort du Parlement Fédéral. Alors, la question cesse d'être d'une nature "purement locale ou privée dans la province", et la juridiction provinciale qui alors était absolue cède la place au contrôle fédéral, qui légifère alors pour "la paix, l'ordre et le bon gouvernement du Canada".

Une abondante jurisprudence ne permet plus d'entretenir de doute à ce sujet. Déjà en 1896, dans *Attorney-General for Ontario v. Attorney-General for the Dominion of Canada* (3), Lord Watson émettait le principe suivant:—

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and justify the Canadian Parliament in passing laws for their regulation and abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within jurisdiction of the provincial legislatures and that which has ceased to be merely local and provincial and has become a matter of national concern.

(1) (1881-82) 7 A.C. 96 at 109.
(2) [1936] S.C.R. 398 at 416.
(3) [1896] A.C. 348 at 361.

Dans *Attorney-General for Canada v. Attorney-General for British Columbia* (1) Lord Tomlin confirmait ce qu'avait antérieurement dit Lord Watson:—

> The general power of legislation conferred upon the Parliament of the Dominion by section 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in section 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: See *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896) A.C. 348.

Ces expressions d'opinions ont été maintes fois confirmées par le Comité Judiciaire du Conseil Privé, et on a même précisé davantage quelle était la nature de l'urgence requise pour justifier l'intervention du Parlement Fédéral. Mais ce n'est pas dans tous les cas où l'intérêt national est en jeu qu'il peut le faire. Ainsi, le Comité Judiciaire du Conseil Privé dans *The Board of Commerce* case (2), emploie les expressions "under necessity in highly exceptional circumstances;" dans *Fort Frances Pulp & Power Co. v. Manitoba Free Press* (3) on se sert des mots "sudden danger to social order", "in the event of war when the national life may require . . . very exceptional means;" dans *Toronto Electric Commissioners v. Snider* (4) on exige: "some extraordinary peril to the national life of Canada", "epidemic of pestilence"; dans *The Regulation and Control of Aeronautics in Canada* (5), on confirme les expressions employées dans certaines des causes ci-dessus. En 1937, dans *Attorney-General for Canada v. Attorney-General for Ontario* (6), Lord Atkin réaffirme encore les principes ci-dessus mentionnés, et emploie en les confirmant de nouveau les expressions suivantes: "abnormal circumstances", "exceptional conditions", "standard of necessity", "some extraordinary peril to the national life of Canada", "highly exceptional", "epidemic of pestilence". Ce sont là des cas où la distribution normale des pouvoirs accordés aux provinces en vertu de l'article 92 peut être mise de côté afin de permettre au Parlement Fédéral de légiférer. Dans ce

(1) [1930] A.C. 111 at 118.
(2) (1922) 1 A.C. 191 at 197.
(3) [1923] A.C. 695 at 703.
(4) [1925] A.C. 396 at 412.
(5) [1932] A.C. 54 at 72.
(6) [1937] A.C. 326 at 353.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Taschereau J.

jugement, Lord Atkin approuve le jugement de Sir Lyman Duff, ancien juge en chef de cette cour (*The Natural Products Marketing Act* (1), où il a défini dans quels cas le pouvoir fédéral pouvait se substituer à l'autorité provinciale, et légiférer sur des matières ordinairement dévolues aux provinces. Lord Atkin dit que le jugement du Juge en chef forme le "locus classicus" de la loi et ferme la porte à toute autre discussion.

Le Procureur Général du Canada a soumis que le présent conflit doit être réglé par l'ancienne décision du Conseil Privé de *Russell* v. *La Reine* (2) rendue en 1882. Cet arrêt que l'on a souvent invoqué depuis au delà d'un demi-siècle n'a pas, il me semble, la signification qu'on a voulu lui donner, en s'appuyant sur les commentaires de Lord Haldane dans *Toronto Electric Commissioners* v. *Snider* (3). Appelé à interpréter cette dernière décision dans une cause récente de *Attorney-General for Ontario* v. *Canada Temperance Federation* (4) Lord Simon a définitivement précisé que le Conseil Privé en 1882, n'a jamais rendu son jugement en se basant sur le fait qu'il y avait *une urgence* qui justifiait le Parlement Fédéral de légiférer sur une matière qui ordinairement aurait été de la compétence provinciale. Le "ratio decidendi" du Conseil Privé a été qu'il s'agissait en l'occurrence de "Temperance", qui était du ressort fédéral et nullement de "propriété et de droits civils". Le Scott Act a été jugé une loi permanente et non pas temporaire. Ce n'est pas l'existence de certaines conditions anormales et passagères qui en ont justifié la validité.

Cette jurisprudence démontre clairement que ce n'est que dans des cas *très exceptionnels* que le Parlement Fédéral acquiert l'autorité nécessaire pour adopter des lois qui sont normalement du ressort provincial. Et il est très heureux qu'il en soit ainsi, car autrement les droits des provinces que l'on croyait inviolables ne seraient qu'illusoires et les assises mêmes de la Confédération canadienne seraient en péril. Sous le prétexte facile de légiférer "pour la paix, l'ordre et le bon gouvernement du Canada", le pouvoir central aurait dans tous les cas, l'autorité nécessaire d'intervenir

(1) [1936] S.C.R. 398.
(2) (1881-82) 7 A.C. 829.
(3) [1925] A.C. 396.
(4) [1946] A.C. 193.

dans le domaine provincial, et le résultat évident de cette théorie, si malheureusement elle était admise, serait de modifier fondamentalement la distribution des pouvoirs législatifs attribués par la Constitution de 1867, et par conséquent, méconnaître non seulement la lettre, mais aussi l'esprit de l'Acte de l'Amérique Britannique du Nord, tel que l'ont compris ceux qui en furent les inspirateurs. Comme le disait le Juge en chef Anglin en 1913 (re Insurance Act (1)), "There would be few subjects of civil rights upon which it (the Parliament of Canada) might not displace the provincial power of legislation".

Je ne trouve pas que des circonstances exceptionnelles, susceptibles de *mettre en péril la vie nationale du Canada,* se rencontrent dans le cas qui nous occupe. Nous sommes bien loin des conditions requises par la jurisprudence de cette Cour et du Conseil Privé, qui pourraient justifier le Parlement Fédéral de se substituer à l'autorité provinciale, et de légiférer sur des matières "de droit civil" d'une "nature locale et privée", qui sont essentiellement du domaine des provinces.

Si même ces produits offraient quelque danger à la santé, je ne crois pas que leur réglementation dans le pays serait de la compétence fédérale. Mais si pareil danger a jamais existé, il est entièrement disparu maintenant, et c'est non seulement le droit mais aussi l'obligation des tribunaux de s'enquérir si les circonstances qui justifiaient le Parlement Fédéral d'agir subsistent toujours. Il y a une présomption qu'elles subsistent, et c'est la partie qui invoque le contraire qui doit le démontrer. Comme l'a dit le Conseil Privé dans *Fort Frances Pulp & Power* (2):—

> The question of the extent to which provision for circumstances such as these may have to be maintained is one on which a Court of Law is loath to enter. No authority other than the central Government is in a position to deal with a problem which is essentially one of statesmanship. It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide in overruling the decision of the Government that exceptional measures were still requisite.

(1) (1913) 48 S.C.R. 260 at 312. (2) [1923] A.C. 695 at 706.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Taschereau J.

Voir au même effet, Anglin J. (1).

Dans le cas présent, la présomption est complètement détruite. Le préambule de la loi de 1882, qui disait que ces produits étaient nuisibles à la santé est maintenant disparu. La margarine et l'oléomargarine ont d'après les sociétés médicales et d'après l'aveu même du Gouverneur Général en Conseil les mêmes qualités nutritives que le beurre; la manufacture et la vente en sont permises dans tous les pays civilisés du monde, et on en servait à nos soldats au cours des deux dernières guerres. La valeur nutritive ne fait pas de doute, et l'urgence de préserver la santé nationale ne peut être invoquée pour soutenir la validité de la loi.

Le but actuel de la loi ne peut pas être autre que de donner une préférence au beurre sur un autre produit également comestible. Ceci ne peut pas être une justification pour enlever aux provinces des pouvoirs que leur garantit la Constitution.

Le second argument invoqué par le Procureur Général du Canada est qu'en défendant l'importation, la vente et la possession de ces produits, le parlement canadien a imposé une *prohibition* accompagnée de *sanctions,* et a en conséquence érigé en *crime* toute violation de la loi. Or, en matière criminelle dit-on, le Parlement fédéral est la seule autorité compétente. Je n'oublie pas les définitions du crime et du droit criminel qui ont été données déjà, mais celles-ci doivent se lire et s'interpréter avec les tempéraments qui y ont été apportés.

C'est ainsi que l'on voit dans *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (2) le passage qui suit:

> The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from coextensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts

(1) (1913) 48 S.C.R. 260 at 311. (2) [1931] A.C. 310 at 324.

at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

Dans *Attorney-General for British Columbia v. Attorney-General for Canada* (1) le Comité Judiciaire a dit:

The object of an amendment of the criminal law as a rule is to deprive the citizens of the right to do that which, apart from the amendment, he could lawfully do.

Mais dans ce dernier jugement, (1) Lord Atkin dit aussi:

The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not *in the guise of enacting criminal legislation* in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them.

Auparavant en 1929, le Juge Newcombe dans la Référence sur *Validity of the Combines Investigation Act* (2) s'était déjà exprimé ainsi:

It is not necessarily inconsistent, and I do not think it was meant to be incompatible, with the notion, that one must have regard to the subject matter, the aspect, the purpose and intention, instead of the form of the legislation, in ascertaining whether, in producing the enactment, Parliament was engaged in the exercise of its exclusive and comprehensive powers with respect to the criminal law, or was attempting, in excess of its authority, under colour of the criminal law, to entrench upon property and civil rights, or private and local matters, in the provinces; and when, in the case of the *Combines and Fair Prices Act,* 1919, as in the case of the *Insurance Act,* 1910, their Lordships found that Parliament was really occupied in a *project of regulating property and civil rights,* and outside of its constitutional sphere, there was no footing upon which the exercise of Dominion powers, with relation to the criminal law, could effectively be introduced—no valid enactment to which criminal sanction could be applied.

M. le Juge Newcombe s'appuyait évidemment sur le jugement rendu par le Conseil Privé dans *The Board of Commerce Act and the Combines and Fair Prices Act* (3) où il est dit:

For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words 'the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters,' as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of suject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary

(1) [1937] A.C. 368 at 376.
(2) [1929] S.C.R. 409 at 422.
(3) (1922) 1 A.C. 191 at 198.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Taschereau J.

provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application. For analogous reasons their Lordships think that s. 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

Mais il me semble que la prétention du Procureur Général du Canada, à l'effet que la législation attaquée doit être déclarée constitutionnelle parce qu'elle est du domaine du droit criminel, ne peut être acceptée par suite des jugements que je viens de citer et surtout comme résultat de la décision rendue par le Conseil Privé en 1924, dans une cause de *Attorney General for Ontario and Reciprocal Insurers and Attorney General for Canada* (1). Dans cette cause, il s'agissait de déterminer la légalité d'un amendement que le Parlement Fédéral avait apporté au Code Criminel, dans lequel il était stipulé que c'était une offense criminelle punissable de sanctions sévères, pour une compagnie fédérale ou pour tout étranger, de solliciter ou d'accepter des risques d'assurance à moins qu'une licence fédérale n'ait été préalablement obtenue. Cette législation était évidemment une tentative pour obtenir par un moyen détourné des résultats recherchés par la Loi d'Assurance de 1910, qui avait été déclarée ultra vires des pouvoirs du Parlement Fédéral, dans *Attorney General for Canada* v. *Attorney General for Alberta* (2). Voici ce que disait Sir Lyman Duff (1):

In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid. And indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the subject of which, as Lord

(1) [1924] A.C. 328 at 342. (2) (1916) 1 A.C. 588.

Watson said in *Maritime Bank of Canada v. Receiver-General of New Brunswick* (1892) A. C. 437, 441, was "not to weld the Provinces into one or to subordinate the Provincial Governments to a central authority." "Within the spheres allotted to them by the Act the Dominion and the Provinces are." as Lord Haldane said in *Great West Saddlery Co. v. The King* (1921) 2 A. C. 91, 100, "rendered in general principle coordinate Governments."

Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.

Le cas décidé dans cette cause dispose, il me semble, de la prétention qu'il s'agit en l'occurrence de législation criminelle. Sous le prétexte de légiférer en matière criminelle, l'autorité fédérale qui normalement est compétente en la matière ne peut pas empiéter dans le domaine provincial, sur des matières où son autorité légale ne pourrait autrement s'exercer. Le Parlement Fédéral ne peut pas plus contrôler les contrats de ventes et d'achats de margarine et d'oélomargarine qu'il ne peut contrôler les contrats d'assurance, et les raisons qui justifient la décision du Conseil Privé s'appliquent également à la présente cause.

On peut, je crois, disposer rapidement de la prétention que l'autorité du Parlement Fédéral de légiférer sur la margarine et l'oléomargarine lui vient de l'article 95 de l'Acte de l'Amérique Britannique du Nord qui détermine les pouvoirs du Fédéral et du Provincial en matières agricoles. L'article 5 *a*) de la Loi de l'Industrie Laitière n'est pas une législation agricole. La margarine et l'oélomargarine sont essentiellement le résultat de transformations industrielles, et en conséquence la législation n'est pas une législation se rapportant à l'agriculture, mais bien à des articles de commerce. Vide (*The King v. Eastern Terminal Elevator Co.* (1); (*Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*) (2).

(1) [1925] S.C.R. 434 at 457. (2) [1933] A.C. 168.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Taschereau J.

L'article 91 (2) "Réglementation du Trafic et du Commerce" a aussi été invoqué pour justifier la législation. Ici une distinction, je crois s'impose, selon qu'il s'agisse d'un commerce d'une nature purement locale et privée dans une province, et la réglementation du commerce extérieur. En 1881, *Citizens' Insurance vs. Parsons,* (1), il a été décidé que les provinces pouvaient légiférer en matière de commerce et y imposer des conditions, si ce commerce ne dépassait pas les bornes d'une province particulière, et plus tard, dans *National Products Reference,* (2), Sir Lyman Duff disait:

> It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

Sur ce point, la jurisprudence me semble définitivement fixée, et il faut en conséquence conclure que la réglementation du commerce de la margarine et de l'oléomargarine dans une province, vu qu'il a un caractère d'une nature locale et privée, n'est pas du domaine du gouvernement fédéral. En ce qui concerne la prohibition d'importer d'un pays étranger, je crois que la situation doit être envisagée sous un angle différent.

Je n'oublie pas que 91, para. (2) de l'Acte de l'Amérique Britannique du Nord "Réglementation du Trafic et du Commerce" a été interprété par les tribunaux et que dans *Attorney General for Ontario v. Attorney General for the Dominion* (3), on a déclaré que le pouvoir de réglementer suppose nécessairement la conservation de la chose qui fait le sujet de la réglementation. Cet article de la Constitution canadienne donnerait au Parlement Fédéral le pouvoir de réglementer un commerce mais ne lui conférerait pas l'autorité voulue pour le supprimer. Il faut s'incliner devant cette décision du Conseil Privé, mais je suis clairement d'opinion, sauf peut-être dans quelques cas exceptionnels, dont il n'est pas question ici, que l'importation d'un

(1) (1881-82) 7 A.C. 96.
(2) [1936] S.C.R. 398 at 410.
(3) [1896] A.C. 348 at 363.

produit manufacturé peut être prohibé par le Parlement Fédéral. Si ce n'est pas en vertu de 91 (2) de la Constitution, ce sera sûrement en vertu du pouvoir résiduaire, qui par ce même article 91 est attribué au Parlement Fédéral, et lui permet de légiférer sur les matières qui ne sont pas de la compétence provinciale, et qui ne sont pas prévues dans l'Acte de l'Amérique du Nord.

Il résulte de tout ceci que je suis d'opinion que l'article 5 *a*) est *ultra vires* en partie, des pouvoirs du Parlement Fédéral. Ce dernier ne peut en effet défendre la fabrication, la vente ou la possession pour la vente de la margarine et de l'oléomargarine, mais a le droit d'en interdire l'importation.

On a prétendu que tout l'article doit être déclaré *ultra vires* parce qu'il contient à la fois et la défense d'importation et les autres prohibitions que je viens de mentionner. Le tout serait si intimement lié ensemble que les prohibitions ne pourraient pas être séparées, vu que le Parlement Fédéral n'en aurait pas imposé une seule, isolée, sans les imposer toutes. Je ne crois pas pouvoir accepter cette proposition. Je crois au contraire qu'il est logique de penser que le Parlement Fédéral aurait pu ne défendre que l'importation sans imposer les autres prohibitions.

Le 28 mai 1886 en vertu de la loi des Douanes, l'importation de l'oléomargarine, de la "butterine" et des autres substituts du beurre a été prohibée, et l'on retrouve cette loi qui est encore en vigueur, à l'article 14 de la loi des Douanes (chap. 44 S.R.C. 1927). Ce n'est que le 2 juin 1886, c'est-à-dire quelques jours plus tard que fut sanctionnée la loi à "l'Effet de Prohiber la fabrication et la vente de certains substituts du Beurre." (49 Victoria chap 42) où il n'est pas question d'importation, mais seulement de fabrication et de vente. Ce n'est que plus tard en 1903, comme je l'ai signalé au début de ces remarques, que l'importation a été défendue par le Statut 3 Ed. VII, chap. 6. La prohibition d'importation s'appliquait non seulement à l'oléomargarine et aux substituts du beurre, comme dans la loi des Douanes, mais à un plus grand nombre de produits. On a voulu dans un statut particulier bannir l'importation de ces produits, qui par la loi des Douanes, l'étaient déjà en partie. Je n'ai pas de doute que le Parlement Fédéral, même s'il

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Taschereau J.

avait su que la législation se rapportant à la fabrication et à la vente était *ultra vires*, aurait quand même prohibé l'importation. Son désir de le faire apparaît dans la loi des Douanes, et dans la législation subséquente. (*Attorney-General for Alberta v. Attorney-General for Canada* (1)).

Enfin on a tenté de justifier la validité de l'article 5(*a*) en soumettant que cet article, même s'il n'était pas originairement de la compétence du Parlement Fédéral, est "incidental to" la loi de l'Industrie Laitière, qui assurément a été validement adoptée. Je ne crois pas qu'il en soit ainsi. Je pense plutôt que les prohibitions contenues à l'article 5(*a*) ne constituent, comme je l'ai dit déjà, qu'une préférence accordée à un autre produit, et sont entièrement indépendantes de la loi de l'Industrie Laitière. Je crois aussi que le Parlement aurait adopté la loi de l'Industrie Laitière sans cet article 5(*a*).

Ma réponse à la question soumise est donc la suivante:

L'article 5(*a*) de la loi de l'Industrie Laitière est *ultra vires* des pouvoirs du Parlement du Canada, en ce qui concerne les prohibitions de fabriquer, offrir, vendre ou avoir en sa possession pour la vente. La prohibition d'importer est *intra vires* de ses pouvoirs.

RAND, J.: His Excellency in Council has referred to this Court the following question:—

> Is section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, Chapter 45, ultra vires of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent?

The section is as follows:—

> 5. No person shall
>
> (*a*) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream;

To a proper understanding of the controversy, a statement of the history of the legislation is necessary. The first pertinent enactment is chapter 37 of 1886, an amendment to the Customs Duties Act, which by section 5, s.s. 2 enacted:—

> The importation of oleomargarine, butterine, and all such substitutes for butter, is hereby prohibited, under a penalty of not less than two hundred nor more than four hundred dollars for each offence, and the forfeiture of such goods, and of all packages in which they are contained.

(1) [1947] A.C. 503 at 518.

Although passed on June 2nd, 1886 it was retroactive to May 28th of that year. In the Revised Statutes of the same year the language was changed by substituting for "and all such substitutes" the words "or other similar substitutes". This latter form has been preserved to the present time with the addition in 1907 by chapter 11 of the words "and process butter or renovated butter".

Next there is chapter 42 of the statutes of 1886 passed on the same day, June 2nd:—

WHEREAS the use of certain substitutes for butter, heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. No oleomargarine, butterine or other substitute for butter, *manufactured from any animal substance* other than milk, *shall be manufactured in Canada,* or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months.

In the same year the Act was incorporated in the Revised Statutes as chapter 100, and as is usual in the case of revisions, the preamble was omitted.

In 1903 the Butter Act was enacted as chapter 6 of the statutes of that year and an important change was introduced into the provision dealing with butter substitutes by the language of section 5:—

No person shall manufacture, *import into Canada,* or offer, sell or have in his possession for sale, any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from *any fat other than that of milk or cream.*

This Act was in the revision of 1906 incorporated as Part VIII of the Inspection and Sale Act, chapter 85, R.S.C. 1906. In Schedule A, Vol. III, R.S.C. 1906, at page 2941, chapter 100 of the Revised Statutes is repealed.

Later, in 1914, Part VIII was repealed and the present provision enacted as section 5 of the Dairy Industry Act, chapter 7 of the statutes of that year. This later became chapter 45, R.S.C. 1927.

The question of the preamble was raised. Ordinarily a preamble indicates the purpose of the statute and it may be a guide to the meaning and scope of the language where that is doubtful or ambiguous. But when the question is

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rand J.

the real character of the legislation for the purposes of jurisdiction between two legislatures under a federal constitution, different considerations arise. A legislation cannot conclude the question by a declaration in a preamble: at most it is a fact to be taken into account, the weight to be given to it depending on all the circumstances; and it is significant here that the only prohibitory enactment containing a preamble did not include margarine.

But whatever might have been the case of the 1886 legislation, the situation now is that not only has the preamble disappeared, but its recital of fact is admittedly no longer true of either margarine or oleomargarine. It is conceded that both of them—the latter containing animal fat other than milk added to the ingredients, chiefly vegetable oils, of the former—are substantially as nutritious, possess as much energy value and are as free from deleterious effects as butter itself; and that I take to have been the state of things in 1914. Between December 1st, 1917 and September 30th, 1923 approximately 52,000,000 lbs. of oleomargarine was either manufactured in or imported into Canada under the authorization of both order in council and statute. Margarine has become a staple in Great Britain and on the European continent, and in the United States its use is widespread. When in 1903 importation was banned, "animal substance" changed to "any fat", and the prohibited substitutes thus enlarged to include those made from vegetable oils, the value of the preamble was greatly impaired; and the repeal of Part VIII together with the enactment of the Dairy Industry Act in the situation of 1914 removes any residue that might have survived. To ascertain then the true nature and substance of the legislation—which is the initial determination—I deal with it as free from any such indication of purpose.

The appearance of the provision in a statute dealing comprehensively with the dairy industry and the inclusion of prohibition of importation, the ordinary mode of protection of industry in its ultimate form, are, for this initial purpose, of considerable significance. On the other hand,

the scope and importance of agriculture in the economy of this country, the part played by the dairy industry as an essential branch of it, and the desirability of maintaining a market demand for butter to meet the seasonal exigencies of that industry, are beyond controversy. What, then, in that whole background is the true nature of the enactment?

Mr. Varcoe argues that it is simply a provision of criminal law, a field exclusively Dominion, and the issue, I think, depends upon the validity of that contention. In *The Proprietary Articles Trade Association vs. Attorney-General of Canada,* (1), Lord Atkin rejected the notion that the acts against which criminal law is directed must carry some moral taint. A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

In examining the question, we are to consider not only the matters and conditions upon which the legislation will operate but as well its consequences; and in addition to what will be judicially noticed, evidence may be presented in a case which calls for it; *Attorney-General of Alberta vs. Attorney-General of Canada* (2).

Criminal law is a body of prohibitions; but that prohibition can be used legislatively as a device to effect a positive result is obvious; we have only to refer to Adam Smith's Wealth of Nations, Vol. II, chapters 2 and 3 to discover how extensively it has been used not only to keep foreign goods from the domestic market but to prevent manufactures in the colonies for the benefit of home industries; and as late as 1750 for that object, certain means of iron and steel production in British North America were by statute forbidden; Ashley, Surveys, Historic & Economic, page 327. The Court in its enquiry is not bound by the ex facie form of the statute; and in the ordinary sense of the word, the purpose

(1) [1931] A.C. 310.

(2) [1939] A.C. 117, at 131.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rand J.

of a legislative enactment is generally evidential of its true nature or subject matter: *Bryden vs. Attorney-General of British Columbia,* (1): *Attorney-General of Ontario vs. Rec. Insurers* (2): *In re Insurance Act of Canada,* (3) *Attorney-General of Alberta vs. Attorney-General of Canada, supra.* Under a unitary legislature, all prohibitions may be viewed indifferently as of criminal law; but as the cases cited demonstrate, such a classification is inappropriate to the distribution of legislative power in Canada.

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here. That object, as I must find it, is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is prima facie to deal directly with the civil rights of individuals in relation to particular trade within the provinces: *Shannon vs. Lower Mainland Dairy Board,* (4).

The public interest in this regulation lies obviously in the trade effects: it is annexed to the legislative subject matter and follows the latter in its allocation to the one or other legislature. But to use it as a support for the legislation in the aspect of criminal law would mean that the Dominion under its authority in that field, by forbidding the manufacture or sale of particular products, could, in what it considered a sound trade policy, not only interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another. Whatever the scope of the regulation of interprovincial trade, it is hard to conceive a more insidious form of encroachment on a complementary jurisdiction.

(1) [1899] A.C. 580.
(2) [1924] A.C. 328.
(3) [1932] A.C. 41.
(4) [1938] A.C. 708.

This conclusion is not in conflict with *Attorney-General of British Columbia* v. *Attorney-General of Canada,* (1), (Section 498a of the Criminal Code). There, the essential nature of the legislation was not the equalization of civil rights between competitors or promoting the interest of one trade as against another; it was the safeguarding of the public against the evil consequences of certain fetters upon free and equal competition. There is no like purpose here; there is nothing of a general or injurious nature to be abolished or removed: it is a matter of preferring certain local trade to others.

Is the legislation then within the regulation of trade and commerce? As early as *Citizens' Insurance* v. *Parsons* (2) it was laid down that the reconciliation of the powers granted by the constitutional act required a restriction of the "full scope of which in their literal meaning they ('the regulation of trade and commerce') are susceptible"; and it was so necessary "in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy, which as appears from the scheme of the Act as a whole, the provinces were intended to enjoy"; (3). That and subsequent pronouncements of the Judicial Committee were summarized by Duff, C.J. in the *Natural Products reference,* (4):

> It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

Now, if the regulation of local trade in particular commodities is excluded, a fortiori the control of the manufacture of those commodities for that trade would be so. The logical conclusion of the contention is, as Mr. Varcoe conceded, that *King* v. *Eastern Elevator Company,* (5) was wrongly decided. But so far from that, the decision was expressly approved by the Judicial Committee in the *Natural Products reference, supra* at page 387.

(1) [1937] A.C. 368.
(2) (1881-82) 7 A.C. 96.
(3) [1931] S.C.R. 357 at 366.
(4) [1936] S.C.R. 398 at 410.
(5) [1925] S.C.R. 434.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rand J.

Finally, it was said the legislation related to Agriculture. Its object, I agree, is to benefit the trade in a product of agriculture; but that is a mere consequential effect and does not of itself relate the legislation to agriculture. The *Natural Products reference, supra* by ruling out of the scope of Dominion power the regulation of local trade in the products of agriculture has done so likewise in respect of the manufacture of substitute products.

Then undoubtedly the dairy industry has an aspect of concern to this country as a whole, but as it was said in *Attorney-General of Ontario* v. *Attorney-General of Canada,* (1) if the fact of such an interest or that the matter touched the peace, order and good government of Canada was sufficient to attach the jurisdiction of Parliament, "there is hardly a subject enumerated in sec. 92 upon which it might not legislate, to the exclusion of the provincial legislatures". There is nothing before us from which it can be inferred that the industry has attained a national interest, as distinguished from the aggregate of local interests, of such character as gives it a new and pre-eminent aspect within the rule of the *Russell case,* (2) as interpreted in *Attorney-General of Ontario* v. *Canada Temperance Federation,* (3). Until that state of things appears, the constitutional structure of powers leaves the regulation of the civil rights affected to the legislative judgment of the province.

There is next the prohibition of importation of these substances. It has been observed that the power of regulation assumes, unless enlarged by the context, the conservation of the thing to be regulated; Lord Watson in *Attorney-General of Ontario* v. *Attorney-General of Canada, supra* at 363. The matter being examined by Lord Watson was the power of Parliament to enact the Temperance Act of 1886 as being for the "regulation of trade and commerce"; the object of the statute was "to abolish all such transactions (in liquor)" within the area adopting it; and their lordships were unable to regard such prohibitions as regulation of trade. Although under the enactment certain transactions in liquor escaped the ban, it was not in their

(1) [1896] A.C. 348 at 361.
(2) [1899] A.C. 829.
(3) [1946] A.C. 193.

interest that other transactions were forbidden; and I do not take the judgment to mean that the prohibition of trade in a commodity for a strictly trade purpose, which was not the purpose there, can never be trade regulation. The matter of regulation here is not margarine in isolation; it is butter and its substitutes as a group of commodities in competition; and the legislation fashions their relations inter se in the aspect of foreign trade, clearly an exclusive Dominion field. Under the regulation of that trade, one commodity might be admitted free of duty, and others at different rates: *Attorney-General of British Columbia* v. *Attorney-General of Canada,* (1); and the extension to prohibition would not change the essential nature of the restriction. To the historical references already made on this subject, there can be added that of section 43 of the Act of Union (1840) which after reciting that the Imperial Parliament would not thereafter impose any taxation on the North American provinces "except only such duties as it might be deemed expedient to impose for the regulation of commerce" proceeded to enact that nothing should prevent the exemption of any law made "for establishing regulations and *prohibitions*" in relation to commerce. As this was a reservation from provincial autonomy, the apparent disjunction of powers is not material to the language of the constitutional instrument of the Dominion; but the terms disclose the modes of trade control then practised. Such scope of action is clearly necessary to the nation's jurisdiction over trade with other states. Only Parliament can deal with foreign commerce; provincial power cannot in any mode, aspect, or degree govern it: and it would be anomalous that the jurisdiction to which regulation is committed, which alone can act, and which in this segment of trade is in substance sovereign, should be powerless to employ such an ordinary measure of control.

The remaining question is whether manufacture, sale, etc. and importation can be taken as severable. Having regard to the purpose of the legislation, the restrictions are undoubtedly intended to be cumulative. They are in no sense dependent upon or involved with each other, though no doubt both are necessary to the complete benefit

(1) [1924] A.C. 222 at 225.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Rand J.

envisaged. But distinct in operation and effect, they are to be taken as enacted distributively and not with the intention that either all or none should come into force.

My answers to the questions, therefore, are:—

1. The prohibition of importation of the goods mentioned in the section is intra vires of Parliament.
2. The prohibition of manufacture, possession and sale is ultra vires of Parliament.

KELLOCK, J.:—This reference raises the question of the validity of section 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, cap. 45. In the consideration of the conflicting contentions it is first necessary to determine the true nature and character of the legislation, its "pith and substance". In this inquiry the legislative history of the section in question, which goes back to cap. 42 of 49 Victoria, is relevant. In the preamble to the last mentioned statute it is recited that "Whereas the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health" and section 1 provides that

> 1. No oleomargarine, butterine or other substitute for butter, manufactured from any *animal* substance other than milk, shall be manufactured in Canada, or sold therein...

It is to be noted that the "certain" substitutes for butter "heretofore" manufactured, the manufacture and sale of which are prohibited, are those manufactured from animal substances other than milk. By this language therefore, margarine as distinct from oleomargarine is not affected as the former is manufactured exclusively from vegetable oils, while oleomargarine has in addition some animal fat, usually beef.

Cap. 42 of 49 Victoria became cap. 100 of R.S.C. 1886, but the preamble of the original Act was not continued and does not reappear in any later legislation. Subsequently by 3 Edward VII, cap. 6, "The Butter Act, 1903" was passed, section 5 of which prohibits the manufacture, importation or sale of "any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream". It is to be

observed that importation, as well as manufacture and sale became prohibited and the prohibition is no longer limited to substitutes for butter manufactured from animal substances. Accordingly, margarine would appear to have become included in the prohibitions of this legislation.

In 1906 by cap. 85 of the Revised Statutes of that year, the General Inspection Act, cap. 99 of the Revised Statutes of 1886, the Grain Inspection Act, 4 Edward VII, cap. 15, and the Butter Act of 1903, became consolidated in the "Inspection and Sale Act", the provisions formerly constituting the Butter Act becoming part VIII of the Act. Section 298 is in the same terms as section 5 of the 1903 Act, the penalty section being section 309.

Part VIII of the above Act was repealed by 4 and 5 Geo. V, cap. 7, the "Dairy Industry Act, 1914". This Act was entitled an "Act to regulate the manufacture and sale of dairy products and to prohibit the manufacture or sale of butter substitutes". Its enacting provisions deal with the matters indicated. Section 5 (*a*) reproduces the substance of section 298 of the 1906 Statute. Margarine is, however, for the first time expressly mentioned.

The legislation of 1927 in substance reproduces the provisions of the 1914 Statute but also consolidates therewith the provisions of 9-10 Edward VII, cap. 59, the "Milk Test Act", and 11-12 Geo. V, cap. 28, the "Dairy Produce Act". By section 2 (*n*) "oleomargarine" is defined as "any food substance other than butter, of whatever origin, source or composititon which has the appearance of and is prepared for the same uses as butter". This definition therefore includes margarine.

Mr. Varcoe argues that the existing legislation is still to be considered as legislation in the interests of public health on the basis that when the original prohibitions with respect to oleomargarine, as distinct from margarine were imposed, that was the ground upon which Parliament expressly proceeded. He says the original Act was in no sense a temporary Act and the dropping of the preamble is immaterial.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Kellock J.

In support of this contention reference was made to the recent decision of the Privy Council, *Attorney General for Ontario* v. *Canada Temperance Federation,* (1) where their Lordships had to deal with the Canada Temperance Act, R.S.C. 1927, cap. 196, Parts 1, 2 and 3 of that Statute having had its origin in 1878. It was held that the original Act, having been validly passed in the exercise of authority existing in Parliament at that time and being a permanent and in no sense a temporary Act, could not be challenged on the ground that the circumstances, the existence of which justified the legislation in 1878, no longer continued to exist in 1927. The material provisions of the Act of 1927 were admittedly identical with those of 1878.

As to the matter of public health, the Order of Reference makes no distinction on this basis between margarine and oleomargarine. The Order includes an extract from an article in the Canadian Medical Association Journal of August, 1947, respecting "margarine". This article has the approval of the Department of National Health and Welfare and is as follows:

> One factor absent in vegetable oils is Vitamin A, and if the lack of this could not be remedied it would seriously weaken the value of margarine. But it is quite easy to add as much Vitamin A as is needed, and so make margarine contain more of this Vitamin than the richest butter. Even butter is liable to show seasonal variations in its content of Vitamin A. Other vitamins too could be added to margarine such as Vitamin D., for example, of which butter contains very little. As a source of energy, margarine and butter are exactly equal.

The Order also sets out that by P.C. 3044 of October 23, 1917, made under the War Measures Act, the operation of section 5(*a*) of the Dairy Industry Act was suspended and that by cap. 24 of the Statutes of Canada, 1919, 2nd Session, provision was made for the manufacture and importation of "oleomargarine" until August 31, 1920, and for sale thereof until March 1, 1921. By annual amendments the permission contained in the 1919 Act was extended to August 31, 1923, in the case of manufacture and importation, and to March 1, 1924, in the case of sale. It is worthy of note that the "Oleomargarine Act", as the Act of 1919 was entitled, defines "oleomargarine" as meaning and including "oleomargarine, margarine, butterine, or any other

(1) [1946] A.C. 193.

substitute for butter (*a*) which is manufactured wholly or in part from any fat or oil other than from milk and cream, (*b*) which contains no foreign colouring matter and (*c*) which does not contain more than sixteen per cent of water". Section 3 is as follows:

> Notwithstanding anything contained in The Dairy Industry Act, 1914, chapter seven of the statutes of 1914, or in any other statute or law, the manufacture in and importation of oleomargarine into Canada shall be permitted until the thirty-first day of August, one thousand nine hundred and twenty; and the offering for sale, the sale, and the having in possession for sale of oleomargarine shall be permitted until the first day of March, one thousand nine hundred and twenty-one.

During the operation of P.C. 3044 and the subsequent permissive legislation, almost 52,000,000 pounds of the commodity were manufactured or imported into Canada. Presumably it was a shortage in the supply of butter that brought about the legislation above mentioned and it is not to be assumed that in 1919 Parliament was permitting something injurious to public health. On the contrary this legislation appears to me to be a recognition on the part of Parliament that any basis from the standpoint of public health which may have existed for the legislation of 1886 had been removed and that the legislation thereafter was to be regarded as legislation dealing with the production of and trade in articles of food. In fact, apart from the contention now under consideration, the substantial ground upon which the argument in support of the validity of the legislation proceeds is that it is justifiable as a matter of national concern with respect to the dairy industry.

Whatever may have been the situation in 1886 which prompted Parliament then to legislate in the interests of public health, I think it is plain that at least as early as 1914, margarine and oleomargarine as a subject matter of legislation were dealt with as part of the regulation of the dairying industry with no element of public health involved. There never had been any such element so far as margarine was concerned and in the legislation of 1914 both products were expressly dealt with on the same basis. I think therefore that the true nature and character of the legislation stands thus revealed.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Kellock J.

The next contention on the part of the Dominion is that the legislation cannot be said to be within the authority of a provincial legislature under section 92.

In *Attorney-General for Canada* v. *Attorney-General for Alberta*, (1), the Privy Council had to consider section 4 of the Dominion Insurance Act, 1910, by which the carrying on of the business of insurance was prohibited except under a Dominion licence. Section 70 made provision for a penalty. It was held that the legislation was ultra vires. At page 595 Viscount Haldane said:

> It will be observed that s. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that even a provincial company operating within the limits of the province where it has been incorporated cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the licence of the Dominion Minister... Such an interference with its status appears to their Lordships to interfere with its civil rights within the province of incorporation, as well as with the power of the Legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.

In the *King* v. *Eastern Terminal Elevator Co.*, (2) Sir Lyman Duff said:

> ...such a principle in truth must postulate authority in the Dominion to assume the regulation of almost any trade in the country, provided it does so by setting up a scheme embracing the local, as well as the external and interprovincial trade; and regulation of trade, according to the conception of it which governs this legislation, includes the regulation in the provinces of the occupations of those engaged in the trade, and of the local establishments in which it is carried on. Precisely the same thing was attempted in the Insurance Act of 1910, unsuccessfully.

In his submission counsel for the Attorney-General supported this branch of his argument on the ground that a single province, or all the provinces acting together, could not effect that which is effected by section 5(*a*) of the *Dairy Industry Act*, and that therefore legislative authority must reside in the Dominion. With respect to a similar argument Sir Lyman Duff in the above case said (2):

> The other fallacy is... that the Dominion has no such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme. The authority arises it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in the Board of Commerce Case, 1922, 1 A.C., 191, and, indeed, is the view

(1) (1916) 1 A.C. 588 at 595. (2) [1925] S.C.R. 434 at 447.

which was unsuccessfully put forward in the Montreal Street Railway Case, 1912 A.C., 333, where it was pointed out that in a system involving a division of powers such as that set up by the British North America Act, it may often be that subsiduary legislation by the provinces or by the Dominion is required to give full effect to some beneficial and necessary scheme of legislation not entirely within the powers of either.

In the *Board of Commerce* case (1), the facts of which need not be repeated, Viscount Haldane said:

> It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. *For, normally, the subject-matter to be dealt with in the case would be one falling within s. 92.*

Under section 4(1) of the Natural Products Marketing Act, 24-25 Geo. V, cap. 57, the Dominion Marketing Board was given power, inter alia, to "prohibit the marketing of any of the regulated products of any grade, quality or class". In giving the judgment of the Privy Council on the Reference (2) concerning the validity of this statute Lord Atkin said:

> There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province, and have no connection with inter-Provincial or export trade. It is therefore plain that the Act purports to affect property and civil rights in the Province, and if not brought within one of the enumerated classes of subjects in s. 91 must be beyond the competence of the Dominion Legislature.

On this branch of the argument Mr. Varcoe contends that prohibition of manufacture and sale of an article, if within the jurisdiction of a province, must fall within section 92 (16) rather than 92 (13) and in support of this proposition he relies upon *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (3). It was held in that case that the previous decision in the *Local Prohibition case* (4) had been rested upon 92 (16) rather than 92 (13). But the basis of the decision in the last mentioned case as thus interpreted was that in legislating with respect to the suppression of the liquor traffic the object in view is the

(1) (1922) 1 A.C. 191 at 197.
(2) [1937] A.C. 377 at 386.
(3) [1902] A.C. 73 at 79.
(4) [1896] A.C. 348.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Kellock J.

abatement or prevention of a local evil rather than the regulation of property and civil rights. I do not think therefore that the contention finds any support in these authorities. It is plain from the authorities already referred to that interference by the Dominion in the way of prohibiting the carrying on of a particular business by the inhabitants of a province, except upon terms laid down by the Dominion is an interference with civil rights in the province, a subject committed to the provincial legislatures under section 92 (13).

It will be convenient at this point to deal with another ground upon which the legislation is sought to be supported, namely, the regulation of trade and commerce within the meaning of section 91 (2). In the *Insurance case* (1), Viscount Haldane said:

> Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces... No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded.

In the *Board of Commerce* case (2) their Lordships, after pointing out that it may well be that it is within the power of Parliament to require statistical or other information went on to say:

> But even this consideration affords no justification for interpreting the words of s. 91, sub-s. 2, in a fashion which would... make them confer capacity to regulate particular trades and businesses.

The earliest case under section 91 (2) is *Citizens' Insurance Company* v. *Parsons* (3), where it was laid down that this power involves regulation relating to general trade and commerce. I think the provisions of the legislation here in question go beyond the general and fail as an attempt to regulate a particular trade or business. See also the *Natural Products Reference* (4).

(1) (1916) 1 A.C. 588 at 596.
(2) [1922] 1 A.C. 191 at 201.
(3) (1881-82) 7 A.C. 96.
(4) [1937] A.C. 377 at 387.

Coming to the question of criminal law, it is my opinion that the legislation is not to be supported upon the basis suggested. In the *Board of Commerce* case Viscount Haldane said at page 199:

> It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law...

In the *Reciprocal Insurers'* (1) case, Sir Lyman Duff in delivering the judgment of the Privy Council said:

> Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion... Such a procedure cannot, their Lorships think, be justified, consistently with the governing principles of the Canadian Constitution, as enunciated and established by the judgments of this Board.

The principle of these authorities was again affirmed in the *Proprietary Articles'* (2) case. In the course of his judgment in that case Lord Atkin said at page 324:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?

Lord Atkin, lower down on the same page, refers to what was said by Viscount Haldane in the *Board of Commerce* case at pp. 198-9 of the report, the latter part of which I have quoted above and says that the passage was not intended by the Board as a definition but that

> In that case their Lordships appear to have been contrasting two matters—one obviously within the line, (i.e. criminal law) *the other obviously* outside it.

At page 317 Lord Atkin had already said:

> But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

(1) [1924] A.C. 328 at 340. (2) [1931] A.C. 310.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Kellock J.

And at page 323:

> ...and if Parliament *genuinely* determines that commercial activities which can be so described are to be suppressed in the *public* interest, their Lordships see no reason why Parliament should not make them crimes...

Again in *Attorney-General for British Columbia* v. *Attorney General for Canada,* (1) Lord Atkin said:

> The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92... On the other hand, there seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments.

In the *Unemployment and Social Insurance Reference,* (2) Lord Atkin said:

> It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain.

The argument in support of the present legislation that "It is sufficient that Parliament has unconditionally prohibited the acts or omissions in question with sanctions to be applied by the criminal courts by way of fine or imprisonment" purporting to be based upon the decision in the Proprietary Articles' case overlooks the first requirement as laid down in the case itself, viz., that it is the true nature and character of the legislation which is to be regarded. In my opinion the provisions of section 91 (27) afford no support for the legislation here in question.

Once it is determined that the real object of legislation is to advance the interests of one business or trade by prohibiting another, it cannot be said, in my opinion, that the legislation is to be justified as a genuine determination by Parliament to suppress commercial activities in the public interest. The real object of Parliament in such case is not the suppression but something else, namely, the promotion.

The contention just mentioned depends, in my opinion, upon a too literal interpretation of the first passage quoted

(1) [1937] A.C. 368 at 375. (2) [1937] A.C. 355 at 367.

above from the judgment of Lord Atkin in the Proprietary Articles' case taken out of its context. What was said by Duff J., as he then was, in delivering the judgment of the Privy Council in the *Reciprocal Insurers'* case, (1) approved of in the *Insurance Reference,* (2) is appropriate:

> In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the provinces, it cannot be upheld as valid.

It is further argued that while it may be that the provinces are not excluded from legislating from the local or provincial point of view with regard to the matters dealt with by the legislation here in question, nonetheless there is a standpoint from which the Dominion has jurisdiction under the residuary power given by section 91.

Although legislative power on the part of Parliament may not, in any given case, be found in any of the enumerated heads, it may of course, be nonetheless a matter upon which Parliament may legislate because it concerns the peace, order and good government of Canada if it lie outside the classes of subjects exclusively assigned to the provinces. But with respect to such a matter, the exception from section 92 which is enacted by the concluding words of section 91, has no application. In legislating within the limits of this power, Parliament ought, to employ the language of Lord Watson in the *Local Prohibition* case, (3) "to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92". Lord Watson went on to say that

> If it were once conceded that the Parliament of Canada has authority to make laws *applicable to the whole Dominion,* in relation to matters which *in each province* are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate to the exclusion of the provincial legislatures.

(1) [1924] A.C. 328 at 342.
(2) [1932] A.C. 41 at 53.
(3) [1896] A.C. 348 at 360.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Kellock J.

In describing the area in which Parliament may legislate in the exercise of the power under consideration, Lord Watson said at p. 361:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or *abolition* in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has *ceased to be* merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

The illustration which Lord Watson then proceeds to give is significant of the "dimensions" necessary before the point is reached which justifies Dominion legislation.

In the *Canada Temperance Act,* (1) Viscount Simon in referring to the point now under discussion said:

> In their Lordships' opinion the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its *inherent* nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case, 1932 A.C., 54, and the Radio case, 1932 A.C., 304), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances...

In the *Natural Products Reference* (2), this court had to consider a similar contention with respect to the legislation there in question to which reference has already been made in this judgment. In referring to the language of Lord Watson in the Local Prohibition case, including that quoted above, Duff C. J. described that language as carefully guarded and went on to say at page 419:

> He does not say that every matter which attains such dimensions as to effect the body politic of the Dominion falls thereby within the introductory matter of section 91. But he said that "some matters" may attain such dimensions as to affect the body politic of the Dominion and, as we think the sentence ought to be read having regard to the context, in such manner and degree as may "justify the Canadian Parliament in passing laws for their regulation and abolition..." So, in the second sentence, he is not dealing with all matters of "national concern" in the broadest sense of those words, but only those which are matters of national concern "in such sense" as to bring them within the jurisdiction of the Parliament of Canada.

(1) [1946] A.C. 193 at 205. (2) [1936] S.C.R. 398.

Duff C. J. went on to point out that there had been only one case in which the Judicial Committee had held that legislation with regard to matters which were admittedly ex facie civil rights within a province, had by reason of exceptional circumstances acquired aspects and relations bringing them within the ambit of the introductory clause, namely, the *Fort Frances case* (1). In speaking of the Board of Commerce case the Chief Justice pointed out that the statute there in question was supported among other grounds on the ground that in the year 1919 when it was enacted, the evils of hoarding and high prices in respect of the necessaries of life had attained such dimensions as to affect the body politic of Canada. Nobody denied the existence of the evil; nobody denied that it was general throughout Canada; nobody denied the importance of suppressing it; nobody denied that it prejudiced and seriously prejudiced the well being of the people of Canada as a whole, or that in a loose, popular sense of the words it affected the body politic of Canada; nevertheless, it was held that these facts did not constitute a sufficient basis for the exercise of jurisdiction by the Dominion Parliament under the introductory clause in the manner attempted. The Chief Justice went on to refer to the *Snider* case (2), the legislation there in question having been framed for the purpose of dealing with industrial disputes. This statute was a permanent and not a temporary act. It authorized the Minister of Labour to take steps to convene, in the case of a dispute, a Board composed of representatives of employer and employee and a nominee of the Minister. Strikes and lockouts were prohibited pending the consideration of the Board. Duff, C.J., said that the importance of the matters dealt with by the statute, the fact that the statute made provision for meeting a condition which prevailed throughout the whole of Canada and for dealing with industrial disputes which, in many and, indeed, most cases, would affect people in more than one province, the fact that the machinery provided had proved to be a valuable instrument in the interests of industrial peace, were not disputed but, nevertheless, the Privy Council negatived the existence of the general principle that the mere fact

(1) [1923] A.C. 695.

(2) [1925] A.C. 396.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Kellock J.

that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent, if it cannot be brought within the heads enumerated specifically in section 91.

In my opinion there is nothing appearing in the Order of Reference which justifies the legislation here in question upon the particular ground now under consideration in the light of the judgment just referred to and the authorities to which it refers. Nor in my opinion is there anything inhering in the nature of the matter of the legislation which can be said to be the concern of the Dominion. I therefore think that effect is not to be given to this contention on behalf of the Dominion.

It is next argued on behalf of the Dominion that the legislation is to be supported under the provisions of section 95 as legislation in relation to agriculture. It may well be the fact that the legislation does directly benefit a section of the population engaged in the business of dairying but in my opinion the legislation is not true legislation "in relation to" agriculture. As was said by Migneault J. in the *King* v. *Eastern Terminal Elevator Co.* (1), "The subject matter of the section is not agriculture but a product of agriculture considered as an article of trade".

I am therefore of opinion that insofar as the section here in question deals with manufacture and sale it is not within the legislative authority of Parliament. Were the provisions of the section incapable of severance, it would not be necessary to consider the question of importation. In my opinion, however, that is not so.

Concurrently with the enactment in 1886 of 49 Victoria, cap. 42, there was also enacted cap. 37, section 5, by way of amendment to the Customs Duties Act by which the importation of "oleomargarine, butterine and all *such* substitutes for butter" were prohibited. By R.S.C. 1886, cap. 33, section 5, the above paragraph was amended to read "no oleomargarine, butterine or other *similar* substitute for butter shall be imported".

In their definitions of "butterine", English and American dictionaries of the latter part of the last century and the

(1) [1925] S.C.R. 434 at 457.

early years of this, indicate that that article is a combination of butter and oleomargarine. I therefore think that the change in language in the Revised Statute of 1886 did not effect any change in the substances covered by the prohibition and that butter substitutes of purely vegetable origin were not included. Accordingly, the importation of margarine, as distinct from oleomargarine, was not prohibited by the customs legislation. No material change in this legislation was made down to and including the Customs Tariff Act, R.S.C. 1927, cap. 44, section 14, Schedule "C", item 1204. In prohibiting the importation of margarine, therefore, section 5 of the *Dairy Industry Act* is more comprehensive than the Customs Tariff Act.

The question therefore is whether on a fair review of the whole matter it is to be assumed that Parliament, had it been called to its attention when legislating in 1927, that it could not legislate as to manufacture and sale, would have legislated with respect to importation alone; *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). In view of the provisions of the Customs Tariff Act, by which Parliament has shown an intention to cover the larger part of the field, I think it reasonable to suppose that Parliament, even though it could not deal with manufacture and sale, would have filled up anything lacking in the Customs Tariff with respect to importation of margarine and substitutes for butter of purely vegetable origin. It therefore becomes necessary to consider the question as to importation.

In *Attorney-General for British Columbia* v. *Attorney-General for Canada,* (2) Lord Buckmaster pointed out that customs legislation is enacted for the purpose of taxation or to protect Canadian industry, or for both reasons, and that in either case it is a matter within the exclusive competence of Parliament as being the raising of revenue or the regulation of trade and commerce. It is obvious that a customs duty enacted for the purpose of protecting Canadian industry, might be designed to increase the price of the imported product and thus to improve the competitive position of local industry, or to restrict or to prohibit importation entirely. That being so, I think it follows that Parliament may prohibit not only by a prohibitory tariff but by

(1) [1947] A.C. 503 at 518. (2) [1924] A.C. 222.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Kellock J.

express legislation, and that in either case the authority so to legislate is to be found in head 2, section 91. I do not think that anything said by Lord Watson in the *Local Prohibition* case (1) stands in the way. In enacting prohibitory legislation with respect to importation in order to protect Canadian industry, Parliament is "conserving" that industry. In the present instance I think the legislation is to be upheld as having been enacted from the aspect of the conservation of the dairy industry against foreign competition.

My answer to the question is that section 5(a) of the *Dairy Industry Act,* R.S.C. 1927, cap. 45, is ultra vires the Parliament of Canada as to manufacture and sale but intra vires as to importation.

ESTEY, J.:—In this reference the validity of sec. 5(*a*) of the *Dairy Industry Act,* R.S.C. 1927, ch. 45, as competent Dominion legislation is questioned. Sec. 5(*a*) reads as follows:

> 5. No person shall
>
> (*a*) Manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream;

A brief historical review of this legislation, in view of the various submissions, is desirable. The first legislation enacted by the Parliament of Canada relative to oleomargarine was in 1886, "An Act to prohibit the Manufacture and Sale of certain substitutes for Butter," (S. of C. 1886, ch. 42), which reads as follows:

> Whereas the use of certain substitutes for butter, heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—
>
> 1. No oleomargarine, butterine or other substitute for butter, manufactured from any animal substance other than milk, shall be manufactured in Canada, or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months.

(1) [1896] A.C. 348 at 363.

In the consolidation of 1886 this preamble was not carried forward and the above sec. 1 constituted the entire Act (R.S.C. 1886, ch. 100), until 1906 when it was repealed. (S. of C. 1907, ch. 43, sec. 4—also page IX, Vol. 1, R.S.C. 1906).

In 1903 Parliament passed The Butter Act (S. of C. 1903, ch. 6) and, notwithstanding that the legislation of 1886 prohibiting manufacture and sale was in force (R.S.C. 1886, ch. 100) and so remained until the consolidation of 1906, and the Customs Duties Acts amendment of 1886 (S. of C. 1886, ch. 37, sec. 5) prohibiting the importation of these products was then in force, there was included in sec. 5 of The Butter Act in 1903 a prohibition of the importation, manufacture and sale of oleomargarine, butterine and butter substitutes.

The enactment of 1903 made no reference to either of the 1886 statutes, and in the result both those of 1886 and that of 1903 remained in force until the revision of 1906.

In the revision of 1906 The Butter Act of 1903 was incorporated into Part VIII under the heading "Dairy Products" of an Act entitled "An Act respecting the Inspection and Sale of certain Staple Commodities" (R.S.C. 1906, ch. 85). Sec. 5 of the 1903 Act was carried forward in identical language as sec. 298 in the revision of 1906 (R.S.C. 1906, ch. 85, sec. 298) and is identical in language with sec. 5(*a*) here in question except that in the latter the word "margarine" (added S. of C. 1914, ch. 7) is included after the word "oleomargarine."

Sec. 5(*a*) as included in the *Dairy Industry Act* is but a portion of the prohibitions, restrictions and regulations designed to protect the dairy industry and to regulate the manufacturing and marketing of dairy products. The statute as a whole specifically provides against the adulteration and dilution of these products and authorizes the Governor in Council to make regulations prescribing standards of quality and the classification, grading and other matters in respect of such products.

The material included in the record of this reference indicates that not only have oleomargarine and margarine

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Estey J.

been accepted as articles of food, since some time after the discovery of the original formula in 1867 in many parts of the world, including Great Britain and the United States, but that in Canada, during the First Great War, the legislation prohibiting their importation, manufacture and sale was suspended and from December 1, 1917, to September 30, 1923, over thirty-one million pounds were manufactured and over twenty million pounds were imported into this country. It also includes a published statement approved of by the Department of Public Health which reads in part: "as a source of energy, margarine and butter are exactly equal." It follows that the statement in the preamble of 1886 that "the use of certain substitutes for butter, . . . is injurious to health," in so far as it may refer to oleomargarine and margarine, has no foundation in fact. The foregoing, together with the deletion of this preamble in the consolidation of 1886, the repeal of the statute itself in 1906, the inclusion of the prohibition against importation in the 1903 enactment and the incorporation thereof into a statute relative to the butter industry, and the subsequent legislation, would indicate that Parliament has, since at least 1903, been legislating without regard to the statement contained in the preamble of 1886. Under all of these circumstances, this preamble cannot be regarded as either a basis for or the construction of the present legislation.

In considering the validity of sec. 5(*a*) it is convenient to deal first with the prohibition of the manufacture and sale of these products.

The prohibition of the manufacture and sale in sec. 5(*a*) directly interferes with the freedom of individuals and corporate bodies to engage in the business of manufacturing or selling the specified food products, including oleomargarine and margarine. As such it is legislation in relation to property and civil rights within the meaning of sec. 92 (13), with respect to which the provinces have the exclusive right to legislate, unless the legislation in question may be held to be competent Dominion legislation within the other provisions of the B.N.A. Act.

On behalf of the Dominion it is contended that sec. 5(*a*) is competent Dominion legislation under:

(*a*) Sec. 91 (2) "The regulation of Trade and Commerce."

(*b*) Sec. 91 (27) "The Criminal Law . . ."

(*c*) Peace, Order, and good Government, within the meaning of the opening paragraph of sec. 91.

(*d*) Sec. 95 " . . . in relation to Agriculture . . . "

This legislation in relation to a specific trade or industry is not competent Dominion legislation within the meaning of sec. 91 (2). In 1881 the Privy Council held provincial legislation respecting fire insurance contracts valid. As to the contention that such came under sec. 91 (2) Sir Montague Smith stated: ". . . the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, . . .": *Citizens Ins. Co. of Canada* v. *Parsons* (1). Expressions to similar effect are found in *A.-G. for Canada* v. *A.-G. for Alberta (Dominion Insurance Act, 1910)* (2); *Board of Commerce Case* (3); *Toronto Electric Commissioners* v. *Snider* (4).

In *The King* v. *Eastern Terminal Elevator Co.* (5), the provisions of the Grain Act, 1912 (2 Geo. V, ch. 27, as amended by 9 & 10 Geo. V, ch. 40, sec. 3) and in particular sec. 95 (7) were considered. The importance of the grain trade, and the desirability of the benefits sought by the legislation, including the protection of the external trade in grain were not questioned, nevertheless, the legislation was held to be ultra vires.

Then in the *Natural Products Marketing Act Case* (6), it was held that Dominion legislation with respect to the marketing of natural products was ultra vires, notwithstanding the emphasis laid upon those parts of the Act which dealt with inter-provincial and export trade. The Privy Council stated: "But the regulation of trade and commerce does not permit the regulation of individual forms

(1) (1881-82) 7 A.C. 96 at 113; 1 Cam. 267 at 281.
(2) (1916) 1 A.C. 588 at 596; 2 Cam. 63 at 70.
(3) (1922) 1 A.C. 191; 2 Cam. 253
(4) [1925] A.C. 396; 2 Cam. 363
(5) [1925] S.C.R. 434.
(6) [1937] A.C. 377.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Estey J.

of trade or commerce confined to the Province," and adopted the language of Duff, C.J., in this Court: *Natural Products Marketing Case* (1) in which he stated:

> Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority.

See also *Shannon* v. *Lower Mainland Dairy Products Board* (2).

Moreover, by its express terms this section prohibits rather than regulates the manufacture and sale, and as pointed out by the Privy Council in *Municipal Corporation of City of Toronto* v. *Virgo* (3), there is a vast difference between the two in that "a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." See also *A.-G. for Ontario* v. *A.-G. for Dominion* (4). Whether, therefore, the legislation be regarded as part of an enactment to protect and regulate the dairy industry or as merely prohibitory in character, it is in either event not competent Dominion legislation within the meaning of sec. 91 (2) "The regulation of Trade and Commerce."

It is then contended that as any infraction of the prohibitions under sec. 5(*a*) constitutes an offence for which penalties are provided under sec. 10 of the *Dairy Industry Act,* that this is valid criminal legislation within the meaning of sec. 91 (27). This contention is based upon the oft-quoted statement that the phrase "criminal law" is used in sec. 91 (27) "in its widest sense": *A.-G. for Ontario* v. *Hamilton Street Rly.* (5) and the language of Lord Atkin in *Proprietary Articles Trade Assoc.* v. *A.-G. for Canada (Combines Investigation Act)* (6):

> ...for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State

(1) [1936] S.C.R. 398 at 412.
(2) [1938] A.C. 708.
(3) [1896] A.C. 88 at 93.
(4) [1896] A.C. 348 at 363; 1 Cam. 481 at 493.
(5) [1903] A.C. 524; 1 Cam. 600
(6) [1931] A.C. 310 at 324.

to be crimes, and the only common nature they will be found to posses is that they are prohibited by the State and that those who commit them are punished.

This statement must be construed in relation to its context and the legislation under consideration. It was there the Combines Investigation Act (R.S.C. 1927, ch. 26) under which the combines affected are defined as those "which have operated or are likely to operate to the detriment or against the interest of the public," or as Lord Atkin stated, at p. 323 (Plaxton p. 65): "The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit." In 1937 Lord Atkin in *A.-G. for B.C.* v. *A.-G. for Canada (Sec. 498A of the Cr. Code),* (1) referred to his judgment in *Proprietary Articles Case* in these words:

> The basis of that decision is that there is no other criterion of "wrongness" than the intention of the Legislature in the public interest to prohibit the act or omission made criminal.

In both of these cases the legislation was held to be competently enacted under sec. 91(27). While in the latter "intent to do wrong" and that all of the public be immediately affected were negatived as essentials to the constitution of a crime, both cases emphasize that Parliament in enacting criminal law is acting "in the public interest". This last phrase is significant in relation to the limitation suggested in both cases upon the power of the Parliament of Canada, which in the latter is expressed as follows:

> The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them.

See also *Toronto Electric Commissioners* v. *Snider, supra.*

The limitation here referred to is illustrated in *A.-G. for Canada* v. *A.-G. for Alberta (Dominion Insurance Act, 1910)* (2) and *A.-G. for Ontario* v. *Reciprocal Insurers* (3), where it was determined that legislation prohibiting the carrying on of certain types of insurance business without a licence from the Dominion was ultra vires the Dominion Parliament, whether or not the prohibition and penalty

(1) [1937] A.C. 368 at 375.
(2) (1916) 1 A.C. 588; 2 Cam. 63.
(3) [1924] A.C. 328; 2 Cam. 334.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Estey J.

were contained in the insurance legislation itself or embodied in the Criminal Code. Speaking relative to the amendment to the Criminal Code in the *Reciprocal Insurers Case*, the Privy Council stated at p. 339 (2 Cam. 343):

> It is not seriously disputed that the purpose and effect of the amendment in question are to give compulsory force to the regulative measures of the Insurance Act, and their Lordships think it not open to controversy that in purpose and effect s. 508c is a measure regulating the exercise of civil rights.

And at p. 342 (2 Cam. 344):

> In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.

These authorities emphasize again that secs. 91 and 92 must be read and construed together, and that it is the substance as distinguished from the form of the legislation that in each case must be considered. The legislation here in question does not disclose that the prohibitions were enacted "in the public interest" in the sense in which that phrase is used in the foregoing authorities. It rather appears that those in sec. 5(*a*) were, as well as many other prohibitions in the *Dairy Industry Act*, enacted for the purpose of protecting and regulating that industry. These prohibitions, as already stated, prevented citizens engaging in the manufacture and sale of these specified food products. As such the legislation is in relation to property and civil rights and therefore within the legislative competence of the provinces. Legislation so enacted is ultra vires the Dominion and it does not become intra vires by the inclusion therein of offences and penalties for the purpose of giving coercive and compulsory effect to its provisions. The enactment of such offences and penalties though in form criminal is not in relation to criminal law within the meaning of sec. 91(27) and is therefore not competent Dominion legislation under that heading. It was no doubt that the provinces might have the power to enact compulsory and coercive provisions and thereby give force and effect to

legislation enacted in relation to matters assigned to them that sec. 92(15) was included in the B.N.A. Act, which enabled the provinces to impose "punishment by fine, penalty, or imprisonment for enforcing any law of the province."

It was submitted that sec. 5(*a*) was competent Dominion legislation under the peace, order and good government clause of sec. 91, that while within the provisions of sec. 92 the provinces might prohibit manufacture and sale in a purely local matter "from a provincial point of view," the Dominion possessed in addition thereto a Dominion power to prohibit and thereby deal with such matters as inter-provincial trade. This contention appears to be answered by Duff, J. (later Chief Justice) in *The King* v. *Eastern Terminal Elevator Co.* (1) where he stated:

> The other fallacy is....that the Dominion has such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme. The authority arises, it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in the *Board of Commerce Case,* (1922) 1 A.C. 191, and, indeed, is the view which was unsuccessfully put forward in the *Montreal Street Railway Case,* (1912) A.C. 333, where it was pointed out that in a system involving a division of powers such as that set up by the British North America Act, it may often be that subsidiary legislation by the provinces or by the Dominion is required to give full effect to some beneficial and necessary scheme of legislation not entirely within the powers of either.

Moreover, even if such a power of prohibition did exist, sec. 5(*a*) does not purport to be enacted in relation to inter-provincial trade or any aspect in relation to manufacture and sale other than a direct prohibition of the exercise of civil rights within the provinces.

Neither can this legislation be supported on the basis that it is for the protection of an industry that has attained "such dimensions" or is of such national concern as to give to the Dominion a jurisdiction to validly enact it under the peace, order and good government clause of sec. 91.

In the *Liquor License Case* (2), Lord Watson gave expression to the possibility of the Parliament of Canada enacting such legislation:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body

(1) [1925] S.C.R. 434 at 448.

(2) [1896] A.C. 348 at 361; 1 Cam. 481 at 492.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Estey J.

politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

The nature and scope of such legislation was considered by Chief Justice Duff in the judgment of this Court in *Natural Products Marketing Act* (1) adopted and described by the Privy Council as the "*locus classicus* of the law" in *A.-G. for Canada* v. *A.-G. for Ontario (Labour Conventions Case)* (2). Chief Justice Duff commented upon the carefully guarded language of Lord Watson and reviewed the *Board of Commerce Case, supra,* and *Toronto Electric Commissioners* v. *Snider, supra.* In both of these the legislation was in respect of admittedly important matters that obtained throughout the Dominion and affected the people of Canada as a whole. In both of these cases it was contended that the legislation was valid under the peace, order and good government clause of sec. 91, yet the legislation in both was held by the Privy Council to be ultra vires the Parliament of Canada.

This Court held the *Natural Products Marketing Act,* 1934, ultra vires of the Dominion. Duff, C. J. C., at p. 426 stated:

> . . . this statute attempts and, indeed, professes, to regulate in the provinces of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities. The powers of regulation vested in the commissions extend to external trade and matters connected therewith and to trade in matters of interprovincial concern; but also to trade which is entirely local and of purely local concern.
>
> Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada...

This decision was affirmed by the Privy Council in *A.-G. for B.C.* v. *A.-G. for Canada* (3). It is of interest to note that the *Natural Products Marketing Act* contained a prohibition in the following language:

> 4. (1) (*a*) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be

(1) [1936] S.C.R. 398.
(2) [1937] A.C. 326.
(3) [1937] A.C. 377.

> marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class.

In the Privy Council, as in this Court, it was emphasized that the *Natural Products Marketing Act* was beyond the legislative competence of the Dominion because, though it might affect provincial and export trade, it covered "transactions in any natural product which are completed within the Province, and have no connection with inter-Provincial or export trade."

In *The King* v. *Eastern Terminal Elevator Co., supra* it was contended that the Grain Act was competent Dominion legislation under the peace, order and good government clause, both because it dealt with export trade and because no single province possessed the authority to deal adequately with the subject. Nevertheless, the legislation was held ultra vires the Dominion because it sought to regulate storage of grain in, and the business of operating elevators.

It would therefore appear that this industry cannot be classified as "unquestionably of Canadian interest and importance" as stated by Lord Watson in the *Liquor License Case, supra,* nor within the language of Viscount Haldane in the *Board of Commerce Case* (1):

> It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one.

Nor does it appear that the language of Viscount Simon in *A.-G. for Ontario* v. *Canada Temperance Federation* (2) in any way alters or affects the jurisdiction of the Parliament of Canada. Viscount Simon stated:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case) then it will fall within the com-

(1) (1922) 1 A.C. 191 at 197; 2 Cam. 253 at 258.

(2) [1946] A.C. 193 at 205.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Estey J.

petence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

His reference to the *Aeronautics* and *Radio* cases, and the oft-quoted illustrations of war and pestilence, "the drink or drug traffic, or the carrying of arms," together with his express words: "Their Lordships have no intention, in deciding the present appeal, of embarking on a fresh disquisition as to relations between ss. 91 and 92 of the British North America Act . . .," clearly indicate that the Privy Council was laying down no new rule or principle in this judgment affirming the decision of *Russell* v. *The Queen* (1).

The importance of the dairy industry in the economy of Canada was not questioned. Nor were the statements to the effect that in the grazing season a surplus of milk is realized that must be disposed of in the manufacture of dairy products, that some provinces produce a surplus of butter while others must import a portion of their requirements. These, together with those factors of climate that make the conduct of this industry relatively expensive, are of themselves not sufficient in normal conditions to justify the conclusion that the dairy industry has attained "such dimensions" as to give it a Dominion aspect and thereby bring it within the legislative competence of the Parliament of Canada under the peace, order and good government clause of sec. 91 as interpreted by the foregoing authorities. If the dairy industry itself has not attained "such dimensions" as to give it a Dominion aspect, sec. 5 (*a*) cannot be accepted as competent Dominion legislation in relation thereto.

The Dairy Industry Act, apart from sec. 5(*a*), throughout the hearing of this reference has been accepted as competent Dominion public health legislation under the peace, order and good government clause of sec. 91. The products mentioned in sec. 5(*a*), particularly those to which our attention has been directed, being not injurious to health, that section cannot constitute valid public health legislation. It follows that in neither of these aspects can sec. 5(*a*) be accepted as competent Dominion legislation under the opening paragraph of sec. 91.

(1) (1881-82) 7 A.C. 829.

Nor can sec. 5(*a*) be accepted as legislation enacted by the Dominion "in relation to agriculture in all or any of the provinces" within the meaning of sec. 95 of the B.N.A. Act. As already stated, oleomargarine and margarine are vegetable oil compounds. Legislation with respect to their manufacture and sale is not legislation in relation to agriculture. In *Lower Mainland Dairy Products* v. *Crystal Dairy Ltd.* (1), the Province of British Columbia enacted legislation under which the sale of milk was regulated. The contention that this was legislation in relation to agriculture was not maintained because it did "not appear in any way to interfere with the agricultural operations of the farmers."

In *The King* v. *Eastern Terminal Elevator Co., supra,* it was contended that the legislation relative to the sale of grain was legislation in relation to agriculture. Mr. Justice Mignault disposed of this contention:

> ...the subject matter of the Act is not agriculture but a product of agriculture considered as an article of trade.

The prohibition of the importation, manufacture and sale of these manufactured food products might compete with or affect the sale of dairy products, but it does not interfere with the farmers in their agricultural operations within the meaning of sec. 95.

The prohibition of importation, unlike that of manufacture and sale, is not in relation to any of the matters assigned exclusively to the provinces. It is rather a matter of external trade in relation to which the Parliament of Canada possesses legislative authority under sec. 91 (2) "The regulation of Trade and Commerce."

> It would appear to result from these decisions that the regulation of trade and commerce.....does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers. Per Duff, C.J.C., in *Natural Products Marketing Act* (2).

The Parliament of Canada may also enact Customs Duties under sec. 91(3) "The raising of Money by any Mode or System of Taxation."

> The imposition of customs duties upon goods imported into any country may have many objects; it may be designed to raise revenue or to regulate trade and commerce by protecting native industries, or it

(1) [1933] A.C. 168. (2) [1936] S.C.R. 398 at 410.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Estey J.

may have the two-fold purpose of attempting to secure both ends; in either case it is a power reserved to the Dominion. Per Lord Buckmaster in *A.-G. of B.C.* v. *A.-G. of Canada* (1).

The attainment of the regulation of trade and commerce by the imposition of customs duties necessarily involves a restriction upon importation which increases as the duty is raised. The difference between the imposition of a duty and complete prohibition is therefore but one of degree rather than principle. The enactment of embargoes and prohibitions, the latter often included in customs legislation, has been a recognized practice in matters of external trade not only in this but in other countries. The Parliament of Canada in legislating under one of the enumerated heads or under the peace, order and good government clause of sec. 91 does so as "a fully sovereign state" and upon the basis of the principle underlying the decision of *Croft* v. *Dunphy* (2), Parliament possesses the power to enact such legislation under sec. 91(2).

The considerations that support a prohibition of importation for the regulation and protection of a native industry must often be quite different from those of manufacture and sale, even if both be effected toward the attainment of the same end. Each has a distinct and separate significance, the one affecting external the other domestic trade. In this particular case the vegetable oils which enter into the manufacture of oleomargarine and margarine are largely imported. Moreover, these manufactured products are produced in large quantities in other countries and when the legislation was suspended, as hereinbefore stated, a considerable quantity was imported.

Parliament in 1886 placed the prohibition of importation in the Customs Act (S. of C. 1886, ch. 37) where it has since remained with some amendments and is now found in sec. 214 of the Customs Tariff Act (R.S.C. 1927, ch. 44, Item 1204 of Sch. C). It was not until 1903 that the prohibition of importation was also included in The Butter Act (S. of C. 1903, ch. 6). When in the 1914 legislation supra the prohibition of margarine was enacted, and though not included in the Customs Tariff Act, it was for the attainment of the

(1) [1924] A.C. 222 at 225; 2 Cam. 331 at 333.

(2) [1933] A.C. 156.

same end and competent Dominion legislation under sec. 91(2). The foregoing indicates that not only has the prohibition of importation a separate and independent significance from that of manufacture and sale, but that to some extent Parliament has so regarded it. It is therefore but reasonable to assume that Parliament would have enacted a prohibition against importation even if it could not have competently included a prohibition against the manufacture and sale of these products. *Reference Re Alberta Bill of Rights* (1).

That legislation so enacted may affect matters assigned exclusively to the provinces does not constitute a valid objection unless it be determined that such is "colourable", as that word has been so often used. There appears to be no reason to so conclude in this instance. It would therefore appear that the prohibition of importation as enacted in sec. 5(*a*) is competent Dominion legislation.

My answer to the question submitted is that sec. 5(*a*) of the *Dairy Industry Act,* R.S.C. 1927, ch. 45, is intra vires the Parliament of Canada in so far as it prohibits the importation of the products mentioned, but ultra vires in so far as it prohibits the manufacture, sale, offering or having in possession for sale the specified products.

LOCKE, J.:—The first ground urged by counsel for the Dominion in support of the contention that section 5(*a*) of the *Dairy Industry Act,* cap. 45, R.S.C. 1927, is intra vires Parliament, is that it is legislation in relation to criminal law and thus reserved to Parliament by section 91 (27) of the *British North America Act.*

While the section prohibits, inter alia, the manufacture, importation into Canada or sale of margarine as well as oleomargarine, it is only the latter word that is defined by section 2. The definition is, however, sufficiently broad to include margarine which, according to the statement of facts contained in the order of reference, is a straight vegetable oil compound while oleomargarine contains in addition an animal fat. On the argument addressed to us emphasis was laid upon the fact that when the Act to prohibit the Manufacture and Sale of certain substitutes

(1) [1947] 4 D.L.R. 1 at 11.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Locke J.

for Butter was enacted in 1886, the preamble recited that "the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health and it is expedient to prohibit the manufacture and sale thereof." This, it is said, affords a clear indication that the legislation as originally enacted was for the purpose of safeguarding the health of the public generally, and thus within a field where Parliament might act under heading 27 of section 91. It is said that the prohibition in the *Dairy Industry Act,* as it now stands, is in effect simply a reenactment of the original prohibition contained in the statute of 1886 and reliance is placed upon a passage in the judgment of Viscount Simon in *Attorney-General for Ontario* v. *Canada Temperance Federation* (1), wherein it was said:—

> It was not contended that if the Act of 1878 was valid when it was enacted it would have become invalid later on by a change of circumstances, but it was submitted that as that Act and the Act of 1886 have been repealed, the Act of 1927 was new legislation and consequently circumstances must exist in 1927 to support the new Act.

and again:—

> Their Lordships do not find it necessary to consider the true effect either of s. 5 or s. 8 of the Act of 1924 for the revision of the Statutes of Canada, for they cannot agree that if the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could be successfully contended that the Act of 1927 which replaced it was ultra vires.

We are informed by the statement of facts that both oleomargarine, being a product containing some animal fat, and margarine, a product made in part of vegetable oils and other healthful and harmless ingredients, are equally as nutritious as butter and it is common ground that neither is injurious to health. The recited statement in the preamble to chapter 42 of the Statutes of 1886 relating to oleomargarine is no longer true: as to margarine, the preamble did not refer to it or other products which did not contain animal fats, so that the contention which may be advanced in favour of the prohibition of the manufacture of oleomargarine has no relevancy to the position of the product margarine.

It cannot, in my opinion, be successfully contended that if the real purpose of the prohibition of the import-

(1) [1946] A.C. 193 at 207.

ation, manufacture or sale of these products was the protection of the general health of the public the Dominion might not properly legislate. There can now be no such purpose so that if the legislation in respect of oleomargarine is to be supported on that ground, it must be upon the basis that it is the validity of the prohibition as originally enacted in 1886 that we are to consider and that, in the absence of any evidence that oleomargarine containing animal fat was not injurious to the health at that time, it should be assumed that the prohibition contained in that statute was for the assigned purpose and, therefore, supportable as a valid exercise of the powers of Parliament. The above quoted statement in the judgment in the Canada Temperance Federation case is to be contrasted with that of Viscount Haldane in *Fort Frances Pulp and Paper Company* v. *Manitoba Free Press* (1), which appears to me to conflict with it. It may be noted that the judgment of the Judicial Committee in the Canada Temperance Federation case does not refer to the Manitoba Free Press case. I have come to the conclusion that this phase of the question is to be determined without regard to the legislation of 1886. When the Butter Act 1903 was enacted the prohibition, as contained in the statute and the Revised Statutes of 1886, was altered so that it read:—

> No person shall manufacture, import into Canada or offer, sell or have in his possession for sale any oleomargarine, butterine or other substitute for butter manufactured wholly or in part from any fat other than that of milk or cream.

and the Act contained no recital that butter substitutes so manufactured were injurious to health. The absence of any such recital or of any reference to the protection of the public health means, in my opinion, that by the year 1903 at least it was publicly recognized that oleomargarine, containing animal fat, was not harmful and that the prohibition could no longer be justified on that ground and the product was grouped with all other substitutes for butter and its importation and manufacture prohibited, for the purpose of protecting those engaged in the dairy industry. I think, therefore, that oleomargarine and margarine, which

(1) [1923] A.C. 695 at 706.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Locke J.

was first mentioned by name when the Dairy Industry Act was enacted in 1914, are on the same footing and that the recital in the statute of 1886 does not affect the matter.

In *Proprietary Articles Trade Association* v. *Attorney-General of Canada,* (1), in considering whether the *Combines Investigation Act,* R.S.C. 1927, cap. 36, and section 498 of the Criminal Code were ultra vires the Parliament of Canada, Lord Atkin, approving what had been said theretofore in *Attorney-General for Ontario* v. *Hamilton Street Railway Company,* (2), that "criminal law" means the criminal law in its widest sense, said that criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state and that the criminal quality of an act can be discovered by a reference to one standard only, namely: is the act prohibited, with penal consequences. Here the manufacture, importation, selling or having in possession of oleomargarine and margarine are prohibited, with penal consequences. However, as pointed out in a later passage of the judgment "The contrast is with matters which are merely attempts to interfere with Provincial rights and are sought to be justified under the head of 'criminal law' colourably and merely in aid of what is in substance an encroachment", this being the ground upon which the Board had acted in the *Board of Commerce Act case* (3). The fact that Parliament has declared that the manufacture, importation and sale of a healthful, nutritious food is a crime, does not relieve us of the necessity of inquiring into the real nature of this legislation. The determination of that question does not turn on the language used by Parliament but on the provisions of the Imperial Statute of 1867 *(Union Colliery Company* v. *Bryden* (4): *Attorney-General for Manitoba* v. *Attorney-General for Canada,* (5). It may be observed that if it is within the power of the Dominion to prohibit the manufacture and sale of this valuable and harmless article of food in the provinces of Canada by the simple expedient of declaring these acts to be criminal offences, Parliament might with equal force

(1) [1931] A.C. 310 at 324.
(2) [1903] A.C. 524.
(3) (1922) 1 A.C. 191.
(4) [1899] A.C. 580 at 587.
(5) [1925] A.C. 561.

prohibit the production and sale of milk or the keeping of cattle or the growing of wheat or the manufacture of flour. In my opinion, this is not in pith and substance criminal legislation and if it cannot be supported on other grounds, to sustain it as such would be to permit the Dominion to invoke heading 27 of section 91 in aid of a clear encroachment upon the Provincial field.

Counsel for the Dominion further argued that the legislation may be supported under heading 2 of section 91 as being legislation for the regulation of trade and commerce. In the *Reference re Natural Products Market Act* 1934 (1), Sir Lyman Duff, C.J., after summarizing the authorities said that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers. In that case the Act under consideration provided for the establishment of a Dominion Marketing Board to regulate the marketing of specified natural products. By sec. 4 (1) the Board was invested with power

> (*a*) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class.

and the word "marketed" was defined as embracing "buying and selling, shipping for sale or storage and offering for sale." As in the present case, the legislation admittedly affected civil rights and interfered with, controlled and regulated the exercise in every one of the provinces of the civil rights of the people. In support of the legislation it was contended that it was within the competence of Parliament, not only upon the ground that it was legislation for the regulation of trade and commerce, but also that it was

(1) [1936] S.C.R. 398.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Locke J.

competent under the general authority "to make laws for the peace, order and good government of Canada", within the introductory clause of section 91. In the judgment finding against both of these contentions, the learned Chief Justice pointed out that the statute attempted to regulate in the provinces of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities; that the powers of regulation vested in the commissions extended to external trade and matters connected therewith and to trade in matters of interprovincial concern but also to trade which was entirely local and of purely local concern and that the regulation of individual trades and trades in individual commodities in this sweeping fashion was not competent to Parliament. In my opinion, this decision which was confirmed on appeal (1) is conclusive upon this aspect of the present case. I can see no sound distinction between a statute which prohibits or regulates the buying, selling or offering for sale of a natural product and one which assumes to prohibit the manufacture of articles of food from a natural product. Apart from precedent, it is my opinion that it was never contemplated by the scheme of Confederation that Parliament should in a matter which is so largely of a local or private nature interfere with the property and civil rights of the inhabitants of the various provinces. At the present time it is common ground that, due to circumstances quite beyond the control either of the Dominion or Provincial governments, the price of butter is high and there is a scarcity. The scarcity differs in the different provinces of Canada: in some, more butter is manufactured than is required for local use, while in others the reverse is the case. The growing of soya beans, sunflowers and other natural products used in the manufacture of vegetable oils affords to the residents of the provinces what is, at least in Canada, a comparatively new source of income which the legislatures of the various provinces may well consider to be for the benefit of the people and to contribute to the welfare of the province, while the manufacture and sale of oleomargarine, margarine and other like products would undoubt-

(1) [1937] A.C. 377.

edly be of advantage as contributing to employment. These are all matters which I think to be essentially of a nature which it was intended to commit to the various legislatures rather than to Parliament. The growing of these crops, the production of vegetable oil from them and its use in the manufacture of food are, in my opinion, matters of a merely local or private nature in the province and beyond the jurisdiction of Parliament.

It is further contended that the legislation may be supported as being in relation to agriculture. The same might be said in regard to the *Natural Products Marketing Act of 1934* and I think it cannot be upheld on this ground. In dealing with the same contention in *The King* v. *Eastern Terminal Elevator Company,* (1) Mignault J. said that the subject matter of the Act was not agriculture but a product of agriculture considered as a matter of trade. Here the product dealt with is one step farther removed, being a manufactured article made largely from a product of agriculture.

There remains for consideration the question as to whether the section, in so far as it prohibits the importation into Canada of these products, can be supported. It is relevant to this aspect of the matter to note that by the Customs Duties Act amendment, cap. 47, Statutes of 1886, s. 5, s-s. (*b*) "oleomargarine, butterine and all such substitutes for butter" were added to the list of articles the importation of which into Canada was prohibited by the Customs and Excise Act, cap. 15, Statutes of 1879, Schedule D. By sec. 5, cap. 33, R.S.C. 1886, the prohibition was amended to read: "oleomargarine, butterine or other similar substitute for butter". The articles prohibited were not in terms restricted to those "manufactured from any animal substance other than milk" as in cap. 42, Statutes of 1886, sec. 1. The prohibition in so far as it dealt with substitutes for butter was continued in this form in the Customs Tariff Act 1894, cap. 33, sec. 6, Schedule C, in the Customs Act 1897 and in the Revision of the Statutes, cap. 49, R.S.C. 1906. Later there was added to the prohibition "process butter or renovated butter" and it is in these terms that it now forms part of that Act. Margarine, as distinct from

(1) [1925] S.C.R. 434 at 457.

1948

REFERENCE AS TO THE VALIDITY OF SECTION 5(a) OF THE DAIRY INDUSTRY ACT

Locke J.

oleomargarine, which was first mentioned in the Dairy Industry Act in 1914, is not named as a prohibited article in the Customs Tariff Act but the wording of the prohibition is, in my opinion, wide enough to cover it. The question as to the right of the Dominion to prohibit importation was not fully argued before us. On behalf of l'Association Canadienne des Electrices it was contended that, if the restriction was enacted solely for the purpose of encroaching upon the rights of the province in regard to property and civil rights, it was invalid. The prohibition cannot, I think, be justified under heading 2 of section 91 as a regulation of trade and commerce, in view of the decisions of the Judicial Committee in *Municipal Corporation of Toronto* v. *Virgo,* (1) and in *Attorney-General for Ontario* v. *Attorney-General for Canada* (2). Where, however, the subject matter of any legislation is not within any of the enumerated heads either of s. 91 or s. 92, it has been said that the sole power rests with the Dominion under the preliminary words of s. 91 relative to "laws for the peace, order and good government of Canada" (*Attorney-General for Alberta* v. *Attorney-General for Canada,* (3)). If it be assumed for the purpose of argument that the power to prohibit importation of oleomargarine and margarine rests with the Dominion, this is not, I think, decisive of the matter since it is not that question alone which is to be considered here but whether it can be assumed that Parliament would have enacted the prohibition in section 5(*a*) had it been aware that the prohibition of manufacturing, offering, selling or having in possession for sale, was beyond its powers (*Reference re The Grain Futures Taxation Act,* (4): *Attorney-General for Manitoba* v. *Attorney-General for Canada,* (5)). I am unable to discover in the language of the section or in the context anything showing an intention to pass such a prohibition divorced from the other prohibitions of the section. To enact such a prohibition of importation in the *Dairy Industry Act* apart from the other prohibitions would, it appears to me, be pointless in view of the existing prohibition in the Customs Tariff Act. I think it may also be said that the prohibition of importation in

(1) [1896] A.C. 88 at 93.
(2) [1896] A.C. 348 at 363.
(3) [1943] A.C. 356 at 371.
(4) [1924] S.C.R. 317 at 323.
(5) [1925] A.C. 561 at 568.

the section is merely ancillary to the main prohibitions contained in it and as they are beyond the powers of Parliament the prohibition of importation must fall with the rest (*Attorney-General for British Columbia* v. *Attorney-General for Canada*, (1)).

My answer to the question, therefore, is:—

Section 5(*a*) of *The Dairy Industry Act*, R.S.C. 1927, cap. 45, is ultra vires the Parliament of Canada.

Solicitors for the Attorney General of Canada: *F. P. Varcoe, W. R. Jackett and A. J. MacLeod.*

Solicitor for the Attorney General of Quebec: *L. E. Beaulieu.*

Solicitors for the Canadian Association of Consumers: *Wegenast & Hyndman.*

Solicitor for the Canadian Federation of Agriculture: *R. H. Milliken.*

Solicitor for Hon. W. D. Euler and others: *S. A. Hayden.*

Solicitor for L'Association Canadienne des Électrices and others: *J. M. Nadeau.*

RAYMOND BOYER (PETITIONER).....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1948

*Dec. 8
*Dec. 17

MOTION FOR LEAVE TO APPEAL UNDER SECTION 1025 (1), (NEW) OF THE CRIMINAL CODE OF CANADA.

Criminal Law—Appeal—Jurisdiction—Statute giving new right of appeal not retrospective—11-12 Geo. VI c. 39, s. 42, enacting s. 1025 (1) Criminal Code.

By 11-12 Geo. VI, c. 39, s. 42, s. 1025 (1) of the *Criminal Code* was repealed and the following substituted therefor: "Either the Attorney General or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction or verdict of acquittal in respect

*PRESENT: Rinfret C.J. in Chambers.

(1) [1937] A.C. 377 at 389.

1948

BOYER v. THE KING

of an indictable offence, on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced, or within such extended time thereafter as the judge to whom the application is made may for special reasons allow; in an appeal by the Attorney General the judge may impose such terms, if any, as he may see fit."

Held: that the enactment creates a new right of appeal, where none existed before, on any question of law raised in the Court of Appeal.

Held: also, that legislation conferring a new jurisdiction on an appellate court to entertain an appeal cannot be construed retrospectively, so as to cover cases arising prior to such legislation, unless there is something making unmistakeable the legislative intention that it should be so construed. *(Singer* v. *The King),* [1932] S.C.R. 70, approved and followed.

Semble: that if the new legislation does not apply to a case which arose prior to its coming into force, the old legislation, by virtue of s. 19 of the *Interpretation Act,* continues to apply.

MOTION by appellant before the Chief Justice of Canada in Chambers, for leave to appeal to this Court under s. 1025 (1) *Criminal Code,* from the judgment rendered by the Court of King's Bench (Appeal Side) of the Province of Quebec on November 30, 1948 (1), confirming the jury's verdict rendered against him on December 6, 1947, by which he was found guilty of the crime of conspiracy.

The motion was made under s. 1025(1) of the Criminal Code (R.S.C. 1927, c. 36), as enacted by 11-12 Geo. VI c. 39, s. 42. By the said amending Act, (s. 42), the following was substituted for s. 1025:

1025 (1) Either the Attorney-General or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction or dismissing an appeal against a judgment or verdict of acquittal in respect of an indictable offence, on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced, or within such extended time thereafter as the judge to whom the application is made may for special reasons allow; in an appeal by the Attorney General the judge may impose such terms, if any, as he may see fit.

Lucien H. Gendron K.C. for the motion.

Philippe Brais K.C. contra.

THE CHIEF JUSTICE:—The petitioner prays that permission be granted him to appeal to the Supreme Court of Canada from the judgment rendered by the Court of

(1) Que. 1948 K.B. 829.

King's Bench (Appeal Side) of the Province of Quebec, confirming the verdict rendered against him, by which he was found guilty of the crime of conspiracy.

The petition is based exclusively on the new subsection one of section 1025 of the *Criminal Code of Canada,* which came into force on the 1st of November, 1948.

The petitioner does not allege, nor was it a fact, that, in the judgment of the Court of King's Bench (Appeal Side), affirming his conviction, there was any question of law on which there was dissent in the Court of King's Bench (Appeal Side) (*Criminal Code,* s. 1023). He does not allege, either, that the judgment of the Court of King's Bench (Appeal Side) conflicts with the judgment of any other Court of Appeal in a like case (former ss. 1 of s. 1025 of the *Criminal Code*). He relies entirely and exclusively, as above mentioned, upon the new ss. 1 of s. 1025, being Chap. 39, 11-12 George VI, s. 42, which has only acquired the force of law since the 1st day of November, 1948.

The preliminary question which it is essential to consider and to decide is, therefore, whether the petitioner, against whom the information was laid long before this new amendment became effective—the jury's verdict was rendered on the 6th of December, 1947 and judgment delivered accordingly by the presiding judge; notice of appeal was dated the same day and lodged in the Court of King's Bench (Appeal Side) on December 9, 1947—may invoke, in his favour, the new ss. 1 of s. 1025 in order to ask a judge of the Supreme Court of Canada to grant him leave to appeal to that Court on the questions of law debated and decided by the Court of King's Bench (Appeal Side).

The judgment of the Court of King's Bench (Appeal Side) was delivered on the 30th of November, 1948; and the contention of the petitioner is that, since the judgment from which he wishes to appeal was posterior to the coming into force of the new amendment, that is sufficient to enable him to take advantage of the law.

The point to be decided is, therefore, one concerning the jurisdiction of a judge of the Supreme Court of Canada to grant leave in the circumstances; and it is of great and general importance, because it stands, of course, for the first time to be decided and will likely govern the applica-

1948

BOYER
v.
THE KING

Rinfret C.J.

bility of that new section to all petitions for leave to appeal which may come from all parts of the Dominion in the future, or at least for as long as that section remains part of the *Criminal Code*.

The argument of the petitioner in support of his contention is that, as the judgment of the Court of King's Bench (Appeal Side) was delivered after the new subsection became effective, the date of that judgment is the material one to be considered for the purpose of deciding whether the section is applicable or not.

It is said that the right of appeal accruing to the petitioner, or to any convicted prisoner, was only eventual prior to the judgment of the Court of King's Bench (Appeal Side), and that the right of appeal which the petitioner now seeks to exercise only arose when that judgment was rendered. It is contended the fact that a man committed an indictable offence and was brought before the Courts did not vest a right in the Crown as against him, nor vest in the accused person an immediate right of appeal either to the Court of King's Bench (Appeal Side), or to the Supreme Court of Canada; that the date of the commission of the offence cannot be the date upon which the prisoner's rights should be decided, because, if that were so, as the former ss. 1 of s. 1025 has been repealed by the new legislation and if the new ss. 1 of s. 1025 does not apply to him, he would be deprived of any right of appeal.

Of course, I do not agree that, if the new subsection one of s. 1025 does not apply to the present petitioner in the circumstances of his case, he is deprived of the right of appeal as was provided by the former ss. 1 of s. 1025. It would seem to me in that case that s. 19 (*c*) of the *Interpretation Act* would come to his relief, and that, if the new legislation does not apply to a case which arose prior to its coming into force, by force of s. 19 of the *Interpretation Act* the old legislation continues to apply to the cases that are not governed by the new ss. 1 of s. 1025.

Alternatively, the petitioner contends that the right to apply for leave to appeal in virtue of the new subsection is not a new right, because the right to apply existed under

the repealed ss. 1 of the former s. 1025 in cases where there was a conflict of authority, and that the new subsection merely changes the procedure.

Further, when confronted with a number of decisions rendered in civil cases, he sought to distinguish between those cases and informations brought under the *criminal code* and asked that the rule in the civil cases should not be applied.

There are, of course, a series of decisions in this Court, dating back to almost the beginning of the time when the judicial functions of the Court took effect and could be exercised, whereby this Court is without jurisdiction when the judgment intended to be appealed from was signed, or entered, or pronounced previous to the date when, by proclamation issued by order of the Governor in Council, the right of appeal to this Court was brought into being. *Taylor* v. *The Queen* (1), contains a long exposition of the law as then interpreted by the full Court (Richards, C.J.C., Ritchie, Strong, Taschereau and Fournier, JJ.). All the members of the Court gave reasons on the point now before me and they were unanimous in reaching the conclusion that the provision of the law coming into force subsequent to the date when the judgment sought to be appealed from had been signed, pronounced, or entered, cannot be given a retrospective effect and operate in order to give jurisdiction to the Supreme Court of Canada to hear an appeal from the judgment so signed, pronounced, or entered prior to the date when the new law became effective.

In 1891, in the case of *Hurtubise* v. *Desmarteau* (2), again the Court was unanimous in denying the right of appeal in a case where the judgment sought to be appealed from was delivered on the same day on which the amending Act came into force. It was decided that the Court had no jurisdiction, the appellant not having shown that the judgment was delivered subsequent to the passing of the amending Act.

In 1893 in *Williams* v. *Irvine* (3), the decision of the Court was that a new right of appeal did not extend to cases standing for judgment in the Superior Court prior to the passing of the Act. Fournier J. expressed the view that

(1) (1877) 1 S.C.R. 65.
(2) (1891) 19 S.C.R. 562.
(3) 22 S.C.R. 108.

1948

BOYER v. THE KING

Rinfret C.J.

the statute was not applicable to cases already instituted, or pending, before the Courts, where no special words to that effect had been used in the statute. Taschereau J. merely stated that he would have been of the opinion that the Court had jurisdiction, but he said that he would not take part in the judgment. Sedgewick J. stated that in his opinion the appeal should be dismissed upon the authority of the case of *Couture* v. *Bouchard* (1), decided by this Court in December, 1892.

In *Hyde* v. *Lindsay* (2), the Court decided that the Act 60 and 61 Victoria, chap. 34, which restricted the right of appeal to the Supreme Court in cases from Ontario as therein specified, did not apply to a case in which the action was pending when the Act came into force, although the judgment directly appealed from may not have been pronounced until afterwards. The judgment of the Court was delivered by Taschereau J. who referred to *Hurtubise* v. *Desmarteau, Couture* v. *Bouchard* and *Williams* v. *Irvine supra*; and to *Cowen* v. *Evans* (3), *Mills* v. *Limoges* (4) and *The Montreal Street Railway* v. *Carrière* (5), where a footnote at that page states that an appeal in an action for $5,000 damages was dismissed by the Superior Court prior to the passing of 54 and 55 Victoria, chap. 25, but maintained by the Court of Queen's Bench on the 26th of April, 1893, for $600, was also quashed for want of jurisdiction, following the case of *Cowen* v. *Evans* (*supra*).

In *Hyde* v. *Lindsay supra,* Taschereau J. at p. 103, said:—

> Here we have the question presented under a statute taking away the right of appeal in cases where it existed previously. ***If the statute in former cases does not apply to pending cases, I do not see upon what principle we could hold that the statute in the present case does apply to pending cases.

In 1914 in *Doran* v. *Jewell* (6) it was held that an Act of Parliament enlarging the right of appeal to the Supreme Court of Canada did not apply to a case in which the action was instituted before the Act came into force. In that case the motion was referred to the Court by the registrar for an order to have the jurisdiction of the Court to hear the appeal affirmed and it was unanimously dismissed on the ground that the motion was concluded

(1) (1892) 21 S.C.R. 281.
(2) (1898) 29 S.C.R. 99.
(3) (1893) 22 S.C.R. 331.
(4) (1893) 22 S.C.R. 334.
(5) (1893) 22 S.C.R. 335.
(6) (1914) 49 S.C.R. 88.

adversely to the appellant by the authority of the several judgments previously delivered in this Court on the same point and also as a result of the judgment of the Judicial Committee of the Privy Council in the case of *Colonial Sugar Refining Co.* v. *Irvine* (1). This judgment of the Privy Council may be immediately referred to. The Judicial Committee was composed of Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley, Sir Ford North and Sir Arthur Wilson. The judgment of their Lordships was delivered by Lord Macnaghten and it was held that, although the right of appeal from the Supreme Court of Queensland to His Majesty in Council, given by the Order in Council of June 30, 1860, had been taken away by the Australian Commonwealth Judiciary Act, 1903, s. 39, sub-s. 2, and the only appeal therefrom now laid to the High Court of Australia, yet the Act was not retrospective, and the right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards was not taken away. At p. 372 Lord Macnaghten said:—

> As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is: Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

In 1920, in *Upper Canada College* v. *Smith* (2), the Court had before it the statute 6 George V, c. 24, s. 19, amended by 8 George V, c. 20, s. 58, by which s. 13 of the Ontario Statute of Frauds, R.S.O. 1914, c. 102 was enacted as follows:—

> No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless

(1) [1905] A.C. 369.

(2) (1920) 61 S.C.R. 413.

1948

BOYER
v.
THE KING

Rinfret C.J.

the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

It was held that this enactment was not retrospective and did not bar an action to recover commission under a contract made before it came into force. The majority of the Court agreed with Anglin J., as he then was, who, in his reasons, referred to a great number of authorities. Duff J., as he then was, at p. 417 recalled the well-known passage of Lord Coke (2 Inst. 292) in which it is laid down that it is a "rule and law of Parliament that regularly *nova constitutio futuris formam imponere debet non praeteritis*". And Mr. Justice Duff continued:—

and the rule that statutory enactments generally are to be regarded as intended only to regulate the future conduct of persons is, as Parke B. said in *Moon* v. *Durden*, in 1848 (1), "deeply founded in good sense and strict justice", because speaking generally it would not only be widely inconvenient but "a flagrant violation of natural justice" to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.

At p. 419 of the same judgment Mr. Justice Duff said:—

And even more numerous instances might be adduced of dicta enunciating the doctrine that the intention must appear from the words of the statute itself. "The principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively."

Mr. Justice Duff referred to the *Midland Rly. Co.* v. *Pye*, in 1861 (2), where there is a passage in the judgment of Erle C.J. approved by the Privy Council in *Young* v. *Adams* (3), at p. 476, in these words:—

Those whose duty it is to administer the laws very properly guard against giving to an Act of Parliament a retrospective operation unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

Speaking on the point that the change in the *Upper Canada College* case was only one of procedure, Mr. Justice Duff, at p. 423, said:—

The last mentioned rule (about procedure) rests upon the simple and intelligible reason stated by Mellish L.J. in *Republic of Costa Rica* v. *Erlanger* in 1876 (4) at p. 69, in these words:—

(1) 2 Ex. 22, at pages 42 and 43.
(2) 10 C.B.N.S. 179 at 191.
(3) [1898] A.C. 469.
(4) 3 Ch. D. 62.

"No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed provided, of course, that no injustice is done."

Mr. Justice Duff then referred to the passage in the judgment of Lord Macnaghten in *Colonial Sugar Refining Co.* v. *Irving supra* above quoted.

At p. 429 of the same judgment Mr. Justice Duff refers to *Moon* v. *Durden* and states that in that case *Helmore* v. *Shuter* (1), was accepted expressly by three of the judges, Platt, Rolfe and Parke BB., as being unquestionably a sound decision; and Rolfe and Parke BB. explicitly treated it as an example of the application of the rule that prima facie statutes are to be construed as prospective, which indeed is the ratio upon which the decision was in terms put by the Court that pronounced it.

In *Singer* v. *The King* (2), the Court held that: "Legislation conferring a new jurisdiction on an appellate court to entertain an appeal cannot be construed retrospectively, so as to cover cases arising prior to such legislation, unless there is something making unmistakeable the legislative intention that it should be so construed. The matter is one of substance and of right." *Doran* v. *Jewell* (3) *and Upper Canada College* v. *Smith* (4) were relied upon. In the *Singer* case it was held that 21-22 George V, c. 28, s. 15 (amending s. 1025 of the Criminal Code) did not give a right to appeal to the Supreme Court of Canada from the sustaining of the appellant's conviction by a judgment of the Appellate Division of Ontario rendered prior to such legislation.

Singer had been convicted on the 23rd of March, 1931, and his conviction was sustained by the Appellate Division on the 26th of June, 1931. The statute, in virtue of which Singer sought to appeal to this Court, became law on the 1st of September, 1931. Anglin C.J.C., delivering the judgment of the Court, at p. 72 stated:—

It is common ground that, unless there is something making unmistakeable the intention of the Legislature that a retrospective construction should be put upon the legislation so that it may cover cases arising prior thereto, no clause, conferring a new jurisdiction on an appellate court to entertain an appeal, can be so construed. The matter is one of substance and of right.

(1) 2 Sh. 17.
(2) [1932] S.C.R. 70.
(3) (1914) 49 S.C.R. 88.
(4) (1920) 61 S.C.R. 413.

1948

BOYER v. THE KING

Rinfret C.J.

The decision in *Doran* v. *Jewell* (1) is binding upon us and is conclusive to that effect. If further authority be required on this point, it may be found in *Upper Canada College* v. *Smith* (2).

I wish to underline the following words in this decision of the Court:—

> Unless there is something making unmistakeable the intention of the Legislature that a retrospective construction should be put upon the legislation so that it may cover cases arising prior thereto, no clause, conferring a new jurisdiction on an appellate court to entertain an appeal, can be so construed. The matter is one of substance and of right.

This decision assumes an added importance from the fact that the amendment there considered was one enacted to modify the same section 1025 as is invoked in the present case, and the Court there said that legislation conferring a new jurisdiction on an appellate court to entertain an appeal cannot be construed retrospectively so as to cover "cases arising prior to such legislation"—words which might refer either to the institution of the case, or at least to the actual beginning of the trial in the original Court, but surely not to the mere incident of the judgment of the Court of Appeal.

Further, the decision in *Doran* v. *Jewell* (a civil case) is there stated to be "binding upon us and is conclusive to that effect"; and the decision in *Upper Canada College* v. *Smith* (another civil case) is also stated as being "a further authority on this point".

The question is not whether the case is civil or criminal. No distinction is made in that respect in the jurisprudence. The question is solely: What is the character of the legislation? If, in terms or by necessary intendment, it is retrospective, then, of course, it produces retroactive effects; but otherwise, it is prospective only and becomes applicable only for the future.

It would appear from the judgment in the *Singer* case that not only is legislation conferring a new jurisdiction upon an Appellate Court to entertain an appeal—which is the very case that we have in the present petition—not to be construed retrospectively so as to cover cases arising prior to such legislation, but also, although the *Singer* case was a criminal case, it was put exactly on the same footing

(1) (1914) 49 S.C.R. 88. (2) (1920) 61 S.C.R. 413.

in that respect as *Doran* v. *Jewell* and *Upper Canada College* v. *Smith,* both civil cases which were declared binding upon this Court and conclusive to that effect.

I cannot see any distinction that can be made between the *Singer* case and the present one. It covers exactly the situation that we have as a result of the petition which I now have before me; and I would say that it is *a fortiori* binding upon this Court and conclusive, because, although the two cases cited by Anglin C.J.C. were civil cases, the *Singer* case was not only a criminal case but it came before this Court precisely on the application of a new amendment to section 1025 of the Criminal Code, which was practically to the same effect as the new subsection one of section 1025 which is now invoked by the petitioner.

Further reference might be made to the judgment of the Appellate Division of the Supreme Court of Alberta in *Rex* v. *Rivet* (1), where it is stated:—

> Legislation creating or abolishing a right of appeal does not relate merely to procedure and will not be given a retrospective effect in the absence of an apparent intention to the contrary. Therefore, sub-para. (*k*) of para. (7) of s. 2 of the Criminal Code (am. 1943, c. 23, s. 1), designating a Court of Appeal in criminal matters for the Northwest Territories, is ineffective to confer jurisdiction upon the Alberta Court of Appeal in respect of appeals from convictions, made prior to the enactment of such legislation.

I might add that I do not agree with the contention of Counsel for the petitioner that the new subsection one of section 1025 does not create a new right of appeal. Up to the coming into force of that new subsection, there existed only two rights of appeal in favour of the person convicted, whose conviction had been affirmed by the Court of Appeal. One was under section 1023: "On any question of law on which there has been dissent in the Court of Appeal"; the other was under the former subsection one of section 1025: "If the judgment appealed from conflicts with the judgment of any other court of appeal in a like case".

Under the new subsection one of section 1025 "any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court

(1) 81 C.C.C. 377.

1948

BOYER
v.
THE KING

Rinfret C.J.

of appeal setting aside or affirming a conviction or dismissing an appeal against a judgment or verdict of acquittal in respect of an indictable offence, on any question of law". The only requirement is that leave to appeal must be granted by a judge of the Supreme Court of Canada.

It is quite clear and evident that a new right of appeal is created where none existed before; that is, while section 1023 was left as it was, the new subsection one of section 1025, now substituted for the former one, has done away with the need of showing a conflict between two courts of appeal and a new right of appeal is created "on any question of law". It does not even require that there should be a dissent in the Court of Appeal, nor that any of the judges who took part in the judgment in that Court should have entertained the question of law upon which the convicted person may ask for leave to appeal. It is now sufficient that the person convicted may have raised a question of law in the Court of Appeal and, although every one of the judges in that Court refused to accept that proposition of law as being sound, the mere fact that the said question of law was raised by the convicted person in the Court appealed from is sufficient to give him a ground upon which he may ask a judge of the Supreme Court of Canada to grant leave to appeal on that question to this Court.

For these reasons I am of opinion that the petitioner herein cannot invoke the new subsection one of section 1025 in his case; that, as a consequence, since he does not allege either dissent or conflict and as, in fact, no dissent exists and no conflict has been shown, I am without jurisdiction to grant leave to appeal in the present instance.

Having come to that conclusion, I have nothing to say about the other questions raised by the petitioner.

The petition is dismissed.

Leave to appeal dismissed.

1948

OLE HANSON (PLAINTIFF) .....APPELLANT; *April 29, 30 May 3

AND *Oct 5

BERTHA CAMERON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Logging agreement provided time of essence—Default waived —Whether Court may declare contract subsisting and decree specific performance—Whether interest in land vests in holder of special timber license under Forest Act, 1912, B.C., c. 17 and/or his assignee.

The respondent, the holder of a special timber license issued under the provisions of the *Forest Act,* 1912, Statutes of B.C., c. 17, by an agreement under seal dated May 15, 1941, agreed to sell to the appellant all the merchantable timber upon the lands covered by such license. The appellant agreed to "log and/or pay for" not less than 4,000,000 feet board measure each year during the term of the agreement and to log the lands clean of all merchantable timber not later than May 15, 1945. The stipulated stumpage was to be paid on all timber cut and removed from the lands based on government scale in the boom as and when the logs were sold. It was agreed that if default were made by the purchaser, the vendor might by notice in writing demand such default be remedied, and should default continue for 30 days, terminate the agreement. Time was declared to be of the essence. The appellant did not log or pay for the stipulated quantity of timber in any of the first three years but respondent accepted payment for the quantity cut without protest. On April 13, 1945, however, the respondent gave notice of default and of her intention on continued default for 30 days to cancel the agreement. The appellant then tendered a sum sufficient to pay stumpage upon the merchantable timber remaining upon the limits based on a cruise made prior to the date of the agreement. This was refused and the appellant then paid the money into court and sued for specific performance.

Held: by the majority of the court, Locke J. expressing no opinion, that the parties by their conduct having waived the provision making time of the essence, the agreement should be declared subsisting and specific performance decreed, and the matter referred to the trial court to fix a reasonable time for performance.

(The principle laid down in *Kilmer* v. *B. C. Orchards,* [1913] A.C. 319 as explained in *Steedman* v. *Drinkle,* [1916] 1 A.C. 275 at 280 applied.)

Held: That the effect of the agreement was to create an interest in land. (*McPherson* v. *Temiskaming Lumber Co.* [1913] A.C. 145, followed.)

Per, Locke J., that the respondent acquired an interest in the land under the license and the appellant under the agreement, and neither such interest nor the agreement itself would *ipso facto* terminate if there were default either in cutting the timber, or alternatively, in making the payments within the time stipulated.

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

1948

HANSON v. CAMERON

Per, Locke J., that the parties should be held to have contemplated that if the purchaser elected to pay for any part of the timber not logged prior to May 15, 1945, the quantities would be ascertained by cruising and the judgment at the trial, directing a reference to the registrar to ascertain the amount standing or not removed following which the balance owing if any would be payable, should be restored.

APPEAL from the judgment of the Court of Appeal for British Columbia, (1), reversing (Sydney Smith J.A., dissenting), the judgment of Coady J. at the trial.

Alfred Bull K.C. for the appellant.

J. W. deB. Farris K.C. for the respondent.

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

KELLOCK J.:—Under the provisions of paragraph 6 of the agreement between the parties the appellant covenanted to commence putting logs in the water not later than August 15, 1941, and thereafter to "log and/or pay for" not less than 4,000,000 feet "each and every year during the term" of the agreement, subject to acts of God, strikes, breakdowns, fire or other causes beyond his control, and to log continuously the said lands and premises clean of all accessible and merchantable timber "not later than the 15th day of May, 1945". By the provisions of paragraph 28 time was expressly declared to be of the essence of the agreement and it was further provided that if the respondent should at any time "grant" any extension of time for the payment of any stumpage or other monies, such extension should not operate as a waiver on the part of the respondent of the provision as to time. The effect of the agreement as a whole was to create in the appellant an interest in land; *McPherson* v. *Temiskaming,* (2).

Until the early part of 1945 the parties paid no attention to the times fixed by the provisions of paragraph 6. The appellant logged considerably less than 4,000,000 feet per year, payment being made only for what had been logged and these payments were accepted by the respondent as and when made without any complaint. There was no request on the part of the appellant at any time for any extension of time and no "grant" of any extension by the respondent. The parties simply paid no attention to time

(1) [1948] 1 W.W.R. 733; [1948] 2 D.L.R. 512.

(2) [1913] A.C. 145.

so far as obligation to perform the contract was concerned. On April 13, 1945, however, the respondent served a notice purporting to be under the provisions of paragraph 26 of the agreement. Two grounds of default were alleged, as to one of which the learned trial judge has found there was no foundation in fact. The other ground specified was that the appellant had not "as agreed logged 4,000,000 feet during each year of the agreement". Under the agreement the appellant was not obliged to log 4,000,000 feet but to log and pay for that quantity or to pay for the quantity without having done the actual logging. I therefore agree with Robertson J.A., in the court below (1) in thinking that the notice was ineffective on the ground of its failure to specify a default within the terms of the agreement. I do not accept the argument advanced by Mr. Farris that the words "as agreed" are to be taken as meaning that the appellant had not paid for 4,000,000 feet and that the notice therefore meant that the appellant had not logged or paid for that quantity.

It is contended on behalf of the appellant that by reason of the non-observance by both parties of the provisions as to time provided by paragraph 6, time ceased to be of the essence. In *Kilmer* v. *British Columbia Orchards* (2), the respondent company had sold land for a price to be paid in instalments at specified dates with a forfeiture clause in default of punctual payment, time being declared to be of the essence. The first instalment was duly paid on the execution of the agreement but the second instalment and interest were not paid on the day fixed, and a new day for payment was set. Default being made the company refused to complete and brought action for a declaration that the agreement was at an end. The purchaser counter-claimed for specific performance. It was held that the action failed and specific performance was granted. As explained in *Steedman* v. *Drinkle* (3), the Privy Council reached its decision on the ground that when the vendor had submitted to postponement of the date of payment it could not "any longer" insist that time was of the essence and the provision for forfeiture was considered as a penalty against which equity would relieve. It is true that in *Kilmer's case* there was in question default with respect to one instalment only

(1) [1948] 2 D.L.R. 512.
(2) [1913] A.C. 319.
(3) [1916] 1 A.C. 275.

1948

HANSON v. CAMERON

Kellock J.

and the question as to the effect of the postponement of one payment on the right of the vendor to insist on the provision as to time with respect to later instalments was not raised.

In *Steedman's case* Viscount Haldane in the course of his discussion of *Kilmer's case* said at page 280:

> As time was declared to be of the essence of the agreement, this could only have been decreed if their Lordships were of opinion that the stipulation as to time had *ceased to be applicable.*

Lower down on the same page he said what has already been quoted, in part, that:

> * * * when the company had submitted to postpone the date of payment they could not *any longer* insist that time was of the essence.

In *Barclay* v. *Messenger* (1), Sir George Jessel referred at page 354 to the conflicting views of Lord Cranworth, the Vice-Chancellor, and Lord Romilly, the Master of the Rolls, in *Parkin* v. *Thorold.* The judgment of the former is reported in 2 *Sim.*, 1, and of the latter in 16 *Beavin,* 59. Sir George Jessel said:

> There was no actual decision as to the effect of the so-called waiver upon the original contract, but the Vice-Chancellor had expressed an opinion that the mere giving of time, where time was of the essence of the contract, would have no effect except by extending the time; and the Master of the Rolls thought that having once extended the time, you had destroyed the essentiality of the condition altogether.

He went on to quote the comment of Lord St. Leonards upon the view of Lord Romilly as follows:

> * * * but the opinion of the Vice-Chancellor on the voluntary extension of the time seems to be right, for it can hardly be contended that if time be of the essence of the contract, an extension of it by one party for the convenience of the other can be considered operative beyond the further day named.

Sir George Jessel continues:

> It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time.

This view, however, has not been accepted by the Privy Council in *Steedman's case* which, on the contrary, is in conformity with the view of Lord Romilly to the extent that an extension of time with respect to a particular instalment destroys the essentiality of time with respect to that instalment at least.

(1) (1874) 30 L.T.N.S., 351.

In *Southby* v. *Hutt* (1), Lord Cottenham, L.C., said at page 621:

> The abstract of title was not delivered within the twenty-one days so that *no question* arises as to the time specified in these conditions of sale.

The authors of the 8th Edition of Dart at page 436 express the view that:

> * * * it is conceived that a waiver of time as respects matters (such as the delivery of the abstract, etc.,) which must precede completion, would, in general, amount to a waiver of the time (if any) fixed for completion. So, a vendor who receives and entertains the purchaser's requisitions, delivered after the time specified, waives his right (unless expressly reserved) to insist on the conditions as to time; and, as a general rule, either party relying on time being essential as a defence to an action for specific performance, should take the point promptly.

In *Boyd* v. *Richards* (2), Middleton J.A., acted on a similar view and granted specific performance. In *Korman* v. *Abramson* (3), Rose J., as he then was, reached a contrary conclusion but without any analysis of the authorities. I find myself unable to accept the view of Rose J. In my opinion on the present state of the authorities the expressions from the judgment in *Steedman's case* which I have cited should be taken in a general sense, unless and until the Privy Council should rule otherwise.

I therefore think that the conduct of the parties in the present case was such as to make the provision for complete logging by May 15, 1945, no longer of the essence of the contract. I would allow the appeal and refer the matter to the trial court to fix a reasonable time for the performance of the contract in view of all the circumstances, including the bringing of action and the injunction granted therein which affected due performance of the contract by the appellant. The appellant should have his costs throughout.

RAND J.:—By a contract under seal entered into on May 15, 1941 the appellant, as purchaser and the respondent, the owner of a timber license covering certain lands on Cracroft Island, British Columbia, as vendor, agreed to buy and sell "all the accessible merchantable timber" on the lands, subject to the conditions of the license and the terms of the contract. The purchaser was given "full right, liberty and authority" to enter upon the lands and "to fell, buck

(1) (1837) 40 E.R. 619.
(2) (1913) 29 O.L.R. 119.
(3) (1921) 49 O.L.R. 9.

1948

HANSON v. CAMERON

Rand J.

and carry away *all timber* thereon"; "and was to pay stumpage upon timber *cut and removed* from the lands as the purchase price thereof" at the rate of $2.00 a thousand feet board measure for cedar and 90c for all other varieties, based on the official scaling, as and when the logs should be sold. A down payment of $500 was to be made and an additional $1.00 for each thousand on the first 1,500,000 feet, to serve as a deposit of $2,000 to be applied against the last 2,000,000 feet removed. Logs were to remain the property of the vendor until paid for, but the purchaser was free to sell in the ordinary course of business.

The purchaser covenanted that he would commence putting logs in the water not later than August 15, 1941 and would "thereafter *log and/or pay* for not less than 4,000,000 feet board measure, British Columbia log scale, *each and every year* during the term of this agreement, subject to the acts of God, strikes, breakdowns, fire, or other causes beyond the control of the purchaser", and would "log continuously the said lands and premises clean of all accessible and merchantable timber" not later than the 15th day of May, 1945. A proviso entitled him to shut down logging operations for such time as the price of camp run cedar logs should be below the price of $11 a thousand feet, but they should be reopened and continued so soon as the market price should reach $11. Any excess in the footage produced in any year could be applied to a shortage in subsequent years.

The purchaser was to provide for the scaling in the booms at Cracroft Island if practicable; otherwise at the point of delivery of the booms. The scale bills were to be delivered to the agent of the purchaser in Vancouver who was to sell the logs and pay the stumpage price to the vendor, to whom copies of the bills were to be furnished.

The vendor was to be kept informed of the course of operations, to have the right at all reasonable times to examine the logging records and camp scale, and "to enter upon the said lands for the purpose of inspecting and surveying the said timber".

The purchaser was to take precautions against fire. Any timber destroyed by this cause through his negligence was to be paid for as soon as the quantity had been determined by an official survey. Any timber damaged by fire was

either to be logged or paid for as and when the quantity should be similarly ascertained. In case of loss during transportation or before scaling, the amount was to be determined by a comparison with the next two previous booms scaled in the booming ground.

Then two clauses, 25 and 26, dealt with power to terminate. Under the first, on default in the payment of any moneys "strictly on the days and times and in the manner specified", or in respect of any of the "covenants, stipulations or agreements", and failure to remedy the breach within thirty days after notice in writing, the purchaser was forthwith to "cease to have the right to cut or remove any further timber from the said lands and logging operations shall immediately cease and the purchaser shall not be entitled to sell, remove, pledge or otherwise dispose of any timber or logs cut from the said lands or any part thereof." A receiver might be appointed by the vendor who would be "entitled to *take possession of the said lands and premises*".

Clause 26 declared that if default in any of the "covenants, provisos, terms or stipulations" should continue for thirty days after written notice, specifying the default and the vendor's "intention to cancel this agreement", the agreement should be void and of no effect and the vendor should be at liberty to sell "the said lands and premises and logs" for her own use and benefit. In such event, the purchaser was to *deliver up possession of the lands* but would have no claim against the vendor who was to be deemed to be the owner and entitled to the possession of all the logs or products which at the time of the default had not been sold.

Finally, time was expressly declared to be of the essence in respect of "all payments to be made and all conditions, provisos and stipulations to be observed and performed".

The purchaser at once entered upon the operation. The land was a rough area suitable only for timber, but apparently not unusually difficult for logging purposes in that section of the Province. A main logging road with half a dozen bridges was built at a cost of approximately $15,000 and houses and works put on the lands brought the total initial outlay near $25,000. The quantity logged and sold in the first contract year was 328,000 feet; for the second

1948

HANSON v. CAMERON

Rand J.

year, 2,249,760 feet; for the third, 1,798,757 feet; and to May 15, 1945, 1,400,239 feet, making a total for the four years of 5,776,979 feet. On the last date there were between 1,500,000 and 2,000,000 feet of logs cut and lying on the lands. Thereafter and until June, 1947, the quantity scaled amounted to 3,354,594 feet. Operations were continued until the judgment of the Court of Appeal in March, 1948, but the quantity logged or scaled does not appear.

The evidence indicated that from the commencement the purchaser had trouble in getting and keeping workmen. A normal logging crew would be about sixteen men, but only for two short periods was that number reached. There was difficulty also in obtaining repairs to equipment. But it is clear that the purchaser was a competent logger and had carried out the work efficiently.

Although for the first three years the minimum of 4,000,000 feet had been neither logged nor paid for, no complaint was made by the vendor. The stumpage during those years and up to January, 1945 was paid in the regular way upon the sale of the timber and was accepted without demur.

Early in April, 1945, the husband of the vendor, acting for his wife, a few days after intimating to the purchaser's agent for the first time his dissatisfaction with the operations, met the purchaser and the agent and informed them of the vendor's intention to cancel. The purchaser at once by letter declared his willingness to pay in cash the entire stumpage on the basis of a cruise of the lands made in 1933 which the trial judge found had been the general basis in the negotiations and according to which there was then on the land approximately 16,350,000 feet of lumber, and to pay any additional stumpage the completed operations might show to be owing. This offer was rejected and on April 13, the following notice was given:—

Pursuant to the terms of an agreement dated the 15th day of May, 1941, between BERTHA CAMERON as Vendor and yourself as Purchaser you have made default in the covenants, provisos, terms, conditions or stipulations of the said agreement in the following respects, namely:

1. You have not as agreed logged 4,000,000 feet board measure, British Columbia log scale in each and every year during the term of the said agreement including the year 1944.

2. You have not logged continuously nor clean the said lands and premises of all accessible and merchantable timber, as you went along. If such default shall continue for a period of thirty days after notice

shall have been given to you it is my intention to cancel the said agreement and in accordance with the terms of the said agreement the same shall be void and of no effect.

During those thirty days, letters passed between solicitors and on the 13th of May there was tendered to the vendor the sum of $15,276.05, representing the calculation of stumpage then remaining unpaid according to the 1933 cruise, amounting to $15,705.50, plus 10 per cent, less the $2,000 then being held by the vendor. The tender was refused and a writ issued on the following day claiming specific performance and other relief, and bringing into Court the sum of $13,705.50, representing the outstanding stumpage, $15,705.50 less the same $2,000. This was accompanied by a declaration of willingness by the purchaser to bear the cost of a cruise to ascertain the exact balance of stumpage.

The trial judge, finding that there had been no default as claimed in the second paragraph of the notice, held the first, construed by him to be limited to default up to May 15, 1944, had been cured by the tender and offer; he therefore decreed as claimed and referred it to the District Registrar to ascertain the amount, if any, to which the defendant might be entitled by way of further payment for the accessible merchantable timber.

On appeal this judgment was reversed (1), the action ordered to be dismissed, and judgment on the counterclaim entered for damages for trespass and for logs cut or removed from the lands after May 15, 1945. Sloan C.J., assuming erroneously that the question of the validity of the notice had not been raised in the Court below, held the default could not be cured by a tender of money, and that the trial judge in effect rewrote the contract by substituting for the ascertainment of the price by scaling, an estimation by cruising. Robertson J.A., while finding the notice defective in treating the obligation of the purchaser to be that of logging merely without the alternative mode of payment, and because of the reference to the year 1944-45, not yet elapsed, was of the opinion that no property interest arose until the timber had been cut and removed, and that the real sale was of such logs only as the purchaser might cut and remove before May 15, 1945. Smith J.A. dissented and would have affirmed the trial judgment. He held the

(1) [1948] 2 D.L.R. 512.

1948

HANSON v. CAMERON

Rand J.

provision regarding time to have been waived and the parties to have been remitted to the ordinary rules of equity relating to that factor.

The license had originally issued in 1913 and came under the provisions of the *Forest Act of 1912,* which made it transferable and renewable from year to year while there should be on the land merchantable timber in sufficient quantity to make it commercially valuable. By section 18, there was vested in the holder "all rights of property whatsoever in all trees, timber and lumber cut within the limits of the license during the term thereof, whether the trees, timber and lumber are cut by the authority of the licensee or by any other person with or without his consent." He could seize any such trees or timber in the hands of an unauthorized person and also "institute any action against any wrongful possessor or trespasser and to prosecute all trespassers and all offenders to punishment, and to recover damages (if any)." These powers, together with the right of perpetual renewal, undoubtedly create an interest in the land: *McPherson* v. *Temiskaming Lumber Company* (1); and it was the beneficial interest in them, including, as between the parties, the right of possession, which when realized would exhaust the license, that was conferred on the purchaser: the retention of the legal title to the license and the logs was only for security purposes. The purchaser therefore likewise acquired an interest in land.

I agree with Robertson J.A. that the notice given was defective. The first item alleging failure to log does not specify a default under the contract; and the reference to the year 1944, by its ambiguity, strikes it likewise with a fatal infirmity; and the second item was found against the respondent.

I think, also, with Smith J.A., that the provision as to time was waived. It was purely formal. The indulgence to be given to the purchaser through delay in strikes and other causes beyond his control as well as the specific right to cease operations pending the adjustment of the price of cedar show beyond doubt that time was not in fact of the essence; and the acceptance in each of three years of less than one-third of the stumpage the contract called for and the affirmation of the contract up to January, 1945,

(1) [1913] A.C. 145.

relieve the Court from the coercive effect of the formal stipulation: *Steedman* v. *Drinkle* (1). Even, then, had the notice of cancellation been effective, the Court would be free to apply its ordinary rules as to time and relief from forfeiture in specific performance.

In the covenant to "log and/or pay for" not less than the minimum in each year, the word "pay" must be taken as a supplementary mode of performance in payment, though incapable by itself of being definitive, which the purchaser had the right to employ. And on its further requirement to log the land "clean" not later than May 15, 1945, two observations are to be made: taking the word "log" to extend to removal from the lands, the obligation does not include payment: and since the purchaser may pay in each year, he may do so in the last year, which implies that the logging may not be completed although in fact fully paid for.

The right to enter and remove was subject, as to the vendor, "to the payment of the stumpage and other moneys as hereinafter set forth", but to no other provision. Apart altogether from any right of removal attached by law, this is a power coupled with an interest or a license annexed to a title and in the absence of qualification is irrevocable. Nowhere in the contract is that right of removal rendered controllable or conditioned except under the forfeiture clauses by notice, in the absence of which the right continues in full efficacy; but as security against delay in realizing the value of all the timber, which was the primary object of the vendor, were the obligation to log and the power to terminate.

The amount offered by the purchaser on the threat of cancellation, greater than any sum then due, the vendor was bound to accept under the minimum clause and the promise for the balance was what the contract itself provided. Acceptance of it would have left only a small quantity of logs unpaid for. It is pertinent to the time for paying this balance, that the counterclaim, which the Court of Appeal has allowed, was not delivered until approximately eighteen months after the commencement of the action, during which time the purchaser continued operations. Although there was the tender and later money

(1) [1916] 1 A.C. 275.

1948

HANSON
v.
CAMERON

Rand J.

brought into Court, from the first interview in April to the present appeal he has asserted his readiness and willingness in this somewhat involved situation to do whatever was incumbent upon him as a condition of the equitable relief sought. I agree that the Court cannot substitute a cruise of standing timber for the scaling of logs in boom to ascertain the total price; and the purchaser must perform substantially the entire obligation assumed by him: from this it follows that he must fulfil the covenant to log the lands clean within such time as under all the circumstances would be just and equitable.

I would, therefore, allow the appeal and direct the following judgment:—

1. Declare the contract to be subsisting.

2. Declare the money in Court, subject to the payment of costs, to be payable out to the respondent to apply on the purchase price as from the date of payment in.

3. Restrain the respondent from interfering with the logging operations or from taking any further action on the contract otherwise than as allowed herein before such date to be fixed by the trial Court for the completion of the logging and it is referred back to that Court for such purpose.

4. The foregoing to be without prejudice to any claim for damages on the covenant to log or pay the minimum in each year and to complete in four years, to be made on a reference or by action.

5. Liberty to apply.

The appellant should have his costs throughout.

ESTEY J.:—The appellant asks specific performance of an agreement under which he purchased from the respondent all the accessible merchantable timber situated upon Timber License No. 11943 being Lot 532, Range 1, Coast District, B.C.

The agreement, dated May 15, 1941, was subject to the conditions contained in the license from the Crown and to the appellant paying all rents, royalties, taxes and fire protection fund charges. It provided that appellant would pay as the purchase price thereof stumpage as follows:

For all cedar logs, at the rate of two dollars ($2.00) per thousand feet board measure,

For all other species of timber, at the rate of ninety cents ($.90) per thousand feet board measure.

The learned trial judge found that the agreement was made upon the basis of the Eustace Smith cruise of the premises, made in November 1933, which disclosed a total of 18,511,000 board feet of accessible merchantable timber. Since then and prior to this agreement, 2,124,275 board feet had been logged by a third party, leaving 16,386,725 board feet upon the premises.

Paragraph six of the said agreement reads:

> 6. The Purchaser covenants and agrees with the Vendor that he will commence putting logs in the water not later than the fifteenth day of August, 1941, and will thereafter log and/or pay for not less than Four Million feet board measure British Columbia log scale, each and every year during the term of this agreement, subject to the acts of God, strikes, break-downs, fire, or other causes beyond the control of the Purchaser, and will log continuously the said lands and premises clean of all accessible and merchantable timber as hereinbefore defined not later than the fifteenth day of May, 1945. PROVIDED ALWAYS that the Purchaser shall be entitled to shut down his logging operations for such time as the price of camp run Cedar logs shall be below the price of Eleven Dollars ($11.00) per thousand feet board measure British Columbia log scale on the Vancouver market, according to the British Columbia Loggers' Association price, but shall re-open and continue logging so soon as the market price thereof shall reach the sum of Eleven Dollars ($11.00).

Notwithstanding the foregoing provisions that the appellant would commence putting logs in the water not later than August 15, 1941, log and/or pay for not less than 4,000,000 feet in each year and log continuously, he had logged up to April 15, 1945, but 5,776,979 board feet and paid the purchase price therefor to the respondent in the sum of $9,383.26.

This $9,383.26 was paid in relatively small amounts as the timber was scaled and sold during the currency of this agreement so that when, on April 13, 1945, the respondent gave her notice of cancellation all the lumber logged had been paid for in full and she had also the deposit of $500 and the additional deposit of $1,500. These deposits were required under the terms of the agreement and to be applied on account of the purchase price or stumpage as hereinafter set out.

These payments covering the purchase price of the timber logged were accepted, and while inquiries as to why more was not being logged were made from time to time, there was never a complaint until the respondent's husband, who acted as her agent throughout, in April 1945 (the exact

1948

HANSON v. CAMERON

Estey J.

date is not disclosed) told the appellant that as he had not fulfilled his obligations under the agreement, he (the husband) expected to receive instructions to give notice terminating the agreement.

On the same date, and as a result of that interview, the appellant wrote the respondent in part:

> I do refer you to clause 6 of the agreement which provides for deferment of payments for reasons including causes beyond my control, and it would be a very simple matter for me to establish that the difficulties of labour, equipment, etc., has made it impossible for me to log these limits any faster than I have done.

And he further pointed out that on two occasions he was required by the Government Forestry Department to discontinue operations because of danger of fire. Then, after making reference to his investment in roads and other expenditures, he stated:

> I write to inform you that I have made arrangements to provide for payment in full of the timber which you have sold to me by the 15th of May next, and thus, irrespective of the difficulties of this operation, you will be paid as you contemplated.

He further stated that he proposed to tender the full amount due on May 15th and "If, as and when the scale bills establish that there is more timber logged from the property than the 16,000,000 feet anticipated, I undertake to pay for any such excess timber at the contract rate."

The respondent's solicitor acknowledged the letter under date of April 13, 1945, stating that under the terms of the agreement he was giving the notice of cancellation and that in any event, the agreement would terminate on the 15th of May, 1945, when logging operations by the appellant must cease and the respondent would take possession. In fact the respondent gave notice of cancellation on April 13, 1945, which reads:

> Pursuant to the terms of an agreement dated the 15th day of May, 1941, between Bertha Cameron as Vendor and yourself as Purchaser you have made default in the covenants, provisos, terms, conditions or stipulations of the said agreement in the following respects, namely:
>
> 1. You have not as agreed logged 4,000,000 feet board measure, British Columbia log scale in each and every year during the term of the said agreement including the year 1944.
>
> 2. You have not logged continuously nor clean the said lands and premises of all accessible and merchantable timber, as you went along. If such default shall continue for a period of thirty days after notice

shall have been given to you it is my intention to cancel the said agreement and in accordance with the terms of the said agreement the same shall be void and of no effect.

Dated at Vancouver, British Columbia, this 13th day of April, A.D. 1945.

Bertha Cameron.

This notice, as held by Mr. Justice Robertson, was ineffective in that there was no covenant in the agreement to log 4,000,000 feet board measure per year but rather to log and/or pay for 4,000,000 feet board measure, and in respect to the second default that was found in fact not to exist by the learned trial Judge.

The respondent in her statement of defence alleges a further default in that the appellant had not logged the said lands and premises clean of all accessible and merchantable timber by the 15th of May, 1945.

The foregoing indicates that the appellant realized his default and because of the thirty-day period he could only remedy that default by making payment under the alternative method of performance provided under paragraph six. The giving of the foregoing notice was followed by interviews and correspondence throughout which the appellant offered to pay or make such settlement as would remedy his default. Nothing came of this effort and on May 11, 1945, the appellant's solicitor wrote explaining his proposed tender of $15,276.05 and concluded:

We wish to make it clear past doubt that Mr. Hanson is ready, able and willing to satisfy any proper claim Mrs. Cameron has under the agreement of May 15, 1941.

The tender of the said sum of $15,276.05 was made on May 12, 1945, within the thirty-day period fixed by the notice of April 13th, and was refused. This sum of $15,276.05 was computed by accepting the figures of the Eustace Smith cruise deducting the amounts logged, leaving 10,609,746 board feet divided as follows:

Cedar	5,506,116 feet @	$2.00 per M.	$11,112.23
Other Species	5,103,630 feet @	.90 per M.	4,593.27
			$15,705.50

Then he added 10 per cent as an allowance for any error in favour of the respondent in the said cruise and deducted the deposits in the sum of $2,000.

1948

HANSON v. CAMERON

Estey J.

This action was commenced on May 14, 1945, asking *inter alia* a declaration that the agreement is valid and subsisting, for specific performance thereof, an injunction restraining the respondent from interfering and paying into Court the sum of $13,705.50 with an undertaking to pay the cost of a cruise and of any additional amount found to be thereby owing.

The respondent pleaded default on the part of the appellant in that (*a*) he did not log and/or pay for not less than 4,000,000 board feet in each year; (*b*) he did not log the premises continuously and clean of all merchantable timber by May 1945; (*c*) he did not log the premises clean of all merchantable timber as he proceeded and because of which the value of the said lands and timber had been impaired and decreased; and further that time was expressly of the essence in respect of all payments, conditions and provisos; and that respondent gave notice of cancellation dated April 13th, terminating the agreement, and that, in any event the agreement terminated by virtue of its terms by April 1945; that, under all the circumstances, the appellant was not entitled to relief from forfeiture. The respondent also counterclaimed asking a declaration that the said agreement was null and void, an injunction restraining the plaintiff from further cutting and removing the timber, and for possession of the said lands and premises and damages.

The learned trial Judge found that, under the circumstances, the appellant had not made a default under his covenant to log continuously and clean, but did find that the appellant had made default in that he did not log and/or pay for 4,000,000 board feet in each year. The evidence supports these findings of facts. Therefore the essential issues are whether the appellant had under the terms of the agreement the right to remedy his default, and if so, did he by his tender and payment in Court effect that remedy.

This is an executory agreement of sale of timber with a covenant that the logging should be completed within a specified period rather than a sale subject to a condition that the logging should be completed in a specified time. The vendor might in such a case be entitled to damages

but no evidence was here adduced and the learned trial Judge stated "no such claim for damages is before me for consideration."

The provisions of this agreement indicate that the parties contemplated, subject to the contingencies therein provided for, including causes beyond the control of the appellant and the price of cedar falling below $11 per thousand feet, continuous logging operations on the part of the appellant. If, however, in any year he should not log 4,000,000 board feet, then after allowing for any excess in a previous year, his obligation was to make up the difference by a payment in cash.

The appellant had paid the deposits as aforesaid, and commenced his logging operations on or before the 15th day of August, 1941. He logged very little the first year, a little more the second year, and had in fact, when the notice of cancellation was served, logged about one-third of the estimated accessible and merchantable timber, and had made the payments thereto from time to time throughout the currency of this agreement.

The parties, by paragraph twenty-eight, provided "Time is expressly declared and stipulated to be of the essence of this agreement in respect of all payments to be made and all conditions, provisos and stipulations to be observed and performed."

Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach. Viscount Haldane, *Steedman* v. *Drinkle*, [1916] 1 A.C. 275 at p. 279.

The respondent—with full knowledge of the defaults on the part of the appellant—has accepted in each year the purchase price of the timber logged, and the appellant's explanations as to why he was not logging larger quantities. The giving of the notice on April 13, 1945, though ineffective as such, was an admission on the part of the respondent that she regarded the agreement as current and subsisting, and thereby indicated to the appellant that the provision

1948

HANSON
v.
CAMERON

Estey J.

making time of the essence had been waived. *Fong* v. *Cooper* (1). The conduct of the respondent has therefore been such that it justifies the implication of an agreement waiving the provision making time of the essence. *Kilmer* v. *B.C. Orchard Lands Ltd.*, (2); *Brickles* v. *Snell* (3); *Simson* v. *Young* (4).

If, therefore, the appellant has by his tender and payment into Court remedied his default, it would seem that he is entitled to a declaration that this agreement is valid and subsisting and that a reasonable time be fixed for its performance.

On May 12, 1945, within the thirty-day period fixed by the respondent in the notice of April 13th, the appellant tendered $15,276.05 which the respondent refused and in this action with his claim for specific performance he paid into Court the amount of $13,705.50. The respondent contends that no valid tender has been made because: (*a*) it was made after the cancellation of the said agreement; (*b*) that the amount tendered was insufficient to pay for all the accessible merchantable timber; (*c*) that the amount did not include any sum for damages prior to May 1945.

The agreement contemplated such a payment as one method of remedying a default of the type here in question within the thirty-day period, and I agree with the learned trial Judge that there is, therefore, no merit in the first objection. As to the third, even if such an objection might well be taken in an appropriate case, the respondent while alleging damages, has not tendered any proof thereof and therefore we can only conclude that no damages have been suffered.

The amount of $15,276.05 as tendered on May 12th was made up as herebefore stated. Previously and probably on May 3rd, the appellant's solicitor called upon the respondent's solicitor and left with him a recapitulation of this amount as tendered, and the following day confirmed this by a letter dealing with the figures and showing the computation of the amount tendered as well as the amount of $13,705.50 paid into Court. This latter sum is the $15,705.50 being the purchase price of the timber still to be logged, computed as above, less the $2,000 paid as deposits.

(1) (1913) 5 W.W.R. 633 at 637.
(2) [1913] A.C. 319.
(3) [1916] 2 A.C. 599.
(4) (1918) 56 S.C.R. 388.

The contract makes no provision for the computation of the amount sufficient to pay in any year for 4,000,000 board feet or any balance thereof. As both cedar and other species were logged and paid for at different rates, it made this computation rather difficult. It is therefore reasonable to conclude that inasmuch as the agreement had been negotiated on the basis of the Eustace Smith cruise that the parties, had they provided for such a computation, would have specified that it should be made on the basis of the information in that cruise. In fact the appellant has arrived at his figures on that basis.

> There may be many possibilities within the contemplation of the contract of charter-party which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence. Per Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (1).

With the greatest respect for the opinion of the learned judges who have expressed a contrary view, this tender does not vary or alter the basis for payment as specified in the contract. It is there provided that payment shall be made when the said logs are sold by the purchaser and on the basis of the Government scale. The $500 deposit and the $1,500 additional deposit were, by the express provision of the agreement, to be applied on account of payment of the last 2,000,000 feet of logs to be removed. The same should be implied with respect to any payments in cash on account of the 16,000,000 feet. Under this agreement the parties contemplated the actual logging of the timber, and any payment in cash made under the three above-mentioned headings should be applied on account of the purchase price as determined by the Government scale as and when logged.

The appellant made his computation on the basis that there were 16,386,725 board feet of accessible merchantable timber upon the premises and he therefore did not restrict or limit his tender or payment into Court to the 16,000,000 feet which he was required to pay for within the four year

(1) 1881 6 A.C. 38 at 59.

1948

HANSON v. CAMERON

Estey J.

period. His tender is therefore sufficient in amount and possibly larger than required to remedy his default. A tender of too large an amount does not invalidate the tender. *Dean* v. *James* (1); *Benjamin on Sales,* 7th ed., p. 813. It was unconditional and sufficient.

There was no obligation on the appellant to pay or offer to pay for another cruise and his doing so was but further evidence of his desire to complete the contract. It was not suggested that his preparation involving a considerable investment upon the premises for the logging operations contemplated by the agreement were inadequate. In fact, throughout, the evidence discloses that the appellant has consistently disclosed both the desire and ability to perform his obligations under the contract.

The appellant is therefore entitled to a declaration that the said agreement dated May 15, 1941, is valid and subsisting and to a decree that the same be specifically performed within a reasonable time. The judgment of the learned trial Judge, so far as it so directs, should be restored. The case should be remitted back to the learned trial Judge to determine what, under the circumstances, might be a reasonable time within which the appellant might be permitted to perform his agreement.

The appeal should be allowed with costs.

LOCKE J.:—By the special timber license, the ownership of which was vested in the respondent, she was authorized "to cut, fell and carry away timber upon all that particular tract of land" described in the license. The term was for a period of one year from March 12, 1913, and it was stated to be renewable from year to year, as provided by the statute. Sec. 18 of the *Forest Act, cap.* 17, Statutes of British Columbia, 1912, reenacted sec. 95 of the *Land Act, cap.* 129 R.S.B.C. 1911, and declared that such a license vested in the holder thereof "all rights of property whatsoever in all trees, timber and lumber cut within the limits of the license during the term thereof, whether the trees, timber and lumber are cut by authority of the licensee, or by any other person with or without his consent" and entitled the holder thereof to seize any such trees, timber or lumber found in the possession of any unauthorized

(1) (1833) 4 B. & Ad. 546.

person and to prosecute "all trespassers and other offenders to punishment, and to recover damages (if any)". The sections of the *Land Act* and of the *Forest Act* referred to may be compared with sec. 3 of the *Crown Timber Act* of Ontario considered in the judgment of the Judicial Committee in *McPherson* v. *Temiskaming Lumber Co. Ltd.* (1), and while the British Columbia statutes do not in terms state that the licensee shall have the right to take and keep exclusive possession of the lands subject to the regulations, the effect of the license granted and of the sections of the statute was to vest that right in the licensee. That the right thus acquired by the licensee is an interest in land is determined by the judgment of the Judicial Committee in *McPherson's case* and it may be noted that in *Glenwood Lumber Company* v. *Phillips* (2), where the effect of a license granted by the Government of Newfoundland giving an exclusive right to occupation of lands and the right to cut timber and carry it away, though subject to certain reservations or to a restriction of the purposes for which it might be used, was considered, Lord Davey said that it was in law a demise of the land itself. It was, in my opinion, an interest in land that was the subject matter of the sale entered into between the parties to this action on May 15, 1941. By it the respondent agreed to sell to the appellant who agreed to purchase all the accessible merchantable timber upon the timber license and the appellant was authorized to enter into possession for the purpose of felling and removing the timber, subject to the terms and conditions of the license. It is clear from the agreement that what was intended was that the appellant as purchaser should have the same exclusive right of possession of the lands covered by the license as had been granted to the respondent by the license from the Crown. The right to possession and the right to cut and remove timber might be suspended in the manner provided by the first of the default clauses in the agreement, in which event the respondent was to be entitled to appoint a receiver to take possession of the lands, and both rights might be determined in the event of certain defaults under a cancellation clause which provided, *inter alia,* that upon the termination of the agreement under its provisions the purchaser should

(1) [1913] A.C. 145 at 151. (2) [1904] A.C. 405 at 408.

1948

HANSON v. CAMERON

Locke J.

deliver up possession of the lands and premises to the vendor. While by the terms of the agreement title to the timber felled on the limit was not to pass to the purchaser until the agreed stumpage and royalty charges had been paid, the purchaser, in my opinion, acquired under the agreement an equitable estate in the interest in land which was the subject matter of the sale and became in the eyes of a court of equity the real beneficial owner, the vendor being a trustee of such interest for him (*McKillop* v. *Alexander* (1), Anglin J. at 578; *Shaw* v. *Foster* (2). Neither such interest nor the agreement itself would *ipso facto* terminate if there were defaults either in cutting the timber or alternatively making the payments within the times stipulated.

I think it is apparent from the terms of the agreement providing that the purchaser would "log and/or pay for not less than four million feet board measure British Columbia log scale each and every year during the term of this agreement" that, contemporaneously with the making of the agreement, the parties had ascertained to their satisfaction the quantities of the various species of merchantable timber that were to be found upon the limit. If this were not so it is not easy to understand how the payment or the aggregate of the payments which the purchaser was permitted to make in lieu of logging four million feet a year was to be determined. The learned trial Judge upon conflicting evidence found as a fact that a cruise of the timber made by Eustace Smith, a well-known timber cruiser, was the basis upon which the parties dealt. This had been made some years before and some of the timber had been logged in the interval but, as the cruise showed the quantities of each of the species of timber and the records obtainable from the Forest Branch showed the exact quantity of each species which had been cut and removed, it was possible to ascertain the amount remaining upon the limit. Assuming the accuracy of the Smith cruise, there remained as of the date of the agreement 16,386,726 feet. With this information available it appears that the respondent was satisfied with an arrangement whereby the purchaser would log or pay for not less than four million feet board measure in each year of the term, since this would

(1) (1912) 45 S.C.R. 551. (2) (1872) L.R. 5 H.L. 321 at 338

ensure that in a period of four years the timber, with the exception of a small quantity, would be either logged or otherwise paid for. Whether the option to "log and/or pay" for this quantity in each year would have permitted the purchaser to pay for that quantity of timber and refrain from logging, or whether the further provision of the same clause whereby the purchaser agreed to "log continuously the said lands" required him to carry on logging operations continuously in any event and pay for any deficiency in the required yearly quantity, need not be determined in view of what transpired between the parties.

The learned trial Judge has found that the appellant did in fact carry on logging operations continuously and, though the required annual total was not reached in this manner, the appellant might remedy this by paying for the difference between the amount cut and such total in each year. While the agreement thus permitted the appellant to pay for any such deficiency it did not specify the rate of such payment for timber paid for but not cut and this appears to me a clear indication that what the parties contemplated was that this should be determined by the Eustace Smith cruise. This showed that as of May 14, 1941, there remained standing upon the limit a total of 6,625,612 feet of fir, hemlock and balsam and 9,761,913 feet of cedar. For any deficiency below four million feet board measure the purchaser might have paid the lower stumpage rate of 90 cents until either by logging or by payment the above amount of fir, hemlock and balsam had been paid for, and thereafter the higher rate upon cedar would be payable. Had there not been such a cruise available and had the parties not dealt on the basis that it was at least a reasonably accurate estimate of the timber on the limit, it seems apparent that the vendor would not have agreed to this alternative means of payment. The value of the limit to the respondent lay entirely in the timber and upon its removal possession of the land was of no further value: what she was concerned with was to obtain payment for the timber within the four year period in either one of the methods specified by the contract and the recovery of possession of the lands on that date was of no moment. The evidence showed that up to May 12, 1945, the appellant had cut and removed and paid for 4,254,997 feet of cedar

1948

HANSON v. CAMERON

Locke J.

and 1,521,982 feet of the other species, leaving either standing upon the limit or felled and bucked and not removed 10,609,746 feet consisting of 5,506,116 feet of cedar and 5,103,630 feet of other species according to the Smith cruise, and it was stumpage upon these quantities at the contract rate, plus an added amount of ten per cent thereon to allow for any under-estimate in the cruise, which the appellant endeavoured to pay to the respondent in advance of the commencement of the action. The total of all species for which the appellant had paid and attempted to pay was the 16,386,726 feet which the cruise had shown to be upon the limit at the time the agreement was entered into and the appellant gratuitously added to this the further amount, apparently in the hope of bringing about an amicable settlement. In my view, what the respondent attempted to do was exactly what both parties must have contemplated would be done if the purchaser elected to log part of the timber and pay in cash for the balance. Since the amount to be paid annually to make up for any deficiency in the timber logged was apparently to be computed on the basis of the species and quantities as shown by the Smith cruise and not by scaling, I consider it must be held that the parties contemplated that if the purchaser elected to pay for any part of the timber which was not logged prior to May 15, 1941, the quantity remaining, which clearly was ascertainable by cruising, would be so ascertained. This was the reasonable method proposed by the solicitor for the appellant on his behalf and while I agree that the Court cannot be asked to make a contract for the parties a court of equity exercising its jurisdiction in specific performance may properly direct the ascertainment of the quantities in a case such as this in the manner ordered by the learned trial Judge. The word "tender" seems to me to be a misnomer for what was attempted to be done on behalf of the respondent. It is true that the letter of May 11, 1945, written by the solicitor for the appellant stated that the bearer had instructions to tender the sum of $15,276.05 in full of the purchase price of the timber and that if it was not accepted the appellant proposed to commence an action for a declaration that the full purchase price had been paid and for such ancillary and other relief as might be required to protect his interest, but at the same time the letter stated

that the appellant was still prepared to pay $13,705.50 and the cost of a cruise to determine whether any additional moneys might be due. The larger amount included the added ten per cent which the appellant had earlier in the correspondence suggested that he was prepared to pay to dispose of the matter, and it was this amount which was offered to the respondent on May 13th in legal tender. The solicitor who formally offered the sum to the respondent was not called as a witness but the amount offered was satisfactorily proven. As a general rule, in the case of vendor and purchaser where the mutual engagements of the parties will be considered dependent on each other, either must perform his liabilities before seeking to enforce his rights under the contract and a purchaser cannot in general sue upon an agreement for sale of land without tendering a conveyance and the sum due in respect of purchase money and interest. But here the parties had agreed that the purchaser might pay for the timber, partly by logging and paying the stipulated stumpage after the scaling of the logs at tidewater and their subsequent sale, and partly by payments in cash in advance of logging without in terms defining how the exact quantity of timber was to be ascertained if the purchaser exercised his option to pay for part of it in the latter manner. The purchaser in this case was not in the letter of May 11th or on the day following asking for a transfer of the timber license but was simply attempting to pay the amount which he computed as the balance of the amount to be paid for stumpage and proposing, if that was unacceptable, to pay the lesser amount which according to the Eustace Smith cruise was payable and suggesting a method of determining what balance, if any, was payable by a cruise. The respondent could have accepted the money without acknowledging that it was payment in full by simply so stating. I think no formal tender on the part of the appellant was necessary in the present case. I agree with the learned trial Judge that the offer of payment and the subsequent payment of the amount into Court remedied any default on the part of the appellant.

The notice of cancellation was, in my opinion, wholly ineffective. It is true that the appellant had in each year

1948

HANSON
v.
CAMERON.

Locke J.

of the three year period between May 15, 1941, and May 15, 1944, failed to either log or pay for four million feet board measure. However, after these respective defaults the respondent accepted repeated payments of stumpage from the appellant, thus precluding herself from claiming to terminate the agreement by reason of them. As to the year terminating May 15, 1945, the time within which the purchaser was entitled to log or pay for the balance of the timber had not expired when the notice was given. As to the other reason assigned for giving the notice, that the respondent had not "logged continuously nor clean the said lands and premises of all accessible and merchantable timber as you went along", the trial Judge has found there was no such default.

The judgment entered after the trial is in terms permitting the Registrar to have ascertained the quantities of merchantable and accessible timber now remaining upon the limit by a cruise and the enquiry directed will determine the quantity which has been cut for which stumpage is payable. The sum paid into Court should be credited as of the date of the payment in upon the amount payable and the balance, if any, in respect not only of the timber which has been felled or felled and removed and timber remaining standing should be payable forthwith. The appeal should be allowed and the judgment of the trial Judge restored: the appellant should have his costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: *Bull, Houser, Tupper, Ray, Carroll & Guy.*

Solicitors for the respondent: *Campbell, Murray & Campbell.*

THE MINISTER OF NATIONAL REVENUE (RESPONDENT)..... APPELLANT;

1948
*June 7, 8, 9
*Oct. 5

AND

NATIONAL TRUST COMPANY, LIMITED, Executor of the last Will and Testament of Edward Rogers Wood, deceased, (APPELLANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Succession Duty—Settlement—Trust—Gift of equitable interest in securities—Bona fide possession and enjoyment by donee immediately upon making of gift retained to entire exclusion of donor—The Dominion Succession Duty Act, S. of C., 1940-41, c. 14, (am. S. of C., 1942, c. 25), ss. 2(e), (m), (n), 3 (1) (a), (d), 7 (1) (g), 8, 10, 11, 15 (1), (2), (3), 22, 36.

In 1930 by a deed of settlement, "W" transferred to trustees certain securities in trust to pay the annual income arising therefrom to his daughter "M" during the lifetime of the settlor, and upon his death to transfer the said securities and the accumulated income therefrom to "M" for her absolute use; provided that should "M" die before "W", the trustees should transfer the securities and the accumulated income therefrom to "W" for his absolute use.

The Dominion Succession Duty Act, S. of C., 1940-41, c. 14, came into force on June 14, 1941 and by an amendment, S. of C., 1942, c. 25, the provisions of the Act were made applicable retrospectively to successions derived from persons dying on or after June 14, 1941. "W" died on June 16, 1941 survived by "M". The Crown claimed succession duties under the Act on the value of the securities in the trust fund at the death of "W".

Held: The trust fund was exempt from duty under the provisions of s. 7 (1) (*g*)—such actual and bona fide possession and enjoyment of the property, the subject matter of the gift, was assumed by the donee immediately upon the making of the gift, as the nature of the gift and the circumstances permitted, and was thenceforth retained to the entire exclusion of the donor, or of any benefit to him.

Commissioner for Stamp Duties of the State of New South Wales v. *Perpetual Trustee Co., Ltd.,* [1943] A.C. 425; 1 All E.R. 525, followed.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J. (1) allowing an appeal from the decision of the Minister of National Revenue confirming an assessment made under The Dominion Succession Duty Act.

J. W. Pickup K.C. and *Ian G. Ross* for the appellant.

Wilfred Judson K.C. for the Respondent.

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

(1) [1946] Ex. C.R. 650.

1948

MINISTER OF NATIONAL REVENUE v. NATIONAL TRUST CO. LTD.

Kerwin J.

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

KERWIN J.: The Minister of National Revenue appeals from a decision of the Exchequer Court (1) allowing an appeal by National Trust Company Limited, executors of E. R. Wood, from an assessment made under *The Dominion Succession Duty Act,* chapter 14 of the Statutes of 1940-1941, as amended by chapter 25 of the Statutes of 1942. The original Act came into force June 14, 1941, and while Mr. Wood died June 16 of that year the question of the liability to assessment depends upon the effect of a settlement dated December 8, 1940, as amended.

By this settlement, Mr. Wood as settlor transferred certain securities to two trustees for the benefit of his daughter Mildred, therein called the beneficiary. Clauses 1, 2, 4 and 5 of the settlement read:—

1. The Trustees shall hold the securities transferred to them and set forth in Schedule "A" hereto, hereinafter called the "Trust Fund", on trust to pay the annual income arising therefrom after the 1st day of January 1931 to the Beneficiary in quarterly instalments on the 1st days of January, April, July and October in each year, commencing on the 1st day of April 1931, for and during the lifetime of the Settlor and upon his death shall transfer the securities then representing the Trust Fund and the accumulated income therefrom to the Beneficiary for her own absolute use and benefit; provided that in the event of the Beneficiary dying in the lifetime of the Settlor the Trustees shall transfer such securities then representing the Trust Fund and the accumulated income therefrom to the Settlor for his own absolute use and benefit.

2. The Trustees shall have power to hold the securities set forth in Schedule "A" hereto or any securities substituted therefor as hereinafter provided, notwithstanding that the said securities may not be securities in which trustees are authorized by law to invest trust funds, and shall from time to time upon the direction in writing of the Settlor during his lifetime sell, call in and convert into money the said securities or any part thereof, and invest the moneys thereby produced in such securities or investments as the Settlor may from time to time direct and notwithstanding that the said securities or investments may not be securities or investments in which trustees are authorized by law to invest trust funds, and shall have power upon the direction in writing of the Settlor during his lifetime to accept from the Settlor in substitution in part or *in toto* of the said securities set forth in Schedule "A" hereto other securities in respect of which the Settlor shall certify in writing that the securities so substituted are of *a value at least equal* to the value of the securities for which the same are to be substituted, and the securities so substituted together with the securities to be retained by the Trustees and constituting the Trust Fund shall yield at the date of such substitution a net income of at least Twenty-four Thousand Dollars ($24,000) per annum after allowing from the gross income from such securities for the payment of

(1) [1946] Ex. C.R. 650.

all taxes payable by the Beneficiary in respect of the income from such securities which may be assessed or levied by the Dominion of Canada or Province of Ontario, or any other taxing authority.

The Trustees shall be entitled to accept the hereinbefore referred to certificate of the Settlor as the conclusive evidence of the truth of any statement of facts therein contained, and the Trustees shall be completely protected in relying and acting upon any such certificate.

The Trustees shall incur no responsibility whatsoever to the Beneficiary and the Beneficiary shall have no claim whatsoever against the Trustees by reason of the Trustees retaining the securities set forth in Schedule "A" hereto in their present state of investment or selling the same or any part thereof and investing the proceeds therefrom in securities or investments which may not be securities or investments in which Trustees are authorized by law to invest trust funds, or accepting by way of substitution in the manner hereinbefore provided other securities for any or all of the said securities set forth in Schedule "A" hereto.

4. The Trustees shall have power to appoint the Settlor or any person named by him as their attorney in their names, places and stead to vote at all meetings and otherwise to act as their proxy or representative in respect of all shares, bonds and other securities which may at any time be held by the Trustees under the terms hereof, with all the powers the Trustees could exercise if personally present.

5. The Settlor may from time to time and at any time reduce or increase the number of Trustees or substitute any one or more Trustees for either or both of the Trustees and may appoint a new Trustee or Trustees in the event of the death, absence, refusal or incapacity to act of any Trustee or in case any Trustee desires to be released or is discharged by the Settlor from the trusts hereof.

By a document dated February 1, 1937, clause 2 of the original settlement was amended so as to provide that the power of the trustees to accept from the settlor in substitution in part or *in toto* of the securities should be exercised upon the direction in writing of the settlor, and the National Trust Company Limited, or any chartered bank in the Dominion of Canada instead of upon the direction of the settlor alone. The necessary change was also made in the second paragraph of that clause. Clause 4 was stricken out and clause 5 was amended by adding a proviso at the end by which the settlor should not be appointed a trustee.

Many points were raised before the learned trial judge and argued before us but I find it necessary to deal only with the question as to whether the respondent is entitled, under subsection 1 of section 7 of the Act, to an exemption from the dutiable value of any property that might otherwise have been included in a succession. If that question is answered in the affirmative, it disposes of the matter as section 6 of the Act (so far as relevant) provides that "subject to the exemptions mentioned in section 7," there is to be assessed, levied and paid at the rates provided

1948

MINISTER OF NATIONAL REVENUE v. NATIONAL TRUST CO. LTD.

Kerwin J.

for in the First Schedule, duties upon or in respect of the succession to all real or immoveable property situate in Canada and all personal property wherever situated, when the deceased was at the time of his death domiciled in a Province of Canada. By section 10, there is to be assessed, levied and paid to the Receiver General of Canada, upon or in respect of each succession mentioned and described in section 6, an initial duty at the rate set forth under the heading "Initial rates dependent on aggregate net value" in the First Schedule, which corresponds to the aggregate net value in the Schedule, and the duty so levied is payable by each successor in respect of his succession. By section 11, an additional duty is to be assessed, levied and paid upon or in respect of each succession mentioned and described in section 6 at the rate set forth in the First Schedule, which corresponds to the dutiable value therein.

For our present purpose, we need not refer to the definitions of "aggregate net value" and "dutiable value" except to note that the latter, as it appeared in section 2 of the original Act, was amended by the 1942 statute so that while the original Act excluded the "exemptions and allowances as authorized by sections 7 and 8," the latter exempts the "allowances as authorized by section 8". However, by the same amendment, the opening part of subsection 1 of section 7, "In determining the dutiable value of any property included in a succession, the following exemptions shall be allowed and no duty shall be levied in respect thereof," was repealed and the following substituted therefor:—"From the dutiable value of any property included in a succession, the following exemptions shall be deducted and no duty shall be leviable in respect thereof." It is clear that if the present claim falls within an exemption from the dutiable value of any property included in a succession, any initial duty, based on the aggregate net value, as well as any additional duty, must disappear whether there would otherwise be a "succession" within the definition of that term in section 2(*m*) or within the closing words thereof, "and also includes any disposition of property deemed by this Act to be included in a succession." The aggregate net value is of importance only in determining the rate of initial duty since such duty is to be assessed, levied and paid upon or in respect of each succession mentioned in

section 6 and, as we have seen, section 6 is subject to the exemptions mentioned in section 7. The same result, of course, follows even more clearly with respect to additional duty.

In the original Act, clause (*g*) of subsection 1 of section 7 read:— "in respect of any gift made by the deceased prior to the twenty-ninth day of April, one thousand nine hundred and forty-one" but by the amending Act of 1942, which applies retrospectively to successions derived from persons dying on or after June 14, 1941, there was added to these words the following:—

where actual and bona fide possession and enjoyment of the property, the subject matter of the gift, has been assumed by the donee or by a trustee for the donee immediately upon the making of the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him, whether voluntary or by contract or otherwise;

and it is these additional words that cause any difficulty that arises.

That there was a gift by E. R. Wood to his daughter is indisputable, and the gift, in addition to that of the income from the securities to be paid quarterly, is an equitable interest in the corpus and accumulated income contingent upon the daughter surviving her father. So far as the father is concerned the principle is well understood that a contingent reversion reserved to the donor of the property is not reserved out of the gift but is something not comprised in it. "The property, the subject matter of the gift", to use the phraseology of clause (*g*), is the daughter's equitable interest and the daughter assumed such bona fide possession and enjoyment of the property immediately upon the making of the gift as the nature of the gift and the circumstances permitted. In similar circumstances it has been held to be so by the Judicial Committee in *Commissioner for Stamp Duties of New South Wales* v. *Perpetual Trustee Co.* (1) and that decision should be followed. It is true that the word "actual" does not appear in the statute there under review but I am satisfied that, here, the daughter, through the trustees, had actual as well as bona fide possession and enjoyment of the property. In view of the reference to "a trustee for the donee" in clause (*g*), the argument that clause (*g*) applies only to corporeal property capable of manual or physical possession falls

(1) [1943] A.C. 425.

1948

MINISTER OF NATIONAL REVENUE v. NATIONAL TRUST CO. LTD.

Kerwin J.

to the ground. Furthermore, this reference and the other references in the Act to equitable interests compel me to disagree with the view presently held by the Supreme Court of the United States as set forth in its decision in *Helvering* v. *Hallock* (1).

The only other condition to be met under clause (*g*) is that the actual possession and enjoyment should be assumed and retained by the daughter "to the entire exclusion of the donor or of any benefit to him." It logically follows from the principle set forth above, that is, that the reversion of the father is something not comprised in the gift to the daughter, that the former was excluded from any benefit in the subject matter of the gift. This was decided by three judges in the King's Bench Division in the Irish case of *In Re Cochrane* (2) and by the three judges in the Court of Appeal (3) where there was an express reversion, and that decision was approved by the Judicial Committee in the *Perpetual Trustee Case,* although in the latter there was no express reversion. The judgment of Lord Russell of Killowen on behalf of the Judicial Committee, after referring to the argument that the *Cochrane Case* was in conflict with the decision of the House of Lords in *Grey (Earl)* v. *Attorney General* (4), proceeds at pages 445-6:—

> There is nothing laid down as law in that case which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated by s. 11, sub-s. 1, of the Act of 1889 is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the sub-section requires.

Finally, on this branch of the case it is contended that there was no entire exclusion of Mr. Wood or of any benefit to him because of the power of substitution of securities in the trust fund. The evidence discloses that what was actually done in this respect certainly did not inure to Mr. Wood's benefit and in any event it cannot be said that the mere power, hedged about as it was, in itself takes the matter outside the provisions of clause (*g*) of subsection 1 of section 7. The argument based on the suggestion that the trustees might be under the control of the settlor since

(1) (1940) 309 U.S. 106.
(2) [1905] I.R. 626.
(3) [1906] I.R. 200.
(4) [1900] A.C. 124.

they were either his employees or employees of a company dominated by him, is even weaker and cannot be upheld.

Two further submissions on behalf of the appellant remain to be noticed. The first is that no appeal has been taken by the daughter and the only appeal being that of the executors, the assessment in question has become final and binding. Under subsection 1 of section 15 of the Act, every heir, legatee, substitute, institution or other successor is to file an inventory of all the property included in the succession. By subsection 2, a similar inventory is to be filed by the executor but by subsection 3, if one of these has complied with the filing requirements, it is unnecessary for the other to do so. In this case a statement was filed by the executors and in accordance with section 22, the Minister assessed the duties he considered to be payable under the Act (including the item in question) and sent a notice of such assessment to the executors. The latter, as a "person who objects to the amount of duty" mentioned in section 36, appealed as provided by that section. They, therefore, are the proper and sufficient parties to that appeal, to the notice of dissatisfaction, and to the appeal to the Exchequer Court. The second submission that the succession duties having been paid by the executors, no refund could be obtained except in proceedings by way of petition of right is without any basis or merit. If, instead of appealing from the assessment, the executors had taken those proceedings, they would probably have been met by the contention that they had failed to avail themselves of the remedies provided by the *Succession Duty Act*.

The appeal should be dismissed with costs.

RAND J.:—The question in this appeal is, in my opinion, answered by section 7(1) (*g*) of the *Succession Duty Act*. That provision "exempts" from duty "*any* gift made by the deceased prior to the 29th day of April, 1941, where actual and bona fide possession and enjoyment of the property, the subject matter of the gift, has been assumed by the donee or by a trustee for the donee immediately upon the making of the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him whether voluntary or by contract or otherwise."

I agree with the Crown that the Act distinguishes between the contingency of death of the donor in the lifetime of the

1948

MINISTER OF NATIONAL REVENUE v. NATIONAL TRUST CO. LTD.

Rand J.

donee from other contingencies both in the definition of the word "succession", section 2(*m*), and in paragraph (*a*) of section 3(1). But "*any* gift" in section 7(1) (*g*) must be interpreted to embrace all contingencies: *Commissioner for Stamps, New South Wales* v. *Perpetual Trustee Company Limited,* (1) and the same case decides that bona fide possession and enjoyment by the donee to the entire exclusion of the donor is satisfied by a conveyance in trust to vest the *corpus* in the *cestui que trust* upon the happening of the contingency. That is the situation here and it is unaffected by the word "actual"; there is in this case as in the other, to use the words of Lord Russell, such "beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances" permit.

The appeal must then be dismissed with costs.

The judgment of Taschereau and Kellock, JJ. was delivered by:

KELLOCK J.:—Section 6 of the *Dominion Succession Duty Act,* as it stood at the time of the matters here in question, provides for liability to duty subject to the exemptions in section 7. Section 7, so far as material, is as follows:

> 7. (1). From the dutiable value of any property included in a succession the following exemptions shall be deducted and no duty shall be leviable in respect thereof:—
>
> (*g*) In respect of any gift made by the deceased prior to the twenty-ninth day of April, one thousand nine hundred and forty-one, where actual and bona fide possession and enjoyment of the property, the subject matter of the gift, has been assumed by the donee or by a trustee for the donee immediately upon the making of the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him, whether voluntary or by contract or otherwise.

By section 2(*e*) "dutiable value" means, in the case of the death of a person domiciled in Canada, the fair market value, as at the date of death, of all property "included in a succession to a successor". "Property" by section 2(*k*) includes property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death, and any right or benefit mentioned in section 3. "Succession" by section 2(*m*)

(1) [1943] 1 All E.R. 525.

means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by the Act to be included in a succession. "Successor" is defined by clause (*n*) of section 2 as the person entitled under a succession.

The "dispositions" of property deemed by the Act to be included in a succession are set forth in section 3. Paragraph (*d*) of subsection 1 of that section reads as follows:

> (*d*) property taken under a gift whenever made of which actual and *bona fide* possession and enjoyment shall not have been assumed by the donee or by a trustee for the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise;

Under the trust instrument here in question it is recited that the settlor, the late Edward Rogers Wood, "being the absolute owner of the securities specified in Schedule 'A' hereto has transferred the same to the Trustees to hold as a Trust Fund upon the Trusts hereinafter expressed". Paragraph 1 is as follows:

> 1. The Trustees shall hold the securities transferred to them and set forth in Schedule "A" hereto, hereinafter called the "Trust Fund", on trust to pay the annual income arising therefrom after the 1st day of January 1931 to the Beneficiary in quarterly instalments on the 1st days of January, April, July and October in each year, commencing on the 1st day of April 1931, for and during the lifetime of the Settlor and upon his death shall transfer the securities then representing the Trust Fund and the accumulated income therefrom to the Beneficiary for her own absolute use and benefit; provided that in the event of the Beneficiary dying in the lifetime of the Settlor the Trustees shall transfer such securities then representing the Trust Fund and the accumulated income therefrom to the Settlor for his own absolute use and benefit.

It is argued on behalf of the respondent that the exemption provided for by section 7(1) (*g*) is applicable and that that being so the case does not fall within paragraph (*d*) of section 3(1) nor within any other taxing provision of the Act. It is said that under the express

1948

MINISTER OF NATIONAL REVENUE v. NATIONAL TRUST CO. LTD.

Kellock J.

provision of the first three lines of section 7(1) it is immaterial whether or not but for clause (*g*) of that subsection the case would otherwise have fallen within either section 2(*m*) or any other provision of section 3; in other words, that the exemption specified by section 7(1) (*g*) is an overriding exemption and it is sufficient to make out appellant's case if it falls within that clause. In my opinion the argument is well founded and the only question is whether or not the present case falls within the provisions of the clause mentioned.

In *Commissioner for Stamp Duties of the State of New South Wales* v. *Perpetual Trustee Co., Ltd.* (1) the Privy Council had to consider a case arising under certain legislation of New South Wales. Section 102 of that legislation read, in part, as follows:

> For the purpose of the assessment and payment of death duty * * * the estate of a deceased person shall be deemed to include and consist of the following classes of property:—
>
> (2) (*d*) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever.

In that case the question was as to whether or not certain shares in a company formed part of the dutiable estate there in question. By an indenture the deceased in his lifetime had settled the shares and they had been transferred into and were registered in the names of five trustees, of whom the deceased himself was one. The trustees were directed to hold the shares upon trust to apply the whole or such part or parts of the income as the trustees should think fit for the benefit of the infant son of the deceased; to invest any surplus income; to apply the income and any accumulations thereof during the minority of the son and the proceeds of sale of any of the said shares, or any sums raised by way of mortgage, for the maintenance, education, advancement or benefit of the son and upon the said son attaining his majority the trustees were directed to transfer to him as his absolute property, the corpus and accumulations of income. While there was not, as in the trust in question in the case at bar,

(1) [1943] 1 All E.R. 525.

an express provision for the transfer of the securities to the settlor in the event of the beneficiary dying in his lifetime, there was a resulting trust in that event.

The judgment of the Judicial Committee was delivered by Lord Russell of Killowen. At page 529 the questions to be determined were set out as follows:

(i) What was the property comprised in the gift; was it the shares themselves or only a particular kind of interest in the shares?

(ii) Had *bona fide* possession and enjoyment been assumed by the donee immediately upon the gift?

(iii) Had *bona fide* possession and enjoyment been thenceforth retained by the donee to the entire exclusion of the settlor, and to the entire exclusion of any benefit to him of whatsoever kind or in any way whatsoever?

I quote the following excerpts from the judgment from page 530 of the report:

In their Lordships' opinion there is no ambiguity in this settlement. There is no gift of *corpus* to the son except in the direction to the trustees to transfer to him upon his attaining 21 years of age. What have then (and only then) to be transferred are described as "all the property and assets whatsoever including the accumulations of income and all investments held by the trustees" and they are then to be transferred to him "as his absolute property". Until that event had happened they were not in their Lordships' opinion, his absolute property; until that event had happened he had only a contingent interest. He was only to be absolutely entitled to *corpus* if and when he attained his age of 21 years.

For the reasons hereinafter appearing their Lordships are in agreement with the decision of the High Court in this case. In their opinion the property comprised in the gift was the equitable interest in the 850 shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees and declaring such trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift; whether the son alone was the donee (as their Lordships think) or whether the son and the body of trustees together constituted the donee seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty.

Did the donee assume *bona fide* possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question, therefore, must be answered in the affirmative, because the son was (through the medium of the trustees) immediately put in such *bona fide* beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted.

Did he assume it and thenceforth retain it to the entire exclusion of the donor? The answer, their Lordships think, must be in the affirmative, and for two reasons: viz., (i) the settlor had no enjoyment and possession such as is contemplated by the section; and (ii) such possession and

1948

MINISTER OF NATIONAL REVENUE v. NATIONAL TRUST CO. LTD.

Kellock J.

enjoyment as he had from the fact that the legal ownership of the shares vested in him and his co-trustees as joint tenants was had by him solely on behalf of the donee. In his capacity as donor he was entirely excluded from possession and enjoyment of what he had given to his son.

Did the donee retain possession and enjoyment to the entire exclusion of any benefit to the settlor of whatsoever kind or in any way whatsoever? Clearly, yes. In the interval between the gift and his death, the settlor received no benefit of any kind or in any way from the shares, nor did he receive any benefit whatsoever which was in any way attributable to the gift. Indeed this was ultimately conceded by the appellant.

It was therefore held that the case did not fall within the taxing provisions above set forth.

I find it impossible to distinguish this decision in its application to the proper construction of section 3(1) (*d*) and section 7(1) (*g*) of the Canadian statute. The only distinction suggested by Mr. Pickup is that in the New South Wales legislation the word "actual" was not used and he contended that the presence of that word in the Dominion statute indicates that neither section 3(1) (*d*) nor 7(1) (*g*) can be applied to equitable interests but only to corporeal property capable of manual or physical possession. I find it impossible to accept this contention in view of the definition of "property" itself in section 2(*k*) quoted above. In the language of Lord Russell in the New South Wales' case, already quoted, the beneficiary "was (through the medium of the trustees) immediately put in such *bona fide* beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted". In my opinion this language is as apt in relation to actual possession of property included in the wide definition of the Act in question as it was to the legislation before the Judicial Committee in that case.

I think therefore section 7(1) (*g*) applies and that in the language of section 7 "no duty shall be leviable in respect" of the subject matter of the present litigation; *In re Adams* (1). I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Samuel Quigg.*

Solicitors for the respondent: *Daly, Thistle, Judson & McTaggart.*

(1) [1932] N.Z.L.R. 741.

MICHAEL ANGELO VESCIO.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1948

*Oct. 8, 12, 13, 14
*Nov. 2

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Murder—Withdrawal of accused's counsel because postponement refused—Appointment of another counsel by Court—Refusal of Court to hear another counsel retained by accused's family—Illness of juror—Discharge of jury—New jury containing some members of original jury—Criminal Code ss. 929, 942, 960, 1014 (2).

The accused was arrested and charged with murder on August 8, 1947, and within a few days retained the services of counsel W. After many adjournments, the preliminary hearing started on October 8 and he was committed for trial on October 21. On that same day he was brought up for arraignment. His counsel W. moved to have the trial adjourned to the next assize and said that he was contemplating an application for a change of venue. The presiding judge refused the motion to traverse and set the date for the trial at November 10. Counsel W. then withdrew from the case and the judge stated that he would appoint someone if the accused did not appoint counsel within a day or two. The following day, accused's sister addressed the Court in accused's presence and asked for an adjournment, saying that they did not want W. to withdraw and that they wanted their own counsel and not one appointed by the Court. However the presiding judge appointed R. as accused's chief counsel and postponed the trial for a week beyond the date previously fixed; the arraignment was also postponed to the day of trial. When the trial opened, R. appeared for accused but before arraignment M., a counsel, addressed the Court, saying "I am appearing on behalf of the accused, retained by his family". The trial judge informed M. that the Court had appointed counsel and refused to hear M. as to the nature of the application which he proposed to make. On arraignment, accused pleaded not guilty but when asked if he was ready for trial answered "No Sir". Thereupon R. said that this was accused's answer and not his and that he was prepared to go on.

During the trial, when the jury was recalled to the courtroom after a trial within the trial, one member was found to be absent because of illness. The jury was then discharged but instructed to remain on the panel, and a new jury was drawn. Nine members of the new jury had been on the previous jury, which had sat for two days. The trial judge admitted the evidence which was the subject of the trial within the trial.

The majority of the Court of Appeal having affirmed the conviction, appellant raised two grounds of appeal in this Court, (*a*) that he was not permitted to make full answer and defence by counsel of his choice and (*b*) that the jury was not properly constituted.

Held: that, by his conduct, the accused has ratified the choice of counsel made by the Court.

*PRESENT: The Chief Justice and Kerwin, Taschereau, Rand, Kellock, Estey and Locke JJ.

1948

VESCIO
v.
THE KING

Even if the trial judge should not have declined to hear M., as it was shown that the proposed application was for a further postponement of the trial, the accused suffered no prejudice and the incident taints in no way the fairness of what has been done. There was no substantial wrong or miscarriage of justice.

Held: also, that when discharged, the jury cease to be the jury in that case, their functions are terminated and consequently they were free to act again in the new trial.

Rex v. *Luparello* 25 C.C.C. 24 approved.

Rex v. *Chong Sam Bow* (1925) 1 W.W.R. 240 overruled.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) dismissing (Dysart and Adamson JJ.A. dissenting) the appellant's appeal from his conviction, at trial before Williams C.J. K.B. and a jury, on a charge of murder.

H. Walsh for the appellant.

O. M. M. Kay for the respondent.

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

TASCHEREAU J.: Michael Angelo Vescio, the appellant in the present case, was charged with the murder of one George Robert Smith, and on the 25th day of November, 1947, was found guilty by a jury at the City of Winnipeg, at the Fall Assizes. The Honourable Chief Justice Williams imposed the death penalty.

The appellant appealed to the Court of Appeal for the Province of Manitoba, and the appeal (1) was dismissed Dysart and Adamson, JJ. dissenting.

The grounds of dissent in the judgments of Dysart and Adamson, JJ. may be summed up in one general statement, that the accused was deprived of his right to make a full answer and defence to the charge laid against him, by counsel of his own choice, that there was consequently a mistrial of such a fundamental nature, that section 1014(2) of the Criminal Code does not apply.

The first Notice of Appeal to this Court based on the above dissenting judgments was served on the 27th of April, 1948, and was followed on the 28th of May by a second Notice, pursuant to an order of the Honourable Mr. Justice Rand, made under section 1025 of the Criminal

(1) [1948] 2 W.W.R. 161.

Code. Leave to appeal to this Court was granted on the ground that the judgment of the Court of Appeal for the Province of Manitoba conflicts as to the constitution of the jury, with a judgment of the Court of Appeal for British Columbia (*Rex* v. *Chong Sam Bow* (1)).

The information on which the accused was charged was laid on the 7th day of August, 1947, the warrant was executed the next day, and the preliminary hearing which commenced on the 8th of October came to an end on the 21st of the same month, on which date the accused was committed for trial.

The Fall Assizes of the Eastern Judicial District opened at two P.M. on the same day with Mr. Justice Major presiding. Mr. C. W. Tupper appeared for the Crown and immediately asked that Vescio be arraigned on the indictment charging him with the murder of George Robert Smith. This application was strenuously opposed by Mr. Harry Walsh who appeared for Vescio, and who asked that the case be traversed to the next Assizes in February, on the ground that he was not ready to proceed. The next day, on the 22nd of October, Mr. Justice Major refused the application and set the date for trial for the 10th of November. It is then that Mr. Walsh made the following declaration:—

in which case I must withdraw from the defence. I would ask in fairness to the accused that your Lordship should defer arraignment until he has an opportunity to consult counsel.

After a brief argument between the Court and Mr. Walsh, Mr. Justice Major said:—

I will give two days for decision in the matter. If I do not hear anything by Thursday I will appoint counsel to represent him. I will adjourn this until Thursday. I expect the Crown counsel to advise me what has been done.

On Thursday no counsel appeared for Vescio, but his sister Mrs. Bernhardi who was in the audience, applied for an adjournment of three or four months. She insisted that she did not want Mr. Walsh to withdraw; "we want to keep him", said she. Mr. Justice Major adjourned the case until the 17th of November and explained to Mrs. Bernhardi that in view of the fact that Mr. Walsh had declined to continue to act, it was the duty of the Court to appoint counsel for him.

(1) (1925) 1 W.W.R. 240.

1948

VESCIO
v.
THE KING

Taschereau J.

On Friday, the 24th of October, at the opening of the Court Mr. Justice Major appointed Mr. Ross, K.C. as "chief counsel" to defend the accused and the case stood adjourned until the 17th of November for trial.

On that date the case came for trial before Chief Justice Williams, Mr. O. M. M. Kay appeared for the Crown and Mr. J. L. Ross for the accused. It was then, that Mr. E. J. McMurray, K.C. who is the senior partner of Mr. Walsh said at the opening of the Court: "I may say my Lord that I am appearing on behalf of the accused, retained by his family". The Chief Justice then said that he could not recognize Mr. McMurray in that capacity, that a counsel had been appointed for the accused 3½ weeks before, that he was in Court and prepared to go on. Mr. McMurray offered to tell the Court the nature of the application which he intended to make, but the Chief Justice replied that he "did not think it was advisable to do so, because he regretfully declined to hear him". Mr. McMurray then withdrew, the accused was arraigned and pleaded not guilty. The trial lasted seven days and a verdict was given on the 24th of November.

It is the contention of the appellant that a gross and substantial miscarriage of justice was occasioned to the accused and a mistrial took place, when Major, J. denied the accused counsel of his own choice, thus denying him his right to "make full answer and defence by counsel learned in the law", and forced upon the accused counsel whom he was not willing to accept and through whom he did not wish to speak. It is also submitted that the refusal of the learned trial judge to hear Mr. McMurray, was a refusal of the accused of counsel of his own choice or of additional counsel to Mr. J. L. Ross.

It is a fundamental principle of our criminal law that the choice of counsel is the choice of the accused himself, that no person charged with a criminal offence can have counsel forced upon him against his will, and that it is the paramount right of the accused to make his own case to the jury if he so wishes, instead of having it made for him by counsel (*Rex* v. *Woodward* (1)). Mr. Kay acting for the respondent did not challenge this, but submitted that in the present case the appellant accepted Mr. Ross as his counsel. With this proposition I agree.

(1) [1944] A.E.R. 159.

The appellant had selected Mr. Walsh as his counsel, but unfortunately Mr. Walsh withdrew leaving the appellant without counsel. It might have been advisable for the learned trial judge to ask the appellant if he desired a counsel, or if he wished to defend himself, and thus the situation would have been made clearer; but I do not think that under the circumstances, the failure to ask this preliminary question had the effect of vitiating the whole trial, as suggested by the appellant. By his conduct the accused has ratified the choice which he now says has been forced upon him.

Immediately after the withdrawal of Mr. Walsh, Mr. Justice Major adjourned the arraignment to allow the accused to appoint a new counsel. When the Court resumed on the 24th, Mrs. Bernhardi who was present, objected to the voluntary withdrawal of Mr. Walsh, but the accused remained silent. Mr. Ross cross-examined the witnesses, addressed the jury, was in Court during six days, and during 3½ weeks had the opportunity of conferring with the appellant, and we cannot of course assume that he did not. During all these proceedings not a word was said by the appellant that can lead us to believe that he even ever thought of repudiating the choice made by the Court. It is then that the accused should have done so, if he had any idea of conducting his own case or of selecting a new counsel, and not now. In dealing with this matter I have kept in mind the case of *Reg.* v. *Yscuado* (1) but with due deference, I do not agree with all the statements made by Erle, J. as to the inferences which may be drawn from the silence of an accused when the Court requests a member of the Bar to give his services to a prisoner.

The conduct of the accused is to my mind a sufficient sanction of what has been done, and is a bar to his tardy claims of unfair trial and miscarriage of justice.

As to the refusal of the learned trial judge to hear Mr. McMurray on the date of the opening of the trial, I would like to make the following observations. For 3½ weeks, Mr. Ross had been acting as counsel for Vescio, and on the 17th of November, he appeared on his behalf and was ready to proceed. There had already been three different applica-

(1) (1854) 6 Cox C.C. 386.

1948

VESCIO v. THE KING

Taschereau J.

tions made to traverse the case to the Winter Assizes which had all been refused, and it is now clearly established by the Crown and uncontradicted by the appellant, that when Mr. McMurray appeared in Court, "retained by the family", he wished to make a new application to postpone the case, and we know that this application would have been refused. It has also been made clear that neither Mr. McMurray nor Mr. Walsh intended to proceed with the case and defend the accused. Vescio suffered therefore no prejudice, and this incident taints in no way the fairness of the trial that has been held.

There now remains the last question concerning the constitution of the jury. After eighteen Crown witnesses had given their evidence, "a trial within the trial" was held to determine the admissibility of certain statements made by the accused to Port Arthur Police Officers, in Port Arthur and Fort William. During these proceedings the petit jury was excluded, and the Chief Justice reserved his judgment on the admissibility of this evidence until the 19th of November. On that morning the petit jury was recalled and only eleven jurymen took their places in the box, one of them having been taken to hospital during the night. The Chief Justice then discharged the balance of the petit jury, the jury panel was brought back into the Court, and the cards of the petit jury placed back in the jury box. A new petit jury was empanelled and when sworn it comprised nine former petit jurors and three new members. It is submitted by the accused that this new jury was improperly constituted and that a mistrial and a miscarriage of justice occurred, when nine of these jurors who had been sworn and empanelled on November 17th, and who had heard evidence on November 17th and 18th and were discharged on November 19th, were permitted to be sworn and empanelled on the new jury on November 19th. The law on this point is quite clear. Section 929 of the Criminal Code states:—

> The twelve men, or in the Province of Alberta the six men, who in manner aforesaid are ultimately drawn and sworn shall be the jury to try the issues of the indictment, and the names of the men so drawn and sworn shall be kept apart by themselves until such jury give in their verdict or until they are discharged; and then the names shall be returned to the box there to be kept with the other names remaining at that time undrawn and so *toties quoties* as long as any issue remains to be tried.

Section 945 of the Criminal Code provides:—

The trial shall proceed continuously subject to the power of the court to adjourn it.

2. The court may adjourn the trial from day to day, and if in its opinion the ends of justice so require, to any other day in the same sittings.

3. Upon every adjournment of a trial under this section, or under any other section, the court may, if it thinks fit, direct that during the adjournment the jury shall be kept together, and proper provision made for preventing the jury from holding communication with any one on the subject of the trial.

4. Such direction shall be given in all cases in which the accused may upon conviction be sentenced to death.

5. In other cases, if no such direction is given, the jury shall be permitted to separate.

6. No formal adjournment of the court shall hereafter be required, and no entry thereof in the Crown book shall be necessary. R.S., c. 146, s. 945.

I fail to see that the law as it then was, has not been strictly complied with in the present proceedings. In a murder case, the jury must be kept together as long as the trial lasts, and as it is stated "upon every adjournment", but when they are discharged, as they have been in the present case, the application of the law comes to an end. They cease to be the jury in *that case* and their functions are terminated, pursuant to section 929 already cited. The jurors after having been discharged were consequently free to act again in the new trial, and if the accused thought that one or many of them, on account of what they have heard or seen, "were not indifferent between the King and the accused", he could challenge him or them "for cause" pursuant to section 935 of the Criminal Code. It was also his right to challenge peremptorily twenty jurors, but as the record shows, he used only eighteen of these challenges. I agree with what has been said on this point by the Court of Appeal for Manitoba (1) and also with the judgment of the same Court rendered in 1925 in *Rex* v. *Luparello* (2) which has been followed.

The British Columbia case of *Rex* v. *Chong Sam Bow* (3) conflicts with the *Luparello* case (2) and it is overruled. It is useless to deal with the case of *Rex* v. *Wong O Sang* (4) because there, the procedure was governed by section 960 of the Criminal Code, which is not the case here.

On the whole, the appeal fails and should be dismissed.

(1) [1948] 2 W.W.R. 161.
(2) 25 C.C.C. 24.
(3) (1925) 1 W.W.R. 240.
(4) (1924) 3 W.W.R. 45.

1948

VESCIO
v.
THE KING

Rand J.

The judgment of Kerwin, Rand and Kellock JJ. was delivered by

RAND J.: Two grounds are taken in this appeal and I will deal with that of the constitution of the jury first. The contention is this: that where, in a capital case, after part of the evidence has been offered, the jury, because of the illness of a juror, is discharged, the second panel must not include any member of the first. It is put on two considerations: one, that the purpose underlying section 945, which provides against the separation of the jury in certain circumstances, would be defeated; and the other that the effect on the minds of the jurors made by the evidence given must be taken to be of the same objectionable character as if they had heard the case in full, had disagreed and been discharged, in which case section 960 directing a "new" jury would in principle govern.

On the point there is a conflict of authority. In *Rex* v. *Chong Sam Bow* (1), the Appeal Court of British Columbia acted on the latter ground and following *Rex* v. *Wong Sang* (2), held the jury defective. In *Rex* v. *Luparello* (3), the contrary view was taken by the Court of Appeal of Manitoba, Richards, J. A. dissenting, which in the case before us was followed. The point seems to have been similarly dealt with in *Rex* v. *Gaffin* (4), by the Supreme Court of Nova Scotia.

It is indisputable that at common law in such circumstances the remaining members of the jury were competent to serve on the second jury: *Rex* v. *Edwards* (5), in which before all of the judges except Lawrence, J., (1812), the rule was assumed: and for the same point only, *Rex* v. *Lawrence* (6). The analogy of a disagreement, whatever may be the true interpretation of section 960, therefore disappears. The one, if not the primary, object of section 945 is to keep the jurors free from being tampered with, but obviously that ends when they have ceased to be jurors. No doubt it may be desirable also that their minds be clear of all matter except what is laid before them in court; but the remaining members of the array summoned are free to read and listen at large; and to concede the

(1) (1925) 1 W.W.R. 240.
(2) (1924) 3 W.W.R. 45.
(3) (1915) 25 M.R. 233.
(4) (1904) 8 C.C.C. 194
(5) Russel & Ryans Crown Cases 224.
(6) (1909) 25 T.L.R. 374.

competency of the latter to the second panel and to deny it to the remaining members of the first would be wholly illogical. And where, as here, the discharge and the reconstitution of the jury took place within a period of fifteen minutes, any substance in the point vanishes.

The next ground is of some difficulty. I agree with the dissenting judgments of Adamson, J.A. and Dysart, J.A. (1) that the Chief Justice at trial should have heard Mr. McMurray. There seems to have been an initial misconception both of the nature of the action of appointing counsel for an accused and of the right of the accused thereafter in relation to him. To speak through counsel is the privilege of the client, and such an appointment is made in circumstances in which for various reasons the accused, assuming him to be of sufficient understanding, though he desires the benefit of counsel, is not in a position to obtain it; and in the interest of justice counsel should and will be assigned for his assistance. The desire of the accused if not expressly indicated can ordinarily be presumed, but if there is any doubt about it, the court should inquire: *Reg.* v. *Yscuado* (2), where Erle J. said at page 387: "I do not think I have any authority to assign counsel to a prisoner without his consent. I should be very glad if I could do so but by allowing counsel to appear without any communication with the prisoner and without his sanction, I might be authorizing a defence which the prisoner himself would never have made and yet for which he must be responsible." And certainly there is no statutory rule that defence by counsel is a necessary part of the machinery of trial. In fact the contrary appears from what is contemplated by section 944(2) of the Criminal Code where it uses the language ". . . or the accused, if he is not defended by counsel, shall be allowed."

Here, the accused, before Major, J., was represented by counsel who had already conducted on his behalf the preliminary inquiry. There was nothing so far to indicate any obstacle to his defence in the ordinary way. But immediately on the withdrawal of Mr. Walsh—because of the refusal of his motion to traverse the trial to the next sittings —Major, J., without reference to the accused, intimated his duty and intention, should Mr. Walsh persist in his

(1) [1948] 2 W.W.R. 161. (2) (1854) 6 Cox C.C. 386.

1948

VESCIO v. THE KING

Rand J.

withdrawal, to appoint counsel. Surely in that situation nothing could be clearer than that the wishes of the accused should have been consulted.

Then, when the arraignment was moved, Mr. Walsh's partner, Mr. McMurray, K.C. rose, stating that "he was appearing for the accused, having been retained by the family." The Chief Justice answered that he could not hear him because counsel had already been appointed by the court. That I cannot but think was both unfortunate and erroneous. The appearance of Mr. McMurray was an unmistakable intimation that for some purpose at least he had been retained by the accused and that so far Mr. Ross, K.C., who had been appointed "senior" counsel had not been accepted as sole counsel. If Mr. McMurray under his retainer, which I accept as having been made with the consent and approval of the accused, had intended to proceed for all purposes of the defence, I should have had great difficulty in finding that the refusal to hear him had not vitiated all the subsequent proceedings. It is argued that we must infer a general retainer to defend and that we cannot for any purpose go behind the language "I appear for the accused"; but with such a plea as that the latter was deprived of his right to make full defence, we must deal with the realities of what took place and not merely with the formality of the external circumstances: we are therefore entitled to inquire into the extent of the retainer, and into the intention of Mr. McMurray.

We have the undisputed statement of Mr. Kay that Mr. McMurray stated to him immediately before he rose that he was making a motion to traverse the trial, and that if he were not successful, Mr. Walsh would not act with Mr. Ross. Mr. Kay states further, and again without challenge, that nothing indicated in the slightest degree that Mr. McMurray would himself in any circumstances have gone on with the defence; and Mr. Walsh very frankly in the course of his able argument placed himself on the bare formal fact of the refusal to hear Mr. McMurray, regardless of the nature of the motion Mr. McMurray intended to make or of his intention in case of an adverse decision or of the extent or purpose of his retainer. Mr. McMurray's appearance, therefore, appears to have been in fact, as the Chief Justice says he understood it, to make the motion

for postponement and that only. But even if the facts do not compel us so to interpret his intervention, there can be no doubt whatever that his participation in the proceedings would have ended with the motion, if it had been refused. If this were not so, we would have the assurance of another intention on Mr. McMurray's part.

We know likewise, beyond any doubt, that a motion for traverse would in fact have been refused. It had been denied by Major, J. at the opening of the sittings: immediately after the abortive trial and when the circumstances were most favourable, on the application of Mr. Ross, it had been rejected by the Chief Justice; and we have both the statement of the latter made immediately afterwards, that "this case is going on", and in his report, that he should have refused the motion had it been made by Mr. McMurray.

Now, in these circumstances, what appears externally as an error of cardinal importance, is seen to be in reality of an entirely different character; and it must be taken as beyond doubt that upon the conclusion of the motion, the accused would have been in precisely the same position as when Mr. Walsh withdrew. No suggestion has been made either that other counsel would have been engaged or that the accused, aged twenty-one years, would have defended himself; and although the ruling of the Chief Justice was no doubt a coercive circumstance on the mind of the accused, yet in fact it played no part in denying him the assistance of counsel of his choice. The contention is that the trial in fact was what it was because of the refusal to hear Mr. McMurray. The circumstances show conclusively that that was not so; the circumstances of the trial would have been precisely the same had the motion been heard; and the effective cause of the trial as it was carried out was the voluntary withdrawal of counsel chosen by the accused. There was no suggestion either of any failure or inability in confidential co-operation between the accused and Mr. Ross, an experienced counsel, and no intimation of any sort before the Chief Justice at any time during the trial that he was unwanted.

As against this error, there are in the case unchallengeable facts so convincing and conclusive that it would seem a mockery of the practical administration of justice to require

1948

VESCIO v. THE KING

Rand J.

their repetition in a new trial. Notwithstanding that, however, had the actualities not been as indubitably they were, the vital importance of administering the criminal law not only according to the procedure laid down by law, but so that it would not only be *but appear to be* in accordance with our basic conceptions of justice, would have compelled me to conclude that that repetition must be made. But the facts, properly understood, satisfy that fundamental obligation.

I should add that no point is made connected with any ground on which the withdrawal of Mr. Walsh was based. In fact all grounds mentioned in the Notice of Appeal—and there were twenty-nine of them—other than those against the charge dealing with accident, drunkenness and provocation and as to intent, and those with which I have dealt, were abandoned in the court below. The appeal must therefore be dismissed.

LOCKE J.:—The facts in connection with the withdrawal of Mr. Walsh, the appointment of Mr. Ross, K.C. and of the appearance of Mr. McMurray, K.C. before the Chief Justice at the opening of the Assizes, have been stated in the dissenting judgments in the Court of Appeal. There are, in my opinion, some additional facts to be considered in deciding the issues raised on this appeal.

The appellant, a convict serving a sentence for robbery in the Stony Mountain Penitentiary, was taken in charge by the Police authorities on the charge of murdering the boy George Robert Smith on August 8, 1947, and within a few days thereafter retained Mr. Walsh to defend him. Mr. Walsh was thus engaged on the matter for something more than two months before the accused was brought before Major, J. on October 21st, and during that time had represented the accused at the lengthy preliminary hearing during the course of which the confession was admitted in evidence, and was thoroughly familiar with the matter and had had ample time to make whatever preparations were necessary for the defence. When the case was spoken to before Major, J. at the opening of the Fall Assizes on October 21st, counsel for the prisoner asked that it be traversed to the next Assizes on the ground that widespread publicity had been given by the Winnipeg newspapers to

the fact that the prisoner had made a confession and to a statement made by the Chief of Police of Winnipeg that the bullet which had killed the boy had been fired from a revolver found in the possession of the accused, that counsel expected that the evidence of the ballistic expert called at the preliminary by the Crown would be refuted by an expert on behalf of the defence, and that he would require two or three months to prepare the defence. Mr. Walsh then stated that unless the trial Judge adjourned the case until the following January he would withdraw from the defence. The learned Judge's decision on the motion for a traverse was given on the following morning whereupon Mr. Walsh announced that he must withdraw from the defence and when the trial Judge questioned his right to do so insisted that he had the right to withdraw and proceeded to do so. I think it must be assumed that Mr. Walsh who had been paid a retainer by the accused and apparently undertaken to defend him withdrew with the consent of his client. In England the employment of a barrister is a purely honourary one in the sense that it confers on him no legal right to remuneration for his services but in Manitoba, by virtue of section 72 of *The Law Society Act,* R.S.M. 1940, cap. 111, a barrister may sue for his fees on the footing that an enforceable contract exists between him and his client. On October 22nd when Mr. Walsh announced his withdrawal, Major, J. stated that if the accused did not appoint counsel within a day or two the Court would appoint someone and it was on the day following, when a sister of the accused stated in Court that they did not want any other counsel than Mr. Walsh, that he informed the accused that he had appointed Mr. Ross, K.C. to act as counsel for him and on the following morning Mr. Ross appeared and on behalf of the accused asked that the arraignment be deferred until the 17th of November, the day fixed by the presiding Judge for the commencement of the trial. While the sister of the accused had said on October 23rd in the presence of the prisoner that they did not want to have any other counsel but Mr. Walsh, when the trial opened twenty-four days later Mr. Ross appeared and stated that the defence was prepared to proceed. In the interval since his appointment Mr. Ross had on the prisoner's behalf asked that he be examined by

1948

VESCIO
v.
THE KING

Locke J.

a psychiatrist to determine whether he was sane and this had been done. Either on the evening of November 16th or the following morning before Court Mr. McMurray informed Mr. Ross that he proposed to make an application at the opening of the trial, and on that morning he also spoke to counsel for the Crown in Court informing him that he had been retained by the family of the accused and wished to make another application for a traverse of the case to the next Assizes. According to Mr. Kay's statement he thereupon asked Mr. McMurray if in the event of the application being refused he intended to have his partner, Mr. Walsh, act with Mr. Ross as second counsel: the answer was in the negative and Mr. Kay understood that neither Mr. McMurray nor Mr. Walsh intended to take any part in the proceedings if the application was refused. Nothing was said by the prisoner or by Mr. McMurray on his behalf to the effect that he did not desire the services of Mr. Ross, of which he had already availed himself, and during the ensuing trial which lasted seven days Mr. Ross actively conducted the defence, apparently with the prisoner's approval and consent.

The Notice of Appeal to the Court of Appeal for Manitoba (1) stated twenty-six grounds of objection, these including a contention that a miscarriage of justice occurred "when counsel was appointed on my behalf that I did not wish and whose services I did not desire and whose appointment I did not sanction", and further that "I insisted that a witness should be brought to my trial from Verdun, Que. but my desires were constantly overridden by the said counsel appointed by the Court." It was open to the accused under section 27(3) of *The Court of Appeal Act*, R.S.M. 1940, cap. 40, to have obtained the leave of the Court of Appeal to prove by affidavit or otherwise the truth of the contention that he had not in fact accepted the services of Mr. Ross, or to support his complaint as to the witness, but nothing of this nature was done and the complaint against the manner in which the defence had been conducted was abandoned in that Court (1).

It is of course fundamental that a person accused of a crime is entitled to make full answer and defence either personally or by counsel of his choice and that an accused

(1) [1948] 2 W.W.R. 161.

may decline the services of counsel nominated by the Court. While Mr. Justice Major had announced his intention of appointing counsel, I have no doubt that the accused was made aware by Mr. Walsh, in whose presence the announcement had been made on October 22nd, that this meant that the services of a counsel nominated and paid by the Crown would be made available to him and that he might reject the services of anyone so nominated. If he was not then so advised I would assume that this information was given to him by his family after they consulted Mr. McMurray, K.C. No doubt had the appellant informed Mr. Ross that he did not desire his services the latter would have withdrawn at once. Had the appellant so informed Mr. Ross I would assume that the experienced counsel who represented him before the Court of Appeal (1) would have obtained leave to prove that fact by affidavit before that Court (1) and the fact that this was not done indicates to me that nothing of the kind occurred. Apart from the fact that, as shown by the trial judge's report, Mr. Ross acted for the appellant in arranging that he be examined as to his sanity, to assume that he stated to the Court that the defence was prepared to proceed when the trial opened in the Assizes without having thoroughly discussed the matter with the accused and made all proper preparations for the defence, would be to draw an inference which I consider to be directly contrary to the fact. While the prisoner when asked by the clerk whether he was ready for his trial said that he was not, it was for his counsel, so long as he retained his services, to say whether the defence was ready. The prisoner had apparently been a consenting party to the withdrawal of Mr. Walsh some twenty-four days earlier after the application to traverse the case to the next Assizes had been refused and the answer made by him was apparently merely another attempt on his part to obtain a further adjournment. Apart from the fact that Mr. Ross stated that the defence was ready to proceed, an examination of the evidence makes it apparent that ample time for preparation had been given. The prisoner had signed a confession in which he admitted having accosted the boy on the street at night, pointing a gun at him, forcing him into a back lane and shooting the

(1) [1948] 1 W.W.R. 161.

1948

VESCIO
v.
THE KING

Locke J.

child when he attempted to escape. The signed statement, however, attributed the discharge of the gun to accident, claiming that the accused had slipped on some clay in the lane when the boy attempted to get away from him and pulled the trigger by mistake. Medical evidence given at the trial showed that in addition to the fatal wound caused by the bullet which passed through his body the boy had been struck a heavy blow on the head fracturing his skull, the evidence indicating that this blow had been struck after the bullet wound had been inflicted. The confession had been made voluntarily by the accused and had been admitted in evidence at the preliminary hearing and it must have been apparent to counsel for the accused that it would be admitted at the trial. It is to be noted that while one of the grounds of appeal was that evidence had been improperly admitted at the trial the point was not considered worthy of argument in the Court of Appeal (1) and, when counsel for the Crown stated at the commencement of his argument in that Court (1) that he understood this ground of appeal had been abandoned, there was no dissent by counsel for the accused. In addition to this evidence a statement made by the accused to his brother and sister while he was in custody in the Winnipeg Police Station, to the effect that he had confessed and had done so voluntarily, which had been overheard, was given in evidence both at the preliminary and at the trial. While in view of the evidence afforded by the confession and this statement it would appear the evidence was unnecessary, the Crown called a ballistic expert, both at the preliminary hearing and at the trial, who gave evidence that the bullet found in the ground near the boy's body had been fired from a revolver found in the possession of the prisoner when he was arrested in Port Arthur on the charge of robbery. It is apparent that even if there were a ballistic expert who would have given evidence contradicting this Crown witness it would have been pointless to call him. The sanity of the prisoner had been enquired into at the instance of Mr. Ross and he had been found sane. The crime had been committed at night and there were no eye witnesses. In these circumstances it cannot, I think, be seriously contended that twenty-four days was

(1) [1948] 2 W.W.R. 161.

not ample time for counsel to prepare the defence. In my opinion there can be no well founded criticism of the course followed by Mr. Justice Major in making the services of Mr. Ross available to the prisoner and in directing that the trial proceed twenty-four days after that date, or by Chief Justice Williams in accepting the answer of Mr. Ross on November 17th that the defence was ready and directing that the trial proceed.

When Mr. McMurray appeared at the opening of the trial he stated that he was appearing "on behalf of the accused, retained by his family" and asked to be permitted to state the nature of the application he proposed to make. In the report made by the Chief Justice to the Court of Appeal (1) he states that he did not understand that Mr. McMurray was seeking to defend the prisoner and that he took from this statement that counsel was appearing for the clients who had retained him and not for the accused. I think it was unfortunate, assuming as I do that Mr. McMurray had been retained to make the application by the accused, that he did not make this clear to the learned trial Judge. Counsel may speak on behalf of a prisoner only if authorized by him to do so but the retainer would be none the less that of the prisoner if it had been made on his behalf by some member of his family on his direction, which presumably was the case here. Had the question been asked whether Mr. McMurray was authorized by the prisoner the position would have been made perfectly clear and the only matter then to be decided would be whether, in view of the fact that an application to traverse the case had been made and dismissed by Major, J., the Chief Justice would entertain another motion to be made apparently without filing any material to support it. If Mr. McMurray had said that he proposed to undertake the defence of the accused and either dispense with the services of Mr. Ross or to act with him, he would no doubt have been heard. It has been made quite clear that the only application which he proposed to make was that the case be traversed to the next Assizes and that he did not intend to take any part in the defence if the motion was refused and we are informed by the judge's report that any such motion would have been refused. In my opinion, if

(1) [1948] 2 W.W.R. 161.

1948

VESCIO
v.
THE KING

Rand J.

it was error on the part of the learned Chief Justice in declining to permit Mr. McMurray to make this motion, it has been shown affirmatively by the Crown that no substantial wrong or miscarriage of justice has actually occurred and the provisions of section 1014(2) of the Criminal Code should be applied.

A further ground of appeal urged on behalf of the appellant is that the jury was not properly constituted. As to this I agree with my brother Rand.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the Appellant: *McMurray, Greschuk, Walsh, Micay, Molloy, Denaburg & McDonald.*

Solicitor for the respondent: *Hon. J. O. McLenaghen.*

1948

*Oct. 18, 19, 20

1949

*Jan. 7

JOHN PRESTON .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Arson—Accessory—Aiding and abetting—Active part—Presence during commission of crime—Failure to leave or protest—Charge to jury—Duty to review evidence—Comments and suggestions by trial judge—Criminal Code, ss. 69, 511, 1014(2).

Appellant was charged with having set fire to a school. At trial before a jury, the contention of the Crown was that (*a*) he had actually set the fire, or (*b*) he had formed a common intent with one Bryan to burn the school, or (*c*) he had aided, abetted, counselled or procured Bryan to set the fire pursuant to section 69 of the Criminal Code. On the offence of aiding and abetting, there was evidence that they had a conversation respecting the burning of schools, that he drove with Bryan to the scene of the crime, that some gasoline was purchased and that accused made statements in a restaurant to the effect that they were out to burn schools. Although accused was there when the crime was committed, he alleged that he was unaware of the intention of Bryan to fire the building, took no active part and remained in the car. The majority of the Court of Appeal affirmed the conviction.

*PRESENT: Rinfret C.J. and Kerwin, Kellock, Estey and Locke JJ.

Held, Kellock and Locke JJ. dissenting, that the trial judge's charge, as a whole, properly directed the jury that they must find some act of participation on the part of the accused before they can find him guilty of aiding and abetting.

Held also, that the trial judge has a duty to review the evidence in relation to the issues and he has the privilege of making such comments and suggestions as will be of assistance to the jury, provided that he does not seek to impose his views upon nor in any way relieve the jury of their responsibility to find the facts.

Per Kellock and Locke JJ. (dissenting): The portion of the charge dealing with aiding and abetting tended to lead the jury to understand that mere presence at the scene of the crime, the failure of the accused to get out of the car earlier in the evening when his companion had made some general statements to the effect that he approved the burning of schools and his failure to telephone the police, constituted aiding and abetting and there should be a new trial.

Mohun's case (1693) Holt K.B. 479; *Reg.* v. *Coney* (1882) 8 Q.B.D. 534 and *Rex* v. *O'Donnell* (1917) 12 Cr. App. R. 219 referred to.

APPEAL from the judgment of the Court of Appeal for British Columbia dismissing (O'Halloran J.A. dissenting) the appellant's appeal from his conviction, at trial before Manson J. and a jury, on a charge of having set fire to a school.

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

Thomas F. Hurley for the appellant.

George R. McQuarrie for the respondent.

The judgment of the Chief Justice and Kerwin and Estey, JJ. was delivered by:—

ESTEY J.:—The appellant and Nick Bryan were charged jointly with having set fire to the Queen Elizabeth School House on Lulu Island in New Westminster, January 31, 1948, contrary to sec. 511 of the Criminal Code. At their trial before a jury, after a number of witnesses had been heard, the learned trial Judge directed that the case be continued against the appellant only and that of Bryan adjourned. The appellant was convicted and upon his appeal to the Court of Appeal in British Columbia the majority of the learned Judges in that Court affirmed the

1949

PRESTON v. THE KING

Estey J.

conviction. Mr. Justice O'Halloran dissented and by virtue thereof the appellant appeals to this Court under sec. 1023 of the Criminal Code.

The evidence left no doubt but that either appellant or Bryan set fire to the Queen Elizabeth School. There was evidence upon which the jury might have found that the appellant actually set the fire. However, the main contention of the Crown was that appellant and Bryan had formed a common intention, either in Vancouver or prior to the setting of the fire, to burn one or more school houses; or alternatively, if that common intention did not exist and Bryan set the fire that the appellant had aided, abetted, counselled or procured Bryan to set the fire and was, therefore, under the provisions of sec. 69 of the Criminal Code, a party to the offence.

The evidence established that the Queen Elizabeth School was set on fire about 11.30 Saturday night, January 31, 1948, by either the appellant or Nick Bryan. These two had been together from the time they met in Vancouver, at the office where Nick Bryan was employed, at about 4.40 that afternoon, until they were apprehended in Bryan's automobile a few minutes after the burning of the Queen Elizabeth School. The contention on behalf of the appellant was that he knew Bryan only as a real estate agent and that they had set out from Vancouver at about 8.45 that night in order that Bryan might show him some properties in or near New Westminster that the appellant might accept at least in part payment for a rooming house, which he deposed he owned in Vancouver and which he had listed for sale with Bryan; that he was not in any way a party to setting fire to the school house.

Appellant in giving evidence on his own behalf stated that on the way to New Westminster they stopped at a filling station where Bryan purchased a can of gasoline. This can, when purchased at the filling station, was by the attendant placed just behind the front seat in Bryan's two-door coach while the appellant was sitting in the front seat. He deposed that he did not see that can so placed nor the bottle of motor oil that the attendant said he saw either appellant or Bryan pass over the front seat. Eventually Bryan's car was parked opposite the Queen Elizabeth School, the can of gasoline purchased at the filling station

taken therefrom and the fire set. Hamilton, driving a taxi with three passengers, came up in time to see the party who set the fire go from the school house, get into the automobile and drive away at an increasing speed. Hamilton pursued them and notified the police.

The issues were defined and the evidence reviewed in relation thereto by the learned trial Judge. The objections to his charge in the dissenting opinion of Mr. Justice O'Halloran are set out in six paragraphs of the formal judgment.

First, that the charge confused in the minds of the jury the evidence relating to the appellant as the one who actually set the fire and that of one aiding and abetting, as the learned trial Judge treated the case against the appellant as if it were one of common intention from the outset and that it did not matter whether Bryan or the appellant set the fire. The evidence upon which the jury might have found the appellant guilty of having actually set the fire was very short and will be more fully discussed later. It was reviewed by the learned trial Judge but not in any way did he relate it to or discuss it in relation to the appellant as one who was acting pursuant to a common intent (although if he did set the fire it might have been in carrying out a common intent), or as one who aided and abetted. More than once the learned trial Judge made it plain that the appellant could be found guilty as one aiding, abetting, counselling and procuring only if they found that Bryan actually set the fire. It is possible in explaining and discussing aiding, abetting, counselling and procuring that the learned trial Judge interposed remarks relative to the main contention of the Crown, that the appellant and Bryan were acting pursuant to a common intent, with such emphasis that the jury may have concluded, in order to find the appellant did aid, abet, counsel or procure, they must find that he had a common intention with Bryan up to and at the time of the setting of the fire. Instructions to that effect would be in error. In order to find the appellant guilty of aiding, abetting, counselling or procuring, it is only necessary to show that he understood what was taking place and by some act on his part encouraged or assisted in the attainment thereof. *Re Bernard*

1949

PRESTON v. THE KING

Estey J.

Albert Kupferberg (1). In so far, however, as such confusion may have been created in this regard, it favoured rather than prejudiced the appellant.

The second ground is that the learned trial Judge did not put to the jury the weaknesses of the evidence of the Crown witnesses relative to the appellant starting the fire instead of Bryan. The only evidence indicating that the appellant had set the fire was that of the two ladies in the back seat of Hamilton's taxi. They said the man who ran from the school entered the automobile on the side opposite to that of the driver, or the side upon which appellant was seated. The learned trial Judge in referring to this evidence not only stated that it was suggested one of them had made a contrary statement at the preliminary hearing, although that was not proved, but pointed out that Hamilton's evidence was to the effect that the man had entered the driver's side, and commented favourably on his credibility. He also referred to the other man in the taxi who, while he had seen the man running, had not observed upon which side he entered the automobile. It would appear that the learned trial Judge not only indicated the possible weakness in the Crown's evidence, but rather emphasized Hamilton's contrary evidence.

The third ground of dissent is on the basis of the omission of the learned trial Judge to instruct the jury that mere passive presence is not aiding and abetting. In discussing the meaning of aiding and abetting the learned Judge plainly indicated that in order to find the appellant guilty of aiding, abetting, counselling or procuring they must find that he took some active part. He emphasized this when dealing with the defence, which at one point he summarized as follows: "I'm not guilty. I hadn't anything whatever to do with this. The other man was wholly responsible. I was just an unwilling passenger." Other statements to like effect in his charge are quoted in dealing with the fifth ground. In referring to a slightly different matter, but also important in this connection, the learned trial Judge pointed out that the Crown directed the attention of the jury to the active acts rather than to the mere acts of omission on appellant's part. Mere presence does not constitute aiding and abetting but presence under

(1) (1918) 13 Cr. App. R. 166.

certain circumstances may itself be evidence thereof. *Mohun's Case* (1); *Reg.* v. *Young* (2); *The Queen* v. *Coney* (3). In this case the appellant admitted and explained his presence. If the jury accepted his explanation as above summarized then the effect of the learned Judge's direction was that they should find the appellant not guilty. In determining whether they would accept his explanation the jury would properly take into account all the facts, including the conversations relative to burning schools, first at the office in Vancouver and later in the evening, the protests and threats which the appellant deposed he had made to Bryan, as well as his assuring Bryan a short time before the fire was set that if the latter did anything wrong he would tell the truth. Under the circumstances of this case the jury would take into account appellant's conduct in relation to the other events during the evening and it was the duty of the learned trial Judge in reviewing the evidence to place before the jury both the contentions of the appellant and of the Crown. If appellant's explanation was not believed by the jury there was evidence in addition to his mere presence upon which they might well conclude that he was guilty of aiding, abetting, counselling or procuring. In this regard the charge to the jury read as a whole was to the effect that before the jury could find the appellant guilty of aiding, abetting, counselling or procuring they must be satisfied of some act of participation on his part. In relation to the evidence and the issues the charge in this regard is not subject to exception on the part of the appellant.

The fourth ground of dissent is based upon the contention that the learned trial Judge neglected to charge the jury that if they accepted the evidence of the appellant he was entitled to be acquitted. These precise words were not used but the charge as a whole, and particularly those portions contrasting the evidence of appellant with that of the Crown, would leave but one impression upon the minds of the jury that if they believed appellant's evidence to the effect that he was throughout concerned only with a real estate deal and was but a passenger who never realized what Bryan had in mind, then and in that event

(1) (1693) Holt K.B. 479; 90 E.R. 1164.

(2) (1838) 8 Car. & P. 64; 173 E.R. 655.

(3) (1882) 8 Q.B.D. 534.

1949

PRESTON v. THE KING

Estey J.

he was not guilty of the offence as charged. In this regard it is appropriate to quote the language of the Lord Chief Justice speaking for the Court of Criminal Appeal in *Rex* v. *Stoddart* (1):

> Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether such topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice.

The charge upon this point left no doubt in the minds of the jury that they were to find the appellant not guilty unless they were satisfied that he either set the fire, acted throughout with a common intent or aided, abetted, counselled or procured Bryan to commit the offence.

Counsel for the appellant at the hearing of this appeal particularly stressed the fifth ground of dissent—to the effect that the charge as a whole suggested the guilt of appellant, discounted his evidence, minimized his real defence and did not state his contention in a way that brought out the real force and effect of his defence. The learned trial Judge defined the issues and reviewed the evidence in relation thereto. He reviewed the appellant's evidence and concisely stated the contention of the defence. In reviewing the latter's evidence he pointed out that as a witness the appellant was an interested party and discussed his evidence in relation to what might be expected under all of the circumstances. The learned Judge was not apt in one of his comparisons, but he went on immediately to state: "Just because this man has an interest, you must not for a moment say his story is untrue. It may be true, that is to say, apart from other circumstances, the fact that he tells it doesn't render it untrue." He reviewed the history of the appellant as he, himself, had stated it, which set forth a commendable record, including a reference to the fact that the appellant did not adhere to the Dukhobor faith and was not a member of the Sons of Freedom. The learned trial Judge concluded his review: "Now, there is the summary of it. 'I had no common intent with Bryan to burn this school. I did not take any active part in

(1) (1909) 2 Cr. App. R. 217 at 246.

setting a fire.' That is the defence." Then when giving further instructions, he again stated that the appellant says: "I'm entirely innocent. True, I was there all the time and I made these statements in the restaurant and all that, but despite all that, I wasn't in it. I was just an unwilling spectator of what occurred." Appellant's evidence was directed to two main points (1) Bryan set the fire and (2) that appellant did not realize the possibility of Bryan setting a fire and was in no way a party thereto. The foregoing summary briefly, effectively and forcefully emphasizes the real defence. The learned trial Judge unfortunately did state that the Crown could not have called Bryan as a witness, but here again he went on to point out that they were not trying Bryan, that Preston alone was before the Court and made it plain that it was only the evidence before them that the jury could take cognizance of.

Counsel for the appellant took exception to the fact that the learned trial Judge expressed the view that Bryan in making the statement at appellant's rooming house that "the house is going to be sold tonight" in the presence of Mrs. Dodderidge sounded like liquor and thereby depreciated that evidence to the prejudice of the appellant. The evidence disclosed that they had been drinking whiskey and beer and this comment on the part of the learned trial Judge was but an expression of his view, which the jury need not have accepted.

It is the duty of a trial Judge to review the evidence in relation to the issues and it is his privilege to make such comments and suggestions as will be of assistance to the jury in arriving at their verdict, always subject to this, that he must not seek to impose his views upon nor in any way relieve the jury of their responsibility to find the facts. *Rex* v. *O'Donnell* (1). Throughout he impressed upon the jury that the facts were to be found by them and that in so doing they should not act upon any view he might express unless they agreed therewith, and further, that if he neglected to mention any portion of the evidence they should, nevertheless, take it into consideration in arriving at their verdict.

The sixth ground of dissent is to the effect that the learned trial Judge did not instruct the jury that the

(1) (1917) 12 Cr. App. R. 219.

1949

PRESTON v. THE KING

Estey J.

evidence against the appellant was inferential and entirely circumstantial, that his defence was consistent with truth and that of aiding and abetting pointed to a rational hypothesis of innocence. The learned trial Judge correctly pointed out that the evidence of aiding and abetting was not inferential and entirely circumstantial. Apart from any other item of evidence, the remarks in the restaurant constituted direct evidence against the appellant. Notwithstanding this, the learned trial Judge did instruct the jury with regard to circumstantial evidence and that if their verdict depended upon circumstantial evidence, he stated: "Before you can find the prisoner 'guilty' on circumstantial evidence, you must be satisfied not only that the circumstances proved are consistent with his having committed the act, but you must also be satisfied that the facts are such to be inconsistent with any other rational conclusion than that the prisoner is the guilty person." This language is almost identical with that in *Hodge's* Case (1) which has been repeatedly approved. *McLean* v. *The King* (2).

The foregoing objections cannot, with respect, be supported. The charge of the learned trial Judge read as a whole set forth the issues and reviewed the facts in relation thereto in a manner that placed the case for the defence fully and fairly before the jury.

The appeal should be dismissed.

KELLOCK J. (dissenting):—I desire to refer to two only of the grounds of the dissenting judgment of O'Halloran J.A. The third, with which I shall first deal, is as follows:

3. The learned Judge did not instruct the jury upon the legal meaning of aiding and abetting directed to the evidence presented by the Crown and the defence; for example, he did not instruct the jury that passive presence is not aiding and abetting.

The jury, having deliberated some two hours after having been charged by the learned trial judge, returned to the court room, the foreman stating that they would like the court to explain to them the meaning of the word "accessory".

Thereupon the learned trial judge told them that an accessory before the fact was a person "who does or omits

(1) (1838) 2 Lewin C.C. 227; 168 E.R. 1136.

(2) [1933] S.C.R. 688.

an act for the purpose of aiding anyone to commit the offence; abets, that is assists or encourages any person in the commission of the offence; or who counsels or procures any person to commit the offence."

In elaboration of that he said that if they were satisfied that Preston and Bryan set out with a common intention of burning a school (subsequently he told them it was not necessary that the two had had the common intention from the outset) and that Preston "assisted in any way either by active part or by *omission*" he would be an accessory and as guilty as the man who actually lit the match. The learned judge then said that he did not recall that there was anything in the way of omission which had been suggested but that the Crown had directed attention to Preston's "active acts". Very shortly after so stating, however, he said:

> Then the Crown directs your attention to the fact that he didn't do anything about it despite the statements of this man (Bryan) out across the bridge beside a school, and that he didn't protest or do anything at the time of the actual setting of the fire. They say, "Look at his conduct. Is that the conduct of an innocent man?"

In his original charge he had referred to this matter as follows:

> I perhaps missed one thing in presenting the Crown's case. The Crown laid stress on the point—that point was well enough taken by Mr. McQuarrie—The Crown says "Well, why did this man not get out of the car and leave him, particularly when they came back to Westminster from across the Fraser River bridge?" Why in the world didn't he say "Bryan, I don't like the way you are behaving". Or, why didn't he telephone the police? The Crown makes that point. You will have it in mind.

While it was perfectly in order for the learned trial judge to direct the jury's attention to the appellant's conduct as a whole for the purpose of determining what weight they should give to his evidence, I think that when it came to an explanation of the meaning of abetting in relation to the evidence the jury may well have been misled into an understanding that they might find in the things the appellant did not do, and which were enumerated to them, evidence which *in itself* amounted to abetting. In this I think there was error.

To constitute a person a party to a criminal offence within the meaning of section 69 (1) (*c*) of the Criminal Code, it is necessary that there be "participation" in the crime and although a person is present while a crime is

1949

PRESTON v. THE KING

Kellock J.

being committed, yet if he takes no part in it and does not act in concert with those who commit it, he is not a party merely because "he does not endeavour to prevent the felony or apprehend the felon"; per Cave J. in the *Queen* v. *Coney* (1). That learned judge quoted from "Foster's Crown Law", where the author states that "if A happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory". I take it that the word "criminal" is here used in the sense of "morally reprehensible".

Hawkins J. in the same case (1) said at 557:

> It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime.

The omission of the appellant to do any of the things to which the learned trial judge referred on his charge, were not, in themselves, evidence of abetting. In my opinion the jury may well have understood the contrary from what was said and have been influenced by it. I do not find it possible in the circumstances of this case to apply the provisions of section 1014 (2) of the Criminal Code.

The first ground of dissent is:

> 1. The learned Judge's charge led naturally to confuse in the minds of the jury, the evidence relating to the appellant setting the fire with the evidence relating to his aiding and abetting, in that the learned Judge treated the case against the appellant as if it were one of common enterprise and common intention from the outset, and instructed the jury it did not matter whether Bryan or the appellant started the fire.

With respect to this what is said by A. T. Lawrence J. in giving the judgment of the Court in *Rex* v. *Kupferberg* (2), is relevant. That learned judge said:

> To prove conspiracy against the appellant, it is necessary that an agreement, express or implied, should be proved to the satisfaction of the jury, but it is quite unnecessary to prove such agreement where the charge is one of aiding and abetting. In the latter case, it is only necessary to show that the appellant appreciated what was going on and did something to further it.

I do not repeat all that was said by the learned trial judge in the case at bar with respect to "common inten-

(1) (1882) 8 Q.B.D. 534 at 539.

(2) (1918) 13 Cr. App. R. 166 at 168.

tion". I think that the distinction above described was not very clearly explained to the jury with relation to the facts as they might find them. Further, I think that subsection 2 of section 69 of the Code was irrelevant and the repeated references to it could only have tended to confuse. I would not however, having regard to the charge as a whole, have thought a new trial necessary on this ground alone.

I would therefore allow the appeal and direct a new trial.

LOCKE J. (dissenting):—The appellant was charged that "he did on the 31st day of January, 1948, with Nick Bryan, unlawfully and wilfully without legal justification or excuse and without colour of right, set fire to a certain building, to wit, the Queen Elizabeth School belonging to the Corporation of the City of New Westminster." The evidence enabled the prosecution to contend that (*a*) it was Preston who had actually fired the building, or (*b*) in advance of the commission of the offence he had conspired or agreed with Bryan to fire the school and that it was the latter who had actually set the blaze, or (*c*) he had, within the meaning of sec. 69(*c*) of the Criminal Code, abetted Bryan in committing the offence or conceivably as a branch of this latter aspect of the case that he had done some act for the purpose of aiding Bryan to commit the offence, or counselled or procured him to do so within subss. (*b*) and (*d*) of sec. 69.

It is sufficient to say without reviewing the evidence that there was some evidence upon which the jury might have found under (*a*) that the appellant had actually fired the building. There was also evidence upon which they might have found that prior to the time when the offence was actually committed he had conspired or agreed with Bryan to commit the indictable offence of arson (an offence in itself under sec. 573 of the Code), and that Bryan had fired the building in pursuance of such conspiracy or agreement. As to (*c*) restricting it to subsec. (*c*) of sec. 69, the fact that the appellant had proceeded to the place where the offence was committed with Bryan and remained in the latter's automobile while he set fire to the school, if unexplained, was some evidence from which the jury might have drawn the inference that the

1949

PRESTON v. THE KING

Locke J.

appellant was abetting Bryan in committing the offence (*The Queen* v. *Coney* (1)). As Cave, J. there expresses it, "where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental it is evidence, but no more than evidence, for the jury."

From the fact that the learned trial judge in his charge to the jury pointed out and commented upon the evidence which might justify the jury in finding the accused guilty under either headings (*a*) or (*b*) above and also defined the term "abet", it is apparent that all three aspects of the matter were submitted to the jury and, in my opinion, the real matter to be determined in deciding the question raised by the first and third grounds of dissent expressed in the formal judgment of the Court of Appeal is as to the sufficiency of the charge in instructing the jury as to the law applicable to the charge of abetting and its application to the evidence. I have come to the conclusion that the dissent of Mr. Justice O'Halloran upon this ground is well founded. The learned trial judge in explaining the meaning of the word "abets" said that it meant "encourages, pushes them on, that is about as good a way I think as I can put it—abets any person in the commission of the offence or counsels or procures any person to commit the offence. You must keep that section in mind here." After summarizing the evidence for the prosecution he then said:—

> Now that is the Crown's case. The Crown asks you to take all these circumstances and the final fact that one or the other of them burnt the school or set it on fire, and the Crown says to you, "Don't worry who started the fire, but come to the conclusion that they were engaged in a common enterprise and that regardless of who set the match or lit the match, the other is guilty." The particular one before us today is Preston and the Crown says upon that basis, "We ask you to bring in a verdict of guilty against him."

As a summary this was not complete since it did not state fully the three contentions of the Crown as mentioned above and it is clear that the jury recognized this as after retiring and being out for some two hours they returned and the foreman said that they would like the court to explain to them the meaning of the word "accessory", which clearly related to the charge of abetting Bryan in committing the offence or of aiding, counselling or procuring him

(1) (1882) 8 Q.B.D. 534 at 539-540.

to do so. In reviewing the evidence for the defence the learned trial judge said that the evidence of the appellant was to the effect that he had no idea of burning a school or being a party to burning a school and that while he had been with Bryan in his car he did not grasp the seriousness of the situation, saying in part:—

> That is the defence. I cannot elaborate on it anymore. It is very fresh in your memory. His defence is this: "While I was with this man I admit, throughout the hours preceding, I did not have anything whatever to do with the buying of the gasoline in preparation for the making of the fire, or the oil. I didn't know that he seriously intended to burn a school. I didn't have any hand in it and I didn't leave the car when the fire was set." Now that is the defence. He says: "I had no common intent with this man to burn this school". Now there is the summary of it. "I had no common intent with Bryan to burn this school. I did not take any active part in setting a fire." That is the defence.

Immediately following the above quoted statement he said that the Crown laid stress upon a point which he had theretofore failed to mention: that the Crown said: "Well, why did not this man get out of the car and leave him and particularly when they came back from Westminster from across the Fraser River bridge? Why in the world didn't he say: 'Bryan, I don't like the way you're behaving.' Or why didn't he telephone the police? The Crown makes that point. You will have it in mind." When the jury returned for further instructions, after defining an accessory before the fact and saying: "abets, that is, assists or encourages any person in the commission of the offence," and again summarizing the evidence for the defence he said:—

> Then the Crown directs your attention to the fact that he didn't do anything about it despite the statements of this man out across the bridge beside a school, and that he didn't protest or do anything at the time of the actual setting of the fire. They say, "Look at his conduct. Is that the conduct of an innocent man?"

The learned trial judge had thus pointedly directed the attention of the jury to the failure of the appellant to quit Bryan's company after the remarks made by the latter when they were out at the property upon the Pacific Highway, his failure to telephone the police and his failure to protest or do anything at the time of the actual setting of the fire. These circumstances were perhaps evidence from which the jury might infer that Preston had conspired or agreed with Bryan to fire the building, but I think it

1949

PRESTON v. THE KING

Locke J.

much more likely that the jury understood from the charge that it was suggested that these facts afforded evidence upon which they might act in finding the appellant guilty of abetting the commission of the offence. I think this was peculiarly a case where after explaining the nature of the defendant's evidence the trial judge should have explained to the jury the application of the law as to aiding or abetting to the facts as they might find them. It was not sufficient, in my opinion, to define the legal meaning of the term "abet", to state the nature of the evidence for the defence and to leave it to the jury to decide whether, assuming the evidence of the appellant was true, he was guilty of the offence. In the absence of a clear direction, the jury was left to decide for themselves whether these various acts or omissions amounted in law to abetting. As to the necessity of carefully explaining to the jury the application of the law as to abetting to the facts as the jury might find them, I agree with what was said by Robertson, C.J.O. in *Rex* v. *Dick* (1).

In Stephen's Digest of the Criminal Law, 8th Ed. p. 17, the learned author, summarizing the authorities, says that mere presence on the occasion when a crime is committed does not make a person a principal in the second degree (that is, as abetting the commission of the offence) even if he neither makes any effort to prevent the offence or to cause the offender to be apprehended, though his presence may be evidence for the consideration of the jury of an active participation in the offence, and that when the existence of a particular intent forms part of the definition of an offence, a person charged with aiding or abetting its commission must be shown to have known of the existence of the intent on the part of the person so aided. The appellant's position was, assuming that his story was the truth, that he did not know that Bryan contemplated committing any offence. As expressed by Cave, J. *The Queen* v. *Coney, supra,* at 539:

> Now it is a general rule in the case of principals in the second degree that there must be participation in the act, and that, although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon.

(1) (1947) 87 Can. C.C. 101 at 115.

In the same case Hawkins, J. said (p. 557):

> In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a more passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not.

The onlookers at the prize-fight whose position was considered in Coney's case were present and did not protest against the prize-fight being held and stayed at the scene and did not inform the police but they were not guilty of any offence, and, in my view, the learned trial judge should have instructed the jury that these matters in themselves did not amount to abetting the commission of the offence in the present case. In 9 Hals. p. 30, the effect of the authorities is summarized as follows:—

> All who are present aiding and abetting, when a crime is committed, but who take no part in the actual perpetration of it, are principals in the second degree.
>
> To constitute a principal in the second degree mere presence at the crime is not enough; there must be a common purpose, an intent to aid or encourage the persons who commit the crime and either an actual aiding or encouraging or a readiness to aid and encourage them, if required.

The evidence of the appellant was to the effect that he had left Vancouver that evening in company with Bryan, in the latter's automobile, to examine some property in the vicinity of New Westminster, and while the latter had made various wild remarks about burning schools and expressed his sympathy with the actions of a fanatical sect of the Doukhobors which engaged in such activities, that he (Preston) did not realize at the time they stopped in front of the Queen Elizabeth School, or at any time prior to the actual firing of the building by Bryan, that the latter intended to set fire to that or any other building

1949

PRESTON v. THE KING

Locke J.

and that he had taken no part in committing the offence or done anything that might be construed as abetting Bryan in its commission. If the jury accepted this as the truth and if they had been properly instructed as to the application of the law to these facts, I would assume they would have acquitted the appellant. Upon the record as it is, I consider that it is impossible to say whether the jury found the appellant guilty as having abetted the commission of the offence or as having fired the building himself or as having been a party to an agreement with Bryan to commit the offence, the latter being the one who actually set the blaze. As was said by Lord Reading in *Isaac Schama and Jacob Abramovitch* (1):

> We must not be too critical in dealing with the summing up of a judge after a lengthy trial and speeches by counsel. Nevertheless, the Court must be satisfied that when the jury find the prisoner guilty they have applied the right principle of law to the facts before them.

The prisoner was entitled as a matter of right to have the jury instructed as to the application of the law to the facts as found by them and the failure to do this was a substantial wrong. I think, therefore, sec. 1014 (2) of the Criminal Code does not apply.

In my opinion, this conviction should be set aside and a new trial directed.

Appeal dismissed.

Solicitor for the appellant: *Thomas F. Hurley.*

Solicitor for the respondent: *E. Pepler.*

1948

*Dec. 14

1949

*Jan. 7

HIS MAJESTY THE KING.....APPELLANT;

AND

FRANK JOSEPH MORABITO.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Trial judge sitting alone acquitting on reasonable doubt at close of Crown's case—No election by accused as to adducing evidence—Appeal on question of law—Criminal Code ss. 839, 944, 1013(4).

The accused, on a charge of unlawful possession of a drug, was tried by a judge sitting without a jury under Part XVIII of the Criminal

(1) (1914) 11 Cr. App. R. 45 at 49.

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

Code. At the close of the case for the Crown, the accused, before making his election to call or not to call evidence, moved to dismiss for lack of "sufficient evidence which could legally and properly support a conviction". The trial judge thereupon dismissed the charge because of reasonable doubt arising upon the evidence of the Crown. The majority in the Court of Appeal upheld the acquittal.

Held: The trial judge having the same power as to acquitting or convicting as a jury and no more, could only have decided whether or not there was evidence upon which the jury might convict. The question of reasonable doubt did not arise at that stage.

Held: In the light of the evidence which the Crown submitted, the case could not have been withdrawn from the jury nor could it have been submitted to the jury until it was known that the evidence had been completed.

The King v. *Hopper* (1915) 2 K.B. 431; *The King* v. *Comba* [1938] S.C.R. 396; *Perry* v. *The King* 82 Can. C.C. 240 and *The King* v. *Olsen* 4 C.R. (Can.) 65 referred to.

APPEAL by the Crown from a judgment of the Court of Appeal for Ontario (1) dismissing (Roach J.A. dissenting) the appeal of the Crown from the decision of Parker J. dismissing the charge against respondent for unlawful possession of a drug.

N. L. Mathews K.C. for the appellant.

N. Borins K.C. for the respondent.

KERWIN J.:—For the reasons given by Mr. Justice Roach (1), the appeal should be allowed and a new trial directed.

TASCHEREAU J.:—I agree that this appeal should be allowed and a new trial directed.

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

KELLOCK J.:—This appeal should, in my opinion, be allowed for the reasons given by Mr. Justice Roach (1) in his dissenting judgment in the court below. The correctness of that judgment is emphasized by the position taken in this court by counsel for the respondent who contended that, had he failed in the application made by him to the trial judge, he considered that he still had the right, should

(1) [1948] 3 D.L.R. 513; O.R. 528; 91 Can. C.C. 210.

1949

THE KING v. MORABITO

Kellock J.

he so elect, to call evidence on behalf of the defence. His argument, as presented to this court therefore, involved the proposition that, at the close of the case for the prosecution, the trial judge had the right to try the case on the evidence adduced by the Crown, and if he came to the conclusion not that he could, but that he would convict, then there should be another trial upon that evidence together with any further evidence called on behalf of the accused. Needless to say, no authority was cited in support of this contention.

In *Metropolitan Rly. Co.* v. *Jackson* (1), Lord Cairns said:

> The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct.

This statement of the law is, of course, not limited to civil actions. It is equally applicable to a criminal as to a civil proceeding; *Regina* v. *Lloyd* (2); *The King* v. *Hopper* (3).

The learned trial judge did not, in my opinion, keep these functions distinct. The fact that he was sitting without a jury made no difference. He had the same power as to acquitting or convicting as a jury would have had; section 835. He had no additional power. By section 944(1) it is provided that if an accused person is defended by counsel, such counsel "shall", at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused and if he does not thereupon announce such intention, counsel for the prosecution may make his address.

The learned trial judge, upon the conclusion of the case for the Crown asked counsel for the defence if he were calling any evidence. That question was not answered, but a motion to dismiss for lack of "sufficient evidence which *could* legally and properly support a conviction" was made. It is clear, I think, that no other application

(1) (1877) 3 App. Cas. 193 at 197.
(2) (1890) 19 O.R. 352 at 357.
(3) (1915) 2 K.B. 431.

could have been made at that stage in the absence of an election on the part of the defence to call or not to call evidence. Had a jury been present, the learned trial judge could have done no more, on the application of the defence, than have decided whether or not there was evidence upon which the jury might convict; *The King* v. *Comba* (1). Had he ruled adversely to the Crown in the present case he would clearly, in my opinion, have been wrong in law in the light of the evidence which the Crown had submitted; *Girvin* v. *The King* (2). He would have had no right, as he in fact did, to proceed to weigh the evidence until all the evidence was in. The decisions are uniform.

In *Rex* v. *Perreault* (3), counsel for the defence moved for a non-suit at the conclusion of the case for the Crown and *before declaring that he had no witnesses,* on the ground that a fact material to the Crown's case had not been proved. The Crown thereupon moved to reopen its case to supply this lack. Langlais J. in the Superior Court of Quebec said at p. 237:

> Counsel for the defence could have declared that he had no evidence to offer and then he would have raised this question of lack of an essential element in his pleading (argument), . . . and then I would have been obliged to declare to the jury that this element was lacking.

In *Perry* v. *The King* (4), in the Supreme Court of Prince Edward Island, on appeal from a summary conviction, Campbell C.J. said at p. 242:

> On the conclusion of the evidence for the respondent, counsel for the appellant has moved that the appeal be allowed, as no *prima facie* case of guilt had been proved against the appellant. No authorities were cited to indicate just what cogency of proof is required to establish a *prima facie* case at that stage, and I have not run across any case in which the point was settled. I presume, therefore, that, in order to put the accused on his defence, a Judge or Magistrate sitting alone need find only such evidence as would entitle the Crown, in a jury case, to have the facts left to the decision of the jury. In other words, the criterion would be whether the evidence is such as a jury might, in the absence of contradiction or explanation, reasonably and properly convict upon. This view is supported by the wording of the Code, s. 726, which provides that the Justice shall consider the whole matter after hearing what each party has to say and the witnesses and evidence adduced. The Justice or Judge, therefore, apparently does not exercise the function of a jury until both sides have completed their case; and the question of proof beyond reasonable doubt *does not arise at this stage.*

(1) [1938] S.C.R. 396.
(2) (1911) 45 S.C.R. 167 at 169.
(3) (1941) 78 Can. C.C. 236.
(4) 82 Can. C.C. 240 at 242.

1949

THE KING v. MORABITO

Kellock J.

I do not think, in view of section 944, made applicable to the case at bar by section 839, that the lack of any inference to be drawn from section 726 affects the relevancy of the above decision.

Again in *Rex* v. *Olsen* (1), also an appeal from a summary conviction, a magistrate had dismissed the charge at the conclusion of the case for the Crown *without calling upon* the defence. The case, like that at bar, involved a charge under sec. 4(1) (*d*) of the *Opium and Narcotic Drug Act,* 1929. The British Columbia Court of Appeal unanimously set aside the acquittal. O'Halloran J.A. said at p. 66:

> I am of opinion, with respect, that the Crown in the circumstances here made out a case warranting conviction in the absence of any defence which might have been disclosed if the defence had been called upon. But the learned magistrate dismissed the case without calling upon the defence. With respect the case ought not to have been dismissed as it was. I must conclude there was no proper trial in the true legal sense.

To borrow the language of Viscount Sankey, L.C., in *Woolmington* v. *Director of Public Prosecutions* (2):

> . . . it is not till the end of the evidence that a verdict can properly be found . . .

In the words of section 944(2) it is only when *all* the evidence is concluded that counsel for the defence, or the accused himself, as the case may be, may sum up the evidence. The public has an interest in the proper trial of accused persons and I do not think that the fact that counsel for the Crown at the trial apparently failed to realize at the time that the learned trial judge was going beyond the application made to him should, in the circumstances, be allowed to influence the result, particularly in view of the fact that the position of the respondent in this court, as already mentioned, is that the stage had never been reached when he had elected whether he would or would not call evidence. Had the question put to him with respect to that matter been insisted upon, and evidence been called, the case could only have been disposed of on the whole of the evidence; *The King* v. *Joseph Power* (3); *Rex* v. *Lenton* (4).

The case on the Crown's evidence could not have been withdrawn from the jury nor could it have been submitted

(1) 4 C.R. (Can.) 65.
(2) [1935] A.C. 462 at 481.
(3) (1919) 1 K.B. 572.
(4) [1947] O.R. 155.

1949

THE KING v. MORABITO

Kellock J.

to the jury until it was known that the evidence had been completed. Counsel for the respondent tells us he does not yet know whether or not the evidence was complete.

In my opinion there must be a new trial.

Appeal allowed; new trial directed.

Solicitor for the appellant: *N. L. Mathews.*

Solicitor for the respondent: *N. Borins.*

1948

CANADIAN NATIONAL RAILWAYS (DEFENDANT) ..... APPELLANT; *Nov. 15, 16

1949

AND

*Jan. 7

JOSEPH LANCIA ES QUAL. (PLAINTIFF) ..... RESPONDENT.

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

Railways—Negligence—Jury trial—Evidence—Trespasser boy fell off moving freight car—Finding of jury that railway employee's shouting was a fault contributing—Liability of railway company—Province of judge and jury—Judgment after verdict—Arts. 475, 491, 508 C.C.P.—Art. 1053 C.C.—Railway Act, R.S.C. 1927, c. 170, s. 443.

Respondent's minor son, age 9, boarded a freight car at the corner of Murray and Wellington Street, in Montreal, which car formed part of a then stationary freight train. The train then started to move and while it was in motion, the boy still holding on, one of appellant's employee, from the caboose of the train, shouted to him to get off. The boy, jumped off, fell and was injured. It is undisputed that the boy was a trespasser. The jury found that the boy, immediately prior to the accident, was riding on the ladder of one of the cars and that the appellant's employee, one Tremblay, was in the cupola of the caboose when he shouted at the boy the last time. The verdict of the jury was that the accident was due to the fault, negligence and imprudence of both the boy because he had no business on the train and the appellant's employee for shouting. The jury assessed the contribution of each at fifty per cent. Appellant moved the Court to set aside the jury's verdict on the ground that the fault against the appellant, as determined by the jury, was not a fault in law in the circumstances of the case. The trial judge refused the motion as did the majority of the Court of King's Bench.

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

1949

C.N.R. v. LANCIA

Held: The Court should have declared that, in the circumstances, the shouting, as found by the jury, did not amount to a fault in law and should have dismissed the action. *C.P.R.* v. *Anderson* [1936] S.C.R. 200; *Grand Trunk Ry.* v. *Barnett* [1911] A.C. 361; *Addie* v. *Dumbreck* [1929] A.C. 358; *Latham* v. *Johnston* (1913) 1 K.B. 398 and *Metropolitan Ry. Co.* v. *Jackson* (1877) 3 A.C. 193 referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), confirming (McDougall J.A. dissenting) the decision of the trial judge, Tyndale J., refusing to reject the verdict of the jury that appellant was at fault and awarding damages to respondent.

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

Lionel Coté K.C. for the appellant.

Louis Fitch K.C. for the respondent.

THE CHIEF JUSTICE:—On the 5th of March, 1943, between eight and nine a.m., the respondent's minor son Angelo boarded a freight car at the corner of Murray and Wellington Streets, in Montreal, which car formed part of a then stationery freight train which started to move.

Whilst the boy was holding on to the then moving freight car and waiting for the train to come to a stop, one of the appellant's employees stepped out of the caboose of the train and, seeing young Lancia, shouted to him to get off. Young Lancia states that he became frightened, jumped off the moving train and a freight car passed over one of his legs. The employee in question then got back into the caboose and stopped the train.

It is established, beyond any possible question of doubt, (as found by the learned trial judge) that Angelo Lancia (the boy) was at all relevant times a trespasser on the property of the appellants.

The matter came before a jury and the latter found in its verdict that the respondent's minor son, just before he fell under the train, was riding on the ladder of one of the cars and that the appellant's employee, one Tremblay, was in the cupola of the caboose when he shouted at the boy the

(1) Q.R. [1948] K.B. 156.

last time. Another finding of the jury was that at the date of the accident the boy was capable of discerning right from wrong.

The jury was put the questions which are usually put in similar trials in the Province of Quebec. They found that the accident was not due solely to the fault, negligence and imprudence of the appellant or its employees, nor solely to the fault, negligence and imprudence of the respondent's minor son, adding to their answer in that respect a rider reading as follows:—

> The affirmative answer is based on the fact that the boy got on the train, got off and on again and persisted in doing so despite the trainman's shoutings.

The verdict was that the accident was due to the fault, negligence and imprudence of both the respondent's minor son and the appellant's employee, or its employees, and stated that the respective fault, negligence and imprudence consisted in:

> Tremblay for shouting and the boy had no business on the train.

They assessed the damages as a result of the accident in the total amount of $17,800, but, as they arrived at the conclusion that there was common fault, they fixed the proportion in which the respondent's minor son and the appellant, or its employees, contributed to the accident at fifty per cent each, as a result of which the amount allowed the respondent, who was sueing in his quality as tutor of his son, was the sum of $8,900.

After the verdict the appellant moved the Court to set aside the jury's verdict and dismiss the respondent's action on the ground that the fault against the appellant, as determined by the jury, was not a fault in law in the circumstances of the case; that it did not constitute a fault, since what the appellant's employee, Tremblay, did was the only reasonable thing he could do in the circumstances and showed sound judgment on his part; that it was absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the appellant; that, at all events, the facts as found by the jury required a judgment in favour of the appellant, as the fault attributed to the latter at the most would constitute an error in judgment only, for which the appellant could not be held liable; that it was within the province or

1949
C.N.R.
v.
LANCIA
Rinfret C.J.

jurisdiction of the presiding judge to decide whether or not the fault or negligence found by the jury constituted a fault in law; that the jury's finding in that respect clearly indicated misunderstanding by the jury of the presiding judge's directions as to the duty or obligation of the appellant towards the respondent's minor son, a trespasser, or refusal on the part of the jury to follow the directions of the presiding judge as to such duty or obligation, and that the verdict was contrary to law and also to the evidence and ought to be set aside.

In his judgment the learned trial judge stated that he would have had no hesitation in answering the questions put to the jury as to whether just before he fell under the train the boy was running beside the train with his hand grasping a rung of the ladder or some other part of one of the cars; which answers, in the opinion of the learned judge, would have been in accordance with the weight the evidence and would obviously have required a decision in favour of the appellant, because it would then have been impossible to find any fault against Tremblay, the employee. The learned judge stated that it was only with "very considerable hesitation" that he accepted the answers of the jury.

With respect to the appellant's motion contending that, even accepting the majority answers to the four specific questions of fact, the fault found against Tremblay by the majority of the jury was not a fault in law, here again the learned judge stated that, acting as a judge alone, he would unhesitatingly have decided in favour of the appellant. He added:—

> In view of the admitted fact that Angelo Lancia was a trespasser, it seems clear that Tremblay committed no breach of the obligation or duty owed to him.

However, the learned judge concluded that as nine out of twelve presumably reasonable men considered that Tremblay's shouting at the boy constituted a fault, he "very reluctantly" refused to reject the verdict.

Likewise, when judgment was rendered in the Court of King's Bench (Appeal Side) (1), where the verdict and judgment of the trial Court was affirmed (E. McDougall, J.A. dissenting), St. Jacques J.A. in his reasons refers particularly to the statement of the trial judge that he

(1) Q.R. [1948] K.B. 156.

very reluctantly refused to reject the finding of the jury to the effect that "Tremblay's shouting at the boy constituted a fault". St. Jacques J.A. added that since the jury found that such a fact was a fault and applying what he construed to be the meaning of a certain passage of the judgment of Mr. Justice Duff, as he then was, in the case of *Napierville Junction Rly. Co.* v. *Dubois* (1), he concluded his reasons by saying:—

> Comme la Cour Supérieure, je me crois lié par le verdict ainsi motivé et, conséquemment, je rejetterais l'appel avec dépens.

Marchand, J.A. considered the answers of the jury as being pure questions of fact without any implication of law. After stating that he could not say that the verdict is clearly against the weight of evidence (C.C.P., Sec. 498, s.s. 4), he was of the opinion apparently that such a consideration concluded the duty of the judge, in view of Article 501 which states: "A verdict is not considered against the weight of evidence unless it is one which the jury, viewing the whole of the evidence, could not reasonably find." However, the learned judge said that he could not make up his mind to come to that conclusion. He stated that he did not know how he himself would have dealt with the facts, but that, at all events, he would not have considered a contrary finding of fact altogether unreasonable. He referred to what Sir Lyman Duff, C.J.C., said in the case of *Canadian Pacific Railway* v. *Anderson* (2), with regard to the duty of the owner towards a trespasser, that the owner should not intentionally injure the trespasser, not do a wilful act in disregard of humanity towards him and not act "with reckless disregard of his presence".

Then the learned judge pointed out that, with respect, he could not subscribe to the opinion of the trial judge that if a verdict of a jury finds fault which is not a fault in law, he (the trial judge) is bound to accept the verdict for the simple reason that it is the jury's finding. The learned judge very properly says that it seems impossible to accept such a principle, a principle that if the verdict of a jury finds a so-called fault which does not constitute a fault or a *delict* in law, nevertheless the trial judge must accede to the verdict and give judgment accordingly. In the view of Marchand J.A. that would be unjust, contrary

(1) [1924] S.C.R. 375 at 380. (2) [1936] S.C.R. 200.

1949

C.N.R. v. LANCIA

Rinfret C.J.

to law, and it would be the duty of the presiding judge to refuse to admit and to sanction such a verdict. There is no doubt, he added, that the young boy was a trespasser and that he placed himself in the dangerous position in which he found himself, that he had exposed himself to the danger of a fall which might have been provoked by an abrupt movement of the car, or by the gradual ebbing of his strength. But, in the view of the learned judge, Tremblay's warning was an order to the boy to let go of the car and to jump to the ground—an order which, according to the learned judge, was evidently and obviously dangerous, with the result that the boy, seized with fright, loosened his grip on the rung of the ladder and fell a victim to the danger that would necessarily result, and this should have been obvious to all and to Tremblay in particular. The learned judge stated that this was an imprudence towards the child which had a direct effect on the accident which took place subsequently. Accordingly, Marchand J.A. concluded that the appellant company had failed to demonstrate that the verdict of the jury was unreasonable or contrary to law and on that ground he dismissed the appeal.

In his dissenting judgment McDougall J.A. expresses this view:—

> If, in law, such finding does not constitute fault within the purview of the law (C.C. 1053), the very basis upon which the action rests is demolished. It would be idle to speculate as to the effect of such finding. Without negligence, in a case of this nature, there can be no liability. As to the respective functions of the Judge and Jury in such circumstances, I can do no better than cite the clear and direct remarks of St. Jacques J. in the case of *Bouillon* v. *Poiré* (1):—
>
> Pour conclure que quelqu'un est en faute, il faut d'abord savoir ce qu'il a fait, ou ce qu'il a omis de faire.
>
> C'est là le rôle du jury. Il doit constater après avoir entendu la preuve, si les faits allégués ont été prouvés. Il ne devrait pas aller plus loin. Quand il a fait cette constatation, le rôle du juge commence alors. C'est à lui qu'il appartient de décider si les faits constatés par le jury ont été imputés comme faute au défendeur et si, en droit, ces faits comportent en réalité une faute.

To reiterate the statement of St. Jacques J.A., just quoted, it is for the judge to decide whether the facts found by the jury ought to be imputed as a fault to the appellant and if, in law, those facts, as found, really constitute a fault.

(1) 63 (Que.) K.B. 1 at 20.

McDougall J.A. continued that it is, he considered, beyond question that upon the judge, not upon the jury, rests the responsibility of declaring whether or not the facts as found by the jury constitute a fault in law. He added that in dealing with mixed questions of fact and law, notwithstanding the jury's answer, the judge retains his decisive authority to pronounce upon the law. It is clear, he says, that in the present case the learned presiding judge did not consider that such facts constituted negligence because he (the trial judge) said it was with "very considerable hesitation" that he accepted the answers of the jury. Nevertheless, the learned trial judge gave effect to these answers, which amounted to saying that "Tremblay's shouting" constituted a fault for which the appellant company and its employees should be held responsible.

Now, the finding of the jury did not mean anything more than that Tremblay shouted. It was for the learned presiding judge to decide whether, in the circumstances of the case, that fact constituted a fault in law.

I agree with McDougall J.A. when he says:—

> What is not a fault in law can scarcely become such by the mere erroneous or ill-considered finding of the jury to that effect. They go beyond their sphere of action and usurp the functions of the judge when they assume to trench the question of law by declaring an actionable fault an act which is not such.

McDougall J.A. goes on to say:—

> With the greatest deference I cannot find that the shout of the brakeman, in the circumstances, constitutes actionable fault. His acts do not constitute a breach of the principle of law stated by the learned trial judge in his charge to the jury when indicating the duty owed by the appellant's employee to the victim of the accident . . . Tremblay was exercising his best judgment in a difficult situation, not of his choosing, but cast upon him by the actions of the victim of the accident, and the very most that can be said is that in the imminence of the danger he apprehended, Tremblay may have committed an error of judgment in the course which he pursued.
>
> In my opinion he did what any reasonable person placed in the same circumstances would have done. To have done nothing would have exposed him to even greater criticism.
>
> From a slightly different angle, I find it difficult to say that the shout of the brakeman was the direct and foreseeable cause of the accident (again a question of law). The element of a sure and certain relation between cause and effect is distinctly doubtful. The act of the brakeman may possibly be an *"incuria"*, but not an *"incuria dans locum injuriae"*. (See *Davey* v. *L. & S. W. Ry. Co.* (1))

(1) (1883) 12 Q.B.D. 70.

1949

C.N.R. v. LANCIA

Rinfret C.J.

McDougall J.A. then referred to the opinion expressed by the Chief Justice of the Province in *Collard* v. *Farrar* (1), which seems very much in point in the present case, and also to the judgment of this Court in *Grand Trunk Railway* v. *Labrèche* (2).

Gagné J.A., agreeing with the majority of the Court appealed from, recited the answer of the jury to the effect that the fault, negligence and imprudence of the appellant's employee, Tremblay, "for shouting", was the only fault found against Tremblay and that this shouting consisted of the word "Get off, get off". On that point he added that the verdict of the jury must be accepted, because there was certain evidence to support it, even though it was weak. Tremblay did shout, he said, since he admitted it himself, but Tremblay did so because he thought that that was the best means of protecting the boy. Shouting alone cannot constitute a fault, the learned judge stated, but he believed that it must be interpreted broadly when taking into account all the other circumstances and more particularly the allegations of the declaration; that one must conclude that this answer of the jury blames Tremblay for having shouted to the boy to get away, or to climb down from the train (it was evident to the jury that the boy was on the train) at a time when the train was moving and that Tremblay was aware of the danger that might result. In the opinion of Gagné J.A. that is the fault which the verdict attributes to Tremblay.

The learned trial judge very clearly stated what the doctrine was with respect to the obligations of an owner towards a trespasser. After such direction, the jury found the employee of the appellant company guilty of a fault. It is argued that the jury did not limit itself to the question of passing upon the facts alone, but that it has passed upon the law as well and that, therefore, this Court must intervene. In the opinion of Gagné J.A. that is the question to be decided in this case and he remarked that to him it did not appear to have been a simple question, because the answer of the jury raises a mixed question of fact and law. He very properly said that it was for the jury to determine the facts which gave rise to the accident; but he went on to say that in that regard the presiding judge,

(1) Q.R. 60 K.B. 445. (2) 64 S.C.R. 15 at 23, 27.

as well as the Court of King's Bench (Appeal Side), (1) cannot intervene unless the answers are manifestly and clearly against the weight of evidence. On the other hand, the jury should not be called upon to decide a question of law.

Gagné J.A. continued by saying that the jury must necessarily declare whether there was fault or not; that that is how the jury characterizes the facts which it finds to have been proven. The learned judge asked himself if that were within the province of the jury and answered by saying: "I believe it, in view of the Canadian, as well as the English, jurisprudence." Basing his decision on that alleged jurisprudence and on what he describes as the "doctrine", he states that he finds himself bound (whatever might be his opinion as to the responsibility of the respondent with regard to the accident) to decide that the Court cannot intervene, the jury having determined the facts upon the evidence, evidence which the Court may consider insufficient but which, nevertheless, is on record, and also having passed upon the question of responsibility after having been correctly directed on the law governing the parties.

In the opinion of MacKinnon J. (*ad hoc*) there was manifest inaccuracy in the evidence which led to the jury's answers as to whether the boy ran along the train or was standing on the ladder of the car until he slipped and fell from the train. He pointed out that he could not possibly have got on the third car from the caboose, which was a considerable distance east of where the boy said he got on the train. He added:—

> It is clear from the judgment that the learned judge was greatly embarrassed in having to arrive at the decision he did and that can be readily understood. I am entirely in agreement with him when he says that he would have no hesitation in answering question 2-A in the affirmative and question 2-B in the negative, as being in accordance with the weight of the evidence. However, there is sufficient evidence to make it impossible to say that the verdict was one that, taking the evidence as a whole, the jury could not reasonably find.

The learned judge continued:—

> The learned judge also had difficulty in dealing with the finding of the majority of the jury that Tremblay had committed a fault in shouting. Although it seemed clear to him that Tremblay had committed no breach of any obligation or duty owed by him to a trespasser, he was of the opinion that as his charge to the jury was as clear as he could

(1) Q.R. [1948] K.B. 156.

1949

C.N.R. v. LANCIA

Rinfret C.J.

make it, and as nine out of twelve jurors considered Tremblay's shouting constituted a fault, he was reluctantly obliged to accept this finding. I find myself in the same position . . .

It is evident that the jury must have considered that Tremblay when he shouted acted either with the intention of injuring Angelo or did a wilful act with disregard of humanity towards him or acted with reckless disregard of his presence.

The jury was instructed that if they found that what Tremblay did was an error of judgment, then there was no fault. Accordingly the finding of fault on the part of Tremblay means that the jury considered that there was no question of any error in judgment. My opinion that there was an error in judgment cannot be substituted for the opinion of the jury. I consider that Tremblay was faced with a situation in which he had to act quickly and what he did should be considered an error of judgment. Angelo was on a moving train picking up speed and had got on with the intention of getting off at or near Bridge Street. His position was rapidly getting more dangerous as the train proceeded. Shouting to the boy to hang on might have frightened him more than telling him to get off. Tremblay says the only means of stopping the train was by the emergency air-brake in the caboose, which would probably have jolted Angelo off the train had he applied it.

MacKinnon J. concludes:—

I am reluctantly forced to accept the verdict of the jury as confirmed by the judgment *a quo* and to dismiss the appeal, with costs.

The law of Quebec on this point is (C.C.P., article 475):

The jury finds the facts, but must be guided by the directions of the judge as regards the law.

It is quite clear from this Article of the Code that the Quebec law is exactly the same as under the common law, that is to say, that the jury's province is exclusively limited to the finding of facts and that the law is exclusively the province of the presiding judge. It may be, as suggested by Mr. Justice Rivard, formerly of the Court of King's Bench (Appeal Side), at p. 75 of his book entitled "Manuel de la Cour d'Appel", that the wording of the questions in the present case (it has invariably been the same in all jury trials in the Province of Quebec) is the source of difficulties which can be avoided by limiting the questions put to the jury to the facts purely and simply. However, no criticism can be made of the questions as they were put in the present case, since they followed the invariable practice in the Province.

It is clear, however, as the learned judges both in the Superior Court and in the Court of King's Bench (Appeal Side) (1) have said, that when the jury was asked to decide the fault that caused the accident that was putting

(1) Q.R. [1948] K.B. 156.

a question of mixed law and fact. Notwithstanding the form of the question, it cannot detract from the principle laid down in Article 475 of the Code of Civil Procedure, nor from the well-established principle that the jury's verdict must be limited to the finding of facts and that the law is exclusively the domain of the courts.

With respect, it was, therefore, the duty of the presiding judge and of the learned judges forming the majority in the Court of King's Bench (Appeal Side) (1) to accept the verdict of the jury in the present case as a finding of fact that Tremblay had shouted and perhaps also that such shouting was one of the causes of the accident, the other cause being, as found by the jury, that "the boy had no business on the train". The result of the jury finding was that the boy was a trespasser and, in its opinion, the shouting at the boy was a contributory cause of the accident.

It remained, however, for the Courts to decide whether, in the circumstances, the mere shouting, as found by the jury, amounted to a fault in law, or, in the language of the Civil Code (Article 1053) amounted to a fault or "offence" within the four corners of that section of the law.

It can be seen, from the review I have made of all the judgments of the learned judges both in the Superior Court and in the Court of King's Bench (Appeal Side) (1), that not only was the shouting of Tremblay not an offence or fault in the circumstances, but, moreover, it was not a contributory cause of the accident of which the boy, Lancia, was a victim.

To arrive at that conclusion it is only necessary to proceed as did MacKinnon, J. (although he did not press his analysis of the facts to its normal result) and to follow the reasoning of the dissenting judge, McDougall J.A.

One can only ask what Tremblay could have done in the situation of imminent danger in which the boy had placed himself—a situation, for the making of which, the boy was exclusively responsible.

At the hearing before this Court, Counsel for the respondent was asked several times what he could suggest that Tremblay might have done instead of shouting. He could not claim that it would have been better to have

(1) Q.R. [1948] K.B. 156.

1949
C.N.R.
v.
LANCIA
Rinfret C.J.

stopped the train immediately, because Tremblay himself explained that would have created a greater danger as a freight train of some forty cars suddenly coming to a stop would have jolted more sharply and caused the fall of the boy from the car. On the other hand, if he had done nothing, there is every likelihood that the jury would have found that his remaining inactive was truly negligence, for which he himself and his company should be held liable.

Now, of these three alternatives—stopping the train suddenly, doing nothing, or shouting to the boy to get off—one may properly ask which was the correct decision to arrive at, quite apart from the fact that Tremblay had to act on the spur of the moment and without the slightest hesitation, because the predicament of the boy was becoming increasingly dangerous as the train gathered momentum. In my opinion what Tremblay did was not even an error of judgment. I verily think that he chose the best way of protecting the boy and coming to his rescue, that what he did could never be apprehended as a fault or an offence; and that the course he took to try and protect the boy was, in the circumstances, the best means at his disposal. It really comes to this—that the sole fault committed by any one in this accident was caused by the boy's own reckless act in getting on the freight car and remaining there while the car was moving. Such being the case, it is impossible to say that the finding of the jury (shouting) could ever be declared a fault under the law of Quebec. As it was not a fault, it was the duty undoubtedly of the judges to so declare it, and, therefore, to dismiss the action on the verdict rendered. That is what should have been done by the trial judge (C.C.P., article 491), or by the Court of King's Bench (Appeal Side) (C.C.P., article 508). *Canadian Pacific Rly.* v. *Anderson* (1) is conclusive on the point of trespass in this Court.

For the reasons stated I think that the appeal should be allowed and the action of the respondent dismissed, with costs throughout.

KERWIN J.:—There was no evidence upon which the jury could reasonably find that the shouting of Tremblay,

(1) [1936] S.C.R. 200.

said by them to be the latter's fault, was negligence contributing to the accident. The appeal should be allowed and the action dismissed, all with costs if demanded.

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

KELLOCK J.:—This is an appeal from a judgment of the Court of King's Bench (Appeal Side) (1), for the Province of Quebec, affirming a judgment at the trial in favour of the respondent. The action was brought to recover damages in respect of personal injuries sustained by the minor son of the respondent when injured by being run over by one of the appellant's trains. The boy, who was nine and one-half years old, had climbed on to the side of a car and the injuries were sustained when he attempted to get off the moving train in circumstances to be mentioned.

In his declaration the respondent alleged that his son boarded the freight car while the train was stationary; that the train suddenly started; that while it was in motion an employee of the appellant shouted to the boy from the steps of the caboose to get off; and that when the boy did not do so the employee pretended to pick up something from the side of the rail to throw at him, whereupon the boy became frightened and in attempting to jump fell under the moving train.

The evidence for the respondent was to the effect that the boy was on the ladder on the side of the car firmly grasping the rungs and did not get off at any time until the appellant's employee shouted and made the gesture referred to in the declaration from the latter's position on the steps of the van. The evidence of the appellant's employee, Tremblay, however, is that he was not on the steps of the caboose at any time but in the cupola on the top; that he saw two boys on the train, one on the front of the second car from the caboose and one on the rear of the third car, and that there were several other boys on the ground further away; that he called to the two boys to get off and that they did so. He says that the respondent's son, when first seen by him, was holding on to one of the cars and running beside it and that when he shouted the boy

(1) Q.R. [1948] K.B. 156.

1949

C.N.R. v. LANCIA

Kellock J.

released his hold and let a couple of the cars pass but then grabbed another and ran about fifty feet. When Tremblay shouted again he says the boy fell under the car. At this time the train was proceeding at about seven or eight miles an hour. Tremblay immediately applied the brakes and brought the train to a stop in about 200 feet. On being asked why he had not put on the brakes and stopped the train before the boy fell he said that in his opinion it would have caused a jerk which might have thrown the boy from the train and that in doing what he did he had acted in accordance with his best judgment under the circumstances.

In answer to specific questions the jury found that the boy, just before he fell, was not running beside the train with one hand grasping the ladder or some other part of the car but was riding on the ladder itself. They also found that Tremblay was not standing on the steps of the caboose when he shouted but was in the cupola. They also found that the accident was due to the joint negligence of the boy and Tremblay, this negligence consisting on the part of "Tremblay for shouting" and on the part of the boy in that he "had no business on the train." All other allegations of negligence were therefore negatived. The jury found the boy and Tremblay guilty of fault in equal degrees.

The learned trial judge refused a motion by the appellant to dismiss the action on the answers of the jury, being of opinion that although the boy was a trespasser, as was admitted, and although it seemed clear to him that Tremblay had committed no breach of duty, nevertheless he could not interfere with the verdict.

In the Court of Appeal (1), MacKinnon J. took the same view. He pointed out that the jury had been instructed that if they found that what Tremblay did was an error of judgment, there was no fault and that, accordingly, the finding of fault on the part of Tremblay excluded such error. The learned judge was of opinion that his own view that Tremblay's action amounted merely to error of judgment could not be substituted for the opinion of the jury.

As he expresses so clearly and concisely the situation which Tremblay faced at the time, I quote from the notes of the learned judge:

> I consider that Tremblay was faced with a situation in which he had to act quickly and what he did should be considered an error of judgment.

(1) Q.R. [1948] K.B. 156.

1949

C.N.R. v. LANCIA

Kellock J.

Angelo was on a moving train picking up speed and had got on with the intention of getting off at or near Bridge Street. His position was rapidly getting more dangerous as the train proceeded. Shouting to the boy to hang on might have frightened him more than telling him to get off. Tremblay says the only means of stopping the train was by the emergency air-brake in the caboose which would probably have jolted Angelo off the train had he applied it.

McDougall J. dissented from the majority. Accepting the findings of fact made by the jury, he was of opinion that the answer of the jury with respect to Tremblay did not constitute fault in law within the meaning of Article 1053 of the Civil Code and that the act of Tremblay in shouting, while it may have been *causa sine qua non*, was not *causa causans*.

With respect to the duty owing to the infant trespasser, the learned trial judge charged the jury in accordance with the law laid down in *Anderson* v. *C.P.R.* (1). In that case however, the presence of the trespasser upon the train was not known to the railway company. It was known however, in *Canadian Northern Railway Co.* v. *Diplock* (2), but in that case, as in Anderson's case, both of which followed the decision of the Privy Council in *Grand Trunk Railway* v. *Barnett* (3), it was held that it is not sufficient to enable one who is a trespasser to recover, merely to show negligence on the part of the servants of the railway. In the case where the presence of the trespasser is known to the servants of the railway, the respondent contends that these authorities are not applicable in the Province of Quebec. The judgment of Lord Wright at least, in *Glasgow* v. *Muir* (4), indicates that with respect to positive acts of an occupier of premises, the duty owed to a trespasser may not differ from that owed to other classes of persons who are known to be thereon. In the case at bar I am content to deal with the case on the basis, although without deciding the point, that the duty owed to the minor in the case at bar was of this higher nature. But, in my opinion, the answer made by the jury with respect to Tremblay does not amount to a finding of fault in law. It is of course clear that while it is for the jury to find the facts it is the function of the court to determine whether or not there is any evidence to support the findings and also to decide whether any particular answer is in law a finding of fault

(1) [1936] S.C.R. 200.
(2) 53 S.C.R. 376.
(3) [1911] A.C. 361.
(4) [1943] A.C. 448.

1949

C.N.R. v. LANCIA

Kellock J.

or negligence; *Verdun* v. *Yeoman* (1); *McKay* v. *Grand Trunk Railway* (2); *Bouillon* v. *Poire* (3), per St.-Jacques J.

In the case at bar it is plain that the act of negligence pleaded as against the appellant was not established in evidence. The jury have negatived anything of a threatening nature in the gesture made by Tremblay or that he was in the position the respondent alleged he was. The situation confronting Tremblay is as I have said, clearly expressed by MacKinnon J. and I think there was no element of negligence in the choice which he made. Upon the facts as found by the jury, any finding that Tremblay fell short of the conduct of a reasonably careful man must be regarded as perverse. That situation had been created by the wrongful act of the boy and forced upon him the necessity of making a choice. As to stopping the train, he did not do so because he thought the shock might throw the boy off. Had he done nothing, the train was gathering speed and the boy might well have been placed in a more dangerous situation later if he were allowed to remain. He did not know that the boy himself intended to jump off at Bridge Street, a comparatively short distance further on. There is no allegation and no finding that the speed of the train at the time the boy attempted to get off was such that Tremblay should not have ordered him off at that time. Tremblay says the speed was from seven to eight miles an hour and the respondent himself in his factum describes this speed as slow. Tremblay had observed the other boys jump off very shortly before. While the act of leaving any moving train no doubt involves some danger, I do not think that Tremblay's act in ordering the boy off amounts to any breach of duty toward him in the circumstances. It could not be more than an error of judgment, even if it could be said to be an error, and it was not open to the jury, in my opinion, to bring it to the level of fault.

I would therefore allow the appeal and dismiss the action with costs here and below if demanded.

LOCKE J.:—In the plaintiff's declaration it is alleged that the infant plaintiff boarded a freight car of the defendant company which was part of a train then stationary at the

(1) [1925] S.C.R. 177.
(2) 34 S.C.R. 81.
(3) 63 (Que.) K.B. 1 at 20.

corner of Murray and Wellington Streets in Montreal, that the train suddenly started to move and that while it was in motion an employee of the defendant company stepped out of the caboose of the train and "on seeing the said boy imprudently shouted to him to get off." There were further allegations that when the boy did not get off the train an employee of the defendant threatened violence to him and pretended to pick up something from the side of the rail to throw at him, whereupon the boy being frightened had jumped and fallen under the wheels of the moving train. Various other charges of negligence were made but all of these, including the allegation that an employee of the defendant had frightened the boy by threatening him with violence or pretending to pick up a missile, were negatived by the answer made by the jury that the negligence attributable to the defendant was that of its employee Tremblay "for shouting"; *Andreas* v. *Canadian Pacific Railway Co.* (1).

The undisputed fact is that the infant plaintiff was a trespasser upon the property of the defendant. Upon conflicting evidence the jury found that immediately prior to the accident he was riding on the ladder at the side of one of the freight cars of the moving train, and not running beside the train with his hand grasping a rung of the ladder as stated by Tremblay, an air brakeman employed by the defendant and who was riding at the time in the cupola of the caboose at the rear of the train. The boy admittedly got on to the train without permission, with the intention of riding on it a short distance to the west to the vicinity where he lived and, when observed by Tremblay, the train was travelling some seven or eight miles an hour and it must be taken that he jumped from the ladder at the side of the freight car after the brakeman had shouted to him to "get out of there."

The defendant company was operating the train in question upon its right-of-way in the exercise of its statutory powers. Of necessity, the operation of freight and other trains involves danger to those who trespass upon the right-of-way in the path of these trains, or who attempt to ride upon the freight cars without permission. For damages caused by the operation of such trains in pursuance of its

(1) 37 S.C.R. 1.

1949

C.N.R. v. LANCIA

Locke J.

powers the defendant is not, in the absence of negligence, liable. Here the infant plaintiff, in defiance of the provisions of sec. 443 of the *Railway Act*, cap. 170, R.S.C. 1927, trespassed upon the freight car in question and the contention to be made on his behalf must be put upon the ground that while he had of his own motion unlawfully placed himself in a position of danger, the defendant or its servants had failed in some duty owed to him to protect him from the consequences of his own rash act. In the situation in which Tremblay was placed when he saw the boy he might perhaps have shouted to him to hang on tightly to the ladder or conceivably have brought the train to a halt by using the emergency air brake or have followed the course which he did pursue in shouting to the boy to get off the train. There was risk to the boy in continuing to ride on the ladder at the side of the car, since the train was picking up speed. There was danger if the air brakes were applied suddenly since, as stated by Tremblay, the jolting stop might shake the boy off the ladder. There was also obviously some risk to the boy if he jumped from the train though, in view of the slow speed at which it was travelling, this would appear to be slight. In these circumstances Tremblay ordered the boy to get off the train and it is this act which the jury found to be negligent and to have contributed to the accident.

In *Grand Trunk Railway Company* v. *Barnett* (1) where the plaintiff was a trespasser on the railway company's property and on a train which to his knowledge was not at the time in use as a passenger train and on which he had taken up a precarious position on the platform and steps of the carriage, Lord Robson said that the railway company were undoubtedly under a duty not wilfully to injure him, nor were they entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way, and that though he was a trespasser a question might arise as to whether or not the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care. It was this statement of the law which was adopted by Duff, C.J. in *Canadian Pacific Railway Company* v. *Anderson* (2), and while it does not appear that in either of these

(1) [1911] A.C. 361. (2) [1936] S.C.R. 200 at 218.

cases the presence of the trespasser was known to the employees of the railway company, the manner in which the principle is stated makes it quite clear that its application is not limited to such cases. In *Addie's* case (2) Viscount Dunedin quoted with approval what was said by Hamilton, L.J. in *Latham* v. *Johnson* (2), that "the owner of the property is under a duty not to injure the trespasser wilfully; 'not to do a wilful act in reckless disregard of ordinary humanity toward him'; but otherwise a man trespasses at his own risk," and said further that as to trespassers there is no duty, save only that of not inflicting malicious injury. As to the decision in *Excelsior Wire Rope* v. *Callan* (3), I agree with what was said by Humphreys, J. in *Walder* v. *the Mayor, Alderman, etc. of Hammersmith* (4), that that case was decided on the fact that it did not matter whether the child who had been injured was a trespasser or not, since there was such carelessness amounting to recklessness on the part of the owners of the property, the persons responsible for the land, as would have given a good cause of action even to a trespasser. Applying the law as thus stated to the present case the judgment cannot, in my opinion, be supported. The plaintiffs had pleaded various acts of negligence, including the alleged act of Tremblay in frightening the boy by a threatening gesture as if he was going to throw a stone so that, as matters stood at the conclusion of the plaintiff's case, I think the learned trial judge would not have considered withdrawing the case from the jury. If, however, the plaintiff's case as proven had been as found by the jury, that the only act complained of was that Tremblay shouted at the boy to get off, a motion for non-suit should have succeeded on the ground that no facts had been established in evidence from which negligence might be reasonably inferred. (*Metropolitan Railway Company* v. *Jackson* (5)).

In the judgment of the learned trial judge on the motion made by the defendant after the jury's verdict the following passage appears:—

> The next important point in Defendant's Motion is the contention that, even accepting the majority answers to the four specific questions

(1) [1929] A.C. 358.
(2) (1913) 1 K.B. 398, 410.
(3) [1930] A.C. 404.
(4) (1944) 1 A.E.R. 490 at 494.
(5) (1877) 3 A.C. 193, 197.

1949

C.N.R. v. LANCIA

Locke J.

of fact, the fault found against Tremblay by the majority of the Jury is not a fault in law. Here again the undersigned, acting as a Judge alone, would unhesitatingly have decided in favour of Defendant. In view of the admitted fact that Angelo Lancia was a trespasser, it seems clear that Tremblay committed no breach of the obligation or duty owed to him.

I take from this that he considered that negligence could not be inferred from the mere fact that Tremblay had shouted to the boy to get off the train under the circumstances then existing. The position of the plaintiff cannot possibly be improved by the fact that, rejecting the evidence as to the threat by Tremblay that he would throw the stone and the various other charges of negligence, the jury found that shouting alone was actionable. If Tremblay, instead of shouting to the boy to get off the slowly moving train, had told him to remain where he was and the boy had thereafter fallen, or had he stopped the train with the emergency air brake and the jolt had thrown the boy under the wheels, it could scarcely be contended that there was a right of action for the resulting injuries. It seems to me that the present claim is equally without foundation. It was the boy who was in danger through his own actions and if Tremblay erred in the course he took for the boy's protection (and I think he did not), there is no actionable negligence in the circumstances of this case. The reckless driver of an automobile who, by his negligence, places the driver of another vehicle in a position of danger cannot complain if in the situation thus created the other person makes an error in judgment and a collision results. A trespasser cannot, in my opinion, create a situation of danger to himself and complain of an error of judgment in the steps taken to extricate him. There was here no evidence upon which to find that there had been any wilful act in disregard of humanity towards the boy, nor any act done with reckless disregard of his presence, nor any wilful act involving something more than the absence of reasonable care nor, in the language of Viscount Dunedin in *Addie's* case (1), any "malicious injury."

In my opinion, the finding made that the act of Tremblay in shouting under the circumstances of this case amounted

(1) [1929] A.C. 358.

to fault or negligence cannot be supported. The appeal should be allowed and the action dismissed. If costs are asked they should follow the event.

1949
C.N.R.
v.
LANCIA
Locke J.

Appeal allowed and action dismissed with costs.

Solicitors for the appellant: *Coté & Perrault.*

Solicitor for the respondent: *Allan A. Grossman.*

MONTREAL TRAMWAYS CO. ..... APPELLANT;

AND

MARY OLIVE CREELY, ES-QUAL, ET AL (PETITIONERS) ..... RESPONDENTS.

1948
*Dec. 13
1949
*Feb. 1

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

Appeal—Interlocutory judgment—Jurisdiction—Final judgment—Substantive right—Judicial proceedings—Amount in controversy—Art. 46 C.C.P.—Supreme Court Act R.S.C. 1927, c. 35, ss. 2(b) (e), 39(a).

In an action claiming $250,000 for fatal injuries resulting from a collision between a tramway and an automobile, the judgment of the Court of Appeal that it is without jurisdiction to hear an appeal from the decision of the trial judge dismissing a motion for non-suit made at the close of plaintiff's case on the ground that there was not sufficient evidence for the jury to find a verdict in favour of plaintiff, is a final judgment within section 2(*b*) of the Supreme Court Act; and the amount in controversy is the amount of the original claim.

MOTION to quash for want of jurisdiction.

J. G. Ahern K.C. for the motion.

L. E. Beaulieu K.C. contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is a motion to quash for want of jurisdiction.

The action came on for hearing before Tyndale C.J. and a jury on the 23rd and 24th days of February, 1948. At the close of the plaintiff's case the defendant moved that the action be dismissed on the ground that there was not sufficient evidence for the jury to find a verdict in the plaintiff's favour. The motion was dismissed by the presiding judge.

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

1949

MONTREAL TRAMWAYS CO. v. CREELY ET AL

Rinfret C.J.

As the defendant indicated its intention to appeal from that judgment, Tyndale C.J. told the jury that they might separate and that they would be called back to continue the hearing of the case if and when such appeal was disposed of.

The defendant then applied to one of the judges of the Court of King's Bench (Appeal Side) for leave to appeal to that Court from the decision of Tyndale C.J. (C.C.P., 1211).

The motion came on for hearing before St-Jacques J., who granted it; but the plaintiffs then moved the full Court to dismiss the appeal for want of jurisdiction, notwithstanding the permission granted by St-Jacques J.

The full Court granted the plaintiff's motion to quash the appeal to it on the ground that the judgment appealed from was interlocutory and that it did not fall within the provisions of Sec. 46, C.C.P., and that jurisdiction to deal with it could not be conferred upon the Court by a judge of that Court granting leave to appeal.

The defendant then appealed to this Court from this last mentioned judgment and the plaintiffs now move to quash for want of jurisdiction in this Court upon the ground that the judgment appealed from is not a final judgment, that the amount or value of the matter in controversy in the appeal does not exceed the sum of $2,000 (Sec. 39(*a*), Supreme Court Act), and that no special leave has been obtained from the Court of King's Bench (Appeal Side) for the Province of Quebec, or from this Court.

The only point decided by the judgment of the Court of King's Bench (Appeal Side) is that the Court was without jurisdiction to hear the motion for non-suit made by the defendant at the trial, that the judgment of the presiding judge dismissing that motion was interlocutory, and that it did not fall under any of the conditions required by Sec. 46, C.C.P., to make it susceptible of appeal, as it did not (1) decide in part the issues, (2) order the doing of anything which cannot be remedied by the final judgment, or (3) unnecessarily delay the trial of the suit.

The Court of King's Bench (Appeal Side) did not, therefore, pass on the merits of the motion for non-suit which was dismissed by Tyndale C.J.

In our view, this judgment of the Court of King's Bench (Appeal Side) comes within the definition of a final judgment in Sec. 2 (*b*) of the Supreme Court Act. The right of appeal asserted by the defendant, and which was allowed by St-Jacques J., is a substantive right in controversy between the parties in a judicial proceeding (Sec. 2 (*e*), Supreme Court Act).

The question raised by the defendant (appellant) concerns the jurisdiction of the Court of King's Bench (Appeal Side) to pass upon its motion for non-suit; and, by the judgment appealed from, that Court has finally deprived the defendant (appellant) of its substantive right to have that matter determined. (*Ville de St. Jean* v. *Molleur* (1) by Fitzpatrick C.J. at 153 to 157; *Bulger* v. *The Home Insurance Co.* (2); *The Cosgrave Export Brewery Co.* v. *The King* (3); *Montreal Tramways Co.* v. *Brillant* (4) and *Ballantyne* v. *Edwards* (5)).

In *The Grand Council of the Canadian Order of Chosen Friends* v. *The Local Government Board and the Town of Humboldt* (6), the matter in controversy was an order of the Local Government Board made under the provisions of the Local Government Board (Special Powers) Act. Embury J. had given leave to appeal against the order to the Court of Appeal for Saskatchewan. The latter court held that there was no right of appeal from the order of the Local Government Board in the premises. The situation was the same as in the present case, since the Grand Council had obtained leave to appeal from Embury J. and the Court of Appeal denied its jurisdiction, notwithstanding that leave had been given. In this Court jurisdiction was held to exist to decide whether the Court of Appeal was right in so holding and the case was heard on the point determined by the Court of Appeal.

In *The Provincial Secretary of the Province of Prince Edward Island* v. *Egan and The Attorney General of Prince Edward Island* (7), the Provincial Secretary had refused to issue a license to operate a motor vehicle to Egan who had been convicted of driving his motor vehicle while under the influence of intoxicating liquor. The Prince Edward

(1) (1908) 40 S.C.R. 139.
(2) [1927] S.C.R. 451.
(3) [1928] S.C.R. 405.
(4) [1929] S.C.R. 598.
(5) [1938] S.C.R. 392.
(6) [1924] S.C.R. 654.
(7) [1941] S.C.R. 396.

1949

MONTREAL TRAMWAYS CO. v. CREELY ET AL

Rinfret C.J.

Island Act was to the effect that in such a case the license was automatically suspended for twelve months with such conviction, and that "the Provincial Secretary shall not issue a license to any person during the period for which the license has been cancelled or suspended under this section."

From the refusal of the Provincial Secretary Egan appealed to a County Court judge, who allowed the appeal and ordered the issuance of a license. The Provincial Secretary appealed to the Supreme Court of Prince Edward Island *en banc*, which dismissed the appeal, holding that the County Court judge had jurisdiction to make the order and that there was no appeal therefrom. In this Court the appeal was allowed and the order of the County Court judge set aside. It was held that there was no right of appeal to the County Court judge from the refusal of the Provincial Secretary in the circumstances, that there was no provision authorizing such an appeal, that the order of the County Court judge was made without jurisdiction and that the Supreme Court of Prince Edward Island *en banc* should have so held and set aside the order.

It will be seen, therefore, that in the Egan case this Court entertained jurisdiction on the matter of the jurisdiction of the Supreme Court of Prince Edward Island *en banc*, even although, as happened there, it was held that the County Court judge himself had no jurisdiction to entertain the appeal from the refusal of the Provincial Secretary.

Reference might also be made to *Lord* v. *The Queen* (1), where the decision of the Court of Queen's Bench (Appeal Side) was reversed and the case was remitted to that Court to be there heard on the merits.

We might also refer to our recent decision in *Hartin et al* v. *May et al* (2).

Gatineau Power Co. v. *Cross* (3), a case cited by Counsel for respondent, was an expropriation matter. The Quebec Public Service Commission refused to give authority to the Gatineau Power Co. to expropriate Cross' property. This power was a matter of discretion for the Commission and the Court of Appeal merely decided that it could not interfere.

(1) 31 S.C.R. 165.
(2) [1944] S.C.R. 278.
(3) [1929] S.C.R. 35.

1949

MONTREAL TRAMWAYS CO. v. CREELY ET AL

Rinfret C.J.

Tremblay v. *Duke-Price Power Co.* (1), another case referred to by Counsel for the respondent, really turned merely on a matter of practice and procedure. The Court of King's Bench (Appeal Side), having decided under Sec. 1213 of the C.C.P. that the inscription in appeal had been abandoned, for that reason rejected the appeal. No question of the jurisdiction of that Court was involved.

From the reasons delivered in the present instance by the Court of King's Bench (Appeal Side) it follows that that Court only decided that it had no jurisdiction to hear the appeal which had been allowed by St-Jacques J., and it went no further.

We are of opinion that an appeal lies to this Court in such circumstances and that the amount or value in controversy is truly the amount or value of the original claim, i.e., the sum of $250,000.

For these reasons the respondent's motion to quash the appeal should be dismissed with costs.

Motion dismissed with costs.

1948

*Dec. 9, 10

1949

*Feb. 1

RAY SULLIVAN (DEFENDANT).....APPELLANT;

AND

DONALD A. McGILLIS (PLAINTIFF).....RESPONDENT.

AND

THE ATTORNEY-GENERAL OF CANADA ..... } INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Gaming and wagering—Cheque given to cover losses in betting on horse-races—Whether amount recoverable—Whether horse racing within Gaming Act, R.S.O. 1937, c. 297.

Section 3 of the Gaming Act, R.S.O. 1937, c. 297, which reads as follows: "Any person who, at any time or sitting, by playing at cards, dice, tables, or other game, or by betting on the sides or hands of the players, loses to any person so playing or betting, in the whole, the sum or value of $40 or upwards, and pays or delivers the same or any part thereof, shall be at liberty, within three months thereafter, to sue for and recover the money or thing so lost and paid or delivered", applies to money lost in betting on horse racing, payment of which has been made by a cheque.

(1) [1933] S.C.R. 44.

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

1949

SULLIVAN v. MCGILLIS AND OTHERS

APPEAL from the judgment of the Court of Appeal for Ontario dismissing (1) the appeal of the defendant-appellant from the decision of the trial judge, Mackay J., in favour of the plaintiff-respondent.

J. R. Cartwright K.C. for the appellant.

R. M. W. Chitty K.C. and *W. J. A. Fair* for the respondent.

F. P. Varcoe K.C. and *W. R. Jackett* for the Attorney-General of Canada.

W. C. Bowman for the Attorney-General of Ontario.

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

KERWIN J.:—This appeal should be dismissed on the ground that the respondent is entitled to succeed on his alternative claim under section 3 of *The Gaming Act,* chapter 297 of the Revised Statutes of Ontario, 1937:—

> 3. Any person who, at any time or sitting, by playing at cards, dice, tables, or other game, or by betting on the sides or hands of the players, loses to any person so playing or betting, in the whole, the sum or value of $40 or upwards, and pays or delivers the same or any part thereof, shall be at liberty, within three months thereafter, to sue for and recover the money or thing so lost and paid or delivered.

It is unnecessary and therefore inadvisable to express any opinion upon the constitutionality of those parts of sections 1 and 2 of the *Act* dealing with notes and bills although those sections must be referred to in considering the history of section 3.

The respondent sued the appellant for the principal sum of $5,479 and interest at five per centum per annum thereon from May 28, 1945. Judgment was given for the principal sum and interest from the issue of the writ, and that judgment was affirmed by the Court of Appeal for Ontario (1). May 28, 1945, was the date of a cheque drawn and signed by the respondent on a bank for the principal sum, on which date the appellant presented the cheque to the bank and received the money therefor. It was alleged by the respondent in his statement of claim that this cheque was so drawn, executed and delivered for

(1) [1947] O.R. 650.

an illegal consideration, in that the principal sum was the amount claimed by the appellant as owing to him by the respondent on account of gaming at horse racing during the week of May 21 to May 26, 1945, and the respondent pleaded sections 1 and 2 of the Act. In the alternative the respondent said that the sum was money lost by playing at a game, viz., horse racing, and the respondent pleaded section 3. Because of the question of onus raised by the appellant, it is important to notice that in answer to the alternative claim the appellant in his defence repeated certain allegations to the effect that the $5,479 was paid to him as agent for the respondent to be paid by the appellant to the person with whom the appellant claimed such wagers for the appellant had been placed, and denied that the said sum was at any time lost by playing at a game within the meaning of section 3. The only other defence to the claim under that section was that the money was not lost to the appellant and that the appellant was not playing or betting in such game.

The trial proceeded upon the basis of the pleadings and the only divergence in the evidence was on the point whether the appellant made any bets with the respondent or merely acted throughout as the latter's agent in placing bets with others. That issue was found against the appellant and confirmed by the Court of Appeal (1), and the appellant accepts that finding as the basis upon which this appeal must be determined. However, he contends that the respondent has not shown that he lost to the appellant $40 or more "at any time or sitting" within the meaning of section 3. The evidence disclosed that bets were placed each day on horse races during the week in question and that settlement was made by the cheque of May 28th. In view of the pleadings and the course of the trial, the appellant cannot now be heard to advance the present contention and, in any event, it is a fair inference from all the evidence that the respondent did lose to the appellant $40 or more at any sitting, i.e., on any one day during that week.

The trial judge held that section 2 of the *Act* applied but stated that, if he were wrong in that conclusion, he was also of opinion that section 3 likewise applied. In the Court of Appeal (1), after the first argument, reasons were

(1) [1947] O.R. 650.

1949

SULLIVAN v. MCGILLIS AND OTHERS

Kerwin J.

delivered in which Mr. Justice Laidlaw, speaking for himself and Mr. Justice Aylesworth, while dealing at some length with the other questions argued, expressed, in one sentence, the view that the respondent had a substantive right under section 3 to sue for and recover the money lost by him and paid to the appellant. While agreeing with the reasons of Mr. Justice Laidlaw, the third member of the Court, Mr. Justice Hogg, stated:—

> This result, however, with respect to the question as to whether horse racing is embraced by the language of the Statute, was reached by me only after considerable deliberation because of the amendment made in 1912, by which the word "whatsoever" was omitted from s. 3 of the Statute, which is now known as "The Gaming Act".

It was only after the reasons for judgment had been delivered, following the first argument, and before the formal order was issued, that the appellant obtained leave to raise the constitutional question. That question was subsequently determined adversely to the appellant but, for the reasons already stated, I express no view upon the matter.

The first legislation in Ontario dealing with the matters under review is found in chapter 1, "The Statute Law Revision Act, 1902", of the Statutes of 1902. Section 2 provides in effect that the Imperial Statutes described in the Schedule to that Act are repealed so far as the same are in force and within the legislative authority of the province. In the Schedule appears "16 Car II, c. 7—An Act against Disorderly and Excessive Gaming." Section 8 of the 1902 Act provides that the statute passed in the ninth year of Queen Anne intitled "An Act for the better preventing of excessive and deceitful gaming" (1710) is amended so far as the same has been incorporated into the laws of the province by striking out the first section thereof and by substituting the following:—

> All notes, bills, bonds, judgments, mortgages, or other securities, or conveyances whatsoever given, granted, drawn, or entered into, or executed, by any person, where the whole, or any part of, the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming, or betting, as aforesaid, or lent, or advanced, at the time and place of such play, to any person so gaming, or betting, as

aforesaid, or that shall, during such play, so play, or bet, shall be deemed to have been made, drawn, accepted, given, or executed, for an illegal consideration.

Section 9 follows the Imperial Statute of 5-6 William IV (1835) chapter 41, section 2, by providing that money paid to the holder of such securities shall be deemed to be paid on account of the person to whom the same was originally given and to be a debt due and owing from the latter and recoverable by action.

Chapter 13 of the Ontario Statutes of 1902 provides for what is known as Volume 3 of the Revised Statutes of Ontario, 1897, in which volume appears chapter 329, "An Act for the better preventing of excessive and deceitful gambling". Section 1 of that Act is the same as that part of section 8 of chapter 1 of the 1902 Statutes copied above. Section 2 is, with irrelevant verbal changes, the same as section 9 of chapter 1 of the 1902 Statutes. Section 3 enacts in part:—

> Any person who shall, at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any person so playing, or betting, in the whole the sum or value of forty dollars, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same shall be at liberty, within three months then next, to sue for, and recover, the money or goods so lost, and paid, or delivered, or any part thereof, from the respective winner thereof, with costs of suit, by action, founded on this Act, to be prosecuted in any of His Majesty's courts of record, in which actions no privilege of Parliament shall be allowed, and in which actions it shall be sufficient for the plaintiff to allege that the defendant is indebted to the plaintiff, or received to the plaintiff's use, the monies so lost and paid, or converted the goods won of the plaintiff to the defendant's use, whereby the plaintiff's action accrued to him according to the form of this statute, without setting forth the special matter.

Provision is then made for suit by any person in case the loser does not bring action. The only other section may be disregarded.

R.S.O. 1897, chapter 329, was repealed by *The Gaming Act*, chapter 56 of the Statutes of 1912, to which Mr. Justice Hogg (1) referred. Sections 2, 3 and 4 correspond to sections 1, 2 and 3 of the previous Act, with an alteration upon which the appellant relies. That alteration is that the words "or games whatsoever" in old section 1 after the words "bowls, or there game" disappear, and that the words "or games whatsoever" in old section 3, after the words

(1) [1947] O.R. 650.

1949

SULLIVAN v. MCGILLIS AND OTHERS

Kerwin J.

"tables or other game", disappear. Deferring consideration of this argument for the moment, I turn to the contention that horse racing is not included in section 3 of the present *Act*, R.S.O. 1937, chapter 297. As Lord Justice Fletcher Moulton stated in *Hyams* v. *Stuart* (1), a long series of cases in England had settled that horse racing was within the statutes of Anne and William IV. It is objected that while that may be so in England because of references in the statute of Anne to the earlier statute of Charles II, which specifically mentioned horse racing, that consideration should not apply in Ontario. The argument fails because the statutes of Charles II and Anne were undoubtedly part of the law of Ontario by virtue of the first chapter, passed at the first sitting of the Upper Canada Legislature in 1792, and the subsequent statutes that have taken its place: *Bank of Toronto* v. *McDougall* (2). The statute of Charles II was repealed and the statute of Anne, with the modifications already made in England by the statute of William IV, was enacted as previously explained by section 8 of chapter 1 of the Ontario Statutes of 1902 and became chapter 329 of R.S.O. 1897. The same meaning should be ascribed to the Ontario legislation, and horse racing was therefore an "other game" within section 3 of R.S.O. 1897, chapter 329.

Turning now to the argument based upon the omission of the words "or games whatsoever" in sections 2 and 4 of chapter 56 of the 1912 statutes, it should be noticed that in section 1 of the original statute of Anne there were five "whatsoevers", relating to (1) securities or conveyances, (2) persons, (3) valuable thing, (4) games, and (5) "all intents and purposes." In section 1 of R.S.O. 1897, chapter 329, this number is reduced to three, and in the 1912 statute is omitted entirely. The dropping of the words "or games whatsoever" was merely for the purpose of shortening the enactment and as expressed in the recital to chapter 13 of the 1902 Ontario Statutes, to remove language that had become antiquated.

The decision of the House of Lords in *Sutters* v. *Briggs* (3), is an authority merely for the proposition that the word "holder", in section 2 of the English Gaming Act of

(1) (1908) 2 K.B. 698 at 715.
(2) (1878) U.C.C.P. 345 at 352.
(3) [1922] 1 A.C. 1.

1835, includes the original payee and a banker who receives the note or bill for collection, but certain expressions in the speeches of Viscount Birkenhead and Lord Sumner might, on a casual reading, be taken as supporting or negativing the conclusion I have reached. A careful perusal of those speeches, however, has convinced me that it would be dangerous to look there for any guidance in determining the precise point before us as it really had no relevancy to the matters decided by their Lordships and in my opinion neither of them desired to state, or expressed, any view upon the subject. The mere fact that in the present case a cheque was given does not take the matter out of the operation of section 3 of *The Gaming Act,* R.S.O. 1937, chapter 297; *Smith* v. *Bond* (1).

The appeal should be dismissed with costs but there should be no costs to or against either Attorney General.

TASCHEREAU J.:—In his statement of claim, the plaintiff-respondent alleges that on the 28th of May, 1945, he signed a cheque payable to "cash", drawn on his bank, the Bank of Montreal, at Peterborough, for $5,479, which cheque was delivered to the defendant and cashed by him. He claims that this cheque represented the total amount which he had lost to the defendant by betting with him on horse races, and that, the consideration being illegal, he is therefore entitled to the reimbursement of that amount.

The defendant, now appellant before this Court, pleaded that he never at any time made any bets with the plaintiff, but merely acted throughout as agent for the plaintiff from time to time in placing with other persons in the City of Toronto, wagers for the plaintiff on the result of horse races without any consideration from the plaintiff, and solely on the ground of friendship.

The trial judge found as a fact that the defendant was a principal making bets with the plaintiff. He also found that the plaintiff under the law was entitled to recover the amount claimed and gave judgment in his favour. The appellant before this Court does not quarrel with this finding of fact, which was confirmed by the Court of Appeal (2), and assumed for the purpose of his appeal, that the cheque referred to, was given by the plaintiff to the defendant in payment of bets made between themselves.

(1) (1843) 11 M. & W. 549. (2) [1947] O.R. 650.

1949

SULLIVAN v. MCGILLIS AND OTHERS

Taschereau J.

Before the Court of Appeal (1), after the case had been fully argued, a motion was made on behalf of the defendant to present further argument and, by order of the Court dated the 21st of April, 1947, leave was given to the defendant to amend his statement of defence and notice of appeal, so as to raise the following question:—

3A. The Defendant submits that the Gaming Act, being Chapter 297 of the Revised Statutes of Ontario, 1937, is *ultra vires* of the Legislature of the Province of Ontario and particularly that Sections 1 and 2 of the said Act are *ultra vires* being legislation in regard to bills of exchange and promissory notes a class of subjects assigned exclusively to the Parliament of Canada by the British North America Act and particularly Section 91 (18) thereof.

The amendments were made accordingly and the matter was further argued before the Court of Appeal (1). Notice of the hearing of this argument was duly served on the Attorney General for Canada and the Attorney General for Ontario, pursuant to section 32 of the *Judicature Act*, R.S.O. 1937, chap. 100. On the 18th of June, 1947, the Court of Appeal (1) gave further reasons for judgment, and held that sections 1 and 2 were *intra vires* of the Ontario Legislature, and the defendant's appeal was dismissed with costs.

The Act which is challenged is the *Gaming Act*, chap. 297 of the Revised Statutes of Ontario, 1937. Section 1 provides that every agreement, note, bill, bond, confession of judgment, cognovit actionem, warrant of attorney to confess judgment, mortgage, or other security, or conveyance, for which, or any part of it, is money or other valuable thing won by gaming, or playing at cards, dice, tables, tennis, bowls, *or other game,* shall be deemed to have been made, drawn, accepted, given, or executed for an *illegal consideration.*

Section 2 says that if any person makes, draws, gives, or executes, any note, bill, or mortgage, for any consideration which is hereinbefore declared to be *illegal,* and actually pays to any indorsee, holder, or assignee of such note, bill, or mortgage, the amount of the money thereby secured or any part thereof, such money shall be deemed to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given, and to be a

(1) [1947] O.R. 650.

debt due and owing from such last named person to the person who paid such money, and shall accordingly be recoverable by action.

The last relevant section is section 3 which is to the effect that any person who, at any time or sitting, by playing at cards, dice, tables, *or other game,* loses to any person so playing or betting, in the whole, the sum or value of $40 or upwards, and pays or delivers the same or any part thereof, shall be at liberty, within three months thereafter, to sue for and recover the money or thing so lost and paid or delivered.

The defendant-appellant before this Court submits that the court below wrongly held, that bets made on horse races came within the words "or any game" of sections 1 and 2 of the *Gaming Act.* He also submits that the court erred in holding that the plaintiff was entitled to recover the moneys in question by reason of the provisions of section 3 of the *Gaming Act,* because a bet on a horse race would not come within the words of that section, and that there was no evidence that any one bet of those that made up the total of the cheque, was in excess of $40. Finally, it is the contention of the appellant before this Court that sections 1 and 2 of the *Gaming Act* are *ultra vires* of the Province of Ontario, being legislation in regard to bills of exchange and promissory notes.

The origin of this Ontario legislation which is challenged, may be found in the Imperial Statute 9 Anne, Chap. 14, 1711, and entitled "An Act for the better preventing of excessive and deceitful gaming." This Act stipulated that after the 1st of May, 1711, all notes, mortgages, etc. where the consideration was for money won by gaming, or the repayment of money lent at such gaming were *void.* Section 2 of the same Act was to the effect that the loser could sue for the repayment of the money within three months.

Later, in England, in 1835, (5 & 6 William IV, Chap. 41) another act was enacted entitled "An Act to amend the law relating to securities given for considerations arising out of gaming, usurious, and certain other illegal transactions". In this Act, it was stipulated that any notes, bills, or mortgages which up to then, were under the Statute of Anne absolutely *void,* should in the future be deemed and

1949

SULLIVAN v. McGILLIS AND OTHERS

Taschereau J.

taken to have been made, drawn, accepted, or executed for an *illegal consideration.* Section 2 was also enacted, which reads as follows:—

11. AND be it further enacted, that in case any person shall, after the passing of this Act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the herein-before recited Acts of . . . the ninth and eleventh years of the reign of her said late Majesty Queen Anne, or by any one or more of such Acts, declared to be *void,* and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such *illegal consideration* as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's courts of record.

Several amendments to the original Statute were adopted by the legislature of Ontario, and we now find the *Gaming Act,* as it now stands in chapter 297 of the R.S.O. 1937. It practically embodies the Statute of Anne and the amending Imperial Statute of 1835.

Dealing first with the contention that the words "other game" found in the Statute do not include horse racing, it is sufficient to refer to the previous judgments on this point, to reach the conclusion that they do.

In *Goodburn* v. *Marley* (1), it was held that horse races was within the Act against the Statute of Anne, and this judgment was later confirmed in *Blaxton* v. *Pye* (2). In *Hyams* v. *Stuart King* (3), Fletcher Moulton L.J., said:—

Horse racing is not expressly referred to either in the statute of Anne or in the Gaming Act, 1835; but by a series of decisions, culminating in the decision of this Court in *Woolf* v. *Hamilton* (4), it has been settled that horse racing is within these statutes, and that a cheque given for a bet upon a horse race is therefore to be deemed to have been given for an illegal consideration.

More recently in *Sutters* v. *Briggs* (5), Lord Sumner said at page 19:—

They accepted that, as *Fletcher Moulton L.J.* observes in *Hyams* v. *Stuart King* (1908, 2 K.B. 696, 715), a long series of cases has settled that horse racing is within the statutes of Anne and William IV.

If any further authority is needed on this point, vide the following American cases: (*Tatman* v. *Strader* (6));

(1) (1742) 93 E.R. 1099.
(2) 2 Wils. Exch. 309.
(3) (1908) 2 K.B.D. 715.
(4) (1898) 2 Q.B. 337.
(5) (1922) 1 A.C. 1 at 19.
(6) (1859-60) 23 Ill. 493.

(*Ellis* v. *Beale*, (1)); (*Swaggard* v. *Hancock*, (2)); (*Daintree* v. *Hutchison* (3)); (*Swigart* v. *People of the State of Illinois* (4)); (*Boynton* v. *Curle* (5)).

As to the contention that there was no evidence that any one bet was in excess of $40, so as to bring the case within section 3 of the statute, I do not think that the appellant, who has never raised that point in the lower courts, may now be allowed to do so here. The case has never been fought on that basis, and I therefore assume that each bet was for over $40.

Turning now to the constitutional aspect that has been raised, I do not think it necessary to deal with sections 1 and 2 of the *Act*, because whether they are or not within the powers of the Legislature of Ontario, the respondent is entitled to succeed, even if he relies merely on section 3. Moreover, the case contemplated in section 2, deals with the rights of the loser when third parties are involved. But we are not confronted here with this eventuality. The legal relationship in the present case is between the winner and the loser of the bet, and in my opinion, section 3 is sufficient to justify the judgment given in favour of the respondent.

I have no doubt that this section is severable from the rest of the *Act*, and that the Legislature would have enacted it without the other provisions.

The appeal should be dismissed with costs. But there should be no costs to or against the Attorneys General.

The judgment of Kellock and Locke JJ. was delivered by

KELLOCK J.:—The first point made on behalf of the appellant with which it is necessary to deal is that section 3 of the *Gaming Act*, R.S.O., 1937, cap. 297, does not apply to money lost in betting on horse racing.

This section derives from section 2 of 9 Anne, cap. 14. So far as relevant that section read as follows:

> . . . any person or persons whatsoever who at any time or sitting, by playing at cards, dice, tables or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting in the whole the sum or value of ten pounds, and shall pay or deliver the

(1) (1841) 18 Maine 337.
(2) (1887) 25 Mo. App. 596.
(3) (1842) 10 M. & W. 85.
(4) (1892) 50 Ill. App. 181.
(5) (1870) 4 Houck (Mo.) 351.

1949

SULLIVAN v. MCGILLIS AND OTHERS

Kellock J.

same or any part thereof, the person or persons, so losing and paying or delivering the same, shall be at liberty within three months then next, to sue for and recover the money or goods so lost and paid or delivered or any part thereof, from the respective winner and winners thereof, with costs of suit, by action of debt founded on this Act . . .

It has been uniformly held in England under the Statute of Anne that although horse racing is not specifically mentioned in the statute, as was the case with earlier legislation, nevertheless it applied equally to money lost by betting on horse races, the words "other game or games" being held sufficient for that purpose; *Sutters* v. *Briggs* (1), per Lord Sumner at 19; *Woolf* v. *Hamilton* (2); *Blaxton* v. *Pye* (3); *Goodburn* v. *Marley* (4); *Applegarth* v. *Colley* (5). As stated by Lawrence, L.J., in *Ellesmere* v. *Wallace* (6):

> It is settled that . . . horse racing is a game within the meaning of the Gaming Acts;

and he cites *Applegarth* v. *Colley, supra.* The same construction has been put upon section 2 as upon section 1, notwithstanding that the enumeration of the games in section 2 is not the same as in section 1; *Thorpe* v. *Coleman* (7).

The Statute of Anne became part of the law of Ontario by the provisions of the *Constitution Act,* 1792, 32 Geo. II, cap. 1 (U.C.)

Prior to 1902 the amendments to the Gaming laws of 5 and 6 Wm. IV, cap. 41, sections 1 and 2, were not in force in Ontario; In *re Summerfeldt* v. *Worts* (8). In that year however, these sections were enacted by 2 Edward VII, cap. 1, sections 8 and 9. By section 8 section 1 of the Statute of Anne was amended to provide that the instruments mentioned in the section should be deemed to have been given for an illegal consideration instead of being rendered void as was the case under the original statute. Section 2 of 9 Anne was not affected by the amending Act. By section 9 the provisions of section 2 of the Act of William were enacted; now embodied in section 2 of the existing statute. By cap. 13 of 2 Edward VII, "An Act respecting the Imperial Statutes relating to property and civil rights incorporated into the Statute Law of Ontario",

(1) (1922) 1 A.C. 1.
(2) (1892) 2 Q.B. 337.
(3) 2 Wils. K.B. 309.
(4) 2 Str. 1159.
(5) 10 M. & W. 722.
(6) (1929) 2 Ch. 1 at 38.
(7) 1 C.B. 991.
(8) 12 O.R. 48.

the Statute of Anne, as thus amended, was revised and consolidated as part of the Revised Statutes of Ontario, 1897. By section 2 of cap. 13 provision was made for the repeal of the Imperial Acts to take effect from the day upon which the revision of 1897 should take effect, provision being made for the latter by section 4. By section 9 it was provided that the Revised Statutes should not be held to operate as new laws but should be construed and have effect as a consolidation and as declaratory of the law as contained in the repealed statutes for which the Revised Statutes were substituted. Section 10 provided that if upon any point the provisions of the Revised Statutes were not in effect the same as those of the repealed Acts then as to all matters subsequent the Revised Statutes should prevail.

Cap. 329 contained the revision of the Statute of Anne as amended by 2 Edward VII, cap. 1, sections 8 and 9. Section 3 perpetuates the provisions of section 2 of the Statute of Anne. Verbal changes were made in this section, such as omitting the words "or persons whatsoever" after the words "any person" at the beginning of section 2 of the Statute of Anne and there were similar changes. The phrase "or other game or games whatsoever" remained in the section.

In 1912 by cap. 56 the Act was again revised, section 3 of the earlier statute becoming section 4. Among the changes made the words "or other game or games whatsoever" in the Act of 1902 became "or other game". The phrase "the sides or hands of such as do play at any of the games aforesaid" was also shortened to "the sides or hands of the players". I see no reason however, for thinking that the legislature intended to make the statute inapplicable to the subject matters of the preceding Act and I think the Act of 1912, which is reproduced in the Revised Statutes of 1937, is to be given the same construction so far as betting on horse racing is concerned as the original Statute of Anne.

It is however, further contended that by reason of the tax imposed on betting at horse races by the *Race Tracks Tax Act* of 1939, cap. 39, section 3, the *Gaming Act* should not be construed as including horse racing. Assuming the subject matter of the Act of 1939 is the same as that of the

1949

SULLIVAN v. MCGILLIS AND OTHERS

Kellock J.

Gaming Act, section 3 of the *Gaming Act* remains on the statute books and, in my opinion, it is not to be considered as thus indirectly amended without more express language than that contained in the Statute of 1939. There is no contradiction in taxing the winner in respect of his gains even although he may, though not necessarily must, be called upon to repay.

The next point which arises is as to whether or not section 3 of the present statute applies where the plaintiff has given a cheque to the winner in payment of the bets lost or whether the section is, as appellant contends, limited to cash payments. That the section has always been limited to the recovery of payments directly made by the loser to the winner is clear, I think, from the authorities. It is sufficient to refer in this connection to *Sutters* v. *Briggs, ubi cit.* It is however, also established that a payment made by cheque is within the section where the cheque has been collected directly by the winner; *Smith* v. *Bond* (1). Under section 1 of the Statute of Anne all bills were void and payment thereof could not be recovered in any case not within section 2. Section 2 of the Statute of William was enacted to permit recovery where payment had been made by bill of exchange which had found its way into the hands of third parties; *Sutters* v. *Briggs, ubi cit.* The present case appears to come clearly within the provisions of section 3 as the appellant received payment directly from the bank upon which the cheque here in question was drawn payable to "cash".

While argument was addressed to us on the basis that sections 1 and 2 of the statute, or at least those portions of the sections which relate to bills of exchange, are *ultra vires* on the ground that they constitute legislation within the exclusive jurisdiction of the Parliament of Canada, no similar argument was addressed to us, nor I take it from the judgments below, to the Court of Appeal (2) with respect to section 3. The matter need not therefore be considered.

It is next argued that it was not proved on behalf of the respondent that the amount sued for was made up exclusively of amounts lost "at any time or sitting" of "the sum or value of $40 or upwards."

(1) 11 M. & W. 549. (2) [1947] O.R. 650.

The Statement of Claim includes in the alternative a claim within section 3 to which the Statement of Defence raised two defences, namely, (1) that the section does not include money lost by betting on horse races; and (2) that the respondent was, in any event, an agent and not a principal. The present objection was not raised before the trial judge and the course of the trial in my opinion brings the case within the principle of the decision in *The Century Indemnity Co.* v. *Rogers* (1). I would dismiss the appeal with costs, save that there shall be no costs to either of the Attorneys-General.

Appeal dismissed with costs; no costs to or against either Attorney-General.

Solicitors for the Appellant: *Smith, Rae, Greer and Cartwright.*

Solicitor for the respondent: *W. J. A. Fair.*

Solicitors for the Attorney-General of Canada: *F. P. Varcoe and W. R. Jackett.*

Solicitor for the Attorney-General of Ontario: *C. R. Magone.*

THE CORPORATION OF THE CITY OF WINDSOR ..... APPELLANT;

AND

HIRAM WALKER-GOODERHAM & WORTS LIMITED and SUBSIDIARIES HOLDING COMPANY LIMITED ..... RESPONDENTS.

1948
*May 17, 18, 19, 20, 21, 25, 26, 27.

1949
*Jan. 7

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and Taxation—Income Assessment—Whether decision of County Court Judge under s. 57(3) final—The Assessment Act, R.S.O. 1937, c. 272, ss. 57, 59, 60, 73, 76, 84, 123, (as amended by 1939, c. 3 s. 8), and s. 125.

The appellant municipal corporation under the *Assessment Act,* R.S.O. 1937, c. 272, s. 57(2), assessed the appellant in 1943 in respect of income received in 1940, 1941 and 1942. The respondent, as provided

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

(1) [1932] S.C.R. 529.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

by s. 57(3), appealed to the court of revision and from that court to the county court judge, who upheld the appeal. The municipality then appealed under s. 84 and the Ontario Municipal Board allowed its appeal. The respondent appealed to the Court of Appeal for Ontario and that court held the decision of the county court judge was final.

Held: That the appeal should be dismissed.

Held: Also that as to the by-law passed in 1943 under s. 123, the appellant was not, in view of subsection 12, entitled to assess and tax the 1942 income.

Per: Taschereau, Kellock and Locke JJ., as to the income for the years 1940 and 1941, which the appellant purported to tax under s. 57:

(1) The right of appeal given by s. 57(3) is a special and limited right of appeal from taxation exhausted when the county court judge is reached. *Scottish Widows' Fund Life Assurance Society* v. *Blennerhassett,* [1912] A.C. 281 at 286; *Furtado* v. *London Brewery Co.,* [1914] 1 K.B. 709 at 712.

(2) The right of appeal given by s. 84 is with respect only to entries in the current assessment roll which have been made the subject of formal complaint to the court of revision and not with respect to taxes already imposed. *Re Blackburn* v. *City of Ottawa,* (1924) 55 O.L.R. 494 at 501.

Per: Kerwin and Estey JJ., that as to the 1940 and 1941 income, the income assessments and tax rolls prepared by the appellant in 1941 and 1942 do not fall within the meaning of "the assessment roll from which such assessment has been omitted" as prescribed by s. 57(2), and the actions of the appellant's officers failed to bring the respondents within the terms of s. 57.

Per Kerwin and Estey JJ., (dissenting in part):

(1) The effect of deleting the words "and no appeal shall lie from the decision of the county court judge on any such appeal" from s. 123(8) by 1939, c. 3, s. 8, must have the effect of permitting further appeals, if the necessary conditions are met, to the Ontario Municipal Board and the Court of Appeal under s. 84. When the person assessed exercises the right of appeal to the court of revision under s. 57(3), the matter is brought into the general stream so as to permit either the party or the municipality to pursue the matter to the end.

(2) In view of subsequent changes in legislation, the decision in the *Blackburn* case is no longer applicable.

APPEAL from the judgment of the Court of Appeal for Ontario, (1) setting aside a decision of the Ontario Municipal Board allowing an appeal from a decision of the county court judge.

S. Springsteen K.C. and *L. R. Cumming* for the appellant.

C. F. H. Carson K.C. and *P. Kidd* for the respondent.

(1) 1947 O.R. 488.

The judgment of Kerwin and Estey, JJ., dissenting in part, was delivered by

KERWIN J.:—The Court of Appeal for Ontario allowed the appeal of the respondent companies from a decision of the Ontario Municipal Board, which had allowed the appeals of the present appellant, the Corporation of the City of Windsor, from a judgment of the senior County Judge of the County of Essex. All these appeals were assessment appeals under the Ontario *Assessment Act*, R.S.O. 1937, chapter 272, as amended, as they arose from assessments made against the respondents in 1943 in respect of the income received by them in the years 1940, 1941 and 1942. The Court of Appeal decided that the decision of the county judge was final with respect to the income for any of these years and as agreement with that conclusion would be sufficient to dispose of the matter, that point should first be considered.

The assessments for 1942 income were made in pursuance of By-law 425 of the City of Windsor, passed July 20, 1943, under the authority of section 123 of the Act. The names of the respondents were entered in a special roll of taxable income and payment of the taxes due was demanded by the tax collector. Thereupon, in the words of subsection 8 of section 123, the respondents had "in respect thereto the right of appeal provided in this Act in the case of assessments." If, in reading subsection 8, one omits for the moment the following words that appear between commas, "upon receipt from the collector of demand for payment of the said rate upon the amount for which he is taxable according to said roll", the first part of the subsection would then provide:—"A person whose name is entered in the special roll of taxable income shall not be entitled to notice of such entry but shall have in respect thereto the right of appeal provided in this Act in the case of assessments." That, I think, is the correct way of reading the subsection, and the words between commas merely indicate the time when the right of appeal arises. Upon that construction the word "thereto" would refer to the entry in the special roll and the appeal would be an assessment appeal. However, even if "thereto" be taken

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kerwin J.

to refer to the demand for payment, that demand is based upon a prior assessment, and upon the respondents' appeals the amounts of the assessments were put in issue.

The respondent failed before the Court of Revision and unless there is something else in the Act, conferring a further right to appeal to the county judge, the Court of Revision's decision would be final. Subsection 10 envisages an appeal to the county judge so that it is permissible to call in aid the previous sections of the Act dealing with what might be termed the general scheme of assessment appeals. That view is confirmed when one considers the history of subsection 8. It was first enacted by section 8 of chapter 1 of the 1934 statutes as part of what was then section 120A when the following words appeared at the end "and no appeal shall lie from the decision of the county court judge on any such appeal." These words presuppose an appeal from the Court of Revision to the county judge. They were continued in subsection 8 of section 123 of the Revised Statutes of 1937 but in 1939, by chapter 3, section 8, they were deleted. This deletion must have the effect of permitting further appeals, if the necessary conditions are met, to the Ontario Municipal Board and the Court of Appeal under section 84. I am unable to agree with the contention that only the person assessed has all or any of these rights of appeal and that the municipality has none. While no right of appeal to the Court of Revision is given the municipality under subsection 8 of section 123, neither is such right given under the earlier sections dealing with the general scheme of assessment appeals. When the person assessed exercises the right of appeal to the Court of Revision the matter is brought into the general stream so as to permit either the party or the municipality to pursue the matter to the end.

The question of the right of appeal from the county judge in connection with the income received in 1940 and 1941 sends us to subsections 2 and 3 of section 57. Acting under subsection 2, the Assessment Commissioner in 1943 reported to the city clerk that income assessments against the respondents for 1940 and 1941 had been omitted. The assessments were accordingly added to assessment rolls, to be described hereafter, and to the collector's roll for 1943, prepared under By-law 425 and section 123 of the Act.

In accordance with subsection 3 of section 57, notices of the amounts of the assessments and of the taxes were sent to the respondents. The words "so taxed" in this subsection are merely descriptive of the person to whom notice is to be sent as he is notified as well of the assessments as of the taxes. The subsection provides not only that such person may appeal to the Court of Revision but also that "an appeal may also be had to the county judge by such person or by the municipality from any decision of the Court of Revision." This makes the matter quite clear up to and including appeals to the county judge and, once an appeal under the subsection is brought, the matter falls into the general scheme of assessment appeals so as to make applicable section 84, conferring a right of appeal from the county judge, not only upon the person assessed and taxed, but also upon the municipal corporation. If this be the correct conclusion upon the language of the subsection itself, it is no argument to the contrary that as a result of a municipality's appeal the person assessed and taxed may incur penalties for non-payment at the time demanded since the same result would follow in the ordinary course.

Reliance is placed upon the decision of the Court of Appeal for Ontario in *Re Blackburn and City of Ottawa* (1). At that time the section under which the Assessment Commissioner for Ottawa purported to report to the city clerk that income assessment had been omitted, contained the words "and the parties so assessed and taxed shall have the right of appeal as provided in section 118." Section 118 was the one conferring upon the Court of Revision power to order a remission of taxes, and the Court of Appeal considered that the right to petition for the exercise of such power and the right of appeal from an assessment had always been entirely separate and distinct things so that the decision of the county judge was final after an alleged omission had been entered on the rolls. In 1929, however, what is now subsection 3 of section 57 was first enacted, at which time subsection 2 was amended by striking out the following words at the end thereof:—"and the parties so assessed and taxed shall have the right of appeal as provided in section 121." Section 121 there

(1) (1924) 55 O.L.R. 494.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kerwin J.

mentioned is for all relevant purposes the same as section 118 referred to in the *Blackburn* Case. In view of the changes in the legislation, that decision is no longer applicable.

The appeal as to the assessability of 1942 income may be quickly disposed of. Although it was argued that subsection 12 of section 123 was superfluous, some meaning must be ascribed to it, and reading it in conjunction with all the other subsections, I agree that the earliest the provisions of section 123 could take effect under By-law 425 was the year 1944 with respect to income for 1943. The income for the year 1942, therefore, is not caught.

In order to decide as to the 1940 and 1941 income, it is necessary to describe the assessment rolls to which were added the assessments of income for those years. It has already been pointed out that By-law 425, by virtue of which section 123 of the *Assessment Act* took effect, was passed July 20, 1943. Up to that time, By-law 22, passed October 30, 1935, was in force. This latter by-law was passed in pursuance of what is now section 60 by which a city, instead of proceeding as set forth in section 59, may by by-law provide for making the assessment at any time prior to September 30th and for fixing prior and separate dates for the return of the roll of each ward. By subsection 2 of section 9, the income to be assessed shall be the income received during the year ending December 31st then last past. Without detailing the other provisions of the *Assessment Act* and the relevant sections of the *Municipal Act,* the result should have been that the income for 1940, for instance, would be entered on the assessment roll prepared in 1941 and that the taxes in respect thereof would be payable in 1942 and not before. Instead of following this normal procedure, the City officials, commencing in 1936, proceeded as if By-law 425 had been enacted and section 123 brought into effect. In 1941, they prepared a "Corporation Income Tax Roll, 1941, from returns for the year 1940 Assessment and Tax Roll 1941", the title of which is self-explanatory and in 1942 they prepared a similar roll, which, however, is headed "Income Assessment and Tax Roll 1942." On each of these appeared the names of certain corporations, the amounts of income for which

they were assessed, and the taxes figured at the proper rate, which it might be noted was the same in each of the years 1940, 1941 and 1942. So far as the respondents are concerned, neither of these rolls falls within the meaning of "the assessment roll from which such assessment has been omitted" as prescribed by subsection 2 of section 57. None of the cases cited assists the appellant to overcome the fact that the actions of its officers have failed to bring the respondents within the terms of section 57.

The appeal should be dismissed with costs.

The judgment of Taschereau, Kellock and Locke JJ. was delivered by:—

KELLOCK J.:—Dealing first with the income of the respondent companies for the years 1940 and 1941, which the appellant purported to tax under the provisions of section 57 of the *Assessment Act*, the first question which arises is as to whether or not section 84 applies so that the appellant was entitled to appeal from the county judge to the Ontario Municipal Board.

By subsection 1 of section 84 an appeal lies "where a person is assessed" in excess of amounts mentioned in the subsection. The respondents' contention is that the appeal provided for by this section does not apply to cases coming within either section 57 or, with reference to the income of 1942, with which I shall deal later, section 123, i.e., that section 84 applies where assessment only is involved and not to cases where the matter has gone beyond that stage and taxation has been imposed.

Turning to the statute, section 23 provides that every assessor in preparing the assessment roll, which takes place annually, shall set down therein certain particulars, including the names of all persons who are liable to assessment in the municipality, with the amounts assessable against each in respect of land, buildings, business and income, as well as the total assessment. Before completing his roll section 52 requires the assessor to send to every person named in the roll a notice of the assessment. While under section 54 he may correct any error in his assessment and alter the roll accordingly, he may do so only within the time fixed for the return of the roll and he must give an

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

amended notice of assessment to the person affected. Form 4 of the statute speaks of the assessment as made when the notice has been sent out, but however that may be, the taxation stage is not reached until appeals against assessments have been disposed of and the roll has been revised by the court of revision and county judge and a levying by-law has been passed by the council under section 315 of the *Municipal Act*, the levy being arrived at under section 316 upon the basis of the estimated expenditure in relation to the total assessment as disclosed by the assessment roll. After these steps have been taken the collector's roll is then made up pursuant to section 104 of the *Assessment Act* and this roll is then delivered to the collector who is required by section 108 to proceed to collect.

Subject to sections 59 to 63 of the Act, the assessor is required by section 53 to begin to make his roll in each year not later than the 15th of February and to complete the same by the 30th of April, by which last mentioned date he must deliver the roll, completed and added up, with the requisite affidavits, to the clerk of the municipality. Where this section applies the time for appealing against an assessment to the court of revision is, as provided by section 73, subsection 2, within fourteen days after the day upon which the roll is required to be returned or within fourteen days after its return, if it has not been returned within the time fixed by law. It is provided by subsection 21 that all the duties of the court of revision shall be completed and the roll finally revised before the 1st of July. Section 76 authorizes an appeal from the court of revision to the county judge, notice of appeal being required to be given by subsection 2 within five days after the date limited for the closing of the court of revision, or in case the court sits to hear appeals after that date, then within five days after its actual closing. By subsection 7 it is required that all appeals shall be determined before the 1st of August.

In certain municipalities where it is not desired to follow the procedure provided for by section 53 it is provided by section 59 that by-laws may be passed for taking the assessment between the 1st of April and the 30th of September, the rolls being returnable on the 1st of October. In such case the time for closing the court of

revision is the 15th of November and the final return by the county judge is to be on the 15th of December, although subsection 2 recognizes that there may be delay in the final return beyond the last mentioned date.

By section 60 cities, instead of proceeding under section 59, may by by-law provide for making the assessment at any time prior to the 30th of September and for fixing prior and separate dates for the return of the assessment roll of each ward or subdivision of a ward. The by-law must provide for the holding of a court of revision for the hearing of appeals from the assessment in each ward or subdivision upon the return of the assessment roll of such ward or subdivision and the time for appeal to the court of revision is to be within ten days after the last day fixed for the return of the roll and for appeal to the county judge within ten days after the decision of the court of revision or after receipt of written notice of such decision. By subsection 4 the county judge is required to complete his revision of the last of the assessment rolls for the city by the 20th of October in each year, although again subsection 5 recognizes that there may be delay.

Under the combined provisions of section 1(*j*) and section 74, the roll as revised by the county judge is deemed to be finally revised and binds all parties concerned, notwithstanding any error mentioned in section 74.

In cases falling within section 53 therefore, the time for appealing an assessment would, in the normal course, expire on the 15th of May in each year as provided by section 73, subsection 2. In cases within section 59 the time for such appeals would normally expire on the 15th of October and in cases within section 60 on the 10th of October. Section 76 provides for appeals to the county judge and in cases where the assessment is sufficient in amount there may be a further appeal to the Municipal Board under section 84. On questions of law there is an appeal also from the Board to the Court of Appeal under section 85, but as already mentioned, the assessment roll is considered as finally revised once the county judge has finished his revision and notwithstanding that there may be appeals outstanding to the Municipal Board or the Court of Appeal,

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

the clerk of the municipality is required by section 104 to make up the collector's roll and insert therein the several amounts of taxes.

The above outline of these statutory provisions is sufficient, in my opinion, to indicate the subject matter dealt with by section 84. The right of appeal thereby given is with respect only to entries in the current assessment roll which have been made the subject of formal complaint to the court of revision within the time prescribed as above mentioned. Entries in the assessment and collector's rolls under section 57 may be made "at any time" and hence long after, and as much as two years after the time prescribed for appeals in the ordinary assessment procedure.

Subsection 6 of section 73 prohibits any exercise of jurisdiction with respect to making any change in an assessment except in cases which have originated by a formal complaint to the court of revision as provided by that section. The appeal with which section 84 is concerned is therefore an appeal with respect to assessments and not an appeal with respect to taxes already imposed.

It is convenient at this point to refer to section 123. By subsection 1 the council, instead of making "an assessment of income as hereinbefore in this Act provided", may pass by-laws requiring every person liable to assessment in respect of income to furnish, within the time fixed by the by-law, a return of income received during the year ending on the 31st of December then last past and providing for the entry of the names of all such persons, whether or not they have complied with the demand, with the amount of the taxable income of each in a "special roll of taxable income" and also for levying upon the taxable income according to such roll at the appropriate rate. Subsection 2 provides for the rate and for recovery thereof in the same way as other rates. By subsection 8 a person entered on this roll is not entitled to notice of the entry but upon receipt of the tax demand from the collector he is given "in respect thereto", that is the demand for payment of taxes, "the right of appeal provided in this Act in the case of assessments".

In my view the language last quoted recognizes that the "case of assessments" is not the same thing as that with which section 123 is concerned, namely, the immediate imposition of taxation. The person upon whom the tax is imposed is, however, given the right of appeal applicable in the case of assessment.

In *Teck* v. *Hayward* (1), Henderson J.A., in speaking of the predecessor of section 73, subsection 1, and the other sections dealing with assessment appeals to the county judge, said at p. 133:

> It is clear, in my opinion, that the appeal provided for by these sections is an appeal only from an assessment, and does not confer any right of appeal from the rate of taxation imposed by the municipality.

On the following page with respect to subsection 8 of the then section 120a, now section 123, he said:

> My construction of this subsection is that the appeal is in respect of the demand for payment of the rate and that the words "the right of appeal provided in this Act in the case of assessments" describes the tribunals to which the appeal lies.

With respect to section 84, then section 80, Middleton J.A., in *Re Blackburn* v. *City of Ottawa* (2) said at page 501:

> But, reading the section in its context, it appears to me clearly to indicate that it was intended to apply only to appeals from actual assessments made in the ordinary way, and not to the attempt on the part of the municipality to collect taxes upon land or income which had inadvertently escaped assessment.

In his consideration of section 80 as it stood at that time, Middleton J.A., had in his mind, it is true, the ancestor of the present section 57, which was then in different form. I shall deal with that aspect of the matter in connection with consideration of the provisions of section 57. In my view, however, any change in the form of section 57 since the above judgment does not affect the appropriateness of the excerpt from the judgment just quoted to the present section 84.

When one comes to section 57 the situation is, in my opinion, analogous to that arising under section 123 in that section 57 does not deal merely with matters of assessment but with the imposition of taxation. While under subsection 2, in the case of income which has been omitted from the assessment roll, the assessor is directed

(1) [1936] 3 D.L.R. 125. (2) (1924) 55 O.L.R. 494.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

to enter the same on the appropriate assessment roll or rolls, he is also directed to enter the rates on the collector's roll for the current year. On so doing the clerk is then required by subsection 3 to deliver or send by registered letter post to the person "so taxed" a notice which contains not only the amount of the assessment but also the taxes, and such person is given the right of appeal provided for by the subsection.

As already stated, in my opinion, the language of section 123, subsection 8, namely, "the right of appeal provided in this Act in the case of assessments" indicates that an assessment appeal and the appeal from the imposition of taxation provided for in section 123, subsection 8, are separate and distinct. The appeal provided for in section 57, subsection 3, is of the latter class. In the last mentioned subsection this differentiation is emphasized. The subsection makes no reference to the appeal given in the case of assessments but sets out specifically the persons entitled to appeal and the tribunals to which resort may be had. It provides, in my opinion, a special and limited right of appeal and is its own code. There is no room under section 57(3), for instance, for any reference to section 73 so as to permit the persons mentioned in subsection 3 of that section to appeal. With respect to the appeal to the court of revision it is the "person so taxed" only who may appeal. Again, section 57(3) permits only that person and the municipal corporation to appeal to the county judge. There is no room therefore for the application of section 76(1), which permits other persons to make the appeal thereby provided for. Section 73(22) emphasizes that that section is dealing only with "an appeal * * * against an assessment" which is the subject of "a complaint formally made according to the above provisions", (subsection 6) notice having been given within fourteen days after the return of the assessment roll (subsection 2). The appeal to the county judge provided for by section 76 is an appeal from a decision of the court of revision made pursuant to section 73. The same is, in my opinion, true of section 84, which operates by way of exception to the prohibition contained in section 83, both sections, however, dealing only with appeals with respect to assessments made

in pursuance of sections 53, 59 or 60, and made the subject of formal complaint to the court of revision within the prescribed time after the assessment.

When one looks at the way in which section 57 has evolved to its present form the conclusion set out above is very much strengthened. It is not necessary to go back beyond the Revised Statutes of 1927, cap. 238. At that time the right of appeal in the case of income omitted from assessment at the proper time being subsequently inserted in the assessment and collector's rolls is to be found in section 57, subsection 2, which gave to "the party so assessed and taxed * * * the right of appeal as provided in section 121", (formerly 118). Subsection 1 of the last mentioned section, as it then stood, provided that the court of revision should receive and decide upon an application from any person assessed for a tenement which had remained vacant during more than three months in the year or from any person who declared himself from sickness or extreme poverty unable to pay taxes or who by reason of any gross or manifest error in the roll had been overcharged or who had been assessed in respect of land, income or business assessment under section 57, or who had been assessed for business but had not carried on business for the whole year and the court was authorized to remit or reduce the taxes or reject the application. By subsection 3 of section 121 an appeal was authorized to the county judge by either the applicant or the municipality from any decision of the court of revision.

In 1924, by 14 Geo. V, *cap.* 59, section 7, "application" was substituted for "petition" in the section. In 1929 by 19 Geo. V, *cap.* 63 sec. 7(3), section 121 was recast so as to permit of an appeal from the court of revision in the case only of an application for the cancellation or reduction of taxes by a person assessed for business who had not carried on such business for the whole year. At the same time by section 4 of the same statute, section 57 was amended, eliminating the provision as to appeal by reference to section 121 and providing expressly for an appeal to the court of revision and to the county judge, the same tribunals mentioned in the last mentioned section.

While the legislation was in the form in which it appeared in 1927, apart from the amendment of 1924, to which I

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

have referred, it was decided by the Appellate Division in *Re Blackburn and City of Ottawa supra* that section 84, in the language of Middleton J.A., cited above, applied "only to appeals from actual assessments made in the ordinary way and not to the attempt on the part of the municipality to collect taxes upon land or income omitted from assessment". The whole argument of the appellant on the present appeal is that the effect of the amendments of 1929 was to make applicable the provisions of section 84 to the cases covered by section 57. If that be the result it has been brought about in my opinion by accident rather than by any design on the part of the legislature. The subject matter of section 57 is not "assessments made in the ordinary way" but the imposition of taxation. In my opinion the change in 1929, from the right of appeal defined by reference to section 121 in the 1927 legislation, to a right of appeal to the same tribunals named in section 57 itself, did not constitute the appeal an "assessment" appeal. In my view the right of appeal given by section 57(3) remained a special and limited right of appeal exhausted when the county judge is reached just as it was when the right of appeal was defined by reference to section 121. The fact that both tribunals are expressly mentioned in sections 57 and 125 (formerly 121) as well as the persons entitled to appeal, emphasizes to my mind that that procedure exhausts the right of appeal in the case of each section.

It is useful at this point to contrast the language of subsection 4 of section 57a where the legislature enacts that "the same rights in respect of appeal shall apply as if such building or land had been assessed in the usual way". The appellant's contention really is that the effect of the language used in section 57(3) is the same as that used in section 57a, but I am unable to take that view.

In the *Blackburn* case there was of course involved in the decision of the court that there was no room for the application of section 84 to the subject matter of section 118, now section 125, a section dealing not with assessment but with remission of taxes. The amendments which that section has undergone since that decision, to some of which I have already referred, did not change the applicability

of that decision to cases within that section. It remains a section giving a special and limited right of appeal, exhausted when the county court judge is reached and I do not think there is any more reason for thinking that the legislature, by reason of any amendments to section 57 since the *Blackburn* decision, have made applicable to the subject matter of that section the provisions of section 84 than in the case of section 125. Neither did the 1935 amendment to section 84, 25 Geo. V, *cap.* 3, section 3, in my opinion, do more than give the municipal corporation a right of appeal in assessment cases, properly speaking, as to which doubt had been raised by the view expressed by Ferguson J.A., in the *Blackburn* case as to the distinction made throughout the statute between "person" and "municipal corporation" rendering inapplicable, in his view, the provisions of the *Interpretation Act*. The appeal with which that section concerns itself is still, in my opinion, an appeal with respect to an assessment duly made pursuant to sections 53, 59 or 60, which has been passed upon by the court of revision and county judge pursuant to sections 73 and 76.

In the case of section 142 also, as with sections 57, 123 and 125, the subject matter is taxes, in this case taxes already imposed. An appeal from the decision of the assessment commissioner to the court of revision and to the county judge is provided and not only are the tribunals to which appeal may be had, but the persons entitled to appeal, are prescribed in the section itself. In my opinion all these sections stand outside the sections dealing with appeals from assessments and the provisions of section 84 do not apply to them. There being no other provision for an appeal subsequent to the appeal to the county judge provided for by subsection 3 of section 57 applicable to the cases within that section, there was, in my opinion, no right of appeal by the appellants in the present case to the Municipal Board.

In *Scottish Widows' Fund Life Assurance Society* v. *Blennerhassett* (1) the Earl of Halsbury said at page 286:

> I content myself with saying that if there is an appeal it must be shewn. It is a principle of law that you cannot have an appeal unless there is either a pre-existing right of appeal at law or a right of appeal conferred by statute.

(1) [1912] A.C. 281.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

In *Furtado* v. *London Brewery Company* (1), Swinfen Eady L.J., put the matter thus at page 712:

> The rule of law is that although a certiorari lies unless expressly taken away, yet an appeal does not lie unless expressly given by statute.

Coming to the income of 1942, which the appellant purported to tax by entry in the special roll of taxable income in 1943, the first question to be considered is the right, if any, on the part of the appellant municipality to appeal from the county judge to the Municipal Board. The question is governed by section 123, subsection 8, already mentioned. It is the contention on behalf of the appellant that the effect of the subsection is to make applicable to the subject matter of section 123 the provisions of sections 73 and 76 and hence also the provisions of section 84, although counsel appeared to be pressed with some difficulty as to the applicability of subsection 3 of section 73, which entitles any person whose name appears on the ordinary assessment roll in respect of some assessment for real property, business or income, to appeal to the court of revision if he thinks that any other person has been assessed too high or too low or who has been wrongly inserted in or omitted from the assessment roll.

In my opinion it is impossible to say that subsection 3 of section 73 is applicable to a case arising under section 123. I think any such construction is excluded by the express mention in section 123, subsection 8, of the person whose name has been entered on the special roll as entitled to appeal and if that be so I think there is no room for the application of section 76, subsection 1 either, which permits an appeal to the county judge at the instance of other persons and particularly at the instance of "any person assessed". If that person is precluded from an appeal to the court of revision, as I think he is, it would be strange if the legislature had provided for an appeal by that person from the court of revision to the county judge and subsequently to the Ontario Municipal Board. In my opinion no one is given any right of appeal under section 123, subsection 8, except the person therein described and I think there is no question but that the right of appeal given by the section is not limited to an appeal to the court of revision but includes an appeal therefrom to the

(1) [1914] 1 K.B.

higher tribunals mentioned in the statute. If there were any doubt as to the proper construction of subsection 8 on this point I think it would be removed by a reference to the form of the subsection in which it was originally enacted in 1934 by 24 Geo. V, *cap.* 1, section 8. At that time the subsection had a provision that no appeal should lie from the decision of the county court judge. This provision has since been eliminated by 3 Geo. VI, *cap.* 3, section 8, but this amendment does not affect the construction of the subsection on this point. The truth is that the subject matter of section 123 as in the case of sections 57, 125 and 142, is outside the appeal procedure laid down by the statute in the case of assessments. There is no general language such as that employed in section 57a (4) and I am unable to apply to the *Assessment Act* any different canon of construction than that which applies in the case of other statutes; *Cartwright* v. *City of Toronto,* (1). Further, in every case outside of the ordinary appeal procedure provided for the case of assessments (and there are no others that I know of except the sections just mentioned, namely, 57, 123, 125 and 142) not only are the tribunals to which an appeal lies either specifically mentioned or as in the case of section 123, subsection 8, defined by reference, but the persons intended to have the right of appeal are also expressly mentioned.

I agree also with Robertson C.J.O., in the view that the mere striking out of the words in subsection 8 limiting the right of appeal given to the county judge did not have the effect of conferring any right of appeal on the municipality. In my opinion, therefore, there was no right on the part of the appellant municipality to appeal to the Municipal Board. The argument for the appellant as to the applicability of section 76, subsection 1, is that, read literally, it provides for an appeal to the county judge against "a decision" of the court of revision and similarly, that section 84, subsection 1, provides for an appeal from "the decision" of the judge and it is said that once a person affected by an entry under section 123 appeals to the court of revision and that court deals with the appeal, there is then "a decision" of that court from which an appeal lies under the sections just mentioned. That argument would

(1) (1914) 50 S.C.R. 215 at 219.

1949

CITY OF WINDSOR v. HIRAM WALKER-GOODERHAM & WORTS LTD. ET AL

Kellock J.

be equally applicable in the case of a decision of the county judge under either section 125 or section 142, but in my opinion "the decision" referred to in sections 76 and 84 is a decision on appeals with respect to assessments and not with respect to matters dealt with by sections 57, 123, 125 or 142.

With respect to the 1942 income I should in any event be of opinion that the appellant was not entitled to assess and tax that income in 1943. On the 16th of March, 1943, the council passed by-law 403, levying upon the whole assessment according to the last revised assessment roll. On the 20th of July, 1943, by-law 425 was passed under section 123, providing for a special roll of taxable income and for collecting the taxes not later than the first day of October of the same year.

On the same day, July 20th, by-law 426 was passed, referring to by-law 403 and stating that the last mentioned by-law had, through an error, described the revised assessment roll as including income assessments, whereas it did not in fact include such assessments and it amended by-law 403 by striking out all reference to income and providing for a levy upon the special roll of taxable income at the same rates as were set forth in by-law 403. It also by paragraph 5 repealed all by-laws or parts of by-laws inconsistent or repugnant to it.

Prior to by-laws 425 and 426, the city had been proceeding under the provisions of by-law 22 passed in conformity with section 60 and by-law 403 in purporting to levy on the last revised assessment roll was levying upon the assessment, so far as income was concerned, made in 1942 of 1941 income.

So far as subsection 1 of section 123, had it stood alone, is concerned, this procedure would appear to have been regular but it is provided by subsection 12 that "income received in the year in which a by-law is passed under subsection 1 *for the purpose of bringing the provisions of this section into effect* shall be subject to the provisions of this section and of such by-law, notwithstanding that such income or any part thereof may have been received before the provisions of this section take effect".

Mr. Cumming argues that this subsection, to use his language, is to be given "no legal effect" and that therefore

the procedure adopted by the appellant was authorized. Mr. Springsteen submitted that the effect of the subsection was to remove any doubt there might be as to the liability to taxation of that portion of income received in the year the by-law was passed between the first of January and the date of the passing of the by-law. In my opinion the purpose of the subsection was to make it clear that while, in the contemplation of the legislature, a by-law passed under the provisions of the section would, apart from subsection 2, have no operation on income received in fact before the date of its passing, such by-law, by reason of the subsection would operate with respect to income received during the whole of that year but should have no further retroactive effect. It would be difficult to attribute to the legislature the view that while apart from subsection 12 the section applied to income received during the whole of the year preceding the year in which the by-law was passed, it would not but for the subsection apply to income received in the latter year between the first of January and the date of the passing. Accordingly, in my opinion, the view of the Court of Appeal on this point was right and, with respect, I agree with it.

A number of other points were discussed on which, in view of the conclusions to which I have come, it is not necessary to express any opinion, including the question as to whether the income for any of the years here in question was received from the business in respect of which the respondents were liable to business assessment.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Lorne R. Cumming.*

Solicitor for the respondent: *Paul J. G. Kidd.*

1948
*May 28
1949
*Jan. 7

THE CORPORATION OF THE CITY OF WINDSOR..... APPELLANT;

AND

FORD MOTOR COMPANY OF CANADA LIMITED..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Municipal Income Taxation—Whether appeal under s. 57(3) exhausted by county court judge's decision or further appeal permitted to Ontario Municipal Board and Court of Appeal—The Assessment Act, R.S.O., 1937, c. 272, ss. 57, 60, 84, 123 (as amended by 1939, c. 3, s. 8).

The facts in the case were similar to that in *The Corporation of the City of Windsor* v. *Hiram Walker-Gooderham & Worts Ltd.* and *Subsidiaries Holding Co. Ltd.*, v. *The City of Windsor* reported at page 215 of this volume, with the exception that there was no assessment in the year 1941 for 1940 income. The members of the Court were the same, and for the reasons respectively given by them in the *Hiram Walker* case, dismissed the appeal with costs.

L. R. Cumming for the appellant.

G. C. Richardes for the respondent.

Solicitor for the appellant: *Lorne R. Cumming.*

Solicitors for the respondent: *Bartlet, Braid, Richardes & Dickson.*

1948
*May 31
*June 1, 2
1949
*Jan 7

THE CORPORATION OF THE CITY OF TORONTO..... APPELLANT;

AND

SIMPSONS, LIMITED..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Business Assessment—Assessment of Income not derived from business assessed—Whether appeal lies from decision of county judge under s. 57(3)—the Assessment Act, R.S.O., 1937, c. 272, ss. 8, 9, 57, 84 and 123.

The respondent was incorporated with powers *inter alia* to purchase, hold, sell or exchange or otherwise dispose of shares of the capital stock of any other company. It owns all the shares, excepting qualifying shares, of *The Robert Simpson Co. Ltd.* It also owns all the property

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

occupied by the latter company in Toronto, which it leases to it. In 1936 the subsidiary surrendered a portion of its leased property on Mutual street to the respondent to be occupied by it as its principal office. The respondent's income consisted practically entirely of the dividends it received from its subsidiary.

The appellant under the *Assessment Act, R.S.O.*, 1937, c. 272, s. 8 assessed the respondent for business assessment in respect of the premises used for its business in each of the years 1939, 1940, 1941 and 1942 and the respondent paid the taxes thereon in each of the succeeding years. The appellant pursuant to s. 9(1) (*b*), in each of the years 1940 to 1943 inclusive, also assessed the respondent in respect of income which it contended was not derived from the business in respect of which it had been assessed under s. 8. In assessing such income it did so pursuant to a by-law passed under s. 123 (formerly s. 120a of 1934, c.1, s.8) which enables income to be taxed in the year immediately following the year in which income is received.

Held: per Taschereau, Kellock and Locke JJ., (Kerwin and Estey JJ., dissenting), that the facts in the case bring it within s. 123 of the *Assessment Act* and for the reasons given in *Walker's case*, ([1949] S.C.R. p. 215, there was no right of appeal from the decision of the county court judge to the Municipal Board, and the appeal should therefore be dismissed.

Per Kerwin and Estey JJ., (dissenting), that for the reasons given by them in *Walker's case, supra,* an appeal lay to the Municipal Board, and the question now to be decided was whether the appeal from the Board's decision to the Court of Appeal was upon a question of law, as prescribed by s. 84(6), and that it should be held, that even if the purposes for which the respondent was occupying and using the premises in question could be said to be the carrying on of a business, and that therefore the respondent was liable to business assessment under s. 8; the question whether the income for which the respondent was assessed was derived from the business in respect of which it was so assessable for business, is one of fact, and hence no appeal lies to the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for Ontario, setting aside a decision of the Ontario Municipal Board. The decision of the Ontario Municipal Board had allowed an appeal from a decision of His Honour Judge Parker, senior judge of the County of York, which held that since the respondent was liable to business assessment under s. 8 of the *Assessment Act,* R.S.O. 1937, c. 272, it was not liable to assessment under s. 9 of the Act. The result of the judgment of the Court of Appeal was that the decision of the county judge was restored.

F. A. Campbell K.C. and *J. P. Kent K.C.* for the appellant.

C. F. H. Carson K.C. and *Allan Van Every K.C.* for the respondent.

1949

CITY OF TORONTO v. SIMPSONS, LIMITED

The judgment of Kerwin and Estey JJ. was delivered by:

KERWIN J. (dissenting):—This is an appeal by the Corporation of the City of Toronto from a judgment of the Court of Appeal for Ontario allowing the appeal of the respondent, Simpsons, Limited, from an order of the Ontario Municipal Board which had allowed the appeal of the City from a decision of a county judge. All those appeals were assessment appeals under the Ontario *Assessment Act*, R.S.O., 1937, c. 272, as amended, as they arose from the following assessments for income made against the respondent:—

In 1940 in respect of 1939 income of $ 920,163.
In 1941 in respect of 1940 income of 1,039,859.
In 1942 in respect of 1941 income of 556,897.
In 1943 in respect of 1942 income of 175,015.

These assessments were made under section 123 of the Act, which, as section 120a of the *Assessment Act* of 1934, had been brought into effect as of January 1, 1935, by a by-law of the City, passed June 25, 1934. Accordingly, in each of the years 1940, 1941, 1942 and 1943, the City assessed and taxed the income for the previous year. In the *City of Windsor* appeals (1), I have stated my reasons for differing from the Court of Appeal's conclusion that no appeal lay to the Board, and the same result follows in the present case on the question of the Board's jurisdiction.

Appeals to the court of revision from such assessments for income were dismissed but the county judge allowed the appeals of the present respondent from the decision of the court of revision and set aside the assessments. On a transcript of the evidence given before the judge, the Board allowed an appeal by the City from the former's decision. The first question to be determined is whether the appeal from the Board's decision to the Court of Appeal was upon a question of law, as prescribed by subsection 6 of section 84 of the Act:—

(6) An appeal shall lie from the decision of the Board under this section to the Court of Appeal upon all questions of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality is concerned is a party, or any order of the Board.

(1) [1949] S.C.R. 215 and 234.

The provisions of subsection 1 of section 9 of the Act might here be noted:—

9. (1) Subject to the exemptions provided for in sections 4 and 8—
(*a*) every corporation not liable to business assessment under section 8 shall be assessed in respect of income;
(*b*) every corporation although liable to business assessment under section 8 shall also be assessed in respect of any income not derived from the business in respect of which it is assessable under that section.

As a matter of fact the respondent was assessed for business assessment in each of the years 1939, 1940, 1941 and 1942, in the sum of $750 and the respondent paid the taxes thereon in each of the succeeding years. While an explanation appears in the record as to this being done as a result of an earlier appeal to the county judge, who declared that the respondent carried on business at 108 Mutual Street, Toronto, it is unnecessary in the view I take to deal with the argument on behalf of the City that, notwithstanding such actual assessment, the respondent was not properly "liable" to business assessment under section 8.

The income in question consists practically entirely of the dividends received by the respondent from the Robert Simpson Company, Limited. The conclusion of the county judge is stated as follows:—

I find that the premises occupied by Simpsons Limited at 108 Mutual Street is occupied and used for the purpose of carrying on its business as an investment, financing and holding company, and that such business is within the contemplation of the *Assessment Act* and liable for business assessment; and I further find that the dividends on shares held by Simpsons Limited in the Robert Simpson Company, Limited, is income derived from the business of which it (Simpsons, Limited) is liable for business assessment.

On the other hand, the Board found on the same evidence that

even if the purpose for which the respondent was occupying and using the premises at 108 Mutual Street could be said to be the carrying on of a business the dividends received by it from The Robert Simpson Company, Limited, and assessed to it by the appellant are not income received by it from that business.

The difficulty of determining whether there is a question of law involved has been pointed out in *Rogers-Majestic Corporation* v. *City of Toronto* (1). The appeal in that case originated with a stated case under section 85 of the *Assessment Act* and the judgment of this court was

(1) [1943] S.C.R. 440.

1949

CITY OF TORONTO v. SIMPSONS, LIMITED

Kerwin J.

based upon the ground that there was no evidence upon which the decision of the county judge could be supported. The appeal culminating in the decision of this court in *Loblaw Groceterias Co. Ltd.* v. *Corporation of the City of Toronto* (1), also originated upon a stated case under section 85. As to appeals under section 84, the Court of Appeal has taken such a finding as that of the Board in the present case as one of fact; *The City of Toronto* v. *Famous Players Canadian Corporation Ltd.* (2); *Re International Metal Industries Ltd. and City of Toronto,* (3); *Re Russell Industries Ltd.* v. *The City of Toronto,* (4). The judgment of this Court in the first mentioned case, [1936] S.C.R. 141, was carefully expressed so as not to decide the point.

In the chapter on *"Fact or Law in Cases Stated under the Income Tax Acts"*, in Dr. Farnworth's book *"Income Tax Case Law"*, the author discusses practically all the cases in the House of Lords and Court of Appeal in England dealing with the question under the Taxing Acts. He points out that no guidance can be obtained from other branches of the law in which the distinction between fact and law is important. The decision of the House of Lords in *National Anti-Vivisection Society* v. *L.R.C.* (5), on the particular question of fact there involved may appear to some to be revolutionary but it is in conformity with the course of decision in the Court of Appeal for Ontario under the *Assessment Act*. There is much to be said for the contrary view but in my opinion, it should be held that, even if the purposes for which the respondent was occupying and using the premises at 108 Mutual Street could be said to be the carrying on of a business and that therefore the respondent was liable to business assessment under section 8 of the Act, the question whether the income for which the respondent was assessed was derived from the business in respect of which it was so assessable for business is one of fact and hence no appeal lay to the Court of Appeal.

The appeal should be allowed and the order of the Board restored. The appellant is entitled to its costs in the Court of Appeal and in this Court.

(1) [1936] S.C.R. 249.
(2) [1935] O.R. 314.
(3) [1940] O.R. 271.
(4) [1941] O.W.N. 147.
(5) [1947] 2 A.E.R. 217.

1949

CITY OF TORONTO v. SIMPSONS, LIMITED

Kerwin J.

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

KELLOCK J.:—The facts in this case bring it within section 123 of the *Assessment Act* and for the reasons given in *Walker's case* (1) I am of the opinion that there was no right of appeal on the part of the appellant from the decision of the county judge to the Municipal Board. I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for appellant: *W. G. Angus.*

Solicitors for respondent: *J. S. D. Tory* and associates.

SYDNEY PICKLES (PLAINTIFF).....APPELLANT;

AND

JAMES BARR AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1948

*Oct. 25, 26, 27

1949

*Feb. 1

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Malicious prosecution—Malice—Reasonable and probable cause—Evidence—Judge's charge—Misdirection—Criminal Code s. 542—British Columbia Supreme Court Act R.S.C. 1936, c. 56, s. 60.

In an action for malicious prosecution, the judge's charge amounted to misdirection, when, after properly saying that a want of reasonable and probable cause was a circumstance from which the jury might infer malice, he concluded that if malice was to be found at all in this case it was not because of lack of reasonable and probable cause, although, in addition to some evidence from which the jury might have inferred malice, there was also evidence upon which the jury might have found want of reasonable and probable cause.

Brown v. *Hawkes* (1891) 2 Q.B. 718 referred to.

APPEAL from the decision of the Court of Appeal for British Columbia (2) dismissing (Smith J.A. dissenting) appellant's appeal from the decision of Macfarlane J. dismissing an action for malicious prosecution.

Sydney Pickles in person for the appellant.

R. D. Harvey K.C. for the respondent.

(1) [1949] S.C.R. 215.

(2) (1948) 1 W.W.R. 1097.

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

1949
PICKLES
v.
BARR
Locke J.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal by the plaintiff in an action for malicious prosecution from a judgment of the Court of Appeal for British Columbia (1) dismissing his appeal from a judgment of Macfarlane, J. by which, after findings made by a jury, the action was dismissed. In the Court of Appeal Sydney Smith, J.A. dissented and would have directed a new trial.

The defendants, with the exception of the defendant Weeks, are the executive officers of the Victoria Branch of the Society for the Prevention of Cruelty to Animals. Weeks is employed by the Victoria Branch of the Society as an inspector and on February 19, 1947, laid an information charging the plaintiff and his employee, one Longdon, with having wantonly neglected to provide proper care to a sheep, thereby causing unnecessary suffering. The charge was laid under sec. 542 of the *Criminal Code* and the magistrate issued a summons. On March 6, 1947, the appellant appeared, represented by counsel, and counsel instructed by the Victoria Branch of the Society appeared for the prosecution and obtained leave from the magistrate to withdraw this charge and to substitute the following charge against the appellant alone:—

> That Sydney Pickles, between the 27th day of January, 1947, and the 4th day of February, 1947, in the Municipality of the District of Saanich, in the County of Victoria, being the owner of four sheep, namely, one sheep destroyed on or about the 3rd day of February, 1947, at Sunstead Farm by Inspector Weeks of the Society for the Prevention of Cruelty to Animals and three others found dead there by the said Weeks on the same day, did unlawfully cause unnecessary suffering by unreasonably omitting to care for such animals contrary to the Criminal Code.

At the conclusion of the evidence for the prosecution this charge was dismissed. The evidence taken at this hearing was made part of the record in the action and it is quite clear that no other disposition of the matter could properly have been made.

As, in my opinion, there should be a new trial, it is inadvisable that there should be any extended comment on the evidence adduced at the hearing. Briefly stated, the facts were that following an anonymous report received on February 3, 1947, by the defendant Florence G. Barr, the corresponding secretary of the Victoria Branch, that the

(1) (1948) 1 W.W.R. 1097.

sheep on the farm of the appellant in the Municipality of Saanich were in bad shape, Weeks in company with an assistant inspector named Hamer was sent to the farm to investigate. They found, according to their evidence, a flock of about a hundred sheep of which, according to Hamer, all but ten or twelve were in good shape. In addition, they found two dead sheep and a dead lamb in or near the barn and in the field nearby a sheep lying on its side struggling and evidently in an extremity. The appellant who lived in Victoria was not present but, with Longdon's consent, the inspectors shot the sheep and a post-mortem performed by a veterinary surgeon on the following day disclosed that the animal was suffering from an infestation of worms in its stomach and small intestines and fatty degeneration of the liver. Certain further inquiries were made by the inspectors and written reports submitted to a meeting of the members of the Executive on February 4, on which date a resolution was passed instructing that the opinion of one McIntyre, described in the resolution as a sheep expert, and that of Mr. C. L. Harrison, the city prosecutor for Victoria, be obtained. A further report of the veterinary surgeon made to the appellant on the day following the visit of the inspectors to the farm, and a copy of which was made available to them, recommended that the worming of the flock was necessary but, because of the inclement weather, it would not be advisable to do so at the time and in the meantime advised giving the animals free access to phenotiazine mixed with salt. On February 12, following a further report from the defendant Weeks, the minutes disclose that "it was decided to lay a charge against Mr. Pickles in regard to one sheep found in a suffering and dying condition." It was not, however, until the 17th of February that the defendant Weeks and Florence G. Barr laid the matter before Mr. Harrison who gave evidence that, after considering the facts and particularly noting that there was nothing to indicate that the appellant knew anything about the sheep being ill which had been found lying in the field and had been destroyed and that the veterinarian had said it would not be apparent to the farmer that the sheep was sick until it laid down to die, he advised them not to lay a charge without consulting their solicitor and

1949

PICKLES v. BARR

Locke J.

getting advice on it and told them that he (Harrison) would not lay the charge or recommend that it be laid. On the day following, however, Weeks saw Harrison and showed him an information which had been prepared charging the appellant with wantonly neglecting to provide proper care to a sheep, thereby causing unnecessary suffering. On being asked by Mr. Harrison whether he had got the advice of their lawyer Weeks replied in the negative and was then advised not to swear the information. The charge was, however, laid by Weeks on February 20 and the matter thereafter dealt with as above stated.

It should be said that there was a conflict as to what had actually transpired between Mr. Harrison and these two defendants on February 17th and in his discussion with Weeks on the day following. According to Mrs. Barr, Mr. Harrison had told them to go ahead and prosecute and to have Mr. Harvey, K.C. handle the prosecution. According to the defendant Weeks, Mr. Harrison had told them to go ahead and that when he had shown the latter the information which had been drafted he had approved of it. Upon this evidence the jury found that Mr. Harrison's evidence was true and that the statements which the defendant Weeks and Florence G. Barr claimed to have been made to them by him were not made. To these findings, however, a rider was added to which further reference will be made.

In charging the jury the learned trial judge informed them that he proposed to ask them to make certain findings of fact and that, dependent upon the nature of their findings, he would decide the question as to whether there was a want of reasonable and probable cause. After reviewing the evidence the learned judge said in part:—

> I think those, gentlemen, are the things to which I will direct your attention when you come to consider the questions I will put to you, and upon which I will direct you as to my finding, as to reasonable and probable cause. If you find that Mr. Harrison warned him not to take this prosecution without getting the advice of Counsel, and that he did so without getting it, that evidence goes to show that they had not reasonable cause.
>
> On the other hand, you have the evidence of Mr. McIntyre. Did Mr. McIntyre advise him that there was evidence of neglect, or just what was the nature of his comments in connection with that? Were they conditional only, or were they such as a reasonable person would act upon in coming to the decision that the charge should be laid? Was it.

evidence of neglect, the evidence of the existence of a state of circumstances which would reasonably lead any ordinarily prudent and cautious man placed in the position of Weeks, to come to the conclusion that the person charged was probably guilty of the crime accused?

That is the extent of the obligation, and I am asking you questions so I can find out whether or not that is true. I am going to ask you a question with regard to Dr. Bruce, as to what he told them, and with regard to Colonel Evans. When I have put before you those questions and you have answered them, if you answer that Dr. Bruce's evidence is the evidence to be accepted, that Mr. Harrison's evidence is the evidence to be accepted, that Colonel Evans' is the evidence to be accepted then I would instruct you that my verdict would be that the plaintiff has established that there was want of reasonable and probable cause.

If, on the other hand, you think that Mr. Weeks' evidence where it is contradicted by those other men, is the evidence to be accepted, and that Mrs. Barr's evidence is the evidence to be accepted; and that Mr. McIntyre gave them a firm opinion that there was neglect under the circumstances, and in your opinion the circumstances were properly described to him, then I would advise you that the plaintiff has not satisfied the onus that was on him.

Upon the jury retiring a discussion ensued between the learned trial judge and counsel as to certain aspects of the charge and the jury was recalled. In the further charge then delivered the following passage appears:—

Now I mentioned malice in my charge this morning. There is a provision in law that you may infer malice from want of reasonable and probable cause, but you are by no means bound to do so. In determining the question of malice, the jury may, but are not bound to, find malice in the absence of reasonable and probable cause. You are not obliged to find malice, although both must be found in order that the plaintiff may succeed; unless he proves both lack of reasonable and probable cause and malice, he fails in the action. You may infer malice from some lack of reasonable and probable cause, but there is evidence here directed to the question of malice, which I have referred to in my charge, and I do not think that question needs to arise here. If you find malice at all, you will find it, not because of lack of reasonable and probable cause in this case, but because of the fact that the prosecution was undertaken from motives other than those I have described as proper.

and it was with this final instruction that the jury retired and arrived at their verdict.

The questions asked and the answers made were as follows:

Question 1: "Were the statements which Mr. Harrison says he made to Inspector Weeks and Mrs Barr in fact made to them?" Answer: "Yes."

Question 2: "Were the statements which Inspector Weeks and Mrs. Barr say that Mr. Harrison made to them in fact made to them?" Answer: "No." Rider: "We feel that there was a misunderstanding in the interpretation of Mr. Harrison's instructions."

Question 3: "Did Mr. Bruce make the statements which Weeks attributed to him on February 7th?" Answer: "Yes."

1949

PICKLES v. BARR

Locke J.

Question 4: "Were the statements attributed to Colonel Evans by Mrs. Barr and Inspector Weeks made to them respectively by him?" Answer: "Yes."

Question 5: "Did Mr. McIntyre give his opinion that there was neglect as a final opinion on the facts stated by Weeks?" Answer: "No."

Question 6: "Did Mr. McIntyre express the opinion subject to confirmation after he had seen the sheep?" Answer: "Yes."

Question 7: "Was the evidence on which Weeks acted reasonably apparent to him to be unreliable or incomplete?" Answer: "No."

Question 8: "Did Weeks honestly believe, taking into consideration all the statements as you find them made on the evidence in this case, that Pickles was probably guilty of the offence charged?" Answer: "Yes."

Question 9: "Did Weeks lay the Information or either of them maliciously, that is, from any motive other than an honest desire to bring a person (that is the plaintiff) whom he believed to be a guilty person to justice?" Answer: "No."

Question 10: "Did any of the remaining defendants authorize the prosecution of the plaintiff maliciously?" Answer: "No."

Question 11: "If so, which defendant?" No answer.

Question 12: "Regardless to your answers to the above questions, give total damages suffered by the plaintiff: (*a*) 'for Special damages.'" Answer: "$403.94." (*b*) "for General damages." Answer: "Nil."

As to the rider attached to the answer to the second question it must, in my opinion, be rejected. It had not been suggested either by the defendant Florence G. Barr or by the defendant Weeks that they had misunderstood the advice given to them by Mr. Harrison on February 17th; rather had they both attributed to him statements which the jury found as a fact had not been made. There was in truth no possibility of misunderstanding the advice given by Mr. Harrison to these two defendants or that given by him to Weeks on the following day. The suggestion made in the rider that there was a misunderstanding contradicts the jury's findings in Question 1, that the statements which Mr. Harrison said he had made were in truth made, since those statements were incapable of misinterpretation. The jury had also found that the statements of Weeks and Mrs. Barr that Mr. Harrison had told them "to go ahead" were untrue. As these findings were made in response to direct questions, the rider which is inconsistent with the answers should be rejected.

As to Questions 3 to 6 inclusive, the learned trial judge had informed the jury that if they accepted the evidence of Doctor Bruce, Colonel Evans and Mr. Harrison he would instruct them that he would decide that the plaintiff had established that there was want of reasonable and probable

cause. He had said further that if they believed the evidence of Weeks and Mrs. Barr in preference to that of Bruce, Evans and Harrison, and if they found that McIntyre gave them a firm opinion that there was neglect under the circumstances, he would advise them that the plaintiff had not proven a want of reasonable and probable cause. The jury, however, as has been pointed out, accepted the evidence of Mr. Harrison and found that McIntyre had only expressed his opinion subject to confirmation after he had seen the sheep, while accepting the evidence of Weeks and Mrs. Barr where it contradicted that of Evans and Bruce. This contingency was not provided for in the charge so that if in fact the jury interpreted the concluding portion of the judge's charge as a direction that they were to consider whether there was a want of reasonable and probable cause in answering Questions 9 and 10 which were directed to malice, they were without any instructions as to whether a want of reasonable and probable cause had been shown. That question was one for the trial judge to determine and in the situation created by the answers made to Questions 1 and 6 inclusive the jury acted without instructions. In *Brown* v. *Hawkes* (1), Cave, J. said in part:—

> There may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made and in that case want of reasonable and probable cause is evidence of malice.

It is impossible in the present case to know whether this aspect of the matter was even considered by the jury or, if it was, upon what basis they proceeded. This, I think, is a fatal objection to the verdict and the judgment entered.

If it is wrong to assume that the jury understood from the concluding portion of the charge that a want of reasonable and probable cause was a circumstance from which they might infer malice and accepted the concluding part of the direction that, if malice was to be found at all, it was not because of lack of reasonable and probable cause, there was misdirection. The plaintiff had, it is true, adduced some other evidence from which the jury might have inferred that the prosecution had been initiated

(1) (1891) 2 Q.B. 718 at 723.

1949

PICKLES v. BARR

Locke J.

maliciously but, in addition to this, there was evidence upon which the plaintiff might properly contend that there was a plain want of reasonable and probable cause.

The appeal should be allowed with costs and a new trial directed. No objection was made to that portion of the judge's charge which, in my view, was misdirection, though counsel for the plaintiff had in the earlier discussion made it clear that he contended that from a want of reasonable and probable cause malice could be inferred. Having in mind the provisions of sec. 60 of the *Supreme Court Act*, cap. 56, R.S.B.C. 1936, and in the exercise of the powers vested in this Court there should be no costs to either party in the Court of Appeal. The costs of the first trial should be in the discretion of the presiding judge at the new trial.

Appeal allowed with costs; new trial directed.

Solicitors for the appellant: *Crease, Davey, Lawson, Davis, Gordon and Baker.*

Solicitor for the respondents: *R. D. Harvey.*

1948

*April 27, 28

*Oct. 5

HIS MAJESTY THE KING IN THE Right of the Province of British Columbia ..... APPELLANT;

AND

BRIDGE RIVER POWER CO. LTD., VANCOUVER POWER CO. LTD., and BURRARD POWER CO. LTD. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA

Assessment and Taxation—Schools—"Improvements"—"Improvements done to land"—Whether tunnel, machine shop equipment, transformers, assessable—"actual cash value"—Whether basis of valuation correct—Taxation Act, c. 282, Public Schools Act, c. 253,—R.S.B.C., 1936.

This appeal involved the assessment and taxation under the *Taxation Act*, c. 282, and the *Public Schools Act*, c. 253, R.S.B.C., 1936, of an intake canal and certain aqueducts or tunnels. The intake canal is an open ditch leading from the river to the canal intake. The tunnels are for the purpose of carrying water for the development of hydro-electric power. In some the water flows against the bare rock, others are partially or fully lined with reinforced concrete, and others are

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

mere openings through the rock to allow the passage of a steel pipe to carry water. The issue to be determined was whether such objects constituted "improvements" as defined by the *Taxation* and *Public Schools* acts respectively.

A second issue was whether machinery and equipment in a machine shop and transformers, not attached to but merely resting by their own weight upon the land, or in a building, are "improvements" within the meaning of s. 2 of the *Public Schools Act,* as amended.

Held: That what is to be assessed is land, and the land is more valuable with the buildings, canal and tunnel thereon or therein than without them, the land in the condition in which the assessor found it is therefore assessable under the *Taxation Act.*

Held: Also that the intake canal and tunnels are at least "*things* erected upon or affixed to land",—they are not "improvements"—and the same result therefore follows under the *Public Schools Act* as under the *Taxation Act. Rector of St. Nicholas* v. *London City Council* [1928] A.C. 469 followed; *Maritime Telegraph & Telephone Co.* v. *Antigonish,* [1940] S.C.R., 616 and *McMullen* v. *District Registrar,* 30 B.C.R., 415, distinguished.

Held: Also that the machines and transformers retain their character of personalty, and not being part of the real estate so as to constitute an "improvement" thereto, are not assessable or taxable under the *Public Schools Act.*

Per Rand J. (dissenting)—The basis of valuation employed by the assessor and the court of revision was contrary to that laid down by s. 30 of the *Taxation Act,* and since the mandatory provision of the statute to tax has not been complied with, the case should go back to the court of revision in which the error in law was made. *Cedar Rapids Manufacturing & Power Co.* v. *Lacoste,* [1914] A.C. 569; *Maritime T. & T. Co.* v. *Antigonish, supra.*

The machines and transformers were properly included in the assessment.

APPEAL by His Majesty the King in the right of the Province of British Columbia from the judgment of the Court of Appeal of that Province (1), affirming the judgment of Manson J. allowing appeals from the Court of Revision concerning the assessment as "improvements" under the *Taxation Act,* R.S.B.C., 1936, c. 282, and amendments, of certain tunnels and intake canals, and allowing a cross-appeal in part, of the assessment of certain equipment, machinery and transformers as "improvements" under the Public Schools Act, R.S.B.C., 1936, c. 253 and amendments.

J. A. MacInnes, K.C. for the appellant.

J. W. deB. Farris, K.C. and *W. H. Q. Cameron,* for the respondents.

(1) [1948] 1 W.W.R. 223.

1948

THE KING v. BRIDGE RIVER POWER CO. LTD. ET AL

Kerwin J.

The judgment of the Chief Justice, Kerwin, Estey and Locke, JJ. was delivered by:—

KERWIN J.:—This is an appeal by His Majesty the King in the right of the Province of British Columbia from a judgment of the Court of Appeal for that Province, affirming three orders of Manson J. so far as the appellant's appeals therefrom were concerned, and allowing a cross-appeal in part. By the judgment under review, the appeals were consolidated. The matters in dispute relate to the assessment and levying of taxes for the year 1947 on the three respondent companies, Bridge River Power Company Limited, Vancouver Power Company Limited, and Burrard Power Company Limited, (*a*) for provincial revenue under the *Taxation Act,* R.S.B.C. 1936, c. 282, and amendments, (*b*) for public school revenue under the *Public Schools Act* R.S.B.C. 1936, c. 253, and amendments. It will be convenient to consider first the points upon which the appellant appealed to the Court of Appeal, all of which are included in the appeal to this Court, and then the matter of the companies' cross-appeal to the Court of Appeal, which so far as it was allowed is also included in the present appeal.

The *Taxation Act* provides for the division of the province into assessment and collection districts and the appointment of assessors and collectors for those respective districts. The assessor in each district is to prepare an annual assessment roll on which he is to enter

> (*a*) The names and last known addresses of all persons liable to assessment and taxation in the assessment district:
>
> (*b*) A description of all taxable property * * * within the district:
>
> (*c*) The assessed value, quantity, or amount of the property * * * and the taxes thereon.

By section 4 all property within the province shall be liable to taxation and every person shall be assessed and taxed on his property. By section 2 "Property" includes land, and "Land" includes land covered by water, and all quarries and substances in or under land, other than mines or minerals, and all trees and underwood growing upon land, and all improvements, building fixtures, machinery, or things erected upon or affixed to land or to any building thereon, but shall not include such improvements, fixtures, machinery, or things other than buildings as, if so erected

or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property. "Improvements" means buildings, fixtures, and things erected upon or affixed to land, and improvements done to land.

Section 30 sets forth the basis of assessment in these words:—

30. Land shall be assessed at its actual cash value in money. In determining the actual cash value of land in money, the Assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which the land would sell at auction, or at a forced sale, or in the aggregate with all the land in the assessment district, but he shall value the land by itself, and at such sum as he believes the same to be fairly worth in money at the time of assessment. The true cash value of land shall be that value at which the land would generally be taken in payment of a just debt from a solvent debtor.

By section 113 of the *Public Schools Act* as amended in 1946, all the provisions of the *Taxation Act* apply to the assessment, levying, collection and recovery of all taxes imposed under the *Public Schools Act*.

First, as to Bridge River Power Company Limited. In accordance with the provisions of the *Taxation Act*, the proper assessor assessed this company on certain lots admittedly owned by it at values for the bare unimproved land which are not in question. To these valuations he added an assessed value for improvements on each lot, the nature of which must now be explained. The company operates a hydro-electric undertaking in the Bridge River area of the assessment district. At the upper end is Bridge River from which the company constructed "an intake canal" about 60 feet wide at the top and about 40 feet deep to a cylindrical intake tower approximately 40 feet in diameter, built of reinforced concrete and approximately 60 feet in height and equipped with devices to prevent trash and flotsam from flowing through a tunnel lined with reinforced concrete throughout, and constructed by the company, through a mountain, from the intake tower to the tunnel's outlet on the shore of Seton lake. At the outlet is a surge chamber. The difference in elevation between the intake and outlet is about 1200 feet. At the time of the assessment very little power was generated but a dam was being constructed below the diversion point

1948

THE KING v. BRIDGE RIVER POWER CO. LTD. ET AL

Kerwin J.

on the river, which when completed will back the water up to the necessary level at the intake. The intake canal is temporary and will be abandoned when the dam is completed.

The assessor assessed this company, with reference to the first lot at the upper level, under the heading of "improvements" for the intake canal at his estimate of the original value, $12,000, less a depreciation of 75 per cent, or a net of $3,000, and that part of the tunnel on the lot, 1339·5 feet, "together with portal and operating appurtenances", at his estimate of the original value $355,131, less a depreciation of 40 per cent, or a net of $213,000. In connection with each of the other lots, he assessed the company for the number of feet of the tunnel therein, and on the lot with the outlet he included the surge chamber. His estimates of the original value were based upon the admitted figures as to the original cost. No question is raised as to the correctness of these figures or as to the reasonableness of the depreciation.

Section 4 of the *Taxation Act* is clear that all property within the Province is liable to taxation. "Property" includes land and "Land" includes improvements, buildings, fixtures, machinery, or things erected upon or affixed to land. What is to be assessed is land and surely the land is more valuable with the buildings, canal and tunnel thereon or therein than without them. On that basis and leaving aside for the moment the question of amount, there can be no difficulty in determining that the land in the condition in which the assessor found it is assessable under the *Taxation Act*.

Under the *Public Schools Act* as amended in 1946, all moneys required to be raised for school purposes shall be assessed and levied in respect of the assessed value of land and 75 per centum of the assessed value of taxable improvements. By the new interpretation clause, improvements, for the purposes of taxation under the Act, means all buildings, structures, fixtures, and things erected upon or affixed to land, or to any building, structure, or fixture thereon, including machinery, boilers, and storage-tanks erected upon, affixed to, or annexed to any building, structure, or fixture, or erected upon or affixed to the land, and includes the poles, cables, and wires of any telephone, tele-

graph, electric light, or electric power company, and the track in place used in the operation of a railway. It will be noticed that the *Public Schools Act* provides for the separate assessment of land and improvements so that the latter may have the advantage of 25 per cent deduction. There can be no question as to the intake tower and the surge chamber and, with respect, I find no more difficulty as to the intake canal and tunnel. All of these are at least "*things* erected upon or affixed to the land." A wider term than things is difficult to conceive and that the canal and tunnel are erected upon or affixed to land seems to me to be plain. I am led to this conclusion by a consideration of the intent and terms of the Act itself, and of the several cases cited by counsel for the appellant, I think it necessary to refer only to one, *Rector of St. Nicholas* v. *London County Council* (1). There it was sought to construct an underground chamber in a disused burial ground to be used as an electricity transformer station. The *Disused Burial Grounds Act* prohibited the erection of any building upon any disused burial ground. The proposed chamber was to be wholly underground except for two ventilators projecting about 9 inches above the surface. At page 474, Lord Hailsham, after stating that their Lordships entertained no doubt that the proposed transformer chamber was a building and that this was not seriously contested, continued:—

> But the appellants' counsel contended that even if the chamber were a building it would not be a "building erected upon" the churchyard. It was argued that this expression must be limited to buildings raised substantially above the ground level and interfering with the use of the churchyard for the purposes of an open space. In their Lordships' view the language of the statute cannot be so limited. The erection of the building is commenced as soon as the foundation has been excavated, and a building is erected upon the site upon which it is built, none the less because no part of it is raised above the ground level as existing at the date of its erection.

So far, therefore, as concerns what might be termed the main question with reference to the Bridge River Power Company Limited, the same result followed under the *Public Schools Act* as under the *Taxation Act*.

The Court of Appeal were of opinion that tunnels were not "improvements" but for the reasons given I am unable to agree. In view of the mandatory provisions of the

(1) 1928 A.C. 469.

1948

THE KING
v.
BRIDGE RIVER POWER CO. LTD. ET AL

Kerwin J.

Taxation Act as to the time within which a decision must be given, Mr. Justice Manson had been unable to reserve consideration of the matter and at the conclusion of the argument before him dealt with the contention of the present appellant that the decision of this Court in *Maritime Telegraph and Telephone Co.* v. *Antigonish* (1), must be taken to have overruled the judgment of the British Columbia Court of Appeal in *McMullen* v. *District Registrar of Titles,* (2), upon the point that the "scrap iron" cases in Ontario were no longer applicable.

(3) *In re Bell Telephone Co. and the City of Hamilton;* (4) *In re London Street Railway Co.;* (5) *In re Queenston Heights Bridge Assessment;* (6) *In re Toronto Electric Co. Assessment;* (7) *Consumers Gas Co.* v. *Toronto.*

An examination of the reasons of Mr. Justice Davis, Mr. Justice Hudson and myself, who constituted the majority, will show that nothing was said as to the Ontario decisions but that we proceeded on the ground that there was evidence, as explained by Sir Joseph Chisholm in the Nova Scotia Court *in banco,* upon which the assessors could and did make their valuation in accordance with the Nova Scotia statute. The *McMullen* case was concerned with the interpretation of sections 174 and 175 of the *Land Registry Act,* which provided for the payment of registration fees calculated upon the market value of the land at the time of application for registration, and it has no bearing upon the decision of this court in the *Antigonish* case or upon the present appeal since all that was involved in the *McMullen* case was a mountain with a tunnel through it. Without further information as to the evidence upon which that case was decided, I refrain from further comment upon it. It does not, in my view, affect the decision in the present appeal where there is evidence as to the value of the land, both to the present owner and to others, and where the land under consideration with its improvements and appurtenances is apparently a complete unit for the development of electrical energy by water power.

(1) [1940] S.C.R. 616.
(2) (1922) 30 B.C.R. 415.
(3) (1898) 25 O.A.R. 351.
(4) (1900) 27 O.A.R. 83.
(5) (1901) 1 O.L.R. 114.
(6) (1901) 3 O.L.R. 620.
(7) (1895) 26 O.R. 722.

Any doubts there may have been in respect of the proper rule to be applied in Ontario in the assessment of the plant of telephone and telegraph companies were removed by legislation but it might be noted that in *Re Ontario and Minnesota Power Co. Ltd.* and *Town of Fort Frances* (1), Chief Justice Meredith in a judgment concurred in by Garrow, Maclaren and Magee JJ.A., ventured to think that the earlier decisions had placed too narrow a construction on the provisions of the *Assessment Act*. However that may be, the Courts there had been confronted with a situation where the assessors were confined to assessments in wards for the purposes in question. Another decision of the British Columbia Court of Appeal, referred to by Manson J., *The First Narrows Bridge Co. Ltd.* v. *City of Vancouver* (2), was a question of assessment of that part of the company's Lions Gate Bridge which lay within the boundaries of Vancouver. The majority of the court considered the scrap iron cases of assistance in construing the provisions of the charter of the City of Vancouver but, again, what was in question was only that part of a bridge within the city boundaries. In the present case the lands and improvements of the Bridge River Power Company Limited in question are in one assessment district and, therefore, no jurisdictional difficulties arise.

It has already been noted that section 30 of the *Taxation Act* applies to assessments under the *Public Schools Act*. The criterion set forth in the last sentence of section 30 is met by the evidence before the Court of Revision at page 57. I take this evidence to mean, not that the assessor considered the original cost less depreciation to be the basis upon which the valuation should be made, though it was a factor to be considered, but that, taking everything into consideration, the resulting figure represented even less than the actual cash value in money at which, by section 30, land is to be assessed. There was no contradiction of this evidence as the witnesses for the companies declined on more than one occasion to give any evidence of the assessable value, and subsection 3 of section 112 of the *Taxation Act* provides that the burden of proof shall, in all cases, be upon the party appealing to the Court of

(1) (1916) 35 O.L.R. 459. (2) (1940) 55 B.C.R. 304.

1948

THE KING
v.
BRIDGE RIVER POWER CO. LTD. ET AL

Kerwin J.

Revision. The company appealed to that court and the onus was therefore on it. Before Manson J., by consent the same evidence as had been given before the Court of Revision was used without any additions. A solvent debtor would undoubtedly consider what the land as improved is worth to him, or, under the *Public Schools Act*, what the land and improvements were worth to him, before handing them over to a creditor in payment of a just debt.

While there is nothing in the evidence on the matter, it was stated that the company's authority to construct the dam and divert the water is under the provisions of the *Water Act*, the current statute being chapter 63 of the 1939 Statutes of British Columbia. Without embarking upon an extensive examination of the provisions of this Act, it is sufficient to note that thereby the property in and the right to the use and flow of all the water at any time in any stream in the province are for all purposes vested in the Crown in the right of the province, except only in so far as private rights therein have been established under special acts or under licences issued under the present or some former act. A licence entitles a holder thereof to divert and use beneficially, for the purpose and during or within the time stipulated, the quantity of water specified, and to construct, maintain and operate such works as are authorized under the licence and are necessary for the proper diversion, carriage, distribution and use of the water or the power produced therefrom. By section 11:—

> Every licence and permit that is made appurtenant to any land, mine or undertaking shall pass with any conveyance or other disposition thereof.

We do not know the exact nature and form of the licence held by the company but, again referring to the provisions of section 30 of the *Taxation Act*, the matter of the licence would be something that would be taken into consideration by a creditor in taking the land in payment of a just debt from a solvent debtor.

Mr. Justice Manson proceeded upon another ground which was urged before us, viz., that the decision in the *McMullen case* must be taken to have received legislative sanction by the enactment (or re-enactment) of the interpretation clauses of the *Taxation Act*. The rule relied on

appears in *Barras* v. *Aberdeen Steam Trawling and Fishing Co.* (1), followed in *McMillan* v. *Brownlee* (2), 318, and is stated by Viscount Buckmaster, at page 411 of the *Barras* case as follows:—

> It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it.

Lord Warrington of Clyffe and Lord Russell of Killowen stated the rule in similar terms. But the words must be used in a similar context or in reference to the same subject-matter. The *McMullen case,* as already noted, dealt with the *Land Registry Act* which provided for the payment to the Registrar on application to register a conveyance of a fee calculated upon the market value of the land. The *Land Registry Act* deals with a matter entirely different from that covered by the *Taxation Act* and the rule therefore has no application.

I turn now to the case of the Vancouver Power Company Limited. That company has a hydro-electric power plant some miles from Vancouver. I accept the following statement of facts as it appears in the appellant's factum and which statement has not been questioned:—

> The plant has two separate power-houses, and the water for power is taken to the power-houses by two pipe-lines direct from Lake Buntzen, which has an elevation of 390 feet above the power-houses. Lake Buntzen did not have a sufficiently stable supply of water, so the company constructed an aqueduct or tunnel to drain water from Lake Coquitlam to augment the Lake Buntzen supply. This tunnel is nearly 2½ miles in length, with concrete-gate structures at the intake portal to control the flow of water from Lake Coquitlam and a concrete structure at the outlet into Lake Buntzen for protective purposes. Other than for a short distance at both ends, the tunnel is unlined. The first power-house was erected in 1903, and the water from Lake Buntzen was taken through a battery of eight pipes let into a dam thrown across the northern outlet of the lake. This battery of pipe-lines led down to the original power-house, 390 feet below, on the shore of Burrard Inlet. This is known and referred to as the No. 1 pipe-line. Part of this pipe-line system was laid on the surface of the ground, but on the way to the power-house it was found necessary to construct a tunnel through a rocky bluff in which tunnel the pipe-lines are installed.
>
> In or about 1911, in order to supply electric power required, the company constructed a second power-house. The dam at Lake Coquitlam was raised in order to impound more water, and the tunnel from Lake Coquitlam to Lake Buntzen was enlarged. To get water to the secondary

(1) [1933] A.C. 402. (2) [1937] S.C.R. 318.

1948

THE KING v. BRIDGE RIVER POWER CO. LTD. ET AL

Kerwin J.

power-house erected in 1911, it was found necessary to construct a tunnel 1,800 feet through a rocky hill from Lake Buntzen to a point immediately above the second power-house, which tunnel terminated in a large open tank called a "surge tank," and from this surge tank three pipelines or penstocks were laid down the hill to supply three generating units in the No. 2 plant. This system, designated as Buntzen No. 2 pressure tunnel, is a fully lined tunnel.

The assessor for the proper district assessed the company for the land as unimproved at a figure which is not disputed and (omitting a number of items which are not before us) the following tunnels:—

Coquitlam Buntzen tunnel	$472,337
Buntzen No. 1 pipe-line tunnel	16,485
Buntzen No. 2 pressure tunnel	155,422

He ascertained the actual cost of these tunnels from the records of the company and then allowed a depreciation of 50 per cent. At pages 87 and 88 of the case, he gave the above figures as his valuation of the actual value and explains his reasons. These I take to mean, as in the evidence of the assessor of the Bridge River Power Company's land, that cost less depreciation was a factor to be taken into consideration together with other matters in arriving at the actual cash value referred to in section 30 of the *Taxation Act*. His evidence is not contradicted except in the sense of the contention of this company, as in the case of the other two companies, that unless a licence under the *Water Act* was held and unless transmission lines, etc., be taken into consideration, the tunnels actually had no value. For the reasons already given in connection with the Bridge River Power Company, this contention cannot prevail.

As to the Burrard Power Company Limited, it is sufficient to state that the main point puts in question the assessability of a tunnel, unlined save for the two portals and a section of about 200 feet near the middle of the tunnel, which tunnel is built underground for the purpose of a hydro-electric power development. Except that it makes a difference in the total cost, the fact that the tunnel is in the main unlined has no significance. The same assessor who had assessed the Vancouver Power Company Limited, at page 104 of the record, testified:—

Well, as I previously outlined in regard to the Vancouver Power Company I obtained the original cost figures from the B.C. Electric Company; and with due regard to what I considered normal depreciation,

having in mind the continued permanency of the operation or at least the generation of the electrical energy at that point, I determined the value of the tunnel by allowing a depreciation of 50 per cent. Again I think I created an assessment there which is certainly in favour of the company. The tunnel was constructed in 1928, according to my information.

Q. Furnished by whom?

A. That information was furnished by the company. The tunnel was put in operation in 1928. From 1928 to 1946—that is eighteen years. Assuming the depreciation at 1 per cent yearly, which seems to be the accepted rate of depreciation on accepted structure of this kind, I should have depreciated only 18 per cent.

The reference to the B.C. Electric Company is explained by the fact that the three respondents are subsidiaries of the British Columbia Electric Railway Company Limited. Again, this evidence was not contradicted as to value and the same result follows as in the other two cases.

There remains for discussion the assessment under the *Public Schools Act* of the machines in the machine shop of Bridge River Power Company Limited and of certain transformers set up by that Company at various points in their transmission line. The answer to the question depends upon whether the machines and transformers are within "improvements" as defined in the 1946 amendment to the *Public Schools Act* as set out earlier in this opinion. It is admitted that they are not affixed to, or annexed to, but it is argued that they are erected upon, the land or a building, structure or fixture thereon. The machines and transformers rest by their own weight either on the land or in a building or, in the case of some of the transformers, on skids. The appellant relies upon *Smith* v. *Stokes* (1), and *Williams* v. *Weston-Super-Mare Urban District Council* (2). The headnote to the first case states the point that was determined in these words:—

> Stat. 5 & 6 W. 4, c. 50 s. 70 enacts that it shall not be lawful to erect or cause to be erected any steam engine within twenty-five yards from any part of any carriageway, unless it shall be within some house or other building, or behind some wall, or fence, sufficient to conceal or screen it from the carriageway, so that it may not be dangerous to passengers, horses, or cattle: Held that a portable steam engine, upon wheels and drawn by horse power, used to drive a threshing machine within a barn, but not fixed thereto or to the soil, was within this enactment.

In the second case a local authority, as authorized by a section of their special act, passed a by-law providing that no person should, except as therein provided, "erect any

(1) (1863) 4 B. & S. 84.

(2) (1910) 26 T.L.R. 506.

1948

THE KING v. BRIDGE RIVER POWER CO. LTD. ET AL

Kerwin J.

booths, tents, sheds, stands, stalls, shows, exhibitions, swings, roundabouts, or other erections on any part of the parades, foreshores, sands, or wastes: Provided that the foregoing prohibition shall not apply in any case where upon application to the Commissioners for permission to erect any booth, tent, shed, stand, stall, show, exhibition, swing, roundabout, or other erection on any part of the parades, foreshore, sands, or wastes upon such occasions and for such purpose as shall be specified in such application the Commissioners may grant, subject to compliance with such conditions as they may prescribe, without making any charge therefor, permission to any person to erect such booth, tent, shed, stand, stall, show, exhibition, swing, roundabout, or other erection." The intent and object of the legislation and by-law in question in these cases was so entirely different from the point before us that the decisions have no relevancy.

Prior to 1946, real and personal property was assessable for Public School purposes but by the amendments of that year to the Act every one is to be assessable and taxable on the assessed value of his taxable land and 75 per centum of the assessed value of improvements as defined. It would appear, therefore, that anything that retained its character as pure personality and did not become part of the land was not assessable. The last part of the definition of "Land" in the *Taxation Act* reads "but shall not include such improvements, fixtures, machinery, or things other than buildings as, if so erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property." No such provision appears in the *Public Schools Act*. Without adopting any test that may be applicable as betwen vendor and purchaser, mortgagor and mortgagee, or landlord and tenant, it is sufficient to say that the machines and transformers in question retained their character of personality and that not being part of the real estate so as to constitute an improvement thereto are not assessable or taxable.

The appeal is therefore allowed. The orders of the Court of Appeal and of Manson J. are set aside and the orders of the Court of Revision restored, except as to those machines and transformers in question before us. That leaves the matter with no order as to the costs of the

appeals to Manson J. but, as the appellant has succeeded substantially in all the proceedings that have been taken since then, he is entitled to his costs not only in this court but in the Court of Appeal.

RAND J. (dissenting in part):—I am unable to agree with the view of the Court of Appeal that the tunnels here are not taxable. The word "Improvements" is thus defined in section 2 of the *Taxation Act*:—

> "Improvements" means buildings, fixtures, and things erected upon or affixed to land, and improvements done to land, but shall not include the cost of surveying land:

and "Land":—

> Land includes land covered by water, and all quarries and substances in or under land, other than mines or minerals, and all trees and underwood growing upon land, and all improvements, buildings, fixtures, machinery, or things erected upon or affixed to land or to any building thereon, but shall not include such improvements, fixtures, machinery, or things other than buildings as, if so erected or affixed by a tenant, would, as between landlord and tenant, be removable by the tenant as personal property:

The court assumed that all improvements were included in the scope of land but held that tunnels were not "improvements done to land". This interpretation is, I think, much too narrow and it would conflict with the purpose of the statute clearly indicated by the language used to embrace generally all work on land adding value to it.

But Mr. Farris argues that "land" does not take in all improvements; that the latter as land are limited to those "erected upon or affixed to land". The definitions are no doubt somewhat repetitious and overlapping and are inartistically drawn, but to restrict the word as argued would likewise go far to defeat the obvious scope of value intended to be drawn within taxation. The words "all improvements" in the definition of land should be given the full effect of their own definition; if that were not so, "improvements done to land" although so particularly added to the definition would have no operation except in section 31 and the use there would, on the contention made, be futile.

Nor have I any hesitation in holding that tunnels are "improvements erected upon or affixed to land". Certainly this language does not limit improvements to the surface of the land. The tunnels, as part of their structures, have

1948

THE KING v. BRIDGE RIVER POWER CO. LTD. ET AL

Rand J.

concrete walls and contain pipes to carry water and are annexed to surface works at each end; and treating them, with the connected works, as I think they should be treated, as a single body of improvement, they are both erected upon and affixed to land: *Rector of St. Nicholas* v. *London County Council,* (1); *Lavy* v. *London County Council,* (2).

But I am unable to take the basis of valuation employed by the assessor and by the Court of Revision as other than original cost less depreciation which I think clearly contrary to that laid down in the statute by section 30:—

> 30. Land shall be assessed at its actual cash value in money. In determining the actual cash value of land in money, the Assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which the land would sell at auction, or at a forced sale, or in the aggregate with all the land in the assessment district, but he shall value the land by itself, and at such sum as he believes the same to be fairly worth in money at the time of assessment. The true cash value of land shall be that value at which the land would generally be taken in payment of a just debt from a solvent debtor.

What is contemplated is that the land taxed, embracing all its possibilities and risks of sale or utilization and without reference to any privilege or interest not annexed to or forming part of it and divorced from any larger work or system, the property of the owner, shall have its present value ascertained by a judgment related to the criteria mentioned in the section: *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste,* (3); *Maritime T. & T. Co.* v. *Antigonish,* (4). No doubt cost and depreciation are relevant to that mode of ascertainment, but they are only relevant and they do not themselves constitute the mode. I agree with Mr. Farris that the so-called scrap value cases do not lay down a rule of law; in them the conclusion was that the value of the property taxed was only what would be obtained by selling the property as scrap. In each case, under such a statutory provision as we have here, the question is, what is the value of the property taxed? What could be obtained for it as it stands on the basis laid down by the statute?

On the other hand, I cannot agree that since the method applied was wrong, the property escapes taxation. The statute is mandatory in its direction to tax and has not

(1) [1928] A.C. 469.
(2) [1895] 2 Q.B. 577.
(3) [1914] A.C. 569.
(4) [1940] S.C.R. 616.

yet been complied with. The case must then go back to the Court of Revision in which the error in law was made.

The Court of Appeal reversed the holding of Manson J. affirming the Court of Revision that the machinery in the machine shop of the appellant, Bridge River Company, and certain transformers set up by that company along its power lines and connected and used as part of the essential operating equipment with them, were assessable. The definition of "improvements" in the *Public Schools Act* is as follows:—

> "Improvements" for purposes of taxation under this Act, means all buildings, structures, fixtures, and things erected upon or affixed to land, or to any building, structure, or fixture thereon, including machinery, boilers, and storage-tanks erected upon, affixed to, or annexed to any building, structure, or fixture, or erected upon or affixed to the land, and includes the poles, cables, and wires of any telephone, telegraph, electric light, or electric power company, and the track in place used in the operation of a railway.

Keeping in mind the purpose of the statute, I find no difficulty in holding that machines, consisting of a lathe, drill press, shaper and accessories, driven by a gasoline motor, set up and forming part of the permanent equipment of the shop, are machinery "erected upon" a building, even though they are maintained in position by their own weight. The same conclusion applies to the transformers. Both of these items were then properly included in the assessment.

I would, therefore, allow the appeal, but in view of the ground on which the allowance proceeds, without costs in this court, in the Court of Appeal, and in the appeal before Manson J.

Appeal allowed with costs in this court and the Court of Appeal.

Solicitor for the appellant: *H. Alan Maclean.*

Solicitor for the respondents: *A. Bruce Robertson.*

1949

*Feb. 7, 8
*Apr. 12

GASTON BOUDREAU.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Murder—Evidence—Statements made to police after questioning—Whether made voluntarily—Whether incriminating or exculpatory—Admissibility—Criminal Code s. 259.

While in custody, on a coroner's warrant, as a material witness, during the investigation of a murder case, appellant made two written statements to the police during the course of questions put to him by them. For the first statement, the usual warning was not given before accused had completed his verbal answers, but it was given before the written statement was signed. This statement contained an account of the movements of the appellant for some days before and after the day of the commission of the crime, which indicated that he could not have been concerned in the crime. It also contained admissions of his intimate relations with the wife of the murdered man. The second statement before which a warning was given, reiterated the substance of the first, but added a complete confession of the commission of the crime by appellant. The trial judge ruled that these statements were admissible in evidence and the majority in the Court of Appeal agreed with him.

Held: Estey J. dissenting, that both statements were voluntarily made and that the appeal should be dismissed.

Held also, that the first statement was incriminating and not exculpatory (The Chief Justice and Taschereau J. *contra*).

Held further, that the dictum in *Gach* v. *The King* [1943] S.C.R. 254 that "when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given" was obiter: *Ibrahim* v. *The King* [1914] A.C. 599 and *Prosko* v. *The King* 63 S.C.R. 226 followed. (The Chief Justice and Taschereau J. expressing the opinion that the *Gach* case had no application to the present case as, in their view, the first statement was exculpatory).

Per Estey J. (dissenting): The first statement was incriminating and the trial judge misdirected himself to the effect that the statement was exculpatory and not evidence against the accused. That though a warning was given prior to the second statement, it was immediately followed by questions and incidents which were not sufficiently disclosed by the evidence to justify a conclusion that the statement was voluntarily made.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing

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

(1) 93 C.C.C. 55.

(Bissonnette J.A. dissenting) the appellant's appeal from his conviction, at trial before Coté J. and a jury, on a charge of murder.

Hon. Lucien Gendron K.C. for the appellant.

Nöel Dorion K.C. for the respondent.

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

TASCHEREAU, J.:—The appellant Gaston Boudreau was charged with the murder of Joseph Laplante, and on the 26th of September, 1947, he was found guilty and condemned to be hanged. This conviction was upheld by the Court of King's Bench, Province of Quebec (1), Mr. Justice Bissonnette dissenting, on the ground that certain confessions made by the appellant were illegally admitted in evidence.

The main facts leading to these alleged confessions which are impugned, may be briefly stated as follows:

On the morning of May the 29, 1947, the body of Laplante was found on the highway, leading to Lake Castagnier, a small municipality near Amos, Abitibi, P.Q. The police authorities started immediately to investigate, and the Coroner's inquest, originally fixed for the 29th of May, was adjourned *sine die* by Coroner Brousseau until further evidence could be obtained. It was resumed on the 6th of June, 1947.

At first, Constable Lefebvre, Sergeant Dupont, Sergeant Massue, Detective Oggier and Dr. Roussel, legal medico expert for the Provincial Government, who had come from Amos and Montreal to try and solve the mystery of Laplante's death, which was obviously a brutal murder, had but very scant clues leading to the discovery of the author of this crime.

On Sunday, the 1st of June, Lefebvre, Oggier and Dr. Roussel went at Laplante's house where the body was exposed. There, they saw amongst others, Mrs. Laplante and Gaston Boudreau, the appellant in the present case. As Boudreau looked nervous, he was asked by Oggier to follow him, and was brought the same evening to Amos at the police headquarters. He was there put under the

(1) 93 C.C.C. 55.

1949

BOUDREAU v. THE KING

Taschereau J.

supervision of the jailer, in the Constable's room, and Sergeant Massue telephoned the Coroner to obtain the necessary authorization to detain him as an important witness. This authorization was given verbally on Sunday night, and the next morning, Massue received by mail a written authorization to detain Boudreau.

On that morning, Massue summoned Boudreau in his office and told him that he was held as an important witness. In view of the fact that Boudreau's friendship with Mrs. Laplante was publicly known, it was decided to ask him a few questions, and on Tuesday evening, at about eight thirty, Massue questioned him on his movements during the week of the murder. Without being warned, Boudreau said that he had left the previous Tuesday to go hunting at a place called Canton Vassal, and that he had taken with him a shot gun. He explained his run in the bush where he had sprung his traps, his return on foot the following Saturday to one Therrien's house, and then to his home in a taxi with one Carpentier. He also gave some information concerning his fire-arms, his cartridges and the result of his hunt. Massue then pursued further his investigation, and asked him about his relations with Mrs. Laplante. Boudreau freely told the circumstances in which he had met her, and the fact unknown to the police, that she was his mistress.

Boudreau was then asked if he was willing to repeat his statement so that it could be taken in writing, and he agreed without hesitation. Mr. Z. Bacon, secretary at the police headquarters, took down word for word Boudreau's statement. As the sheet of paper on which the answers were to be typewritten bore the regular warning, it was read to the accused before anything was committed to writing. Upon completion, the whole document including the warning, was read to the appellant who signed it after having been sworn by a Justice of the Peace.

Oggier continued his investigation. It was discovered that the pellets found in Laplante's skull were BB Gauge, shot very likely from a 12 gauge shot gun, the same calibre as the one found in Aubuchon's house and belonging to Boudreau. The cartridges he had in his house were also BB. This new evidence strengthened the detective's suspicions which at first were very slight, but were, nevertheless

still quite insufficient to charge Boudreau with murder. There was no direct evidence to link him with the commission of the crime.

On the 5th of June, when Oggier returned from Lake Castagnier with Massue, it was decided to call Boudreau back to obtain from him additional information. Massue told him that he was held as an important witness concerning Laplante's death, and *warned* him that he was not obliged to talk, but that if he wished to say anything, it could be used as evidence before the Court. Boudreau then volunteered to give further information. He gave additional details concerning his intimacy with Mrs. Laplante, and while he was talking, Massue left the office to get a glass of water, and the accused spontaneously admitted to Oggier, without any question being put to him: "I may as well tell you, I killed him." Oggier called Massue back, and in the presence of Oggier and Massue Boudreau told the whole story of how he killed Laplante. This statement was typewritten by an employee of the police, and sworn to by Boudreau.

The learned trial judge ruled that these statements were admissible in evidence, and the majority of the Court of Appeal (1) agreed with him.

The law concerning the admissibility of statements made to persons in authority, finds its application only when these statements are of an incriminating nature. The first statement made by the appellant on the 2nd of June to Massue, was not in my opinion of that character, and nothing can be found in it, which directly or indirectly tends to connect the appellant with Laplante's murder. In fact, Boudreau denied all participation in the offence, by telling all that he had done in the course of his hunting trip. His statement was exculpatory. The admission of his intimacy with Mrs. Laplante may at the most constitute a possible motive, but cannot in itself be considered as evidence of guilt. It does not show in the remotest way that the appellant was involved in Laplante's death.

Counsel for the appellant has cited the case of *Gach* v. *The King* (2). I do not think that the present case can be governed by that case, where the accused had made confessions of an incriminating nature. The Court (3)

(1) 93 C.C.C. 55.
(2) [1943] S.C.R. 250.
(3) [1943] S.C.R. 250.

1949

BOUDREAU v. THE KING

Taschereau J.

held that in view of the circumstances revealed by the evidence, the accused was entitled to the same protection, before being questioned by a person in authority, as if he had been in custody.

As to the second statement made on June the 5th, it is said in the dissenting judgment of Mr. Justice Bissonnette, that it was a logical sequence of the first one, and therefore became illegal, notwithstanding the warning by the police officers. With due respect, I do not agree with this contention. I fail to see anything in the first statement that could in any way influence the second one, and be an inducement for Boudreau to make it to the police. Boudreau spoke freely after having been warned, and I have no doubt that it is without fear and without a hope of advantage from the detectives, that he made the minutely detailed recital of this premeditated crime. The spontaneity of that part of the confession, dealing with the actual killing, establishes clearly its voluntary character, and this, with all the other circumstances shown at the trial, leaves no doubt in my mind, that the conclusions reached by the learned trial judge on the "voir-dire", were right.

I would dismiss the appeal.

KERWIN J.:—The first statement has been treated by the majority of the judges in the Courts (1) below as exculpatory and I understand that that is also the view in this Court of my lord the Chief Justice and my brother Taschereau. There is no doubt, however, that the statement affords a possible motive for the murder, and in my opinion that would be sufficient to warrant applying the rule, if it exists, that once a person is under arrest any statement given by him in answer to questions by those in authority is inadmissible unless preceded by a proper warning. It was argued that such a rule was laid down by this Court in *Gach* v. *The King* (2). Mr. Justice Taschereau, who spoke for the majority in that case, is of opinion that the decision does not apply but that is because, in his view, the first statement given by Boudreau was exculpatory. For the reason given, I am, with respect, unable to concur and it therefore becomes necessary to consider the Gach decision.

(1) 93 C.C.C. 55.

(2) [1943] S.C.R. 250.

I believe it is agreed that it was sufficient for the disposition of that appeal (1) to decide that the statement there in issue was given as a result of a threat and that the following statement, at page 254, was therefore unnecessary for the actual decision:—

> There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence unless proper caution has been given. This rule which is found in Canadian and British law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority.

This statement is couched in very broad terms and, if read in its widest sense, would prevent, for instance, the placing in evidence of any incriminating answers to questions put by a police officer to a person arrested at the scene of a crime immediately after its commission. It has been construed to change the law as it was considered to be prior to Gach,—by the Court of Appeal for Saskatchewan in *Rex* v. *Scory* (2), and by the dissenting judge in the Court of Appeal (3) in the present case and is really the basis of the appeal to this Court.

Again with great respect, I think it advisable that it should now be stated clearly what this Court considers the law to be. My view is that it has not been changed from that set out in *Ibrahim* v. *Rex* (4) and *Rex* v. *Prosko* (5). The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one.

In the present case the accused gave a second statement in which is repeated the admissions of his intimacy with the deceased's wife contained in the first statement but, in addition, contained an admission of the slaying. The second statement was made after a proper warning. The

(1) [1943] S.C.R. 250.
(2) 83 C.C.C. 306.
(3) 93 C.C.C. 55.
(4) [1914] A.C. 599.
(5) 63 S.C.R. 226.

1949

BOUDREAU v. THE KING

Kerwin J.

trial judge admitted both in evidence and notwithstanding that he admitted the first because of his view that it was exculpatory, I am not prepared to disagree with his conclusion as to either. The police were not compelled to tell the accused specifically that notwithstanding his first statement he was not obliged to make another, and the first contains nothing that is not incorporated in the latter.

The appeal should be dismissed.

RAND, J.:—The appellant Boudreau was convicted of murder and the point of dissent on which he comes to this Court is the improper reception of two written statements, the first containing an admission of intimacy with the wife of the murdered man and the second, in addition to a repetition and an elaboration of the first admission, a full confession of the deed itself. At the time of making them he was being held under a coroner's warrant as a material witness. There was no more than a suspicion against him when in the first conversation with police officers in which questions were asked him he purported to detail his movements on the two or three days before the death and admitted the intimacy. Having consented to make the statement in writing, a justice of the peace was summoned and the statement made out, signed and sworn to by him. Before the signing, the justice read out the words of the usual warning which happened to be printed across the top of the paper. Two days later, after a formal warning, a further discussion took place with two officers and while one of them was momentarily out of the room and after a reference had been made to his mother, Boudreau suddenly burst out with the words "j'aime autant vous le dire: c'est moi qui l'a tué." This was followed by details. He then, as in the first case, consented to have the statement put in writing, and a like course was followed as before.

The objection is that the first oral admission, without warning, of what, in my opinion, was, in the circumstances, an incriminating fact, nullified both statements: that, having committed himself so far, what followed was its compulsive sequence, unless, which was not the case, the warning on the second occasion had so specifically dealt with the previous statement as to efface any effect that might then have remained on his mind.

In support of this position, *Rex* v. *Gach* (1), is cited. Mr. Gendron argued that what was formerly a rule of practice under which the trial judge could and almost invariably did but was not bound to rule out confessions resulting from questions put to a person under arrest by one in authority without a warning has, by that decision, been converted into an inflexible rule of law; and it is pointed out that that view of it has been taken by the Court of Appeal for Saskatchewan in *Rex* v. *Scory* (2). The particular language from which this conclusion is drawn is that of Taschereau J. in the following paragraph:—

> There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence unless proper caution has been given. This rule which is found in Canadian and British law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority.

As the reasons of both Kerwin, J. and Taschereau, J. show, there was in the case clear evidence of a threat on the part of the officer, and the facts which might have called for such an examination of the rule as is suggested were not present. At the most, then, it could be only a dictum: but I am bound to say that I cannot take the language as intended to do more than to state the existing rule. It is, therefore, I think, a misinterpretation of this decision to treat it as having effected a significant change in the character of the rule, and the point as put to us by Mr. Gendron fails.

The cases of *Ibrahim* v. *Rex* (3), *Rex* v. *Voisin* (4) and *Rex* v. *Prosko* (5) lay it down that the fundamental question is whether the statement is voluntary. No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the

(1) [1943] S.C.R. 250.
(2) 83 C.C.C. 306.
(3) [1914] A.C. 599.
(4) (1918) 1 K.B. 531.
(5) 63 S.C.R. 226.

1949

BOUDREAU v. THE KING

Rand J.

case. The underlying and controlling question then remains: is the statement freely and voluntarily made? Here the trial judge found that it was. It would be a serious error to place the ordinary modes of investigation of crime in a strait jacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice.

I do not mean to imply any right on the part of officers to interrogate or to give countenance or approval to the practice; I leave it as it is, a circumstance frequently presented to courts which is balanced between a virtually inevitable tendency and the danger of abuse.

The appeal must therefore be dismissed.

The judgment of Kellock and Locke JJ. was delivered by

KELLOCK, J.:—This appeal comes to this court upon the basis of the dissenting judgment of Bissonnette J. in the court below (1), which affirmed the conviction of the appellant by the Superior Court on a charge of murder. The questions raised involve the admissibility of two statements made by the appellant to police officers during the course of questions put to him by them on two different occasions. On the first occasion the usual warning was not given until the appellant had completed his verbal answers but it was given before his statement was committed to writing and signed by him. This statement contained a circumstantial account of the movements of the appellant for some days before and after the day upon which the crime was committed, which indicated that he could not have been concerned in the crime. It also contained admissions however, with respect to relations existing between the appellant and the wife of the murdered man.

The second statement reiterated the substance of the first, but added a complete and circumstantial account of the commission of the crime by the appellant. Mr. Justice

(1) 93 C.C.C. 55.

Bissonnette treated the first statement as having been made without a warning and he considered it inadmissible on the ground that it had been laid down by this court in the case of *Rex* v. *Gach* (1), that lack of warning in any case rendered a statement inadmissible as a matter of law. He was also of the opinion that the inadmissibility of the first statement rendered the second inadmissible, as in his view, the appellant ought to have been pointedly warned that notwithstanding he had made the first statement he need not say anything. The question is therefore raised as to whether or not, assuming the warning with respect to the first statement to have been insufficient, either statement was thereby rendered inadmissible as a matter of law, even although the learned trial judge, upon a consideration of all the relevant circumstances, was of opinion that in each instance the appellant had spoken voluntarily.

The governing principle is stated by Viscount Sumner in *Ibrahim* v. *The King* (2) as follows:

> It has long been established as a postive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Regina* v. *Thompson* (3) . . .

At page 613 Viscount Sumner refers to the decision of the Court of Criminal Appeal in England in *Rex* v. *Knight and Thayre* (4), and quotes from the judgment of Channell J. at page 713, where the latter said with respect to answers to questions put by a constable after arresting:

> When he has taken anyone into custody . . . he ought not to question the prisoner . . . I am not aware of any distinct rule of evidence, that if such improper questions are asked the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence . . .

On the same page Viscount Sumner refers to an excerpt from the judgment of Channell J. in *Rex* v. *Boot and Jones* (5), where the latter said at p. 179:

> the moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question, or a magistrate, it is ridiculous to suppose that a policeman can. But there is

(1) [1943] S.C.R. 250.
(2) [1914] A.C. 599 at 609.
(3) (1893) 2 Q.B. 12.
(4) (1905) 20 Cox C.C. 711.
(5) (1910) 5 Cr. App. R. 177.

1949

BOUDREAU v. THE KING

Kellock J.

no actual authority yet that if a policeman does ask a question it is inadmissible; what happens is that the judge says it is not advisable to press the matter.

Viscount Sumner concludes:

And of this Darling J., delivering the judgment of the Court of Criminal Appeal observes the "principle was put very clearly by Channell J."

Lord Sumner at p. 614 refers to this view of the law as "a probable opinion of the present law, if it is not actually the better opinion", although their Lordships say that the final declaration as to the law on the subject should be left to the "revising functions of a general Court of Criminal Appeal."

In *Rex v. Colpus* (1), a decision of the Court of Criminal Appeal in England, in delivering the judgment of that court Viscount Reading C.J., said at 579:

We do not propose to say more in this case than that the principle laid down in *Reg.* v. *Thompson* (2) and approved in *Ibrahim* v. *Rex* (3) is the principle which is to be applied in the present case.

The case before that court involved statements made by the appellants before a military court of inquiry. These were admitted although there had been no warning, the court being of opinion that on all the evidence they were voluntary statements.

In the following year in *The King* v. *Voisin* (4), again a decision of the Court of Criminal Appeal, the appellant, in response to a request by the police, went to a police station where he made a statement which was taken down in writing. He was then asked whether he had any objection to writing down certain words, and upon his stating he had no objection, he wrote them. He was not cautioned at any time. It was contended at the trial that the words which he had written were inadmissible on the ground that the writing was obtained by the police without having first cautioned the appellant and while he was in custody. The writing was, however, admitted. The court followed the judgment of Lord Sumner in *Ibrahim's* case (5). At page 558 A. T. Lawrence J. said:

The question as to whether a person has been duly cautioned before the statement was made is one of the circumstances that must be taken

(1) (1917) 1 K.B. 574.
(2) (1893) 2 Q.B. 12.
(3) [1914] A.C. 599.
(4) (1918) 1 K.B. 531.
(5) [1914] A.C. 599.

into consideration, but this is a circumstance upon which the judge should exercise his discretion. It cannot be said as a matter of law that the absence of a caution makes the statement inadmissible.

I do not think it possible to regard this case as other than a case of a statement obtained from a person in custody as the result of questioning by the police and it was so dealt with by the court. There is, in my opinion, no room for distinction whether there be one or more than one question asked.

In 1922 the question came before this court in *Prosko* v. *The King* (1). In that case the appellant was in the custody of two American detectives for the purpose of being brought before the American Immigration authorities. A warrant for his arrest on a charge of murder had been issued in this country.

The appellant was told by the immigration officers that they were going to take up his case with the United States Immigration officials and have him deported to Canada, whereupon he said, "I am as good as dead if you send me there." Upon the officers asking "why", he gave the statement which was in question. No warning had been given to him. The Chief Justice, Idington, Anglin and Brodeur, JJ., followed and applied the principle laid down in *Ibrahim* v. *The King* (2), *The King* v. *Colpus* (3) and *The King* v. *Voisin* (4). In this case but a single question was asked. The case was treated by all the members of the court as one of answers made to questions by persons in authority without a warning having been given. It was held that the evidence was admissible. The court considered that the basic question to be answered was as to whether or not the statement had been voluntarily made. At page 237 Anglin J. said:

> The two detectives were persons in authority; the accused was in my opinion in the same plight as if in custody in extradition proceedings under a warrant charging him with murder. No warning whatever was given to him. While these facts do not in themselves suffice to exclude the admissions, as Duff J. appears to have held in *The King* v. *Kay* (5), they are undoubtedly circumstances which require that the evidence tendered to establish their voluntary character should be closely scrutinized.

In *Gach* v. *The King* (6), the appellant was charged with having unlawfully received certain ration books, knowing them to have been stolen. Certain police officers

(1) 63 S.C.R. 226.
(2) [1914] A.C. 599.
(3) (1917) 1 K.B. 574.
(4) (1918) 1 K.B. 531.
(5) (1904) 9 Can. Cr. C. 403.
(6) [1943] S.C.R. 250.

1949

BOUDREAU
v.
THE KING

Kellock J.

called upon the appellant and told him that one Nagurski had stated that he had sold ration books to the appellant, that he could be prosecuted, and that in any event it would be better for him to hand them over. At the end of the conversation they told him that he was to accompany them to the police barracks to talk to an inspector. The inspector there told the appellant that he would, in all probability, be charged. He was then asked certain questions and made certain answers. No warning was given. The admissibility of these answers was challenged.

Kerwin J., who delivered the judgment of himself and Duff C.J., referred to *Ibrahim* v. *The King* (1) and *Sankey* v. *The King* (2), and held the evidence inadmissible as having been made after appellant had been told by the police that it would be better if he made a statement.

The judgment of Taschereau J., with whom Rinfret J., as he then was, and Hudson J. agreed, reached the same result. The judgment of the majority is based upon the judgments in *The Queen* v. *Thompson* (3), *Rex* v. *Knight and Thayre* (4), *Lewis* v. *Harris* (5), and *Rex* v. *Crowe and Myerscough* (6).

As already mentioned, the first two of the above four authorities are referred to by Viscount Sumner in *Ibrahim's* (1) case. In *The Queen* v. *Thompson* (3) there is no suggestion that any warning had been given. The statement, however, was not rejected on that ground but on the ground that the Crown had not satisfied the burden resting on it of establishing that the statement had been made voluntarily. That is all that the case is cited for by Taschereau J. Had the mere lack of warning been regarded as rendering the statement inadmissible, the strong court which decided *The Queen* v. *Thompson* (3), would undoubtedly have said so. They did not.

Again in *Rex* v. *Knight and Thayre* (4), the statement which the Crown tendered had in fact been preceded by a warning. It is not therefore in itself a decision as to

(1) [1914] A.C. 599.
(2) [1927] S.C.R. 436.
(3) (1893) 2 Q.B. 12.
(4) (1905) 20 Cox C.C. 711.
(5) (1913) 24 Cox 66.
(6) (1917) 81 J.P. 288.

admissibility or inadmissibilty where no warning is given. Taschereau J. quotes from the reasons for judgment of Channell J. at p. 713, including:

> When he has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so.

Channell J. immediately adds, however, what is included in that which is quoted by Lord Sumner in *Ibrahim's* (1) case:

> I am not aware of any distinct rule of evidence, that if such improper questions are asked the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answer to be given in evidence and in my opinion that is the right course to pursue.

That is not to say that the rule is that all such answers are inadmissible, but that as a matter of discretion the judge may refuse to admit. That this is the correct view of what the learned judge says is shown by that part of his direction in *Rex* v. *Booth and Jones* (2), quoted by Lord Sumner in Ibrahim's case at p. 613:

> . . . the moment you have decided to charge him and practically got him into custody, then, inasmuch as a judge even cannot ask a question, or a magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask a question, it is inadmissible—what happens is that the judge says it is not admissible to press the matter.

In *Rex* v. *Booth and Jones* (2), as in *Rex* v. *Knight and Thayre* (3), the statement tendered had in fact been preceded by a warning.

In *Lewis* v. *Harris* (4), the headnote to which is quoted by Taschereau J., a constable had observed a child coming out of a store on a Sunday, and finding out from her that she had made a purchase of candy, he went back into the store with her and asked the proprietor certain questions, the admissibility of which was in question on the appeal. In that case the fact was that the appellant was not in custody and the constable had not made up his mind to lay a charge. The case is therefore not in *pari materia* with the case at bar. In the course of his judgment Darling J. said at p. 71:

> A constable ought not, if he has made up his mind that whatever the answer may be he will arrest the person to whom he is speaking, to

(1) [1914] A.C. 599.
(2) (1910) 5 Cr. App. R. 177 at 179.
(3) (1905) 20 Cox 711.
(4) (1913) 24 Cox 66.

1949

BOUDREAU v. THE KING

Kellock J.

ask that person an incriminating question. The law does not say that the answer must be excluded and that it is not evidence, but it has been frequently held that if that rule is infringed then the judge in his discretion may reject the evidence, and it is tolerably certain that if there is any sign that the evidence was unfairly obtained he would reject it. The true rule is that nothing must be done to hold out an inducement to a person, and no threat must be used to induce a person, to make an incriminating statement . . .

The last case to which Taschereau J. refers is *Rex* v. *Crowe and Myerscough* (1), a decision of Sankey J., as he then was. The question involved was as to the admissibility of a statement in answer to questions put by the police made by the appellant Myerscough before arrest and before the police had determined to arrest her. After she had made the answers orally, the appellant signed a written statement in which she said that "This statement has been read over to me. It is made quite voluntarily and is true". Sankey J. admitted the statement on the grounds, (1) that it had been made when she was not under arrest; (2) before it had been decided to arrest her; and (3) that she herself had said it had been made voluntarily. In the course of his judgment Sankey J. said what is quoted by Taschereau J., viz:

> If a police officer has determined to effect an arrest, or if the person is in custody, then he should ask no questions which will in any way tend to prove the guilt of such person from his own mouth.

It is to be noted that Sankey J. does not say that if this rule is disobeyed and a statement is made, it is inadmissible as a matter of law.

It is clear therefore that in none of the cases referred to in the judgment of the majority in *Gach's* (2) case, is it laid down that a statement made by a person in custody in answer to questions but by a person in authority, is, as a matter of law inadmissible. On the contrary, the question is in all cases as to whether the Crown, as stated in *Rev. Thompson, supra,* has satisfied the onus that the statement has in fact been made voluntarily. While there may be expressions in the judgment of the majority in *Gach's* case, taken apart from the context, which might appear to extend the decisions, as pointed out by Atkinson J. in *Lorentzen* v. *Lydden & Co.* (3):

(1) (1917) 81 J.P. 288.
(2) [1943] S.C.R. 250.
(3) (1942) 2 K.B. 202 at 210.

Again and again judges have been told by the Court of Appeal and the House of Lords that words used in previous cases must be interpreted with reference to the facts before the court and the issues with which it was dealing.

In Gach's case it is plain from the judgment of the majority that the statement sought to be used in evidence had been made by the appellant after the officers had said to him "that it would be better for him to hand them over." In these circumstances all the members of the court were of opinion that it could not be said that the statement was voluntary.

I do not consider therefore that it can be said that anything said in *Gach's* (1) case can be taken as inconsistent with the previous decision in *Prosko's* (2) case by which the court was bound, even though it could be said that the court was not also bound to follow what was termed by Lord Sumner in *Ibrahim's* (3) case as a "probable opinion of the present law, if it is not actually the better opinion."

In the case at bar the second statement, which included the substance of the first, was held by the trial judge to have been voluntarily made. I think therefore that the appeal must be dismissed.

ESTEY, J. (dissenting):—The appellant's conviction for the murder of Joseph Laplante was affirmed by a majority in the Court of King's Bench (Appeal Side) in Quebec (4). Mr. Justice Bissonnette dissented on the bases as set out in the formal judgment:

1. L'illégalité dans l'obtention et la production de la première confession;

2. L'illégalité dans l'obtention et la production de la deuxième confession, particuliérement en raison de l'illégalité de la première;

3. L'inadmissibilité de la preuve des aveux ou confessions.

Mr. Justice Bissonnette was of the opinion that the first statement or confession was not exculpatory as the learned trial judge has construed it, and because no warning had been given it was in his opinion improperly admitted. He summarized his conclusions relative to the second statement under three headings, as follows:

Le premier, c'est que j'estime que la mise en garde sur la deuxième confession, même si elle a été faite, ne constituait pas, sous les circonstances de cette cause, un avertissement suffisant, car ce jeune homme ne

(1) [1943] S.C.R. 250.
(2) 63 S.C.R. 226.
(3) [1914] A.C. 599.
(4) 93 C.C.C. 55.

1949

BOUDREAU
v.
THE KING

Estey J.

pouvait alors ignorer qu'il avait déjà fait certains aveux et que tout ce qu'on lui demandait ce soir-là, c'était de circonstancier ce qu'il avait déjà dit. Il s'attache donc une présomption très forte que l'appelant pouvait se croire tenu, obligé, contraint de parler.

Le deuxième motif c'est que les deux confessions sont si intimement liées, que l'exclusion de l'une entraîne celle de l'autre, car le jury ne pouvait certes pas se détacher complètement de l'impression que la lecture de la première pouvait avoir dans son esprit, dans la considération du mobile du crime.

Comme troisième motif, je dirai, à la suite de M. le juge Anglin dans l'affaire Sankey, que si l'interrogatoire que l'on fait subir à un prévenu n'est pas, per se, illégal, il faut, d'autre part, bien s'assurer que la Couronne s'est acquittée de son obligation de prouver que les aveux sont libres, nullement entachés d'une contrainte physique ou morale quelconque. Et cette preuve, ajoutait le juge en chef Anglin, ne peut qu'exceptionnellement ressortir du seul fait du serment des officiers de police que l'inculpé a parlé librement.

The murder occurred Thursday, May 29, 1947, at Lac Castagnier about twenty-four miles from Amos in the Province of Quebec.

Detective Oggier arrived at Amos on Saturday, May 31st. He acquainted himself with the information already gathered by the Provincial Police and on Sunday he and Constable Lefebvre proceeded to Lac Castagnier. At Mrs. Laplante's they found a number of people, including Boudreau. Detective Oggier desired to question Boudreau "sur ses allées et venues," and "parce que j'avais des soupçons," and requested him to accompany them to Amos. At Amos the coroner was communicated with and Boudreau detained at the jail. On Monday morning, June 2nd, Detective-Sergeant Massue had Boudreau brought into his office and there informed him that he was held as a material witness. Boudreau said nothing when so informed and was taken back into custody. In fact no questions were asked and no statement made by Boudreau until Tuesday night, the reason for which is explained by Detective Oggier in the course of his evidence:

Q. Vous avez pas jugé à propos de lui parler de ses allées et venues?
R. Non, mon enquête était pas complète.
Q. Pourquoi pas commencer à le questionner?
R. J'avais pas assez d'informations sur la cause et j'ai cru bon de continuer mon enquête.

Detective Oggier continued his inquiries at Lac Castagnier and returned to Amos on Tuesday, June 3rd. That evening at about 8.30 Boudreau was brought into the office of Detective-Sergeant Massue where Massue and Oggier questioned him. No warning was given and the

conversation lasted about an hour. The statements made by Boudreau were in reply to questions, for the most part by Detective-Sergeant Massue. Boudreau there admitted ownership of a ·12 gun as well as a revolver and told the police that he had left his home about midday on Tuesday, May 27th, to go into the woods to check over his traps, and returned on Saturday, when he heard of the murder of Laplante. He also stated that he had visited and worked at Laplante's place. When questioned he admitted intimate relations with Mrs. Laplante but when pressed with regard thereto "il paraissait un peu gêné."

The officers acknowledged that his information relative to his relations with Mrs. Laplante, apart from some details, but corroborated that which they had already received. In fact as regards the entire interview Oggier deposed that they had received no new information of consequence but their suspicions were strengthened. As yet, however, they concluded that they did not have sufficient to justify the laying of an information and complaint.

Boudreau, after making these verbal statements to the officers, consented to make a statement in writing. Bacon, the secretary of the provincial police, was called to take down the statement and when completed Tessier, Deputy Prothonotary, was called. He ascertained that Boudreau could read, handed to him a copy of the statement which he followed as Tessier read it aloud. Boudreau thereafter signed it and pledged his oath thereto before Tessier.

Detective Oggier returned on Wednesday and Thursday to Lac Castagnier where he continued his investigation and returned again to Amos Thursday evening about 8.00 or 8.30. He and Detective-Sergeant Massue had further conversation and decided to again question Boudreau. Oggier's own explanation is as follows:

R. On a décidé tous les deux ensemble. J'ai rencontré le sergent Massue à son bureau et je lui ai fait part de mon enquête additionnelle au Lac Castagnier et on a décidé de le faire venir, de le mettre sur ses gardes et de voir s'il était décidé de nous donner d'autres informations.

D. Vous croyiez avoir une preuve contre lui et vous vouliez avoir une déclaration de lui?

R. Lui, parce que je voyais que sa premiére déclaration était pas complète.

Boudreau was brought into Massue's office at about 11.00 o'clock that night and there remained until about 1.00 o'clock in the morning. On this occasion prior to any

1949

BOUDREAU v. THE KING

Estey J.

questions being asked Massue warned Boudreau. As to why the warning was given Massue deposed: "Parce que nous étions plus convaincus que le mardi soir." Immediately he had given the warning Massue asked the appellant "s'il avait des informations nouvelles à nous donner." Oggier deposed: "Il s'est assis et il a pensé et il a commencé à conter la même histoire que la fois d'avant." He also deposed: "Le sergent Massue a posé plusieurs questions concernant les armes à feu et madame Laplante." The appellant's gun used in committing the murder, his revolver and some cartridges were shown to him during this interview. The sack and the box found near the scene of the murder may or may not have been shown to him. It was at this interview that Boudreau stated: "Messieurs, vous le savez pas combien que j'aime cette femme-là." At some time during the interview the appellant became and remained very nervous. After about half an hour Massue left his office to obtain a glass of water. As to what happened in his absence Oggier deposed:

> Je lui ai dit que j'avais vu son pére et sa mère et là il a dit: "J'aime autant vous le dire, c'est moi qui l'a tué." J'ai lâché un cri et j'ai dit: "Viens t'en de suite."

In reply to their further questions Boudreau gave them the details of the murder and consented to give a written statement. Then, as on Tuesday evening, Bacon was called, later Tessier, before whom the statement was signed and appellant pledged his oath thereto.

The learned trial judge admitted the first statement in evidence because, in his opinion, it did not implicate the appellant but was rather exculpatory in character. It did contain an alibi and an admission that appellant owned a ·12 gun. The greater part, however, described his relations with Mrs. Laplante, from which the jury might well find the motive that prompted the murder. In this aspect the statement implicated the appellant in the commission of the offence.

> If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well. Ped Duff, C.J. in *The King* v. *Barbour* (1).

See also Lord Atkinson in *Rex* v. *Ball* (2).

(1) [1938] S.C.R. 465 at 469. (2) [1911] A.C. 47.

Then when both statements are read together the alibi is but a contradiction of his subsequent confession and to that extent is evidence that would be prejudicial to the appellant should any question of credibility arise in the mind of the jury. The learned trial judge, with respect, misdirected himself as to the significance of this statement as evidence against the appellant.

On Thursday evening Massue and Oggier again had the appellant, who was still under arrest, brought into the former's office, ". . . de voir s'il était décidé de nous donner d'autres informations . . . parce que je voyais que sa première déclaration était pas complète."

The important issue the learned trial judge had to determine was whether the confession "J'aime autant vous le dire, c'est moi qui l'a tué," made to Oggier was free and voluntary within the meaning of the authorities. These words are not in the written statement that followed. It is, however, what led up to the making of this confession that is vital in determining the issue, was it freely and voluntarily made. If in determining whether a confession is freely and voluntarily made the trial judge does not misdirect himself in law his finding should be accepted by an Appellate Court. It appears that in this case the learned trial judge, apart from his misdirection with regard to the first statement already dealt with, has misdirected himself in not considering the warning as given in relation to all the circumstances leading up to the making of this confession, including those before as well as those after the warning was given, and particularly as to whether, under all the circumstances, the effect of the warning as given had not been destroyed. It is the sufficiency of the warning under all the circumstances, the association of or connection between the two statements and the effect of the questions asked that are raised in the dissenting opinion of Mr. Justice Bissonnette.

The oft-quoted statement of the law by Lord Sumner in *Ibraham* v. *Rex* (1), reads as follows:

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

(1) [1914] A.C. 599 at 609.

1949

BOUDREAU v. THE KING

Estey J.

In the *Ibrahim* case the accused was in custody when Major Barrett came up to him and without any thought of a prosecution asked, "Why have you done such a senseless act?" to which the accused replied, "some three or four days he has been abusing me; without a doubt I killed him." Nothing more was said and no warning or caution had been given. This confession was held to have been freely and voluntarily made and therefore admissible. In this connection it is important to observe the remarks of Lord Sumner relative to the question as asked:

> In truth, except that Major Barrett's words were formally a question they appear to have been indistinguishable from an exclamation of dismay on the part of a humane officer, alike concerned for the position of the accused, the fate of the deceased, and the credit of the regiment and the service.

In *Rex* v. *Voisin* (1), no warning was given and yet the evidence was admissible. There the murdered party had not been identified. The police had a parcel containing a portion of the remains on which appeared the words "Bladie Belgiam". Several persons, including the accused, were held for questioning. At the request of the police the accused wrote the words "Bladie Belgiam" in handwriting that resembled and spelling identical with that on the parcel. Lawrence, J. at p. 94 stated:

> In this case the appellant wrote these words quite voluntarily. The mere facts that they were police officers, or that the words were written at their request, or that he was being detained at Bow Street do not make the writing inadmissible in evidence . . . if the writing had turned out other than it did and other circumstances had not subsequently happened it is certain that he, like others who were similarly detained, would have been discharged.

In *Prosko* v. *The King* (2), the accused was held in custody by the United States immigration officials who explained to the accused that they were taking proceedings for his deportation to Canada. The accused then said, "I am as good as dead if you send me over there." A constable asked why and the accused in the course of his explanation included the confession tendered and admitted at his trial. No warning was given and yet the statement was held to be freely and voluntarily made and admissible in evidence.

These cases are illustrative of the principle that the statement must in every case be voluntary. The mere fact

(1) (1918) 13 Cr. App. R. 89. (2) 63 S.C.R. 226.

that the confession was made by one in custody in response to a question by one in authority without a warning given does not make it inadmissible.

Then there are the cases such as *Rex* v. *Knight & Thayre* (1), where a detective after warning the accused questioned him for nearly three hours. Throughout the first two hours the accused denied any knowledge of the fraud but during the last hour made the confession tendered as evidence. Channell, J. stated, at p. 714:

> The questioning was continued for a very long period, the man's denials were not accepted, and the impression conveyed by Shinner to the prisoner's mind may well have been this: "You will have to tell me that you did this thing, because I shall not let you go till you do so." This certainly cannot be said to be making a statement voluntarily. It may well be that an admission made immediately after a caution had been given by the person in authority would be admissible, but it does not follow that a suspended person can be cross-examined until the person putting the questions is satisfied.

These cases emphasize that whether the warning has or has not been given it must be determined under all the circumstances of each case if in fact the statement has been freely and voluntarily made.

There has developed a rule of practice that when the police or others in authority have either arrested the accused or made up their minds that he is the party whom they will prosecute then before being questioned he should be cautioned or warned in a manner that will explain his position much as a justice of the peace or magistrate does to an accused at the conclusion of the Crown's evidence at a preliminary inquiry under sec. 684(2). In *Gach* v. *The King* (2), it was the view of the majority of this Court that the warning under the circumstances of that case should have been given. The general language used has been construed to effect a change in the law. *Rex* v. *Scory* (3). The general language construed as effecting a change in the law was unnecessary to that decision. Moreover, that case does not purport to overrule *Prosko* v. *The King, supra,* nor any of the cases in which a statement has been received as voluntary although no warning had been given, nor does it purport to hold that a statement should be held to be voluntary where the warning has been given. In each case the confession must be affirmatively proven

(1) (1905) 20 Cox Cr. C. 711.
(2) [1943] S.C.R. 250.
(3) 83 C.C.C. 306.

1949

BOUDREAU v. THE KING

Estey J.

by the Crown to have been freely and voluntarily made before it can be received in evidence. The fact a warning has been given as well as its content is an important circumstance to be considered. *The Queen* v. *Thompson* (1).

The circumstances from the outset pointed to Boudreau and, as the police stated, caused them to be suspicious that he had committed the murder. He was taken into custody on Sunday but not questioned until Tuesday evening, when in reply to their questions he explained that at the time of the murder he was in the woods caring for his traps and did not hear of Laplante's death until he returned Saturday morning. He admitted ownership of a ·12 gun and his relations with Mrs. Laplante. The following Thursday evening the appellant was again brought into Massue's office to see if he had decided to give them further information and because, as Oggier stated, he did not think his first statement was complete.

The events of Thursday evening in these circumstances cannot be segregated from those of Tuesday evening. The questions asked on Tuesday evening, his alibi, his admission to ownership of a ·12 gun and his relations with Mrs. Laplante, the reasons why he was again questioned on Thursday evening, as well as the questions asked, and all the incidents of that evening are important factors. At the outset Thursday evening appellant was warned and immediately asked by Massue the question already stated, "s'il avait des informations nouvelles à nous donner," which directed the appellant's mind at once to what he had said Tuesday evening. Then what is of the greatest importance in this issue—apart from this first question, the showing of the equipment used in the commission of the murder to the appellant, the reference to his parents, the fact that other questions relative to the gun and his relations with Mrs. Laplante were asked, and the nervous condition of the appellant—is the evidence does not disclose what further questions were asked or what transpired in that office immediately prior to the appellant's confession. The events prior to and of that evening, including the actual words of the confession, "J'aime autant vous le dire, c'est moi qui l'a tué," were important factors in the circumstances.

(1) (1893) 2 Q.B. 12.

The passage already quoted by Lord Sumner in the *Ibrahim* case is an indication of the importance of the nature and character of the actual questions asked. The three authorities, *Ibrahim, Voisin* and *Prosko, supra,* as well as *Sankey* v. *The King* (1), all emphasize the importance of considering the details leading up to a confession.

I do not subscribe to the view pressed by counsel for the appellant that the warning necessarily should have included such words as would have informed the appellant that, notwithstanding that he had already made one statement, no matter what it contained he need not now make another or any statement. Had such words been included they, of course, would have been a factor. It is not, however, desirable that separate and distinct requirements should be specified designed to cover specific situations; rather the issue to be determined should remain in all cases, was the confession freely and voluntarily made. The existence of a previous statement and the circumstances under which it had been made may well be important in determining the issue in a particular case. It was important here because the same officers were present on each occasion. Immediately the warning was given the question asked directed the appellant's attention to his previous statement and appellant himself began by repeating the same history he had related on Tuesday evening. It was from this beginning on Thursday evening that events led up to the confession. A warning under such circumstances, when already he had given information in reply to questions and when immediately after the warning he is further questioned by the same parties in a manner that directed his mind to the information already given, is quite different in its effect from a warning given before any questions are asked.

The events of the two evenings upon all the facts of this case were intimately associated by the officers themselves as well as by the appellant and cannot be separated in considering the admissibility of the statements made on these respective occasions. The courts have under such circumstances always insisted that such confessions be

(1) [1927] S.C.R. 436.

1949

BOUDREAU v. THE KING

Estey J.

received with care and caution. The statement of Chief Justice Anglin in *Sankey* v. *The King, supra,* at p. 441, is appropriate:

> It should always be borne in mind that while, on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. *The King* v. *Bellos* (1); *Prosko* v. *The King* (2). That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

The learned trial judge's misdirection relative to the first statement caused him to eliminate and not to consider what transpired prior to the warning on Thursday evening. That which took place after the warning should have been placed before the learned trial judge in greater detail. As Chief Justice Anglin stated in *Sankey* v. *The King, supra,* at p. 441:

> We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he "interviewed" the prisoner . . .

The learned trial judge in proceeding to find that the Crown had discharged the onus of proof and established that the statement was freely and voluntarily made without these further details, in particular the questions asked, the incidents surrounding the showing of the equipment used in the commission of the murder, as well as all the other incidents of that half hour, constituted a failure to direct himself as to that caution and care with which evidence in such cases should be scrutinized.

The appeal should be allowed and a new trial directed.

Appeal dismissed.

Solicitors for the appellant: *Gendron* and *Gauthier.*

Solicitor for the respondent: *Noël Dorion.*

---

(1) [1927] S.C.R. 258. (2) 63 S.C.R. 226.

BENNETT AND WHITE CONSTRUCTION COMPANY LIMITED } APPELLANTS;

AND

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

1948

*May 3, 4
*Oct. 5

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income Tax—Deductions from Income—Payments by construction company to obtain working capital to guarantors of bank loans—Whether "disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning income", s. 6(1) (a). Whether "payments on account of capital", s. 6(1) (b),—Income War Tax Act, R.S.C., 1927, c. 97.

Held: That payments by a construction company to obtain necessary working capital for its operations, to guarantors of bank loans, are "disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the meaning of s. 6(1) (*a*), and therefore not allowable deductions under the Income War Tax Act, R.S.C., 1927, c. 97. They are "payments on accounts of capital" within the meaning of s. 6(1) (*b*).

Montreal Coke and Manufacturing Co. v. *Minister of National Revenue* [1944] A.C., 127 followed.

Judgment of the Exchequer Court of Canada [1947] Ex. C.R. 474, affirmed.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J., (1), dismissing the appeal of the appellant with costs and affirming an assessment made under the provisions of the *Income War Tax Act* and *Excess Profits Tax Act* for the years 1941 and 1942.

James L. Lawrence and *Ross Tolmie* for the appellant.

L. St. M. Du Moulin and *J. D. C. Boland* for the respondent.

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

LOCKE J.:—The appellant is incorporated by letters patent under the *Dominion Companies Act*. Its declared objects are many in number including the carrying on of a contracting and construction business and that of financial agents and brokers but, of these, its activities have

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

(1) [1947] Ex. C.R. 474.

1949

BENNETT & WHITE CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

been confined to the former. Its authorized capital stock when incorporated in 1925 was $100,000: this was later increased to $250,000, of which as of October 31, 1942, shares to the par value of $136,320 had been issued.

Joseph G. Bennett was one of the original incorporators and a large shareholder. In the year 1934 Bennett informed his sons, John G. and A. G. Bennett that he wished to substantially retire from the business and the sons then acquired larger interests in the company and carried on the business. A. G. Bennett found when he applied to the bank for a loan that the company's credit was very low and asked his father to give a guarantee to the bank to enable the company to borrow money for its business purposes and it was arranged that he would do so for a consideration and this was agreed upon as being an annual amount equal to the amount of interest paid to the bank. One of the amounts required at this time was for a deposit of $15,000 for a tender on the Calgary Administration Building. During the years 1934 to 1939 inclusive Joseph G. Bennett continued his guarantees to the bank. In 1937 and thereafter John G. Bennett gave his guarantees. A. G. Bennett guaranteed the loans for the year 1938 and thereafter. In June of 1940 Joseph G. Bennett died and thereafter his widow gave her guarantees to the bank. In respect of these guarantees varying amounts were paid to all of the persons named during the years 1935 to 1940 inclusive and apparently the sums so paid were allowed by the Department of National Revenue as expenses of the business.

Apparently no written agreement was made at any time concerning these payments but on June 19, 1935, a resolution of the Executive Committee of the company fixed "the rate of interest" to be paid to Joseph G. Bennett for his guarantee at five per cent on the amounts borrowed. Similarly in 1940 the payments to be made to the guarantors for the fiscal year ending October 31, 1940, were authorized by the directors and designated as interest and like resolutions were passed by the Board in the years terminating on October 31, 1941, and 1942. For the fiscal year ending on October 31, 1941, $20,969.34 were paid to the guarantors and for the year following $23,984.15 and these were disallowed by the Department, giving rise to the present litigation.

In the interval between the giving of the first guarantee by Joseph G. Bennett and those given in later years the business of the company was largely increased. In the year 1938 contracts undertaken by it amounted to $1,116,652.15. In 1940, 1941 and 1942, due to the company obtaining large war contracts, these amounts were respectively $3,267,148.13, $3,581,019.49 and $4,458,108.59. The bank loans and overdrafts secured by the guarantees which when given by Joseph G. Bennett in 1935 had approximated some $46,000 totalled as of the date of the preparation of the balance sheet in 1940 some $588,000, in 1941 some $534,000 and in 1942 $505,000. Upon these advances interest was paid to the Bank of Montreal in amounts slightly in excess of the amount paid to the guarantors: such interest was claimed as a deductible expense and allowed by the Department. A. G. Bennett, vice-president of the company, giving evidence at the trial said that it was not possible for the company to carry on its business without substantial loans from the bank and these could not be obtained without having satisfactory guarantors: he estimated that without the loans from the bank the company could not have done more than twenty-five per cent of the business which was carried on during these years. In view of the comparatively small subscribed capital of the company, it is apparent that this would be so. The evidence is not very clear as to all of the purposes for which these large amounts were required: a statement filed, however, shows that as of October 31, 1940, approximately $196,000 was deposited on contracts that were either completed or in progress and as of October 31, 1942, the total amount of funds so deposited approximated $122,000. These, it was shown, were amounts paid as deposits to ensure the company's performance of contracts undertaken and were presumably retained until the completion of the work in accordance with the terms of the various contracts. In addition to these large sums which were thus rendered inactive for extended periods, the moneys were required for payrolls, the purchase of materials and, part of it at least, for the purchase of bulldozers and other equipment, though to what extent they were used for this latter purpose is not disclosed.

While the amounts paid to the guarantors were described as interest in the various resolutions which authorized their

1949

BENNETT & WHITE CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

payment, this was clearly inaccurate. Interest is paid by a borrower to a lender: a sum paid to a third person as the consideration for guaranteeing a loan cannot be so described. Sec. 6(*a*) prohibits the deduction of disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income and the first matter to be determined is whether amounts such as these, paid to enable the company to obtain the necessary working capital for its operations by way of loans from the bank, are properly so described. In *Addie* v. *Commissioners of Inland Revenue* (1), the Lord President, considering the meaning to be assigned to the expression "money wholly and exclusively laid out for the purposes of the trade" in the *Income Tax Act* of 1918 (8 & 9, Geo. V, cap. 40) said in part:

> It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning? Or, on the other hand, is it a capital outlay; is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all? It was pointed out by Lord Davey in the case of *Strong* v. *Woodifield* (2), and it has long been recognized, that in order to make deduction of a disbursement admissible "it is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits".

In *Tata Hydro-Electric Agencies Ld., Bombay* v. *Income Tax Commissioner* (3), the appellant company sought to have deducted from its profits as an expense twenty-five per cent of the annual commissions earned by it which it had agreed to pay as part of the purchase price of the agency under which the amounts became payable. Under the Indian Income Tax Act of 1922 the deduction was allowable if it had been incurred "solely for the purpose of earning income, profits or gains" in the business. In delivering the judgment of the Judicial Committee upholding the disallowance of the claim Lord Macmillan said in part, p. 695:—

> Their Lordships recognize, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. In the present case their Lordships have reached the conclusion that the payments in question were not expenditure so incurred by the

(1) (1924) S.C. 231 at 235.
(2) [1906] A.C. 448 at 453.
(3) [1937] A.C. 685.

appellants. They were certainly not made in the process of earning their profits; they were not payments to creditors for goods supplied or services rendered to the appellants in their business; they did not arise out of any transactions in the conduct of their business. That they had to make those payments no doubt affected the ultimate yield in money to them from their business, but that is not the statutory criterion. They must have taken this liability into account when they agreed to take over the business. In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business.

and approved the above quoted statement of the Lord President in *Addie's case* (1). In *Montreal Coke and Mfg. Co.* v. *Minister of National Revenue* (2), the right of the appellant company to charge as a disbursement expenses incurred in redeeming certain of its bonds before maturity and borrowing again at lower rates of interest and less onerous conditions as to payment, these including the payment of premiums on redemption, disbursements on account of exchange, discount to underwriters and legal and other expenses, was considered. The passage from the judgment of Lord Macmillan quoted in the judgment of the learned trial judge clearly points out the distinction to be drawn between expenditures made in providing capital for an enterprise and those for the carrying on of the trade from which its earnings are derived. I think the character of the payments in the present case does not differ in essence from those which were disallowed in the *Montreal Coke* case. They were, in my opinion, simply expenditures incurred in obtaining the capital to make the large deposits required, to purchase equipment and generally to finance the operations. A sum expended as interest for the use of capital is clearly to be distinguished from expenditures such as these, being the cost of obtaining guarantees without which the loans would not have been made by the bank, expenditures of the same character as the cost of floating issues of bonds or debentures or of selling shares for the purpose of obtaining capital.

Sec. 6(*b*) prohibits the deduction of "any payment on account of capital". The subsection did not appear in the *Income Tax Act* of 1917: it was enacted by cap. 52, Statutes of 1923, sec. 3, and was not taken from the English Act. While the expression "any payment on account of

(1) (1924) S.C. 231. (2) [1944] A.C. 126.

1949

BENNETT & WHITE CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

capital" is capable of meaning any return of capital, I think it obvious that this cannot have been intended since no statutory prohibition of deducting amounts so paid could be required. In *Montreal Coke and Mfg. Co.* v. *Minister of National Revenue supra,* 94, Duff C. J. and Kerwin J. were of the opinion that the deductions there claimed were payments on account of capital within the meaning of this subsection. I am of the opinion that expenditures such as these made by reason of the necessity of obtaining working capital are payments of the same nature.

The appeal should be dismissed with costs.

RAND J.:—The company carries on general construction work. In doing so, its current outlays are in part financed by temporary bank loans. For the years in question the bank required as collateral the guarantee of three shareholders who held a controlling interest in the company. These persons in turn agreed to give the guarantees on terms that they should be paid a sum equal to the amount of interest in each year paid to the bank. In calculating the net profit of the business for income tax purposes, the company, in addition to the interest paid to the bank, deducted the amounts so paid to the guarantors. The latter deductions were disallowed and the question is whether the company is entitled to have them restored.

The case for the company is that the payments were "wholly, exclusively and necessarily" paid out to earn the income. In a remote sense that is so; but the same can be said for almost every outlay in the organization of the company. The conception of the statute however is an earning of income through the use of capital funds which in one form or another constitute the means and instruments by which the business is prosecuted; but that providing or organizing them must be clearly differentiated from the activities of the business itself has been lately reaffirmed by the Judicial Committee in *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (1).

The acquisition of capital may be by various methods including stock subscriptions, permanent borrowings through issues of securities, or term loans; and ordinarily

(1) [1944] A.C. 126.

it should make no difference in taxation whether a company carried on financially by one means or another. In the absence of statute, it seems to be settled that to bring interest paid on temporary financing within deductible expenses requires that the financing be an integral part of the business carried on. That is exemplified where the transctions are those of daily buying and selling of securities: *Farmer* v. *Scottish North American Trust* (1); or conversely lending money as part of a brewery business: *Reid's Brewery* v. *Mail* (2).

Now the Crown has allowed the deduction of interest paid to the bank, and it must have been either on the footing that the day-to-day use of the funds was embraced within the business that produced the profit, or that the interest was within section 5, paragraph (*b*). But setting up that credit right or providing the banking facilities is quite another thing from paying interest; it is preparatory to earning the income and is no more part of the business carried on than would be the work involved in a bond issue. The lender might insist on being furnished with premises near the scene of the works; it might exact any other accommodation as the price of its willingness to provide funds; but all that would be outside the circumference of the transactions from which the income arises. Within the meaning of the Act, the premiums create part of the capital structure and are a capital payment: *Watney* v. *Musgrave* (3). They furnish a credit apparatus to enable the business to be carried on, and although they affect the distributable earnings of the company, they do not affect the net return from the business. That was the view of O'Connor J. below (4) and I agree with it.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.:—For the reasons given by my brother Locke I am of opinion that the amounts sought to be deducted by the appellant fall within section 6(*a*) of the *Income War Tax Act* and are therefore not deductible in ascertaining the taxable income of the appellant.

I would dismiss the appeal with costs.

(1) [1912] A.C. 118.
(2) [1891] 2 Q.B. 1.
(3) (1880) 5 Ex. D. 241.
(4) [1947] Ex. C.R. 474.

1949

BENNETT & WHITE CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

Estey J.

ESTEY J.:—The appellant borrowed funds from the Bank of Montreal under a line of credit secured by the personal continuing guarantee of three of its shareholders. These shareholders received in consideration of their giving that guarantee an amount in each year equal to the interest paid to the bank in the same period. In the year 1941 the guarantors were paid $20,813.06, and in the year 1942, $23,455.07. These amounts were not allowed as deductions in computing the profits by the taxing authorities. In the Exchequer Court this disallowance was confirmed.

The appellant contends that its borrowings from the bank under the security of the guarantee were not capital nor were the payments made to the guarantors part of its "financial arrangements", but rather that these payments to the guarantors were disbursements "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" and therefore should be deducted under the provisions of para. 6(1) (*a*) of the *Income War Tax Act,* (1927 R.S.C., c. 97).

The appellant, incorporated by Dominion letters patent dated February 25, 1925, carries on a general construction business in the provinces of British Columbia, Alberta and Saskatchewan. As early as 1934 its paid up capital and surplus was such that in relation to the volume of business available it required additional funds. These funds were advanced in 1934 by the Bank of Montreal under a line of credit of $10,000 secured by a personal continuing guarantee by the founder of the company, J. G. Bennett. In 1935 the guarantee was raised to $90,000, and in 1938 to $150,000. In the latter year J. G. Bennett and his two sons, A. G. Bennett and John G. Bennett, were the guarantors. In 1940 it was raised to $300,000. In that year J. G. Bennett died and when later in the same year the amount was raised to $370,000 the guarantors were Mrs. Mabel Bennett, widow of J. G. Bennett, and her sons, A. G. Bennett and John G. Bennett. This last guarantee continued throughout the fiscal years 1941 and 1942 and all payments here in question were made to the guarantors in consideration of this guarantee.

The first guarantee given in 1934 was obtained in order that the appellant company might have sufficient funds to undertake "some prospective business that was offering."

No other reason was suggested for the $90,000 or $150,000 guarantees. Then came the war and the government required "plants, air fields and that sort of thing." These had to be constructed, the appellant desired a share of that business, and as the vice-president stated, "it was necessary to get this money in order to carry those projects on." He made it clear that the bank would not have granted the line of credit without the guarantee, and without the funds so available the company would "not have been able to do 25 per cent of the business" that it did in 1941. The guarantee was therefore the asset which the company purchased to enable it to borrow the necessary funds.

The importance and position of this line of credit in the finances of the company is evidenced by the following figures: At the end of the fiscal year October 31, 1941, the paid-up capital of the company was $104,060, while at the same date the bank loan under the guarantee was $424,882.50. At the end of the appellant's fiscal year October 31, 1942, the paid-up capital was $136,320, and the bank loan at the end of that year was $273,050. Moreover, at the end of each fiscal year October 31, 1935, to October 31, 1942, the appellant company showed an overdraft at the bank. In 1941 at the end of its fiscal year this overdraft was $109,978.09, and in 1942 it was $232,721.80. These figures support what was stated at the trial that the appellant's "paid-up capital and surplus has never been large, compared with the magnitude of its operations." In these circumstances it appears to have been the settled policy of the company to provide for its expansion by funds made available under these guarantees.

The money borrowed under this line of credit was treated as capital and the interest paid to the bank allowed under sec. 5(1) (*b*), which provides:

> 5. (1) "Income" * * * shall * * * be subject to the following exemptions and deductions:—
>
> * * *
>
> (*b*) Such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow * * *

No exception is taken to this allowance of interest upon capital by the appellant and it is therefore not an issue in this appeal.

1949

BENNETT & WHITE CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

Estey J.

This was not a borrowing of money on a temporary or short-term basis such as is necessary and incidental to the ordinary and usual transactions in the course of the appellant's business. In effect this line of credit made available to the appellant for an indefinite period the ability to borrow funds for the purpose of accepting contracts beyond the volume its paid-up capital and surplus would permit. The provision for the cancellation of the guarantee, having regard to the relation of the guarantors to the company, and the practice since 1934, does not detract from the conclusion that this line of credit provided a long-term basis upon which the company might obtain the funds it required.

In *Scottish North American Trust* v. *Farmer,* (1) Lord Johnston stated at p. 698:

> It may be well said that if money is borrowed on a permanent footing as from year to year, the capital of the concern is in a commercial sense enlarged thereby, and the business extended, whereas no commercial man would consider that his banking facilities were part of his capital, or the consideration he paid for them anything but an expense of his business.

That the bank computed the interest from day to day, that payments were made on account thereof as funds were available, and if construction contracts were at any time not available this loan in the normal course would be paid in full, do not of themselves require, under the authorities, the description of the borrowing under this line of credit as temporary. These factors are here but the details of the way in which the loan was dealt with and do not affect its character, as evidenced by the reason therefor and the use thereof to expand and increase its business. A company engaged in the construction business may from time to time find it necessary to borrow on a temporary basis as necessary and incidental to its business, but the evidence does not establish that such obtained in this case. The learned trial Judge held that the sums as borrowed were capital and the evidence fully supports his finding.

The appellant's position is similar to that of the taxpayer in *The European Investment Trust Co., Ltd.* v. *Jackson* (2), where it was engaged in the business of financing the purchase of automobiles. Its paid-up capital was relatively small and when that and the proceeds of a

(1) (1911) 5 T.C. 693. (2) (1932) 18 T.C. 1.

loan, admittedly capital, from the Finance Corporation of America, were exhausted, in order to finance further purchases it was arranged that the Finance Corporation of America would make further advances. It was contended that the interest on these further advances should be deducted in computing the profits. These advances were made as required by the taxpayer and were repaid by amounts as received from the purchasers. They were described by the taxpayer as short loans and the interest was computed upon monthly statements. The commissioners found as a fact that the proceeds of these additional advances were "employed or intended to be employed as capital in the trade" and that therefore the interest paid could not be deducted in computing profits. On appeal this decision was affirmed. The taxpayer in that case, as the appellant here, when its capital was exhausted found it necessary to borrow in order that further contracts or a larger volume of business might be accepted.

The *Jackson* case was decided since that of *Scottish North American Trust* v. *Farmer, supra,* so much relied upon by the appellant. The taxpayer in that case was engaged in the buying and selling of securities. In the course of its business it purchased securities in New York in amounts beyond its available cash. Arrangements were made with a New York banker for an overdraft (for a period a line of credit was arranged). The interest paid on this overdraft was held to be a deductible expense. In the Court of Sessions their lordships stressed that these were short-term loans, or as stated by the Lord President:

> I cannot see how a temporary accommodation in the course of business ever is or ever can be capital.

Then in the House of Lords Lord Atkinson pointed out that the money was borrowed in a "fluctuating temporary manner" and the daily borrowing and lending of money being part of their business is not to be treated as capital. Moreover, in discussing this case in the *Jackson* case, Romer L.J., pointed out that in the *Farmer* case the money was found by the commissioners not to be capital and after reviewing that decision and others in relation thereto, concluded that in each case:

> * * * it is a question of fact whether the capital money borrowed is or is not capital employed in the trade within the meaning of this sub-paragraph, and if the Commissioners have decided, as a question of fact, that it is, then this Court cannot interfere.

1949

BENNETT & WHITE CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

Estey J.

In *Ascot Gas Water Heaters, Ltd.* v. *Duff* (1), it was held that the commission paid for a guarantee of an existing debt was deductible in computing the profits as an expense wholly and exclusively laid out for the purpose of the trade, while the commission on a guarantee of a loan for further capital facilities was not deductible. It appeared in the facts stated that "further expansion is only possible if an adequate long-term credit is obtainable and sufficiently large liquid assets in the form of reserves are formed." A commission of 3 per cent *per annum* was paid to the guarantor and the loan supported by this guarantee made in 1935 was due in 1953. See also *Bridgwater* v. *King* (2).

In *Southwell* v. *Savill Brothers, Ltd.* (3), expenditures incurred to obtain new licences and therefore to extend the business were held to be capital expenditures.

The funds borrowed were therefore capital and the payments made to the guarantors constituted a part of the "financial arrangements" of the appellant. They are in principle identical with those dealt with by the Privy Council in *Montreal Coke and Mfg. Co. Ltd.* v. *Minister of National Revenue* (4), where the expenses of refinancing a bond issue in order to effect a low rate of interest and other savings were disallowed under sec. 6(1) (*a*). Lord Macmillan stated at p. 133:

> It is important to attend precisely to the language of s. 6. If the expenditure sought to be deducted is not for the purpose of earning the income, and wholly, exclusively and necessarily for that purpose, then it is disallowed as a deduction. If the expenditure is a payment on account of capital it is also disallowed * * *

And again:

> Expenditure to be deductible must be directly related to the earning of income.

And further:

> Of course, like other business people, they must have capital to enable them to conduct their enterprises, but their financial arrangements are quite distinct from the activities by which they earn their income. No doubt, the way in which they finance their businesses will, or may, reflect itself favourably or unfavourably in their annual accounts, but expenditure incurred in relation to the financing of their businesses is not, in their Lordships' opinion, expenditure incurred in the earning of their income within the statutory meaning.

The disbursements of the guarantors here in question were made not as interest on the money borrowed but as

(1) (1942) 24 T.C. 171.
(2) (1943) 25 T.C. 385.
(3) [1901] 2 K.B. 349.
(4) [1944] A.C. 126.

the purchase price for the guarantee that made borrowing under the line of credit possible. The appellant upon obtaining this line of credit was enabled to complete its financial arrangements at the bank, which enabled it to undertake the larger volume of business. Sums borrowed under such circumstances are capital and the sums paid are not deductible under the provisions of 6(1) (*a*).

The judgment of the Exchequer Court should be affirmed and this appeal dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. L. Lawrence.*

Solicitor for the respondent: *E. S. MacLatchy.*

JAMES STEPHENSON WAUGH (DEFENDANT) ..... APPELLANT;

AND

PIONEER LOGGING CO. LIMITED (PLAINTIFF) ..... RESPONDENT.

1948
*Oct. 21, 22

1949
*Mar. 18

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Logging—Interpretation—Trust fund set up to guaranty performance—To be forfeited if covenants not carried out—Whether provision is penalty, liquidated damages or deposit.

Held: Taschereau and Locke JJ. dissenting, that the provision of an agreement to the effect that a special trust account set up by the purchaser out of the sale price of the timber, accumulating as the logging progressed but not to exceed $14,000, "to guaranty the due and proper logging by the purchaser", shall be forfeited by the default of the purchaser to carry out the covenants, is a penalty and not liquidated damages. (Judgment of the Court of Appeal (1948) 1 W.W.R. 929 maintained).

Public Works Commissioners v. *Hills* [1906] A.C. 368; *Dunlop Pneumatic Tyre Co.* v. *New Garage* [1915] A.C. 79 and *Mayson* v. *Clouet* [1924] A.C. 980 referred to.

Per Taschereau, Estey and Locke JJ.:—The clause in the agreement providing that the logging was to be carried on "except in periods when the price and market for logs is such that logs cannot be sold without loss" operated only when market conditions were such that logging operations on the Pacific Coast could not be carried on without loss.

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

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Per Taschereau and Locke JJ. (dissenting): The purchaser of the timber was not entitled to recover the moneys paid by it into the special trust account which were in the nature of a deposit and in the terms of the agreement intended as a guarantee of the complete logging of the said lands. The evidence disclosed that the lands had not been completely logged and that the purchaser had repudiated its obligations under the contract before the expiration of the time fixed for performance. (*Wallis* v. *Smith* (1882) 21 Ch. Div. 243; *Howe* v. *Smith* (1884) 27 Ch. Div. 89 and *Sprague* v. *Booth* 1909 A.C. 576 referred to).

APPEAL from the judgment of the Court of Appeal for British Columbia (1) allowing the appeal from the decision of Wilson J.

W. S. Owen, K.C. and *D. J. Lawson* for the appellant.

John J. Robinette, K.C. for the respondent.

KERWIN J.:—Notwithstanding the form of the pleadings, there is no doubt as to the issues upon which the parties went to trial. I am willing to assume that the respondent company is in error in its construction of paragraph 6 (*g*) of the contract and to treat it as a party in default, asking for the return of its own money which comprises the special fund. On this basis, the appellant Waugh was entitled to claim damages from the company for its breach. For what, upon the record, are obvious reasons, he did not do this but claimed the money as liquidated damages. This claim is untenable as by the contract the money would be forfeited upon the slightest breach of any of its provisions and it is, therefore, a penalty: *Public Works Commissioners* v. *Hills* (2); *Dunlop Pneumatic Tyre Co.* v. *New Garage* (3).

At the trial and throughout the appeals, the appellant took the position that there was but one fund in question, and the case has been fought on that basis. The appellant has not sought to change his ground but, in view of the discussion in the reasons of my brothers Rand and Estey, I have examined the agreements of November 1, 1926, and May 4, 1940. Upon consideration I have concluded that they in nowise change the result as the moneys were never a genuine pre-estimate of damages but only a penalty.

(1) (1948) 1 W.W.R. 929.
(2) [1906] A.C. 368.
(3) [1915] A.C. 79.

Such cases as *Howe* v. *Smith* (1) and *Sprague* v. *Booth* (2) are in my opinion inapplicable. Waugh had only a right to cut and remove timber from Crown lands, which right, under the contract, passed to the respondent company's predecessor and, by subsequent agreement, to the company itself. Even if in one aspect these cases would be at all relevant, the decision of the Privy Council in *Mayson* v. *Clouet* (3) points the distinction between a deposit and instalments of purchase price of land. Here, the money in the special fund, while not part of the purchase price of the timber, was certainly not a deposit. If the contention put forward on the basis of the cases first mentioned were sound, the Hills case (4) could not have been decided as it was.

I agree with my brothers Rand and Estey as to the item $600.94. The appeal should, therefore, be dismissed with a variation as to this item and the respondents are entitled to four-fifths of their costs in this Court.

RAND J.:—Mr. Robinette's chief ground was that the trust account of $14,000 made up of the moneys now in the bank and the balance deemed to be held by the appellant, less the twenty-two hundred odd dollars admittedly to be credited to the appellant, is a penalty and not liquidated damages within the principle of *Dunlop Pneumatic Tyre Co.* v. *New Garage* (5), and on that ground I think he succeeds. Viewing the purpose of the fund as of the date of the agreement, it clearly provides for the forfeiture of the amount accumulated to any time for any breach of the provisions of the contract thereafter. This would include failure (*a*) to pay taxes, (*b*) to sell any number of logs for the best price, (*c*) to keep all equipment on the land until the logging was completed, (*d*) to log continuously subject to the conditions mentioned, and (*e*) to cut and remove all of the timber from the lands. If a default continued for ten days after notice, the agreement could at once be terminated, the moneys forfeited and other action taken as provided; but the forfeiture would relate to the default and not to the consequence of termination. There is the accumulating amount on the one hand

(1) (1884) 27 Ch. D. 89.
(1) [1909] A.C. 576.
(3) [1924] A.C. 980.
(4) [1906] A.C. 368.
(5) [1915] A.C. 79.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Rand J.

and both fluctuating and static damages on the other. The range of the latter would include an insignificant amount for taxes and a minimum of unlogged timber, say a quarter of a million feet. There is no item for which the ascertainment of damages would be difficult or uncertain; for uncompleted logging it would be only a matter of obtaining an offer of stumpage, with damages limited to the rate or amount originally stipulated. There could be such variation both in specific and estimative amounts as makes it impossible for me to find the fund a genuine pre-estimate of damages.

This result does not mean, however, that a party in default is allowed in effect to demand a restitution of partial performance; setting up the fund is a collateral arrangement by which the vendor secures himself against a failure in performance by the purchaser; and finding its loss to be a penalty is, *ipso facto,* to declare it to be a security from which damages will be recouped, with the vendor a mortgagee, and the mortgagor entitled to ask that, subject to the deduction of damages, his property be returned to him: *Public Works Com.* v. *Hills* (1).

Against this it is said that the money was a "deposit" which cannot be recovered by a defaulting party. The nature of a deposit was discussed in *Howe* v. *Smith* (2) in which Fry, L.J. examined the matter historically. It is a term employed almost exclusively in the simple case of the sale of property. Whether in such a transaction a sum so called could ever be held to be a penalty it is unnecessary to decide because this is not merely a sale; the essential obligation is that the purchaser shall cut and remove the timber. But the mere employment of the term could not conclude the question. If that were so, the elaborate discussion in *Wallis* v. *Smith* (3) would appear to have been unnecessary. In the ordinary sale of property, the obligation of the purchaser is the single act of paying the price, and the deposit serves the additional purpose of part payment; it could be only in an unusual case where there would be an equitable ground for its return. In *Wallis, supra,* the purchaser was indeed to carry on a large scale land development scheme, but the deposit, so described, was

(1) [1906] A.C. 368.
(2) (1884) 27 Ch. D. 89.
(3) (1882) 21 Ch. D. 243.

to apply on the purchase price and was to be forfeited only on a substantial breach, the damages for which would be difficult of assessment; it was not a case where penalty could be found. Those circumstances sufficiently distinguish it from the contract here. In the *Hills* case, *supra*, there was no suggestion that the fund could be treated as a deposit: and in both that and the agreement here the term employed is "guarantee".

I have so far assumed that the $14,000 maintained its identity as a fund subject to the provisions of the contract and particularly clauses 4 and 7 (b), which stipulated for forfeiture. But there were two amendments, one dated November 12, 1936 and the other May 4, 1940. Under the former, the money amounting to about $6,000 then in the special trust account was paid out to the vendor and thereafter the 40c deduction was to be paid to him up to the total amount of the fund. When 15,000,000 feet remained to be logged, from the basic stumpage of $2.50 the trustee was to deduct the sum of $1.00 and pay it into a new special trust account until the fund was fully reconstituted, and thereupon the new account was to be subject to the original provisions. By the latter amendment, modifying the former, made when the new account had reached approximately $7,000, the $1.00 deduction was to be paid to the purchasers until they had received sufficient to make up with what was in the bank the total of $14,000.

I would have construed these amending agreements as having made inapplicable to the money while in the hands of the vendor and until the fund had been so reconstituted, the forfeiture provisions of the contract; but the consideration of this feature seems to be precluded by the footing on which the case was tried and carried to appeal. The case shows the trial judge as stating to Mr. Clyne, representing the vendor:—

> There is no argument as to how it was created. It is just as if the original $14,000 was there in the bank and I have to dispose of it. It isn't all in the bank, but the possession isn't essential because the defendant is obligated. If Mr. Clyne I would find against your client throughout, for instance, he would be compelled to bring that fund up to $14,000. Suppose I found against him throughout in addition to the $7,000 in the bank he paid out to Mr. Jackson's clients, would your client be compelled to bring up the fund to $14,000. Mr. Clyne: Yes, but not more.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Rand J.

This understanding was accepted before us on the argument. The effect of the amendments is not, therefore, to be taken into account.

There remains the item of $600.94 arising from the sale of logs at the booming ground rather than at a mill point. Under the contract, the purchasers were to obtain the "best possible price". From that price which was to be dealt with by the respondents Tait and Marchant, there was first to be deducted the sum of $10.50 out of which were to be paid:

(*a*) Royalty and scaling fees to British Columbia;
(*b*) Two dollars and fifty cents for certain logs and $3.00 for other logs, to the vendor as a portion of the sale price;
(*c*) The sum of 60c for booming charges to a named company;
(*d*) The sum of 40c per 1,000 feet for the trust fund mentioned; and
(*e*) The balance to the purchasers "in respect of their work of logging, booming and towing of the said logs."

The difference between the price and $10.50 was to be shared equally by the vendor and the purchasers. Nothing is expressly said as to any place of sale, but for the first five years the rafts were towed by the purchasers to a mill at Victoria, and it was the price obtained upon the delivery of the logs there that was handed over to Tait and Marchant.

As the vendor was obviously interested in the excess of the sale price over $10.50 and as the latter sum was to include expenses of the purchasers in towing the logs—which could only mean from the booming ground to delivery at a mill—the price contemplated would be the best offered at a milling point. The language is wide enough to include the entire area of milling markets for Vancouver Island logs. But it is not necessary to attempt to define the range of delivery points to which the "best possible price" might be applicable. The judgment at trial allows damages to the vendor only on logs sold to Victoria mills but delivered at the booming ground and towed by the purchaser. In effect the towage charges were thus transferred from the loggers to the excess of the selling price over $10.50. The

range of price places was by the conduct of the parties for five years declared to include at least Victoria; and as that is the only destination with which we are concerned, the objection to the indefiniteness is removed. On this point, therefore, I agree with the trial judgment. But the respondent, Pioneer Company alone is bound by the provision. Neither Tait nor Marchant as individuals had anything to do with selling the logs; their duty was limited to distributing what was actually received in the manner provided. Nothing done by them as shareholders in the Pioneer Company can, in the circumstances, draw upon them personal liability.

The appeal must, therefore, be allowed as to the item for towage damages at $600.94 (the amount agreed upon) against the Pioneer Company and deducted from the moneys payable to that company. Beyond that, the appeal must be dismissed. The respondents appearing throughout by the same counsel should be allowed four-fifths of their costs in this court.

ESTEY J.:—The respondent asks a declaration that having completed on its part the terms and conditions of a logging contract, it is now entitled to the proceeds of a trust fund created under the contract as a guarantee for its due performance. At the trial respondent's claim to the proceeds of this trust fund was dismissed and the amount thereof awarded as liquidated damages to the appellant under his counter-claim. The Appellate Court (1) varied this judgment holding the fund to be a penalty and as no damages were awarded directed the amount thereof, less certain deductions, to be paid to respondent.

As a matter of convenience, the Pioneer Logging Company Limited will be hereinafter referred to as "respondent" and Messrs. Tait & Marchant, the other respondent, as "trustees."

The contract made between the appellant Waugh, as vendor, and Joseph and Louis Pedneault, as purchasers, is dated April 24, 1934. Under date of December 18, 1935, the Pedneaults assigned their entire interest to the respondent Pioneer Logging Company. This assignment was approved of by the appellant and no question arises with regard thereto. The original contract comprised three

(1) (1948) 1 W.W.R. 929.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Estey J.

parcels: Lot 78 and Timber Licences 3733 and 3734 in the Renfrew District on the West Coast of Vancouver Island, British Columbia. The logging was completed on Lot 78 and the issues in this appeal are concerned only with the Timber Licences 3733 and 3734.

The contract provided:

> The Vendor gives and grants unto the purchasers the sole right, . . . until the 31st day of December, 1940, . . . to cut, remove, and carry away therefrom all of the timber . . .

This date of December 31, 1940, was by a supplementary agreement extended to December 31, 1941.

It also provided that the proceeds from the sale of the logs as received would be paid to Messrs. Tait & Marchant to be disbursed as in the agreement provided, including para. 2(A) (4) which directed payments "into a special trust account . . . the sum of forty (40c) cents per thousand feet to guarantee the due and proper logging by the purchasers of the said lands . . ." It is not questioned but that this 40c was paid into the trust fund from the respondent's share of the sale price and the ultimate disposition thereof is provided for in para. 4:

> . . . when the said lands shall have been completely logged and the sale price above provided paid to the Vendor, then the purchasers shall be entitled to all of the moneys in the said special trust account; but should the purchasers fail to complete the logging of the said lands in accordance with this agreement, and (or) the Vendor shall lawfully cancel this agreement by reason of the Purchasers' default in carrying out and performing the covenants and agreements herein contained on their part to be observed and performed, then and in such case all moneys in the said special trust account shall be forfeited to and shall belong absolutely to the vendor as liquidated damages for the non-performance or breach of this agreement.

The learned trial judge found that on December 31, 1941, the respondent was in default under the contract in that it had not logged "some 8 million feet of merchantable timber." The respondent does not contest the fact that it had not logged the 8 million feet but submits that its failure to do so did not constitute a default on its part because it could not have logged this timber except at a loss and by virtue of the provisions of para. 6 (*g*) it was in that circumstance excused from logging. Para. 6 (*g*) reads as follows:

> 6. (*g*) To carry on the logging of the said lands continuously with all of the logging equipment of the purchasers until the whole of the said lands shall be logged, save and except in weather which makes logging,

booming or towing unsafe, or in times of extreme fire hazard, or in periods when the price and market for logs is such that logs cannot be sold without loss.

It was suggested that this paragraph had no relation to any question of ultimate default such as here in question. Even on the assumption, however, that it does apply its provisions do not under the circumstances excuse the respondent. In order for the respondent to succeed under this paragraph it must be so construed that the words "when the price and market for logs is such that logs cannot be sold without loss" is a provision personal to its own conduct under this contract. In this connection it is important to observe that in para. 1 the respondent was granted the right to log, and in para. 5 it covenanted to "cut and remove all of the timber." In para. 6 (*f*) to conduct its "logging operations in a proper and workmanlike manner according to the most approved method of logging used by competent loggers of Vancouver Island . . ." Then in para. 6(*g*) to log continuously except in three events, weather, fire and market. In this context the parties in 6(*g*) were contracting with regard to contingencies beyond their control. When, therefore, they stipulated that "when the price and market for logs is such that logs cannot be sold without loss," they were providing against operating under adverse market conditions, which, as the learned trial judge has found, did not exist in the period with which we are here concerned. The evidence amply supports his finding in this regard. In fact Bestwick, a witness on behalf of the respondent, who operated the premises under a contract with the respondent, said there were 6 or 7 million feet that could be cut and removed at a profit.

On March 26, 1941, the respondent by letter notified appellant that because logging upon the premises could no longer be carried on except at a loss it would be "impossible to open up the camp and proceed with the logging this year." Thereafter throughout 1941 correspondence and conversations followed relative to the possibility of commencing logging operations and other matters under the contract but no agreement was arrived at. Even after December 31st the parties continued the negotiations until early in March the respondent concluded that the appellant intended to keep the trust fund.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Estey J.

Respondent then took the position that there was no timber upon the premises that could be logged at a profit and therefore it had completed its obligations under the contract and demanded payment of the proceeds in the trust fund. When as a consequence of this formal demand the proceeds were not made available respondent on April 2, 1942, commenced these proceedings. The appellant by its defence and counter-claim treated the contract as at an end and claimed, under para. 4 *supra,* the special trust account by virtue of the respondent's default. Neither party asked for specific performance.

The appellant cites *Sprague* v. *Booth* (1) in support of his contention that because of respondent's default he is entitled to claim the trust fund by virtue of the forfeiture clause in the agreement. In the *Sprague* case (1) the purchaser had made default and the Privy Council held that the deposit was the property of the vendor under the terms of the contract and in the course of the judgment Lord Dunedin stated:

> The nature and incidents of such a deposit are accurately discussed in the case of *Howe* v. *Smith* (2).

In *Howe* v. *Smith* (2), the court emphasized that in the event of the default the disposition of the deposit depends upon the terms of the contract and both Lord Justices Cotton and Fry quoted the statement of Baron Pollock in *Collins* v. *Stimson* (3):

> According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.

The word "deposit," as explained by Lord Justice Fry in *Howe* v. *Smith, supra,* "is not merely a part payment, but . . . also an earnest to bind the bargain so entered into." Its use as such has developed from that period when parties concluded their contract by giving a sum of money, a ring or other object. It has now become a very common and well understood word between vendors and purchasers, and in their contracts the amount thereof is usually in relation to the total purchase price a relatively small sum. The courts in construing a document in which the parties have used the word "deposit" have accepted it as an

(1) [1909] A.C. 576.
(2) (1884) 27 Ch. D. 89.
(3) (1882-83) 11 Q.B.D. 142.

expression of their intention to the extent that in the language of Baron Pollock, *supra*, "the inference is . . . where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit." That it is only an inference is indicated by the remarks of the Privy Council in *Brickles* v. *Snell* (1) and *Boericke* v. *Sinclair* (2). In *Mayson* v. *Clouet* (3), the distinction between a deposit and other instalments is emphasized.

The parties to this action have neither used the word "deposit" nor treated the fund as such. It was not as a deposit paid to and received by the appellant as his own money to be retained by him in any event, either as part of the purchase price or as an amount forfeited in the event of default. The parties have described it as a "special trust account" in the name of two trustees and defined its purpose "to guarantee the due and proper logging by the purchaser" (para. 2(A) (4)), and again, it "is intended as a guarantee of the complete logging of the said lands . . ." If the matter had ended there the issue would have turned largely upon the meaning of the word "guarantee." A guarantee is ordinarily a collateral or secondary contract under which the guarantor becomes answerable for the debt or default of another's primary debt or obligation. The word "guarantee' in this case is not used in precisely that sense, but having regard to its ordinary meaning it would appear rather that the parties intended the respondent would gradually out of its income from its operations under this contract build up a fund as a guarantee or as security for its completion of the contract. So construed the trust fund would be liable only for such damages as were suffered by the appellant.

The agreement, however, goes on and provides that "when the said lands shall have been completely logged and the sale price above provided paid to the vendor" then the purchaser shall receive all of the moneys in the said special trust account "but should the purchasers fail to complete the logging of the said lands in accordance with this agreement, and (or) the vendor shall lawfully cancel this agreement . . . then and in such case all moneys in the said special trust account shall be forfeited to and shall belong absolutely to the vendor as liquidated dam-

(1) (1916) 2 A.C. 599.
(2) (1928) 63 O.L.R. 237.
(3) [1924] A.C. 980.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Estey J.

ages for the non-performance or breach of this agreement."

The main issue, therefore, in this appeal, and that particularly stressed by counsel at the hearing, is whether the special trust account constituted a genuine pre-estimate of damages or a penalty. It is the terms of the contract that determine this issue. This trust fund increased as the work progressed and therefore the further the purchaser proceeded in the performance of its obligations under the contract the larger the amount. It must be obvious that at the commencement of the work and for some time thereafter the amount in the special trust account would be entirely inadequate if any substantial damages were suffered; while on the other hand, if the default occurred near the completion of the contract the amount might well be much larger than any damages that might be incurred.

Moreover, while the appellant never did cancel the agreement, he had the right to do so in the event of a number of possible defaults, and whether the parties genuinely pre-estimated damages or fixed a penalty depends upon the agreement as drawn and not upon subsequent events. In para. 5 the purchasers covenanted to "cut and remove all of the timber . . . in the manner and at the times above described." Then para. 6 contains a list of fourteen matters with regard to which the purchasers covenanted. These include: Covenant to obtain a registered timber mark for all logs; to have all logs scaled at the expense of the purchasers in the manner specified; to sell each and every raft or boom of logs at the best possible price; not to mix any of the logs; to take all fire precautions; not to remove its logging equipment. These are sufficient to illustrate the general character of the paragraph. Then in para. 7(*b*) it is provided that "if the purchasers shall at any time make default in observing or performing any of the covenants . . . the vendor shall be at liberty to give to the purchasers notice in writing of intention to determine this agreement . . . whereupon the purchasers shall be deemed to have abandoned this agreement and the vendor shall retain all sums of money . . . and all logs, timber . . ."

It will therefore be observed that in these paras. 5, 6 and 7 appellant as vendor had a right to cancel this agreement

for default in any one of a number of covenants, the damages in respect of each of which would vary and might in some cases be relatively small. It is in every case the language of the contract as a whole that must determine the intent and purpose of the parties and while the particular words used are important, the mere use of the words "liquidated damages" or "penalty" is not conclusive. In this case the language used is not particularly helpful as both the words "forfeited" and "liquidated damages" appear in the text. Lord Dunedin, in referring to similar language in *Commissioner of Public Works* v. *Hills* (1), stated:

> Indeed, the form of expression here, "forfeited as and for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being peculiarly appropriate to penalty, and not to liquidated damages.

If for the moment the fund here in question be accepted as sufficiently definite, under the forfeiture clause it would become the property of the appellant upon the breach of any of a number of covenants in which consequent damages would in regard to some be relatively small and others substantial. The case therefore comes within the oft-quoted language of Lord Justice Mellish in *In re Dagenham (Thames) Dock Co.* (2):

> I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty.

This same principle is embodied in the test suggested by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.* (3):

> There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" (Lord Watson in *Lord Elphinstone* v. *Monkland Iron & Coal Co.* (4)).

There are no circumstances in this case to rebut the foregoing presumption.

Moreover, until the sum of $14,000 was paid into the fund, which would be near the completion of the respondent's obligations, it was not a definite amount or one that could be determined with accuracy prior thereto. This

(1) [1906] A.C. 368 at 375.
(2) (1873) L.R. 8 Ch. App. 1022 at 1025.
(3) [1915] A.C. 79 at 87.
(4) (1886) 11 App. Cas. 332.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Estey J.

and other features make this case somewhat similar to *Commissioner of Public Works* v. *Hills, supra.* In that case the plaintiff undertook to build three railways and lodged as security the sum of £50,000 with a third party and in addition thereto certain percentages of the contract price were withheld as further security. The plaintiff, as contractor, in that case had made default and sued for the work done and the return of the £50,000 and the percentages retained. In the reasons for judgment the Privy Council commented upon the indefiniteness of the total amount, held that these funds were penalties and directed the return to the plaintiff of the sum of £50,000 and the percentages, less any damages the defendant proved.

The parties have presented their respective contentions upon the basis that at all times there was but one fund and the provisions of the original agreement with respect thereto obtained throughout. However, an examination of the agreements made subsequent to April 24, 1934, and filed as exhibits, so far as they relate to this fund do not support the view that in fixing the sum of $14,000 the parties were pre-estimating damages. Whether under these agreements the fund, as it passed to the appellant, by him in part repaid and finally a portion ($2,230.35) paid to the respondent to assist it in financing, remained subject to the forfeiture clause or was but a fund to guarantee any damages that might be suffered need not be determined as the result of this litigation is the same whichever of these alternatives might be adopted.

It would therefore appear that this special trust account must be construed as a penalty and consequent relief against forfeiture granted. As no amount of damages have been proved it should be regarded as belonging to the respondent.

The claim against the trustees Tait & Marchant is based upon the fact that they did not notify the appellant of a change effected by the respondent in the sale of the logs at the boom rather than at the mill, which, under the particular provisions of this contract effected a loss of 30 cents per thousand feet to the appellant and a gain of the same amount to the respondent.

This new contract for the sale of the logs was negotiated in September or October 1939 by Garrison as manager of the respondent with the Songhees Timber Co. Ltd. The contract of April 24, 1934, between the parties hereto contained no specific directions as to whether the logs should be sold at the mill or the boom but because of the practice followed to date it did raise a question between the appellant and respondent but which did not involve the trustees.

This claim against the trustees is not based upon the breach of any express duty imposed upon them by the contract but rather that this duty to inform appellant was imposed upon them because at the time Garrison negotiated this contract for the sale of the logs they were substantial creditors of the respondent and benefited by this 30 cents per thousand feet. That they had some time before guaranteed the bank account (which they had not been called upon to implement), had in fact a relatively small block of capital stock and Tait himself was secretary of the respondent, was not denied. Apart from a reference to the payment of towage by the purchasers the contract of April 24, 1934, makes no mention thereof. This absence of any provision as to the place from and the distance of towage was mentioned between the trustees and the appellant as early as 1934 when the trustees stated it would demand consideration sooner or later. Now when the matter came up the trustees took the same position, as they had taken earlier with respect to towing charges and other matters arising out of the contract upon which there was some disagreement, that it was a question to be settled between the parties to that contract. It was no part of the trustees' duty to interpret or settle questions arising under the contract. They had acted in a professional capacity for both parties but had advised them long before this that in matters arising under this contract of April 24, 1934, they could not act for either party. This is not denied; in fact the appellant had employed other solicitors to act for him in such matters. Appellant deposes as to only one interview with Tait with regard to this matter and said he expected Mr. Tait to do something. He did not indicate why or upon what basis and nothing more was done as regard to these towing charges until this action was brought.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Estey J.

The trustees' duties with respect to the reception and disposition of the sale proceeds were not affected by the new contract. Neither did its existence involve any conflict of interest between their duties as trustees and their personal interests. That such was the position and that the trustees were carrying on to the satisfaction of the appellant is evidenced by the fact that when appraised of all the facts, the appellant on May 4, 1940, when the trustees had acquired a majority of the stock, had increased their guarantees and were in active management of the respondent, executed a supplementary agreement which dealt with the towing charges from there on but left the trustees in the same position and with the same duties with respect to the sale price. That trustees cannot take advantage of their position as trustees to attain a personal benefit is well established, but here the new contract was not negotiated by the trustees, and while it involved a possible question between the contracting parties, it did not affect the trustees' position and any benefit that accrued was indirect and remote and not because of any conduct in relation to the new contract on the part of the trustees. Under these circumstances it cannot be regarded as a case in which the facts justify the imposition of liability on the trustees for the amount claimed.

The appellant also claims this amount of 30 cents per thousand feet from the respondent. The contract, as already intimated, does not specifically provide whether the logs should be sold at the mill or at the boom. There is a covenant, however, requiring the respondent to sell at the "best possible price" and also a provision that the purchasers would receive a portion of the purchase price "in respect of their work of logging, booming and towing of the said logs." The agreement of June 20, 1935, between Waugh, Pedneault Bros. and Wilfret set up a mill for the sawing of the fir logs from the premises here in question and provided "upon delivery of each boom of logs to the mill . . ." This provision plainly indicates that the logs were to be delivered at the mill. By an agreement dated December 18, 1935, the Pedneaults assigned to and the respondent did "agree to assume and carry out and perform all of the covenants" of the said agreement of the 20th June, 1935. This agreement of June 20, 1935, was replaced

by an agreement dated October 1, 1936, between the respondent, the Esquimalt Lumber Co. Ltd. and appellant and its provisions contemplated that the logs should be sold at the mill. Moreover, this contract was entered into in 1934 and up until 1939 the logs had been sold at the mill and the towing charges paid by the respondent. Under these circumstances, and particularly because of the foregoing provision relative to towing charges, I think it but reasonable that the parties contemplated that the ordinary towing charges as distinguished from those that might arise in respect of logs at distant points, would be paid by the purchasers, and that a term to that effect should be implied. The respondent therefore in breach of this implied covenant sold the logs at the boom, and having regard to the directions for the disposition of the selling price by the trustees, it did better its position to the extent of 30 cents per thousand feet and deprived the vendor of a like amount. This 30 cents per thousand feet totalled $600.94 and the judgment of the Court of Appeal (1) should be varied by allowing this amount of $600.94 as a deduction, along with the items of $972.20 and $2,230.35 as therein specified.

The appellant has not succeeded in his main contentions upon this appeal. The respondent and trustees have filed but one factum and appeared by the same counsel. Under these circumstances, the respondent and trustees should have four-fifths of their costs in this court.

The dissenting judgment of Taschereau and Locke JJ. was delivered by

LOCKE J.:—The principal question to be determined in this appeal depends upon the construction to be placed upon the terms of an agreement in writing made between the appellant and Joseph Pedneault and Louis Pedneault carrying on business in partnership under the firm name of Sooke Harbour Logging Company, dated April 24, 1934, the benefit of which was, with the appellant's consent, assigned to the respondent company. By its terms the appellant granted to the purchasers the right until December 31, 1940, to enter into and upon and to cut, remove and carry away therefrom, *inter alia,* all of the timber suitable for the manufacture of lumber on Lot 78

(1) (1948) 1 W.W.R. 929.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Locke J.

in the Renfrew District of British Columbia and two adjoining timber licences numbered 3733 and 3734. The right thus granted was stated to continue "so long as the purchasers are not in default in the observance of any of the covenants or agreements herein contained on their part to be observed or performed until the 31st day of December, 1940." Lot 78 was, by agreement, thereafter eliminated from the contract. As to the two timber licences the price to be paid by the purchasers was a stumpage of $2.50 per thousand feet board measure for all timber taken from them and 50 per cent of the surplus realized from the sale of logs over and above a deduction of $10.50 per thousand feet. To ensure the proper distribution of the moneys realized from the sale of logs, it was provided that as booms were sold the purchasers would be directed to pay the purchase price to the respondents Tait and Marchant, a firm of solicitors practising in Victoria who were directed to dispose of them by deducting from the sale price a sum equal to $10.50 per thousand, and to pay thereout the royalty and scaling fees, the stumpage payable to the vendor, booming charges and:—

> To pay into a special trust account, in the name of J. S. Waugh and Sooke Harbour Logging Company, the sum of forty cents per thousand feet to guarantee the due and proper logging by the purchasers of the said lands as hereinafter mentioned.

any balance of the $10.50 remaining was to be paid to the purchasers and any remaining surplus of the purchase money was to be paid into a trust account to be divided equally between the vendor and the purchasers.

The principal issue is as to ownership of the moneys accumulated by the payment of forty cents per thousand feet above referred to, and the exact terms of the further provisions of the agreement dealing with these moneys are of importance. Paragraph 4 of the agreement read:—

> 4. The sum of forty cents per thousand feet to be paid into a special trust account as provided in sub-paragraph (A) (4) of paragraph 2 hereof shall be deducted and paid only from the proceeds of the logging of the first thirty-five million feet of the timber on the said lands, and is intended as a guarantee of the complete logging of the said lands; and if and when the said lands shall have been completely logged and the sale price above provided paid to the vendor, then the purchasers shall be entitled to all of the moneys in the said special trust account; but should the purchasers fail to complete the logging of the said lands in accordance with this agreement, and (or) the vendor shall lawfully cancel this agreement by reason of the purchasers' default in carrying out and performing

the covenants and agreements herein contained on their part to be observed and performed, then and in such case all moneys in the said special trust account shall be forfeited to and shall belong absolutely to the vendor as liquidated damages for the non-performance or breach of this agreement.

By paragraph 5 the purchasers agreed that they would cut and remove all of the timber from the lands and would pay to the vendor the stumpage price provided for in the manner and at the times described, and by sub-paragraph 6 (*g*):

To carry on the logging of the said lands continuously with all of the logging equipment of the purchasers until the whole of the said lands shall be logged, save and except in weather which makes logging, booming or towing unsafe, or in times of extreme fire hazard, or in periods when the price and market for logs is such that logs cannot be sold without loss.

A further term provided that if the purchaser should make default in performance of any of the covenants, terms, provisions or conditions of the agreement, the vendor should be at liberty to give the purchasers notice in writing of an intention to determine the agreement at the expiration of ten days from the giving of such notice, and that if such default should not be remedied within that time the purchasers' rights under the agreement should at the option of the vendor cease and determine.

It is, I think, unnecessary to examine into the manner in which the fund of $14,000 was eventually constituted, and sufficient to say that at the time of the commencement of the action, either in the hands of the appellant or in a special trust account in the Royal Bank of Canada at Victoria, this amount had been accumulated out of payments made for the purposes defined by the agreement.

Joseph and Louis Pedneault entered on the property and commenced logging operations in the year 1934. In December 1935 they assigned their interest in the agreement with the appellant to the respondent company, by which operations were carried on during the years 1935 and 1936. The market price of logs was very low at the time the agreement was made but by 1936, when the Pedneaults sold their share interest in the company to one Garrison, the market had substantially improved and, according to Joseph Pedneault, they made money from 1934 to 1936. Thereafter, according to the account of the respondent company, the operations were unsuccessful:

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Locke J.

in 1937 there was a small loss and substantial losses were made in the years 1938, 1939 and 1940, so that in the latter year the company had become hopelessly insolvent. The respondents Tait and Marchant of whom Garrison had sought help advanced money to the company and, according to the respondent Tait, the losses were extremely heavy. Garrison abandoned the undertaking in the spring of 1940 and left the country transferring all of his shares in the company, which were sufficient to control it, to Tait and Marchant. On May 4, 1940, a further agreement was negotiated between the defendant company and the appellant whereby, *inter alia,* the time for logging the entire tract was extended to December 31, 1941, and the company agreed to log at least five million feet in the season of 1940. The company made an arrangement with one Bestwick to take out logs under which a considerable quantity were logged and sold during the year 1940, Bestwick being paid a flat price of $7.00 a thousand for logs delivered to Victoria but in October of that year he refused to operate further without an increase in the amount to be paid him and the operation was closed down. According to Bestwick, when he ceased operations in 1940, there were six or seven million feet left standing upon the limits which it would have been profitable to log at that time. In the spring of 1941 all the equipment of the respondent company had been removed from the limits and sold to Bestwick. While the time for removal of all the timber had been extended to December 31, 1941, nothing more was done by the purchasers after Bestwick ceased his operations. Upon conflicting evidence the learned trial judge accepted that given by Eustace Smith, a very experienced timber cruiser, who said that when he cruised the property for the appellant in 1942 he found 8,254,000 feet of economically accessible timber remaining upon the licences.

By its Statement of Claim the respondent company asserted that it had cut and logged all the timber which could be logged without loss, that the limits had been completely logged and that it had complied with all the requirements of the agreement entitling it to receive payment of what it, not inaccurately, designated as the Guarantee Trust Fund. The plaintiff's obligation under paragraph 1 of the agreement was to "cut, remove and

carry away therefrom all of the timber suitable for the manufacture of lumber" and not merely that which could be logged without loss. The plaintiff invoked the provisions of subparagraph 6(*g*), however, which as noted relieved it of the obligation of carrying on the logging of the said lands continuously under certain circumstances. While admittedly there was a substantial stand of timber suitable for the manufacture of lumber remaining upon Timber Licence 3734 when Bestwick ceased to operate in October 1940, the attitude taken by the plaintiff was that since this could not be logged in 1941 without incurring losses its obligations under the agreement had been discharged.

The case of the respondent company is that the words "when the price and market for logs is such that logs cannot be sold without loss" should be interpreted as referring to the logs cut from these properties, while the appellant contends that its proper meaning is that continuous logging is excused only when market prices are such that logging operations generally cannot be carried on on the Pacific Coast without loss. I think the appellant's contention is correct. The agreement as a whole was intended to ensure that all merchantable timber upon these limits would be cut and removed and the Pedneaults, after examining the property and therefore well knowing that there was on the upper levels of Timber Licence 3734 several million feet of rather small merchantable timber which they would be required to remove, undertook that obligation and the respondent company later assumed it. The guarantee trust fund was in the words of the agreement "intended as a guarantee of the complete logging of the said lands." If the respondent company's contention were correct, its obligation to completely log the limits could be avoided by showing that to log the remaining eight million feet would result in a loss to it, irrespective of the state of the log market. This was a risk which the purchasers assumed when they entered into the contract and I think they are not relieved from their obligation by the proviso. No attempt was made to establish that logging operations generally on the Pacific Coast could not be carried on without loss in the year 1941. The respondent company endeavoured at the trial to avail

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Locke J.

itself of the proviso by showing that its own operations in the years 1937 to 1940 inclusive had resulted in a loss and, in a letter written by it to the appellant of March 26, 1941, the opinion was expressed that there would be a loss of not less than $3.00 per thousand in completing the logging of the limit. The learned trial judge being of the opinion that the proviso should be interpreted in the manner contended for by the appellant did not make any finding as to whether the respondent company could have cut and removed the remaining timber without loss. He did, however, find that the contention that an increase in logging costs during the period had resulted in a loss to the respondent company had not been proved. In the reasons for judgment of Sidney Smith, J.A. in delivering the judgment of the Court of Appeal (1), it is said:

> The purchasers found they could not continue logging these lands without loss, and paragraph 6(*g*) then began to operate in their favour.

With great respect, I think this finding is not supported by the evidence. Bestwick, a practical logger, expressed the opinion that the timber remaining when he discontinued operations in October 1940 could be profitably logged and Eustace Smith considered that in each of the years 1936 to 1941 inclusive operations could have been carried on without loss. As opposed to this, the respondent Tait gave evidence that certain capital expenditures were required and that, in his opinion, the operations would result in a loss. No practical logging operator was called by the respondent company to establish this fact, while on cross-examination Bestwick expressed the opinion above referred to. If it were the fact that the remaining timber could not be taken out by the plaintiff company without incurring loss, the onus of establishing this rested upon it and, in my opinion, that burden was not discharged: on the contrary, in the absence of a finding by the trial judge, I think the evidence of Bestwick and Eustace Smith should be accepted. I am, therefore, of the opinion that even if the respondent company's contention as to the interpretation of clause 6(*g*) were correct, the claim is not supported by the evidence.

If the Statement of Defence had merely put in issue the allegations made in the Statement of Claim, this would be decisive of the question as to the Guarantee Trust Fund.

(1) [1948] 1 W.W.R. 929.

The defendant, however, while traversing these allegations alleged affirmatively various defaults by the respondent company in carrying out the terms of the agreement including, *inter alia,* its failure to cut and remove all the merchantable timber from the said lands, and that accordingly the moneys deposited in the special trust account had become forfeited "and now absolutely belong to the defendant as liquidated damages for the non-performance and breach of the original agreement" and by counterclaim asked a declaration that the moneys were so forfeited as liquidated damages. The respondent company replied and joined issue and by this pleading set up for the first time that the provision in the agreement providing for the forfeiture of the moneys was in the nature of a penalty and asked relief from the penalty. This plea was incorporated by reference in the reply to the counterclaim and in this manner the question was properly put in issue.

In considering this aspect of the matter, it is to be borne in mind that a cruise made of the two limits in 1944 by Eustace Smith had shown a little over forty-one million feet of merchantable timber upon the two limits and that by the agreement the fund to be accumulated by the payments of 40 cents per thousand feet were to be paid only from the proceeds of the logging of the first thirty-five million feet of the timber. This would provide a fund of $14,000 and, assuming the accuracy of the cruise, the stumpage payable upon the remainder of the timber computed at $2.50 a thousand would amount to $15,000. By paragraph 4 which stated that the fund was intended as a guarantee of the complete logging of the lands, it was provided that if and when the lands had been completely logged and the sale price (meaning the stumpage) paid, the purchasers would be entitled to receive the money. It was upon the basis that it had complied with this part of the clause that the action was launched. In my opinion, the pleader properly appreciated the position of the plaintiff in framing the Statement of Claim. The contention that the clause provides for a penalty is based upon the theory that the amount of the guarantee trust fund which, it is said, might be forfeited for a number of trifling defaults is so large that the court in the exercise of its equitable jurisdiction should grant relief. It may be noted in passing

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Locke J.

that in the result the trust fund was inadequate to provide against the situation which arose when the respondent company announced its intention of leaving the remaining 8,254,000 feet upon the limit uncut. The stumpage upon this quantity of timber would have been something in excess of $20,000 while the fund then accumulated was some $6,000 less. It is, however, said that the fund would equally be liable to forfeiture if the respondent company had cut all but an insignificant amount of the timber, and as paragraph 4 which provided for the forfeiture for failure to complete the logging of the lands further provided for forfeiture if "the vendor shall lawfully cancel this agreement by reason of the purchasers' default in carrying out and performing the covenants and agreements herein contained on their part to be observed and performed", this would mean that if default were made in paying the stumpage of $2.50 on one thousand feet board measure of logs the fund would be forfeited. It is of importance to remember that this is not a case in which the plaintiff asks specific performance or asserts his willingness to complete his part of the agreement and asks relief from an alleged forfeiture. On the contrary, this plaintiff commenced the action by asserting that it had fulfilled all the terms of the contract and that it was entitled under the terms of the agreement to recover the moneys. The correspondence produced makes the attitude of the respondent company perfectly clear. By a letter dated March 26, 1941, addressed by the respondent company to the appellant, the latter was informed that an investigation as to the possibility of logging the remaining timber had been made and that it was found that there would be heavy losses and concluded:—

> We accordingly have no course but to advise you that it is impossible to open up the camp and proceed with the logging this year.

According to Mr. Tait, there was at this time ample time to complete the logging before December 31, 1941. Further evidence of the intention of the respondent company not to proceed is shown by the fact that in the spring of 1941 it removed all of the logging equipment from the property and sold it to Bestwick. It appears that following this there were some negotiations between the parties for the purchase of the remaining timber but nothing came of this

and on March 6, 1942, shortly prior to the commencement of the action, the solicitors for the respondent company wrote the appellant saying that under the contracts their client was only required to log timber which could be logged at a profit, that there was no longer any timber of that sort on the lands, so that the company was entitled to the guarantee funds and demanded payment of $14,000.

In my opinion, the letter of March 26, 1941, amounted to a repudiation of its obligations under the contract by the respondent company. The test as to what amounts to such repudiation is stated by Lord Coleridge, C.J. in *Freeth* v. *Burr* (1):

> The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

language which was expressly approved in the House of Lords in *Mersey Steel Company* v. *Naylor* (2) and *General Billposting Company* v. *Atkinson* (3).

There is no distinction to be made between the position arising from the fact that the plaintiff misconceived its liability under the contract and that which would result from a wilful refusal to discharge its obligations under it. The argument for the plaintiff must, therefore, be that while failing to fulfil its covenant to cut and remove all of the timber and, in breach of another of its covenants, having removed its logging equipment without the consent of the appellant while there remained several million feet of merchantable timber standing and having, some eight months in advance of the expiration of the period, wrongfully repudiated its obligation to cut and remove the remaining timber, it is entitled as against the appellant to recover the accumulated fund of $14,000 which, in the words of the agreement, was payable to it "if and when the said lands shall have been completely logged and the sale price above provided paid to the vendor", leaving the appellant to his remedy in damages. While we have had the advantage of hearing a most careful and thorough argument on behalf of the respondent on the question as to the right of the respondent company to these moneys on the footing that to permit the appellant to recover them would be to enforce a penalty, we were not referred to any authority which, in my opinion, supports the position which the

(1) (1874) L.R. 9 C.P. 208 at 213
(2) (1884) 9 A.C. 434.
(3) [1909] A.C. 118, 122.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Locke J.

plaintiff must sustain if it is to succeed. The principles upon which the courts have proceeded in determining whether sums to be paid upon the breach of one or more covenants in an agreement are to be regarded as in the nature of penalty or as liquidated damages are summarized in the judgment of Lord Dunedin in *Public Works Commissioners* v. *Hills* (1) and in *Dunlop Pneumatic Tyre* v. *New Garage* (2). It was on the footing that these principles were applicable that the judgment of the Court of Appeal (3) proceeded in finding that the portion of the agreement, which provided that should the purchaser fail to complete the logging in accordance with its terms or if the vendor should lawfully cancel the agreement by reason of the purchaser's default in performing its obligations the moneys should be forfeited and belong to the vendor as liquidated damages, was in the nature of a penalty against which the court should relieve. It must, however, be borne in mind that in none of these cases was there, as in the present case, a fund set up to be deposited in a bank in the joint names of the parties or otherwise as a guarantee for the fulfilment by the purchaser of its obligations under the contract, which was to be forfeited if the purchasers failed to complete their bargain. The distinction is pointed out by Jessel, M. R. in *Wallis* v. *Smith* (4) where, after referring to the cases where the question is as to whether or not the sum to be paid or the obligations imposed is in the nature of a penalty, it is said:—

> I now come to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does not apply and that the bargain of the parties is to be carried out.

In the present case the purpose of establishing the fund was, in the language of the agreement, "to guarantee the due and proper logging by the purchasers of the said lands." I am unable to see any distinction in the legal position of a deposit thus established for a definite purpose during the course of the performance of the contract and one which is paid in a lump sum at the time an agreement is negotiated. Unless they are to be distinguished the matter is, in my view, concluded by the authorities.

(1) [1906] A.C. 368.
(2) [1915] A.C. 79 at 86.
(3) (1948) 1 W.W.R. 929.
(4) (1882) 21 Ch. D. 243 at 258.

In *Hinton* v. *Sparkes* (1), an agreement for the purchase of a public house with fixtures, etc. contained the following stipulations:—

> And, as earnest of this agreement, the purchaser has paid into the hands of the vendor £50, which is to be allowed in part payment of the completion of this agreement. If the vendor shall not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated: and, if the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited, in part of the following damages: and if either of the parties neglect or refuse to comply with any part of this agreement, he shall pay to the other £50, hereby mutually agreed upon to be the damages ascertained and fixed, on breach hereof.

Instead of depositing the £50 the purchaser gave an I.O.U. for the amount: thereafter he failed to complete the purchase and the vendor sold the public house for ten pounds less than the purchaser agreed to pay for it and brought an action against the purchaser for breach of the agreement and upon the I.O.U. It was held that the fact that an I.O.U. had been given for the deposit did not affect the matter.

Boville, C.J. said that the intention of the parties, as he gathered it from the agreement, was that this was to be taken as the ordinary case of payment of a deposit, to be forfeited on the purchaser's failure to complete the contract and that there was no answer to the action, and in dealing with the numerous cases to which he had been referred as to the distinction between penalty and liquidated damages held that they had no application to a contract in the form of that in question.

In *Ex parte Barrell* (2), the facts were that by a contract for sale of real estate it was stipulated that a portion of the purchase money should be paid immediately and the residue of this on the completion of the contract. There was no stipulation as to the forfeiture of the deposit in case the purchase went off through the purchaser's default. After the title had been accepted the purchaser became bankrupt and his trustee disclaimed the contract under the provisions of the Bankruptcy Act and called upon the vendor to repay the deposit. Sir W. M. James, L.J. said that the trustee had no legal or equitable right to recover the deposit; that the money had been paid to the vendor as a guarantee that the contract should be performed; that

(1) (1868) L.R. 3 C.P. 161. (2) (1875) L.R. 10 Ch. App. 512

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Locke J.

the position of the trustee was that while refusing to perform the contract he demanded back the deposit, and Sir George Mellish, L.J. agreeing with this conclusion said that even where there was no clause in the contract he could not have back the money, since the contract had gone off through his own default.

In *Howe* v. *Smith* (1), a purchaser paid £500 which was stated in the contract to be paid "as a deposit and in part payment of the purchase money." The contract provided that the purchase should be completed on a day named and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase price and after repeated delays the vendor resold the property for the same price. On the purchaser bringing an action for specific performance, it was held that he had lost this right by delay: as to the deposit, although it was to be taken as part payment if the contract was completed, it was held to be also a guarantee for the performance of the contract and that the plaintiff having failed to perform his contract within a reasonable time had no right to its return. Cotton, L.J. after referring with approval to what had been said by Lord Justice James in *Ex parte Barrell* (2) said that a deposit was a guarantee that the contract should be performed and that if the purchaser repudiated the contract he could have no right to recover the deposit. Fry, L.J. said in part (p. 101):—

> Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.

In *Sprague* v. *Booth* (3), the contract provided in terms that the deposit was paid as security for the due carrying out of its terms and that in the event of default it should be forfeited as liquidated damages. There the deposit was

(1) (1884) 27 Ch. D. 89.
(2) (1875) L.R. 10 Ch. App. 512.
(3) [1909] A.C. 576.

a sum of $250,000 on account of a purchase price of $10,000,000 for shares in Canada Atlantic Railway Company. In addition to the shares, certain bonds were to be issued by the company and delivered at a named date but, owing to what was held to be a default of the proposed purchaser, they were not ready for delivery. The plaintiff to whom the rights of the latter had been assigned repudiated liability to complete and claimed the return of the deposit. Counsel for the appellant contended, as has been done in the present case, that the forfeiture of the deposit was a penalty from which the court would relieve, that it was not one of liquidated damages, for the purchaser was exposed to it equally upon a refusal to perform, the slightest delay, or, in the absence of any delay, by reason of a deficiency in the smallest portion of the price, and relied upon the decisions In *re Dagenham (Thames) Dock Co., Ex parte Hulse* (1); *Cornwall* v. *Henson* (2); *Public Works Commissioners* v. *Hills* (3). In rejecting this contention Lord Dunedin (4), after reciting the facts, said in part (p. 580):

> When therefore the parties have agreed that the furnishing of the corpus of the bonds should be entrusted to Webb, and when Webb failed to produce the bonds in time to be signed by June 1, it seems to their Lordships that it stopped the mouth of Webb or his assignee from saying that Booth was in default in not having signed the bonds. It therefore follows that the non-payment of the money was not excused by any default of Booth, and was therefore default on the part of Webb or his assignee. This result seems to follow equally whether time was or was not of the essence of the contract. If it was, the result must follow. If it was not, it might still be that, by offering the money, Webb or his assignee might have been entitled to be given specific performance on terms as to the actual date of payment and delivery of the bonds. But to consider themselves absolved by the mere non-production of the bonds, the completion of which they themselves had by their conduct prevented, and then—without even proposing to offer the money—to treat this as a basis for repetition of the deposit and a claim of damages for non-performance, was, in the opinion of their Lordships, out of the question.

As in the present case the trustee in *Ex parte Barrell* (5) and the plaintiff in *Sprague* v. *Booth* (6) while wrongfully repudiating their own obligations under the contract sought to recover the moneys deposited, as here, to guarantee its performance. As pointed out by Lord Dunedin (4) in the passage quoted from his judgment, this differentiates that case from those in which while there has been default the

(1) (1873) L.R. 8 Ch. App. 1022.
(2) (1899) 2 Ch. 710.
(3) [1906] A.C. 368.
(4) [1909] A.C. 576.
(5) (1875) L.R. 10 Ch. App. 512
(6) [1909] A.C. 576.

1949

WAUGH v. PIONEER LOGGING CO. LTD.

Locke J.

purchaser seeks to remedy such default and to carry out his contract and asks relief. Here the plaintiff seeks to be placed in the same position as the plaintiff in *Steedman* v. *Drinkle* (1). The equitable principle upon which the court acted in granting relief in that case has no application to the facts of the present case, in my opinion. The appellant is entitled to a declaration that he is entitled to the moneys accumulated in the trust fund, whether in his hands or in those of the Royal Bank.

As to the claim for $600.94 advanced against the respondent company and Tait and Marchant, I agree with my brother Rand and would allow the appeal as against the company.

The appeal as to the guarantee trust fund and as to the last mentioned claim against the respondent company should be allowed: the appeal from the dismissal of the said claim as against Tait and Marchant should be dismissed. The appellant should have his costs throughout as against the respondent company. The defendants by counterclaim, Tait and Marchant, were found liable to the appellant at the trial for a further sum of $972.90 and costs and did not appeal from that finding: they are, however, entitled to succeed, in my view, in respect of the claim of $600.94 and should have their costs in the Court of Appeal and in this court.

Appeal dismissed.

Solicitor for the appellant: *H. J. Davis.*

Solicitors for the respondent: *Burns & Jackson.*

---

(1) (1916) 1 A.C. 275.

IN THE MATTER OF THE JUDICATURE ACT, ORDER XXXIII

AND

IN THE MATTER of the Estate of W. Herbert Brookfield, late of Chester, in the County of Lunenburg, in the Province of Nova Scotia, deceased.

1948
*Oct. 28
1949
*Feb. 1

THE ROYAL TRUST COMPANY, Administrator of the Estate of the late W. Herbert Brookfield, late of Chester, in the County of Lunenburg, in the Province of Nova Scotia, deceased, ... (PLAINTIFF); APPELLANT.

AND

HIS MAJESTY THE KING in the right of the Province of Nova Scotia, (DEFENDANT); RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Revenue—Succession Duty—Constitutional Law—Shares in United States companies, registered in names of nominees, endorsed in blank—No transfer office in Nova Scotia, where certificates situate—Situs of shares—Whether on death of testator domiciled in Nova Scotia, "property situate in Nova Scotia"—The Succession Duty Act (N.S.), 1945, c. 7—Canada-United States Tax Convention Act, 1944, (Dom.) c. 31.

"B", domiciled in Nova Scotia, caused to be registered in the names of employees at Halifax of the Royal Trust Company, shares of United States companies having no share registry in Nova Scotia. The certificates, endorsed in blank, had attached declarations of trust by the registered holders to the effect that they had no right or interest in the shares and had delivered them to the Trust Company to whom all dividends were to be paid. The Trust Company, in accordance with "B's" written instructions held the certificates for management and safekeeping. After "B's" death it was appointed administrator with the will annexed of his estate.

Held: that the shares were not "property situate in Nova Scotia" within the meaning of *The Succession Duty Act*, s. 9(8). The *situs* of the shares was where they could be effectively dealt with as between the

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

1949

IN RE W. H. BROOKFIELD ESTATE THE ROYAL TRUST COMPANY v. THE KING

Kerwin J.

company and the shareholders, namely the United States. Succession duty was therefore not payable under the *Succession Duty Act,* N.S., 1945, c. 7.

Stern v. *the Queen* [1896] 1 Q.B.D. 211, distinguished. Kerwin J. was of the opinion that even if that case be treated as an extension in England of the common law rule, it should not be so treated in Canada where the question of divided jurisdiction arises, but that the test of *situs* laid down in *King* v. *National Trust* [1933] S.C.R., 670, approved by *Rex* v. *Williams* [1942] A.C. 541, should be followed. Rand J. was of the opinion that the law-making sovereignity of England was to be distinguished from that of a province of the Dominion of Canada, and that the power "of direct taxation within the province", interpreted as it has been by the authorities cited, is to be exercised on the footing that there is only one *situs* for every class of property and that *situs* must be within the province, and for shares, there can be no such division of interest or powers in or annexed to them as would in the result attribute to them a *situs* in two or more places. In the circumstances of the case, Kellock J., with the concurrence of Estey J., said, the mere fact that the shares were not registered in the name of the deceased does not render inapplicable the principle of the decision in *Rex* v. *Williams; In re Ferguson* (1935) I.R. 21; *Attorney-General* v. *Higgins* 2 H. & N. 339.

Per Kerwin, Taschereau and Rand JJ., that the provisions of the *Canada-United States of America Tax Convention Act,* 1944, (Dominion) do not affect the power of the Province of Nova Scotia to collect and retain Succession Duty taxes.

APPEAL by the appellant, as Administrator with the Will annexed of W. Herbert Brookfield, deceased, from the decision of the Supreme Court of Nova Scotia *in banco* (1) whereby it was held—on a case stated as to—whether Succession Duty was leviable and payable for the use of the Province of Nova Scotia in respect of certain shares held by the late W. Herbert Brookfield at his death in companies of American registry, which shares were registered in the name of his nominees and had been endorsed by them in blank,—that Succession Duty was leviable and payable for the use of that Province.

R. A. Ritchie for the appellant.

T. D. MacDonald K.C. for the respondent.

KERWIN J.:—On October 7, 1937, W. Herbert Brookfield, domiciled and resident in Nova Scotia, made an arrangement with Royal Trust Company under which the latter from time to time, on his instructions, bought shares of

(1) (1948) 22 M.P.R. 140.

the capital stock of various companies incorporated under the laws of different states of the United States of America. Each of these companies had its head-office in the United States and maintained no share register or transfer office in Nova Scotia. The shares were registered in the names of various persons employed by the trust company at its office at Halifax and the certificates for such shares were endorsed in blank by the respective persons in whose names they were made out. To each such certificate, singly or by groups, was attached a declaration of trust, signed by the person in whose name the certificate was made out, declaring that such person held the shares as nominee of the trust company and that he had furnished the company with authority to collect and receive all dividends to which he, as registered owner, might become entitled.

Mr. Brookfield died November 14, 1944, having previously made his last will and testament, wherein he appointed executrices but, they being unable or unwilling to act, administration with the will annexed was granted to the Trust Company. The trust company paid the Collector of Succession Duties for Nova Scotia a sum of money which included succession duty in respect of the property to which the testator was entitled in the shares. Later, the company paid the Collector of Inland Revenue of the United States a sum of money as Federal Estate Tax in respect of the said shares. The company claimed a refund of this latter amount from Nova Scotia on the theory that the provisions of the Canada-United States of America Tax Convention Act, chapter 31 Statutes of Canada, 1944, was applicable. The taxes therein referred to are the taxes imposed under the *Dominion Succession Duty Act* and as to the first question raised by the stated case, I agree with the Court *en banc* that such an Act and the Convention could not have any effect upon the power of the province to collect and retain succession duty taxes.

The second question is more difficult. Section 3(1) of the Nova Scotia *Succession Duty Act,* chapter 7 of the 1945 Statutes, provides:—

> 3 (1) For the purpose of raising a revenue for provincial purposes, and save as is hereinafter otherwise expressly provided, there shall be levied and paid for the use of the Province a duty (called Succession

1949

IN RE W. H. BROOKFIELD ESTATE THE ROYAL TRUST COMPANY v. THE KING

Kerwin J.

Duty), at the rates hereinafter specified upon all property hereinafter mentioned which has passed on the death of any person who has died on or since the 1st day of July, A.D. 1892, or which passes on the death of any person who shall hereafter die, the duty to be according to the fair market value of such property at the date of the death of the deceased.

and section 8(*a*) enacts:—

8. Save as is hereinafter otherwise expressly provided the property on which succession duty shall be levied and paid under this Act at the rates hereinafter specified shall be as follows:—

(*a*) all property situate in Nova Scotia which has passed as aforesaid or which passes as aforesaid on the death of any person, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere * * *

The subject matter of the taxation is property "situate in Nova Scotia." Mr. Brookfield had the beneficial interest in the shares and undoubtedly at the time of his death that interest passed within the meaning of the Act; but the question is whether such interest is property situate in the province.

The court *en banc* decided that the question was concluded by the decision in *Stern* v. *The Queen* (1), but before dealing with that decision it is convenient to refer to certain propositions that have been established in cases of this nature. They were formulated by Chief Justice Duff, speaking for this court in *The King* v. *National Trust Company* (2), and were expressly approved and repeated by the Judicial Committee in *Rex* v. *Williams* (3). As pointed out by Lord Uthwatt for the Judicial Committee in *Treasurer of Ontario* v. *Blonde* (4), the authorities before the *Williams* case established that, if, for the purposes of Succession Duty Acts (such as the Nova Scotia Act), there be found within a particular provincial jurisdiction a place in which registered shares in a company can be effectively dealt with as between the shareholders and company, the shares are situate within that jurisdiction; but that in none of those cases was there present the feature that there were two places where the shares could effectively be dealt with, one within, and the other outside, the jurisdiction. Lord Uthwatt proceeded to say that the principle laid down in the *Williams* case was that if it were possible on rational grounds to prefer one of the alternative

(1) [1896] 1 Q.B. 211.
(2) [1933] S.C.R. 670.
(3) [1942] A.C. 541 at 559.
(4) [1947] A.C. 24 at 30.

places to the other as the place of transfer for the shares in question, the selection should be made accordingly. It was in applying this principle that Viscount Maugham in the *Williams* case stated that their Lordships had come to the conclusion that the existence in Buffalo, at the date of the death, of certificates in the name of the testator, endorsed by him in blank, must be decisive. Their Lordships did not think it right to express any opinion as to the conclusion which they would have come to if the certificates had not been endorsed and signed in blank by the testator, since the point did not arise for decision and there were some obvious distinctions arising in cases where the endorsement on certificates has not been signed by the registered holder. This reservation, it will be noticed, was made in a case where the judicial committee was faced with the problem of preferring one of two alternative places, one of which was within the jurisdiction of a province and the other outside Canada.

In the *Blonde* case, as here, there was no place within the claiming province where a transfer of the shares could be carried through but, differing from the present case, the certificates, while physically situate in the claimant province, had not been endorsed in blank by the registered holder. I assume without deciding that we are dealing with "street certificates." In stating in the *Blonde* case the first matter to be ascertained, Lord Uthwatt left aside the case of street certificates but in my view the presence in Nova Scotia of such certificates does not alter the effect of the proposition that in deciding in such cases as this whether a matter is "taxation within the province" within head 2 of section 92 of the *British North America Act*, the test is where the shares, not as between transferor and transferee, but as between the company and the owner, may be effectively dealt with. A transferee of such a certificate would, of course, obtain the right to take the necessary steps to become the registered holder of the shares represented by the certificate but that is not sufficient.

The judgment in *Stern* v. *The Queen, supra,* so strongly relied upon by the respondent and followed by the court *en banc,* was delivered by Wright J. on behalf of a Divi-

1949

IN RE W.H. BROOKFIELD ESTATE THE ROYAL TRUST COMPANY v. THE KING

Kerwin J.

sional Court. It was concerned with certificates of shares in a foreign company. In the statement of facts it is stated that while the forms of transfer and powers of attorney had in regard to a large number of the shares been signed by the firms or persons in whose names the certificates were made out, with regard to some of the shares, of which the certificates were in the name of Stern Bros., such forms had not been signed by them. Nevertheless, the case apparently proceeded on the basis that all the certificates were included in the first class. It is evident that Wright J. intended to follow *Attorney-General* v. *Bouwens* (1). At the time, the view was held that he really extended the operation of that decision (12 L.Q.R. 105), and in the Court of Appeal in *Winans* v. *Rex* (2) at 1026, the Master of the Rolls states that the *Bouwens* case was "possibly carried further in the case of *Stern* v. *Reg.*" (3).

In the *Winans* case it was admitted for the purposes of argument that the bonds were all bearer bonds passing by delivery and that they were capable of being dealt with, and were in fact dealt with, for money on the stock exchange. The case had, therefore, nothing to do with shares. It had to do with taxation under the Finance Act of 1894 which was held to be analogous, not to the Legacy and Succession Duty Acts but to the old Probate Duty Acts, and it was in that connection that Lord Atkinson, on the appeal to the House of Lords [1910] A.C. 27, at page 35, cited the *Bouwens* and *Stern* cases for the proposition that probate duty would before the passing of the 1894 Finance Act have undoubtedly been payable in respect of the bonds. The only other law lord who referred to the *Stern* case was Lord Gorell who, at page 39, states that the *Bouwens* case was followed in *Stern*.

I am inclined therefore to assume that the approval of the *Stern* case by Lord Atkinson and Lord Gorell was confined to cases of bonds. Even if that be not so and if the *Stern* case be treated as an extension in England of the common law rule in the *Bouwens* case, it should not be so treated here in constitutional cases. In England there is no question of divided jurisdiction but certainly in Canada

(1) (1838) 4 M. & W. 171.
(2) [1908] 1 K.B. 1022.
(3) [1896] 1 Q.B. 211.

it would make serious inroads upon the test of the *situs* of shares as being where they may be effectively dealt with as between the company and the owner.

Another argument of the respondent is put thus in his factum:—

> The notional rule of the *Brassard* (1) case fixes the *situs* of the property of a registered owner of shares as the *locus* of the share registry because that is where the rights that make up that property may be dealt with:—the rights to vote, attend meetings and receive dividends. The rule would completely lose its logic if applied to such a case as the present where the deceased held none of these rights.

In the first place, Duff J., as he then was, in *Smith* v. *Levesque* (2), points out that *situs* ascribed to intangible property for the purpose of determining the authority of the executor to deal with it is not, strictly speaking, a fictitious *situs*. Then, so far as the respondent's present contention is based upon the fact that the deceased was not the registered owner nor in possession of the certificates, the trust company and its employees, in my view, were merely Mr. Brookfield's agents, bound to follow his instructions as to voting, attending meetings and receiving dividends. The contention that the real nature of Mr. Brookfield's property was a right of action under a Nova Scotia trust, is to overlook the realities of the situation. Even if the trust company and its employees were trustees, the trusts ended when the certificates, endorsed in blank, came into possession of the trust company as administrator with the will annexed of the deceased.

The appeal should be allowed. Notwithstanding the form of the stated case and of a written agreement signed on behalf of the parties, I understand that if the above views prevail, the proper order to be made is that the answer to the following question submitted for determination, namely:—

> Whether succession duty was leviable and payable for the use of the Province of Nova Scotia in respect to the property to which the said W. Herbert Brookfield was at the time of his death entitled or which passed upon his death by reason of the facts related in Paragraphs 5, 6 and 7 of the Stated Case herein?

is that such succession duty was not leviable and payable for the use of the province of Nova Scotia and that the province of Nova Scotia was not right in exacting the said

(1) [1925] A.C. 371. (2) [1923] S.C.R. 578 at 585-586.

1949

IN RE W. H. BROOKFIELD ESTATE THE ROYAL TRUST COMPANY v. THE KING

Taschereau J.

tax and is required to make a refund of the sum of $14,347.09 without costs of any of the proceedings in this court or in the court *en banc*.

TASCHEREAU, J.:—W. Herbert Brookfield died in November, 1944, and at the time of his death, had his domicile in the province of Nova Scotia. The administration of his estate, valued at more than $450,000 was given to the Royal Trust Company, appellant in the present case.

Prior to his death, the testator caused to be registered in the names of certain persons, shares of incorporated companies having their respective head-offices in the United States of America, and no transfer offices in the province of Nova Scotia. It is common ground that these shares were held on the testator's behalf, for management and safe keeping, in the vaults of the Royal Trust Company in Halifax. The certificates were endorsed in blank by the respective persons in whose names they were made out, and to each certificate was attached a Declaration of Trust.

Some time after the death of Mr. Brookfield, the Royal Trust Company, as administrator of the estate, paid to the Collector of Succession Duties for the province of Nova Scotia, the sum of $65,258.97, in which amount were included duties on the shares previously referred to. An amount of $17,897.92 was also paid to the Collector of Inland Revenue of the United States, being the Federal American taxes due on the transfer of said shares. The appellant, then claimed a refund from the province of Nova Scotia amounting to $14,347.09, and a stated case was submitted to the Supreme Court of Nova Scotia *en banc*. The question was the following:—

> Whether succession duty was leviable and payable for the use of the Province of Nova Scotia in respect to the property to which the said W. Herbert Brookfield was at the time of his death entitled or which passed upon his death by reason of the facts related in Paragraphs 5, 6 and 7 of the Stated Case herein?

The unanimous answer was that such duties were leviable and payable, and that the province of Nova Scotia was right in exacting the tax, and was not required to make a refund thereof.

I agree with the Supreme Court *en banc* of Nova Scotia (1), that the Royal Trust, as administrator, cannot base its claim for a refund on the ground that under the *Canada-United States of America Tax Convention Act,* (Statutes of Canada, 1944, chap. 31) the taxes are not due. I fully concur in the following statement made by Mr. Justice Doull:—

> I am of opinion that this convention can have no application to a question of *situs* arising under the Nova Scotia *Succession Duty Act.* I do not agree with the suggestion that the Dominion Parliament has power to change the Nova Scotia enactment, if such enactment is within the power of the Nova Scotia Legislature under the *British North America Act,* but in the present case, no such question arises for the convention by its terms deals only with "the tax imposed under the *Dominion Succession Duty Act.*" Equally true it is that while Canada is defined as the "Provinces, the Territories and Sable Island," the definition is only "in a geographical sense." The convention does not purport to affect any Provincial power.

But with due deference, I cannot agree with the court below on the second point.

The relevant section of the Nova Scotia *Succession Duty Act* is the following:—

> 8. Save as is hereinafter otherwise expressly provided the property on which succession duty shall be levied and paid under this Act at the rates hereinafter specified shall be as follows:—
>
> (*a*) all property situate in Nova Scotia which has passed as aforesaid or which passes as aforesaid on the death of any person, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere * * *

The words "property situate in Nova Scotia", mean property, and in the present case, "shares that can be effectively dealt with in Nova Scotia, as between the shareholders and the company". I am of the opinion that these shares purchased with the deceased's money, in which of course, he had a beneficial interest, issued in the name of nominees and endorsed by them in blank, cannot be dealt with in Nova Scotia, as between the shareholder and the company, but only in the United States, where are the share registers and transfer offices.

I would allow the appeal, but without costs here, or in the court *en banc.*

RAND, J.:—At the threshold of any consideration of the *situs* of shares of stock in relation to succession duty lie two

(1) (1948) 22 M.P.R. 140.

1949

IN RE W. H. BROOKFIELD ESTATE THE ROYAL TRUST COMPANY v. THE KING

Rand J.

recent rulings of the Judicial Committee. In *Brassard* v. *Smith* (1), the test of the local situation, the place where shares are to be taken to be situate, was enunciated in the question, where can they be effectually dealt with? In *Rex* v. *Williams* (2), this was declared to mean, dealt with as between the shareholder and the company. *Situs*, in other words, is at the *locus* of the controlling act from which the relation of shareholder immediately arises. As between transferor and transferee the test would be virtually useless since a shareholder can, speaking generally, effectively transfer the right to a share in any part of the world.

The latter judgment affirms certain other propositions relating to death duties imposed by Canadian provinces: first, that as between provinces, moveable or immoveable property transmitted owing to death can have only one local situation; that the *situs* of intangible property must be determined by some "principle or coherent system of principles" deducible from the common law of England; and that a provincial legislature is not competent to prescribe the conditions fixing *situs* for the purpose of defining the subjects of its taxing powers under section 92(2). The further rule was laid down that "the solution must be the same in this case (where there were two valid registries, one in Ontario and one in Buffalo, New York) as it would have been if the testator had been domiciled in another province of Canada, say in Quebec, instead of in New York, and if all the other facts had been as they were in fact, including the existence of a separate registry in Quebec."

These pronouncements, re-affirmed in *Treasurer of Ontario* v. *Blonde* (3), treat mere transferability or merchantability of the right to become a shareholder, in the initial stages of the enquiry, as having little if any relevance to *situs;* but they recognize as matters of a determinative nature what the law creating the shares has provided to evidence their characteristics as property. Registration in a book and representation by a certificate are tangible badges which set conditions to complete transferability of the shares as well as facilitate dealings with

(1) [1925] A.C. 371.
(2) [1942] A.C. 541.
(3) [1947] A.C. 24.

them. If, as in the case of bearer shares, in analogy to bearer bonds, the issuing jurisdiction has in effect embodied in a certain instrument the exclusive symbol of the total rights created, then, certainly, as a rule, the *situs* is taken to be the locality in which the instrument may at any time be.

Mr. MacDonald's contention is that the merchantability of street certificates differentiates the case here from the previous controversies. His argument is this: a share certificate endorsed in blank by the registered holder and transferred to a purchaser by delivery has come thereupon to represent a separate unit of property consisting of the beneficial interest in the share coupled with a power in the bearer to become a shareholder, with the delivery of the certificate concluding the transaction between the parties; the right thus acquired, as against the company, to make a transfer of ownership on the registry satisfies the requirement that direct and immediate legal relations must arise between the transferee and the company as the result of acts done at the *situs*. The difference between the two cases is obvious: in the one a person is or can be made a shareholder by acts within the jurisdiction; in the other, by such acts he is clothed with power only to make himself a shareholder by means of his further acts outside: and the test remains unsatisfied. For his proposition, however, Mr. MacDonald has the support of *Stern* v. *The Queen* (1), and the question comes down to this: whether in a province under the rules laid down, the legislative situation is such as will permit the distinction to be acted on.

Under a law-making sovereignty the subject-matter of taxation may in fact be anything on which power can be exerted or in respect of which the payment of money can be made the condition of the doing of an act or exercising a right within its territorial boundaries. In the *Stern* case there were street certificates within England which were essential to an entry of transfer on the register outside of England; and the legislative authority of England extended in effect to restrain the use of those certificates until, or to charge other property admittedly in England with, the payment of certain monies related to them. Whether

(1) [1896] 1 Q.B. 211.

1949

IN RE W. H. BROOKFIELD ESTATE
THE ROYAL TRUST COMPANY
v.
THE KING

Rand J.

these monies are taken to be probate or estate duties or legacy or succession duties does not, for purposes of jurisdiction in taxes, appear to be material.

But a province of the Dominion is not apparently in that degree of sovereignty. The power of "direct taxation within the province", interpreted as it has been by the authorities cited, is to be exercised on the footing that there is only one *situs* for every class of property and that that *situs* must be within the province. And for shares, there can be no such division of interests or powers in or annexed to them as would in the result attribute to them a *situs* in two or more places.

It is not suggested that the law of New York has embodied the visible and exclusive evidence of these rights in one tangible and moveable symbol to be looked upon and dealt with as a chattel as in *Attorney-General* v. *Bouwens* (1), and that being so, we are remitted to the considerations by which the shares are localized in the place where they may be effectually dealt with. But it is conceded that an entry of the purchaser's name on the registry of the shares in New York would be essential to admitting him to membership in the company and the case comes then directly within the principles laid down.

The appeal must, therefore, be allowed but as agreed without costs in both courts.

KELLOCK J., (concurred in by Estey J.):—The stated case shows that at his death on the 14th of November, 1944, the testator was domiciled and resided in Nova Scotia. Some time prior to his death the shares here in question, all common shares, were registered, pursuant to the instructions of the deceased, in the names of nominees of The Royal Trust Company, the share certificates being endorsed in blank. In every instance a "Declaration of Trust" was also executed by the nominee, stating that the shares were registered in the name of the shareholder as the nominee of The Royal Trust Company and that the certificates had been delivered to the Trust Company together with an irrevocable authority to collect and receive the dividends. It appears also that these certificates were

(1) (1838) 4 M. & W. 171.

so delivered pursuant to the direction of the deceased for safekeeping and management. They were therefore in the possession of the deceased through his agent.

The respondent contends that the case is not within the principle of the decision in *Rex* v. *Williams* (1), for the reason that although the deceased was the beneficial owner, he was not the registered owner. It is said that (1) in the case of certificates endorsed in blank, where the deceased was not the registered shareholder, the physical location of the certificates fixes the *situs* for succession duty purposes, their marketability there, according to the contention, being the determining consideration; and (2) that in any event the only property which passed on the death was a *chose in action* under a Nova Scotia trust.

The statute which is applicable is the *Succession Duty Act* of Nova Scotia, 9 Geo. VI, c. 7. By section 3, subsection 1, provision is made for the levying of a succession duty upon all property mentioned in the statute passing on the death of any person who has died on or since the 1st day of July, 1892. By subsection 2 "property passing on the death" is deemed to include for all purposes of the Act:

> (*a*) property of which the deceased was at the time of his death competent to dispose.

By section 2 (*b*) the expression "property" includes real and personal property of every description, whether tangible or intangible, and every estate and interest therein. By subsection 2 (*a*) of section 2, a person shall be deemed competent to dispose of property for the purposes of the Act:

> if he has such an estate or interest therein or such general power as would if he were *sui juris* enable him to dispose of the property.

In *Bradbury* v. *English Sewing Cotton Co.* (2), Lord Wrenbury said at page 767:

> A share is, therefore, a fractional part of the capital. It confers upon the holder a certain right to a proportionate part of the assets of the corporation.

Certain rights or incidents are attached thereto, such as the right to attend meetings and to vote, etc.

In the case at bar the property passing on the death of the late Mr. Brookfield was, in my opinion, the full

(1) [1942] A.C. 541. (2) [1923] A.C. 744.

1949

IN RE W. H. BROOKFIELD ESTATE THE ROYAL TRUST COMPANY v. THE KING

Kellock J.

beneficial interest in the shares and was not merely a *chose in action*. I think it unnecessary to say more as to the second branch of the argument.

Coming to the first branch, the deceased in *Rex* v. *Williams, supra,* an American citizen, domiciled in the state of New York, was the owner of certain shares of Lake Shore Mines Ltd., a company incorporated by letters patent issued under the *Ontario Companies Act*. The share certificates were at all material times physically located in the state of New York and they had been endorsed in blank by the testator. At the date of the death, the company had an office in Toronto and one in Buffalo, in the state of New York, at both of which transfers of shares might properly be made. The executors had taken out probate in the state of New York and subsequently ancillary letters probate in Ontario, where the testator possessed property apart from the shares. The question for decision was as to whether the testator's property in the shares was liable to succession duty in Ontario. It was held that the shares were not so subject, not being property situate in Ontario. In the course of delivering the opinion of the Board, Viscount Maugham referred to the earlier decision of the Board in *Brassard* v. *Smith* (1), where the rule was laid down that in cases where there is but a single province in Canada in which shares of a company may be effectively dealt with, i.e., where they can be transferred on the books of the company, the *situs* of the shares for fiscal purposes is in that province. At page 558 he said:

> The first observation is that the phrase used in laying down the principle clearly means "where the shares can be effectively dealt with as between the shareholder and the company, so that the transferee will become legally entitled to all the rights of a member", e.g., the right of attending meetings and voting and of receiving dividends.

In the circumstances present in the *Williams'* case, as already noted, the shares were transferable either in Ontario or in New York, and it was held that the presence of the certificates, endorsed as mentioned, in New York, was the determining element. As to whether a different rule applies as between two provinces than as between one or more provinces and a foreign country, their Lordships stated at page 559:

(1) [1925] A.C. 371.

They observe that the solution must be the same in this case as it would have been if the testator had been domiciled in another province of Canada, say in Quebec, instead of in New York, and if all the other facts had been as they were in fact, including the existence of a separate registry in Quebec.

The same principle was applied in *Treasurer of Ontario* v. *Aberdein* (1).

The present problem differs from the problem presented by the facts in the *Williams'* case in that in the case at bar the deceased was not the registered owner.

In the *Williams'* case Viscount Maugham said at page 556:

> The rule laid down in *Brassard* v. *Smith* (2) would in practice be useless if the place where the certificates for shares were found at the time of the death should be taken to be necessarily the *situs* of the shares. Their Lordships have no hesitation in holding that the *situs* of the certificates is not, taken alone, sufficient to afford a solution to the present problem.

In adverting to the fact that the certificates in the *Williams'* case had been endorsed in blank, their Lordships said at page 557:

> This had the admitted result of making a delivery of the certificates with the endorsements signed in blank a good assignment of the shares, since it passed a title to the assignees both legal and equitable, with a right as against the company to obtain registration and to obtain new certificates; *Colonial Bank* v. *Cady* (3). It must be accepted, therefore, as a fact, that the certificates were currently marketable in the State of New York as securities for the shares, and that they were documents necessary for vouching the title of the testator to the shares.

Again at page 558:

> The late owner in the normal case was absolutely entitled to the shares as the registered owner of them in the books of the company, and, if resident in a country or province different from that in which the shares can be effectively dealt with, could nevertheless have sold the shares and completed the transaction by an attorney or otherwise.

In the present case the deceased, although not the registered owner, was in a position to deliver the certificates, endorsed in blank, to whomsoever he pleased and thereby to pass to his assignee the interest of the registered shareholder (*Colonial Bank* v. *Cady, supra,* per Lord Watson at 277) as well as his own interest, with a right as against the company to obtain registration and new certificates. It is difficult perhaps to see why, if the respondent's con-

(1) [1947] A.C. 24 at 31.
(2) [1925] A.C. 371.
(3) (1890) 15 App. Cas. 267.

1949

IN RE W. H. BROOKFIELD ESTATE THE ROYAL TRUST COMPANY v. THE KING

Kellock J.

tention be correct, the ability of a registered owner to sell his shares and to satisfy his contract by delivering endorsed certificates, does not touch the question of *situs*, while the same capacity on the part of a beneficial owner has not the same effect.

In the *Williams'* case their Lordships went on to say at page 560:

> The certificates endorsed and signed as they were cannot be regarded as mere evidence of title. They were valuable documents situate in Buffalo and marketable there, and a transferee was capable of being registered as holder there without leaving the State of New York or performing any act in Ontario. On the testator's death his legal personal representatives in the State of New York became the lawful holders of the certificates, entitled to deal with them there. Any sale by them would be "in order", and the purchaser could obtain registration in the Buffalo registry. If we contrast the position in Ontario the difference is obvious. Nothing effective could lawfully be done there without producing the certificates * * * In a business sense *the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario.*

In the case at bar the shares could be "effectively dealt" with only in some one or more of the United States. The transferee could not become "legally entitled to all the rights of a member" in Nova Scotia; see Viscount Maugham at page 558. It seems to me therefore that, in the circumstances of the present case, the mere fact that the shares were not registered in the name of the deceased does not render inapplicable the principle of the decision in *Rex* v. *Williams*. The certificates here in question all require the production of the certificate for the purpose of transfer.

The conclusion as above to which I have come was the conclusion arrived at in somewhat similar circumstances in the Supreme Court of the Irish Free State in *In re Ferguson* (1). In that case shares in a British company belonging to a person of unsound mind, which had been transferred into the name of the accountant of the Courts of Justice, were held to have their *situs* in England where the register of shareholders was located. The statute there considered was the Finance Act, 1894, the relevant provisions of which are all reproduced in the Nova Scotia statute set out above. The court applied the principle of

(1) [1935] I.R. 21.

Attorney-General v. *Higgins* (1), and *Brassard* v. *Smith*, *supra*, as well as *Erie Beach Co., Ltd.*, v. *Attorney-General for Ontario* (2). The argument presented in the present case on behalf of the respondent was rejected in *Ferguson's* case. Hanna, J., at page 49 says:—

> Mr. McCann distinguishes all these cases by the fact that in each of them the legal interest and the beneficial ownership were in the same person. In my view that cannot affect the position, even if we resort to the dissection of the legal situation as the Revenue Commissioners invite us to do. If the Chief Justice desired by an order to deal with the shares, it could not be effective save by operating upon the register in Great Britain where the property is situate and seeking in aid, if necessary, the jurisdiction of the British Courts. The executors also, in the final resort, must go to the register in Great Britain or appeal to the British Court. Accordingly, I think that the distinction drawn by Mr. McCann in this case does not effect the principle once the Court comes to the conclusion that it is the shares that pass.

Fitzgibbon J., at page 65 in delivering the judgment on appeal said:

> The law is summed up by Lord Merrivale, quoting from Baron Martin's judgment in *Attorney-General* v. *Higgins*: (3) "When transfer of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares." The Revenue Commissioners can have no doubt that estate duty is payable in Great Britain upon these shares by reason of the death of Sarah Ferguson; it has been decided by us that it was the property in these shares that passed upon her death; and it follows that the respondents are entitled to an allowance of the sum paid in duty in Great Britain.

At page 66 Fitzgibbon J., also said in dealing with the same point:

> We do not agree with this contention, having regard to the circumstances in which the name of the Accountant came to be placed upon the registers, but in any event the decision of Eve J. in *In re Aschrott* (4), is an authority for the proposition that the same principles apply even when the name of the deceased person is not actually upon the register of shareholders at the time of his death.

In *Aschrott's* case the testator, a German subject, was entitled to stock, shares and securities in English, South African and American companies which had been purchased for him by certain German banks acting through their London agencies. The certificates were in all cases situate in London and the securities themselves were transferable in London at the outbreak of the war of 1914 and at the date of the testator's death in 1915. The securities were

(1) (1857) 2 H. & N. 339.
(2) [1930] A.C. 161.
(3) 2 H. & N. 339.
(4) [1927] 1 Ch. 313.

1949

IN RE W.H. BROOKFIELD ESTATE THE ROYAL TRUST COMPANY v. THE KING

Kellock J.

held in large blocks by the London agencies and had not prior to his death been specifically allocated to the testator so that it would appear that none of the certificates were in his name. By virtue of the provisions of the Treaty of Peace Orders all the shares became charged with the claim of the Custodian of Enemy Property. The question for decision in the case was whether estate duty was payable on all or any of the securities which in turn depended, as put by Eve J., on the question "were these shares in companies registered in South Africa and America, but having offices in England where certificates could be produced, transfers passed, and the names of transferees entered on the register, property situate out of the United Kingdom?" It was held that the shares had their *situs* in England.

If it be the province where the shares are situate which has the constitutional authority to levy a succession duty upon the death of the owner, it seems past question that, upon the death of the person in Nova Scotia who is the registered shareholder but who is not the beneficial owner, if the register, of the company is situate in another province, say Quebec, the latter province would be entitled to levy succession duty in respect of nothing more than the interest of the nominee, i.e., the bare legal interest. The value of such interest would appear to be nominal only.

In the court below reliance was placed on the case *Stern* v. *The Queen* (1). In that case the testator died in England owning shares in foreign companies, the certificates being in England and standing in the names of persons other than the testator. Some were endorsed but some had not been at the time of the death. It was held that the certificates being currently marketable in England were liable to probate duty.

That case was decided upon a stated case which contained the statement, *inter alia,* that the delivery of a certificate endorsed by the registered owner in blank constitutes as between the parties to the transaction a good assignment of "the shares" both in law and in equity passing the title to the shares both legal and equitable. In giving judgment Wright J. said at p. 218:

> There is in this country * * * a document the existence of which vouches and is necessary for vouching the title of some one to the

(1) [1896] 1 Q.B. 211.

foreign share, so that in the absence of that document no one at all could establish a title to the share * * * It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value in the hands of the executors within the jurisdiction of the Ordinary.

It would appear that the considerations which determined the decision were the existence of the endorsed certificates within the jurisdiction and their marketability there, together with the fact that as between transferor and transferee, the legal and equitable title to "the shares" was vested in the transferee.

Marketability as later laid down in the *Williams'* case "does not touch the question of *situs*", and the "*situs* of the certificates is not, taken alone, sufficient to afford a solution to the problem."

Unless the decision in *Stern's* case proceeded on the ground, apparently assumed by counsel in *Aschrott's* case at 317, and in *Blonde's* case at p. 27, that the shares in question in that case were transferable on branch registers in England, I cannot consider it a governing authority as to the *situs* of shares for the purposes of succession duty in one of the provinces of Canada where *situs* has been authoritatively determined to depend on the considerations already discussed and not mentioned in *Stern's* case.

In *Winans* v. *Attorney-General* (1), a case concerned with bonds, Lord Atkinson at page 35 treated *Stern's* case and *Attorney-General* v. *Bouwens*, as founded on a common principle, as did also Lord Gorell at pp. 38-39. At page 31 Lord Atkinson said:

> It is not disputed that the bonds are payable to bearer, are marketable in England, are not registred in the name of the deceased, nor is his name mentioned in them, are transferable in England by delivery, and that no act other than delivery need be done in or out of England to complete the title of *the transferee*.

All of this applies to the certificates here in question except the last, and the first and "leading" enquiry in the case of shares is the location of the place of transfer where the transferee will become *legally* entitled to all the rights of a member. That consideration is the same for the transferee whether or not he receives a certificate directly from the registered shareholder. In a case of shares as distinct

(1) [1910] A.C. 27.

1949

IN RE W. H. BROOKFIELD ESTATE THE ROYAL TRUST COMPANY v. THE KING

Kellock J.

from the case of bearer bonds *Attorney-General* v. *Bouwens* has been determined not to be, but *Attorney-General* v. *Higgins*, the governing authority.

In the judgment in *Blonde's case* (1), Lord Uthwatt left open the question of the *situs* of "street certificates". Until a different rule is established by their Lordships in such cases however, my view is as above. Bearer share warrants are subject to different considerations. In such case the legislation usually provides that delivery of the warrant in itself effects a transfer of the shares without more.

I would allow the appeal. There should be no costs in this court or below.

Appeal allowed without costs.

Solicitor for the appellant: *Roland A. Ritchie.*

Solicitor for the respondent: *Thomas D. MacDonald.*

1949

*Feb. 10
*Apr. 12

MAURICE BEAUDIN (PLAINTIFF).....APPELLANT;

AND

FERNAND CHOQUETTE (DEFENDANT)...RESPONDENT.

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

Negligence—Motor vehicle—Collision between automobile and bicycle—Evidence—Onus—Bicycle turning left without signaling—Whether horn of overtaking vehicle sounded—Responsibility for accident—Presumption of fault created by sec. 53(2) of the Quebec Motor Vehicles Act—Affirmative and negative proof—Meeting and passing—Quebec Motor Vehicles Act, R.S.Q. 1941, c. 142, ss. 29, 36, 53.

Respondent's car struck appellant riding his bicycle. The accident happened as the car was overtaking two cyclists following one another on the right side of the pavement, appellant being ahead. Respondent contents that he was driving at 40-45 m.p.h. and that he sounded his horn twice, the first time at 100 to 125 feet from the cyclists and then a few feet away from them. Neither cyclists who were riding about 20 feet apart heard the horn. The collision occurred about the center of the pavement, as the appellant had swung to the left to cross the road without looking back or signaling. The trial judge found both parties equally at fault and the majority in the Court of Appeal held that appellant's negligence was the sole cause of the collision.

(1) [1947] A.C. 24 at 30.

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

1949

BEAUDIN v. CHOQUETTE

Rinfret C.J.

Held, Rand and Estey JJ. dissenting, that appellant's action in crossing the road without looking back and without signaling his intention to do so was the sole cause of the accident. It being established by affirmative evidence against negative evidence that the horn was sounded twice, respondent has rebutted the presumption of fault created by section 53 of the Quebec Motor Vehicles Act.

Held also, that section 36(1) of the Quebec Motor Vehicles Act has no application when the vehicle overtakes the bicycle.

Per Rand and Estey JJ (dissenting): The failure of the driver to give the warning in a reasonable manner as required by sec. 36(4), and the maintenance of his speed at 40-45 m.p.h. under the circumstances do not support the conclusion that the respondent has discharged the statutory onus imposed upon him by sec. 53(2).

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing, St. Jacques J.A. dissenting, the judgment of the Superior Court, Sevigny C.J., and dismissing the 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.

H. Bernier, K.C., Y. Bernier and A. Labelle, K.C. for the appellant.

Jacques de Billy for the respondent.

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

The CHIEF JUSTICE: Il s'agit d'un accident où l'appelant, monté sur une bicyclette, a été blessé par l'automobile de l'intimé sur la route nationale qui va de Sainte-Anne-de-la-Pocatière à Lévis.

L'appelant, en compagnie d'un ami, également en bicyclette, se dirigeait vers l'ouest et était à la droite de la route. La voiture de l'intimé, conduite par son fils âgé de dix-sept ans, allait dans la même direction.

J'emprunte au jugement de la Cour Supérieure les quelques passages suivants:

Le fils du défendeur (intimé) affirme qu'il a signalé son approche et il est corroboré par ses deux frères âgés de douze et quinze ans, lors de l'accident. L'automobile du défendeur était conduite à une vitesse de quarante à quarante-cinq milles à l'heure.

Le demandeur et son compagnon ont juré que l'approche de l'automobile n'a pas été signalée... Il résulte de la preuve qu'il fut heurté

(1) Q.R. [1947] K.B. 817.

1949

BEAUDIN
v.
CHOQUETTE

Rinfret C.J.

par l'automobile du défendeur à peu près au centre de la route... Dans l'espèce, le défendeur, pour dégager sa responsabilité, devait établir hors de tout doute que l'accident n'est pas dû à sa négligence ou à sa conduite répréhensible. (Article 53 de la Loi des véhicules automobiles.)

Le fait d'avoir signalé avec son klaxon lorsqu'il approchait des bicyclettes, comme le prétend le fils du défendeur, est-il suffisant pour conclure qu'il n'y a eu ni négligence ni conduite répréhensible de sa part?...

Lorsque le chauffeur du défendeur a signalé son approche, comme il le prétend, l'automobile était à environ cent pieds des cyclistes, à une vitesse de quarante à quarante-cinq milles à l'heure, et il conduisait à cette vitesse lorsque, à environ vingt pieds en avant de lui, il a vu que le demandeur dirigeait son bicycle en travers de la route.

Le défendeur base sa non-responsabilité sur les précautions qu'il a prises et sur la faute commise par le demandeur en dirigeant sa bicyclette sur le centre de la route...

Un signal de klaxon, comme dans l'espèce, ne suffit pas...

Un appareil sonore "ne peut être mis en usage que comme signal de danger" (article 29, Loi des véhicules...

Il (le défendeur) pouvait réduire sa vitesse de façon à arrêter son véhicule dans quelques pieds et s'il avait agi ainsi et avait eu quand même un accident, il serait justifiable de l'attribuer à la seule imprudence du demandeur...

Considérant qu'il y a eu imprudence et négligence de la part du défendeur et qu'il y a eu aussi imprudence et négligence de la part du demandeur en dirigeant sa bicyclette vers le centre de la route et que, vu la faute contributive des parties, il y a lieu de réduire de moitié la réclamation du demandeur établie à la somme de $9,094.18...

Condamne le défendeur à payer au demandeur une somme de $4,547.09 avec intérêt et dépens.

La Cour du Banc du Roi (1) a infirmé ce jugement et a rejeté l'action du demandeur avec les dépens contre lui tant en Cour Supérieure qu'en Cour du Banc du Roi.

Dans le jugement formel (1), on trouve les CONSIDÉRANTS suivants:

Considérant que le demandeur est clairement en faute d'avoir traversé la route sans regarder en arrière et sans donner aucun signal;

Considérant que l'appelant s'est complètement disculpé de la présomption de responsabilité qui résulte de l'article 53 de la Loi des véhicules moteurs;

Considérant que la collision survenue entre l'automobile du défendeur et le bicycle du demandeur ne peut être attribuée à la vitesse que faisait alors le dit automobile du défendeur;

Considérant que le défendeur a prouvé que le conducteur, en la dite circonstance, prêtait la plus grande attention à la direction de son automobile, a donné le signal qu'exige la loi avant un dépassement, s'est dirigé vers la gauche suffisamment pour laisser aux bicycles tout l'espace requis, et a même, au moment où la collision est devenue inévitable, incliné davantage vers la gauche, de sorte que le demandeur avait alors à sa disposition plus de la moitié de la voie pavée;

(1) Q.R. [1947] K.B. 817.

Considérant que la faute très grave commise par le demandeur, en tournant tout à coup vers sa gauche pour traverser le chemin, est l'unique cause de l'accident, et des dommages qu'il a subis;

Fait droit à l'appel, et infirme le jugement attaqué.

Ce jugement a été rendu à la majorité de quatre des juges de la Cour du Banc du Roi contre M. le Juge St-Jacques, dissident.

Voici ce que l'on trouve dans les notes de ce dernier juge:

Il est certain, en effet, que le demandeur a commis une grave imprudence en entreprenant de traverser la route vers la gauche sans avoir en aucune façon signalé ce changement de direction. Il était, à ce moment, trop tard pour que le conducteur de l'automobile puisse éviter le choc qui s'est produit.

Il ajoute, d'autre part, que le conducteur de l'automobile ne pouvait pas entreprendre de dépasser le demandeur "sans avoir signalé son approche d'une façon effective, lui permettant raisonnablement de croire qu'on l'avait entendu. Les dispositions des paragraphes trois et quatre de l'article 36 de la *Loi des véhicules moteurs* lui en imposent l'obligation, et, à mon avis, ce serait une faute que d'essayer de s'y soustraire, sous le prétexte que la route est libre et que le dépassement n'offre aucun danger".

Le savant juge est d'avis qu'il ne peut déduire de la preuve, d'une façon certaine, que le conducteur de l'automobile a donné un signal pouvant être entendu par le demandeur. La Cour Supérieure, dit-il, paraît avoir eu sur ce point de forts doutes, et lui-même reste, comme la Cour Supérieure, "avec des doutes très sérieux à cet égard."

En pareille matière, s'il subsiste un doute, la jurisprudence est bien à l'effet que le propriétaire de l'automobile ne s'est pas disculpé entièrement.

Il était donc d'avis de rejeter l'appel.

La majorité des juges de la Cour (1), après avoir détaillé les circonstances de l'accident dans leurs notes, a été au contraire d'avis que, devant les faits prouvés, la prescription de l'article 53 devait céder et que l'action devait être rejetée.

Elle conclut de la preuve que le demandeur, sans signal qu'il entendait tourner à sa gauche, sans s'assurer si la route était libre, sans aucune précaution, fit un virage brusque, soudain et presqu'à angle droit, pour traverser la route. Le conducteur de la voiture de l'intimé vit les deux cyclistes

(1) Q.R. [1947] K.B. 817.

1949

BEAUDIN v. CHOQUETTE

Rinfret C.J.

qui roulaient à droite et rien de leur part n'indiquait une intention quelconque de changer leur course; il corna à cent ou cent vingt-cinq pieds du dernier et se rangea à gauche avec l'intention de les dépasser. Ce mouvement, suivant la preuve, mettait une partie de la voiture à gauche du centre de la route. Au moment où l'automobile arrivait vis-à-vis du compagnon du demandeur (ce dernier témoigne sur ce point et admet ce fait) le demandeur venait de faire le mouvement de couper à travers la route. Le conducteur de l'automobile corna de nouveau et appliqua fortement ses freins; mais les deux cyclistes n'étaient éloignés l'un de l'autre que d'une couple de longueurs de leur propre bicyclette et le mouvement du demandeur s'est fait à une distance de seulement quelques vingt pieds de l'automobile.

Aucun indice ne pouvait laisser présumer à l'automobiliste qu'une telle manœuvre devait s'effectuer: aucune circonstance pouvant faire naître chez le conducteur la possibilité d'un soudain et rapide virage.

M. le juge Bissonnette dit que "la faute du cycliste est l'une des plus lourdes, des plus graves, des plus caractérisées qui puissent se commettre par un homme normal dans la force de l'âge . . . Il est en faute, et, à mes yeux, il est le seul artisan de cette collision . . . La vitesse n'a pas été la cause de cet accident et le conducteur de l'automobile n'était pas tenu à ces précautions extraordinaires dont la Cour Supérieure a fait état... Il faut se demander, au-dessus de tout et avant tout, si la manœuvre de l'intimé était un événement prévisible... La diligence que doit exercer le conducteur d'une automobile, eu égard à l'article 53, est en fonctions de la prévisibilité du préjudice qu'il peut causer... Selon Planiol et Ripert, t. 6, p. 710, "il n'est en faute que s'il existait pour lui une obligation de le prévoir et de faire diligence pour éviter qu'il se produise"... Dans la présente affaire, le conducteur n'avait donc pas le devoir de réduire sa vitesse de façon à pouvoir arrêter derrière les bicyclettes si ces dernières commettaient une imprudence impardonnable. (*Allard* v. *Vallières,* (1))... La prescription que l'automobiliste doit rester maître de sa vitesse doit comporter en même temps que le conducteur doit garder sur sa voiture une maîtrise suffisante pour parer aux événements prévisibles". (*Plouffe* v. *McKenzie* (2).)

(1) [1945] S.C. (Que.) 124. (2) [1943] R.L. 242.

Il faut se garder, ajoute le savant juge, d'élever la présomption de l'article 53 "au degré de présomption *juris et de jure*. (*Davis et Latulippe* (1).)

En outre, le savant juge fait remarquer que le juge de première instance a omis de considérer le paragraphe 4 de l'article 36 qui exige qu'avant de dépasser et avant de se ranger à gauche, la personne conduisant un véhicule automobile doit avertir de son intention au moyen de l'appareil sonore.

Il s'en suivrait que le juge de première instance, qui semble s'être appuyé uniquement sur l'article 29 de la *Loi* et qui en a conclu que le conducteur d'une automobile ne devait se servir de l'appareil sonore de sa voiture que dans le but de signaler un danger, s'est mépris sur le sens de la *Loi,* puisque l'article 36 (4) exige qu'un avertissement soit donné avec l'appareil sonore lorsque la personne conduisant un véhicule automobile veut dépasser, afin d'avertir de son intention.

L'honorable Juge Gagné commence par signaler immédiatement la sincérité des témoignages que contient le dossier.

Il interprète la preuve comme établissant que le conducteur de l'automobile de l'intimé a fait sonner son klaxon mais que, comme un bicycle qui était en avant, conduit par le demandeur, s'est dirigé vers la gauche pour traverser la route "tout à coup", l'accident était inévitable... Sa faute est d'ailleurs évidente, ajoute-t-il. Il a entrepris de traverser la route sans regarder en arrière et sans donner le moindre signal. C'est là une faute tellement grave qu'on peut dire qu'elle est la seule cause de l'accident.

La suggestion de l'honorable juge de première instance que si le conducteur de l'automobile avait réduit sa vitesse de façon à arrêter son véhicule dans quelques pieds, et si par la suite il y avait eu quand même un accident, le défendeur serait justifiable de l'attribuer à la seule imprudence du demandeur, ne lui paraît pas fondée. "Exiger en outre de l'automobiliste qu'il réduise sa vitesse à un point "qui lui permette d'arrêter en quelques pieds" serait rendre le dépassement impossible".

L'accident est arrivé en 1944 alors que la limite de vitesse (*voir* Statut de Québec de 1942, 6 George VI, Chapitre 43,

(1) [1946] R.R. 300.

1949

BEAUDIN v. CHOQUETTE

Rinfret C.J.

article 4) était de quarante milles à l'heure; et il est clair, pour l'honorable juge, que l'accident se fût produit de la même façon quand même la voiture aurait circulé exactement à quarante milles. "Ce n'est certainement pas là une cause de l'accident."

Le défendeur a donc prouvé, à l'avis du savant juge, que la vitesse était raisonnable, que le conducteur prêtait la plus grande attention à la direction de son automobile, qu'il s'est dirigé vers la gauche suffisamment pour laisser aux bicycles tout l'espace requis, et qu'il a même incliné davantage vers la gauche au moment où la collision est devenue inévitable.

Il retient des trois témoignages donnés en faveur du défendeur, et dont il dit qu'ils sont évidemment véridiques, que "ce signal a bien été donné".

L'enquête a démontré que le demandeur avait à sa disposition plus que la moitié de la voie pavée au moment où s'est produite la collision. Il s'en suivrait que le défendeur a raison quand il soutient que la faute très grave commise par le demandeur, en tournant tout à coup vers sa gauche pour traverser le chemin, est la seule cause de l'accident et des dommages qu'il a subis. "L'appelant s'est complètement disculpé de la présomption de responsabilité qui résulte de l'article 53".

M. le juge Pratte déclare qu'il partage l'opinion de messieurs les juges Bissonnette et Gagné, et qu'il "ne trouve rien dans la preuve qui établisse à la charge du conducteur une violation de la loi". L'automobiliste doit pouvoir compter que ses co-usagers de la route suivront au moins les règles de la prudence élémentaire, dont la violation dénote, chez celui qui s'en rend coupable, une absence complète du souci de sa propre sécurité ou de celle d'autrui. Rien ne permettait au conducteur de prévoir que l'un ou l'autre des cyclistes allait dévier de sa course; il pouvait donc continuer la sienne en comptant que les cyclistes continueraient la leur de façon normale. Le conducteur de l'automobile ne pouvait prévoir que le cycliste qui, jusque-là s'était conduit normalement, "allait commettre subitement et sans signe préalable, la suprême imprudence de virer à gauche pour traverser la route... C'est cette manœuvre inopinée et imprévisible du demandeur qui a été la seule cause de l'accident, et le défendeur doit en être exonéré".

1949

BEAUDIN v. CHOQUETTE

Rinfret C.J.

Lors de l'audition devant cette Cour, le savant procureur de l'appelant n'a pu me convaincre que les propositions émises par la majorité de la Cour du Banc du Roi (en Appel) (1) devaient être mises de côté, tant sur les faits que sur le droit.

L'on ne peut interpréter autrement que ne l'a fait la Cour d'Appel le passage du jugement de la Cour Supérieure à l'effet qu'un appareil sonore "ne peut être mis en usage que comme signal de danger". L'honorable juge de première instance paraît avoir été sous l'impression que c'était le seul cas où un automobiliste devait se servir de l'appareil sonore. Or, l'article 36 (4) dit en toutes lettres, qu'il doit également s'en servir pour avertir lorsqu'il entend dépasser. Il s'en suivrait que l'honorable juge était d'avis que du moment que le conducteur de l'automobile du défendeur mettait en usage l'appareil sonore de sa voiture, il se rendait compte qu'il y avait danger, et que, dès lors, il devait prendre les précautions requises en pareil cas. Mais lorsque, à cent pieds des bicycles, le conducteur a donné avec l'appareil sonore l'avertissement qui est prouvé, il obéissait évidemment aux prescriptions de ce paragraphe 4 de l'article 36. Ce n'est que lorsqu'il fut à vingt pieds du demandeur et que ce dernier fit le mouvement imprévisible dont parle la majorité de la Cour d'Appel, qu'il donne alors l'autre signal prévu par l'article 29 de la Loi, car alors le danger non seulement était évident, mais comme le disent les juges de la Cour d'Appel, il était inévitable.

J'ai dit plus haut que la preuve démontre que les deux avertissements ont été donnés, parce que l'on est en présence de trois témoins qui le jurent affirmativement, et, à l'encontre de ces témoignages, il n'y a que la preuve négative des deux compagnons à l'effet qu'ils n'ont pas entendu. C'est une règle invariable que si la crédibilité des témoins n'entre pas en doute, la preuve positive, en pareil cas, doit l'emporter sur la preuve négative. C'est ainsi que le décide la Cour Suprême dans la cause de *Lafeunteum* v. *Beaudoin* (2).

In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.

(1) Q.R. [1947] K.B. 817.

(2) (1898) 28 S.C.R. 89.

1949

BEAUDIN v. CHOQUETTE

Rinfret C.J.

Je ne connais pas de décision rendue au contraire depuis ces dernières cinquantes années, et, d'ailleurs, nous sommes liés par ce jugement de la Cour Suprême.

C'est avec raison que, dans la présente cause, l'on a référé au jugement du Comité Judiciaire du Conseil Privé dans l'affaire de *Winnipeg Electric* v. *Geel* (1), relativement au fardeau de la preuve dans l'application de l'article 53 de la *Loi des véhicules automobiles.* Ainsi que le dit fort bien M. le Juge Bissonnette, il ne faudrait pas transformer en présomption *juris et de jure* la présomption que crée cet article 53. Ce jugement (1) prononcé par Lord Wright, donnait sur cette question les préceptes les plus clairs que voici:

> It is then for the defendant to establish to the reasonable satisfaction of the jury that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants.

Et il est assez curieux de noter que Lord Wright, en se demandant de quelle manière le défendeur peut apporter une preuve disculpatoire, donne précisément l'exemple d'un cas comme celui que nous avons dans la cause actuelle:

> by proof that the plaintiff was the author of his own injury; for example, by placing himself in the way of the defendant's vehicle in such a manner that the defendant could not reasonably avoid the impact.

Et sur la question du fardeau de la preuve dans l'application de l'article 53:

> the burden remains on the defendant until the very end of the case, when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by negligence. If, on the whole of the evidence, the defendant establishes this to the saisfaction of the jury, he will be entitled to judgment: if however the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. *A fortiori* the defendant will be held liable, if the evidence actually establishes his negligence. No doubt the question of onus need not be considered, if at the end of the case the tribunal can come to a clear conclusion one way or the other, but it must remain to the end the determining factor unless the issue of negligence is cleared up beyond doubt to the satisfaction of the jury.

C'est au cours de ce jugement que Lord Wright apporte l'approbation du Conseil Privé à la règle telle que l'a exposée M. le Juge Turgeon, parlant au sujet d'une législation semblable à celle de Québec, dans une cause de la

(1) [1932] 4 D.L.R. 51.

province de Saskatchewan, *Stanley* v. *National Fruit Co.* (1). Cette citation tirée du jugement de M. le Juge Turgeon contient les passages suivants qui doivent être retenus dans la présente cause:

1949

BEAUDIN v. CHOQUETTE

Rinfret C.J.

> But if evidence for and against is given upon the points in question, the rule in favour of the preponderence of evidence should be applied *as in ordinary civil cases;* and the statutory onus will cease to be a factor in the case, if the Court can come to a definite conclusion one way or the other, after hearing and weighing the whole of the testimony. Nor does this statutory onus increase the degree of diligence required in the owner or driver of a motor vehicle . . . He must take proper precautions to guard against risks that might reasonably be anticipated to arise from time to time as he proceeds on his way. This degree of care, and nothing more, is required of him except in cases specially provided for, with which we are not concerned here.

Et, en conclusion, Lord Wright ajoute dans cette cause de *Winnipeg Electric Co.* v. *Geel* (2):

> Nor is it necessary further to emphasize that, in some running down cases under the statute, the defendant may discharge the burden, as already explained, by other evidence than that of inevitable accident.

Il est tout naturel de référer également au jugement de cette Cour dans *Charbonneau* v. *Dubé* (3) car les faits de cette cause sont remarquablement semblables à ceux du présent appel. Là comme ici, se posait la question de savoir si le chauffeur de l'automobile avait signalé son approche au moyen de son klaxon. Le chauffeur avait juré qu'il avait fait fonctionner l'appareil sonore de la voiture, la dernière fois à environ 50 pieds de la bicyclette, et il était corroboré par deux témoins qui étaient dans le camion avec lui. D'un autre côté, le demandeur et son fils, Léo, disaient que le chauffeur n'avait pas klaxonné, et surtout deux témoins qui étaient sur les lieux et qui avaient vu l'accident déclarèrent la même chose. Sur cette preuve, le juge de première instance en était arrivé à la conclusion que le chauffeur du camion n'avait pas signalé, bien qu'il tentât de dépasser le bicycliste. Mais, à la lecture de cette preuve, cette Cour en arriva à la conclusion que ni le fils du demandeur, ni les deux autres témoins avaient vraiment juré que le conducteur n'avait pas signalé, et qu'ils avaient simplement juré qu'ils n'avaient pas entendu.

Sur une pareille preuve, la Cour Suprême (3) unanimement décida que la preuve positive du chauffeur du camion

(1) [1930] 2 D.L.R. 106 at 109.
(2) [1932] 4 D.L.R. 51.
(3) [1948] S.C.R. 82.

1949

BEAUDIN v. CHOQUETTE

Rinfret C.J.

et de ses deux compagnons devait l'emporter sur celle des témoins qui se contentaient de dire qu'ils n'avaient pas entendu.

En plus, dans la cause de *Charbonneau* v. *Dubé* (1), non seulement le demandeur-cycliste avait réussi devant le juge du procès, mais la majorité de la Cour d'Appel avait confirmé le jugement de la Cour Supérieure, tout en déclarant qu'il y avait eu négligence contributoire et en réduisant, en conséquence, le montant des dommages accordé au demandeur. Cependant, la Cour Suprême fut d'avis que l'action devait être rejetée et que l'appel devait être maintenu avec dépens, dans toutes les Cours.

Ici, la situation de l'appelant est moins favorable, car tout en ayant vu maintenir son action par la Cour de première instance, au moins pour la moitié de sa réclamation, "vu la faute contributive des parties", la Cour du Banc du Roi (en Appel) a infirmé ce jugement et a rejeté l'action du demandeur, ainsi qu'il est dit plus haut, à la majorité de quatre des juges de cette Cour.

C'est dans cet état que la cause nous est maintenant soumise, et je suis incapable de découvrir en quoi la situation de l'appelant dans la présente affaire peut être accueillie avec plus de faveur que celle du bicycliste dans l'affaire de *Charbonneau* v. *Dubé*. En réalité, à mon avis, le cas de Charbonneau était vraiment plus favorable que celui de Beaudin en l'espèce.

Je considère que décider l'appel actuel d'une façon différente de celle que nous avons suivie dans la cause de *Charbonneau* v. *Dubé* aurait pour effet de rendre deux jugements contradictoires.

Il ne me reste plus qu'un dernier point à signaler. Le procureur du demandeur-appelant a cité un jugement dans une cause de *Moreau* v. *Thibault* rapportée au vol. de 1945 des Rapports Judiciaires Officiels de Québec, C.S., p. 128, où il aurait été décidé que la *Loi des véhicules automobiles,* article 36, paragraphe 1, est à l'effet que l'automobiliste qui rencontre par croisement une bicyclette doit laisser une distance d'au moins huit pieds entre l'automobile et la bicyclette, et que cette règle s'impose *à fortiori* lorsqu'il s'agit d'un dépassement, vu qu'alors le bicycliste ne peut se rendre compte aussi bien du danger que s'il s'agit d'une voiture venant à sa rencontre.

(1) [1948] S.C.R. 82.

Il me semble que pour mettre de côté pareille prétention de la part de l'appelant, il suffit de citer l'article de la *Loi* auquel il réfère:

(36-1) Toute personne conduisant un véhicule ou un animal sur un chemin public doit, quand c'est possible, tenir le côté du chemin à sa droite, et laisser libre à sa gauche le plus large espace possible, et au moins la moitié du chemin quand elle croise un autre véhicule ou un troupeau d'animaux, ou, au moins huit pieds quand elle croise un piéton, un cycle ou un animal isolé.

Remarquons bien le texte de cet article. Tout d'abord, il se lit: "laisser libre *à sa gauche* le plus large espace possible". L'article dit: "à sa gauche;" et si l'on tient compte des prescriptions de la loi, cela ne peut s'entendre que d'un croisement, au cours duquel le véhicule ou l'animal qui est rencontré est toujours à la gauche de l'automobiliste, tandis que s'il s'agissait d'un dépassement, il faudrait que l'article se lut: "à sa droite."

Puis, si l'on en vient à la dernière partie de l'article: "et au moins la moitié du chemin quand elle croise un piéton, un cycle ou un animal isolé", le mot qui est employé est "croise" et l'on ne peut donc appliquer cette prescription au cas d'un dépassement. Mais, en plus, il est évident que l'article exige d'une personne conduisant un véhicule sur un chemin public, quand c'est possible, de laisser à sa gauche, le plus large espace possible, et au moins la moitié du chemin quand elle croise un autre véhicule ou un troupeau d'animaux, ou, au moins huit pieds quand elle croise un piéton, un cycle ou un animal isolé. Cela ne signifie pas (ce qui, je le dis en tout respect, serait absurde) que l'automobiliste doit laisser une distance d'au moins huit pieds entre son automobile et la bicyclette, mais que si il croise un piéton, un cycle ou un animal isolé, il doit lui concéder au moins huit pieds du chemin du côté où ce piéton, ce cycle ou cet animal se trouve.

En d'autres termes, si le chemin a par exemple 18 pieds de largeur, l'automobile peut occuper les dix pieds qui se trouvent à la gauche du chemin, pourvu qu'elle laisse huit pieds du chemin au piéton, au cycle ou à cet animal.

Nous sommes loin de compte, à l'égard de la prétention de l'appelant, qu'il faille une distance d'au moins huit pieds entre l'automobile et le piéton, le cycle ou l'animal. Une loi à cet effet serait tout simplement impossibe et impraticable.

1949

BEAUDIN v. CHOQUETTE

Pour ces raisons, je ne puis découvrir aucun motif pour infirmer le jugement de la Cour d'Appel, et je suis d'avis que l'appel du demandeur doit être rejeté avec dépens.

Rinfret C.J.

RAND J. (dissenting):—The facts of this controversy are simple and few. On Sunday morning, September 3, 1944 the appellant aged forty and a brother-in-law of thirty-two, spending the day in the country, set out westerly for a short bicycle ride before dinner. The day was fine with a slight breeze facing them, the road was paved over a width of about 20'6" and was straight for any distance material here, there was no other traffic in sight and very little at that time moving, and the two men were riding close to the right-hand side, one behind the other at a distance of twenty feet or so. Reaching a point opposite a house, the appellant who was ahead swung to the left intending to enter the roadway leading to it. At that moment the automobile of the respondent, who was engrossed in a document, driven by his 16-year-old son and carrying himself and two other younger sons, running between 40 and 45 miles an hour, passed the rear bicycle and in a moment struck the other with the right end of the front bumper just about the center of the pavement. No sound of the horn had been heard by either bicyclist. The tracks showed that just before the collision the auto had been moving angularly to the south side of the road and it came to a stop off the pavement after having dragged the bicycle about forty feet. The appellant was knocked twenty-five feet across the road and seriously injured. There were marks on the pavement indicating an application of the brakes seventeen feet before the impact, but the distance from the easterly end of these marks to the northerly edge of the pavement does not clearly appear.

The son claims that he was driving near the center of the highway and swerved to the left to pass the bicycles. It is not suggested that they were more than three or four feet from the northerly edge of the pavement and if the automobile had been straddling the center the right side would be at least 2½' to the north of it. Taking the handle bars into account, the bicycles may have occupied as much as four feet, leaving a distance of approximately 3½' between them and the automobile. The rear bicyclist, who gave

his evidence very frankly, as in fact all the witnesses appear to have done, says the automobile seemed to sweep by him with a blast of air between three and four feet away; and on the best consideration I can give to the evidence I conclude that that was about the distance.

The judgment in the Court of King's Bench (1) more or less accepts the statement that the horn was sounded when the automobile was from 100 to 125′ behind the bicycles. Admittedly moving at least sixty feet a second, it is obvious that considering its speed and position on the highway, the absence of traffic and the quiet conditions, the distance of 125′ would be traversed in sounding a reasonable signal; and those factors would be most pertinent also to the point at which the warning would be commenced. So far from this it is claimed that a second signal was given when the bicycle was seen to turn out. I cannot accept this evidence of distance and it leaves me, as it left the trial judge, in doubt of the horn having been sounded at all. I should say that as an ordinary precaution a prudent driver in such circumstances, particularly of the speed and passing space, could and would effectually bring the warning home to the riders. Both of them had good hearing and the conditions, apart from the slight breeze, were favourable to an effective signal if one had been given. Although, as it was found by the trial judge and as I will take it, the appellant should have looked back or indicated his intention to turn, it was equally, if not more, important that the driver should have followed the course of a prudent man. That a bicyclist on such a day and in such conditions might have acted on the assumption, in the absence of a warning, that no automobile was within range, is, apart from the question of his negligence in so doing, not beyond the range of reasonable anticipation a prudent man would foresee. The person behind has the whole situation ahead of him; he sees the actual behaviour of the person ahead as well as the approaching danger; and that, in the surroundings here, the signal was not heard indicates that if given it was not sufficient, and calls for evidence to justify the speed and position more precise and weighty than was presented.

(1) Q.R. [1947] K.B. 817.

1949

BEAUDIN v. CHOQUETTE

Rand J.

It must not be forgotten that bicyclists are still lawfully on the highway, and their likely conduct must be interpreted in the prevailing conditions. On a little used back road it would be absurd to go through motions which are absolute on a busy city street; and whether on a highway through the countryside at a time when all is quiet and traffic virtually absent, a prudent man on a bicycle might not feel it to be somewhat ridiculous either to give a hand signal or to look around before changing his course, is a question of circumstances and of degree. The relations between the two parties are interlaced: and here the trial judge has found the appellant to have contributed to the accident.

But these matters have a bearing on the conduct of the driver behind. When it is considered what a slight and cheap precaution, while moving at such speed, is needed to remove all possibility of danger, such as a signal lengthened to three, four or even five seconds, carried up, if necessary, to a point beyond all possibility of not being heard, the complaint that no indication of turning has been given must be received with qualification. It may be that bicycles on a paved highway present risks that are an annoyance to people in a hurry in automobiles; but so long as they are not banned, the danger of serious injury to those using them must be recognized and the relatively trivial measures of warning and safely exacted.

The respondent was bound under the statute to satisfy the Court that he was not guilty of negligence contributing to the accident, and I agree with the trial judge and with St. Jacques, J.A. that he has not met that burden.

I would, therefore, allow the appeal and restore the judgment at trial with costs here and in the Court of King's Bench.

ESTEY J. (dissenting):—The appellant (plaintiff) in this action asks damages suffered when the bicycle upon which he was riding was struck by respondent's (defendant's) automobile. The appellant and his brother-in-law were riding their respective bicycles westward on the main highway along the south shore of the St. Lawrence River a few miles west of Ste. Anne de la Pocatière about noon on Sunday, September 3, 1944. It was a clear day with a light

wind from the west. The road, about 20 feet in width, was paved and the portion here in question level and straight. The appellant was travelling at 3-4 m.p.h. and about 10-12 feet in front of his brother-in-law. Both bicycles were close to the north side of the pavement, the estimates varying from 2 to 4 feet. The appellant, with the intention of crossing the road, suddenly turned to the south (his left) when at or near the center of the road he was struck by respondent's automobile also proceeding in a westerly direction.

Respondent was a passenger in his automobile which at the time was driven by his son Guy, age 17. Guy saw the two bicycles in front of him and when about 100-125 feet east of them he sounded his horn, turned toward the left side of the road but maintained his speed of 40-45 m.p.h. until within about 20 feet of the bicycles he saw appellant suddenly and without signal turn toward the center of the road. Guy applied his brakes and again sounded his horn but was unable to avoid a collision.

The trial judge found both parties equally negligent. His findings are not based upon any question of credibility. He apparently concluded that all the witnesses were truthfully deposing to the facts as they remembered them. The appellant did not appeal but the respondent's appeal to the Court of King's Bench in Quebec (1) was allowed and the appellant's negligence held to be the sole cause of the collision. Mr. Justice St. Jacques dissenting would have affirmed the judgment at trial. The appellant in this appeal asks that the judgment of the learned trial judge holding the parties equally responsible for the collision be restored.

Respondent's automobile being in operation on a public highway and having struck and injured the appellant the law in Quebec places the onus upon respondent to prove that the collision was not caused by his negligence or reprehensible conduct.

53. (2) Quand un véhicule automobile cause une perte ou un dommage à quelque personne dans un chemin public, le fardeau de la preuve que cette perte ou ce dommage n'est pas dû à la négligence ou à la conduite répréhensible du propriétaire ou de la personne qui conduit ce véhicule automobile, incombe au propriétaire ou à la personne qui conduit le véhicule automobile.

(1) Q.R. [1947] K.B. 817.

1949

BEAUDIN v. CHOQUETTE

Estey J.

The respondent's contention is that under the circumstances, a clear day, a dry paved road 20 feet in width, two bicycles in their proper places on the road proceeding without any indication of change in position and no other traffic nearby, the driver, having sounded his horn and turned slightly to the left, was justified in assuming that the bicycles would continue in that position and in maintaining his speed of 40-45 m.p.h. as he passed them. The immediate difficulty respondent encounters in maintaining this position is that the learned trial judge did not find that in sounding his horn the driver exercised reasonable care. Sec. 36(4) of the *Motor Vehicles Act,* R.S.Q. 1941, c. 142, provides:

> 36. (4) When preparing to pass, the person driving a motor vehicle shall, before bearing to the left, give warning of his intention to do so, and make sure that it is possible to pass without any risk of a collision with a vehicle or an animal coming in an opposite direction. The warning shall be given by means of the sounding device.

The driver of the respondent's automobile under this section was required to "give warning of his intention" to pass by means of a sounding device. Under sec. 29(1) every motor vehicle operated on the highway "must . . . be provided with a horn or other sounding device sufficient in capacity to be heard at a distance of two hundred feet". The statute requires the driver of the forward vehicle upon hearing the warning to move toward the right, or if there, remain in that position until the passing is effected. The warning must be given at such a distance and in such a manner that the party ahead actually hears or ought to hear it. The evidence of the driver, Guy Choquette, and his brother's upon this point is as follows. Guy Choquette deposed:

> Q. Quelle sorte de coup de klaxon avez-vous donné? Un coup ordinaire? Un petit coup? Ou un klaxonnement prolongé?
>
> R. Je ne pourrais pas dire au juste, là... naturellement. Habituellement je donne toujours un coup prolongé; je ne donne jamais des petits coups.

As to how he proceeded just prior to the collision he deposed:

> R. Oui. J'ai klaxonné justement pour les avertir, d'ailleurs, c'est toujours ce que je fais quand je veux dépasser des cyclistes ou des piétons; j'ai klaxonné et j'ai continué comme ça, tranquillement, comme si rien n'était arrivé, comme antérieurement... Au milieu de la route, j'allais à une vitesse de quarante (40), quarante-cinq (45) milles à l'heure, sur la

recommandation de mon père. Je regardais le compteur et ça ne marquait pas plus de quarante (40), quarante-cinq (45) milles à l'heure; j'ai klaxonné à environ cent (100), cent vingt-cinq (125) pieds, la première fois; ensuite j'ai passé comme ça. Je me suis aperçu que le cycliste qui était en avant de l'autre—je ne me rappelle pas quelle distance séparait les deux,—a tourné devant moi quand j'étais à peu près à une vingtaine de pieds. J'ai appliqué les freins et j'ai klaxonné en même temps, mais l'auto avait assez d'élan pour aller frapper... la victime, enfin.

Marc Choquette, a brother of Guy, age 15, was seated in the back seat. When his brother sounded the horn for the first time he looked up but could not say at what distance they were from the bicycles but thought it was a sufficient distance to advise them. He stated that before the accident his brother was driving in the middle of the road and when he sounded his horn the first time he continued straight, that when he passed the first bicycle he was in the centre of the road. He was seated on the rear left-hand side and said he had a very good view.

Auguste Choquette, age 12, also seated in the back seat, deposed:

R. Je sais que la première fois qu'il a klaxonné, juste un petit coup comme ça, je ne me suis pas énervé. Dans un voyage, ça arrive plusieurs fois, ça. Un peu plus loin, ça été un grand coup de klaxon. Je me suis levé la tête et, à peu près à une longueur d'auto, il y avait un cycliste qui avait la tête tournée vers nous autres.

Q. Sais-tu à quelle distance la machine était lorsque ton frère à klaxonné, la première fois?

R. Non. Là, je ne m'en rappelle plus du tout.

That the driver saw the bicycles is clear. As to how he sounded his horn upon his own evidence is a matter of conjecture, but to Auguste it was "juste un petit coup comme ça". The learned trial judge did not find that the horn had been properly sounded and no doubt in appreciation of its insufficiency he referred to it as "un signal de klaxon, comme dans l'espèce," or "comme le prétend le fils du défendeur," or again, "comme il le prétend". That the horn was not sounded with sufficient strength appears to be the most probable explanation of the fact that upon a clear day with nothing present to interfere with a person's hearing or to attract one's attention neither of the two men riding the bicycles heard the sound of the horn. Moreover, the learned trial judge did not find that it was sufficient under the circumstances for the driver to sound the horn but once before he saw the appellant turn. He was driving

1949

BEAUDIN v. CHOQUETTE

Estey J.

upon a rural highway at a time when no other traffic was sufficiently near to be a factor. He had received no intimation from either of the bicyclists that they had heard the horn. Under these circumstances, to continue as he said he did, without further sounding his horn, at a speed of 40-45 m.p.h., even admitting that he turned slightly to the left, would appear, in the absence of an express finding of fact to the contrary, not to be exercising reasonable care, nor to be sufficient to discharge the onus placed upon the respondent under sec. 53 (2). His own statement is indicative:

...j'ai klaxonné et j'ai continué comme ça, tranquillement, comme si rien n'était arrivé, comme antérieurement.

Dionne, riding the second bicycle, asked when he had seen the automobile, replied:

Au moment où elle me dépassait; le vent qu'elle m'a causé, vu qu'elle était près de moi, ça m'a effrayé et j'ai viré à tête à gauche et j'ai vu l'auto.

The learned trial judge would have this and other evidence in mind when he stated:

Un signal de klaxon, comme dans l'espèce, ne suffit pas pour permettre au chauffeur de continuer sa course à une vitesse de quarante à quarante-cinq milles à l'heure et de laisser ainsi le risque d'un accident à celui pour qui le signal a été donné.

and when he further stated:

La grande prudence qu'exige la circulation ne se limite pas à de simples signaux et le fait du défendeur d'en avoir donné un, comme il le prétend, n'est pas suffisant pour le justifier et dégager sa responsabilité.

The appellant and respondent's driver were each of them under a duty to use due care and both failed to do so. If the appellant had signalled or if the respondent's driver had reasonably sounded his horn, we are asked by the respective parties, and with some reason, to say that the collision would have been avoided. It seems under these circumstances rather that these respective failures constituted negligent conduct which continued to the moment of impact by virtue of which both parties contributed directly to the cause of the collision.

These factors distinguish this case from *Charbonneau* v. *Dubé* (1), where at p. 85 Mr. Justice Taschereau on behalf of the Court speaks as follows:

Le conducteur conduisait avec prudence, à une vitesse raisonnable; ses phares étaient allumés, et il a signalé son approche à trois ou quatre

(1) [1948] S.C.R. 82 at 85.

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.

1949
BEAUDIN
v.
CHOQUETTE
Estey J.

This quotation emphasizes the important factors that are absent in the case at bar—reasonable speed and a signal repeated three or four times.

In *The King* v. *Anderson* (1), the by-law of the City of Vancouver, unlike the Quebec statute, provided only that the horn should be sounded "whenever it is reasonably necessary," and in that respect the cases are quite different.

The failure of the driver to give the warning in a reasonable manner as required by sec. 36(4), and the maintenance of his speed at 40-45 m.p.h. under the circumstances do not support the conclusion that the respondent has discharged the statutory onus imposed upon him by sec. 53(2).

The appeal should be allowed with costs throughout and the judgment of the learned trial judge restored.

Appeal dismissed with costs.

Solicitors for the appellant: *Bernier & Bernier.*

Solicitors for the respondent: *Gagnon & de Billy.*

HIS MAJESTY THE KING.....APPELLANT;

AND

GERARD BUREAU.....RESPONDENT.

1949
*Feb. 22
*Jun. 2

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Customs—Smuggling—Seizure—Forfeiture—Acquittal by jury—Whether it invalidates seizure—Notice of seizure—Whether it concludes the right of Crown to make the seizure—Customs Act, R.S.C. 1927, c. 42, ss. 172, 177.

Respondent's automobile and 159,600 American cigarettes were seized by Customs officers at the customs house at Armstrong, Quebec, where the respondent was reporting his re-entry into Canada but without declaring his possession of the cigarettes. The Minister of National Revenue decided that the cigarettes and the automobile should be forfeited but his decision was reversed by the Exchequer Court.

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

(1) [1945] S.C.R. 129.

1949

THE KING
v.
BUREAU

Rinfret C.J.

Held: Taschereau J. dissenting, that as the evidence established that respondent was guilty of a number of breaches of the Customs Act, any one of which was sufficient to warrant the seizure and forfeiture, his acquittal by a jury on a charge of unlawfully importing nor the fact that there had been no "smuggling" did not invalidate the seizure nor affect the right of forfeiture. Section 177 of the Customs Act considered.

Per Taschereau J. (dissenting): The evidence shows that respondent did not smuggle the cigarettes, and as the Court has no jurisdiction to go beyond the reasons given by the Minister in the notice under sec. 172, it cannot therefore inquire whether he committed other infractions justifying the seizure.

APPEAL, ex parte, by the Crown from a decision of the Exchequer Court of Canada (1), Thorson J., reversing the decision of the Minister of National Revenue that respondent's automobile and goods be forfeited for breach of the *Customs 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.

F. P. Varcoe, K.C. and J. Desrochers for the appellant.

The CHIEF JUSTICE:—On November 19, 1945, the respondent, with his wife and his brother, went to Lewiston in the United States where he purchased 159,600 American cigarettes which he brought in his automobile on his return to Canada on November 20th. He arrived at the Customs Office at Armstrong, which is ten miles inside the border, about one o'clock in the morning of a stormy night. He stopped his automobile near the office. He entered the office and told Mr. Gosselin, one of the customs officers whom he knew, that he had returned from a trip to the United States and that he had brought in his automobile a small ·22 rifle which he had purchased. When Mr. Gosselin, and also Mr. Poulin, another customs officer, asked him if he had any merchandise to declare, he replied that he had nothing else. Officer Poulin, who was on duty that evening, went out from the office to make an inspection of the automobile and, some minutes later, returned to the office saying to Gosselin that the automobile was full of cigarettes and that he was going to find a flashlight.

(1) [1948] Ex. C.R. 257.

Gosselin immediately went out of the office and the respondent followed him. Gosselin says that the respondent and his brother offered him $100 if he would let them proceed, but the brother and also the respondent's wife denied any such promise and Poulin says he did not hear it.

When Poulin went out the first time he had seen three cartons of cigarettes on the front seat and when he made a more complete inspection he found that the luggage compartment of the automobile and the rear seat were full of cigarettes. The cigarettes were unloaded from the automobile and taken into the office and, when Gosselin told the respondent that the duty would be about $2,600, the respondent said that that was too much and that he could not pay it and asked permision to take the cigarettes and return to the store in the United States where he had bought them, but he was refused permission to do this. The officers detained the cigarettes, but because it was night and raining they permitted the respondent to continue his trip to St. Georges de Beauce with his wife and brother on condition that he return to the office the next day to deliver his automobile. When he did not return the officers caused the automobile to be seized.

The respondent admitted that, when questioned in the Customs Office as to whether he had any other goods to declare, he did declare that he had no other goods, but says he did so because there were other people in the Customs Office and he did not wish to declare his cigarettes in front of them, but he knew that the officer would see the cigarettes. It is to be noted that, while the respondent contends that he had understood that the customs duty would be thirty-five per cent of the value of the cigarettes and states that he paid about $1,100 for the cigarettes, nevertheless he did not have with him even $100 at the time he reported to the Customs Office. In addition, it is to be noted that he stopped at the office very late at night when it was dark and stormy, that he stopped a short distance away from the Customs Office and that the cigarettes were covered with two coats.

On December 4, 1945, a notice was given on behalf of the Deputy Minister of National Revenue for Customs and Excise to the respondent that the cigarettes and automobile, valued at $4,910, had been seized and that he was

1949

THE KING v. BUREAU

Rinfret C.J.

charged with smuggling the cigarettes into Canada and with using the automobile for such illegal importation. The notice gave the respondent thirty days within which to submit evidence to refute this charge.

On July 3, 1946, the Minister of National Revenue rendered a decision that the cigarettes and automobile be forfeited, and, on July 4, 1946, notice was given to the respondent's solicitor of the Minister's decision.

On July 3, 1947, the Minister of National Revenue referred the respondent's claim to the Exchequer Court of Canada for adjudication under section 176 of the *Customs Act*.

The solicitors for the claimant and the respondent agreed, *inter alia*, that the evidence given at a trial of the respondent on a charge laid against him under the *Customs Act* in respect of the alleged illegal importation should be used instead of taking evidence in the Exchequer Court, and, further, that the respondent had been found not guilty by a jury of such charge and that there had been no appeal from that verdict.

The case came on for hearing before the learned President of the Exchequer Court at Quebec (1) on January 20, 1948, and on March 9, 1948, he gave judgment whereby it was adjudged that the respondent's automobile and certain goods which had been seized from him should be returned to him upon payment by him of the customs duty, and further that he was entitled to his costs.

The learned President held that the respondent's acquittal by the jury on the criminal charge did not make the question of whether the cigarettes were illegally imported *res adjudicata*. He held, however, that the proof showed that the respondent had not smuggled the cigarettes into Canada and that the forfeiture could not be upheld by reason of any other breach of the *Customs Act* because no other breach had been specified in the notice of December 4, 1945, to the respondent. The Minister of National Revenue, in the name of His Majesty the King, now appeals from that judgment.

The Customs Seizure Report by Officer Poulin was to the effect that the respondent was "trying to import into Canada 159,600 cigarettes". The notice to the respondent

(1) [1948] Ex. C.R. 257.

1949

THE KING v. BUREAU

Rinfret C.J.

stated that "les dites cigarettes ont été passées en contrebande au Canada et que la dite automobile a servi à cette importation illégale".

After he received such notice the respondent, through his solicitor, sent to Mr. Hicklin, Deputy Minister of National Revenue for Customs, an affidavit stating that he never had any intention of defrauding the customs and that he had imported these cigarettes with the intention of paying thirty-five per cent of their value at the customs office, but that, when he found several persons playing cards in the office, he felt that he would not make the declaration because there were too many people there but that he would wait until the officer in charge had gone out of the office. However, he states, he had told his brother and his wife, who were with him, to tell the officer, when he came to the automobile, that the goods were cigarettes and, as a matter of fact, when Officer Poulin came out his brother informed him that there were cigarettes in the automobile. The affidavit continues to state that when Poulin came out of the office he asked the respondent how many cigarettes he had and that he told Poulin immediately that all the goods in his car were cigarettes, that he had stopped at the office to pay the customs duty, upon which Poulin told him that they were going to unload them, which was done. Gosselin then informed the respondent that it would cost him $3.31 duty on each carton. The respondent answered: "You must be mistaken, because they told me here that the duty was only thirty-five per cent", to which the officer replied that thirty-five per cent represented the duty on other goods but not on cigarettes. Then, it is stated, the respondent asked the officer to give him back the cigarettes as he could not pay such a duty and that he would return them to the store where he had purchased them in the United States. This was refused on the ground that it was too late, although the cigarettes had not yet been seized, but the respondent stated that he said that it was his right to have them returned to him if he did not decide to import them into Canada. It was after that that they were declared seized and the officer kept the cigarettes. He was, however, allowed to pursue his trip to St. Georges de Beauce in his automobile and it was three days after these

1949

THE KING v. BUREAU

Rinfret C.J.

incidents that one Constable Charron, of the R.C.M.P., came to seize the automobile at St. Georges. The respondent's contention was that the automobile could not be seized three days after his return to his home at a time when none of the goods remained in the car, and, moreover, that the automobile was not subject to seizure because at the time he went through customs he had declared the goods in his possession. He denied that the cigarettes had been smuggled and that the automobile had been used for that purpose.

In answer to the affidavit Officer Poulin declared that the way the respondent acted it looked very much as if he wanted to avoid the duties and taxes on the cigarettes. He also denied the respondent's statement that he had been asked about the rate of duty on cigarettes or on any other goods. The declaration that the cigarettes were in the car only came after Poulin had seen them and when there was nothing else that the respondent could say. Poulin stated that as he went to the automobile the respondent did not say one word to him, but that his wife then declared that "they were going to be ruined". He states that he seized the cigarettes because the respondent refused to declare the same when asked and he only let him proceed in his automobile because it was one o'clock in the morning, it was raining and there was hardly any other means for him to go home, and, besides, he knew that he could get the automobile at any time afterwards. Poulin stated as a positive fact that the respondent never declared his cigarettes to him when asked and, therefore, the automobile was liable to seizure.

The statement of Officer Poulin is corroborated by Officer Gosselin.

Having the respondent's affidavit and the statements of the two Customs Officers, the Assistant Deputy Minister of National Revenue decided that the cigarettes should be seized for having been smuggled into Canada and the automobile for having been used therein. He went over the several reports sent to him and concluded that while there were other factors which point towards deliberate intent to smuggle these cigarettes on which duty and taxes exigible were $2,636.20, the mere failure to declare them was

sufficient and the cigarettes and the automobile should be declared forfeited. His recommendation was to that effect and the respondent was notified accordingly.

The respondent's solicitor wrote several letters to the Department asking that the decision on the confiscation should be stayed until the criminal charge against the respondent had been disposed of, but he was told by the Department that the criminal charge was an entirely distinct matter from the seizure and confiscation of the goods and automobile.

On the 24th of October, 1946, the respondent was acquitted of the criminal charge by a jury, and on the 19th of August, 1947, the respondent brought the matter before the Exchequer Court of Canada (1), with the result already mentioned.

The charge before the Criminal Court was that on November 20, 1945, without any legitimate excuse, the respondent had in his possession goods illegally carried into Canada, to wit, 159,600 American cigarettes of dutiable value of more than $200, and on which the duty exigible had not been paid, contrary to section 217(3) of the *Customs Act*.

The evidence of Officer Gosselin was very clear. He said that the respondent came into the Customs Office and declared that he had a rifle which he was bringing from the United States. Gosselin told him that he would have to leave it at the office until he got a permit from the Department to import it. He then asked him whether he was importing other goods and, if he had any, to declare them. The respondent's answer was that he had nothing except a few small parcels of goods purchased in 5, 10 and 15 cent stores of a value of a few dollars. Gosselin repeated the question whether he had anything else, and the answer was "No, sir". Gosselin asked him what amount he had spent in the United States and the respondent's answer was "Almost nothing, perhaps $15, including the rifle." It was then that Officer Poulin said that he would go and inspect the automobile.

When Poulin discovered the cigarettes the respondent and his brother told Gosselin: "Don't be a fool, let us pass, you know us." Gosselin replied "It is too late, I cannot

(1) [1948] Ex. C.R. 257.

1949

THE KING v. BUREAU

Rinfret C.J.

let you pass; you ought to have declared that you were bringing cigarettes"; and the respondent told him "We will pay you, we will give you $100."

Officer Poulin, who was present with Gosselin in the Customs Office, corroborates Gosselin word for word, except that he did not hear the offer of $100.

Immigration Inspector Caron was also in the Customs Office when the respondent appeared there on the 20th of November, 1945. He heard the questions put to the respondent and the latter's reply that he had with him a rifle and that his wife had some inconsequential things. This last answer of the respondent came when Officer Gosselin asked him if he had brought any other goods with him. Shortly afterwards the cartons of cigarettes were brought into the office. Subsequent to this the respondent told Caron that he had made "une fausse manœuvre" and that he would have to take the consequences.

It was correctly decided in the Exchequer Court (1) that the acquittal of the respondent in the Criminal Court could not be invoked by him in the present case. That is in accordance with the judgment of this Court in *La Foncière Compagnie d'Assurance de France* v. *Perras et al and Daoust* (2).

It was, therefore, necessary for the case to be tried *de novo* absolutely as if no criminal charge had been brought against the respondent.

The respondent, being in possession, without lawful excuse, of goods which were dutiable and whereon the duties lawfully payable had not been paid, had the burden of proving any lawful excuse which he might invoke; and, unless he succeeded in this proof, the goods, according to the law, "shall be seized and forfeited without power of remission." (*Customs Act,* sec. 217(1) and sec. 262(2).

In the present case the following sections of the *Customs Act* are pertinent:—

Sec. 2, s.s. (2). All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

Sec. 2, s.s. (o). "Seized and forfeited", "liable to forfeiture", or "subject to forfeiture", or any other expression which might of itself

(1) [1948] Ex. C.R. 257. (2) [1943] S.C.R. 165.

imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty or forfeiture is imposed.

Sec. 17. No goods shall be imported into Canada in any vehicle, other than a railway carriage, or on the person, between sunset and sunrise of any day, or at any time on a Sunday or a statutory holiday, except under a written permit from a collector, and under the supervision of an officer.

Sec. 18 (*a*). The person in charge of any vehicle other than a railway carriage, arriving by land at any place in Canada and containing goods, whether any duty is payable on such goods or not, shall come to the Custom-house nearest to the point at which he crossed the frontier line, or to the station of the office nearest to such point, if such station is nearer thereto than any Custom-house, before unloading or in any manner disposing of the same, and there make a report in writing to the collector or proper officer, stating the contents of each and every package and parcel of such goods and the quantities and values of the same.

Sec. 18 (2). Such person shall also then truly answer all questions respecting such goods or packages, and the vehicle, fittings, furnishings and appurtenances and animals, and the harness or tackle appertaining thereto, as the said collector or proper officer requires of him, and shall then and there make due entry of the same, in accordance with the law in that behalf.

Sec. 177. On any reference of any such matter by the Minister of the court, the court shall hear and consider such matter upon the papers and evidence referred and upon any further evidence which, under the direction of the court, the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, or the Crown, produces, and the court shall decide according to the right of the matter.

Sec. 190. (*a*) Any vehicle containing goods, other than a railway carriage, arriving by land at any place in Canada, whether any duty is payable or not;

(*c*) Any goods brought into Canada in the charge or custody of any person arriving in Canada on foot or otherwise shall be forfeited and may be seized and dealt with accordingly, if before unloading or in any manner disposing of any such vehicle or goods, the person in charge does not

(*a*) come to the Custom-house nearest to the point at which he crossed the frontier line, or to the station of the officer nearest to such point, if such station is nearer thereto than any Custom-house, and there make a report in writing to the collector or proper officer, stating the contents of each and every package and parcel of such goods and the quantities and values of the same; and

(*b*) then truly answer all such questions respecting such goods or packages, and the vehicle, fittings, furnishings and appurtenances appertaining thereto, as the said collector or proper officer requires of him; and

(*c*) then and there make due entry of the same in accordance with the law in that behalf.

1949

THE KING v. BUREAU

Rinfret C.J.

Sec. 193. (1) All vessels, with the guns, tackle, apparel and furniture thereof, and all vehicles, harness, tackle, horses and cattle made use of in the importation or unshipping or landing or removal or subsequent transportation of any goods liable to forfeiture under this Act, shall be seized and forfeited.

Sec. 197. If any goods entered or attempted to be passed through the Customs are found which do not correspond with the goods described in the invoice or entry, such goods may be seized and forfeited.

Sec. 203. If any person

(*a*) smuggles, or clandestinely introduces into Canada any goods subject to duty under the value for duty of two hundred dollars;

(*b*) makes out or passes or attempts to pass through the Custom-house, any false, forged or fraudulent invoice of any goods of whatever value; or

(*c*) in any way attempts to defraud the revenue by avoiding the payment of the duty or any part of the duty on any goods of whatever value;

such goods if found shall be seized and forfeited, or if not found but the value thereof has been ascertained, the person so offending shall forfeit the value thereof as ascertained, such forfeiture to be without power of remission in cases of offences under paragraph (*a*) of this subsection.

3. Every one who smuggles or clandestinely introduces into Canada any goods subject to duty of the value for duty of two hundred dollars or over is guilty of an indictable offence and liable on conviction, in addition to any other penalty to which he is subject for any such offence, to a penalty not exceeding one thousand dollars and not less than two hundred dollars, or to imprisonment for a term not exceeding four years and not less than one year, or to both fine and imprisonment, and such goods if found shall be seized and forfeited without power of remission, or if not found but the value thereof has been ascertained, the person so offending shall forfeit without power of remission the value thereof as ascertained.

Sec. 245. All goods shipped or unshipped, imported or exported, carried or conveyed, contrary to this Act, or to any regulation made by the Governor in Council, and all goods or vehicles, and all vessels under the value of four hundred dollars, with regard to which the requirements of this Act or any such regulation have not been complied with, shall be forfeited and may be seized.

Sec. 253. Any person required by this Act, or by any other law, to answer questions put to him by any officer, who refuses to answer or does not truly answer such questions, shall, in addition to any other penalty or punishment to which he is liable, incur a penalty of four hundred dollars.

Without hesitation, I am of opinion that not only has the respondent not succeeded in proving that he had a lawful excuse to have in his possession the goods which were dutiable and on which duties lawfully payable had not been paid, and that he was entitled to recover the goods and the automobile which were seized, but the evidence on behalf of the Crown is conclusive that the

respondent violated the *Customs Act* and that the cigarettes and the automobile were properly and legally seized and declared forfeited.

The respondent may truly be said to have violated almost all the sections of the *Act* applying in the circumstances which have been established in evidence. He was importing the cigarettes at a time when he could not do so except under a written permit from a collector and under the supervision of an officer. In the Custom-office he declared only the rifle which he had in his possession and he failed to declare the cigarettes; and, moreover, when questioned as to whether he had any other goods in his possession, he declared positively that he had none, contrary to s.s. 2 of sec. 18. It was, therefore, more than a failure to declare the cigarettes; it was an untrue answer, contrary to sec. 253, and a positive act for the purpose of defrauding the government, contrary to sec. 203 and its subsections. At that very moment the respondent had the cigarettes in his possession and concealed them and acted in a way so that the duties lawfully payable on the goods should not be paid, contrary to sec. 217 of the *Act*. Undoubtedly he was contravening sec. 245 of the *Act* in carrying and conveying the cigarettes without complying with the requirements of the *Act*. Under every one of these sections the cigarettes and automobile were liable to seizure and forfeiture.

Referring again to subsection (*o*) of section 2, the words "seized and forfeited", "liable to forfeiture" or "subject to forfeiture", or any other expression which might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty or forfeiture is imposed. Therefore, in acting as he did, the respondent made himself liable to the seizure and forfeiture of the cigarettes and the automobile, even if he had not subsequently got beyond the Customs Office in possession of these goods.

We are not concerned, therefore, with the necessity of inquiring whether what the respondent did really comes

1949

THE KING v. BUREAU

Rinfret C.J.

under the definition of "smuggle", because the contravention of the several sections to which I have referred was sufficient to warrant the seizure of the cigarettes and the automobile and their forfeiture. By virtue of subsection (*o*) of section (2)—"the forfeiture shall accrue at the time and by the commission of the offence"—there is no necessity of any subsequent act on the part of the respondent. Such subsequent act became unnecessary and the forfeiture accrued, even in the absence of such subsequent act, to wit: although he did not actually go beyond the Custom Office with the cigarettes in his possession.

Of course, I am not at all disturbed by the respondent's explanation that the reason why he made his untrue answer to the questions put to him by the Customs Officers was because some other people were playing cards in the office. It would indeed be an easy way out of a contravention of the *Customs Act* and to escape the penalties and the forfeiture for a false declaration, if it were recognized that a smuggler would be relieved of the obligation of giving true answers to questions put to him by Customs Officers merely by reason of the fact that there were "too many people in the Customs Office".

Nor, with respect, do I agree with the learned President (1) that in the Exchequer Court of Canada the case had to be decided exclusively on the reasons given by the Minister when he ordered the seizure and forfeiture of the cigarettes and automobile. Under Section 177, dealing with the reference by the Minister to the Court, the Court is directed to hear and consider such matter upon the papers and evidence referred and upon any further evidence which, under the direction of the Court, the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, or the Crown, produces, "and the court shall decide according to the right of the matter". In my opinion, that section authorizes the Exchequer Court to explore the whole subject matter and the circumstances referred to it—not to say anything of the fact that, in the present case, that is precisely what was done in the evidence submitted to that Court, to which the respondent made no objection. In the circumstances, it was fully within the power of the Exchequer Court to

(1) [1948] Ex. C.R. 257.

declare the seizure and forfeiture valid upon all the contraventions of the *Act* which were allegedly proven in the case.

For these reasons, I am clearly of opinion that the appeal should be allowed with costs both here and in the Exchequer Court, that the respondent's claim should be dismissed and that the decision of the Minister of National Revenue, declaring the cigarettes and the automobile seized and forfeited in this matter, should be maintained.

TASCHEREAU, J. (dissenting): L'intimé a été arrêté et traduit devant les tribunaux criminels à St-Joseph de Beauce, pour répondre à l'accusation suivante:

Que Gérard Bureau, ci-dessus décrit, a, à Armstrong dans le District de Beauce, le ou vers le 20 novembre 1945, sans excuse légitime, eu en sa possession des effets illégalement importés au Canada, à savoir, 159,600 cigarettes américaines, d'une valeur imposable de $2,636.20, sur lesquelles les droits légitimes exigibles n'ont pas été acquittés, contrairement à l'article 217 (3) de la *Loi des Douanes du Canada* et ses amendements.

Le procès présidé par l'honorable Juge Cannon s'est instruit devant un jury, et le prévenu a été acquitté. Le Ministère du Revenu National avait cependant, avant de loger sa plainte, saisi à Armstrong les 159,600 cigarettes américaines ainsi que la voiture automobile dans laquelle elles étaient transportées des États-Unis. L'intimé a reçu après la saisie, l'avis requis par l'article 172 de la *Loi des Douanes,* en vertu duquel il était mis en demeure de fournir dans un délai de trente jours des explications de nature à justifier sa conduite.

Le 26 janvier 1946, au moyen d'un affidavit, l'intimé a tenté d'expliquer la raison pour laquelle il avait été trouvé en possession de ces cigarettes, mais le 4 avril de la même année, le Sous-Ministre du Revenu National a avisé Bureau que le Ministre avait ordonné que "l'automobile et les cigarettes fussent confisquées". Après avoir été avisé que cette décision n'était pas acceptée, le Ministre, s'autorisant des pouvoirs qui lui sont conférés par l'article 176 de la *Loi des Douanes,* a référé la question à la Cour d'Échiquier. L'honorable Président de cette Cour (1) en est venu à la conclusion qu'il n'y avait pas eu d'importation illégale, et a ordonné que mainlevée soit donnée de la saisie de l'automobile ainsi que des cigarettes sur paiement des droits de Douane.

(1) [1948] Ex. C.R. 257.

1949

THE KING v. BUREAU

Taschereau J.

En vertu de l'article 18 de la *Loi des Douanes,* toute personne en charge d'une voiture, et dans le cas présent d'une voiture automobile, contenant des effets sur lesquels des droits sont exigibles ou non, doit avant de les décharger ou d'en disposer de quelque façon que ce soit, se rendre au Bureau de la Douane le plus rapproché de la frontière, et faire une déclaration par écrit indiquant la qualité et la valeur des marchandises.

En revenant des États-Unis, ayant dans sa voiture les 159,600 cigarettes américaines en question, l'intimé s'est arrêté à Armstrong qui était l'endroit le plus rapproché où il devait traverser la frontière, et il déclara à l'inspecteur en charge qu'il n'avait aucune marchandise dans sa voiture, sauf une carabine calibre .22, mais les autorités douanières en inspectant l'automobile se sont vite aperçus de la quantité de cigarettes qu'elle contenait. L'explication de l'intimé à l'effet qu'il n'a pas voulu déclarer devant les personnes présentes dans le bureau de l'inspecteur cette grande quantité de cigarettes, parce qu'il ne voulait pas que la chose fût connue, me paraît inadmissible et ne peut en aucune façon excuser ou justifier cette fausse déclaration qui a été faite.

Mais, malgré cette fausse déclaration, il demeure que l'intimé n'a pas importé de cigarettes au Canada, car elles ont été saisies avant l'"importation" au sens de la *Loi des Douanes.* En effet, pour qu'il y ait importation illégale, il faut que les marchandises aient traversé la frontière sans que les droits exigibles aient été payés. Or ici, tel n'est pas le cas. Aucune marchandise n'a traversé la frontière et, en conséquence, il n'y a pas eu d'importation illégale.

Il y a clairement, cependant, une tentative d'importer illégalement des cigarettes et il y a eu également, de la part de l'intimé, une déclaration fausse faite à l'inspecteur des Douanes. La tentative d'importation est une offense prévue à l'article 203 (1) (*c*) de la même loi. En vertu de l'article 190, les cigarettes et l'automobile qui les contenait, pouvaient être légalement saisies pour cette double offense.

Mais il y a, pour que la saisie soit légale, une procédure essentielle qui doit être suivie. En vertu de l'article 172, aussitôt que la saisie est faite, le Commissaire des Douanes doit notifier le propriétaire de la chose saisie, et doit lui expliquer *les motifs de cette saisie,* et lui demander de

fournir dans les trente jours de la date de l'avis toute preuve qu'il désire apporter pour obtenir mainlevée de la saisie. Or, dans le cas présent, aucun avis n'a été donné à l'intimé qui avait tenté d'importer illégalement des marchandises, ou qu'il avait fait une fausse déclaration à l'inspecteur des Douanes à Armstrong. L'avis qui lui a été signifié le 4 décembre 1946 informe l'intimé que le 20 novembre 1945, on a saisi 159,600 cigarettes et une automobile parce que "lesdites cigarettes ont été *passées en contrebande au Canada et que ladite automobile a servi à cette importation illégale*". Or, il est clairement établi qu'aucune offense de cette nature n'a été commise, et il en résulte que l'avis prescrit par l'article 172 n'a pas été légalement donné, et cet avis est une condition essentielle préalable à la validité de la saisie. Comme l'a dit l'honorable Président de la Cour d'Échiquier, (1) la Cour n'a pas juridiction pour décider une confiscation. Ce pouvoir est conféré exclusivement au Ministre, et la question que le Ministre peut référer à la Cour est la décision de confisquer qu'il a prise, et dans le cas actuel, la décision de confisquer parce qu'il y aurait eu *importation illégale*. C'est ce seul point que la Cour a à décider, et elle n'a pas à rechercher s'il y a eu d'autres offenses prévues à la *Loi des Douanes*, qui pourraient justifier la confiscation. En donnant son avis, et les motifs qui selon lui ont justifié la saisie, le Ministre limite la juridiction de la Cour. L'appel donné à la Cour d'Échiquier n'est qu'une revision de la validité de ces motifs.

L'appel doit être rejeté.

The judgment of Rand and Kellock JJ. was delivered by

KELLOCK J.:—This is an appeal from a judgment of the Exchequer Court (1), Thorson, P., dated March 9, 1948, pronounced on a reference by the Minister of National Revenue under section 176 of the *Customs Act*, R.S.C., cap. 42. The evidence consisted of the documents remitted to the Exchequer Court by the Minister, together with a transcript of the evidence taken in the Court of King's Bench, for the District of Beauce, upon the trial of the respondent for a breach of section 217(3) of the *Act*, viz., of being in possession of goods unlawfully imported on which the duties had not been paid.

(1) [1948] Ex. C.R. 257.

1949

THE KING v. BUREAU

Kellock J.

It appears that on the 19th of November, 1945, the respondent, accompanied by his wife and his brother, went by automobile to Lewiston, in the State of Maine, where he purchased, for resale in Canada, 159,600 American cigarettes. Returning on the following day, he arrived about 1.00 a.m. at the custom house at Armstrong, which is about ten miles inside the Quebec border. The respondent got out of his car, leaving the left front door open, entered the custom house and reported to the officers present that he had a ·22 rifle to declare. He was asked if he had anything else to declare and he said, as he admits, that he had not, giving as the reason for this statement, according to the transcript, that there were other people in the office and that he did not want to declare the cigarettes before them.

Poulin, one of the officers, then went outside and as he approached the automobile he saw three packages of cigarettes on the front seat. The brother and the respondent's wife were both sitting in the front seat and, on being asked why they had not entered the custom house to declare the cigarettes, they made no response. Poulin then proceeded to examine the car and found, as he says, that it was full of cigarettes. According to the respondent himself, apart from the three packages on the front seat, the remainder of the 159,600 cigarettes were in the trunk of the car and in large cartons between the front and the back seats. The cartons between the seats had a covering over them which Romeo Boudreau said was made up of his coat and that of his brother, but which Poulin says were old bags. The respondent in his evidence says as to these cartons that:

cela ne se cache pas complètement.

When the respondent went outside with Gosselin, the other officer, after Poulin had reported what he had found, Gosselin said the respondent offered him $100 to allow him to go through. The respondent denied this. The respondent, on being advised that the duty was some $2,600 said he could not pay and asked permission to take the cigarettes back to the United States. This was refused, with the result the cigarettes were seized but the respondent was allowed to continue his trip to St. Georges de Beauce,

where he lived, on his undertaking to return the next day and surrender the car. When he did not live up to this undertaking the car was seized by the Royal Canadian Mounted Police.

While the respondent suggests that in bringing in the cigarettes he relied on having been informed by one of the officers some days previously, (which is denied) that the rate of duty on goods from the United States was 35 per cent, it is significant that he had only a few cents with him on his return and was therefore not in a position to pay any duty.

Eventually, on the 4th of December, 1945, a notice was served upon the respondent under section 172 of the *Act*, the reasons for the seizure being stated to be:

que lesdites cigarettes ont été passées en contrebande au Canada et que ladite automobile a servi à cette importation illégale.

By section 203(3) it is provided that every one who "smuggles" goods into Canada is guilty of an indictable offence. The section provides for the seizure and forfeiture of the goods and section 190 provides for the seizure and forfeiture of the car.

The learned trial judge (1) held that the respondent had not smuggled the cigarettes into Canada and ordered the release of the goods and car. He refused to entertain the contention of the Crown that although the evidence of the offence of smuggling was not established, nevertheless if the evidence established an infraction of any other statutory provision, the Crown could support the seizure under the notice given. The learned trial judge also held against the contention of the respondent that because of his acquittal upon the charge under section 217(3), it was, as between the respondent and the Crown chose jugée that the cigarettes were not "unlawfully imported" and therefore the seizure could not be maintained.

Dealing with the last point first, while it might be contended with considerable force that an acquittal under section 217(3) would preclude a subsequent finding that the cigarettes had been "smuggled" into Canada within

(1) [1948] Ex. C.R. 257.

1949

THE KING v. BUREAU

Kellock J.

the meaning of section 203, I think, for reasons to be given, that the Crown is not thereby precluded from justifying the seizure under other provisions of the statute.

In my opinion the act of "smuggling", within the meaning of section 203, is not complete unless the goods are carried past the line of customs. That line, perhaps, may vary in differing circumstances. It may be that the mere crossing of the border with no intention of clearing the goods at any custom house, whether there be one at the point of crossing or not, would, in certain circumstances, be sufficient. As applied to the facts of the present case however, I think the act of smuggling had not been completed as the goods in fact were halted at the line of customs.

In *Keck* v. *United States* (1), it was held that the act of smuggling is not committed by an act done before the obligation to pay or account for the duties arises although such an act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. In the view of the majority of the court the act of smuggling was established only by the overt act of passing the goods through the line of the customs authorities without paying or securing the duties. The majority reached this view upon the meaning of smuggling at common law and in view of the fact that the legislation with which they had to deal dealt with a number of specific acts prior to the actual passing of goods through the line of customs, which acts were visited with penal consequences. In their view this indicated that the offence of smuggling was not made out by evidence of the commission of one or more of these preparatory acts. In my opinion this reasoning is applicable to the Canadian statute. It is enough to contrast clauses (*a*), (*b*) and (*c*) of subsection 1 of section 203.

In Bacon's Abridgment under the heading of "Smuggling and Customs", the following appears under letter F:

> As the offence of smuggling is not complete unless some goods, wares or merchandise are actually brought on shore or carried from the shore contrary to law, a person may be guilty of divers practices which have a direct tendency thereto, without being guilty of the offence. For the sake of preventing or putting a stop to such practices, penalties and

(1) 172 U.S. 434.

forfeitures are inflicted by divers statutes; and indeed it would be to no purpose, in a case of this kind, to provide against the end, without providing at the same time against the means of accomplishing it.

So also Blackstone defines smuggling to be "the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise" (4 Black. Com. 154). The words "importing without paying the duties" obviously imply the existence of the obligation to pay the duties at the time the offence is committed, and which duty to pay is evaded by the commission of the guilty act.

In *Grinnell* v. *The Queen* (1), Ritchie, C.J., delivering the judgment of himself and of Fournier and Taschereau JJ., said:

> The term "smuggling" has been defined to be the difference of importing prohibited articles, or defrauding the revenue by *the introduction of articles into consumption* without paying the duties chargeable thereon.
>
> It is a technical word, having a known and accepted meaning. It implies illegality, and is inconsistent with innocent intent. The idea conveyed by it is that of a *secret introduction of goods* with intent to avoid payment of duty.

I therefore think that the offence of smuggling was not committed by the respondent in the present case.

I proceed to deal therefore, with the other statutory provisions to which I have referred. In my opinion the evidence establishes a sufficient basis upon which the seizure and forfeiture are to be supported, and I think, with respect, that the learned trial judge erred in holding that the terms of the notice given by the Crown under section 172 precludes the seizure from being supported upon this footing.

Section 203(1) (*c*) is as follows:

> If any person *in any way attempts* to defraud the revenue by avoiding the payment of the duty or any part of the duty on any goods of whatever value; such goods if found shall be seized and forfeited.

By section 171 it is provided that wherever any vehicle or goods have been seized under any of the provisions of the statute or any law relating to customs, or when it is alleged that any penalty or forfeiture has been incurred, the proper officer shall forthwith report "the circumstances of the case" to the Deputy Minister of National Revenue for Customs and Excise. In the present case the report

(1) 16 S.C.R. 119 at 135.

1949

THE KING v. BUREAU

Kellock J.

states that the officer had seized the cigarettes and the car for "trying" to import and that he had charged the respondent with contravention of the customs laws as follows:

Trying to import United States cigarettes in Canada illegally.

This report was followed by the notice to the respondent, already referred to. That notice included a copy of sections 171 and 178, inclusive, of the statute. The respondent on the 26th of January, 1946, sent in an affidavit setting out the facts from his point of view. Neither in that affidavit however, nor in the letter of his solicitor, which accompanied it, nor at any subsequent time, did respondent take any objection to the notice, nor did he construe it as an allegation of "smuggling" within the meaning of section 203. On the contrary, in his affidavit he states that he had never had any intention of "defrauding the revenue".

In the report of the Deputy Minister, in pursuance of section 173, the facts are reviewed and the report concluded as follows:

There are other facts which point towards deliberate intent to smuggle these cigarettes on which duty and rates were $2,632.20, but it is submitted that the failure to declare them is sufficient and they and the automobile should be forfeited.

I recommend that the cigarettes and the automobile be forfeited.

This recommendation was accepted by the Minister and it is clear that the ground upon which the seizure was maintained was not that of "smuggling" but failure to declare with intent to smuggle.

On the reference of the matter to the Exchequer Court (1) the respondent filed a formal pleading in which he took no exception to the notice of the 4th of December, 1945. It is clear from this pleading that the respondent not only was not prejudiced in any way by the contents of the notice but that he understood the issue involved. Paragraphs 2 and 9 are sufficient to illustrate this:

2° Le réclamant n'a jamais eu l'intention de frauder le Gouvernement de Sa Majesté ni d'introduire clandestinement au Canada lesdites cigarettes et il n'a jamais fait servir son automobile à cette fin;

9° En conséquence, il est avéré que le réclamant n'a pas violé la loi dans cette affaire et il prétend qu'on a saisi sur lui lesdites cigarettes et son automobile, contrairement à la loi;

In his defence the Minister denied both of these paragraphs and alleged, *inter alia,* the following:

8° Le réclamant a tenté d'introduire clandestinement des cigarettes au Canada sans payer de droits de douane, et il a ainsi tenté de frauder le

(1) [1948] Ex. C.R. 257.

revenu, contrairement à l'article 190 de la même loi, il a omis de faire, au bureau des douanes le plus rapproché de l'endroit où il avait traversé la frontière, une déclaration par écrit au percepteur des douanes, déclaration énonçant le contenu de toutes les marchandises qu'il importait;

15° Le réclamant n'a jamais eu l'intention de payer les droits sur les 159,600 cigarettes saisies. Lors de son retour au Canada, au moment de la saisie, il ne lui restait, de même qu'à sa femme et à son frère, qu'une somme totale liquide d'au plus $179.00;

16° Appelé à l'intérieur du bureau des douanes à faire la déclaration des marchandises qu'il importait, le réclamant a omis à ce moment de déclarer ses cigarettes, et il a fait une fausse déclaration qui rendait toute marchandise non déclarée, passible de saisie et de confiscation en vertu de l'article 251 de la Loi des Douanes du Canada;

17° Le véhicule du réclamant ayant servi à importer des effets frappés de confiscation, devait aussi être saisi et confisqué conformément à l'article 193 de la Loi des Douanes;

I think it is plain that the parties thoroughly understood that the seizure of both the goods and the vehicle was being supported by the Crown upon an alleged attempt to defraud the revenue and that the completed act of "smuggling" within the meaning of section 203(3) was not the issue.

In my opinion the proceedings before the Exchequer Court under the provisions of section 177 were not limited by the terms of the notice given under section 172. By section 171 the proper officer is required to report to the Deputy Minister "the circumstances of the case". He did so and in that report the charge was not "smuggling" but "trying to import illegally". Again, by section 173, it is the "circumstances of the case" which the Deputy Minister is required to consider and report upon to the Minister and upon which the Minister gives his decision under section 174. Further, the decision of the court under section 177 is not an appeal from the decision of the Minister nor limited in evidence to that which was before the Minister. New evidence may be permitted and the court is called upon to decide "according to the right of the matter". In my view, therefore, the contention of the Crown is correct, that, if the evidence adduced before the Exchequer Court established an attempt to defraud the revenue within the meaning of section 203(*c*), or a breach of section 18(2), if that be not included in the former subsection, the seizure would be well founded.

1949

THE KING v. BUREAU

Kellock J.

There remains therefore, for consideration the question as to whether or not the respondent has met the onus resting upon him under section 262 of the statute and has established that he was not guilty of a breach of the statute apart from section 217(3) and section 203(3). In my opinion it should be found that he has not. As already noted, the only evidence before the Exchequer Court (1) in addition to that which was before the Minister, was a transcript of the evidence in the Court of King's Bench. The explanation of the respondent for his false statement that he had nothing to declare beyond the rifle, that he did not want to make his declaration in the custom house because there were some strangers there, and that he intended to make full disclosure when he got outside, is not to be accepted. It is perhaps conceivable that, had the respondent himself given evidence in the court below, he might have impressed the learned trial judge with his honesty of purpose, but evidently his counsel did not think that the transcript of his evidence would be added to by respondent's presence in the witness box.

The whole circumstances are pregnant with suspicion. The cigarettes in the interior of the car were covered, or substantially so, with coats, or, as the officers say, old bags. The respondent had no money with which to pay the duty at the rate of 35 per cent or at any other rate. The conclusion which I draw from all the circumstances is that the respondent was presuming on being known to one of the officers, upon the lateness of the hour and the fact that it was raining, in the hope that by presenting himself at the custom house and declaring the rifle, and giving the assurance he had nothing else, he would be allowed to pass. Whether or not this be a correct appreciation of his intention, I think the court, in the absence at least of an opportunity of judging of the respondent's honesty from his presence in the witness box, should not be expected to say that the onus provided by section 262 is met in circumstances such as are here present. I would therefore allow the appeal with costs here and below and confirm the seizure.

ESTEY J.:—I agree it is not here established that the cigarettes were smuggled into Canada. The evidence, however, justifies the conclusion that the appellant at 1.00 a.m.

(1) [1948] Ex. C.R. 257.

on November 20, 1945, at the Customs House in Armstrong, Quebec, attempted to smuggle the cigarettes into Canada and in the course of doing so failed to make the report in writing to the collector or proper officer at the Customs House of the quantity and value of the cigarettes as required by sec. 190 of the *Customs Act*, R.S.C. 1927, c. 42, and amendments thereto, and at the same time attempted to defraud the revenue by endeavouring to avoid payment of the duty within the meaning of sec. 203 of the *Customs Act*. These issues were raised before the learned President (1) and if either was established the cigarettes and the automobile were subject to seizure and forfeiture under sec. 143, 147 and 203 of the *Customs Act*.

The cigarettes and the automobile were seized by the customs officers at Armstrong on the morning in question.

Sec. 172 provides that the Deputy Minister of Revenue for Customs and Excise may notify the respondent "of the reasons for the seizure" and advise him that he may within 30 days from the date of the notice tender such evidence in the matter as he may desire for the purpose of contesting the validity of the seizure and possible forfeiture. The notice in this case was dated December 4, 1945, and gave as a reason for the seizure of the cigarettes and automobile:

...que lesdites cigarettes ont été passées en contrebande au Canada et que ladite automobile a servi à cette importation illégale.

The learned President was of the view that this language restricted the issue to the act of smuggling and that the owner or claimant "must answer only those reasons," or as he further stated: "The only seizure regarding which the Minister may give his decision under section 174 is that of which the reasons have been made known according to section 172. There is no other seizure before him," and that "the Court has no power to do what is not permitted to the Minister." He then stated:

Since the evidence shows that the claimant has not smuggled the cigarettes into Canada and has not used his automobile for such importation, it follows that the reasons for the seizure of the cigarettes and the automobile are unfounded and the decision respecting the forfeiture, being based on the said seizure, is ill-founded and must be quashed.

(1) [1948] Ex. C.R. 257.

1949

THE KING v. BUREAU

Estey J.

Upon receipt of the notice of December 4, 1945, the respondent consulted his solicitor who prepared an affidavit which he forwarded to the Deputy Minister with the request that the automobile be released.

The Deputy Minister made further inquiries and under sec. 173 submitted his report to the Minister. The Minister under sec. 174, and under date of July 3, 1946, directed "that the cigarettes and the automobile be forfeited."

174. The Minister may thereupon either give his decision in the matter respecting the seizure, detention, penalty or forfeiture, and the terms, if any, upon which the thing seized or detained may be released or the penalty or forfeiture remitted, or may refer the same to the court for decision.

The respondent was immediately notified of the Minister's decision and, after further correspondence, the Minister under date of July 3, 1947, referred the matter to the Exchequer Court under sec. 176.

176. If the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, within thirty days after being notified of the Minister's decision, gives him notice in writing that such decision will not be accepted, the Minister may refer the matter to the court.

The terms of the Minister's reference in this case are as follows:

By virtue of the powers vested in me in that behalf, under Section 176 of the *Customs Act*, I hereby refer to the Exchequer Court of Canada for adjudication the claim of Gérard Bureau against the decision of the Minister of National Revenue, given on July 2, 1946, in the matter of the said Customs Seizure No. 20415/2164, the said decision being to the effect "that the cigarettes and the automobile be forfeited."

The directions to the Exchequer Court upon such a reference are contained in sec. 177.

177. On any reference of any such matter by the Minister to the court, the court shall hear and consider such matter upon the papers and evidence referred and upon any further evidence which, under the direction of the court, the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, or the Crown, produces, and the court shall decide according to the right of the matter.

The foregoing sections 172 to 174 provide for the filing of material by the owner and consideration by the Deputy Minister who thereafter makes a report to the Minister upon which the latter either makes his decision or he may "refer the same to the court for decision." If, therefore, in the opinion of the Minister the matter, in the first instance, is of such importance that it should be made the subject

of a formal trial, where evidence is heard and the issues more thoroughly examined than is possible under the informal procedure contemplated up to the time the report is made to him, he may then direct under sec. 174 that it be referred to the Exchequer Court. It is significant that the language providing for this reference in sec. 174 is in effect identical with that of sec. 176 and when read with sec. 177 it is clear that the procedure is the same in the Exchequer Court whether the Minister has or has not made a decision.

It is therefore clear that these sections do not direct that the reference shall be merely a review of the Minister's reasons nor do they contemplate that if he has based his decision upon a particular section or provision in the statute that it must be either affirmed, varied or reversed upon that same basis. Parliament here provides for a disposition of the matter referred to the Court upon its merits. It contemplates in the Exchequer Court a trial *de novo* "upon any further evidence which, under the direction of the court" (sec. 177) either party may produce and in this regard the concluding words are of particular significance, "and the court shall decide according to the right of the matter," (sec. 177).

The parties hereto have proceeded upon the basis of a trial *de novo* and filed pleadings in the Exchequer Court (1). The defence filed for the Attorney-General of Canada raised not only the issue of smuggling but also those of making a false declaration and of attempting to defraud the revenue. No exception was taken to these pleadings nor to any of the issues raised thereby and upon these issues the evidence was tendered before the learned President. It is, with great respect, the issues raised by the parties through their pleadings and not the terms of the notice under sec. 172 that determine the issues before the Exchequer Court. At most the intent and purpose of the notice under sec. 172, prepared by those charged with the administration of the *Act*, is to assist the owner or claimant in what may be the initial stages of dealing with the matter through the informal procedure before the Minister.

(1) [1948] Ex. C.R. 257.

1949

THE KING v. BUREAU

Estey J.

The accused had been prosecuted for an offence arising out of his conduct at the customs on the morning of November 20, 1945, and found not guilty in October 1946, some time after the Minister made his decision. The parties hereto agreed that the evidence taken at the criminal trial should be tendered and made a part of the record in the Exchequer Court. It was this evidence and the material filed before the Minister that constituted the record before the learned President. It was in every respect a trial *de novo* upon the issues determined by the pleadings.

The evidence before the learned President was a matter of record. No witnesses gave oral testimony and therefore the appellate Court is in as good a position to draw inferences and conclusions from this evidence as the judge presiding at the trial. Upon this evidence there is no question but that the respondent failed to make the report in writing as required by sec. 190 and therefore the cigarettes and automobile were properly seized and subject to forfeiture.

The appeal should be allowed and an order directed that the cigarettes and the automobile be forfeited to the Crown.

Appeal allowed with costs.

Solicitors for the appellant: *F. P. Varcoe and P. Fontaine.*

1949

*Mar. 29, 30
*Apr. 12

JOHN NYKOLYN.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Assault occasioning bodily harm—Accused owner of premises on which acts occurred—As hotel keeper he retained two suitcases for rent due by former roomer—Friends tried to obtain them without paying—Whether injured person a trespasser with intent to commit a wrong or an invitee—Right of accused to resist—Degree of force permisisble to repel assault—Hotel Keepers Act, R.S.M. 1940, c. 98—Criminal Code ss. 57, 290.

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

The accused, being the proprietor of a rooming house, retained two suitcases belonging to a former woman roomer as security for unpaid rent. Four of her friends decided to obtain them without paying the rent. On arriving at the house one remained outside in a taxi and the three others went into the room occupied by the accused and his wife and when their purpose was known a fight started and the accused hit one of them with a hammer, fracturing his skull. The accused was convicted in police court of assault occasioning bodily harm, the magistrate holding that the men were not trespassers. The Court of Appeal being equally divided, his appeal was dismissed.

Held: The failure of the trial judge to appreciate that the men were wrongdoers and under the circumstances trespassers, as well as his failure to direct himself as to the effect of sec. 57 of the *Criminal Code* under which the accused had the right to resist provided he did not use more force than was necessary, amounted to misdirection and therefore a new trial ordered.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) dismissing on an equal division, Richards and Coyne J.A. dissenting, the appeal of the appellant from his conviction, before Macdonell J., on a charge of assault occasioning bodily harm.

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

W. A. Molloy for the appellant.

C. W. Tupper, K.C. for the respondent.

The judgment of the court was delivered by

ESTEY J.:—The appellant, John Nykolyn, was convicted of assault occasioning actual bodily harm upon the person of Peter Farr at Winnipeg on July 29, 1947. His conviction was affirmed by an equal division in the Court of Appeal for Manitoba (1), Mr. Justice Richards and Mr. Justice Coyne dissenting. Several grounds of dissent are set out in the formal judgment. It seems sufficient to deal with the following only:

(1) The learned magistrate failed to direct himself that Farr, Pyke and Gendre were, as they entered upon the premises, trespassers engaged in the purpose of carrying out a conspiracy to commit a criminal offence.

(1) 55 Man. R. 323.

1949

NYKOLYN v. THE KING

Estey J.

(2) That the invitation as found by the learned magistrate was given under duress or misapprehension of the purpose of the men, and therefore not an invitation in law.

(3) That the accused had a right in law to resist the taking of the property from his premises.

The learned magistrate accepted the evidence of Farr, Pyke and Gendre, which may be summarized: The appellant conducted a rooming house. A few days before July 29, 1946, a young woman left appellant's rooming house but being unable to pay her rent the appellant retained her two suitcases, under the provisions of *The Hotel Keepers Act*, R.S.M. 1940, ch. 98. No question is raised as to the right of the appellant to retain these suitcases.

Farr was present and took part in the conversation between the young woman and appellant when the suitcases were retained. In fact he said that one of the suitcases was his, it having been loaned to her. The rent has neither been tendered nor paid. On July 29th Farr, Pyke, Gendre and Seymour were in the beer parlour at the Woodbine Hotel in Winnipeg where they had a few glasses of beer. There Farr told the other three the story of the retention of the suitcases and they decided to go and get them. They all went, as Pyke said "We expected there might be some trouble," and as Farr said that they might "over-awe" the appellant "with superior strength." They proceeded shortly after five o'clock in the afternoon in a taxi. At the rooming house Seymour remained in the taxi with the driver while Farr, Pyke and Gendre went into the rooming house. Appellant lived on the ground floor at the rear of the hall. Farr said that the three of them went to the door and when they knocked it was opened by appellant. Farr asked for the suitcases and the appellant said "Just a minute" and went out, while Mrs. Nykolyn said "Take them." Farr and Pyke walked in, seeing the grips under a table in the room picked them up, when Mrs. Nykolyn began yelling and striking Pyke with a flashlight. Pyke apparently paid no attention to her conduct and carried one of the suitcases out to the taxi.

The evidence is not entirely clear as to just what happened but Gendre, who did not go into the room but remained in the hall, said that while Mrs. Nykolyn was yelling and striking Pyke with the flashlight, Nykolyn came

out into the hall apparently following Farr who had the other suitcase. Gendre held the appellant, not because he entertained any fear of Nykolyn assaulting him, but because as he said, "there was Peter Farr and Mr. Nykolyn arguing about suitcases, and I was going to quiet them down." He then said that after a couple of minutes "I let Mr. Nykolyn go and he said 'Just a minute' and he went behind the door and he picked up a hammer . . ." Gendre said he saw Nykolyn hit Farr with the hammer and then he (Gendre) struck Nykolyn on the jaw with his fist as a result of which Nykolyn fell into his own room and he, Gendre, helped Farr out of the house.

Seymour said he remained in the taxi and "the taxi driver and I heard the screaming and we thought there was a murder on." The taxi driver said "I could hear the noise, but I could not distinguish what it was."

The magistrate accepted the evidence of the three men but failed to direct his attention to the admitted fact that they had gone to appellant's home, as arranged in the beer parlour, to take from him the two suitcases. Farr knew why the suitcases were held because he was present when the appellant had asserted his right to and did retain them. Appellant, in retaining them, was exercising his right under the law of Manitoba and thereby had a property interest in and a right of possession to these suitcases. If, as they deposed, these men went there under the terms of a conspiracy or with a common intent to commit the offence of theft, they were wrongdoers as they entered upon the premises and were, under the circumstances, trespassers. The learned magistrate made no reference in his judgment to this evidence and misdirected himself in law in stating "When they were on the property they weren't trespassing—they rang the bell."

The magistrate also found that "they were told they could get the grips—there was no trespassing there." His finding that they were told to get the grips is based on the statement of Mrs. Nykolyn, who, immediately the door was opened, made some such remark as "Take them." Some question was raised as to the authority of Mrs. Nykolyn to grant such permission on behalf of her husband, which, under the circumstances, I do not think it is neces-

1949

NYKOLYN v. THE KING

Estey J.

sary to consider. Why the invitation was given is not clear. It seems to have been given before any trouble started when she may have been under the impression that the parties had come for the suitcases and would pay the rent and take them lawfully. Certainly the moment she found they were taking them without doing so she began actively to resist. The fact that Mrs. Nykolyn may have been momentarily deceived in thinking the parties were upon a lawful errand and under that misapprehension gave the invitation as found, would not alter the fact that these men were throughout proceeding in the execution of their unlawful purpose and were trespassers. The learned magistrate did not direct his attention to this phase of the case. Perhaps it should be mentioned that apart from all questions as to whether the invitation was given under fear or apprehension of consequences or under the belief that the parties intended to pay the rent for which the suitcases were held, which does not appear to have been considered, there is the important question whether or not by her conduct she had withdrawn any permission or licence she had given that would permit these parties to take the suitcases away. The learned magistrate did not direct his attention to this important issue and his failure to do so would seem, under the circumstances, to constitute a misdirection.

The appellant was in his own home in peaceful possession of the suitcases in question. Sec. 57 of the *Criminal Code* provides:

> 57. Every one who is in peaceable possession of any movable property or thing under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending such possession, even against a person entitled by law to the possession of such property or thing, if he uses no more force than is necessary.

The appellant was in peaceful possession of the suitcases under a claim of right and therefore had, under the foregoing section, a right to resist these men in their endeavour to take the suitcasess provided or so long as he did not use more force than was necessary. The record here would indicate, particularly if the permission, found by the learned magistrate to have been given by Mrs. Nykolyn, was withdrawn or otherwise ineffective in law, that the issue under sec. 57 would be a very important part of this case

1949

NYKOLYN v. THE KING

Estey J.

and to which the learned magistrate did not direct his attention. Whether one in exercising his right under the foregoing section uses more force than is necessary is a question of fact which, under the particular circumstances of this case, should be determined at a trial where the evidence is directed to this issue and the question of credibility of the witnesses determined by the presiding magistrate who has an opportunity to observe them.

In my opinion the appeal should be allowed and a new trial directed.

Appeal allowed; new trial directed.

Solicitors for the appellant: *McMurray, Greschuk, Walsh, Micay, Molloy and McDonald.*

Solicitor for the respondent: *J. O. McLenaghen.*

DONALD FRANCIS MINAKER (PLAINTIFF) ..... APPELLANT;

AND

LENA VIOLET MINAKER (DEFENDANT) ..... RESPONDENT.

1948

*Nov. 30

1949

*Jan. 7

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Legal proceedings—Action by husband to recover land from wife, founded in tort, and barred by the Married Women's Property Act, R.S.O. 1939, c. 209, s. 7.

Following the grant of a decree *nisi* at the suit of a wife, the husband brought action against her, claiming possession and mesne profits of the house and premises occupied by the wife and their infant son, which the husband had left on ceasing to cohabit with his wife. He further claimed an order for the delivery to him of the furniture and chattels on the premises, and damages for injuries done the premises, furniture and chattels. The wife by counterclaim sought a declaration that she was the owner of all the property, or in the alternative, that all the property was held by the husband in trust for her either wholly or to the extent of a one-half interest.

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

1949

MINAKER v. MINAKER

The Court, treating the matter as if proceedings had been taken under s. 12 of the *Married Women's Property Act*, R.S.O., 1937, c. 209.

Held: that the real property was that of the husband and gave him judgment for possession, but held further that even under that section, the husband was not entitled to mesne profits, as that is a claim for a tort barred by s. 7.

Per Rand and Kellock JJ.:—The proceeding for wrongful detention of the possession of land is the modern equivalent of the old action for ejectment, and therefore such an action in tort as is barred by s. 7 of the Act.

The majority of the Court expressed no opinion on this point.

The trial judge having decided that the wife was entitled to one half the furniture, and there being no appeal from that decision, it was affirmed.

APPEAL from an Order of the Court of Appeal for Ontario, dismissing an appeal from the judgment of Gale, J., after the trial of the action without a jury, wherein the learned trial judge dismissed the action of the appellant for possession of the premises, and for an accounting, and for delivery up of certain chattels and funds, and found that the defendant was entitled to a one-half interest in the house and premises, and in the goods and furniture upon the premises.

R. F. Wilson, K.C. for the appellant.

A. W. S. Greer K.C. and C. L. Dubin for the respondent.

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

KERWIN J.:—The parties to this dispute had been husband and wife but, at the suit of the wife, a decree *nisi* was granted by the Supreme Court of Ontario on November 1, 1946, dissolving the marriage, which decree was not made absolute until May 27, 1948. In the meantime, and immediately after the decree *nisi*, the husband demanded possession of the house and premises at 267 College Street, Kingston, in which the parties and their young son had lived and issued the writ in this action on July 4, 1946, claiming possession and mesne profits, an order for the delivery to him of the furniture on the premises and his personal belongings and chattels, and damages for injuries done the premises and furniture and chattels. This was

done instead of proceeding by way of motion as provided by section 12 of *The Married Women's Property Act*, R.S.O. 1937, chapter 209. The wife counter-claimed that she was the owner of the College Street premises, or in the alternative that the husband held them as trustee for her, or in the further alternative that the two were jointly entitled. The trial judge dismissed the action and declared that each party was entitled to a one-half interest in the College Street property and in the goods and furniture. The husband was ordered to pay the costs of the action and there were no costs of the counter-claim. On appeal this order was affirmed.

The litigation has already put the parties to considerable expense and we deem it advisable to treat the matter as if proceedings under section 12 of the *Married Women's Property Act* had been taken. So dealing with the matter, it is impossible to reject the husband's claim that the property is his. We can find no evidence to substantiate the finding of the trial judge that there was an arrangement between the parties, well understood if not expressed, that they should mutually share in what they accumulated. No moneys earned by the wife in any way were advanced to the husband to purchase the earlier residences of the married couple, which, from time to time, were sold until the College Street property was purchased, nor were such moneys loaned by her to the husband. The law is quite clear that under these circumstances the land is the husband's. *Rioux* v. *Rioux* (1), is an example although what was dealt with there was money in a bank account. But while the husband is entitled to judgment for possession, he is not entitled to mesne profits. That is a claim for a tort, which is prohibited by the concluding part of section 7 of the *Married Women's Property Act*.

The furniture stands in a different position. At the trial, the entire record in the divorce proceedings was put in as evidence by the plaintiff and it appears in that record that the wife had testified that the furniture belonged to her. In addition, her mother testified at the trial of this action that the husband had told her that when he sold certain furniture belonging to the wife, there was enough money

(1) (1922) 53 O.L.R. 152.

1949

MINAKER v. MINAKER

Kerwin J.

to purchase the new. The trial judge decided that the wife was entitled to one-half of the furniture and as there was no cross-appeal from that decision, it must stand.

While a question was raised as to the right of a husband to secure an order or judgment for possession of the matrimonial domicile, the point as to whether an action lies at the suit of a husband to recover judgment for possession *simpliciter* of real property was not argued and I express no opinion upon the subject since, in my view, it is unnecessary to do so. I would therefore set aside the judgments below and direct that there should be judgment for possession by the husband of the College Street property. Clause 3 of the formal judgment at the trial as to the goods and furniture stands with a variation that if the parties cannot agree as to their division, the matter will be referred to the local Master of the Supreme Court of Ontario at Kingston. The respondent is entitled to one-half of her costs of the counter-claim in the trial Court and one-half of her costs in the Court of Appeal and in this Court but no further order as to costs is made.

RAND J.:—This action was brought by a husband against his wife to recover land, including a house in which the wife and child were at the time living, as well as furniture and other chattels. In December, 1945, the husband had withdrawn from cohabitation and some time later the wife instituted proceedings for divorce. In that action an order *nisi* after trial was directed on June 5, 1946, by which provision was made for alimony; but as the decree is not before us it is impossible to say just what its terms are. On July 4, 1946 the writ in this action was issued and the order *nisi* was made absolute after the appeal to this Court had been brought.

In addition to possession of the land, the plaintiff claimed an accounting of rents and profits, the delivery of the chattels, and damages to both the real and personal property. The wife by counterclaim sought a declaration that all the property was held by the husband in trust for her either wholly or to the extent of a one-half interest.

The proceeding is clearly one in the nature of ejectment with mesne profits, and detinue, with damages for trespass. By section 7 of the *Married Women's Property Act* of Ontario all actions of tort between husband and wife,

except those necessary for the protection and security of the wife's separate property, are barred, and the initial question is whether or not the case is within that prohibition. That it is would seem to be reasonably clear. It alleges a wrongful detention of the possession of both land and chattels and mesne profits are damages in trespass. In *Salmond's Law of Torts* 5th Ed., p. 208, in the *Digest of English Civil Law* under the editorship of Edward Jenks 3rd Ed., p. 365 and in *Pollock on Torts* 14th Ed., at pp. 7, 271-7, such a claim is treated as in tort. Ejectment was a special form of trespass based upon a wrongful dispossession, and in a note on page 127, Salmond says:—

> The plaintiff in such cases recovers not only the land itself, but also damages for the loss suffered by him during the period of his dispossession (mesne profits), and it is by virtue of this right to damages that the wrongful dispossession of land is correctly classed as a tort.

Originally the relief in trespass *de ejectione firmae* was damages only. Gradually there was added to it the recovery of the land by the dispossessed tenant; and ultimately it became the mode by which conflicting claims to title, as well as possession, were adjudicated. Gradually also the claim for substantial damages or mesne profits beyond the nominal damages in the main action came to be severed from the ejectment; and on judgment for the latter, the courts treated the unlawful possession as a continuing trespass for which an action lay. Under the *Judicature Act* an action for recovery of land on any footing can include a claim for those profits.

A slight elaboration of the elements of the action of ejectment seems to me to put the question beyond doubt. As this proceeding finally developed, from considerations leading to the recovery of the land by a termor as well as the applicability of the action to a freeholder, it was grounded in a fictitious expulsion of a fictitious lessee and it was this lessee who brought the action against the fictitious trespasser. The actual occupant was not allowed to defend unless he admitted the lease and the ouster, and having done that he was allowed to set up any title under which he might claim. But trespass was the foundation and the judgment established a trespass from the time of the wrongful detention of possession on which the claim for damages for mesne profits was based.

1949

MINAKER v. MINAKER

Rand J.

The essential fact is that the action is conceived to be grounded on wrongful detention as a delict or tort; and the question is whether the text of section 7, considering the purpose of the statute as affecting primarily property of the wife and incidentally the relation of husband and wife, is not to be construed as being intended to protect the conjugal association to the extent of maintaining the ban on resort to the ordinary processes of litigation where that arises upon a fault or a wrong. At common law no action lay between husband and wife both because of a formal obstacle, i.e. that the wife could be impleaded only with the husband; and one of substance, that they were held to be one person between whom none of the ordinary rights or claims in law could arise. The Act contains no express provision enabling the husband to bring any action against the wife; that right, uniformly accepted to exist, arises only as an inference from the statute; and in defining the limitations of an exception from that inference, we should, I think, do so in the light of the considerations mentioned.

Section 12 of the Act, under which the judge to whom the application is made, may make such order "as he sees fit", seems designed to meet just such a controversy over possession, and this proceeding can be converted into an application under that section: *Bashall* v. *Bashall* (1), cited in *Lush on Husband and Wife,* 4th Ed., p. 601, in which it was held that the counterclaim for detinue by the husband was within the same ban of the statute.

The judgment declared the wife to be entitled to a one-half interest in both the land and personal property, and it was affirmed unanimously on appeal. The facts tend, no doubt, to excite sympathy for the wife and child, but we must resist the danger of allowing it to outrun rules too well and too long established to be disregarded. Viewing the evidence in the light most favourable to the wife, I can find nothing to warrant the holding either that there was a contract between them by which any interest in the property was to be hers, or that any money belonging to her can be said to be represented by the land. In the early period of their married life the wife accepted the difficulties of the situation courageously and for three or four years worked in outside employment at wages; but they went

(1) The Times, 21st Nov. 1894.

into the common fund used to carry the family life from day to day. It is, I think, impossible to trace any part of the money so earned into the purchase of the land or into the two properties whose purchase and sale preceded it. For those reasons the judgment in this respect cannot stand.

The personal property, however, is in a different position. Admittedly a substantial portion of the original furniture was the wife's, much of which came from her parents' home. A great deal of it was sold and new bought and there is evidence of an admission by the husband that most of what is now in the house was paid for with the proceeds of that sold. The judgment in this respect, therefore, should be affirmed.

Although it is agreed by all members of the Court that the claim for mesne profits is a claim in tort, it is not unanimous that the claim for possession is clearly so. A number of questions are raised by that distinction, among them, the possibility of treating these claims as severable in the sense required; but in the circumstances of the case and notwithstanding my own view, I see no objection to assuming, without deciding, that the action, limited to the claim for possession, lies; in the circumstances, this basis of disposal does not change the result to which I would come by treating the proceedings as brought under section 12 of the statute.

The appeal must therefore be allowed as to the land and the appellant will be entitled to an order for possession. If the parties cannot agree upon a division of the personal property there should be a reference to the Master for the necessary action. The respondent will be entitled to one-half the costs of the counterclaim in the trial court and one-half of her costs in both the Court of Appeal and this Court; there will be no other costs.

KELLOCK J.:—On the hearing of this appeal the question was raised from the bench as to the appellant's right to bring action against the respondent for possession of the matrimonial home and furniture, as well as for mesne profits, even although the action had been commenced after the decree *nisi* in divorce proceedings brought by the respondent against the appellant but before decree absolute.

1949

MINAKER v. MINAKER

Kellock J.

The statement of claim alleges ownership in the appellant and (*a*) as to the real property claims possession, an accounting of rents and profits during the time the respondent "unlawfully" retained possession and damages to the premises; and (*b*) as to the chattels, an order for delivery and damages for injury thereto. There is no evidence of any injury to land or goods.

Under the provisions of section 7 of the *Married Women's Property Act,* R.S.O., 1937, cap. 209, a married woman is given in her own name against her husband, the same remedies for the protection and security of her separate property as if such property belonged to her as a *feme sole,* but, "except as aforesaid no husband or wife shall be entitled to sue the other for a tort". By section 12, subsection 1, it is provided that, in any question between husband and wife as to the title to or possession of property, either party may apply in a summary way and the judge "may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit or may direct * * * any inquiry or issue touching the matters in question to be made or tried in such manner as he shall think fit".

The present action is, with respect to the real property, an action to exclude the respondent from the matrimonial home on the ground that she "wrongfully" retains possession, i.e., that she is a trespasser.

In order to determine whether or not this action is one barred by the provisions of section 7 it is necessary to have regard to the old forms of action. As stated by Salmond in the 10th Edition, page 3:

> * * * all satisfactory definition and classification of the different species of such injuries (civil injuries) must be based on the old procedural distinctions between forms of action, and must conform to those distinctions except in so far as they no longer have any relation to the substantive law of the present day.

What the appellant seeks in this action is that which would formerly have been sought in the action for ejectment and for mesne profits.

In *Adams on Ejectment* the author says at page 334:

> * * * the action for use and occupation is founded on *contract,* the action of ejectment upon *wrong,* and they are therefore wholly inconsistent with each other when applied to the same period of time; since in the one action the plaintiff treats the defendant as a *tenant,* and in the other as a *trespasser.*

And at page 333:

On the first introduction of the action of ejectment, and whilst the ancient practice prevailed, the measure of the damages were the profits of the land accruing during the *tortious* holding of the defendant; but when the proceedings became fictitious, and the plaintiff nominal, the damages assessed became nominal also; and no provisions have since been made by the Courts, either by engrafting additional conditions upon the consent rule, or by the invention of new fictions, to enable the jury in the action of ejectment to inquire into the actual damages, and include in their verdict the real injury sustained by the wrongful holding. The party has not, however, been left without redress . . . The Courts have sanctioned an application of the common action of trespass *vi et armis* to the purposes of this remedy. It is generally termed *an action for mesne profits* * * *

In *Bramwell* v. *Bramwell* (1), Goddard L.J., as he then was, said at 373:

An action for the recovery of land is the modern equivalent of the old action of ejectment. That action was a personal action and could only sound in damages. Then in favour of this class of remedy the courts determined that the plaintiff was entitled to recover as collateral and additional relief possession of the land itself (see *Stephen on Pleading*, 3rd ed. p. 12), but it was in fact always a species of the action of trespass. It is not necessary to decide it in this case, but I have the greatest doubt whether a husband can bring an action for the recovery of land against his wife, alleging that she is wrongly in occupation of it, because, if she is wrongly in occupation of the land and he has a right to the possession of it, it seems to me she is a trespasser and therefore he is suing her for a tort.

Salmond at 214 says:

The wrong of dispossession consists in the act of depriving any person entitled thereto of the possession of land. This deprivation of possession may happen in two ways—namely, either by wrongfully *taking* possession of the land, or by wrongfully *detaining* the possession of it after the expiration of a lawful right of possession. In the first case, the wrong of dispossession is also a trespass; in the latter it is not. But so far as regards the essential nature of the wrong and the remedies available for it, there is no difference between one form of dispossession and the other.

Any person wrongfully dispossessed of land may sue for the specific restitution of it in an action of ejectment.

And at page 217:

The action for mesne profits was a particular form of the action of trespass *quare clausum fregit*; * * * Whether the dispossession had or had not been effected by way of trespass, the claim for mesne profits was always in form a claim for damages for a continuing trespass upon the land.

In my opinion the claim with respect to the real property is an action in tort and barred by the provisions of section 7. The sole remedy of the appellant therefore was under that

(1) [1942] 1 K.B. 370.

1949

MINAKER v. MINAKER

Kellock J.

section, and in my opinion the course of the decisions uniformly recognizes this situation; *Re M. and M.* (1); *Gardner* v. *Gardner* (2); *D. and D.* (3); Under the section however, there is no jurisdiction to award mesne profits; *Larner* v. *Larner* (4).

Similarly, with respect to the chattels, "if a wife wrongfully converts to her own use the goods of her husband the only remedy of the husband, so far as he has any remedy at all, is to apply to the court under the special provisions of the *Married Women's Property Act*"; per McCardie J. in *Gottliffe* v. *Edelston* (5) at 382. The decision of the Court of Appeal in *Curtis* v. *Wilson* (6), overruling *Gottliffe* v. *Edelston* does not affect the correctness of the view of McCardie J. in the excerpt quoted.

In his lectures on *Forms of Action of Common Law* Maitland says at page 76:

> We have no longer to classify the forms for they are gone; but I think we still are obliged to say that every action for a chattel is founded on tort if it be not founded on contract * * *

The action having been wrongly constituted, it might well be dismissed with costs on that ground. The appellant was entitled to come before the court only by way of originating notice under section 12. In *Bashall* v. *Bashall* (7), referred to in the 4th Ed. of *Lush on Husband and Wife,* at page 601, in which Collins J. held that a husband could not sue his wife in detinue, the action was dealt with as though it had been commenced under the corresponding section of the English legislation. I think that may be done in the present instance, but the fact that the appellant had no right of action by writ affects the question of costs.

On the merits the evidence, in my opinion, does not establish any title or interest in the respondent with respect to the real property but there is ample evidence to support the finding of the learned trial judge with respect to the chattels and the appeal as to the chattels should be dismissed with the variation that if the parties cannot agree as to their division there should be a reference to the Master.

(1) [1935] O.R. 329.
(2) [1937] O.W.N. 500.
(3) [1942] O.W.N. 500.
(4) [1905] 2 K.B. 539.
(5) [1930] 2 K.B. 378.
(6) [1948] 2 All E.R. 573.
(7) The Times, Nov. 21, 1894.

1949

MINAKER v. MINAKER

Kellock J.

Ordinarily where proceedings of this nature are initiated while the parties are still husband and wife, the court will not make an order for possession of the matrimonial home in favour of the husband so long as the relationship subsists unless other provision in substitution is made for the wife; *Hill* v. *Hill* (1), *D. and D., supra.* It has been held however, in *Hichens* v. *Hichens* (2), that the court may conclude a proceeding involving questions of title, which was commenced subsequent to the decree *nisi,* notwithstanding the decree absolute and that in such a proceeding the fact of the decree absolute may be taken into consideration.

Appeal allowed. The respondent is entitled to one half of her costs in the Court of Appeal and in this Court, but no further order as to costs is made.

Solicitors for the appellant: *Herrington & Slater.*

Solicitor for the respondent: *A. W. S. Grier.*

S.S. FANAD HEAD (DEFENDANT).....APPELLANT;

AND

HENRY W. ADAMS et al (PLAINTIFFS)....RESPONDENTS.

1948

*Nov. 2, 3, 4, 5

1949

*Mar. 18

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Shipping—Collision at sea in dense fog between fishing schooner and steamer in convoy—In situation of danger convoy orders re speed and position subject to each ship taking independent action in exercise of good seamanship. International Rules of the Road, article 16, (P.C. 259, 1897).

The steamer *Fanad Head* and the auxiliary fishing schooner *Flora Alberta* collided in a dense fog on the Western Bank fishing grounds off the Nova Scotia coast. The schooner sank with a loss of twenty-one of her crew of twenty-eight. The *Fanad Head* was one of a convoy of eight ships in command of a commodore. The convoy was formed in three columns, the commodore's ship led the centre column, the *Fanad Head* the port column of two ships, separated from the nearest ships by three cables abreast and two astern. Under Admiralty orders, transmitted by the commodore each ship was required to keep in convoy order both as to speed and course. For some time prior to the collision the ships were running at eight knots an hour without

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

(1) [1916] W.N. 59. (2) [1945] 1 All E.R. 451.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

lights, except for a cluster of white lights at the stern as a guide for the following ships, and fog signals were blown every ten minutes by the leading ship of each column. On hearing a high pitched whistle ahead and to port, the *Fanad Head* sounded her column number independently and showed navigation lights, and hearing no reply, sounded again some few minutes later, but did not reduce speed. Three to four minutes later she again heard a high pitched whistle to port and a few minutes later saw lights 300 to 400 feet from the bow whereupon she put her helm hard to starboard, her engines full speed astern and blew three short blasts. The *Flora Alberta* was proceding through the fog at nine knots an hour and blowing her fog whistle at regular intervals and her survivors said they heard no other fog signals until a steamer's whistle was heard at about the same time as her lights were sighted a ship's length away bearing down on them. Efforts of both ships to avert the collision were unsuccessful.

International Rules of the Road, article 16, (P.C. 259, 1897), provide that every vessel shall, in a fog go at a moderate speed, having careful regard to the existing circumstances and conditions and that a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Held: Admiralty Orders to ships in convoy both as to speed and course are subject to the responsibility of the master of each ship in any situation of danger taking such independent action as good seamanship may require. *Larchbank* v. *British Petrol* [1943] A.C. 299 followed.

Held: also, Taschereau J. dissenting, that the negligence of both ships contributed to the collision and the blame should be apportioned to the extent of two thirds to the *Fanad Head* and one third to the *Flora Alberta.*

Per Taschereau J., dissenting, the speed of the *Fanad Head* was the determining cause of the accident. It was the duty of her Master, when he heard the fog signals of the *Flora Alberta* to reduce to moderate speed, and if the latter's position could not be ascertained, to stop the engines and navigate carefully. It seems clear he only inferred her position but this is not sufficient, he must ascertain it. *Nippon Yusen Kaisha* v. *China Navigation Co.* [1935] A.C. 177. The finding of the trial judge that the *Flora Alberta* some time prior to the collision had reduced to a moderate speed, was right.

APPEAL from the judgment of Carroll J., Local Judge in Admiralty for the Nova Scotia Admiralty District of the Exchequer Court of Canada (1).

H. P. MacKeen K.C. and *Gordon Dunnet* for the appellant.

W. P. Potter K.C. and *Donald McInnis K.C.* for the respondent.

(1) [1948] Ex. C.R. 360.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Taschereau J.

TASCHEREAU J. (dissenting):—The owners of the ship *Flora Alberta,* a fishing schooner, claim $100,000 from the British ship *Fanad Head* owned by the Ulster Steamship Company, Limited, as the result of a collision which occurred on the 21st of April, 1943, on the High Seas on the Western Bank Fishing Grounds, and at a distance of approximately 90 miles southeast of Halifax.

The *Fanad Head* has a length of 420 feet, a breadth of 59 feet, and a net registered tonnage of 3002 tons. She is powered by triple expansion engines and her maximum speed is 11½ knots. She was mastered by Captain Thos. Heddles, and left Halifax on April 20, 1943, with a general cargo, forming part of a convoy, destined for the United Kingdom. There were eight ships in the convoy, and the *Fanad Head* was leading the port column, the Commodore's ship *ss. Telapa* with Captain Hugh Roberts, was leading the centre column and was in charge of the convoy. The third column on the starboard side, was led by the *ss. Tetela.* There were three ships in this last column, three in the centre column, and two in the port column, separated by three cables abreast and two cables in line. The convoy was steering a course of 132 degrees, with an ordered speed of 10 knots.

The *Flora Alberta* was a vessel of about 140 feet long, had a breadth of 26·4 feet, with a registered tonnage of 93 tons. She left Lunenburg, N.S. on the 17th of April, 1943, bound for the Western Bank Fishing Grounds, west of Sable Island. She reached these grounds on the 18th of April where she stayed on the 18th, 19th and 20th of April. In the course of her operations, she drifted eastward, but on the 21st of April, a course was made to return to the bank, due west magnetic. It was while returning to the Fishing Grounds that on the 21st of April, in the midst of a very dense fog, a collision occurred and the *Flora Alberta* sank within a few minutes. Of a crew of twenty-eight members, only seven were saved.

The Honourable Mr. Justice Carroll, L.J.A. with the assistance of a nautical assessor, found against the *Fanad Head,* and gave judgment for the owners of the *Flora Alberta.* The appellant now appeals from that judgment.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Taschereau J.

The main facts as revealed by the evidence, may be summarized as follows:—

At 2 a.m. Standard Time, on April 21st, the fog was very dense and the visibility was poor. The convoy was running in a northwest-southeast direction at a speed of 8 knots. Previously, this speed had been 10 knots, but it had been reduced, not on account of the fog, but because the convoy would otherwise have arrived too early at a planned rendezvous with ships which were to join the convoy. Under orders, the eight ships were running without lights, the only exception being a white cluster at the stern as a guide for the following ships. The *Fanad Head* had starboard lights, and the Commodore's ship was equipped with starboard and port lights, while the leader of the starboard column had port lights as a guide for the leaders. Every ten minutes fog signals were blown, consisting of various blasts indicating the leaders' numbers, beginning on the Commodore's ship and then on the leader on starboard, the *Tetela,* and then by the port leader, the *Fanad Head.* These fog signals were the signals ordered for the convoy, but were not the ordinary fog signals required by the regulations.

The *Flora Alberta* was heading in a westerly direction with her starboard side towards the oncoming convoy. The suggestion that she had turned around in an easterly direction, has been rightly discarded by the learned trial judge. She had been running at a speed of about 9 knots, but some time before the collision, the Master noting the depth of the water, and realizing that he was nearing the fishing area, reduced the speed to approximately 4½ knots. The fog whistle was blown at regular intervals.

It is also in evidence that at 4:10 the officers on the bridge and the lookout of the *Fanad Head,* heard the sound of a high pitched whistle, and a second one at 4:17, both on the port bow. Captain Roberts of the *Telapa* says:—

> I heard some time afterwards a definite sound signal a little forward of our port beam, one long blast, and close to the convoy. I formed the opinion at that time that this signal had some connection with the previous one that I thought I heard. I was suspicious and I was on the alert, and I knew *definitely* then that there was a ship in the vicinity.

After the first blast, Captain Heddles of the *Fanad Head* immediately ordered the navigation lights switched on his ship, blew his column number independently, and on hear-

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Taschereau J.

ing the second whistle sounded his column number again, but did not reduce his speed. A few minutes later, he saw a white light and a green light at about 300 or 400 feet from his bow. He then ordered "Hard astarboard" and "full astern", and blew three short blasts. On the *Flora Alberta* some members of the crew heard only one blast a few seconds before the accident. At the same moment they saw the lights of the *Fanad Head,* but it was obviously too late to avoid the collision.

I have come to the conclusion that the Master of the *Fanad Head* cannot be exonerated. His speed of 8 knots in this dense fog was clearly in violation of Article 16 of the International Rules which reads as follows:—

Art. 16: Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a *moderate speed,* having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which *is not ascertained,* shall, so far as the circumstances of the case admit, *stop her engines,* and then navigate with caution until danger of collision is over.

It was obviously the duty of the Master of the *Fanad Head* when he heard the fog signals of the *Flora Alberta* to reduce to a *moderate* speed, and if the position of the *Flora Alberta* could not be *ascertained,* his only alternative was to stop the engines and navigate carefully. From the blasts that he heard, it seems clear that he only *inferred* the position of the *Flora Alberta,* but this is not sufficient. He must *ascertain* it. In *Nippon Yusen Kaisha* v. *China Navigation Co.* (1), it was held:—

In order that the position of a vessel whose fog-signal is heard by another vessel may be *"ascertained"* within the meaning of art. 16 of the Regulations for the Prevention of Collisions at Sea, the vessel must be known by the other vessel to be in such a position that both vessels can safely proceed without risk of collision. An *inference* as to the vessel's position, based upon the direction from which the fog-signal was heard, the probable course which she is taking, and the improbability of her crossing the fairway in a fog, is not an *ascertainment* justifying a disregard of the precautions enjoined by the above article. Implicit obedience to the Regulations, upon which navigators are entitled to rely, is of great importance.

In his judgment Lord MacMillan made the following statement:—

The position of the *Toyooka Maru* was not in their Lordships' opinion *ascertained* within the meaning of the Regulations. It was *inferred,* "not ascertained, and as it turned out the inference was wrong."

(1) [1935] A.C. 177.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Taschereau J.

In re *Aras* (1) Sir Gorell Barnes said:—

> I think it is exactly the same because it is so well known—so absolutely well known—that it is impossible to rely upon the direction of whistles in a fog, that I do not think any man is justified in relying with certainty upon what he hears when the whistle is fine on the bow, and is not justified in thinking that it is broadening * * * unless he can make sure of it.

The failure of the Master of the *Fanad Head* to go at a moderate speed and to stop his engines was, in my view, negligence in the circumstances, and the determining cause of this unfortunate accident. Moreover, the Master of the *Fanad Head* knew that in that particular region of the Atlantic, many fishing schooners were in the vicinity, and he should therefore have exercised a more vigilant look-out.

The speed of the *Flora Alberta* was moderate. She blew her whistle which was admittedly heard by the *Fanad Head,* and the moment she heard what is now proved to be the second blast of the *Fanad Head,* it was too late to avoid the accident. Her failure to hear the first blast, does not appear to be the result of any negligence, but must be attributed to the vagaries of sound signals, transmitted through the air, and which are caused by the lack of uniformity in the density of the fog or the atmosphere.

It is argued on behalf of the appellant that the *Fanad Head* forming part of the convoy, was subject to the orders of the Commodore, and that the precise orders were that the speed was to be 8 knots. It is said that the Commodore had a legal authority to give such an order as to speed, and that the *Fanad Head* was under a legal compulsion to obey the order of 8 knots while in convoy, and while subject to those orders.

On this point the law seems to be well settled.

In *Larchbank* v. *British Petrol,* (2), it was held that an "emergency" had arisen, not by reason of the mere fact of the fog, but because the Master of the *British Petrol* had good reason to think that the *Larchbank* might be approaching, even though he could not hear her, and that accordingly he should have sounded fog signals. The *Larchbank* was under orders to join a convoy, and although the British Admiralty had forbidden fog signals, it was

(1) [1907] P. 28. (2) [1943] A.C. 299.

held that in such an "emergency" the ordinary rules of the sea should be followed, and that fog signals should have been given.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Taschereau J.

In the *Scottish Musician* (1) it had been previously decided:—

> A vessel enclosed in convoy has the same duty as every other vessel on the sea to take every possible means to avoid a collision. She is not to regard hereself, because she is in convoy as a vessel which is excused from keeping a lookout outside the convoy * * * On the contrary she has to take every possible means of avoiding a collision which she can take without danger, *that is to say without creating more imminent danger still to her consorts in the convoy.* She has a duty to the convoy to keep her station, but she must not press that duty to the point of never taking measures to keep out of the way of some other vessel which is threatening her with collision.

If any further authority is needed on that point, *vide* the *Vernon City* (2), and on Appeal (3). Nowhere will it be seen that a ship in a convoy must not take "individual action" when necessary, to avoid a collision, particularly as in the present case, where it is clear that an "emergency" arose.

Such also were the orders of the Commodore who clearly states in his evidence, that if a ship is in danger, she has to take individual action. The instructions of the Admiralty are that the Master of a ship, although in convoy, is responsible for the safety of his ship, and that if she is in any position of danger, it is for him to take whatever action he thinks fit. He says quite frankly that if, in his opinion, there is any danger, after hearing a whistle of a ship coming near him, he would naturally take some action irrespective of any ship astern or on either side of his own ship, and forming part of a convoy.

For these reasons I think that the trial judge was right, and that the appeal should be dismissed with costs.

RAND J.:—This is a case of collision. The fishing vessel *Flora Alberta,* between four and five o'clock Atlantic Daylight Time on the morning of April 21, 1943, was running on a west by north course in a dense fog approaching fishing banks lying about 90 miles to the south-east of Halifax. She had been hove to during the night and had drifted some distance to the east of the banks. The final speed is in dispute, but it is admitted that she had for some

(1) [1942] P. 128.
(2) [1942] P. 9.
(3) [1942] P.61.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Rand J.

time been making at least eight knots an hour. The contention is that the speed had been reduced to 4½ knots, and the trial judge has found the order for this to have been given about 15 minutes before the crash. Tanner, the captain, is contradictory. At one place he says he rang for reduced speed while in the pilot house, and in another while on his way to examine the key-sounding device in his cabin; in each case just before going to breakfast. He estimated the time between the signal and the impact at two or three minutes. On board the *Fanad Head* he spoke of ten knots as his speed. After making every allowance for the circumstance that he was then nearing the fishing grounds, I can find nothing to justify the finding of a 15-minute interval or an actual speed of 4½ knots. I take the fact to be that some few minutes before the collision an order was given to reduce speed, but that the actual final speed was several knots greater than 4½; and on that footing, having regard to the dense fog and the surrounding circumstances, I am unable to agree that the speed was not excessive. So far, therefore, the vessel was proceeding in violation of the rules of the sea.

Was the *Fanad Head* at fault? She was one of a convoy of seven or eight vessels sailing in a generally south-easterly direction from Halifax in three columns a distance of three cables apart with the ships following each other at two cables or 1200 feet. The *Fanad Head* was the leading ship on the port side. In the center was the commodore's ship *Tilapa* and on the starboard the *Tetela*. In the port column one ship followed the *Fanad Head*. From 2 a.m. until after the accident, the convoy had been moving at eight knots an hour in the fog and from that time until about 4:06 standard time convoy signals had been given at intervals of ten minutes or thereabouts. These would be initiated by the commodore's vessel and would consist of five blasts, the first one two or three, short, to indicate the column, and they would be sounded only by the leading vessel of each line.

About 4:10 a high pitched whistle was heard on the *Fanad Head* which appeared to come from slightly to port of the vessel's bow. At that time the master, Heddles, the first officer, Rea, an apprentice of twenty years, Stark,

and the helmsman, were on the bridge and either then or shortly afterwards the second officer, Davey. The first three agree in their statements of what took place.

Heddles describes the whistle as "one blast of a high pitched whistle ahead on the port bow;" "we waited to see what would happen to see if they would blow again. Then the Chief Officer blew." It was the convoy signal, and was given independently of the commodore. It was blown a second time, likewise without regard to the commodore. After three or four minutes, the whistle was heard again three points on the port bow. He puts the time between two whistles at seven or eight minutes.

It is beyond doubt that the apparent shift from stem to three points port indicated to him a single vessel crossing from starboard to port and that she was out of danger; but "a few minutes later" they saw the loom of a white and a green light "about 3½ points on the port bow" and at about two ships' length or 800 feet away. On the bearing of the first whistle the master was adamant; the second whistle made it obvious to him that the vessel was going clear; and "I assumed she was clear."

As admittedly the *Alberta* was on a westerly or north of westerly course when the two met, some explanation had to be given of the change, and the master insisted that between the time of the first whistle and the collision she had about turned. "She turned around. She could not possibly have come against me if she had not." This leaves no room for doubt of the effect upon his mind of the second whistle. Later on: "I considered the danger was over when she altered her course." Asked "And you say you sounded it again when you heard the whistle the second time?"—he answered: "We blew our column number twice between his blasts to attract his attention"; and later on, "I did not consider an emergency had arisen until I sighted the *Flora Alberta* three points on the port bow." This evidence excludes the suggestion that after hearing the second whistle, any signal was given before the fishing vessel hove in sight when three short blasts were sounded.

Rea is to the same effect. He says: "At about ten past four we heard a medium length blast of a high note on ahead. I immediately sounded my column number in reply, one short and four long": "we took independent action

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Rand J.

when we heard the whistle": "I waited then for about two or three minutes and then sounded the column number again. There was still no reply." Later: "A couple of minutes after I sounded my column number the second time, we heard this same note about three points to the port bow. Just after that, about a minute, I saw a white light and the starboard green light and they appeared to me to be about a couple of ships' length away." The vessel was "closing on us very rapidly." "Thereupon the master ordered hard to starboard and rang the engines full astern." "As he did that, I sounded three short blasts on our steam whistle." He agreed that he signalled "twice when you blew your column number and then you blew three short blasts when you went astern." Asked, "Did you take any steps after hearing that whistle (the second)" he answered "We had no time to take any steps, not at that time"; "Until I saw the green light, I thought it had gone from ahead to the port side going clear of me" and "We (meaning the master, Mr. Davey and the witness) all assumed it had gone clear." Questioned: "You blew your column number twice you say;" his answer was: "Yes, between the two blasts we heard we blew once and then waited two or three minutes and then blew it again."

Stark is to the same effect. After the first whistle "We immediately sounded our column number, and at the same time switched on the navigation lights, full brilliancy;" "About two minutes later we again blew our column number." Still later, "We heard the same whistle again. We heard it broad on our port bow", and "Just about a minute after that we saw the lights—a green side light and white masthead light." The vessel seemed to be coming across "our bow at about 90 or 100 degrees." Asked "What happened after the first whistle fine on the port bow", he answered, "We sounded our whistle independently of the commodore." Then: "Did you hear the commodore sound his whistle after this deep-toned whistle (the first)?" "No, I never heard the commodore sound his whistle again." He gave the times of the three column signals sounded while he was on the bridge prior to the collision as: 4:06, 4:10 and about 4:12. The first had been a regular signal

led by the commodore; and the witness means that after that sounding, the commodore's whistle was not heard again before the accident.

Now, against this very clear and positive evidence by the persons most interested, there is, first, that of the commodore himself. Shortly after four o'clock he heard a faint whistle; it appeared to come "fine on the port side of the convoy." He says: "As a precaution, I sounded my column number" and, asked whether he heard an answer, replied, "I could definitely say that whenever I sounded my column number the leaders of the other two columns sounded theirs." Some minutes later he heard "a definite sound signal a little forward of our port beam." "About two or three points forward of our port beam and apparently close to the convoy." "We immediately blew our column numbers, but I am not sure whether it was the *Fanad Head* who blew hers first. If she did, we would wait until she had finished sounding before we sounded so as not to have a confusion of signals. But there was definitely plenty of noise at that time." "Did you do anything else on your vessel? No. This other ship being on that bearing, I knew my ship was clear, and it was too late to take any action for the convoy as a whole." Then: "Did you sound any further column signals before you heard the three short blasts of which you have spoken"; "I cannot remember that, because we blew our whistles so often; knowing that there was a ship close to, we would blow our whistle as frequently as possible until all danger was past."

This testimony is vague and general compared with what I have just considered. He is clearly confused about the initiation of the signals and I cannot accept it as going specifically to the sounding of a convoy signal after the second whistle. I draw the inference that he was satisfied, in the situation of the convoy, to leave to the *Fanad Head* the responsibility for dealing with the unknown craft ahead.

Then there is Davey. He is asked at once, "What did you hear?" "I heard a high sounding whistle on the port bow." And, "having heard that whistle signal, did you hear any other signals?"; "We all sounded our column signals." But later: "I heard it (the whistle) a couple of times. I do not know whether the chief officer heard it

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Rand J.

or how many times he heard it." "I do not know whether her first whistle was reported. We may or may not have heard it all together." On re-examination: "Do you remember where you were on the first occasion that you heard her first signal?"; "I am not sure about that, but I believe I was in the chart room when I heard her whistle the first time:" "It may have been" in that room. This likewise cannot be taken to qualify the statements of the others. He is hazy about the circumstances of both whistles and not being on duty after four o'clock, although at times actually on the bridge, it would be but natural that the particular incidents affecting the navigation of the vessel would be more vividly impressed upon the minds of those on whom the immediate responsibility rested.

Then Ward on the lookout is asked: "After you had heard that (the second whistle) did you hear anything more from your own ship"; "Yes, she blew again." And, "In about a minute—it might have been a little more or less—I saw a white light bearing down on the port bow." Previously in speaking of the convoy signals: "I could not say exactly how many times I heard them, but I heard them a few times—twice or something like that—" Describing the signals given after the first whistle, he says: "Yes, our own ship then blew some shorts and longs." Asked "How many times had she blown that signal (the convoy signal) before you heard this other whistle signal?" "I don't know; I didn't pay any attention to our whistle blown." This evidence, too, lacks precision, and I am unable to treat it as affecting in any degree that of those on the bridge.

The vessels of the convoy, being under Admiralty orders as given to them by the commodore, were required generally to keep in convoy order both as to speed and position. This duty, however, was admittedly subject to the responsibility of each vessel to meet any situation of danger in which she might find herself. When, therefore, the second whistle was heard two or three points off the port bow at a distance which the commodore took to be not far from the convoy, did a situation of danger present itself to the *Fanad Head* which called for the independent exercise of good seamanship?

I think the case comes directly within *Larchbank* v. *British Petrol* (1). The word "emergency" in the Admiralty direction there is the equivalent of "danger" here. The assumption by the master and officers of the *Fanad Head* that the *Alberta* was on a starboard-to-port course and had got clear was quite unwarranted. They could not justifiably act on the view that the same vessel had given both signals or upon the apparent quarter from which the first whistle came. Both signals indicated a vessel in motion forward of the beam and the situation called imperatively for at least such action on the part of the *Fanad Head* as could be taken without danger to or serious dislocation of the ships of the convoy. Nothing of that sort would have resulted from sound signals at the moment of the second whistle. Although it is difficult to be precise, yet it is I think unquestionable that at least from two to three minutes elapsed between the second whistle and the sighting of the lights of the *Alberta*. The three blasts were clearly heard by the *Alberta* and there is the strongest probability that had a signal been sounded at 4:17 it would have been heard on the *Alberta*. The failure to hear the signals given four or five minutes before when both vessels were making eight knots is, in the conditions of fog, quite consistent with that conclusion. It is evident, too, that with that additional two or more minutes there would have been sufficient time to manoeuvre the *Alberta* out of collision.

Against this neglect, Mr. McKeen urges both the failure of the *Alberta* to hear the earlier signals sent out by the *Fanad Head* and to have seen the latter much sooner than it did. In the weather conditions then prevailing, swell, heavy fog and wind, the vagaries of sound are notorious: and counsel was driven to say that those who should have been on deck duty were either asleep or below: but their fog signals were being given and heard; and considering the circumstances and the ordinary apprehension of a fishing vessel for fog-shrouded dangers, I find it impossible to treat their evidence in this respect as deliberately false. It is a corroborating circumstance that the master of the *Tetela*, 1800 feet approximately south-westerly of the com-

(1) [1943] A.C. 299.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Rand J.

modore, did not hear the second whistle although he did hear the crash of the vessels coming together; and the distance between the *Tetela* and the *Alberta* at say 4:17 was considerably less than between the *Fanad Head* and the *Alberta* at say 4:13.

Nor can I conclude that the *Alberta* should have seen the *Fanad Head* in time to swing out of danger. The vessels were coming together at a rate of between 20 and 25 feet a second: and as the first officer, Rea, says, the final events crowded rapidly. Even if the *Fanad Head* had been seen at the moment of the emergency signal, the evidence would not justify us in saying that reasonable action by the *Alberta* would have been sufficient.

In these circumstances the question remains whether the *Alberta* by her violation of Article XVI contributed to the collision. Those on board the schooner could reasonably expect a reply from any vessel hearing their signal and the *Fanad Head* should have given it: the failure to do so misled the *Alberta* and influenced in fact both her course and speed: and that had the answer been given, the schooner, notwithstanding her speed, could have avoided the collision, is virtually conceded. Mr. McKeen's strenuous contention was that even after the three blasts there was time to have taken avoiding action; and to add two or three minutes longer is to conclude the question.

But rules of the road accumulate precautions in the general interest of safety; lookout, speed and sound signals anticipate not only accidental and unavoidable circumstances and situations, but the careless and the misjudged as well; and it is not sufficient for the respondent to say that the reply signal would have enabled him to nullify his own delinquency. What we are determining is liability and not abstract causation and it has not been shown that the collision would have taken place regardless of the speed of the *Alberta*.

Although there is no order of precedence in these measures for safety, yet their actual interrelation is to be taken into account in determining degrees of responsibility. Sound signals are clearly dominant in fog and the error on the part of the *Fanad Head* was far more serious in its

consequences than the excessive speed. I would, therefore, attribute to the fishing vessel one-third and to the *Fanad Head* two-thirds of responsibility.

The appeal should be allowed in part with costs in this Court and the judgment below varied accordingly. The respondent will be entitled to two-thirds of its costs in the Court below.

KELLOCK J.:—It is not necessary to repeat an outline of the main facts appearing in evidence. With respect to the speed of the *Flora Alberta* when the *Fanad Head* was sighted, I think the learned trial judge was in error in his finding that it had been reduced to approximately four and one-half knots almost fifteen minutes before the collision. I find no evidence to support that finding. Nor do I think that attention should not be paid to the statement admittedly made by Captain Tanner aboard the *Fanad Head* the afternoon of the day of the collision. The learned trial judge did not hear any of the evidence of this witness and I see no reason why the statement most nearly related in time to the event here in question should not be taken as more reliable than statements made on much later occasions when the evidence of the witness, taken as a whole, appears to have been given without due care to be accurate. Tanner gives no reason why the statement should not be taken as representing the fact.

Rea, the first officer of the *Fanad Head* says that Tanner, on being asked as to the speed of the *Flora Alberta,* said that he was making ten knots. This evidence does not stand by itself. Captain Heddles, of the *Fanad Head,* said that in his opinion the speed of the *Flora Alberta,* when he observed her come out of the fog, was at least nine knots. Rea says the *Flora Alberta* was, at the same time, "cruising rapidly". In my opinion, therefore, it should be found that the speed of the *Flora Alberta* at the time of the collision and at all relevant times before that event was at least nine knots. That this was excessive in the circumstances, I have no doubt.

None of the witnesses called for the respondent would admit having heard any of the whistling of the *Fanad Head* or of any of the other convoy leaders. The reason given,

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Kellock J.

in argument, was the existence of fog and the well known vagaries of sound in fog. If, however, one were to have regard to the evidence of Captain Tanner alone, he said, in answer to his own counsel, that under the conditions prevailing on that particular morning, the whistle of an ordinary steamer could be heard at a distance of seven or eight miles. There is also the fact that the whistling of the convoy leaders was heard in both directions, i.e., the whistling of the *Telapa* and the *Tetela* was heard by the *Fanad Head* and that of the latter by the *Telapa*. No witness was called from the *Tetela*, the leader of the starboard column.

The recklessness of speeding through the fog at nine knots in an area where, as Tanner knew, a convoy might be met with, does not add to the acceptability of the evidence on behalf of the respondents on this point. That such evidence is not to receive automatic acceptance is of course clear; *The Curran* (1), is an illustration, if one be needed. But I am, however, not prepared to find that the convoy signals were heard or should have been heard had a proper lookout been kept on the *Flora Alberta*. Negligence, however, in the matter of speed is to be charged to that vessel.

As to the visibility at the place and time immediately preceding the collision, the only witnesses for the respondents who were able to speak, were the lookout, Knickle, and the helmsman, John Reinhardt. The others, with the exception of Best, who was drowned, were below when the *Fanad Head* was sighted. Knickle says he heard the *Fanad Head's* whistle and saw her lights at the same time. He says he did not see the form of the other ship at any time. He estimates the distance between the two ships as "100 feet or so", or about a ship's length, i.e., 140 feet, but he says, what is of course obvious, that he cannot be sure. As to the time interval between sighting the lights and the collision, he says he just had "time enough to go aft and time enough to get back". This is not very helpful.

John Reinhardt also saw the steamer's lights at the same time as he heard the last whistle blown by her. He estimates the distance then separating the vessels at two shiplengths, which would be about two hundred and eighty

(1) [1910] P. 184.

feet, but he says he could not say how far she was away. It was the whistle which attracted the attention of both these witnesses.

Captain Heddles, of the *Fanad Head,* estimates the visibility at eight to nine hundred feet. When he saw the *Flora Alberta* he says she was about that distance away. Rea, the Chief Officer of the *Fanad Head,* says the same thing. Captain Roberts, the Commodore, estimated the visibility of lights at the time at about the same distance. Davey, the second officer of the *Fanad Head,* says the white light of the *Flora Alberta* was over a ship's length away when he saw it, but he cannot be more definite than more than a ship's length and less than three cables.

Stark, the apprentice on the *Fanad Head,* estimates the distance at not more than a ship's length. The *Fanad Head* is 420 feet long. Dennis Ward, the lookout on the *Fanad Head,* says he "could just about make the bridge out and no more; just the outline of the bridge I could make out"; i.e., the bridge of his own ship. He says further, however, that when he saw the white light of the *Flora Alberta* he could not say whether it was at a greater or less distance than that between him and the bridge. He could not "estimate the distance of light in fog".

When the helmsman on the *Flora Alberta* saw the appellant ship he turned his vessel to port and when Captain Tanner heard Knickle's call he came up on deck and gave Reinhardt the order to stop. The latter then rang for the stopping of the engine. The *Fanad Head* had reversed her engines when she whistled the last time and had also starboarded her helm.

As to the *Fanad Head,* it is admitted that she was subject to binding orders which required her to keep in the convoy, on its course, and at its speed. This does not mean, however, that she had to continue blindly no matter what eventuated. She was also obligated, if occasion arose, to observe the rules of good seamanship, having regard to the fact that there was a vessel behind her, which might as well as other vessels in the convoy on her starboard be out of position. I do not find fault with the *Fanad Head* because she did not stop her engines when she heard the whistle of the *Flora Alberta* on either the first or second

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Kellock J.

occasion, having regard to her being in convoy and to the presence of the other vessels I have mentioned. I think, however, that her officers erred in assuming that the ship whose whistle was heard on two occasions, if it were in fact the same ship, had gone out of danger. No doubt they assumed that ship would have heard the whistling of their ship and that of the other convoy leaders just as the *Fanad Head* had heard the whistle of the *Flora Alberta,* but they erred in assuming that they had ascertained either her course or position. I think the *Fanad Head* ought to have sounded on hearing the *Flora Alberta* not only as she did the first time, but the second time as well when the latter was much closer, and failure to do so constituted negligence directly contributing to the collision.

I think, however, that the excessive speed of the *Flora Alberta* was negligence of the same character. She was struck almost amidships. Therefore, as little as 100 feet would have made all the difference. Kerr, the engineer on the *Fanad Head* says that from the time he had got the engines of his ship going astern until he felt the bump of the collision was from one to one and a half minutes. There is a considerable body of evidence to the same effect. In one minute the *Flora Alberta* would travel 900 feet at nine knots and the *Fanad Head* 800 at eight knots.

In *The Campania* (1), Gorell Barnes J. said at p. 296:

* * * as a general rule, speed, such that another vessel cannot be avoided after being seen, is excessive: see *The City of Brooklyn* (2).

The reasons for judgment of the learned trial judge were approved in the Court of Appeal.

In *The Counsellor* (3), Bargrave Deane J. said at p. 72:

I think a very fair rule to make is this, and it is one which has been suggested to me by one of the Elder Brethren: you ought not to go so fast in a fog that you cannot pull up within the distance that you can see.

In *The Zadok* (4), Sir James Hannen said at p. 115:

It was the duty of both vessels under Article 13, to go at a moderate speed, and it appears to me that the object with which that rule of conduct is imposed is, not merely that the vessels should go at a speed which will lessen the violence of a collision, but also that they shall go at a speed which will give as much time as possible for the making of any proper manoeuvres which may become necessary by unforeseen circumstances—for, in a fog, it cannot be told exactly from what quarter the danger may come.

(1) [1901] P. 289.
(2) (1876) 1 P.D. 276.
(3) [1913] P. 70.
(4) (1883) 9 P.D. 114.

Without laying down any hard and fast rule in the terms of either Gorell Barnes J. or Bargrave Deane J., it is nevertheless apparent that the excessive speed of the *Flora Alberta* not only placed her in the path of the *Fanad Head* but also rendered her, when those on board did observe the *Fanad Head,* unable to manœuvre out of danger which might have been possible had she been going as she ought to have been. The contrary is not to be presumed. Reinhardt, the helmsman, testified that if the *Flora Alberta* were going slowly she would answer her helm better than if she were going fast. There would have been more time for her to have answered her helm and more opportunity to have reversed her engine which apparently was not even attempted.

I am also of opinion that the excessive speed itself may well have contributed to the failure of those on board the *Flora Alberta* to hear any of the whistling on the part of the convoy. The excessive speed in question would undoubtedly increase the noise of her passage through the water and it may well be also that the throb of her engine and the exhaust at that speed caused greater interference with the reception of sound than if she had been moving as she should have been in the circumstances.

I think therefore that the *Flora Alberta* must be held to blame to the extent of one-third and I would allow the appeal to that extent. I think the appellant should have its costs in this court and the respondent two-thirds of the costs in the court below.

ESTEY J.:—This litigation arises out of a collision between the fishing schooner *Flora Alberta* and the *Fanad Head,* one of eight ships in a convoy, on the Western Bank Fishing Grounds about 90 miles out of Halifax. The learned trial Judge in Admiralty of the Exchequer Court in the district of Nova Scotia held the *Fanad Head* solely responsible.

The *Flora Alberta* was observing Atlantic Daylight Saving Time and the *Fanad Head* Atlantic Time. For convenience I have set forth all times on the basis of Atlantic Daylight Saving Time.

The collision occurred on the morning of April 21, 1942, at about 5.20 in a dense fog, a light north-west wind and

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Estey J.

a heavy swell. The *Flora Alberta* was proceeding west-by-north and the *Fanad Head* was proceeding 132° true at the head of the third or port side column of a convoy that had set out from Halifax the preceding afternoon. The fog had existed since 3.00 a.m. and the extent of visibility without lights was about 400 to 500 feet and with lights about 800 to 900 feet. The eight ships in the convoy were placed three in a centre column, three in a starboard column and two in a port column, in the latter were the *Fanad Head* in the lead with the *Timothy Dwight* behind her. The commodore of the convoy was on the *Tilapa* at the head of the centre column. These columns were about 1800 feet apart and in the column the ships were about 1200 feet apart.

As it left Halifax this was a sectional convoy proceeding at 10 knots per hour. At that speed this section would have arrived at the point fixed for meeting the main convoy too early and therefore the commodore, sometime after leaving Halifax, reduced the speed of this section to 8 knots per hour, which speed the *Fanad Head* maintained until the collision was inevitable. At 5.00 a.m. Captain Heddles of the *Fanad Head,* his Chief Officer Rea, Second Officer Davey and Midshipman Stark were on duty, and Lookout Ward was on the forecastle head. Because of the dense fog the ships at the head of the respective columns were sounding their column numbers about every eight to ten minutes and were proceeding without lights, except a cluster in the rear and side lights in the front.

At about 5.00 a.m. Captain Heddles "heard a blast, a short high note . . . ahead on the port bow." The Chief Officer blew his column number, the navigating lights were put on "full brilliance" and Captain Heddles "waited to see what would happen, to see if they would blow again." He did not stop the *Fanad Head,* as he explained, "because there was a ship lying astern, a ship; and on instructions in the convoy, we were to maintain our convoy speed." He did not reduce his speed. Three or four minutes later he repeated the column number. Seven or eight minutes after hearing the first blast he again heard the short high note about "three points on the port bow" which, as he states, led him "to believe that she had crossed out of

danger" and a few minutes later, he saw "the loom of a white light and one green one about three and one half points on the port bow." Captain Heddles then observed the *Flora Alberta* was crossing his bow and "immediately put the helm hard to starboard and the engines full speed astern, giving three blasts to that ship and to the next astern to indicate I was going full speed astern." These steps were of no avail and the *Fanad Head* struck the *Flora Alberta* amidships on the starboard side causing it to sink immediately when twenty-one of its crew of twenty-eight lost their lives. It appears obvious, and, indeed, it was not contested, that from the moment the *Flora Alberta* was seen the collision was inevitable. Nor is it contended that there was any negligence on the part of Captain Heddles prior to his hearing the first whistle. The entire issue so far as the *Fanad Head* is concerned is the conduct of its officers after they heard the first whistle.

The masters before leaving Halifax received certain instructions, the legality of which are admitted and which in these proceedings were deposed to by the commodore. It is significant that these instructions, so far as disclosed, did not cover circumstances such as encountered by the *Fanad Head*. It would rather appear that the management of the vessels was left in such circumstances to the commodore and his masters to take such action as good seamanship under the circumstances would require.

The commodore, referring to the duty of the captains or masters of the respective ships, stated:

> If she is in convoy she is supposed to keep the course and speed of the convoy; but the Admiralty instructions are that the Master of a ship is responsible for the safety of his ship and if there is any position of danger it is up to the Master to take what action he thinks fit.

He further deposed:

> Q. Do you expect a ship under your command to go on and to continue steaming at some 7·5 knots after hearing a ship ahead of her sounding?
>
> A. No.
>
> Q. Do you, as Commodore, expect a ship under your command—one of the leading ships of your convoy—to steam on at a speed of 7·5 knots on hearing a fog signal forward of her beam?
>
> A. I would not expect that; she should in those circumstances take individual action, but that individual action depends on the Master of the ship.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Estey J.

He further deposed relative to the master of the ship:

> His orders are that he has to endeavour to keep his station in the convoy, but at the same time under Admiralty orders a Master is considered responsible for the safe navigation of his ship.

Captain Heddles himself when asked the question: "You say that in convoy you must carry right on until you get an order to change?" replied: "No, sir. Not in an emergency. You take steps to avert trouble."

The commodore himself heard a faint whistle shortly after 5.00 a.m. but no one else on the *Tilapa* heard it. Then later he heard a definite sound signal, one long blast forward of his port beam but "it was then too late to take any action for the convoy as a whole." This would indicate that at that time the commodore expected each ship to act upon its own initiative. When he heard the three short blasts he realized that the *Fanad Head* must have sighted the other ship.

That Captain Heddles when he heard the first whistle or "short high note * * * ahead on the port bow" was in a "position of danger" or emergency must follow from the fact that he knew he was proceeding through a fishing ground in a dense fog at a speed which apart from a convoy was admittedly excessive, and even in a convoy at a speed greater than the commodore would have expected once he heard a whistle. Under such circumstances it was his duty to take individual action. That he appreciated his position is evidenced by the fact that he immediately "switched on the navigating lights full brilliance," sounded his column number (one short and four long), then "waited to see what would happen, to see if they would blow again." In taking those steps he was acting on his own initiative. He did not, however, reduce the speed of the *Fanad Head*. When nothing transpired in three or four minutes he again blew his column number. Seven or eight minutes after he heard the first whistle he again heard the short high note, this time "about three points on the port bow," which led him "to believe that she had crossed out of danger." A few minutes later he saw the light of the *Flora Alberta* about three and one half points on the port bow at a distance of about 800 feet crossing the bow of the *Fanad Head*." This meant that the *Flora Alberta* was now going

in a direction almost directly opposite to that Captain Heddles had concluded she was proceeding when he heard the first and second whistle. Indeed, he himself explained that somewhere between 5.17 a.m., or possibly earlier, and 5.20 a.m. the *Flora Alberta* "turned around. She could not possibly have come against me if she had not." The circumstances and the other evidence do not support any such change of direction on the part of the *Flora Alberta*. Then when asked: "Can you ascertain, with any degree of accuracy at all, the place from where the whistle comes?" Captain Heddles himself replied: "When it is clear, you can get the direction. On this occasion, when it was dull, it was difficult to locate it." All of the evidence emphasizes how unreliable is any conclusion as to distance or location of a whistle heard in a fog. The evidence of experienced seamen, including the commodore who said: "Sound at sea is very deceptive," as well as the expert, make it clear that it is impossible to judge with any degree of accuracy the distance or location of the source of a sound heard at sea during a fog. It is stated in 30 Hals. 2nd Ed., p. 730, para. 940:

> It is not correct, again, to say that a whistle having been heard, it can be located so as to be certain that it is a precise bearing on the bow; case after case in the Admiralty Court shows that that is not true.

As stated by Sir Gorell Barnes, on behalf of the Privy Council:

> It is notorious that it is a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it is almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog "signal when it is heard * * *" *The Chinkiang* (1), quoted in *H.M.S. Malaya,* (1937) P. 191.

Once Captain Heddles found himself in what was a "position of danger" or emergency, it was his duty to take such action as good seamanship would require. *The F. J. Wolfe* (3). What in a particular case constitutes good seamanship is a question of fact. That the *Fanad Head* was here in a convoy is a circumstance to be considered along with the other circumstances, and when the master is thus called upon to take individual action the requirements of the "International Rules of the Road", adopted by Canada in 1897 (P.C. 259, 1897) become important.

(1) [1908] A.C. 251, 259.
(2) [1937] P. 179 at 191.
(3) [1946] P. 91.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Estey J.

Even if they be not binding on a ship in convoy, they do embody the principles or requirements of good seamanship. As stated by Scott, L.J. in *The F. J. Wolfe, supra,* at p. 95:

> Those rules represent the considered views of almost generations of seamen of many nations.

Articles 16 and 29 of these Rules read as follows:

> Article 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.
>
> Article 29. Nothing in these Rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

The foregoing evidence and quotations relative to the location of the source of a whistle were illustrated in relation to art. 16 of the "International Rules of the Road" in *Nippon Yusen Kaisha* v. *China Navigation Co. Ltd.* (1), where two vessels were signalling each other in a dense fog. In that case the master of the *Kiangsu* concluded that from the fog whistle the position of the *Toyooka Maru* was on the south side of the channel. Their Lordships, in construing the word "ascertained" as it appears in the foregoing art. 16, stated at p. 182:

> * * * in the present case the only data were that the fog-signals were heard on the *Kiangsu's* port bow, that outward bound vessels keep to the south side of the channel and that it was improbable that a vessel would be crossing the fairway in a fog. An inference based on these data was not in their Lordships' opinion an ascertainment on which it was justifiable to disregard the precaution enjoined by Regulation 16. In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision.

Captain Heddles never ascertained the position of the *Flora Alberta* in that sense. His experience as a seaman should have indicated that any conclusion that he might entertain as to the location of the vessel sounding the whistle could not be accepted as reliable and ought not to be acted upon, certainly not in a manner to justify his proceeding as he did.

(1) [1935] A.C. 177.

The *Fanad Head* when it heard the second whistle was still in a position of danger or emergency. The duties of a master of a ship in such a position are described by Langton, J.:

> The handling of a vessel when and after the whistle of the *Lairdcastle* was first heard falls into a somewhat different category. There was no convoy order to the effect that she was not to stop on hearing a whistle forward of her beam, and she is also open to criticism in not having stopped her engines at the moment when she first sighted the masthead light of the *Lairdcastle*. These are matters which fall to be decided in relation to the particular circumstances of each individual case. *The Vernon City* (1) affirmed on appeal (2).

The foregoing quotation repeats that which has been so often stated, that each of these collision cases must be decided upon its own facts. Both that statement and the individual responsibility of a master for the conduct of his ship in an emergency is emphasized in the *Larchbank* v. *British Petrol* (3). The master of the *British Petrol,* proceeding in a convoy, did not sound his fog signal when he knew the *Larchbank* was manoeuvring in a dense fog to take a position in the same convoy and immediately behind the *British Petrol.* The master explained he did not do so because he was forbidden by Admiralty Regulations. It was held in effect that he had misconstrued the Admiralty Regulations, which required that he under the circumstances should exercise his own discretion. The House of Lords affirmed the view of the learned trial Judge that in the emergency that there existed the master of the *British Petrol* was negligent in not sounding his fog signals. Lord Wright at p. 307 stated:

> The extra and abnormal risk which here, in my opinion, constituted emergency consisted in the nearness of the *Larchbank* when the fog came down, her probable and at least possible operation of continuing to join the convoy, and the impossibility in the absence of fog signals, after the weather became so thick, of knowing where she was or what she was doing, particularly as no signal was heard from her. The master was, indeed, left with a discretion whether he would or would not sound his fog signal, or, if so, how often. This is a separate issue which only arises if there is found to be emergency. I think there was emergency. The judge has found, and I agree with him, that he exercised his discretion wrongly.

In that case both of the ships were held to be negligent, and the fault apportioned three-quarters to the *Larchbank* and one-quarter to the *British Petrol.*

(1) [1942] P. 9 at 26.
(2) [1942] P. 61.
(3) [1943] A.C. 299.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Estey J.

While Captain Heddles, when he heard the first whistle, sounded his column number and three or four minutes later did so again, the evidence does not disclose that after hearing the whistle a second time he caused any whistle to be sounded on the *Fanad Head*. He did not do so, as he explained, because he concluded that the ship sounding that whistle had passed out of danger. An experienced master, as already stated, was not justified in relying upon such a conclusion. If he had sounded a whistle at that time when the vessels had come much closer to each other, it would probably have been heard by the crew of the *Flora Alberta* and as two or three minutes still remained before the collision, it is possible that steps might have been taken by those on the latter vessel to avoid a collision. In fact he neither sounded the whistle nor stopped his engines. Nothing was done and the *Fanad Head* continued at 8 knots until the lights of the *Flora Alberta* were actually seen and when he sounded the three blasts. The conclusion is unavoidable that at that time the position was such that nothing could have been done on the part of either crew to avoid a collision.

Captain Heddles knew that he was passing through a fishing ground in a dense fog when he heard the first whistle. In spite of that he took only the precautions, which have been mentioned, of putting on the lights and sounding the column number. When he heard the second whistle his conduct, based upon his conclusion as to the position of the *Flora Alberta,* would not be accepted as good seamanship. It was as a consequence of that conclusion that he took no further precautions. Under the circumstances of the fog, the whistles and his position in the fishing grounds, it was negligence on his part to maintain the speed of the *Fanad Head* at 8 knots up to the time when the collision was unavoidable.

The evidence of Captain Tanner of the *Flora Alberta* and of his officers, Reinhardt and Knickle, was taken before other than the learned trial Judge, who, therefore, had not the advantage of observing the witnesses as they gave their evidence. He could but read their evidence

and was in this regard in the same position as members of an appellate court with respect to the inferences and conclusions to be drawn.

The *Flora Alberta* had been on the fishing grounds since the 18th. On the morning of the 21st she had drifted eastward when at 4.00 a.m. her engines were started, and with foresail and mainsail set she was proceeding first due north and from 4.30 a.m. west-by-north at 9 knots per hour. Captain Tanner had altered the course at 4.30 and had gone down to breakfast three or four minutes before the collision. He heard no signal and just before he went down to breakfast he signalled for half speed, or 4½ knots. The learned trial judge finds that Captain Tanner "about fifteen minutes before the collision, reduced his speed to approximately 4½ knots." With great respect, the evidence does not support such a finding. Indeed, apart from the statement that the signal was given just before he went to breakfast there is nothing to support the evidence that a reduction in speed was effected. It is not mentioned by any other of the witnesses of the *Flora Alberta*; moreover, while every allowance must be made for the pain and exhaustion he suffered that day, it is pertinent to observe that he did not mention any reduction in speed during his discussion later that same day with the officers of the *Fanad Head*. Reinhardt, who was at the wheel of the *Flora Alberta* from 4.30 until the collision, did not know the speed of the vessel. Captain Heddles, who observed the *Flora Alberta* crossing his bow, was of the opinion that she was going "at least 9 knots" per hour, and Rea stated, "It was cruising rapidly" and later suggested 10 knots per hour. Under these circumstances, it is impossible to conclude but that the *Flora Alberta* was immediately prior to and at the time of the collision proceeding at too great a speed.

Counsel for the appellant pressed his contention that those in charge of the *Flora Alberta* were negligent in not hearing the whistles from the *Fanad Head* and taking consequent precautions. It was suggested if the officers on the one ship could hear the whistle those on the other could have heard it also. The expert was asked:

Q. Therefore, so far as sound gradients are concerned, if A could hear B, B could hear A.?

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Estey J.

A. As far as temperature gradient is concerned, yes. That would not be true so far as wind velocity. You would hear down-bent and you wouldn't hear up-bent.

There was not sufficient information available to enable him to express an opinion relative to the wind velocity gradient and the matter was left in that position. All the witnesses who gave evidence from the *Flora Alberta* were in agreement that they did not hear any whistle until they had seen the *Fanad Head,* and under these circumstances, having regard to the acknowledged vagaries of sound in fog, I am not disposed to find that those in charge were negligent in this regard.

This collision was caused by both vessels proceeding in a dense fog at too great a speed which they maintained up to the moment of impact. Because the officers of the *Fanad Head* had heard the whistle approximately ten minutes before the collision and took no precautions, apart from sounding their column numbers and putting on their lights, to avoid a collision, I think that they are two-thirds to blame and the *Flora Alberta* one-third. The judgment at trial should be so varied and the appellant should have its costs in this Court and the respondents two-thirds of the cost in the Court below.

LOCKE, J.:—In absolving the *Flora Alberta* from blame in this matter the learned trial judge has found that about fifteen minutes before the collision the schooner, which had been moving through a fog at a speed of about 9 knots, reduced the speed to approximately 4½ knots, that her fog whistle was blown at regular intervals and that those on board heard no other fog signal until about the moment of sighting the *Fanad Head,* when a whistle was heard and at the same time the lights of the approaching steamer sighted about a ship's length away on the starboard bow. A further finding is that there was nothing the *Flora Alberta* could have done after sighting the ship to avoid the collision. The witnesses Guy Tanner, Douglas Reinhardt, Walter Corkum, John Knickle, John Reinhardt and Garth Reinhardt, being all but one of the surviving members of the crew of the *Flora Alberta,* gave their evidence

before a registrar and not in the presence of the trial judge, so that we are in an equally good position to estimate the weight to be given to their evidence.

Tanner, the captain, said that at about 4 o'clock daylight saving time of the morning in question the engines were started and the *Flora Alberta* steered due west through what is described as a heavy fog at a speed of 9 knots: that at 4.30 when the witness John Reinhardt took the wheel he was given instructions to steer west by north and that he (Tanner) then went down to breakfast. On direct examination he said that this was about 3 or 4 minutes before the collision and in response to a question as to what he had then done said: "I went down and slowed her down", and that this was done before he went forward for breakfast. Why after running at 9 knots since 4 a.m. he reduced the speed at this time he did not explain. On cross-examination he said that it was nearly 5 o'clock when he went to breakfast, that he had first gone to his own cabin and then come out on deck and proceeded to the forecastle and had been seated at his breakfast for about two minutes when he heard the shout "Steamer" from the look-out John Knickle and had then gone on deck. This evidence was given on January 3, 1945. On October 31, 1947 Captain Tanner again appeared before the registrar and gave certain further evidence. According to the record, he was recalled at the request of the learned trial judge to clear up some question as to the type of horn used on the *Flora Alberta* and the evidence should have been restricted to this. However, he was asked further questions in chief: one of these related to the time which elapsed between his going down to breakfast and the collision and he then said: "That was just about—just a few minutes." In answer to a further question as to the speed to which he had slowed down the vessel he said to half speed and that this was about $4\frac{1}{2}$ knots. Counsel for the *Fanad Head* had objected to the reception of the evidence unless it was evidence in rebuttal but proceeded to cross-examine and the witness then said that he had rung to the engineer for half speed before he had gone to breakfast. Captain Tanner had been picked up by the *Fanad Head* at some time between 5 and 6 a.m. and later on that day had a conversa-

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Locke J.

tion with the Chief Officer of the *Fanad Head*. This took place at about 1 p.m., Tanner having been invited to the Chief Officer's cabin to have a drink and he then, on his own admission when asked what speed the *Flora Alberta* had been going, said that it was at the rate of 9 knots an hour. When asked further as to whether he had not said they were going 10 knots he said: "I did tell him 10 knots and that we were cutting down to half speed"; then to the question "He asked you what speed you were making and you replied 10 knots?" he answered "Yes." In addition to these statements, according to Chief Officer Edward C. Rea, Tanner had told him at this interview that he was making 10 knots and that the crew of the schooner did not reduce speed unless the captain ordered it. The second officer of the *Fanad Head* who was present at this interview corroborated Rea's account of what had been said by Tanner. John Reinhardt, a member of the crew of the *Flora Alberta* who was present, merely said that he did not remember the interview. Captain Heddles, the master of the *Fanad Head* and Chief Officer Rea, both of whom had seen the *Flora Alberta* a short space of time before the collision, estimated her speed at 9 and 10 knots respectively.

Upon this evidence, I think the finding of the learned trial judge that the speed of the schooner had been reduced to $4\frac{1}{2}$ knots 15 minutes before the collision, or indeed that it had been reduced at all, cannot be supported. No witness suggested that this had been done 15 minutes before the collision. None of the other members of the crew who gave evidence suggested that the speed had been reduced at any time. In particular one would expect that either John Knickle who was at the wheel between 4 and 4.30 and who then went to the look-out, or John Reinhardt who succeeded him at the wheel at 4.30 and was there at the time of the collision, would have noted the change in speed but both of them were silent on the point. Asked on direct examination whether he had any idea at what speed the *Flora Alberta* was going, John Reinhardt said that he had not. Being then asked whether he had noticed anything about the engine exhaust, he said that the engine might have been running slower than usual but gave no opinion as to the speed. As to the admission made by Captain

Tanner several hours after he had been picked up, the learned trial judge said that he attached little importance to the conversations, that both Tanner and Rea had denied making certain statements attributed to them and that it might be that under the circumstances "each misinterpreted what the other said." This quite ignores the admission made at the trial by Tanner as to the statements made by him to Rea, as to which there was no possible ground for misunderstanding. Upon this issue, I think it should be found that the speed of the *Flora Alberta* at the time her look-out first saw the approaching steamer was 9 knots an hour.

By its preliminary act the appellant further contended that the *Flora Alberta* did not maintain a proper look-out. There is no finding as to this by the learned trial judge but, as he found the *Fanad Head* wholly to blame, it must be taken that he considered the claim to be unfounded. According to the witness Knickle, after he was relieved at the wheel at 4.30 he went forward to the bow where he had a clear view on all sides and he heard no whistle blown until the *Fanad Head* loomed out of the fog a little forward of the starboard bow when he says: "I thought I heard a little tinkle and a long blow. I'm not sure of that," and that he heard this and saw the lights almost at the same time. He immediately shouted "Steamer" and the collision followed almost immediately. Asked as to the distance between the vessels when he first saw the *Fanad Head* he estimated this at about 140 feet. John Reinhardt who had been on look-out on the bow between 4 and 4.30 says that he did not hear the sounds of any other ship while he was there and only heard the whistle of the steamer very shortly before the impact. He estimated that the distance separating the vessels was about two ship lengths of the *Flora Alberta* or about 290 feet when he first saw the *Fanad Head*. Walter Corkum who had been on look-out up until 4 o'clock and had gone below heard Knickle's shout but did not hear any whistle from the steamer. Captain Tanner whose movements have been described heard nothing. The respondent's preliminary act stated the distance at which the steamer was first seen as being 275 feet.

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Locke J.

There are a number of discrepancies in the various accounts given by the officers and the crew members of the *Fanad Head* and the commodore of the convoy, the master of the *Tilapa,* which led the centre column of the convoy. The master of the *Fanad Head,* Thomas Heddles, whose evidence was heard by the trial judge and who had had something more than fifty years at sea and had held a master's certificate since 1903, said that the visibility at the time of the collision was about 800 or 900 feet. In pursuance of orders from the commodore of the convoy, the column leaders blew their respective column numbers at intervals of about seven minutes from 2 a.m. when the fog had set in until the time of the accident. The commodore's ship sounded first, sounding two short and three long blasts, the leading ship on the starboard column followed sounding three short and two long, and this was followed by the *Fanad Head* blowing one short and four long blasts. The *Fanad Head* was steering a course 132° true and judging from the whistles on the beam the captain considered that he was in his correct position in the convoy. Following the *Fanad Head* at a distance of two cable lengths was an American vessel, also part of the convoy. According to Captain Heddles, at about 10 minutes past 4 (which would be 5.10 a.m. by the clock of the *Flora Alberta* which was set at fast time), he was on the bridge with Chief Officer Rea and a midshipman named Stark when he heard a high pitched whistle ahead fine on the port bow. On hearing this the Chief Officer, without waiting for the commodore, blew the column number. The speed of the *Fanad Head* at this time was 8 knots and, according to the captain, since there was a ship following them and they had been instructed to maintain their convoy speed this was not slackened. At the same time as the *Fanad Head* blew its column number, the navigating lights were switched on to full brilliance. Three or four minutes later the column number was again blown independently. Shortly thereafter the captain heard what he described as a high pitched whistle about three points on the port bow. He estimated the time this second whistle was heard at about 7 or 8 minutes after it had first been sounded. He said

that "a few minutes later" he saw the lights of the schooner crossing his bow at what he described "as a fairly good speed and distant approximately 800 feet."

Chief Officer Rea who came on duty at 4 o'clock and relieved the second officer on the bridge said that the commodore blew his column number at 4 or 5 minutes past 4 and the *Fanad Head* did likewise: that at about 4.10 he heard a medium length blast of a high note on ahead and immediately again sounded the column number in reply. After putting on the navigating lights and waiting 2 or 3 minutes he sounded the column number again. It was, he says, about a couple of minutes after this that he heard the whistle again about three points on the port bow, and about a minute after that he saw the lights of the schooner. The master had immediately ordered hard to starboard and rung the engines full astern and as he did this three short blasts were sounded on the steamer whistle. According to this witness, he saw the lights of the *Flora Alberta* when they were about two ship lengths' away.

Dennis Ward, a seaman who was on look-out on the forecastle head of the steamer, had gone on duty at 4 o'clock, at which time the vessel was blowing its column signal. He says these signals were being blown from one leading ship to the other and thought the *Fanad Head* was blowing every minute or two. After he came on watch he said he heard some of the other vessels in the convoy blowing what he described as "shorts and longs" and that some 8 or 10 minutes after he had gone on watch he heard a high note whistle a little on the port bow and ahead. He says that he heard the same whistle again later and about a minute after that saw the lights of the schooner which he thought to be about three points on the port bow. Asked as to how far he could see in the fog, he said that he could just see the outline of the bridge of the *Fanad Head* from the forecastle but could not estimate the distance from the steamer where he had first seen the lights of the schooner.

Edward Davey, the second officer, said that after 2 o'clock when the fog commenced the column numbers were sounded at ten minute intervals on the average. He had been relieved by the Chief Officer at 4 o'clock and, after going into the chartroom to write up the scrap log, had

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Locke J.

returned to the bridge and heard what was apparently the first whistle from the schooner at about two or three points on the port bow and says that all the leaders then sounded their column numbers. Thereafter he saw a light on the port bow and heard the order "full speed astern" and "hard-astarboard" and the collision followed. Davey was unable to express an opinion as to how far he could see in the fog but said that the lights of the schooner were over a ship length's away when he saw them. On cross-examination he said that he had heard the whistle of the schooner twice and was indefinite as to the length of time between the two, saying that it was 3 or 4 or 5 minutes. Charles H. Stark, the midshipman who had been on the bridge with the captain when the whistle was first heard and who was at the time his evidence was given the second officer of the *Fanad Head,* had come on duty at 4 o'clock and said that at 4.05 or 4.06 the *Fanad Head* and the other leaders had sounded their column numbers. He heard the whistle which he described as being "right ahead or fine on our port bow" and said that immediately the steamer sounded her column number again. The navigating lights were then switched on and about two minutes later the column number blown again. A few minutes later, he says, he heard the same whistle again, this time broad on the port bow, and about a minute after that saw the green light and white mast head light of the schooner which was then about three or four points on the port bow. Stark said that the sounding of the column number of the *Fanad Head* twice after they heard the first whistle was done independently of the commodore and he had not heard the commodore sound his column number after hearing the whistle. He estimated the distance between the two vessels when he first saw the light of the schooner as being one ship's length.

Captain Hugh Roberts, the master of the *Tilapa,* said that he heard the whistle of what proved to be the schooner shortly after 4 o'clock. He described it as a faint whistle and he was the only one on his vessel who heard it and said that it appeared to be fine on the port side of the convoy. As a precaution he sounded his column number and says that the other leaders of the convoy sounded

theirs after that and that he distinctly remembers hearing that of the *Fanad Head* from its position abeam. Some time afterwards he heard what he described as a definite sound signal a little forward of the port beam and apparently close to the convoy and immediately the column numbers were blown again. Whether it was the *Fanad Head* who blew first he was not certain but said that there was "definitely plenty of noise at that time". After that he heard the three short blasts from the *Fanad Head* followed by the sound of the collision. Captain Roberts estimated the visibility at the time at about 400 or 500 feet.

In addition to these witnesses who were either officers or members of the crew of the ships concerned, Oliver Bertram, a marine engineer who had been torpedoed and landed in Canada and was returning to England as a passenger on the *Fanad Head,* gave evidence that he was in his stateroom on the starboard side and had been awake for some time before the collision. He could hear the whistle of the *Fanad Head* and of the other ships on its starboard side, though the port-hole was closed. He said that these whistles were at fairly regular intervals of between 7 and 10 minutes and that before the accident there seemed more frequent whistles. He had heard also the three short blasts from the *Fanad Head,* the significance of which he appreciated and had then got up and gone on deck. Charles Third, a marine engineer who was travelling as a passenger on the *Fanad Head* under similar circumstances, occupied a cabin on the port side and was wakened by the frequent blowing of the whistles. He said that every few minutes there was a blast and then there were three short blasts and appreciating what these signified he got up and went on deck.

There is no finding of fact which casts any doubt upon the veracity of any of these witnesses. The evidence of Heddles and Rea was taken more than two years and that of Roberts, Davey and Stark nearly three years after the collision occurred and it would be strange if there were not some discrepancies in the recollections of these witnesses. It is, in my opinion, established from their evidence that the convoy leaders were regularly sounding their column numbers at intervals of approximately ten minutes after

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Locke J.

2 o'clock on the morning in question, that this was last done prior to the time when the whistle of the *Flora Alberta* was heard at about 5 minutes after 4: that both the *Fanad Head* and the *Tilapa* again sounded their column numbers promptly following the first of the two whistles and that the *Fanad Head* sounded again some two or three minutes prior to the time when the second whistle from the *Flora Alberta* was heard. It appears to me that it is not established that the *Fanad Head* blew again after hearing the second whistle until the *Flora Alberta* was sighted and the three short blasts were given. In my opinion, the evidence also establishes that the visibility was such that the lights of the schooner were visible at least 400 or 500 feet distant. It was proven that the navigating lights of the *Fanad Head* were switched on at full brilliance as soon as the first whistle was heard from the schooner and yet Knickle did not see them until they were about 140 feet distant. Much evidence was given as to the unreliability of bearings taken to sound signals in a fog and some to the effect that during a considerable fog a fog horn or whistle may not be heard a very short distance which would under normal conditions be heard several miles away. In so far as the latter point is concerned, there is a conflict in the evidence. Neither Heddles nor Rea had had any such experience with steam whistles such as those on the *Fanad Head* and it is significant that the column leaders had since 2 a.m. verified their positions in the convoy by sounding their column numbers and that, according to Captain Roberts, when the *Tilapa* had sounded the signals they were answered every time. The *Fanad Head* was equipped with a double whistle located on the funnel operated by steam. Rea considered that the range of the whistle would be about 4 miles. When the three leaders blew their column numbers at about 4.05, each signal consisted of 5 blasts and the evidence establishes that, at least the *Fanad Head* and the *Tilapa* if not the leader of the starboard column, blew these signals again promptly following the time when the first whistle was heard, and the *Fanad Head* at least blew again shortly before the second whistle of the schooner was heard. Thus, while the single blast of the whistle of the *Flora Alberta* was heard at about 4.10 by the Captain, Chief Officer,

Second Officer, Stark and Ward of the *Fanad Head* and Captain Roberts of the *Tilapa* and also the second blast sounded 7 or 8 minutes later, we are asked to believe that the great volume of sound from the steamers was inaudible to those who were supposed to be on watch on the *Flora Alberta*. The evidence does not satisfy me that this was the case. I think the only proper inference is that if the column numbers sounded were not heard on the *Flora Alberta* it was because no proper watch was being kept or that, having been heard, the Captain was mistaken as to the direction from which they proceeded and did not slacken speed.

By Article 16 of the International Regulations the *Flora Alberta* while proceeding in a fog was required to "go at a moderate speed having careful regard to the existing circumstances and conditions". There was a clear breach of this rule on her part. By the same article she was required upon hearing, apparently forward of her beam, the fog signal of a vessel the position of which was not ascertained, so far as the circumstances of the case admitted, to stop her engines and then navigate with caution until the danger of collision was over. Assuming the signals from the vessel were heard the *Flora Alberta* should have stopped her engines and, as required by Article 19, should have kept out of the way of the steamer which was on her starboard side. If the signals were not heard it was, in my opinion, due to a failure of those who were supposed to be on watch on the schooner to attend to their duties. The schooner was proceeding at a dangerously high rate of speed under the circumstances. It appears to me to be further apparent that the look-out was negligent in failing to see the lights of the approaching steamer, which were on at full brilliance, when she was 400 or 500 feet distant. Had the schooner been proceeding at the rate suggested by her master of 4½ knots and had the look-out been alert and detected the position of the steamer at this distance and the engines then reversed, the collision would have been averted, even had the schooner not altered her course.

As to the *Fanad Head,* she was proceeding in the convoy and was bound to conform to the instructions of the commodore which at the time in question required her to

1949

S.S. FANAD HEAD v. ADAMS ET AL.

Locke J.

maintain a speed of 8 knots an hour and her position in the convoy and not to sound her whistle independently, except in an emergency when the master would be required to exercise his own discretion for the safety of his ship. When the master heard the first whistle from what proved to be the *Flora Alberta,* she was apparently at a distance and fine on the port bow and in view of the position of the ship in the convoy, with the American vessel following her at three cable lengths, I think no fault can be found in that the master did not at that time stop the engines. The International Regulations did not apply without qualification to the *Fanad Head* at this time in view of her obligation to obey the convoy orders and I do not consider that an emergency existed when the whistle was first heard. Having heard the whistle of the *Flora Alberta* which was apparently a high whistle and not of great volume, the master would, in my view, be justified in assuming that the great volume of sound from the three vessels blowing their column numbers would be audible to those on the other ship and that they would have ample time to take measures for their own safety. I think, however, a different situation was created when the second whistle was heard. While it is not entirely clear upon the evidence, I am of the opinion that the proper inference is that the column number of the *Fanad Head* was not blown again after the second whistle was heard and that the only signal given by her was the blowing of the three short blasts when the schooner was sighted. Assuming she was kept upon the course of 132 degrees true, it is difficult to understand the apparent change in the position of the *Flora Alberta* from being fine on the port bow to three points on the port bow, unless either the schooner executed some such manœuvre as is suggested in the evidence of the master of the *Fanad Head* or, owing to fog, the bearing of the signals could not be properly determined. In view of the evidence as to the unreliability of sound bearings taken during fog conditions and of the evidence of the Captain and the helmsman of the *Flora Alberta,* I think the latter is the explanation to be accepted. On this footing the situation was that the master of the *Fanad Head* inferred that the schooner was going to port and the inference was erroneous. When the second whistle was heard forward of the beam and

clearly much closer than the earlier signal, I think a state of emergency existed requiring the *Fanad Head* to take independent action and that the engines should then have been stopped and the whistle blown again, and that had these steps been taken the accident would have been averted.

In my opinion both ships were at fault and the negligence of each continued up to the moment of collision and contributed to its occurrence and accordingly the damages should be apportioned. (*The Eurymedon* (1), Greer, L.J. at p. 50: *Admiralty Commissioners* v. *North of Scotland* (2), Viscount Simon at p. 354). I would apportion the liability one-third to the *Flora Alberta* and two-thirds to the *Fanad Head*. As to costs the appellant should have its costs of this appeal and the respondents should be allowed two-thirds of their taxable costs in the court below.

Appeal allowed in part, the liability being apportioned one third to the Flora Alberta, two thirds to the Fanad Head. Appellant to have costs of this appeal and respondents two thirds of their taxable costs in the Court below. Taschereau J. dissenting, would dismiss the appeal with costs.

Solicitor for the appellant: *C. B. Smith.*

Solicitor for the respondents: *Donald McInnes.*

---

(1) [1938] P. 41.

(2) [1947] 2 All E.R. 350.

1949

*Feb. 1, 2.
*May 9

IN THE MATTER OF
THE ESTATE OF GEORGE GILMOUR LENNOX, DECEASED.

WILLIAM SIDNEY RONALD and BEATRICE AVIS AINLEY CELS, Executor and Executrix of the last will of CORA BELL LENNOX, DECEASED ..... } APPELLANTS;

AND

LENNOX ARTHUR WILLIAMS and HELEN MARGUERITE FULLER.. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Wills—Construction—Life tenant—Residuary Personal estate—Power to executor to invest in securties he may deem advisable—Power to pay part of capital to tenant—What remains to be divided upon death of tenant—Whether executor has power to invest in unauthorized securities—Whether tenant entitled to income from unauthorized securities—Manitoba Trustee Act, R.S.M. 1940, c. 221.

Held: A will directing that the executor "shall invest in such securities as he may deem advisable", the income therefrom to be paid to the widow with power to pay her part of the capital, and directing that "such part of my estate as remained" shall be divided upon her death, does not give the executor power to retain or invest in unauthorized securities; and, therefore, the widow as life tenant of the residuary estate is not entitled to the income produced by unauthorized investments such as shares in a manufacturing company.

Howe v. *Dartmouth* (1802) 7 ves. 137 applies.

APPEAL and CROSS-APPEAL from the decision of the Court of Appeal for Manitoba (1) varying, Coyne J.A. dissenting, the judgment of Montague J., declaring certain moneys paid to the life tenant were capital in the hands of the executor.

Hugh Phillipps, K.C. for the appellants.

F. L. Bastedo, K.C. for the respondents.

The judgment of the Court was delivered by

KERWIN J.:—This appeal concerns the administration of the estate of a testator, George Gilmour Lennox, and the

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

(1) [1948] 4 D.L.R. 753; 2 W.W.R. 640.

proceedings commenced with an application by his executor to the King's Bench in Manitoba for an answer to the following question:—

Is the portion of the moneys received from the T. Herbert Lennox Estate which represent income or revenue in the hands of that estate, income or revenue in my hands and therefore the property of Cora Bell Lennox, widow, or is it capital and therefore to be held for the residuary legatees?

T. Herbert Lennox referred to in this question died in 1934. By his will, following a bequest of household goods and furnishings to his wife and a devise to her of the use or rent of a summer dwelling, he devised and bequeathed the balance of his estate to his trustees. After providing for an annuity for his wife, he directed that upon her death a number of legacies should be paid and the residue divided equally among his brothers and sisters who should survive his wife. Because of the point involved in this appeal, it is not without significance to notice clause 8 of the will of T. Herbert Lennox:—

8. I authorize my trustees to invest the moneys of my estate in any investments which they deem reasonably secure and likely to return a fair annual income, not being restricted to investments expressly authorized by law, and with power to retain the investments made by me in my lifetime as long as they think proper, and to reinvest the proceeds of the same, or any part thereof in similar securities.

The wife of T. Herbert Lennox died August 8, 1937, and the legacies payable on her death were paid June 8, 1938. The residue, which included 300 shares of the capital stock of T. Sisman Shoe Company Limited, was not divided among the four brothers and sisters of T. Herbert Lennox who survived the latter's widow. One of these brothers was the testator, George Gilmour Lennox, who died April 15, 1942. His will, after revoking previous ones and appointing an executor and directing him to pay debts, proceeds:—

I DIRECT that the rest and residue of my estate shall be invested in such securities as my executor may deem advisable and the income from same paid to my beloved wife, Cora Bell Lennox, as long as she shall live.

I HEREBY ACKNOWLEDGE that the house in which I am living at the time of my death and the furniture in the same are the property of my wife.

I FURTHER DIRECT AND REQUEST that my Executor, if he deems it advisable, shall be at liberty to pay, in addition to the income

1949

IN RE LENNOX ESTATE

RONALD ET AL v. WILLIAMS ET AL

Kerwin J.

from my estate, a further amount not exceeding five per cent of the capital of my estate in any one year to my wife as an additional allowance to her.

On the death of my beloved wife, I DIRECT AND REQUEST such part of my estate as shall remain be divided into three equal parts and one part I GIVE, DEVISE and BEQUEATH unto my niece Avis Beatrice Ainley Cels; one part to my nephew Lennox Arthur Williams, son of my sister; and one part to my niece Helen Marguerite Williams, now Helen Marguerite Fuller, daughter of my sister, respectively for their sole and only use forever.

Cora Bell Lennox, the testator's widow, died July 14, 1947, having received from her husband's estate the sum of $1,600. In the meantime, disputes had arisen between her, on the one hand, and Lennox Arthur Williams and Helen Marguerite Fuller, two of the residuary beneficiaries under the will of the testator, on the other. The testator's executor had received from time to time from the executors of T. Herbert Lennox cheques representing income or revenue earned by the latter's estate. While the executor's affidavit, filed on the application for advice, states that all of this was claimed by the two residuary beneficiaries to be capital, such claim is properly confined to the dividends declared and paid by the Shoe Company. The par value of each of the 300 shares held by the T. Herbert Lennox estate was $100 but, for succession duty purposes, each was valued at $240. Down to and including 1945, the annual dividend had been at a substantial rate but at the end of 1946, or early in 1947, while the application to the Court was pending, an extraordinarily large dividend was declared. In accordance with certain amendments to the *Income War Tax Act,* the Company paid the income tax of $73,178.81 out of its total accumulated undistributed income of $369,230.99 for the period 1917 to 1939. The directors objected to paying the balance in cash and decided that it should be distributed as a dividend in the following manner:—$46,052.18 in cash; the sum of $100,000 by the issuing of 1,000 shares of non-transferable preferred stock and the issuing of $150,000 debentures. The T. Herbert Lennox estate was entitled to 30 per cent of each of these items and the estate of George Gilmour Lennox would be entitled to one-fourth of the share of the T.

Herbert Lennox estate. The disposition of this one-fourth share has been treated as involved in the question submitted to the Court.

At the conclusion of the argument before him, the judge of first instance decided that the moneys referred to in the question and the cash and the preferred stock and debentures comprising the dividend declared by the company at the end of 1946 or early in 1947 were capital in the hands of the testator's executor. While no reasons were given, we were advised that the learned judge proceeded on the ground that the income which Cora Bell Lennox was entitled to receive was limited to the income from securities in which the testator's executor actually invested. While the appeal by Cora Bell Lennox to the Court of Appeal (1) was pending she died but the proceedings have been continued at the suit of her executor and executrix, William Sidney Ronald and Beatrice Avis Ainley Cels, the latter being also one of the residuary beneficiaries under the testator's will.

The Court of Appeal (1) dismissed the appeal with the following variations:—

1. That the entire residue of the George Gilmour Lennox estate (including the 75 shares of stock in the T. Sisman Shoe Co. Ltd., with all earnings and undistributed or undeclared accretions to the value thereof) be valuated as at the 15th day of April, 1942, being the date of the death of the said George Gilmour Lennox;

2. That the amount so ascertained by said valuation shall be, and shall be treated as, capital in the estate of the said George Gilmour Lennox;

3. That interest on the sum or amount of that valuation be paid or allowed to Cora Bell Lennox from the said 15th day of April, 1942, until the date of her death, namely, the 14th day of July, 1947;

4. That the interest be computed yearly at the rate of four per cent per annum;

5. That if in any year or years of that period, the said Cora Bell Lennox was actually paid by way of income, to which as life tenant she was entitled, any sum or sums in excess of four per cent of the said valuation but not in excess of five per cent of the residue so valuated, she shall be allowed to retain that excess sum or sums as being paid to her out of capital of the residue;

From that order the representatives of the estate of Cora Bell Lennox now appeal and the other two residuary beneficiaries cross-appeal. The cross-appeal is based on

(1) [1948] 4 D.L.R. 753; 2 W.W.R. 640.

1949

IN RE LENNOX ESTATE

RONALD ET AL v. WILLIAMS ET AL

Kerwin J.

the reasons which found favour with the judge of first instance but in my opinion the testator's will is not capable of the construction adopted by him and the cross-appeal fails. However, subject to a variation, the main appeal also fails as it is clear that the majority of the Court of Appeal (1) were quite right in deciding that the rule in *Howe* v. *Lord Dartmouth* (2) applies.

The rule was well established even before the decision whose name it bears and has been followed consistently ever since (see *Wentworth* v. *Wentworth* (3)). Statements of the rule appear in all the textbooks and a convenient reference is to page 241 of the 4th edition of Hanbury's Modern Equity:—

> Where residuary personalty is settled on death for the benefit of persons who are to enjoy it in succession, the duty of the trustees is to convert all such parts of it as are of a wasting or future or reversionary nature, or consist of unauthorized securities, into property of a permanent and income-bearing character.

Necessarily it is there stated in wider terms than need be considered in this appeal since it takes account of cases as well where the rule operated to the benefit of life tenants, as where it assists residuary beneficiaries. As applied to this appeal, it may be put thus:—The life tenant of residuary personal estate is not entitled to the income produced by unauthorized investments. As pointed out in the third edition of Gober on Capital and Income, at page 171, on the authority of the cases there referred to, the rule does not proceed on any presumed intention of the testator that the property should be converted but is based on the presumption that he intended it to be enjoyed by different persons in succession; an intention which can only be carried out by means of conversion and investment in permanent securities.

In the present case there clearly was to be an enjoyment in succession. While the rule may be excluded if the will discloses an intention either by an express direction or by necessary implication that the property shall be enjoyed in its existing state, the onus of showing that the words in any particular will exclude the rule lies on those who

(1) [1948] 4 D.L.R. 753; 2 W.W.R. 640.

(2) (1802) 7 ves. 137.

(3) [1900] A.C. 163 at 171.

say that it ought not to be applied: per Thesiger L.J. in *Macdonald* v. *Irvine* (1) and James L.J. at 124, and other cases referred to in Gober at 179. Here, the circumstances that the testator's executor had power to pay the widow part of the capital not exceeding five per centum in any one year and that what was to be divided upon her death was "such part of my estate as remained" do not exhibit such an intention. Nor, in the direction to the executor to invest in such securities as he may deem advisable, is there found an authority to him to invest in unauthorized securities. The cases collected in 33 Halsbury, 2nd edition, paragraph 418, show that such a direction has uniformly been held to mean authorized securities only. It is in connection as well with the power to retain as with the power to invest that a comparison of the testator's will with clause 8 of the will of T. Herbert Lennox is enlightening.

In the absence of such authority in the will, the Sisman Company shares are unauthorized investments: *Manitoba Trustee Act,* R.S.M. 1940, c. 221. Mr. Justice Coyne (2) refers to the following provision in section 30 of the *Trustee Act,* R.S.M. 1913, c. 200:—

> Nothing in this Act shall . . . empower any administrator, executor or trustee to purchase any bank or other stock with moneys entrusted to him as such administrator, executor or trustee aforesaid.

and to the fact that it was omitted in S.M. 1931, chapter 52, and in subsequent legislation. However, this cannot alter the construction of the *Trustee Act* as no authority in Manitoba was ever given trustees to purchase bank or other stock except stock of the Government of the Dominion of Canada or of any province.

When once the position of affairs is appreciated and stated, there is, I think, no difficulty. On April 15, 1942, when the testator died, the time had already arrived for the executors of T. Herbert Lennox to distribute the residue of his estate. The testator's executor had no power to retain or invest in unauthorized securities. Even if it be a fact that there were obstacles in the way of the executors of T. Herbert Lennox selling or transferring the Company's

(1) (1878) 8 Ch. 101 at 121, 124.

(2) [1948] 4 D.L.R. 753; 2 W.W.R. 640.

1949

IN RE LENNOX ESTATE

RONALD ET AL v. WILLIAMS ET AL

Kerwin J.

shares (and we have no information upon the subject), that does not alter the application of the rule since equity considers that as done which ought to have been done.

Counsel for the respondents stated that he did not seek to have repaid any moneys paid by the testator's executor to Cora Bell Lennox in excess of the amounts to which she was entitled under the formal order of the Court of Appeal but, in any event, clause (1) of that order should be amended so as to be restricted to the 75 shares of stock (including all earnings and undistributed or undeclared accretions) since there were other income-bearing assets in the estate of T. Herbert Lennox. In case it might be necessary to consider the point on some future occasion, it should be stated that the rate of 4 per centum per annum is accepted as one adopted by the Court of Appeal and as to which counsel for the respondents stated he raised no question.

With the variation mentioned above, the appeal should be dismissed with costs and the cross-appeal without costs.

Appeal dismissed with costs; cross-appeal dismissed without costs.

Solicitors for the appellants: *Phillipps and Tallin.*

Solicitors for the respondents: *Aikins, Loftus, Macaulay & Company.*

IN THE MATTER OF THE ESTATE OF GEORGE V. STEED, DECEASED

AND

IN THE MATTER OF THE ESTATE OF JAMES KENNETH RAEBURN, DECEASED.

1948
*Nov. 18, 19, 22.
1949
*May 9

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

WENDELL THOMAS FITZGERALD..... RESPONDENT.

AND

HIS MAJESTY THE KING..... APPELLANT;

AND

JOHN WALTER WALSH AND WENDELL THOMAS FITZGERALD ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Succession duties—Whether property situated in Canada—Chose in action—Situs—Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, ss. 6 (b), 2 (k).

W. domiciled in B.C., Canada, bequeathed to his wife "the sum of one hundred and fifty thousand dollars or one-half of my estate whichever may be the larger sum", making this bequest a first charge on the estate. W. died in Vancouver in 1921. His widow, also domiciled in B.C., died in 1924 leaving the residue of her property to Bonnie S., domiciled in California, U.S.A., who died in January 1941 and left all her property to her husband George S., also domiciled in California, and appointed him executor. He died in 1944 and left all his estate to his nephew R., domiciled in California. R. died in 1944 leaving portions of the estate bequeathed by George S. to members of his family. The estate of W. in B.C. consisted chiefly of real property and the executor delayed the sale of it until November 1945, when the sum of $250,000 was realized therefrom. The respondent Fitzgerald was appointed by a California Court administrator with the will annexed of Bonnie S. and by virtue of a Power of Attorney from him the respondent Walsh was appointed ancillary administrator of the estate of Bonnie S. in B.C. Upon his death he was succeeded by Tupper who is now the sole executor of the will of W. and of W's widow. The Minister of National Revenue assessed duties on the

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

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

succession from George S. to R. and on the succession from R. to his family. On appeal to the Exchequer Court by the administrator, the assessments were set aside.

Section 2(*k*) of the *Act* reads as follows: "Property includes property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death, and any right or benefit mentioned in section three of this Act".

Held, affirming the judgment below, (Locke J. dissenting), that there was no "property situated in Canada" within the meaning of sec. 6 of the *Succession Duty Act,* as neither George S. nor R. had, in the British Columbia estate, the interest that is required by sec. 2(*k*) of the *Act.* All that devolved upon their deaths was a right to have the estate of Bonnie S. administered and that right was a chose in action properly enforceable in the country of Bonnie S.'s domicile, i.e. in California.

Per Locke J. (dissenting): Raeburn in his personal capacity and those claiming under his will each succeeded to an interest in property situate in British Columbia out of which the legacies were payable, within the meaning of sec. 2(*k*) of the *Dominion Succession Duty Act,* and such successions were liable to duty. (*In re Smyth* (1898) 1 Ch. 89; *Attorney-General* v. *Watson* (1917), 2 K.B. 427 and *Skinner* v. *Attorney-General* [1940] A.C. 350 followed: *Attorney-General* v. *Sudeley* [1897] A.C. 11 and *Doctor Barnado's Homes* v. *Special Income Tax Commissioners* [1921] A.C. 1 distinguished).

APPEALS by the Minister of National Revenue from the decision of the Exchequer Court (1), O'Connor J., setting aside the assessments made under the *Dominion Succession Duty Act,* 1940-41, Statutes of Canada, c. 14, in the estate of George V. Steed, deceased, and in the estate of James Kenneth Raeburn, deceased.

J. W. Pickup, K.C. and John J. Connolly, K.C. for the appellant.

C. F. H. Carson, K.C. and Alfred Bull, K.C. for the respondents.

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

KERWIN J.:—This is an appeal against a judgment of the Exchequer Court (1) pronounced in two appeals from assessments made under the *Dominion Succession Duty Act,* chapter 14 of the 1940-41 Statutes of Canada and in an action commenced in the Exchequer Court by a writ of

(1) [1947] Ex. C.R. 589.

immediate extent. The proceedings in this action and in the two assessment appeals were consolidated as the question to be determined is the same in all three.

That question depends upon whether there was "property situated in Canada" within the meaning of section 6 of the *Succession Duty Act* firstly upon the death of George Steed, and secondly, upon the death of James Kenneth Raeburn, both of whom were domiciled in California, in the United States of America. Section 6, so far as relevant, reads as follows:—

> 6. Subject to the exemptions mentioned in section seven of this Act, there shall be assessed, levied and paid at the rates provided for in the First Schedule to this Act duties upon or in respect of the following successions, that is to say, . . .
>
> (*b*) where the deceased was at the time of his death domiciled outside of Canada, upon or in respect of the succession to all property situated in Canada.

It is admitted that upon each death there was a "succession" as defined by section 2 (*m*) of the *Act*:—

> (*m*) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy * * *

"Deceased person" is defined by section 2(*d*) to mean a person dying after the coming into force of the *Act*. The *Act* came into force on June 14, 1941; George Steed died August 16, 1944, and James Kenneth Raeburn was killed while serving in the United States Armed Forces December 13, 1944.

In order to appreciate the nature of the property which, on behalf of the appellants, it is alleged was situate in Canada, it is necessary to state certain events that occurred before George Steed's death. One Adolphus Williams, domiciled in British Columbia, died at Vancouver in 1921, having made his last will and testament and codicils. By the will the testator bequeathed to his wife Katherine the sum of $150,000 "or one-half of my estate whichever may be the larger sum to be paid to her by my trustees as hereinafter mentioned free of succession duty, and I

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Kerwin J.

direct that the bequest to my wife shall be a first and prior charge on my estate and shall not be subject to any abatement whatsoever." By virtue of the will and first codicil, Walter William Walsh, the testator's wife Katherine and William Godfrey were appointed trustees and executors, and by the second codicil the testator directed his trustees to pay to his wife in equal consecutive monthly instalments, commencing immediately after his death, interest at 5 per cent per annum on the legacy on such portion thereof as might from time to time remain unpaid, and directed that this interest, as well as the legacy, should be a first and prior charge on his estate and not subject to any abatement whatsoever. These directions mean nothing more than that the widow was entitled to be paid the legacy and interest in priority to any other legatee.

Probate was granted to the three executors. The bulk of the estate consisted of real estate in Vancouver. The widow received interest on the legacy but no part of the principal and she died domiciled in British Columbia in 1924, having made her last will and testament and a codicil thereto whereby she devised and bequeathed all her property to her trustees to pay debts and transfer the residue to her sister Isabella Steed, generally known as and hereafter called Bonnie Steed. Probate was granted to the named executors, William Godfrey and Walter William Walsh.

Bonnie Steed was the wife of George Steed and she died January 10, 1941, domiciled in California, having made her last will and testament wherein she devised and bequeathed all her property to her husband and appointed him executor. No proceedings to prove this will in California were taken during the lifetime of George Steed but on March 26, 1941, probate was granted in British Columbia to him, limited to his wife's estate in that province.

George Steed, domiciled in California, died August 16, 1944, and by his will he left all his property to his nephew, James Kenneth Raeburn, and appointed him executor. Probate of this will was granted in the name of Mr. Raeburn by a California court on December 22, 1944, in ignorance of the fact that he had been killed on the 14th of that month. Subsequently, in March 1945, the California court granted letters of administration with the will annexed of

George Steed to Mr. W. T. Fitzgerald, who also in November of that year was granted letters of administration with the will annexed of Mr. Raeburn. By his will, Mr. Raeburn divided among various people what he had inherited from his uncle George Steed but appointed no executor.

It appears that Mr. Walsh, the surviving executor of Adolphus Williams considered it expedient to hold the several parcels of real estate in the hope that they would increase in value and that something would be available for the legatees mentioned in the will of Adolphus Williams other than the latter's widow Katherine. The real estate was not sold until November 5, 1945, at which time, upon receiving the purchase price, Mr. Walsh segregated a sufficient sum to pay the balance of Katherine Williams' legacy and all accrued interest thereon, and placed such sum in the bank in his name in trust.

However, the important date so far as George Steed is concerned is that of his death, August 16, 1944. Upon his death, all that any one claiming under him was entitled to, in relation to the Vancouver real estate of Adolphus Williams, was a right to have the estate of Bonnie Steed administered. The crux of the matter is to ascertain where that right was naturally and properly enforceable, per Lopes and Kay L.JJ. in the Court of Appeal in *Sudeley* v. *Attorney General* (1), whose judgments were explicitely approved in the House of Lord (2). That right was the property which devolved upon the death of George Steed, and that property had its situs, not in Canada, but in Bonnie Steed's domicile, California. It matters not that George Steed took out probate of his wife's will in British Columbia limited to her property there, since George Steed's executor, Raeburn, died without having been effectively granted probate of George's will and without he, himself, having appointed an executor. Upon George Steed's death there was no personal representative of Bonnie Steed in Canada. Neither, it is true, was there one in California but that was her domicile, and the right of any one claiming under George Steed to have the estate of the latter's wife administered was naturally and properly enforceable in the country of her domicile. As a matter of fact, on January 11, 1946, letters of administration with

(1) (1896) 1 Q.B. 354. (2) [1897] A.C. 11.

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Kerwin J.

the will annexed of Bonnie Steed were granted in California to Mr. Fitzgerald and on February 6, 1948, letters of administration with the will annexed of all the unadministered estate within British Columbia, of Bonnie Steed, were granted to Mr. Walsh. Before that namely on November 5, 1945, Mr. Walsh had set aside the balance of Mrs. Williams' legacy and interest, and holding that sum in his capacity as administrator with the will annexed of Bonnie Steed, his duty apparently would be to remit that sum, less debts and administration expenses to Mr. Fitzgerald, the administrator in the country of Bonnie Steed's domicile. An order to that effect was made in the Supreme Court of British Columbia upon Mr. Walsh's motion for directions and what prevented those directions being carried out was the issuance of the writ of immediate extent.

Mr. Pickup relied upon the judgment of the House of Lords in *Partington* v. *Attorney General* (1) but that was merely a decision as to what duty was payable in view of the particular steps taken by the plaintiff Partington. In *Re Berchtold* (2), is a decision on the conflict of laws and it is dangerous and misleading to attempt to apply conflict of laws cases to those of taxation.

The only remaining decision of importance put forward as bearing on the matter is that of the House of Lords in *Skinner* v. *Attorney General* (3). The point there was whether there was "property in which the deceased or any other person had an interest ceasing on the death of the deceased" within section 2, subsection 1, paragraph (*b*) of the *Finance Act*, 1894, which reads as follows:—

> 11. (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . .
>
> (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole;

By testamentary dispositions a testator devised and bequeathed his property to two nephews, subject to specific and pecuniary legacies, including an annuity to his wife. He died domiciled in Northern Ireland and his assets in

(1) (1869) 9 H.L. 100.
(2) (1923) 1 Ch. D. 192.
(3) [1940] A.C. 350.

England were of such little value that no estate duty was payable there in respect thereof. However, his executors invested the greater part of the estate in English securities and it was under those circumstances that upon the death of the testator's widow the English authorities claimed estate duty in respect of the testator's estate in so far as it was then represented by English securities.

In his speech, which was approved by all the other peers, Lord Russell of Killowen, (1) with reference to the provisions of the *Finance Act* set out above, stated at page 358:—

> It appears to me to be beyond question that an annuitant, whose annuity is payable out of a testator's estate and who is therefore interested in the whole estate, is necessarily also interested in all the parts which compose the whole; and that her right to take proceedings (if necessary) to have the estate administered for the purpose of providing her annuity, is merely the right of enforcing or realizing that interest which she has in the whole and its parts.

At page 359 he pointed out that in the *Sudeley* (2) case the interest which was being repudiated was a proprietary interest, and proceeded:—

> The case is not in any way a decision that the widow or her executors had no interest in the mortgages, and it is certainly no authority against the view that an annuitant whose annuity is charged on the estate of a testator "has an interest" in the different items of which that estate from time to time consists.

These extracts from Lord Russell's speech indicate the difference between the *Skinner* (1) case, on the one hand, and the *Sudeley* (2) case and the present one, on the other. Here, we are not dealing with a statute imposing a tax on the passing of property in which a deceased had an interest, ceasing on his death, but with one which imposes a tax upon a succession to property situate in Canada, By section 2 (*k*) of the *Succession Duty Act*:—

> property includes property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death, and any right or benefit mentioned in section three of this Act;

Undoubtedly, as it is put by Lord Halsbury in the *Sudeley* (2) case, in a loose and general way of speaking, George Steed had an interest in the British Columbia real estate held by Mr. Walsh as trustee of Adolphus Williams

(1) [1940] A.C. 350.
(2) [1897] A.C. 11.

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Kerwin J.

but what is referred to in (*k*) is not such a nebulous interest but a proprietary interest, either legal or such an equitable one that is recognized by our Courts, and that Steed did not have. All that devolved upon his death was a right to have the estate of Bonnie Steed administered; and that right was a chose in action properly enforceable and therefore situated in California and not in Canada.

The same result necessarily follows in connection with the death of James Kenneth Raeburn and the appeal should therefore be dismissed with costs.

RAND J.:—This appeal arises out of an unusual situation, the facts of which, however, can be shortly stated.

Adolphus Williams, whom I shall call A, dies in 1921, domiciled and resident in British Columbia where his property is situate, bequeathing his wife, to be called B, one-half of his estate but to be not less than $150,000. The executor of A continues an investment which constitutes the bulk of the assets for the purposes of the estate and in the result B becomes entitled to the minimum sum. The time required for this, however, carries the administration beyond the year 1944. B dies, domiciled in British Columbia, in 1924, leaving her estate to Bonnie Steed, called C, a domiciled resident of California. C dies in January, 1941, leaving her estate to George Steed, her husband, called D. D dies in August, 1944, leaving his estate to a nephew, James Raeburn, called E, of California, who lost his life while serving in the armed forces of the United States in December, 1944. Administration with the will annexed was granted in California to the respondent Fitzgerald in the estates of D and E: and the question is whether those two estates are liable for succession duty under the *Succession Duty Act* of the Dominion which came into force in June, 1941.

Although the definitions of "property" and "succession" in the *Act* are sufficiently broad to cover any property interest which is descendible, the determination of this controversy rests, I think, on a comparatively simple ground which is not affected by them.

An executor holds strictly a representative capacity; he stands in and enforces the right of the testator. At com-

mon law a legatee could not bring an action against an executor before at least the executor assented to the legacy; and a fortiori that rule is applicable where the bequest is residual and unascertained. It is equally clear that rights in action, as assets of the estate, can be asserted in a court only by the legal representative.

But in addition to his capacity of representing the deceased, the executor in equity is looked upon as quasi-trustee for the beneficiaries; and the beneficiary is entitled to resort to that court to have the duty of the executor enforced. The "interest" in property that is transmitted results from that right and becomes, therefore, an equitable interest, subject to the rules which underlie equitable administration.

The applicable section of the *Act* is 6 (*b*) and the duty is based on the operation of the territorial law in vesting a title to property which is within its jurisdiction. The res here as to B and C is undoubtedly in Canada. C acquired a direct right against the representative of B in respect of an interest in property resulting from a personal equitable right in the representative of B against the representative of A. But when C died, domiciled and resident outside of Canada, what was then the legal position? I think it was this: as equity in working out the rights and interests in property which it confers considers that done which ought to be done, the relation of the law of Canada to C must be determined as if the executor of B had reduced the assets of the estate to possession; in that situation, after administering in Canada, his duty, which the law of British Columbia would authorize him to carry out, was to transfer the property to the person entitled, C, in California. When it would then appear that C was dead, a new transmission came to the notice of the court in Canada, while the property was still there; but subject to the administration of that property as an asset of C in Canada, the duty of the executor of B became to deliver the asset over to the representative of C either in Canada or in California. At that point the transmission by Canadian law ends; the personal representation of C remains until the estate is fully administered in California; the death of a particular executor does not affect that representation; and the desti-

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Rand J.

nation of the Canadian property is to that estate in California. The interests of D and E arise out of rights existing by virtue of the law of California as the new situs of the res and are enforceable against the personal representatives there. The concern of Canadian law with the estate of C would be for the ascertainment of the persons entitled under the domiciliary law and the tax deduction to be made from the sum otherwise to be sent out of the country. Since the obligation lies between a Canadian personal representative and a Californian personal representative, with what is equivalent to a corporate existence on both sides, the death of a beneficiary of the estate of C neither appears to the Canadian law nor is it relevant to any action by it. In contemplation of law, therefore, and as it would in fact be carried out in formal procedure as the duty of the executor in Canada, the funds have become possessed by the executor at the domicile in California, they have ceased to be property in Canada, and the Canadian law has nothing further to do with them.

In this conception a present equitable interest which can be realized only in the course of a series of administrations is deemed to exist; but a present "transmission" takes place only subject to the rules and conditions which attach to equitable operation. In that contemplation, if execution of a series of future administrations carries the realized property beyond the jurisdiction, transmission by the local law obviously ceases; present equitable interests arise by that law only up to that point. Succeeding interests may arise and be recognized by the local jurisdiction, but they would not be taken as having been created locally. This view of the nature of transmission seems to underlie the statement of Dicey, 5th Ed. at page 336 where he says: "There can be no succession to property without administration."

The case of *Partington* v. *Attorney-General* (1), was pressed upon us. There a domiciled resident of the United States became entitled to personal property of a deceased person in England. Administration of the estate was granted to the solicitor to the Treasury. The legatee died before receiving the bequest and her husband died without

(1) L.R. 4 E. & 1 App. 100.

administering her estate. A son by attorney was then granted administration of both estates, and the question arose whether probate duty became payable on each. The majority opinion in the House of Lords, that it did, was based largely upon two circumstances: that administration of both had actually been granted; and that under a rule followed in England administration of the estate of a deceased wife must be taken out either by the husband or by his legal representative. Lord Westbury dissented. He viewed the situation in this way: the principal administration in each case would be in the United States; the legal representative of the mother either by himself or certainly after administration taken out in England, could give a discharge to the administrator of the original estate, and with that done the English courts would no longer be interested in the property which would thereafter be administered according to the law of the domicile. He impliedly rejected the view that administration of the father's estate in England was necessary to establish the right of the son to represent his mother there; and if the son had been named the executor of his mother's will it would seem to be beyond doubt that the father's estate would never be brought in question before the English courts: certainly that would appear to be so in relation to succession duty. The situation so conceived is that here. The only question before Canadian courts is the power to discharge the executor of B: that is possessed by the administrator of C: The estates of D and E do not come in question. The power of discharge is the converse aspect of the view of the equitable operation in respect of "interests" already expressed and obviously leads to the same result. The two grounds mentioned, together with the fact that it was probate duty there as against succession duty, distinguish it from the present controversy, to which the opinion expressed by Lord Westbury is, I think, unassailable in its application.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.:—The Crown in the first appeal claims duty upon the succession consequent upon the death of the late George V. Steed, who died domiciled in California,

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Kellock J.

entitled to the residue of the estate of his deceased wife, Bonnie Steed, also of California domicile. In the second appeal the claim is for duty upon the succession consequent upon the death of one Raeburn, who died domiciled in California, entitled to the residue of the estate of George V. Steed.

The *Dominion Succession Duty Act* came into force on the 14th of June, 1941. Bonnie Steed died on the 10th of January of that year, leaving a will under which she appointed her husband sole executor and sole beneficiary. Bonnie Steed was entitled under the will of her sister, the late Katherine Williams, to the residue of the latter's estate, all of the assets of which were locally situated in British Columbia. Bonnie Steed also had other assets to the value of some $10,000 in California. Katherine Williams had died on the 9th of April, 1924, being in her turn entitled to substantial benefits under the will of the late Adolphus Williams, all of whose assets were also in British Columbia. At the date of the death of George Steed on August 16, 1944, the estate of Adolphus Williams had not been fully administered. That did not take place until November of 1945. Consequently, the estates of his widow and of Bonnie Steed were also unadministered.

In the meantime J. K. Raeburn, the sole executor and sole beneficiary under the will of George Steed, had died in December 1944, domiciled in California. W. T. Fitzgerald was appointed by the California court as administrator with the will annexed of the estate of George Steed on the 12th of March, 1945, and on the 28th of November, 1945, Ftzgerald was also appointed administrator with the will annexed of the estate of Raeburn. George V. Steed had, on March 26, 1941, taken out letters probate in British Columbia limited to the estate of Bonnie Steed there. On the 16th of January, 1946, Fitzgerald was appointed in California administrator with the will annexed of Bonnie Steed. Pursuant to a power-of-attorney given by Fitzgerald, Walter William Walsh, who was the surviving executor of the estate of Adolphus Williams, was, on February 5, 1946, appointed by the court in British Columbia administrator de bonis non of the estate of Bonnie Steed.

The Crown's claim as against the estate of George V. Steed is rested upon the fact of his death prior to the actual distribution of the British Columbia assets of the estate of Bonnie Steed in the lifetime of George V. Steed. It is said that there was a succession to property in British Columbia within the meaning of the *Succession Duty Act* on the death of George Steed which is taxable under the provisions of 6 (*b*) of that *Act*.

"Property" is defined by section 2(*k*) of the statute as including real and personal property and every estate and "interest" therein capable of being devised or bequeathed by will or of passing on death. The question in each appeal is whether there was, upon the death of George Steed and of Kenneth Raeburn, respectively, any succession to property or an interest therein in Canada consequent thereon.

Dealing first with the situation arising upon the death of George Steed, the assets of the estate of Bonnie Steed, of which he was residuary beneficiary, consisted of certain assets in California where she was domiciled and where her executor was also domiciled and also an interest in the residuary estate of Katherine Williams. I think the situation becomes clear if one disregards the fact that George Steed was also the sole executor of Bonnie Steed and if the situation be considered as though another person still living were the executor. When the executor of Katherine Williams had realized upon her residuary estate and was in a position to pay, it would have been necessary to take out administration to the estate of Bonnie Steed in British Columbia, Bonnie Steed being then dead and there being no person qualified by the law of British Columbia to give a discharge. Bonnie Steed's representative would have been liable to succession duty in such event but the law of British Columbia would have had no further concern with the moneys so paid over beyond enforcing the claim of the personal representative appointed by the law of the domicile of Bonnie Steed, namely, California, to payment over of such moneys.

The argument on behalf of the Crown is that it would be the duty of the executor of Katherine Williams before paying the administrator in British Columbia of the estate

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Kellock J.

of Bonnie Steed, to inquire whether any of the beneficiaries of that estate, or those claiming under them, were then dead, and to refuse to pay such part of the proceeds of Katherine Williams' estate from which any such deceased person might ultimately obtain a benefit without payment of succession duty under the *Dominion Act* or without a release under that *Act* having been obtained.

It seems to me that in the absence of clear language in the legislation such is not the case. I think this view finds support in the judgment of Lord Westbury in *Partington* v. *Attorney-General* (1). The fact that this judgment was a dissenting judgment does not affect the present point.

In *Partington's* (1) case one, Mary Shard, had died in England in 1819 intestate, leaving one, Isabel Cook, her next-of-kin, domiciled in the United States. The latter died in 1825 without having taken out letters of administration and Isabel Cook's husband, Ellis Cook, also died in 1830 without having taken out letters of administration to his deceased wife. After his death the appellant, under a power-of-attorney, took out letters of administration in England to the estate, first of Ellis Cook and then of Isabel Cook, and it was held that probate duty was payable in respect of both estates. In his judgment Lord Westbury pointed out that the administration of the estate of Isabel Cook was necessary to enable that administrator to give a valid discharge to the administrator of Mary Shard but neither the personal estate of Isabel Cook nor that of Ellis Cook had to be distributed or administered in England. He was therefore of opinion that there was no basis for the levying of duty in respect of the estate of Ellis Cook. The personal representative of Mrs. Shard was of course entitled to receive a discharge upon the distribution of the assets in his hands. As Isabel Cook was dead, Mrs. Shard's administrator was entitled to have a discharge from a personal representative of Isabel Cook appointed in England. It was therefore necessary to take out letters of administration to Isabel Cook in England but solely for the purpose of giving such a discharge. Beyond that the law of England was not interested. In Lord Westbury's

(1) L.R. 4 E. & 1 App. 100.

view therefore the course that ought to have been adopted by the parties was to have taken out administration to the estate of Isabel Cook in the appropriate court in the United States and ancillary letters of administration in England. Notwithstanding that this course was not in fact followed, Lord Westbury would have decided the liability on the part of the estate of Ellis Cook to duty as though that course had in fact been followed.

The Lord Chancellor, Lord Hatherley, however, held that both estates were liable to duty as would have been the case had both been domiciled in England. Administration having in fact been taken out in England in respect of both estates it was not, in his view, for their Lordships to say that they were not bound by this course of action. He was unwilling to decide what might have been the case if the course suggested by Lord Westbury as the proper course had in fact been followed. The judgment of Lord Chelmsford and that of Lord Colonsay also proceeded on the basis of the course actually adopted by the parties. Lord Cairns was, however, of the view that, notwithstanding the course followed, both estates were liable to duty.

In my opinion in the case at bar the representative of Bonnie Steed was entitled to receive that to which Bonnie Steed was entitled under the will of Katherine Williams and to give a good discharge therefor. The accident that George Steed was not only beneficiary but executor and was dead when the time came for payment over does not affect the principle. I do not think the law of British Columbia could be further interested once the moneys reached the hands of the personal representative in British Columbia of Bonnie Steed, whose duty it then was to remit to the administrator in the domicile; *Eames* v. *Hacon* (1).

I pause at this point to deal with an argument of Mr. Pickup, that because in fact George Steed proved the will of Bonnie Steed in British Columbia before there was any administration taken out to her estate in California, British Columbia was thereby constituted as the local situation of all her estate and the main forum of its administration, with the result that George Steed died entitled to the residue of Bonnie Steed's estate, all of which was situate

(1) (1880-81) 18 Ch. D. 347.

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Kellock J.

in Canada. In my opinion this argument is not entitled to prevail. I think the case must be viewed apart from such accidents. Administration was always necessary in California and was ultimately taken out there and the administration in British Columbia ultimately granted subsequent to the death of George Steed was purely ancillary.

There is a further consideration which confirms the view to which I have come, as above expressed. In *Lord Sudeley* v. *Attorney-General* (1), a case dealing with probate duty, it was held that the residuary legatee of a testator who died domiciled in England where his estate was undergoing administration, but whose property included mortgages on real property in New Zealand, was not entitled to any part of the mortgages in specie but to require the testator's executors to administer his personal estate and to receive her share and that this was an English asset of the estate of the residuary beneficiary. The judgment of Lopes L.J., in the Court of Appeal (2) was approved. At p. 363 that learned judge said:

> The right of the executors of Frances (the widow and residuary legatee of the testator) as against the executors of her husband is a right to have his estate administered. Administration where? The husband was domiciled in England, his will was proved in England, his executors are in England, and his estate is being administered in England, and the money recoverable will be brought to England. The executors of the husband can only be sued in the English Courts by the executors of Frances. It is an English chose in action, recoverable in England, and is, in my opinion, an English and not a foreign asset * * *

With respect to estate duties in England the law is thus stated in Dymond on Death Duties, 10th Edition, at page 93:

> In the case of absolute interests in an unadministered estate the right of a residuary legatee, under English law and many other legal systems, is not to the specific assets of the testator. He is entitled merely to require the executors to administer the estate, and to pay him the clear residue, or a share thereof, as the case may be. The same rule applies under an intestacy. If, therefore, a residuary legatee or person entitled under an intestacy dies while the original estate is still under administration, the locality of his interest, as an asset in his estate, is determined by the residence of the debtors, viz., the personal representatives of the original testator or intestate (*Sudeley* v. *A.-G.* (1897) A.C. 11; *Barnardo's Homes* v. *Special Commissioners of Income Tax* (1921) 2 A.C. 1; *Re Steinkopff, Favorke* v. *Steinkopff* (1922) 1 Ch. 174), and by the forum of administration, the latter being determined by the domicile of the testator or intestate. In practice, as between Northern Ireland and Eire

(1) [1897] A.C. 11. (2) (1896) 1 Q.B. 354.

and Great Britain the domicile is treated as the material factor; . . . The Revenue has conceded the application of the general principle stated above to cases where the deceased beneficiary was also the sole personal representative of the other deceased person.

The author points out at page 87 that as regards claims for estate duty on property situate in Ireland such property ranks as colonial or foreign property.

If the question be looked at therefore in accordance with the view of the text writer, the locality of the interest of George Steed in the estate of his deceased wife was situate in California, where the executor was domiciled and where the main administration would proceed. It has not been considered by any text-writer, so far as I have been able to find, that anything said in *Skinner* v. *Attorney-General* (1) is relevant to the situation referred to by Dymond.

It was contended in the case at bar, however, that the decision in Skinner's (1) case was, however, relevant. In that case the House was concerned with a claim of the revenue to estate duty under section 2, 1 (*b*) of the *Finance Act,* 1894, in respect of investments in England made by the executors of a deceased person who died domiciled in Northern Ireland where his estate was undergoing administration, leaving annuities, among others, to his widow. Estate duty was claimed upon the death of the widow on the ground that the widow had had an "interest" in the English investments ceasing on her death within the meaning of the legislation.

It was held that section 2, 1 (*b*) did apply. In the course of his judgment Lord Russell of Killowen considered the decision in *Sudeley's* case and said that it was not in any way a decision that the widow in that case, or her executors, had no interest in the New Zealand mortgages, but that the gist of the decision was that she had no interest in the mortgages so as to make them an asset of her estate.

Assuming that the view of Lord Russell was that for the purposes of such legislation as the *Finance Act,* the widow in *Sudeley's* case was to be considered as having an interest within the meaning of that *Act,* and applying that view to the case at bar, George Steed had not only his claim against the executor of Bonnie Steed in California, but an interest in the assets of Bonnie Steed, one of which

(1) [1940] A.C. 350.

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Kellock J.

was an interest in the assets of the estate of Katherine Williams in British Columbia. In other words, George Steed had an interest in the interest of Bonnie Steed in Katherine Williams' residuary estate. When one comes to Kenneth Raeburn, he, similarly, had an interest in the interest of George Steed in the interest of Bonnie Steed in the residuary estate of Katherine Williams.

In my opinion, while "property" is defined by section 2(*k*) of the statute as including every estate and "interest" in real and personal property capable of being devised or bequeathed by will or of passing on death, I see no reason for construing this statute, without more express language, as including an interest in an interest or more remote interests.

In my opinion therefore the appeal should be dismissed with costs.

LOCKE J. (dissenting):—The bequest by Adolphus Williams to Katherine Wylie Williams, his wife, was the sum of $150,000 or one-half of his estate, whichever might be the larger sum, and it was directed that this bequest should be a first and prior charge on the estate and not subject to any abatement. After making certain further smaller bequests all of the testator's real and personal property was devised to trustees to sell and call in and convert into money and out of the proceeds to pay the debts and the legacies bequeathed by the will, and the trustees were empowered to postpone the conversion of any of the testator's property for so long as they should think best in the interest of the estate. The trustees were further empowered at the request of the wife to convey any part of the real and personal estate at their own fair market value in satisfaction of her legacy. By a codicil it was provided that the named trustees should pay interest on the legacy to the wife in monthly instalments at the rate of five per cent from the date of the death of the testator. By the will of Katherine Wylie Williams made on July 15, 1922, following the death of her husband, after directing the payment of debts, funeral, testamentary expenses, probate and succession duties, and providing a legacy of $5,000 to John Walter Walsh, the trustees were required

"to convey, assign, transfer and set over all the rest and residue of my property, both real and personal, unto my sister Isabella Steed, wife of George V. Steed, of the City of San Francisco, in the State of California" and in the event of her prior death to transfer such residue to George V. Steed. In the exercise of the discretion given to them by the will of Adolphus Williams, his trustees delayed the conversion into money of the Castle Hotel property in Vancouver, which was the main asset of the estate, until November of 1945 when they were able to effect a sale for $250,000 cash and to provide for the balance of the legacy of $150,000 and accumulated interest for the first time since the death of the testator. In the interval Mrs. Williams had died in the year 1924 and her sister Isabella Steed, who is referred to in the proceedings as Bonnie Steed, on January 10, 1941. Mrs. Williams had received some payments by way of interest upon her legacy and Bonnie Steed some small payments of principal, and the balance payable to the estate of Katherine Wylie Williams at the date of the sale of the property was $134,952.66, the balance of the principal amount of the legacy, and $24,-394.67, accumulated interest.

Adolphus Williams, his wife Katherine and Bonnie Steed all died prior to the date upon which the *Dominion Succession Duty Act* came into force and the duty imposed did not attach to the successions in any of these estates. The will of Bonnie Steed made on December 9, 1924, at San Francisco, where she resided with her husband and was domiciled, after directing payment of her debts bequeathed "all my property, real, personal and mixed of whatsoever kind and wheresoever situated" unto her husband and appointed him executor. Following the death of Mrs. Steed her husband applied for probate of her will to the Supreme Court of British Columbia, limited to the estate within that province and letters probate were issued on April 1, 1941, and at the time of the death of George V. Steed on August 16, 1944, no other probate had been obtained in California or elsewhere. By the will of George V. Steed made in California on February 4, 1941, he bequeathed "all my property of whatsoever kind and wheresoever situated" unto James Kenneth Raeburn, his wife's

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Locke J.

nephew, and by the will of Mr. Raeburn dated October 11, 1944, he left the estate which he had inherited from George V. Steed to his sister and other relations, in varying proportions. Raeburn was killed while on active service with the American Forces in December 1944. It is upon the successions in these two estates that the duties in question have been levied.

The assessment made upon the estate of Steed is upon what is said to be a succession of the value of $159,347.33 which, according to the notice of assessment, consisted of money on deposit with the main branch of the Royal Bank of Canada at Vancouver standing in the name of W. W. Walsh in trust. In the estate of Raeburn the dutiable value of the successions is stated to be $143,205.29. The notice in connection with this estate does not assume to designate any particular place as the situs of the moneys bequeathed. While Raeburn had been named the executor of George V. Steed and an application for probate made on his behalf granted in the Supreme Court of California on December 22, 1944, in ignorance of the fact that he had been killed in action earlier that month, his will did not name an executor. Raeburn who by virtue of sec. 75 of the *Administration Act,* cap. 5, R.S.B.C. 1936 would have had all the powers and rights of George V. Steed as executor of the estate of Bonnie Steed in British Columbia, did not exercise those rights and nothing has been done pursuant to these powers from the date of Steed's death. On March 12, 1945, letters of administration with the will annexed of the will of Raeburn were granted to the respondent Fitzgerald by the Superior Court of California and on January 11, 1946, a like appointment was made in that court in relation to the will of Bonnie Steed. Thereafter Fitzgerald, by power of attorney, authorized the appointment of Mr. Walsh as ancillary administrator of the Bonnie Steed estate in British Columbia and letters of administration with the will annexed de bonis non were granted in the Supreme Court of British Columbia on February 5, 1946. Upon the death of Mr. Walsh, Mr. R. H. Tupper was appointed to succeed him as administrator de bonis non of this estate.

Property is defined by sec. 2 of the *Dominion Succession Duty Act* as including *inter alia* "property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death." Succession is defined as meaning:

> every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession.

The duties imposed by the Act are levied where the deceased was at the time of his death domiciled outside of Canada "upon or in respect of the succession of all property situate in Canada" and the point for determination is as to whether the succession of Raeburn under the will of George V. Steed and of Nan Raeburn, Thomas W. Raeburn, Elizabeth W. R. Allan and William J. M. Raeburn, under the will of J. K. Raeburn, were successions to property situated in Canada.

I do not think that the proper determination of this question depends upon the fact that by the will of Adolphus Williams the bequest to his wife was declared to be a first charge upon the estate, since I think this was simply intended as a direction that the wife should be paid in preference to all other legatees and that there was no intention to create a charge in the sense of an encumbrance upon the real and personal assets. Nor do I think that the fact that letters probate of the will of Bonnie Steed were obtained in British Columbia by her executor affects the matter since no one now is vested with the status of executor of the estate in British Columbia and the claim to the moneys in question is made by the administrator with the will annexed, properly authorized by the court in the jurisdiction in which Mrs. Steed was domiciled and died. I am, however, of the opinion that George V. Steed at the time of his death had an interest in the assets of the estate of Adolphus Williams, within the meaning of

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Locke J.

subs. (*k*) of sec. 2 of the *Act*, and that the rights of Raeburn and of his legatees under the respective wills gave to these persons an interest in that property.

As of the date of the death of Steed on August 16, 1944, the remaining assets of the Adolphus Williams estate consisted of the Castle Hotel property and some other less valuable properties in Vancouver, and the unpaid portion of the legacy to Katherine Williams with accumulated interest was to be paid out of moneys realized from the sale of the property, in priority to the other legacies. It was this right which the trustees of Katherine Williams were required by her will to transfer and set over unto Bonnie Steed and it was this right which passed to George V. Steed under the bequest of the residue of his wife's estate and of which he died possessed. The right to receive the amount of the bequest from the executors of Katherine Williams was vested in Steed qua executor of his wife's estate. I am, however, of the opinion that Steed in his personal capacity had not only what was referred to by Romer, J. in *In re Smyth* (1), as an equitable chose in action entitling him to require the executor to administer the estate but also an interest in the assets out of the proceeds of which the legacy was to be paid. In *A.-G.* v. *Watson* (2), a testator bequeathed an annuity of £1,000 per annum to be paid out of his residuary estate and primarily out of the income thereof during the life of the annuitant or such less period as in the will mentioned. By s. 2, sub-s. 1 of the *Finance Act*, 1894, property passing on the death of a deceased was deemed to include property in which the deceased had an interest ceasing on the death of the deceased to the extent by which a benefit accrued or arose by the cesser of such interest, and upon the death of the annuitant the question arose as to whether he had an interest in the testator's residuary estate within the meaning of this section. Lush, J. said at p. 431:—

> On behalf of the defendants it has been contended that the annuitant had no interest in the corpus, and that no annuitant can be said to have an interest in the property out of which the annuity is payable unless the property has been actually appropriated and set apart to answer the annuity. If that is so of course the contention on behalf of the Crown fails, because there has been no express appropriation or setting apart of any specific property to answer this annuity. But in my judgment that is not the true interpretation to be placed upon s. 2, sub-s. 1 (*b*),

(1) (1898) 1 Ch. D. 89 at 91. (2) (1917) 2 K.B. 427.

of the *Finance Act*, 1894. The object of the section is to make estate duty payable whenever there has been a succession in fact, or that which is equivalent to a succession—whenever there has been a cesser of an annuity by reason of the death of the annuitant, which cesser causes a benefit to accrue to that property. And I think one is bound to construe the words "had an interest" in the wider sense and not to restrict the words, and put upon them the narrower meaning for which Mr. Disturnal has contended on behalf of the defendants. In my judgment this annuitant had, according to the ordinary use of language, an interest in the corpus of this property; she had an annuity accruing from day to day, payable out of the property, and it was to that property that the annuitant would necessarily look for the payment of her annuity. It is true she had no estate in the property, but she had an interest in it, because that was the source of the annuity bequeathed to her by the testator. It was the fund to which she could look and to which she was entitled to have recourse, and even to claim to have realized for the purpose of paying the annuity.

In *Skinner* v. *Attorney-General* (1), this decision was approved, Lord Russell of Killowen saying that an annuitant whose annuity is payable out of a testator's estate and who is, therefore, interested in the whole estate is necessarily also interested in all the parts which compose the whole and that her right to take proceedings (if necessary) to have the estate administered for the purpose of providing her annuity is merely the right of enforcing and realizing that interest which she has in the whole and its parts.

In the present case the learned trial judge in coming to the conclusion that the administrator of the estate of George V. Steed had no interest, legal or equitable, in the assets of the estate of Adolphus Williams, considered that the matter was concluded by the decision of the House of Lords in *Attorney-General* v. *Sudeley* (2), which was followed in *Dr. Barnardo's Homes* v. *Special Income Tax Commissioners* (3). In *Sudeley's* (2) case a testator who had died domiciled in England by his will, after bequeathing certain legacies, gave the residue of his real and personal estate to his executors in trust for his wife for life, and by a codicil gave one-fourth of his "said residuary real and personal estate" to his wife absolutely. The will was proved in England by his executors domiciled there and the estate included mortgages on real property in New Zealand. The wife died and her will was proved in England and at the date of her death her husband's estate had not been fully administered, the clear residue had not been ascertained

(1) [1940] A.C. 350.
(2) [1897] A.C. 11.
(3) (1921) 2 A.C. 1.

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Locke J.

and no appropriation had been made of the New Zealand mortgages to the particular shares of the ultimate residue. It was contended by the executors of the wife that no probate duty was payable under her will upon what they contended to be her fourth interest in the New Zealand mortgages since this was an asset the situs of which was New Zealand. It was held that the rights of the wife's executors was not to one-fourth or any part of the mortgages in specie but to require her husband's executors to administer his personal estate and to receive from them a fourth of the clear residue and that this was an English asset of the wife's estate and, accordingly, probate duty was payable under her will upon one-fourth of the value of the mortgages. Dealing with the contention of the executors, Lord Herschell said that the whole fallacy of the argument rested on the assumption that the testatrix was entitled to any part of the mortgages as an asset and that he did no consider that she or her executors had "any estate, right or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate." In Skinner's case Lord Russell pointed out that this passage from Lord Herschell's speech made it clear that the interest which had been repudiated was a proprietary interest and that it was not an authority for the proposition that the widow or her executors had no interest in the mortgages, and was certainly no authority against the view that an annuitant whose annuity is charged against the estate "has an interest" in the different items of which that estate from time to time consists. As Lord Russell pointed out, the whole point of the decision was that the widow did not own any part of the mortgages.

The decision in *Dr. Barnardo's Homes* (1) case does not appear to me to be at variance with this view of the law. There Dr. Barnardo's Homes National Incorporated Association named as the residuary legatee of an estate claimed that certain income received from investments of the estate following the testator's death but before the residue had been ascertained was exempt from income tax on the footing that the residue was its property. Following the decision in *Lord Sudeley's* (2) case it was held that until the residue was ascertained the institution had no property

(1) (1921) 2 A.C. 1. (2) [1897] A.C. 11.

in any specific investment forming part of the estate or the income therefrom and that accordingly income tax had been properly levied.

I think the rights of George V. Steed as at the time of his death were of the same nature as that of the annuitant in *In re Smyth* (1) and in *Skinner's* (2) case and that the matter is not affected by the fact that in Steed's case an action against the executors of Katherine and Adolphus Williams for the protection of his rights would normally be made by him in his capacity of executor of the estate of his deceased wife. It was to the real property held by the trustees of Adolphus Williams that Steed was entitled to look for the payment of the legacy and had the personal representative of his wife's estate been someone other than himself and had it been necessary to take some step for the protection of his legacy or to compel the administration of the estate of either Katherine or Adolphus Williams, Steed could have brought such an action in his own name had the personal representative declined to act, joining the representative of his wife's estate as a party defendant. As pointed out by Lord Russell of Killowen in *Skinner's* (2) case, his right to take proceedings, if necessary, to have the estate administered for the purpose of providing the legacy was merely the right of enforcing or realizing the interest which he had in the whole estate. In my opinion, the decisions in *Sudeley's* (3) case and in that of *Dr. Barnardo's Homes* (4) do not affect the matter to be decided here. The definition of "property" in sec. 2(*k*) of the *Dominion Succession Duty Act* says that the term includes every interest in property, real or personal, and not merely proprietary interests. If there could be any doubt as to the sense in which the word "proprietary" was used by Lord Russell in Skinner's (2) case it would be dispelled by the context. It was used to distinguish between the interest of one who claims a right of property in or ownership of assets, and one who has an interest arising out of the fact that an annuity is to be paid out of the income of such assets or the proceeds of their sale. In my opinion, Steed had no such proprietary interest in the assets of the

(1) (1898) 1 Ch. D. 89.
(2) [1940] A.C. 350.
(3) [1897] A.C. 11.
(4) (1921) 2 A.C. 1.

1949

IN RE STEED AND RAEBURN ESTATES

MINISTER OF NATIONAL REVENUE v. FITZGERALD ET AL

Locke J.

estate of the late Adolphus Williams in the sense that that term is used in Skinner's (1) case, but that appears to me to be aside from the point.

The tax imposed by the *Dominion Succession Duty Act* is upon the succession and in the estate of Steed the succession of the interest was to Raeburn and I consider that his rights as against the assets in the hands of the executors of Adolphus Williams did not differ from those of his predecessor. When Mr. Raeburn made his will it was in the form of a letter addressed to his sister and was apparently made while he was on active service. The exact nature of the bequests to Nan Raeburn, Thomas W. Raeburn, Elizabeth W. R. Allan and William J. M. Raeburn, was expressed to be fractional portions of the estate which he had inherited from the late George V. Steed and in the case of Nan Raeburn certain bonds, an insurance policy and some cash which had not formed part of the inheritance. In the case of these legatees a further administration intervenes but, for the same reason which leads me to conclude that George V. Steed died possessed of an interest in the assets of the estate of Adolphus Williams within the meaning of sec. 2(*k*) of the *Dominion Succession Duty Act,* I think these legatees succeeded to such an interest.

The appeal should be allowed with costs and the judgment in the Exchequer Court set aside. There should be a declaration that the moneys deposited in the Royal Bank of Canada in trust are liable to payment of succession duty at the appropriate rate on the dutiable value of the successions referred to in the assessment notices. The appellant should have the costs of the proceedings in the Exchequer Court.

Appeal dismissed with costs.

Solicitors for the appellant: *Clark, Robertson, MacDonald & Connelly.*

Solicitor for the respondent Fitzgerald: *E. G. Gowling.*

Solicitor for the respondent Walsh: *Alfred Bull.*

---

(1) [1940] A.C. 350 at 358.

THE BORDEN COMPANY LIMITED ..... APPELLANT;

AND

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

1948
*Dec. 1

1949
*Feb. 28

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Excess Profits Tax Act, 1940, c. 32, s. 4(2)—"Taxpayer who acquired his business as a going concern after January 1, 1938"—Section does not apply to the case of a corporation in existence prior to that date which enlarges its business by purchase of assets of other companies by merging them in its own.

The appellant in 1941 and 1942 acquired the assets and business of three subsidiaries as going concerns. Without alteration of its share capital it then, under section 4(2) of *The Excess Profits Tax Act, 1940*, S. of C. 1940-41, c. 32, sought to have added to its own standard profits those of the businesses it had taken over. Section 4(2) provides:

"On the application of a taxpayer who acquired his business as a going concern after January 1, 1938, if the Minister is satisfied that the business carried on by the taxpayer is not substantially different from the business of his or its predecessor, he may direct that the standard profits of the said predecessor may be taken into account in ascertaining the standard profits of the said taxpayer."

Held: Affirming the decision of the Exchequer Court (1)—, that the appellant did not acquire its business as a going concern after January 1, 1938. What it did was to enlarge the business previously carried on by it by purchase of the assets of the three companies. S. 4(2) therefore does not apply to such a case.

APPEAL from a judgment of the Exchequer Court of Canada, (1) Cameron J., affirming the assessment of the appellant under *The Excess Profits Tax Act, 1940*, S. of C. 1940-41, c. 32, as amended, for the taxation year 1942.

John R. Cartwright K.C. and *B. M. Osler* for the appellant.

Gérard Beaudoin and *E. S. McLatchy* for the respondent.

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

KERWIN J.—This is an appeal against a decision of the Exchequer Court affirming the assessment of the appellant, the Borden Company Limited, under *The Excess Profits*

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

(1) 1948 Ex. C.R. 20.

1949

THE BORDEN CO. LTD. v. MINISTER OF NATIONAL REVENUE

Kerwin J.

Tax Act, chapter 32 of the Statutes of 1940 as amended, for the taxation year 1942. Either under its present or a previous name, the appellant has been in existence for a number of years, manufacturing milk products and also carrying on a fluid milk and dairy products business. It is, I think, unnecessary to state in detail the various changes that occurred in the nature of the business carried on by the appellant before 1937 because in that year it purchased all the shares of twenty-six operating companies from a subsidiary of a United States parent concern and all the assets and business of one of its own subsidiaries, and by this step re-entered the fluid milk business which for some time previous, it had ceased to operate.

Among the companies the shares of which the appellant had purchased in 1937 were Laurentian Dairy Limited, Moyneur Co-operative Creamery Limited, and Caulfield's Dairy Limited. As of January 1, 1941, it purchased the assets of the first two companies and as of June 1, 1942, it purchased the assets of the third company.

Under section 3 of *The Excess Profits Tax Act* there is to be assessed, levied and paid a tax upon the excess profits of every corporation or joint stock company residing or ordinarily resident in Canada or carrying on business in Canada. The appellant did not file a consolidated return pursuant to subsection 3 of section 35 of the *Income War Tax Act* and, therefore, it does not come within paragraph (i) of section 2(c) of *The Excess Profits Tax Act* but within paragraph (ii) so that, as to it, "excess profits" means the amount by which its profits exceed one hundred and sixteen and six hundred and sixty-six one thousandths per centum of its standard profits. For present purposes, "standard profits" means the average yearly profits in the years 1936 to 1939 both inclusive because it is admitted that the appellant was during those years carrying on the same class of business as it did in the year in question, 1942.

Unless, therefore, the appellant can bring itself within some other provision of the Act, there can be no question that it was correctly assessed. The contention is that subsection 2 of section 4 applies:—

(2) On the application of a taxpayer who acquired his business as a going concern after January first, one thousand nine hundred and thirty-eight, if the Minister is satisfied that the business carried on by the tax-

payer is not substantially different from the business of his or its predecessor, he may direct that the standard profits of the said predecessor may be taken into account in ascertaining the standard profits of the said taxpayer.

I think that the learned trial judge was right in deciding that it cannot be said that the appellant acquired its business as a going concern after January 1, 1938. The case of a company which starts a new business is referred to in other provisions of the Act, and apparently what Parliament had in mind in subsection 2 of section 4 is a new taxpayer who has acquired its business as a going concern after the specified date. The appellant is not a new taxpayer with reference to the business carried on by it. It is the same taxpayer carrying on a business, enlarged, it is true, to some extent by its purchase of the assets of the three companies, but it is still the same business, and it cannot be said that that was acquired as a going concern after January 1, 1938. Furthermore, "predecessor" is not an apt word in the context in which it is found to describe any of the three companies.

The trial judge dealt with the question as to whether in any event the power of the Minister to "direct" is to direct the Board of Referees for whose appointment provision is made by section 13 of the Act. At the moment I have grave doubts as to whether this is so but I prefer to express no opinion on the subject since my conclusion on the first point is sufficient to dispose of the appeal. The standard profits of Laurentian Dairy Limited, Moyneur Co-operative Creamery Limited and Caulfield's Dairy Limited were quite properly not taken into account in ascertaining the standard profits of the appellant.

The appeal should be dismissed with costs.

RAND J.—The appellant carried on a large business during the standard period under *The Excess Profits Tax Act, 1940,* and its standard profits standing alone are not in question. In 1941 and 1942 it acquired the assets and business of three subsidiaries as going concerns which themselves were carried on during that period, but without alteration in its share capital. It now seeks to have added to its own standard profits those of the businesses taken over and section 4(2) of the Act is invoked.

1949

THE BORDEN CO. LTD. v. MINISTER OF NATIONAL REVENUE

Rand J.

I think it clear that section 4(2) is confined to a case where after January 1, 1938, a person acquires "his business" as distinguished from an addition to his business, as a going concern that was carried on in the standard period and continues it in substance as it was under his or its predecessor. In that situation section 5(2) comes into play. If the acquisition has been made in 1938, on the application of the taxpayer, or if after January 2, 1939, without an application, the Minister refers the case to the Board of Referees. Section 4(2) provides that in either case the Minister may direct the Board to take into account the standard profits, if there were such, of the predecessor. Two years is ordinarily the minimum period for the determination of such profits as average yearly profits, under the definition section 2(1)(i), and where the successor has less than that time within the standard period the case thus becomes or may become one for the Board.

What the appellant did was to add to the capital employed in its business. The Act makes provision for such cases, but the conditions laid down were not here complied with.

The appeal must, therefore, be dismissed with costs.

KELLOCK J.—Section 4, subsection 2, of *The Excess Profits Tax Act,* as it stood with relation to the year 1942, is as follows:

> On the application of a taxpayer who acquired his business as a going concern after January first, one thousand nine hundred and thirty-eight, if the Minister is satisfied that the business carried on by the taxpayer is not substantially different from the business of his or its predecessor, he may direct that the standard profits of the said predecessor may be taken into account in ascertaining the standard profits of the said taxpayer.

As of January 1, 1941, the appellant purchased, as a going concern in each case, the business and assets of Laurentian Dairy Limited and Moyneur Co-operative Creamery Limited, and as of June 1, 1942, the business and assets of Caulfield's Dairy Limited. Appellant contends that the above subsection is applicable to entitle it to have included in its standard profits for the year 1942, or the proportionate part thereof, the standard profits previously applicable to the companies whose assets were purchased. It is contended by the respondent, and this contention has been given effect to by the court below, that the subsection

1949

THE BORDEN CO. LTD. v. MINISTER OF NATIONAL REVENUE

Kellock J.

does not apply to a taxpayer who, while already in business, acquired a further business or businesses since the date mentioned in the subsection.

The appellant's contention really is that "his" in the first line of the subsection is to be read as "a". Read literally in its actual form the subsection does not apply to the case at bar and when one finds that there is other provision in the statute covering the identical case presented by the facts here present, the subsection is, in my opinion, to be construed as the learned judge below has construed it. Subsection 1 of section 4 makes provision for an adjustment of standard profits where any alteration in the capital employed has taken place, provided other conditions not here present are met. The phrase "capital employed" is defined in the first schedule to the Act and includes the value of assets acquired by purchase after the commencement of the business of the purchaser. This being so, I think there is no ground upon which the appellant's contention can be sustained. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Osler, Hoskin & Harcourt.*

Solicitor for the respondent: *W. S. Fisher.*

1948

*June 9, 10
*Nov. 18

1949

*Feb. 1

IN THE MATTER OF THE UNFAIR COMPETITION ACT, 1932, AND IN THE MATTER OF THE TRADE MARK "SUPER-WEAVE

BETWEEN:

THE REGISTRAR OF TRADE MARKS (RESPONDENT) ..... APPELLANT;

AND

G. A. HARDIE & CO. LIMITED (PETITIONER) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade Mark—Descriptive word—Laudatory epithet not subject of monopoly—The Unfair Competition Act, 1932, (Can.) 1932, c. 38, ss. 1, 2 (d), (k), (l), (m), (o), 26, 27 and 29—Practice—The Exchequer Court Act, R.S.C., 1929, c. 34, s. 56—The Exchequer Court Rules—rules 36, 37, 41 and 300.

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

1949

REGISTRAR OF TRADE MARKS
v.
G. A. HARDIE & CO. LTD.

The respondent in proceedings taken under section 29 of *The Unfair Competition Act, 1932,* to register the words "super-weave" as its trade mark, obtained a judgment from the Exchequer Court of Canada declaring that it had been proved to its satisfaction that the mark had been so used by the respondent as to have become generally recognized by dealers in and/or users of textiles as indicating that the respondent assumed responsibility for the character and quality of wares bearing that mark.

In so doing the respondent complied with the practice of the Exchequer Court—under r. 35 it published notice of the filing of its petition for registration in the *Canada Gazette;* under r. 36 it served the Minister with a copy of the petition and of the notice, and no one appearing to oppose its application for registration, it then under r. 37 filed the required affidavit with the Registrar of the Court, served the Minister with notice, and moved for a declaratory order by serving notice upon the Registrar of Trade Marks whom it named as respondent in the style of cause. The latter then opposed the application.

Held: that the appeal should be allowed, and that (reversing the decision of The Exchequer Court), the petition be dismissed.

Held: also, Rand and Kellock JJ. dissenting in part, that the compound word "super-weave" is a laudatory epithet of such common and ordinary usage that it can never become adapted to distinguish within the meaning of s. 2(m) of *The Unfair Competition Act, 1932.* It being impossible to bring the word within the meaning of "trade mark" as defined by s. 2(m), an application under s. 29 cannot succeed.

Rand and Kellock JJ. agreed with the majority of the Court that the appeal should be dismissed but only on the ground that the onus of proof imposed upon the applicant by s. 29 had not been met.

Per Rand J.—The expression "has become adapted to distinguish" as used in *The Unfair Competition Act, 1932,* s. 2(m), includes any case in which the word mark has in fact become the identifying badge of the article to which it is attached so that when associated with goods of a particular trade whatever primary meaning it may have had is submerged and only the trade designation remains.

Per Rand and Kelock JJ.—When it is proposed to withdraw an ordinary word from the common use the task of establishing the secondary meaning becomes greater according to the extent of that use.

Per Kellock J.—By the terms of s. 2(m) if the symbol "has become adapted to distinguish" and "is used" for any of the purposes mentioned therein that is sufficient to constitute a registerable mark provided it is not excluded under such sections as 14, 26 and 27. The Court has no discretion to exclude any word apart from the sufficiency of evidence adduced in support of its having become adapted to distinguish the wares of the applicant.

A clearly descriptive word which has acquired a secondary meaning within s. 29(1) is a word which "has become adapted to distinguish" within s. 2(m) so that in the case of such a word to satisfy the requirements of the latter part of s. 29, is to satisfy the definition in s. 2(m).

Per Estey J.—A survey of the relevant sections and of the Statute as a whole lead to the conclusion that the phrase "adapted to distinguish" has the same meaning in our statute as under the statute in Great

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Britain. It follows that words commonly used and appropriately described as laudatory epithets cannot become registrable as trade marks. Also, that the appellant having been named as a party and so treated by the Exchequer Court, had the necessary status to appeal.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J., (July 30, 1947), granting a declaration in the terms of s. 29(1) of *The Unfair Competition Act, 1932*, with respect to the compound word "super-weave" in relation to cotton goods, woollen goods and synthetic textiles as to the whole of Canada.

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

G. H. Riches for the respondent.

KERWIN, J.—This is an appeal by the Registrar of Trade Marks from an Order of the Exchequer Court made on the application of the Respondent, G. A. Hardie & Co. Limited, under Section 29 of *The Unfair Competition Act, 1932*. This section reads as follows:—

"29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the court by its judgment declares that it has been proved to its satisfaction that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

(2) Any such declaration shall define the class of wares with respect to which proof has been adduced as aforesaid and shall specify whether, having regard to the evidence adduced, the registration should extend to the whole of Canada or should be limited to a defined territorial area in Canada.

(3) No declaration under this section shall authorize the registration pursuant thereto of any mark identical with or similar to a mark already registered for use in association with similar wares by any person who was not a party to the action or proceeding in which the declaration was made.

By the Order appealed from, the Court declared that it had been proven to its satisfaction that the trade mark "SUPER-WEAVE" had been so used by the respondent as to have become generally recognized by dealers in and users of textiles including cotton goods, woollen goods and synthetic textiles, as indicating that the respondent assumed responsibility for their character and quality or

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Kerwin J.

for their place of origin. And the Court further declared that having regard to the evidence produced, any registration of the said trade mark "SUPER-WEAVE" in association with textiles including cotton goods, woollen goods and synthetic textiles should extend to the whole of Canada.

The preliminary point raised by the respondent may first be determined. Under rule 35 of the *Exchequer Court Act* notice of the application was given in the *Canada Gazette* requiring any person desiring to oppose the petition to file a statement of his objections with the Registrar of the Court within fourteen days after the last insertion of the notice, and serve a copy upon the petitioner. No objections were filed, but presumably Rule 35 was complied with by the petitioner, and a copy of the petition and notice above mentioned was served upon the Minister charged with the administration of the Act. Certainly the petitioner complied with Rule 37, which provides that if no one appears to oppose the application, the petitioner may file with the Registrar of the Court an affidavit in support thereof, and upon ten days' notice to the Minister, and upon serving him with a copy of any affidavit so filed, may move the Court for such Order as upon the petition and affidavit he may be entitled to. This was done by serving a notice upon the Registrar of Trade Marks, who was named as respondent in the style of cause, notifying him of the application for an Order setting the date for the hearing of the application. The Registrar of Trade Marks opposed the application, but the respondent complains that it had no notice of the intention of the Registrar of Trade Marks, and now takes the position that the latter never was a party to the proceedings and has no status to appeal. This objection cannot prevail, as the Registrar was named as a party and was so treated by the Exchequer Court. However, I agree with the learned trial judge that the Registrar of Trade Marks should comply with Paragraph 2 of Rule 36 and file and serve a statement of his objections to such a petition.

The evidence on the application consisted of the affidavit of the vice-president of the respondent, showing the nature of the latter's business and how it has progressed, and the

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Kerwin J.

nature of its advertising, together with several affidavits from persons connected with the laundry business or hospitals in different parts of Canada. The deponents were not cross-examined and no affidavits were filed in answer. It might be pointed out that generally speaking the advertising shows that the word "SUPERWEAVE" is overlaid with the words "COTTONS Reg'd.", and no satisfactory explanation of the precise meaning of this was given. However, even accepting the findings made by the trial judge upon this evidence, I am of opinion that the appeal should be allowed. The trial judge referred to the principle laid down in what is known as the *Perfection Case, Joseph Crosfield's & Sons Ltd. Application* (1), that an ordinary laudatory epithet cannot acquire a secondary signification. He also referred to the decision of the President of the Exchequer Court in *C. Fairall Fisher* v. *British Columbia Packers, Limited*, known as the *"Sea-Lect Case,* (2), and, as a matter of fact, the trial judge, shortly after the decision in the present case, decided in *Standard Stoker Company Inc.* v. *The Registrar of Trade Marks,* (3) that the word "standard" used in connection with goods was of a laudatory nature and could not mean the articles made by the Petitioner.

It might be added that this same principle was approved by the House of Lords in *A. Bailey & Co. Ltd.* v. *Clark, Son & Morland, Ltd.,* (4) and by the Privy Council in *The Canadian Shredded Wheat Co. Ltd.* v. *Kellogg Co. of Canada, Ltd., et al,* (5).

The trial judge considered that "SUPER-WEAVE" is not an ordinary laudatory epithet such as "best", "perfect" or "select". He would have refused an application for the single word "SUPER", which, as he points out, is here used as an abbreviation of the word "superior". In his opinion, "WEAVE" is descriptive of the character of the goods as indicating that they are manufactured by the process of weaving, and "SUPER-WEAVE" in its primary sense would indicate a better quality of weaving. He considered that the word "SUPER-WEAVE" was not a common or ordinary laudatory word in ordinary use, but that it came

(1) [1909] 26 R.P.C. 837.
(2) [1945] Ex. C.R. 128.
(3) [1947] Ex. C.R. 437.
(4) [1938] 55 R.P.C. 253.
(5) [1938] 55 R.P.C. 125.

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Kerwin J.

within the statement in the judgment of the Master of the Rolls in the *Perfection Case, supra,* at p. 854, that "in the case of a peculiar collocation of words it (the Court) might be satisfied with reasonable proof of acquired distinctiveness even though the words taken separately might be descriptive words in common use." With respect, I am unable to agree. The *Oxford English Dictionary* contains the following definitions of "superior", "super" and "weave".

SUPERIOR, a.

6. Higher in status or quality than; hence greater or better than * * * more or better than, above, beyond.

SUPER, sb.

6.=superfine

1881 *Instr. Census Clerks* (1885) 64 woolen cloth manufacture * * * Super Weaver. 1885 *Times* (Weekly ed.) 5 June 7/2 of the power looms, 1700 are devoted to the production of extra supers and 3-ply carpets.

SUPER, a.

2.=superfine 4.

1842 Bischoff *Woolen Manuf.* II. 187 Long wool of the best class that is grown in Kent, which we term super matching, or long drawing.

SUPER, prefix

6. prefixed to sbs. with adj. force; higher in rank, quality, degree, or amount; of a higher kind or nature; superior.

WEAVE, sb.

2. A particular method or pattern of weaving.

The word "SUPER" is thus indicative of "superior", or "superfine" quality especially in the textile industry, and the word "WEAVE" is particularly apt to describe an important characteristic of textiles. The result is that the compound word "SUPER-WEAVE" clearly indicates and describes textiles that have a superior or superfine weave, an attribute that is unquestionably much desired by purchasers and users of such wares and, therefore, an attribute which a trader in textiles would naturally wish to emphasize in offering his wares for sale. Such a word may not be commandeered by one manufacturer and registered under *The Unfair Competition Act* so as to prevent others from claiming the same quality in their merchandise and using the same or a similar expression to describe it.

It may be advisable to say that I am dealing only with an application to register. The decision of the Court of

Appeal in the *Matter of an Application by J. & P. Coats, Ld.* (1) for registration of a Trade-Mark (sheen), so much relied upon by the respondent, was decided, as the Master of the Rolls points out at p. 380, on the basis that the word "sheen" was clearly not a merely laudatory word like "perfection", or "best", or "classic", or "universal", or "artistic".

It was not contended that if the Court came to the conclusion that "SUPER-WEAVE" was an ordinary laudatory expression the application should succeed, but, in view of the argument addressed to us, it is advisable to state what appears to be the proper construction of section 29 of the Act. The opening words of subsection 1 "notwithstanding that a trade mark is not registrable under any other provision of this Act" require one to examine the definition of trade mark in section 2(*m*). That definition states that "trade mark" means a symbol "which has become adapted to distinguish". While this wording differs from section 9 of the English Act in question in the Perfection Case, since in section 9 "distinctive" is stated to mean "adapted to distinguish", no distinction should be drawn between the uses of the different tenses. Turning again to section 29, while the Court is empowered to grant the declaration mentioned, notwithstanding that a trade mark is not registerable under any other provision of the Act, the original idea underlying such legislation, as it has been developed in England, should be followed here, with the result that, if a word is held to be purely laudatory, no amount of use or recognition by dealers or users of words as indicating that a certain person assumes responsibility for the character or quality of the merchandise would be sufficient to take such an expression out of the common domain and enable the user thereof to become registered as the owner of a trade mark under *The Unfair Competition Act.*

The appeal should be allowed and the Petition dismissed, both without costs.

TASCHEREAU, J.—The learned trial Judge reached the conclusion that he was satisfied that the trade mark "Super-Weave" had been so used by the respondent, as to have been generally recognized by dealers in and users of textiles, cot-

(1) [1936] 53 R.P.C. 355.

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Taschereau J.

ton and woollen goods, as indicating that the respondent assumed responsibility for their character or quality or for their place of origin.

He also held that the same words were not ordinary laudatory epithets and that they may constitute a trade mark so as to be entitled to registration.

With due respect, I cannot agree, as I believe that the compound word "Super-Weave" is a laudatory epithet, and is capable of application to the goods of any one else. Of its very nature it is common property and cannot be made the subject of monopoly. It is used for the purpose of advertising the superior quality of the weaving of a particular commodity.

I agree with my brother Kerwin, that the appellant, having been named as a party, and having been so treated by the Exchequer Court, has the necessary status to lodge the present appeal.

The appeal should be allowed, but without costs.

RAND, J.—This appeal raises questions in the interpretation of the *Unfair Competition Act, 1932,* of some difficulty and they exemplify again the necessity for caution in interpreting a Canadian statute by the light of English decisions on English statutes.

Mr. Gowling invites us to attribute to "trade mark" the characteristic of being "distinctive" as defined in the English *Trade Marks Act,* 1905, and as this involves the substance of the contention on behalf of the Registrar it is desirable to consider briefly the conceptions of trade mark attributes written into these statutes.

Under section 9 of the English Act certain essential particulars are prescribed for a registrable mark and then an omnibus subsection (5) permits under certain conditions the registration of "any other distinctive mark". For that purpose, "distinctive" means "adapted to distinguish the goods of the proprietor of the trade mark from those of others"; and in determining whether a mark is so adapted the tribunal may "in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such a trade mark in fact distinctive for the goods with respect of which it is registered or proposed to be registered". From this it is seen that the determination in

each case is whether the mark is "distinctive" as defined, whether the quality and character of the word, as it is found in the body of the language, stamp it as so adapted; and it follows that for various reasons certain words will be excluded. The monopoly of a registered mark appropriates from ordinary trade use words which otherwise would be open to all; and the legislative requirement raises at once interests of the public as well as competitors. Under the English decisions it is settled that words of the normal vocabulary which a manufacturer or seller of goods would ordinarily use in either describing or appraising his wares are outside the scope of the statute; and even though by long continued and exclusive use a word may have come actually to indicate particular goods, that fact is only evidential of the character of the word mark which the statute requires.

On the other hand there can be this *de facto* distinctiveness. It is doubtful that any word can be said to be incapable, regardless of time or circumstance, of such an adaptation. We would say of such a mark that it *"has become distinctive";* and I find that the Lord Chancellor in the *Glastonbury case,* (1) at page 258 in dealing with that aspect of adaptation, says: "It is not in dispute that the respondents in the circumstances of this case were called upon to prove by evidence that the word 'Glastonbury' or 'Glastonbury's' alone *had become, at the date of registration, adapted to distinguish* their goods from those of other persons." The Court there rejected the mark because in spite of the *de facto* adaptation it had not the distinctive quality specified by the statute. The difference between the two conceptions is made clear also by Lord Parker in the *W. & G. mark case,* (2) at page 637; and by Lord Justice Hamilton in *R. J. Lea Ltd.,* (3) at page 463 in this language: "Further, the Act says 'adapted to distinguish'; the mere proof or admission that a mark does in fact distinguish does not *ipso facto* compel the judge to deem that mark to be distinctive. It must be further 'adapted to distinguish', which brings within the purview of his discretion the wider field of the interests of strangers and of the public."

(1) (1938) 55 R.P.C. 253.
(2) [1913] A.C. 624.
(3) [1913] 1 Ch. 446.

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Rand J.

With that distinction in mind, then, let us examine the definition of "trade mark" in section 2(*m*) of the Canadian Act. By this, "trade mark" means "a symbol which *has become adapted to distinguish* particular wares falling within a general category from other wares falling within the same category and is used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers in, and/or users of such wares that have been manufactured, sold, leased or hired by him or, etc." The word "distinctive" is seen to be absent; it appears only once in the statute, in section 28(1)(*d*) where it is used in relation to a foreign mark. That fact I consider significant. On the other hand, in the definition of "distinguishing guise", section 2(*d*), the expression "is adapted to distinguish" is used. There is, therefore, no restriction to marks which are "distinctive" in the sense of the English Act.

The expression "has become adapted to distinguish" includes then any case in which the word mark has in fact become the identifying badge of the article to which it is attached; that when it is presented to the mind associated with goods of a particular trade, whatever primary meaning it may have had is submerged, and only the trade designation remains: *J. & P. Coats, Ld.*, (1). If, therefore, a word is used which describes or imports characteristics or qualities of goods, that connotation must have so disappeared before it can be said to have become so adapted; and when it is proposed to withdraw an ordinary word from the common use the task of establishing that exclusive secondary meaning becomes greater according to the extent of that use.

With these considerations in mind, I turn to the case before us. The mark offered is the compound word "Super-Weave". For thirteen years it has been used in connection with textiles, including cottons, woollens and synthetic fabrics, and the mode of its use has taken several forms. The elements of it are ordinary words and their sense is clearly descriptive of quality, and for that reason it was assumed, and properly so, to be excluded from section

(1) (1935) 53 R.P.C. 355.

26; but an application was made to the Exchequer Court under section 29, and it becomes necessary to give some consideration to the language of that section:—

29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the court by its judgment declares that it has been proved to its satisfaction that the mark has been *so used by any person* as to have become *generally recognized by* dealers in and/or users of the class of wares in association with which it has been used, as *indicating that such person* assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

The expression "as to have become *generally* recognized * * * as indicating that such person *assumes responsibility for their character or quality,* etc." appears in this statute, apparently, for the first time. It is contained also in section 2, subsections (*k*) and (*l*) in relation to definitions of the word "similar". "Responsibility" seems to signify only what is imported by every trade mark, i.e. the commercial integrity and dependability of the owner of the mark. But the proof required by the section is both the fact that the mark has become adapted to distinguish certain goods from other goods of the same class as required by the definition and that the owner of it has become generally known as assuring quality or character, etc.

What, then, is the evidence of these matters offered to the Court? There are eight affidavits by customers of the applicant who are familiar with the wares and who say, incorporating the language of the section, that in effect "Super-Weave" means to them the goods of the applicant. There is also evidence of considerable advertising over the period of its use. What is asked for is the monopoly of this mark throughout the Dominion. The purchasers generally are laundries, dry cleaners, linen suppliers, hotels, hospitals and other institutions; but that the exclusiveness of the identifying sense of the word is in fact present to the minds of the customers, apart from that part of the trade which has not spoken, is by no means made out; and much less has it been shown to be recognized "generally" by Canadian dealers as attaching responsibility to the owner. Obviously, to customers purchasing these goods over some years the word would be associated with their origin; but that is short of the identification with the goods in which

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Rand J.

the descriptive sense of the word has disappeared. Neither that nor the general recognition required has, in my opinion, been made out and the application fails.

The respondent took the objection that the Registrar, representing the Minister, had no standing to appeal because he had not, under rule 38 of the Exchequer Court, appeared by filing a statement of objections to the application. I agree that the rule applies to the Minister. By rule 41, however, notice of trial must be served on the Minister. The effect of this is that any default under rule 38 is superseded; and notwithstanding default, the Minister continues as a party. That being so, he has a right of appeal under section 56 of the Act.

As this is the first occasion upon which this Court has been called upon to interpret the unusual language of this statute, the applicant should be given leave, if it desires, to present new evidence to the Exchequer Court to bring itself within the section. I would therefore allow the appeal without costs and refer the matter back to that Court.

KELLOCK, J.—By the judgment of the Exchequer Court (Cameron J.) in appeal, respondent has been granted a declaration in the terms of section 29(1) of the *Unfair Competition Act* with respect to the compound word "Super-Weave" in relation to cotton goods, woollen goods and synthetic textiles extending to the whole of the Dominion.

Appellant contends in the first place that as the words in question are of a laudatory character and clearly descriptive of the said goods they are incapable of registration under the statute. It is said that the Canadian Statute in this respect is to all intents and purposes the same as the corresponding provisions of the English *Trade Marks Act, 1905* and that the decisions under the last mentioned statute, excluding from registration laudatory epithets, have equal application under the Canadian Act.

The first four paragraphs of section 9 of the English statute provide certain essentials of a registrable trade mark but if a mark does not come within them it may yet be registered upon order of the Board of Trade or the court if it is "distinctive", i.e., if, as defined by the statute, it is

"adapted to distinguish" the goods of the proprietor of the mark from those of other persons. In the determination of that question the tribunal is authorized, if the mark has been in use, to take into consideration the extent to which such user has rendered the mark in fact distinctive, but it has been held that this is a purely discretionary power.

Bailey's case (1), is an illustration of the well settled effect of the English statute, namely, that distinctiveness in fact is not conclusive upon the question of registrability. One extract from the judgment of Lord Maugham L. C. at p. 258 is sufficient:

> It is not in dispute that the Respondents in the circumstances of this case were called upon to prove by evidence that the word "Glastonbury" or "Glastonburys" alone *had become,* at the date of registration, adapted to distinguish their goods from those of other persons, and it is further admitted, that even if that question were answered in the affirmative, the tribunal was not bound to allow registration.

By the terms of section 2(m) of the Canadian Statute however, if the symbol "has become adapted to distinguish" and "is used" for any of the purposes mentioned in the paragraph, that is sufficient to constitute a registrable mark provided it is not excluded under such sections as sections 14, 26 and 27. The court, in considering whether or not any particular word satisfies the provisions of the definition section, has no discretion under the Canadian Statute to exclude any word at the threshold of the hearing or to refuse to hear evidence designed to establish that in fact it has become adapted to distinguish. Section 26(1)(*c*) excludes all words which are clearly descriptive or misdescriptive of the character or quality of the wares in connection with which it is proposed to use them and no differentiation is made as among words or classes of words whether laudatory or otherwise. In my opinion therefore it is not open to the court to exclude any word apart from the sufficiency of the evidence adduced in support of its having become adapted to distinguish the wares of the applicant.

The language used in section 2(*m*) is "has become" adapted to distinguish not "is" distinctive or "is" adapted to distinguish.

(1) (1938) 50 R.P.C. 253.

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Kellock J.

In the *Perfection* case (1), Fletcher Moulton L. J. in discussing the provision in the English statute enabling the court to take into consideration the extent to which user had in fact rendered a mark distinctive, said at p. 147:

> To my mind this provision can bear but one interpretation. It recognizes that distinctiveness, i.e., being adapted to distinguish the goods from those of other traders, is not necessarily an innate quality of the word. It may be acquired. There may be cases in which, if the Court says, "The word is descriptive of the goods, and cannot be distinctive solely of your make of those goods," the applicant may (if he can) reply thereto, "I will shew that it *can become* distinctive of my make of those goods by shewing that it *has* actually *become* so either generally or in a particular market." To use a phrase suggested by Farwell L. J. during the argument, the reply is of the type of '*solvitur ambulando*': "It can denote my goods because it actually does so."

In that case the learned Lord Justice was satisfied that the evidence showed that "the past user of the word has identified it in the eyes of the public with the goods of the applicants". Nevertheless under the English statute although a mark has become distinctive, that fact does not necessarily remove objection to a word itself if the word, considered as a word, "is" not adapted to distinguish. Under the Canadian statute however, if a word "has become" so adapted, that is sufficient.

As was said by Kindersley V. C. in *Archer* v. *Kelly*, (2), at 304:

> The word "become" in its usual and proper acceptation imports a change of condition, that is the entering into a new state or condition by a change from some former state or condition.

"Adapted" means "fitted" or "suitable". A word not originally fitted or suitable to serve as a trade-mark may in my view become so, and I am unable to identify the expression "has become" with "is", although, no doubt it may well include it.

While section 26(1)(*c*) is exclusionary, nevertheless registration may be had if, on application to the court under section 29, it is proved to the satisfaction of the court that the mark has been so used as to have become *generally* recognized by dealers in and/or users of the class of wares in association with which it has been used as indicating that such person assumes responsibility for their character or quality, or for the other matters mentioned in the subsection.

(1) [1910] 1 Ch. 130.

(2) (1860) 1 Dr. & Sm. 300.

It is contended by the appellant that the applicant under this subsection is met at the outset with having to establish that he has a "trade-mark", i.e., that he must satisfy the court that the mark meets the provisions of section 2(*m*). In this view, having regard to the provisions of section 12, an applicant who is a manufacturer or vendor is required to establish under section 2(*m*) that:

(*a*) his mark has become adapted to distinguish his wares; and

(*b*) that it is used in association with the wares for the purpose of indicating to dealers in and/or users that they have been manufactured or sold by him;

and under section 29(1):

that the mark has been so used as to have become generally recognized by dealers in and/or users as indicating that such person "assumes responsibility for their character or quality".

The words "assumes responsibility for their character or quality" in the above section are also to be found in sections 2(*k*) and (*l*) and I think that these words were intended by the draftsman to be construed as the equivalent of the words "manufactured, sold, leased or hired by him" as used in section 2(*m*). Reference to sections 26(1) (*c*) and 27(1) (*b*) would indicate that in their context the words "the character or quality of the wares" was there intended to serve a somewhat similar function.

In section 2(*m*) the use specified is use for a purpose. In section 29(1) the use is use which has produced a result. I think that whatever may be the situation in the case of other symbols, a clearly descriptive word which has acquired a secondary meaning within section 29(1) is a word which has "become adapted to distinguish" within section 2(*m*) so that in the case of such a word, to satisfy the requirements of the latter part of section 29 is to satisfy the definition in section 2(*m*).

While the approach to the construction of the Canadian statute is not, in my opinion, the same as in the case of the English Statute, nevertheless by reason of section 26(1)(*c*) I would employ the language of Fletcher Moulton L. J. in the *Perfection* case, supra at 858:

The tribunal before whom is brought an application to register a word under paragraph 5 is entitled to regard the word as *prima facie* unsuitable by reason of its being outside the specified classes, and it is for the applicant to show that it is proper to be registered * * * The extent to which the Court will require the proof of this acquired distinctiveness to go will

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Kellock J.

depend on the nature of the case. If the objections to the word itself are not very strong it will act on less proof of acquired distinctiveness than it would require in the case of a word which in itself was open to grave objection.

I think that the burden of proof increases in direct ratio to the degree in which a word, or words, is in common use as descriptive of an article of trade or laudatory thereof. In *Canadian Shredded Wheat Co.* v. *Kellogg,* (1) Lord Russell said at 142:

> But the onus on the person who attempts to establish this secondary meaning is a heavy one * * * Where the words are purely descriptive and in common use it is even more difficult to conceive a case in which they could acquire a secondary meaning.

I think this language is applicable to the present statute.

Coming to the evidence, the respondent alleges that on January 1, 1933, it adopted the word "Super-Weave" as a trade-mark and applied the same to cotton, woollen and synthetic textiles and that it has since continuously used the said mark in Canada therewith. In the affidavit supporting the petition, made by an officer of the respondent, it is said that a small percentage of the goods manufactured or merchandised by the respondent is sold to the retail trade but that sales are confined principally to launderers, dry cleaners, linen suppliers and institutions such as hospitals and hotels which purchase goods from the respondent either by the piece or manufactured into articles such as laundry bags, laundry wash mats, press cover cloths, towels, knitted padding for ironers and similar types of products. While it is said, as above mentioned, that the respondent has continuously used the words "Super-Weave" since its adoption on January 1, 1933, it is significant that on the 20th of January, 1933, the respondent registered, not the trade-mark "Super-Weave" but "Hardie's Super-Weave". While this registration was with respect to "cotton, woollen, linen and all other cloth materials and merchandise", and while the affidavit says that the petitioner's wares have always been identified by the trade-mark "Super-Weave", *simpliciter,* the exhibits show that what was in part used was "Superweave" as one word with the words "Cottons Reg'd." superimposed thereon. The affidavit also says that all stationery, invoices, wrapping paper, packages and cartons used by the petitioner in connection with the

(1) (1938) 55 R.P.C. 125.

merchandising and distribution of its products have the word "Super-Weave" prominently displayed thereon but the stationery produced bears the words "G. A. Hardie & Co. Limited Super-Weave Cotton Goods". Similarly, the sample of wrapping paper used to package small parcels has the same words in slightly different form and the same applies to the sample of cartons used in the case of large packages. Again, the purchase order form and the same applies to the sample of cartons used in the case of large packages. Again, the purchase order form uses the words "Superweave" with the words "Cottons Reg'd." superimposed, and the same is true of the invoice form, the salesman's order form and the form of desk pad. The respondent's letter-head uses "G. A. Hardie & Co. Limited Super-Weave Cotton Goods" and the office order form uses the style "G. A. Hardie & Co. Limited, Manufacturers and Wholesalers Super Weave Textiles".

Under the provisions of section 6 a trade-mark is deemed to have been, or to be used, for the purposes of the Act. in association with wares if "by its being marked on the wares themselves, or on the packages in which they are distributed, or by its being in any other manner so associated with the wares at the time of the transfer of the property therein or of possession thereof in the ordinary course of trade and commerce notice of the association is then given to the persons to whom the property or possession is transferred". None of the exhibits produced, as mentioned above, which would appear to come within the contemplation of this section use the words "Super-Weave" alone.

In *In re Powell's Trade-Mark* (1), at 401, Lindley L. J. said:

> The cases which have been referred to * * * all shew that the user as a trade-mark must be the user of that which is registered as the trade-mark alone, and not in combination with something else.

See also *Richards* v. *Butcher* (2).

In addition to the affidavit mentioned above, the respondent filed an affidavit by officers of two laundries in Toronto, one in the city of St. John, N.B., one in the city of Winnipeg, one in the city of Montreal, one in the city of Victoria, one in the city of Calgary. There is also an

(1) [1893] 2 Ch. 388. (2) [1891] 2 Ch. 522.

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Kellock J.

affidavit of the superintendent of a hospital of the city of Toronto. All of these affidavits are essentially in the same form. The following are typical paragraphs:

2. That the said NEW METHOD LAUNDRY CO. LIMITED is a firm of launderers, dry cleaners and linen suppliers using various types of textile goods, including laundry bags, laundry identification tags, laundry wash nets, sheeting, press cover cloths, knitted padding for ironers, towels and towelling.

3. That I have been familiar with the trade mark "Super-Weave", as used by G. A. Hardie & Co. Limited, in association with textiles since 1933, and I am familiar with all the products of G. A. Hardie & Co. Limited by reason of receiving advertising literature correspondence and invoices describing said products which are sold under the name "Super-Weave".

4. That said NEW METHOD LAUNDRY CO. LIMITED, have since 1933 purchased from G. A. Hardie & Co. Limited many hundreds of dollars worth of textile goods bearing the trade mark "Super-Weave".

5. That the said trade mark "Super-Weave" indicates to me that textiles, including Cotton goods, Woollen goods and Synthetic textiles bearing the said trade mark are manufactured and sold by G. A. Hardie & Co. Limited, that they are of a defined standard and that G. A. Hardie & Co. Limited assumes responsibility for their character and quality. The said trade-mark has no other meaning to me.

6. Whenever I see textiles sold under the name "Super-Weave", I immediately associate the same with the products of G. A. Hardie & Co. Limited, and I am led to believe that the same are manufactured and sold by the said firm."

It is obvious that these affidavits are quite insufficient to establish the "general" recognition required by the provisions of section 29. There must be hundreds of other laundries and there are many other hospitals throughout the country, none of which are so much as mentioned in the evidence.

The statement in paragraph 5 that the trade-mark upon the goods indicates to the deponents that "they are of a defined standard" is illustrative, in my opinion, of the weight to be given to the affidavits themselves. By section 30, subsection 3, it is provided that if the mark is intended to indicate that the wares are of a defined standard, the application for registration must contain an exact definition of what the use of the mark in association with wares is intended to indicate in respect of the standard which such wares have attained. Nowhere in the affidavits is any information given as to this standard which is indicated to these deponents by the use of this trade-mark and in the absence of such information I take it that these words

were quite ignorantly used. Further, an applicant such as the respondent is precluded by section 12 from adopting a mark to indicate its goods are of a defined standard. In my opinion affidavits of this nature, without any evidence as to how they were obtained and which are limited entirely to customers of the applicant for registration, are quite insufficient to satisfy the heavy onus resting upon the person desiring to obtain a judgment under the provisions of section 29 in circumstances such as are here present.

The proper practice to be followed in obtaining evidence of any weight for use on such an application as that here in question is indicated in *Hack's* case, (1), where questionnaires had been submitted to a large number of persons and firms for the purpose of ascertaining by question or questions, not leading in their nature, the meaning to the addressees of the particular trade-mark there in question. The evidence submitted in support of the present petition falls far short of that which is necessary under section 29.

Counsel for the respondent submitted that should the court be of opinion that the evidence was insufficient the petition should not be dismissed on that ground for the reason that no statement of objections was filed in the court below on behalf of the appellant and the respondent therefore had no notice until the actual trial that any such objection would be taken. Moreover, there is some difference of opinion between counsel as to whether any point was in fact made at the trial with respect to the insufficiency of the evidence. In view of this situation, while I think the appeal should be allowed, I think the petition should be remitted to the court below for a rehearing and that both parties may be at liberty to adduce further evidence. On such rehearing the actual use of the mark will require to be considered as well as the kind of goods with respect to which it had been used in connection with the question as to whether the use in fact made is sufficient to satisfy the requirements of section 29.

Respondent also contends that the appellant has no right of appeal to this court and that in any event as no statement of objections was filed in accordance with the

(1) (1940) 58 R.P.C. 91.

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Kellock J.

second paragraph of rule 36 of the Exchequer Court rules, respondent should not be heard. It is said he is not properly before the court.

It is not and could not, in view of the circumstances, be contended that the appellant was not a party to the proceedings in the court below as the respondent itself made the appellant the party respondent in those proceedings. Section 56 of the *Unfair Competition Act* is accordingly sufficient warrant for appeal.

As to the necessity for filing a statement of objections even if this requirement applies to the Minister, which I am inclined to doubt, rules 37 and 41 both would require, in any event, notice to be given to the Minister of the hearing and it cannot be contended that the Minister could not at the hearing take any ground of objection because of any failure to file objections. Further, rule 300 authorizes relief to be given against such a failure and in my view it would be proper in the present case to relieve against any such obligation if it in fact exists.

I think therefore, that there is no substance in the objections of the respondent. I would allow the appeal and remit the petition to the court below to be dealt with in accordance with the principles indicated above upon any further evidence which may be adduced by either party.

ESTEY, J.—The respondent, its head office in Toronto, manufactures and distributes textiles. Early in 1933 it adopted and identified its merchandise by the compound word "super-weave" or "superweave", and in 1947 commenced these proceedings under s. 29 of *The Unfair Competition Act*, 1932 (S. of C. 1932, c. 38), for a declaration that might lead to the registration of this word as a trade mark. The petition was granted in the Exchequer Court and the appellant appeals from that decision.

S. 29 provides:

29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the court by its judgment declares that it has been proved to its satisfaction that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

Respondent submits that "super-weave" as normally used is descriptive of the "character or quality" of textiles, and therefore not registrable under s. 26(1)(*c*), but that because this word "super-weave" has been continuously used since 1933 in association with its textiles, it has acquired a secondary meaning in the sense that it has "become generally recognized by dealers in and/users" as to justify the declaration provided for in s. 29.

The appellant submits that the word "super-weave" as ordinarily used is a laudatory epithet and cannot "become adapted to distinguish," and therefore not a trade mark within the definition in s. 2(*m*). He cites *Leopold Cassella & Co.*, (1), *Bailey & Co. Ld.* v. *Clark, Son & Morland Ld.*, (2), and *R. J. Lea, Limited* (3). These cases, decided under the *Trade Marks Act*, 1905, in Great Britain (7 Edw. VII, c. 15, as amended in 1919) distinguish between distinctiveness in fact and distinctiveness defined in that Act as "adapted to distinguish." The proof of distinctiveness in fact is relevant but is not conclusive in determining whether a trade mark is "adapted to distinguish." In *R. J. Lea, Limited, supra,* Hamilton, L. J., (as he then was) stated at p. 463:

> * * * the mere proof or admission that a mark does in fact distinguish does not *ipso facto* compel the judge to deem that mark to be distinctive. It must be further "adapted to distinguish," which brings within the purview of his discretion the wider field of the interests of strangers and of the public.

The issue between the parties hereto involves the construction in our statute of the definition of "trade mark" in s. 2(*m*), "word mark' 'in s. 2(*o*), s. 26 under which registration of certain classes of word marks is prohibited, and the meaning and purpose of s. 29 in relation to the definition and registration of trade marks.

"Trade mark" is defined in s. 2(*m*):

> 2. (*m*) "Trade Mark" means a symbol which has become adapted to distinguish particular wares falling within a general category from other wares falling within the same category, and is used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers in, and/or users of such wares that they have been manufactured, sold, leased or hired by him, or that they are of a defined standard or have been produced under defined working conditions, by a defined class of persons, or in a defined territorial area, and includes any distinguishing guise capable of constituting a trade mark.

(1) (1910) 27 R.P.C. 453.
(2) (1938) 50 R.P.C. 253.
(3) [1913] 1 Ch. 446.

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Estey J.

This definition is divided into two main parts: First, it is required that the symbol "has become adapted to distinguish" particular wares from others within the same category, and second, it must be "used by any person in association with wares entering into trade or commerce for the purpose of indicating to dealers * * *" The purpose of a dealer in adopting a trade mark is that it distinguishes his wares from those of all other dealers. A trade mark, therefore, in that sense must be distinctive. The word "distinctive," however, does not appear in definition 2(*m*): On the contrary, the words are "has become adapted to distinguish." The phrase here appears for the first time in our statute law, but the phrase "adapted to distinguish" has been in the statute law of Great Britain since the enactment of the *Trade Marks Act*, 1905. S. 9(5) of this latter statute provides in part " 'distinctive' shall mean adapted to distinguish," and as above explained, this phrase has been given a meaning, as indicated by the quotation from *R. J. Lea, Limited, supra,* different from that of "distinctive in fact." The essential difference is that a symbol which distinguishes in fact the wares of the particular person is not sufficient to obtain registration under the British statute. It must in addition be established that the word is "adapted to distinguish" which involves wider considerations of the rights and interests of the public in the words of our language and more particularly of those commonly and ordinarily used in commendation and praise of wares. The rights of the public in these words have long been protected and dealers prevented from obtaining the exclusive right or monopoly in their use through the registration of them as trade marks both in the law of Canada and Great Britain. *Partlo* v. *Todd* (1).

These two phrases "adapted to distinguish" and "distinctive in fact" were both well known in the law respecting trade marks when the legislation here in question was enacted. It is therefore significant that in the definition of trade mark (s. 2(*m*)) Parliament adopted the phrase "has become adapted to distinguish" rather than "has become distinctive in fact." The adoption of the latter would have changed the law, while the fact that they adopted "has become adapted to distinguish" would, under the circum-

(1) (1888) 17 S.C.R. 196.

stances, indicate an intention not to change the law. In view of the foregoing it would appear that the words "adapted to distinguish" are in the phrase "has become adapted to distinguish" the dominant and important words. These words, as Lord Justice Hamilton pointed out, involve considerations of strangers and the public generally and are therefore of wider import than "distinctiveness in fact."

That the interest of the public is always important was emphasized in this Court upon a somewhat different point in *Lightning Fastener Co. Ltd.* v. *Canadian Goodrich Co. Ltd.* (1), where Rinfret, J. (now Chief Justice) stated at p. 196:

> * * * and it should not be forgotten that legislation concerning patents, trade-marks and the like exists primarily in the interest and for the protection of the public, so much so that it could be said that the public is a third party to all patent or trade-mark litigation.

See also *Eno* v. *Dunn,* (2), at p. 262.

At the hearing of this appeal the two words "has become" were emphasized and it was suggested that they involved the conclusion that evidence of use would be sufficient to establish that the word mark was "adapted to distinguish." If Parliament had desired to effect so important a change in our law it would have adopted the phrase "has become distinctive in fact" or some such words as would have more clearly expressed such an intention. More particularly is this true as these phrases and their separate and distinct significance were so well known. As already indicated, the dominant words in the phrase are "adapted to distinguish" rather than "has become." Moreover, that these words "has become" were not intended to convey such a meaning finds support in the position and effect of the proof of use in the definition 2(*m*) and s. 29.

It is pertinent to observe that a "word mark" in the language of s. 2(*o*) means "a trade mark consisting only of a series of letters and/or numerals and depending for its distinctiveness upon the idea or sound suggested by the sequence of the letters and/or numerals and their separation into groups, independently of the form of the letters or numerals severally or as a series." Distinctiveness founded upon idea or sound is basic in this definition and indicates that it is in the word mark itself rather than in its use that

(1) [1932] S.C.R. 189. (2) (1890) 15 A.C. 252.

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Estey J.

the quality of distinctiveness must be found. It would therefore appear to be more in accord with the language of both ss. 2(*m*) and 2(*o*) that the phrase "has become adapted to distinguish" refers principally to that which is inherent in the symbol itself.

The trade mark defined in s. 2(*m*) is registrable under the Act unless either its adoption or registration as such is therein prohibited. This is made clear by the provisions of s. 39:

> 39. If there is no objection to the registration of a trade mark for the registration of which a sufficient and complete application has been made, the Registrar shall, subject as hereinafter provided, forthwith cause such trademark to be entered in the register as of the date upon which such application was received by him.

The statute therefore contemplates that the trade mark which comes within the terms of the definition of 2(*m*) will be registered unless within the terms of s. 39 there is an objection to the registration within the meaning of the statute.

These objections are expressed in the Act in the main by prohibitions against either the adoption of or the registration of the trade mark as such. This view is emphasized by the language of these sections in which the prohibition is always directed against a trade mark as illustrated by the opening words of ss. 14 and 26. In this latter section these are, "Subject as otherwise provided in this Act a word mark (a trade mark under s. 2(*o*)) shall be registrable if it (*a*) does not contain more than thirty letters * * * (*c*) is not * * * clearly descriptive or misdescriptive of the character or quality of the wares * * * (*f*) is not similar to, * * * some other word mark already registered * * *." If the registrar refuses registration either because the word mark does not come within the definition of ss. 2(*m*) and 2(*o*) or if within that definition then because either its adoption or registration is prohibited by some provision in the statute, the applicant may appeal under s. 51 to the Exchequer Court.

It will be observed that all of the foregoing takes place without reference to s. 29, and, moreover, that s. 29 does not provide an appeal from the decision of the registrar. The opening words of this section, "Notwithstanding that a trade mark is not registrable under any other provision of

this Act," indicate that it is dealing only with trade marks and that it is in the nature of an overriding section which makes possible registration otherwise prohibited. It is important to observe that s. 29 applies only where the trade mark is not registrable and therefore has no reference to the provisions where the adoption of the trade mark is prohibited as in s. 14.

It is, moreover, significant that Parliament in s. 29 does not ask the Court to determine whether the symbol "has become adapted to distinguish" as that phrase appears in s. 2(*m*). On the contrary, and with equal significance, Parliament here adopts in s. 29 language more closely related to the definition of "similar" in relation to "trade marks" in s. 2(*k*).

2. (*k*) "Similar," in relation to trade marks * * * so resembling each other * * * in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality * * *

The proof required in s. 29 is stated as follows:

* * * that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes responsibility for their character or quality * * *

The language in s. 2(*k*) in so far as it relates to trade marks is not directed to any question as to whether the symbol "has become adapted to distinguish." No question of similarity under 2(*k*) arises until the symbols are trade marks within the definition 2(*m*). The word "similar" as so defined appears in s. 26(1)(*f*) already quoted and there the only question before the registrar is whether registration should be prohibited because the word marks are similar and therefore the likelihood of confusion and deception.

If registration is refused under s. 26(1)(*c*) (as in this case the respondent concedes "super-weave" would be) because the word mark is clearly descriptive, it is still open to the applicant to apply under s. 29 and there to make such proof as to satisfy the Court that the word mark "has become generally recognized" as in that section provided. The effect of the declaration is that, although the word mark is within the class which is clearly descriptive in association with these wares and therefore not registrable under

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Estey J.

s. 26(1)(*c*) this applicant has so used it in association with his wares as to cause it to lose its significance as a word of description and that it is now "generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes reponsibility for their character or quality * * *" It is in this section that Parliament provides proof of use by the applicant and while the phrase "distinctiveness in fact" is not here used, the declaration when made in relation to a word mark may be regarded as equivalent to the establishment of "distinctiveness in fact." This evidence, it will be observed, by the express language of s. 29, is given in relation to a trade mark as defined in 2(*m*), the registration of which is otherwise prohibited.

The language and plan of our statute is substantially different from the *Trade Marks Act* of 1905 in Great Britain but in principle its provisions for registration are similar and in effect much the same. It has always been recognized in both the common and statute law of both countries that with respect to trade marks there are words of such common and ordinary use that no person should be permitted to adopt them as trade marks and thereby acquire the exclusive right or monopoly to the use thereof. Even if in a particular instance in relation to specific wares evidence established "distinctiveness in fact" there remained that larger consideration of public interest which prevented their classification as words "adapted to distinguish." No amount of use by an individual could defeat the public interest and make possible their adoption as a trade mark. In the present enactment Parliament has not only not indicated a change but has adopted the phrase "adapted to distinguish" well known in the law of Great Britain under which this very principle is protected. Its meaning and position in Great Britain would be present to Parliament in the adoption of this phrase, and, indeed, it might with propriety be suggested that the language was for that very reason adopted. In any event, a survey of the relevant sections and of the statute as a whole lead to the conclusion that the phrase "adapted to distinguish" has the same meaning in our statute as under the statute of Great

1949

REGISTRAR OF TRADE MARKS v. G. A. HARDIE & CO. LTD.

Estey J.

Britain. It follows that words commonly used and appropriately described as laudatory epithets cannot become registrable as trade marks.

The compound word "super-weave" contains the well-known, commonly used laudatory epithet "super" and the equally well-known word "weave" commonly used to describe the texture or method of manufacture. It is a well-founded principle recognized in both the authorities and statute law that such words (subject to a descriptive word becoming "generally recognized" as in s. 29) should remain the common property of dealers and users and the public generally and no person or corporation should be granted the exclusive right to or a monopoly in the use of such words such as registration of a trade mark bestows upon the applicant.

When these words are joined to form the compound word "super-weave" it means, as stated by the learned trial Judge, "a better quality of weaving," and, with respect, I think would be so understood and commonly used by dealers and users, and as such properly classified as a laudatory epithet.

I agree that the Registrar of Trade Marks was a proper party to this appeal.

The appeal should be allowed, but without costs, and the applicant's petition dismissed.

Appeal allowed and Petition dismissed without costs.

Solicitor for the appellant: *W. P. J. O'Meara.*

Solicitor for the respondent: *G. H. Riches.*

1949

*Mar. 2, 3, 4
*June 2

TORONTO TRANSPORTATION COMMISSION (Defendant)..... APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (Plaintiff)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown, claim by—Damages—Negligence—Common Law—Exchequer Court Act, R.S.C., 1927, c. 34, s. 50A—Ontario Negligence Act, R.S.O., 1937, c. 115.

This action arose out of a collision on the Kingston Road in the city of Toronto on December 22, 1943 between a street car of the appellant and a truck and trailer on the latter of which was loaded a Bolingbroke aircraft, and which formed part of a convoy of Royal Canadian Air Force vehicles. As a result of the damage sustained by the aircraft the Attorney General of Canada on behalf of His Majesty exhibited an information against the appellant in the Exchequer Court claiming the damage had been caused by the latter's negligence.

The trial judge found that both parties were equally at fault, but held that the Crown was not responsible for the negligence of its servants and gave judgment for the Crown in the full amount of its claim together with costs of the action.

Held: That the trial judge's allotment of blame, in equal proportions to the servants of each party, was correct.

Held: Also, reversing the judgment of the Exchequer Court, that while if the common law alone were applicable, the Crown would have no claim by reason of the fact that it failed to prove that the negligence of the appellant's servants alone caused the damage, yet since the Crown is able to take advantage of the Ontario *Negligence* Act, R.S.O., 1937, c. 115, it is therefore entitled to one half of its damages.

APPEAL from a judgment of the Exchequer Court of Canada, O'Connor J. (1), awarding damages to the Crown (Dominion) for injury to an aircraft owned by the Crown occasioned by the negligence of the servants of the (defendant) appellant.

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

I. S. Fairty, K.C. and *A. H. Young,* K.C. for the appellant.

N. L. Matthews, K.C. and *W. R. Jackett* for the respondent.

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

[1946] Ex. C.R. 604.

The judgment of the Chief Justice, Kerwin and Estey, JJ. was delivered by:

KERWIN, J—A Bolingbroke aircraft owned by His Majesty in the right of Canada had sustained damage at Picton and it was sent thence to London, via Toronto, all in the Province of Ontario, for repairs. The motors and main planes were removed from the aircraft, which was loaded on a trailer drawn by a truck with the planes set along the side of the aircraft on the trailer. The truck and trailer formed part of a convoy of Royal Canadian Air Force vehicles. On December 22, 1943, at about 6.45 p.m., while the convoy was on the Kingston Road, in the City of Toronto, a collision occurred between the aircraft on the trailer and a street car owned and operated by Toronto Transportation Commission, causing further damage to the aircraft. The Attorney General of Canada on behalf of His Majesty exhibited an information against the Commission in the Exchequer Court, claiming that this further damage had been caused by the negligence of the Commission's operator of the street car and asking that the amount of it be paid by the Commission.

The trial judge found (1) that the trailer containing the aircraft and the truck to which it was attached were stationary at the time of the collision and that the street car, having come to a stop on a signal of the Ontario Provincial Police who were leading the convoy, started up again and was in motion at the time of the collision. He held that the street car operator was negligent in failing to remain stationary until the entire convoy had passed. However, he held further that W/O Vodden of the R.C.A.F., who was in charge of the convoy, was negligent in taking the convoy, at night, through the City of Toronto on a main east and west highway of the Province of Ontario, in view of the width of the load on the trailer and the absence of lights to mark the outer edges of the load. He also held that Sergt. Taggert of the R.C.A.F. was negligent in the performance of his duties in two respects, i.e., in failing to properly supervise the passing of the convoy and in halting the convoy when the truck and trailer in question were in a certain position. He found these two officers or servants

(1) [1946] Ex. C.R. 604.

1949

TORONTO TRANSPORTATION COMMISSION v. THE KING

Kerwin J.

of the Crown, on the one hand, and the operator of the street car, on the other, to be equally at fault. He fixed the damages at $14,702.71 but, holding that the Crown was not responsible for the negligence of its officers or servants, gave judgment against the Commission for the full amount, together with the costs of the action.

From that judgment the Commission appeals to this Court. It submits that the accident was caused entirely by the negligence of the Crown's servants. It alleges that the amount fixed as damages is unwarranted; and, finally, that in any event it should be held liable for only one-half of the proper amount of damages on the footing that the Ontario *Negligence Act, R.S.O.* 1937, chapter 115, applies to the Crown. The respondent, seeking to uphold the judgment in its favour, submits that the accident was caused entirely by the negligence of the street car operator but contends that even if Vodden and Taggert, or either of them, are held to be negligent in any degree, such negligence cannot operate to defeat the claim of the Crown for the full amount of the damages fixed in the Exchequer Court.

As has been stated, the convoy was in charge of W/O Vodden. When it started from Picton it consisted of an Ontario Provincial Police car, a truck and trailer containing another aircraft, the truck and trailer that subsequently figured in the accident, and a station wagon. At Oshawa a conference was held and it was decided to proceed, notwithstanding the lateness of the hour on a winter day, but another Ontario Provincial Police car joined the procession, which proceeded on its way to Toronto. When it entered the limits of that city, it consisted of (1) a police car driven by Constable Robertson, (2) a second police car driven by Constable Hefferon who was accompanied by Sergt. Taggert, (3) a truck with trailer containing an aircraft, (4) the truck and trailer in question, driven by LAC/Jones who was accompanied by LAC/Novak, (5) a station wagon driven by LAC/Shipp, who was accompanied by W./O Vodden. Each truck and trailer had the proper vehicle lights, which were lighted; each trailer was very long and had a load nineteen feet in width; each trailer was equipped with proper clearance lights but had no lights to mark the outer edges of the aircraft; each aircraft carried a large checkerboard on the engine mounts and a red

flag at the outer edges of the centre section. These boards and flags would give warning of the size of the load in the daytime but were useless at the time of the accident.

The convoy proceeded westerly along the Kingston Road in Toronto where there are two sets of street car tracks. An automobile was parked near the northwest corner of the Kingston Road and Main Street and in order to pass it, it was found necessary for the two trucks and trailers to veer towards the south. The evidence as to what subsequently happened is extremely contradictory. It is admitted that a street car proceeding easterly on the southerly set of tracks stopped,—whether as a result of the police orders or because the operator saw the convoy is immaterial although there appears to be no reason for doubting the evidence of the Police and Crown witnesses. The first and second cars went beyond the street car, and the truck and trailer next in line passed the street car safely. The operator, Smith, says he did not move his street car, and in that he is confirmed by another Commission employee who happened to be returning home on the street car and by an independent witness on the sidewalk on the south side of the Kingston Road. This is denied by several witnesses for the Crown who say the street car started up and ran into the aircraft on the trailer attached to No. 4 vehicle. On this conflicting evidence, the trial judge found that the operator did start the street car, and with this finding I agree. Not only should not such a finding be not disturbed but it appears to be consistent with the evidence that, after the accident, quantities of sand were found on the tracks, which apparently could not have been there except as a result of the street car having been started, particularly when Smith testified that he did not use any sand at any time. I also agree that no assistance may be found in the evidence of experts called by each side, one of whom expressed an opinion that the street car was in motion and the other that the truck and trailer were moving at the time of the impact. The operator Smith was, therefore, guilty of negligence in starting the street car before the entire convoy had passed, and this was the cause of the occurrence.

However, bearing in mind that it was about 6.45 p.m. on December 22 that the convoy was proceeding on a main highway in the City of Toronto, W/O Vodden was negligent

1949

TORONTO TRANSPORTATION COMMISSION v. THE KING

Kerwin J.

in not having clearance lights on the outside limits of the load; the clearance lights on the trailer would be a snare and a delusion, and the red flag was useless. Sergt. Taggert was negligent, as found by the trial judge, because, instead of getting out of the police car and going back to the trucks and trailers, where he would have been able to direct the No. 4 vehicle to proceed, he remained in the police car and attempted to supervise the passing of the two trucks and trailers from that position. I agree that the damage was also caused by the combined negligence of these two and Smith and that the negligence of none may be said to be subsequent to that of another, and that the trial judge's allotment of blame, in equal proportions to the servants of each pary, was correct.

I now turn to the question of damages. The evidence warrants the finding that the cost of repairing the centre section of the aircraft would exceed the price of a new one installed. New parts were obtained at a cost of $12,734.46 and to this the trial judge added the estimate made by the witnesses Lewis and Patterson of the cost to the plaintiff of making the necessary repairs and installing the centre section, $2,310.00. These sums total $15,044.46, which the trial judge considered to be the amount of the damages suffered by the Crown as a result of the accident. The appellant suggests that the trial judge misunderstood its arguments when he said:—"Counsel for the Respondent (the Commission) contended that as a new centre section had been placed in the aircraft, the value of the aircraft would be increased and that the Defendant should not be compelled to pay the full value of a new centre section." In its factum it contends that certain evidence relied upon by it and contained in two reports indicates that the aircraft had received extensive damage at Picton and was in need of substantial repair and overhauling before the street car collision, and that an allowance should have been made for this . I have examined the record in the light of this submission and while it is true that damage to the airplane had occurred at Picton, it was not to those parts damaged by the street car. The trial judge made a just estimate of this damage and no error can be found in his allowance of $14,702.71, being the amount claimed by the respondent

less an allowance subsequently made by it for the salvage of the nacelle, and which is slightly less than the amount that would otherwise have been fixed.

I am unable to agree, however, that on these findings the Crown is entitled to recover the full amount of $14,702.71. The Crown is plaintiff in an action based upon the negligence of the defendant's servant. The defendant does not make a claim against the Crown but in resisting the action sets up the negligence of the Crown's servants which equally caused the damage. There is no question that if, when the doctrine of contributory negligence was in full flower, one subject sued another for damage in these circumstances the plaintiff could not recover because he failed to prove that the defendant caused the damage. The Crown coming into Court could claim only on the basis of the law applicable as between subject and subject unless something different in the general law relating to the matter is made applicable to the Crown. The cases that decide that at common law the Crown is not responsible for the negligence of its servants are not in point as there claims were advanced against the Crown. Nor are such cases as *Black* v. *The Queen* (1), where a claim on a surety bond otherwise recoverable by the Crown was held not to be defeated by laches of its officers. Here, if the common law alone were applicable, the Crown would have no claim by reason of the fact that it failed to prove that the negligence of the Commission's servants caused the damage. In Admiralty, the Commissioners for Executing the Office of the Lord High Admiral of the United Kingdom, as plaintiffs, have been held to be entitled only to one-half of their damages when their officers, as well as the defendant, were held to be at fault. *The Chinkiang* (2), *The Hero* (3).

The Crown is able to take advantage of the Ontario *Negligence Act* and is therefore entitled to one-half of the damages. The appeal should be allowed with costs. In lieu of the judgment *a quo* there should be substituted a judgment for the Crown for $7,351.35 with costs of the action.

KELLOCK J.—This appeal is from a judgment of the Exchequer Court (4) in favour of the respondent with

(1) (1899) 29 S.C.R. 693.
(2) [1908] A.C. 251.
(3) [1912] A.C. 300.
(4) [1946] Ex. C.R. 604.

1949

TORONTO TRANSPORTATION COMMISSION v. THE KING

Kellock J.

respect to damage to an aircraft being carried on a transport trailer while in collision with a street car of the appellant. The learned trial judge, while holding that there had been negligence in equal degree on the part of the servants of both the parties which contributed to the accident, came to the conclusion that the respondent was entitled to recover in full on the ground that the Crown was not affected by the negligence of its servants.

The transport trailer in question was the fourth vehicle of a convoy of five vehicles which was proceeding west on the Kingston road in the City of Toronto on December 22, 1943, the convoy being led by two Ontario provincial police cars, the third vehicle being another transport trailer, also loaded with a Bolingbroke aircraft similar to that on the transport in question and the rear being brought up by an Air Force station wagon carrying a driver and the Air Force officer in charge of the convoy. This convoy had passed the intersection of Main Street and the Kingston Road and by reason of the fact that each aircraft overhung its transport trailer by some five or six feet on each side and also by reason of the fact that there was an automobile parked on the north side of the Kingston Road west of Main Street, the convoy had swung out well into, or south of the centre of the street, for the purpose of passing the parked automobile. The appellant's street car being observed approaching by both provincial policemen, the police cars proceeded west on the southerly set of tracks signalling by flashing their headlights for the street car to stop. It is common ground that the street car did in fact stop. Where it stopped, and why it stopped, were, however, in controversy at the trial.

The contention of the appellant was that while thus at a standstill the street car had been run into by the aircraft, but the learned trial judge found against this. He found that the transport trailer here in question, while standing, had been run into by the street car, accepting the evidence of the respondent, that after the convoy had passed the parked car, but before the two transport trailers with their overhanging loads had returned to the north side of the street, they had been stopped when the approaching street car was sighted. After the street car had been stopped

a signal was given by the Air Force sergeant riding in the second police car for the number three vehicle to proceed and it thereupon passed the street car in safety. According to the finding of the learned trial judge, the street car then started up and ran down the number four vehicle. The evidence on behalf of those in charge of that vehicle, and the Air Force officer in the station wagon, who was in charge of the convoy, was that the lights on both the two last mentioned vehicles were turned off and on and the horns were sounded to call the attention of the street car operator to the presence of the overhanging load of the aircraft in the path of the street car, but without effect. The learned trial judge further found as a fact that the operator had started forward when he knew that the entire convoy had not passed and that he saw the clearance lights on the number four vehicle and the headlights on both that vehicle and the station wagon being turned on and off.

Appellant attacks the finding of negligence on the part of the operator of the street car but, in my opinion, it is not entitled to succeed in this respect. The evidence of the motorman at the trial was to the effect that he had not stopped as the result of any signal from the police but because he had seen the overhanging load of the number three vehicle and he did not think there was sufficient clearance for the street car. He said that after the number three transport went past he was in the act of releasing his brakes preparatory to starting up again when he noticed number four transport and thereupon, and before his car had made any movement, he put on the emergency brake to hold it in its then position as it was on a slight grade.

This evidence, as already mentioned, was not accepted by the learned trial judge and, in my opinion, with respect, on adequate grounds. The learned trial judge, however, points out that the clearance lights on the left hand side of the number four vehicle would tend to deceive the motorman into thinking that they indicated the most southerly point in the highway occupied by that vehicle and that the operator of the street car would be facing its headlights and to some extent the lights of the station wagon, which would make it impossible for him to see the overhanging portion of the load and he was of opinion that this situation was

1949

TORONTO TRANSPORTATION COMMISSION v. THE KING

Kellock J.

calculated to mislead the street car operator. He was also of opinion that the checker-board, mounted upon the load itself, and the red flag at the extreme southerly point of projection of the load, were both useless on a dark night. No reliance is, however, placed by counsel for the appellant upon any deception in this respect on the part of the motorman. I think no other position could be taken consistently with the evidence of the motorman who does not make any such suggestion. His evidence is that he saw the vehicles in question and remained stationary.

In a report made by him to the appellant on the day in question, and subsequent to the accident, he said that as he was proceeding east he noticed a transport truck coming west with some object extending over on to the east bound track; that he immediately applied his emergency brake and stopped the car; that it proved to be an aeroplane loaded on a flat trailer attached to a transport truck and that at the time that danger became apparent to him the other vehicle was some thirty feet distant. At the trial he said that as number three vehicle passed him he had turned his head to the left and the Air Force officer in charge of the convoy in the station wagon said that he saw this and that the operator continued to look to his left following with his eyes the other aircraft right up to the time of the collision.

In view of the findings of the learned trial judge, it would appear that if the motorman, as he says, saw the number four vehicle with its overhanging load, he was negligent in proceeding. If he did not see it he was negligent in failing to do so and the explanation of his having failed to see it may well lie in the fact that his attention was attracted by the number three vehicle and that he started forward without seeing that his path was clear as the Air Force witness deposes.

With respect to the respondent, the learned trial judge found that it was negligent to have taken such a convoy into the city after dark with the clearance lights on the left hand side by the transport trailer, as already described, but with no warning light on the southerly end of the overhanging load, with the result that east bound traffic might well be misled into thinking that the clearance lights marked the southerly limit of the number three vehicle and its load.

He held further that the Air Force sergeant riding in the second police car was negligent in halting the convoy without making sure that no part of the load on either transport trailer was south of the centre line of the street and in failing properly to supervise the passing of the street car by both transport trailers. This he should have done in the learned judge's view, by getting out of the automobile and placing himself in a position in the street where he could have controlled the situation. Instead of doing that he had ridden on the running board of the second police car and had signalled the number three transport to follow, intending, as he said after having seen it safely pass the street car, to have gone back on foot and brought number four vehicle through.

The respondent contends that the finding as to negligence on the part of its servants was not negligence contributing to the accident and that, in any event, the respondent is not affected by any negligence on the part of the Air Force personnel.

With respect to the position of the clearance lights on the number four vehicle and the absence of any light on the southerly end of the overhanging load, I think the proper conclusion is that this is not a factor which contributed to the accident in view of the evidence of the appellant's motorman quite apart from the position taken by counsel for the appellant.

It should have been evident however that the undertaking of conducting such a convoy through busy streets in a city such as Toronto, was one which called for the exercise of the utmost care on the part of those in charge, particularly when the undertaking was to be carried out at night. It is apparent that in the course of its progress from Picton this convoy had, even in daylight, been guided through "tight spots" by an officer on foot and in close contact with each transport trailer as it manoeuvred through. In fact the driver of the number four vehicle said that it was usual and necessary to have someone ahead in a position to guide him through difficult places. Sergeant Taggert himself intended, after having guided number three vehicle through, to go back on foot for the purpose of guiding number four. The question is whether it was negligence on the part of those in charge of the convoy to assume that there would be no

1949

TORONTO TRANSPORTATION COMMISSION v. THE KING

Kellock J.

movement on the part of east bound traffic until the whole convoy had gone through, or whether precaution should have been taken to see that such movement did not take place on the part of some inadvertent person, such as the street car operator, who evidently was unaware that there was more than one aircraft in the convoy. In my opinion it is not placing the duty too high to say that such a precaution should have been taken and that its failure was negligence contributing to the accident and that was the view of the learned trial judge. I therefore think the finding of negligence on the part of those in charge of the convoy in this respect must be affirmed.

With respect to the contention that the Crown in such a case as this may recover the full amount of its damage if a defendant is at all negligent, no authority has been cited in support. The cases referred to by counsel for the Crown were all cases where the Crown was a defendant. It seems to me that when the Crown brings an action at common law, it accepts the common law applicable to such a claim. This is illustrated by analogy in my view in *The Chinkiang* (1), where, in cross actions between the Admiralty as owners of a naval vessel, and the owners of a merchant ship, both ships were held to blame and Admiralty recovered a moiety of its damage. The result thus arrived at seems to me to have been rested upon the basis of the law as administered in Admiralty in collision cases, and the Crown, in bringing a claim in the Admiralty Court was subject to the law so administered. The rule in Admiralty is stated by Dr. Lushington in *The Milan* (2), as follows:

* * * that by the law of the Admiralty, as it is called, if the owner of one ship bring an action against the owner of another ship for damage by collision, and both ships be found to blame, the party proceeding recovers only a moiety of his damage; if there is a cross-action, the damages are divided, each party recovering half his own loss.

In *China Merchants' Steam Navigation Co.* v. *Bignold* (3), a case involving cross-suits in connection with a collision between a merchant ship and a King's ship in which both were held to blame, Sir R. P. Collier in delivering the judgment of the Judicial Committee said, at 517:

That being so, the ordinary rule of the Admiralty Court applies; and therefore * * * the damages should be divided between the parties according to the Admiralty rule, which is that each party shall obtain from the other half of the damage which he has suffered.

(1) [1908] A.C. 251.
(2) (1861) 1 Lush. 388 at 398.
(3) (1882) 7 A.C. 512.

As stated in Chitty on *Prerogatives of the Crown*, page 245, the King "may maintain the usual common law actions * * * And though the King chuse a common law action, he may, by virtue of the prerogative we have just noticed, commence it in any court". In a common law action based on the negligence of the defendant, the plaintiff may not recover if the injury has been contributed to by the negligence of his own servant; *William* v. *Holland* (1). Where, therefore, the Crown brings such an action I think that by analogy to the rule applied in the case of a proceeding in Admiralty, the action is subject to the common law rule, and it is clear, by reason of section 50A of the *Exchequer Court Act*, that the members of the Air Force here in question are to be considered as servants of the Crown for the purpose of this proceeding. While the section does not create any direct or specific right in the Crown, it places the Crown in recognized common law relationship and its rights are those arising from that relation under the rules of that law; *Attorney-General* v. *Jackson* (2), per Rand J. at 493.

On this basis the result in the case at bar, in view of the finding of negligence on the part of servants of the respondent would be that the Crown's claim would be dismissed. It is well settled, however, that the Crown may take the benefit of a statute and, applying the provisions of the Ontario *Negligence Act*, the Crown should recover one moiety of its claim. As to the quantum, I think the trial judge has correctly dealt with the Crown's claim.

The appeal should therefore be allowed to the extent indicated. I think the appellant should have its costs in this court and the respondent should have its costs in the court below.

Appeal allowed and amount of recovery reduced to $7,351.35 with costs in favour of appellant in this Court and costs in favour of respondent in the Court below.

Solicitor for the appellant: *Irving S. Fairty.*

Solicitor for the respondent: *Norman L. Mathews.*

---

(1) (1883) 6 C. & P. 23.

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

1949

*May 20, 23
*June 24.

JEAN PLAMONDON (PLAINTIFF).....APPELLANT;

AND

REGINA DIONNE (DEFENDANT).....RESPONDENT.

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

Improvements to immoveable property—Proprietor—Possessor—Right of retention—Title—Registration—Arts. 417, 2098 C.C.

An owner, whose title to an immoveable property is not registered, has no right under art. 417 c.c. to retain it against the subsequent registered purchaser for payment of the improvements, because art. 417 requires that the improvements be made on somebody else's property and not on one's own property as was the case here.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), maintaining, St-Jacques and Surveyer (*ad hoc*), JJ. A. dissenting, the decision of the Superior Court, Boulanger J.

André Taschereau K.C. and *Pierre Letarte* for the appellant.

Fernand Choquette K.C. for the respondent.

The CHIEF JUSTICE: J'ai eu l'avantage de prendre connaissance des notes de mon collègue, l'honorable Juge Taschereau, et je m'accorde avec ses raisons, ainsi que ses conclusions, auxquelles je veux seulement ajouter ce qui suit:

Il ne saurait faire de doute que l'entente intervenue entre l'entrepreneur Moreau et l'intimée, jointe à la prise de possession par cette dernière de l'immeuble dont il s'agit dans cette cause, a eu pour effet de transférer à l'intimée la propriété de cet immeuble.

A partir de cette entente, l'intimée possédait l'immeuble en vertu du titre translatif de propriété, qui était définitif en autant que Moreau était concerné.

Moreau, en dépit de son entente avec l'intimée, a subséquemment, le 22 août 1946, vendu le même immeuble à

*PRESENT:—The Chief Justice and Kerwin, Taschereau, Rand and Kellock JJ.

(1) Q.R. [1949] K.B. 4.

l'appelant, et, cette fois, le titre qu'il lui a consenti avait la forme requise et l'appelant l'a immédiatement fait enregistrer.

Il s'en est suivi que par application de l'article 2098 du *code civil,* l'appelant qui avait acquis le même immeuble du même vendeur que l'intimée, pour valeur, et dont le titre était enregistré, pouvait opposer son titre à celui de l'intimée. C'est ce qu'ont reconnu à la fois la Cour Supérieure et la Cour du Banc du Roi, (1) en le déclarant propriétaire, à l'encontre de l'intimée, en ordonnant à cette dernière de lui en livrer possession ainsi que de tous les fruits civils en provenant depuis le 20 octobre 1947, date de l'institution de l'action pétitoire intentée par l'appelant.

Cependant, le juge de première instance et la majorité de la Cour du Banc du Roi en Appel ont déclaré que l'intimée avait un droit de rétention sur l'immeuble et qu'elle ne serait tenue d'en remettre la possession à l'appelant que lorsque ce dernier lui aurait remboursé la somme de $4,440.38, valeur des prétendues améliorations faites par l'intimée sur l'immeuble, avec intérêts sur cette somme depuis la date du jugement. Les honorables Juges St-Jacques et Surveyer (*ad hoc*) étaient dissidents.

Les deux Cours ont appuyé cette dernière déclaration des jugements sur l'article 417 du *code civil.*

Comme mon collègue, l'honorable Juge Taschereau, je suis d'avis que cet article-là ne s'applique pas au cas qui nous occupe.

L'intimée était véritablement propriétaire de l'immeuble sur lequel Moreau a construit pour elle, en vertu de l'entente du 16 juin 1945. Elle ne faisait pas des améliorations sur un immeuble dont elle était seulement possesseur, dans le sens de l'article 417; elle construisait sur son propre terrain. Ce n'est pas à cause d'un vice de titre (qu'elle aurait ignoré) qu'elle est maintenant dépossédée par un acquéreur subséquent (l'appelant) qui a fait enregistrer son titre d'acquisition et qui bénéficie du précepte de l'article 2098. Si cette vente subséquente à l'appelant n'avait pas eu lieu, l'intimée demeurait propriétaire incontestable à l'égard de Moreau qui, au bureau d'enregistrement, apparaissait comme le propriétaire. Ce dernier n'aurait jamais

(1) Q.R. [1949] K.B. 4.

1949

PLAMONDON v. DIONNE

Rinfret C.J.

pu valablement revendiquer l'immeuble de l'intimée. Elle n'a qu'à s'en prendre à elle-même d'avoir négligé à la fois de se faire consentir le contrat définitif qui était prévu dans l'entente qu'elle avait faite avec Moreau, puis de le faire enregistrer. L'appelant, que les deux Cours ont refusé de qualifier de fraude ou de mauvaise foi, a été plus diligent et, par le jugement qui a été rendu, a recueilli le bénéfice de sa diligence à l'encontre de l'intimée.

L'intimée est sans doute la victime de la fraude de Moreau, mais elle se trouve dans la présente situation également à raison de sa négligence à parfaire son titre et à se protéger en le faisant enregistrer.

Nous avons au dossier la liste des impenses qu'elle a réclamées de l'appelant et pour lesquelles le jugement dont est appel lui a reconnu le droit de rétention. Pour la plupart, elles sont antérieures à l'acquisition de l'appelant le 22 août 1946, ce qui voudrait dire qu'elles auraient toutes été faites antérieurement à la vente de Moreau à l'appelant. Par suite, l'appelant en acquérant l'immeuble acquérait également toutes ces impenses, ou améliorations. Les seuls item postérieurs à la vente par Moreau à l'appelant pourraient être celui du 6 décembre "pour vitre et faire poser les feutres en dehors et feutre autour des portes, $64.66" et celui du 20 décembre, "pour chez Nobec, défectuosité dans le système de chauffage, $2.50" soit en tout $67.16.

Même parmi les impenses réclamées et qui auraient été faites à des dates antérieures à l'acquisition de l'appelant, il s'en trouve plusieurs qui ne peuvent pas légalement constituer des impenses; telles que l'achat du terrain, l'assurance sur la propriété, le charbon et les lustres qui, suivant le cas, peuvent être considérés comme des meubles que l'intimée aurait le droit d'enlever de la propriété.

Dans les circonstances, comme le juge de première instance, confirmé par la Cour d'Appel, ordonne dans son jugement que l'une ou l'autre des parties puisse demander une reddition de comptes relative aux fruits et revenus de l'immeuble depuis le 20 octobre 1947, à la date de la remise de possession par l'intimée à l'appelant, nous devons comprendre que cette reddition de comptes entre les parties pourrait établir leurs droits respectifs à cet égard.

1949

PLAMONDON v. DIONNE

Rinfret C.J.

Mais, sur cette question de rétention, je partage les vues des deux juges dissidents en appel et de mon collègue, M. le Juge Taschereau. Je suis d'avis que le cas qui nous est présenté ne tombe pas sous le coup de l'article 417 du *code civil,* ni d'ailleurs sous le coup de l'article 412, car, je le répète, le titre de l'intimée n'était pas entaché de vice; il était tout au plus incomplet; et ce qui a entraîné pour l'intimée la perte de son immeuble, c'est le fait que l'appelant a fait enregistrer son titre avant que l'intimée ne l'eut fait elle-même et que, dans ce cas, l'appelant a bénéficié de la propriété conférée par l'article 2098 du *code civil.*

Sauf donc pour l'intimée de faire valoir les réclamations qu'elle peut avoir, au cours de la reddition de comptes qui a été ordonnée entre les parties, l'appel doit être maintenu sur le seul point qui avait été porté par l'appelant devant la Cour du Banc du Roi en Appel, et qu'il a subséquemment fait valoir devant nous. L'intimée n'a pas droit à la rétention de l'immeuble, et cette partie du jugement qui a été prononcée en sa faveur par le tribunal de première instance et par la majorité de la Cour d'Appel, doit en être retranchée. Pour le reste, le jugement qui a ordonné la remise de possession à l'appelant par l'intimée, sauf aux parties à procéder à se rendre des comptes mutuels, ainsi qu'il est déclaré au jugement, doit suivre son cours et recevoir son plein effet.

En conséquence, l'intimée devra payer les frais de l'appelant dans toutes les Cours.

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

TASCHEREAU, J.—Dans son action, le demandeur allègue que par acte authentique passé devant notaire, le 22 août 1946, il a acquis de Louis Antoine Moreau, entrepreneur de la Cité de Québec, une propriété décrite comme suit:

> Cette propriété connue et désignée comme étant les Lots numéros soixante-et-un et soixante-et-deux des subdivisions du lot originaire numéro trente-quatre (61 et 62 de 34) du cadastre officiel pour la paroisse de Notre-Dame de Québec, Banlieue, avec les bâtisses dessus construites, circonstances et dépendances.
>
> Tel que le tout est actuellement et dont l'acquéreur se déclare content et satisfait.

Moreau aurait acquis cet immeuble de la succession Eugène Lamontagne, aux termes d'un acte de vente passé le

1949

PLAMONDON v. DIONNE

Taschereau J.

7 septembre 1945, et enregistré à Québec sous le numéro 298,262. Dans le cours de novembre 1946, le demandeur a averti la défenderesse qu'il s'était porté acquéreur de l'immeuble ci-dessus décrit, et que les locataires occupant les appartements devaient dans l'avenir, lui payer les loyers. Les conclusions de son action sont à l'effet qu'il soit déclaré propriétaire de l'immeuble en question, qu'il a droit à la possession, aux revenus et aux fruits civils provenant dudit immeuble depuis le 1er septembre 1946, et que la défenderesse, en possession de l'immeuble soit condamnée à l'abandonner dans les quinze jours du jugement à intervenir.

L'honorable Juge Boulanger de la Cour Supérieure a maintenu l'action en partie, a déclaré le demandeur, propriétaire de l'immeuble, et lui en a accordé la possession ainsi que tous les fruits civils en provenant, depuis le 20 octobre 1947. Il a déclaré que la défenderesse avait cependant droit à la rétention de l'immeuble, et qu'elle ne serait tenue d'en remettre la possession au demandeur, que sur paiement par ce dernier de la somme de $4,440.38, valeur des améliorations faites par la défenderesse, le tout avec intérêt de la date du jugement. La Cour d'Appel (1) a confirmé ce jugement, les honorables Juges St-Jacques et Surveyer dissidents.

C'est de ce jugement qu'il y a appel.

Afin de bien comprendre les faits nécessaires à la détermination du présent appel, il est important de remonter à la date du 16 juin 1945. A cette date, L. A. Moreau, un des mis-en-cause, a entrepris de construire pour l'intimée, dans la paroisse du St-Sacrement, dans la Cité de Québec, sur les subdivisions 61 et 62 du lot originaire numéro 34 du cadastre officiel de la paroisse de Notre-Dame de Québec, et dont ledit Moreau était propriétaire, l'ayant acquis de la succession Lamontagne. Le coût total de la maison et du terrain a été fixé à $12,500.00. Le contrat intervenu entre les parties se lit de la façon suivante:

Québec, 16 juin 1945.

La présente est une entente entre L.-A. Moreau, entrepreneur de 69, 1ère rue, Québec, et Mlle Regina Dionne de 50 rue d'Aiguillon, Québec.

L.-A. Moreau s'engage de construire une maison de 32 x 44 lambrissée en brique, quatre logements, de quatre chambres plus chambre de bain, plancher bois dur—carré de 3"—enduit au plâtre, système de chauffage

(1) Q.R. [1949] K.B. 4.

eau chaude, buckwheat, la lumière électrique sera incluse mais les lustres seront à la charge du propriétaire mais posés par l'entrepreneur, L.-A. Moreau. Le terrain sera de 50′ x 80′ sur la rue voisine de l'Hôpital St-Sacrement, en bas du chemin Ste-Foy. Le prix pour le tout est de ($12,500.00) douze mille cinq cent dollars.

Mlle Dionne paiera $3,000, dont $1,000 pour l'achat du terrain, $500 sur la signature du contrat. Ces logements devront se louer $50 par mois chacun. En aucun cas Mlle Dionne peut réclamer son argent et L.-A. Moreau se donne 3 mois pour exécuter son désir. Dès la signature du contrat L.-A. Moreau s'engage de commencer la construction de Mlle Dionne immédiatement. Un devis complet sera préparé et soumis à Mlle Dionne pour son approbation. L.-A. Moreau s'engage de négocier un emprunt pour satisfaire les besoins de Mlle R. Dionne.

Ont signé à Québec, ce 16ième jour de juin 1945.

Entrepreneur: L.-A. Moreau,
Propriétaire: Regina Dionne,
N° 50 d'Aiguillon,
Québec.

Le mis-en-cause Moreau a rempli ses obligations en vertu de ce contrat, a construit la maison et a remis les clefs à l'intimée dans le cours du mois de février 1946, alors qu'elle avait payé la somme de $4,440.38. Il est arrivé cependant que l'intimé n'a jamais fait enregistrer son titre de propriété, et le 23 août 1946, Moreau qui avait reçu de l'intimée la somme ci-dessus mentionnée, et qui lui avait remis la possession de l'immeuble, l'a vendue à l'appelant pour la somme de $15,000.00. L'acte de vente a été enregistré au bureau d'enregistrement de la division de Québec, sous le numéro 307,484, et audit acte il est stipulé que l'appelant acquéreur pourra "jouir, faire et disposer de la propriété" à partir de la date de l'exécution du contrat de vente, et qu'il pourra percevoir les loyers depuis le 1er septembre 1946.

Personne n'appelle de cette partie du jugement, déclarant le demandeur-appelant propriétaire, ni de la réserve faite à l'une et l'autre des parties du droit de demander une reddition de comptes relative à la perception des fruits et revenus. Mais l'appelant se plaint de ce que la Cour Supérieure et la Cour d'Appel ont déclaré que l'intimée avait droit de retenir l'immeuble, jusqu'à ce qu'elle soit remboursée de la somme de $4,440.38. Ce droit de rétention lui serait conféré par l'application de l'article 417 du *Code Civil* qui traite des améliorations faites à un immeuble par un possesseur, et qui se lit ainsi:

417. Lorsque les améliorations ont été faites par un possesseur avec ses matériaux, le droit qu'y peut prétendre le propriétaire du fonds dépend de leur nature et de la bonne ou mauvaise foi de celui qui les a faites.

1949

PLAMONDON v. DIONNE

Taschereau J.

Si elles étaient nécessaires, le propriétaire du fonds ne peut les faire enlever; il doit dans tous les cas en payer le coût, lors même qu'elles n'existent plus, sauf la compensation des fruits perçus, si le possesseur était de mauvaise foi.

Si elles n'étaient pas nécessaires et qu'elles aient été faites par le possesseur de bonne foi, le propriétaire est encore tenu de les retenir si elles existent et de payer soit la somme déboursée, soit celle au montant de laquelle la valeur du fonds a été augmentée.

Si, au contraire, le possesseur était de mauvaise foi, le propriétaire peut, à son choix, les retenir en payant ce qu'elles ont coûté ou leur valeur actuelle ou bien lui permettre de les enlever à ses frais, si elles peuvent l'être avec avantage pour ce tiers et sans détériorer le sol; aux cas contraires, les améliorations restent au propriétaire du fonds sans indemnité; le propriétaire peut, dans tous les cas, forcer le possesseur de mauvaise foi à les enlever.

L'intimée prétend qu'ayant été en possession de l'immeuble en question, elle a sur celui-ci un droit de rétention pour les améliorations qu'elle y a faites, aussi longtemps qu'elle ne sera pas remboursée de la somme de $4,440.38.

Je crois que cette prétention n'est pas fondée.

Les relations juridiques qui ont existé entre Moreau et l'intimée ne sont pas celles d'un propriétaire et d'un possesseur, condition essentielle pour que s'applique l'article 417 du *Code Civil*. Il faut de toute nécessité pour qu'il entre en jeu, que le possesseur ait fait des améliorations sur le terrain *d'autrui*. Or, il me semble clair que ce n'est pas ce qui est arrivé. L'intimée a acquis le terrain de Moreau, et celui-ci s'est engagé à construire pour l'intimée une maison que d'ailleurs il a construite. Le 19 juin 1945, soit trois jours après la signature du contrat, l'intimée a payé la somme de $1,500.00 en acompte, et le 10 août de la même année, elle a versé un autre montant semblable, en paiement de ce qu'elle devait, et pour le prix du terrain, et en acompte pour le coût de la construction. Elle a aussi fait d'autres versements et d'autres paiements qui ont tous servi à l'érection de la maison, à son chauffage, au peinturage, etc. Elle était indiscutablement propriétaire de cette maison qui a été construite pour elle, ainsi que du terrain. Il est vrai qu'elle avait la possession de l'immeuble, mais c'est la possession ordinaire que tout propriétaire a de son bien. Elle a construit et amélioré sa propre maison, et je ne vois pas comment pourrait s'appliquer l'article 417 du *Code Civil*.

Elle n'a rien amélioré sur le sol *d'autrui*; elle a construit et amélioré sur un sol qui était le sien. Je m'accorde avec M. le Juge St-Jacques qui dit:

> Les mots "possesseurs" et "propriétaire" sont mis en opposition dès le premier paragraphe de cet article qui, à mon avis, se rapporte au cas où un possesseur a fait, avec ses matériaux, des améliorations sur un terrain qui ne lui appartient pas, et il faut, pour que cet article s'applique, que les améliorations aient été faites sur le terrain d'autrui.

Moreau a vendu cet immeuble le 23 août 1946, pour bonne et valable considération, à l'appelant Plamondon, alors qu'il apparaissait comme propriétaire enregistré, et Plamondon a fait enregistrer son acte d'acquisition. L'article 2098 du *Code Civil* dit:

> 2098. Tout acte entre vifs, transférant la propriété d'un immeuble, doit être enregistré par transcription ou par inscription.
>
> A défaut de tel enregitsrement, le titre d'acquisition ne peut être opposé au tiers qui a acquis le même immeuble du même vendeur, pour valeur, et dont le titre est enregistré.

Il s'ensuit nécessairement que le titre de Plamondon est valide, et qu'il peut l'opposer à celui de l'intimée, et il a en conséquence le droit de réclamer l'immeuble et d'en demander la possession, tel que d'ailleurs l'ont décidé et la Cour Supérieure et la Cour d'Appel.

L'appel doit être maintenu avec dépens, et le jugement *a quo* doit être modifié en en retranchant du dispositif, ce qui suit:

> déclare que la défenderesse a un droit de rétention sur l'immeuble ci-dessus et qu'elle ne sera tenue d'en remettre la possession au demandeur que lorsque ce dernier lui aura remboursé la somme de $4,440.38, valeur des améliorations faites par elle sur le susdit immeuble, avec intérêts de la date du jugement; les frais divisés.

L'intimée paiera également les frais et en Cour Supérieure et en Cour d'Appel.

Appeal allowed with costs.

Solicitors for the appellant: *St-Laurent, Taschereau, St-Laurent & Noël.*

Solicitor for the respondent: *Fernand Choquette.*

1948
*Nov. 8, 9
1949
*Feb. 28

ADO LAANE AND FREDERICK BALTSER, (DEFENDANTS-INTERVENORS), ... } APPELLANTS;

AND

THE ESTONIAN STATE CARGO & PASSENGER STEAMSHIP LINE, (PLAINTIFF), ... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NEW BRUNSWICK ADMIRALTY DISTRICT

International Law—Conflicts of Laws—Courts of this country no jurisdiction to enforce penal law of foreign country of a confiscatory nature.

A decree of the Estonian Soviet Socialistic Republic, dated October 8, 1940, purported to nationalize all Estonian merchant ships, including those in foreign ports, and fixed the compensation therefor at 25 per cent of each ship's value. The *Elise* was owned by Estonian nationals and registered in that country but, at the date of the decree and always thereafter, was beyond the jurisdiction of Estonia and at the date of suit within that of Canada.

Held: that as the decree was a penal, (Rand J., political), law of a foreign country of a confiscatory nature, it would not be enforced in the Exchequer Court at the suit of a corporation established by Estonia and to which a subsequent decree purported to transfer ownership.

APPEAL from the judgment of the Exchequer Court of Canada, New Brunswick Admiralty District, (1), in favour of the plaintiffs in an action *in rem* respecting the proceeds of the sale of a foreign merchant ship.

The facts and the questions of law raised are stated in the judgments now reported.

J. Paul Barry, (and *P. A. Beck* of the New York Bar), for the appellants

C. F. Inches, K.C., for the respondent.

THE CHIEF JUSTICE: —This action is to determine the ownership of the sum of $44,177, with bank interest, which amount is held in the Admiralty Court, New Brunswick

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

(1) 1948 Ex. C.R. 435.

Admiralty District, and represents the proceeds of the sale of the S.S. *Elise*, after payments of all claims against the vessel.

The *Elise* was a steamship owned by the co-partnership of Laane and Baltser, the appellants. She was of Estonian Registry, and was registered at Parnu, in Estonia, where the office of the appellants was also maintained. The appellants were Estonian citizens.

The *Elise* was engaged in running between the United Kingdom and Canada in the summer of 1940, and in the month of August, 1940, she arrived at the Port of Saint John in New Brunswick, having been damaged by grounding. She was arrested at the instance of certain members of the crew for wages, and sold by Order of the District Judge in Admiralty of the Province of New Brunswick. The sale was held by public auction on January 25, 1941, and the amount realized by the sale was $88,000. After payment of the crew's wages and all other claims against the ship, including one for breach of charterparty, there remained the sum which is the basis of the dispute in the present action.

In the month of June, 1940, the Union of Soviet Socialist Republics (hereinafter referred to as the U.S.S.R.) occupied the Baltic States, including Estonia, and set up a government in Estonia which passed certain laws purporting to nationalize certain properties. Two different sets of Decrees or Declarations were apparently passed.

One of the Decrees purported to establish the company (respondent in this appeal), and another Decree purported to transfer ownership of all Estonian vessels to the latter. In September, 1942, the respondent issued a summons *in rem*, claiming the balance of the proceeds of the sale of the *Elise*, and the appellants appeared in the proceedings and claimed the proceeds for themselves. The basis of the respective claims appears in the admissions which were agreed to by counsel for the appellants and the respondent.

From these admissions it appears that prior to the 17th of June, 1940, there existed the Republic of Estonia, the existence of which and the Government of which was not recognized by the Government of Canada *de facto* as it was constituted prior to June, 1940. This is so stated in a letter,

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Rinfret C.J.

signed by the Secretary of State for External Affairs for Canada, required by counsel for both parties for production in the Court in this case. According to this letter, the Republic of Estonia has ceased *de facto* to have any effective existence. In the same letter the Secretary of State for External Affairs stated that the Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics, but does not recognize this *de jure*. It adds that it is not possible for the Government of Canada to attach a date to this recognition. It further states that the Government of Canada recognizes the Government of the Estonian Soviet Socialist Republic to be the *de facto* government of Estonia but does not recognize it as the *de jure* government of Estonia; and again it is stated that it is not possible for the Government of Canada to attach a date to this recognition. The letter of the Secretary of State for External Affairs further states that the question of the effect of a Soviet decree is for the Court to decide and not for the Government.

Prior to the 17th of June, 1940, the *Elise* was owned by the appellants, who did business in co-partnership at Parnu, in Estonia, under the firm name of "Laane and Baltser". The steamship was duly registered and was of the approximate gross tonnage of nine hundred and ninety tons. She had left Estonia prior to July, 1939, and had arrived in the Port of Saint John, New Brunswick, on or about the 15th of August, 1940, without having returned to Estonia in the meantime. She had been sailing between the United Kingdom and the Dominion of Canada only during 1940. It was while the *Elise* was in the Port of Saint John that she was arrested by virtue of several processes issued out of the Exchequer Court of Canada, New Brunswick Admiralty District; and she was ordered sold as aforesaid.

On or about June 17, 1940, a new Government was established in Estonia known as the Estonian Soviet Socialist Republic (hereinafter referred to as the E.S.S.R.). The E.S.S.R. became a constituent Republic of the U.S.S.R., and was recognized as such by the Government of Canada, *de facto* but not *de jure,* as already mentioned.

On August 28, 1940, a new constitution of the E.S.S.R. was published, and Article (6) thereof purported to nationalize the shipping enterprises of juridical and natural persons, such as joint stock companies, partnerships and large scale enterprises, together with their whole property, whatsoever it may consist of and wheresoever it may be, including deposits and current accounts in banks of the Republic and abroad, further, all rights belonging to such enterprises, such as claims to insurance sums, etc. The amount of compensation for the nationalized ships was fixed at twenty-five per cent of their value; and the Council of Peoples Commissars of the E.S.S.R. was charged with the approval of the list of shipping enterprises subject to nationalization and with the fixing of the order of payment of compensation for the nationalized ships.

According to an "Extract-Translation" from the Estonian State Gazette, the list of shipping enterprises subject to nationalization, approved by the Government of the Republic on July 28, 1940, included: "Shipping Association whose part-owners are: A. Laane and F. Baltser". This extract from the State *Gazette* of Estonia is certified to by J. Kaiv, Acting Consul General of Estonia in New York.

On October 25, 1940, there was passed a Decree of the Council of Peoples Commissars of the U.S.S.R. on the "Organization of the Estonian State Steamship Line", section (1) of which provides for the organization on the territory of the E.S.S.R. of the aforesaid line in direct subordination to the Peoples Commissariat of Maritime Fleet with the seat of its administration at Tallinn; and a copy was filed of the "Statute of the Estonian State Cargo and Passenger Steamship Line", by virtue of which the respondent line was organized as a corporation under the laws of the U.S.S.R. On June 17, 1940, and on the respective dates of the above mentioned decrees, the appellants were citizens of Estonia, residing and domiciled therein. The appellant Baltser is presently residing in Sweden.

The summons *in rem* against the proceeds of the sale of the *Elise,* claiming ownership of these proceeds by virtue of the laws of the U.S.S.R. and of the E.S.S.R., and, in particular, the Decrees herein above referred to, was issued on the 11th of September, 1942. In the summons the

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Rinfret C.J.

respondent claimed all rights of title and possession thereof to have been transferred to and to have become vested in the respondent, and that the latter was, therefore, entitled to the balance of the proceeds of the sale. The respondent claimed that the decrees and the statute purported to transfer and vest in it all rights of title and possession in and out of the steamship line.

Now, the dispute between the appellants and the respondent is as follows:—

In paragraph 18 of the Admissions, the plaintiff (respondent) alleges that:—

> On the basis of the facts herein recited and admitted, as a matter of law, the decrees and statute of the *de facto* government hereinabove referred to, nationalized the said steamship and entitle the plaintiff to maintain this action and to receive the said proceeds; claimed.

And the defendants (appellants) deny this allegation, contending that, as a matter of law, based upon the same facts, the decrees and the statute have not the effect alleged by the respondent; and that the said statute and decrees are (*a*) acts of a *de facto* government only, (*b*) confiscatory in nature and not recognized by our law as effective in transferring property outside of the jurisdiction of the promulgating authority, and (*c*) are contrary to the constitution of Estonia as it existed prior to June 17, 1940. All these facts and statements are borne out, either by the admissions of the parties or by the letter of the Secretary of State for External Affairs, dated January 2, 1947.

The admissions conclude by stating that the questions at issue between the plaintiff (respondent) and defendants (appellants) are:—

> (1) Were the Decrees and Statutes herein recited effective in nationalizing the Steamship *ELISE* and transferring ownership to the plaintiff herein?
>
> (2) Is the plaintiff entitled to maintain the action and receive the proceeds?

The learned trial judge, in an elaborate judgment, was of the opinion that the plaintiff (respondent) was entitled to succeed. He went on to say: (1).

> But I do not think that that conclusion disposes of the elements in the action. Although the defendants claim the entire proceeds in court "and such further and other relief as the circumstances may require," there is no specific claim, and there was no suggestion at the trial by either party, that in the event of the plaintiff succeeding on the main

(1) [1948] Ex. C.R. at pp. 480, 482.

issue the defendants' compensation for the nationalization of the *ELISE* should be first paid out of the fund under dispute. I think that a proper disposal of the case requires that I give this aspect due consideration.

* * *

I would assume from the admissions that the nationalization of the *ELISE* under the decree of October 8, 1940, was to be of immediate effect and, accordingly, the value may be taken as of that date as well. There is, however, no specific evidence of the value of the *ELISE* on that date. Under an order of the late District Judge of this Court the vessel was appraised on January 3, 1941, and reported to have a value of $112,000 "provided that she is placed in running order and back in class at Lloyds". This report adds that the above valuation "does not include extra equipment, stores or fuel on board". The *ELISE* was sold by the marshal at public auction on January 25, 1941, for $88,000. The date of sale having been only about four months subsequent to the date of the decree, it would appear fair to all concerned to take $88,000 as the basis for calculating the compensation. The allowance for compensation may therefore be taken to be $22,000. If anyone concerned places a greater value on the *ELISE*, this sum should, of course, be treated as only partial satisfaction.

H. A. Porter, K.C., on behalf of the Secretary of State of Canada, as Custodian of "enemy property" under the latest Order-in-Council (P.C. 8526) of November 13, 1943, has informed the Court that the Custodian waives the commission of two per centum chargeable on the proceeds in court by the terms of that order. The itemized account for Mr. Porter's costs with respect to all actions in connection with the *ELISE* has been approved by the respective solicitors on the record in the aggregate sum of $978.13, and they have consented to this sum being paid from the proceeds without taxation.

In view of the difficulty of the main point of law involved in this action, and of the distribution of the proceeds between the parties, there will be no order with respect to the costs of the parties in the cause or for the applications in chambers preceding the trial.

There will be a reference to the Registrar to report on the amount of the proceeds in court and the net sums payable to the plaintiff and the defendants respectively. The Registrar's fees hereafter chargeable, and the court stenographer's costs on the trial will be paid from the proceeds before payment to the parties. In the result, the defendants are entitled to the sum of $22,000 less half the above fees and costs, and the plaintiff is entitled to the balance of the proceeds then remaining. All payments will be subject to the consent of the Custodian.

I now proceed to answer the two questions at issue between the parties, referred to above.

I will not pause to inquire whether, on their true construction, the decrees had the effect of immediately nationalizing the ship *Elise,* nor if the transfer to the State or to the respondents became operative before the so-called compensation was paid to the appellants.

Mr. Kaiv, in his affidavit, stated that "the decrees and statute, dated October 8, October 25, and October 29,

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Rinfret C.J.

mentioned above, are the same decrees and statute discussed in the English case of *A/S Talinna Laevachisus and others* v. *Talinna S.S. Line and another* (1). The case referred to by the Consul General was decided on April 18, 1946, by Mr. Justice Atkinson, of the King's Bench Division. It was there held that the confiscatory decrees in question issued by the E.S.S.R. Government were illegal and unenforceable in English Courts. This case concerned the winding up of the Vapper Shipping Association, whose ship, *The Vapper*, was among vessels which were purported to have been nationalized under the same decrees as are here in question. It was an interpleader issue to decide the title to insurance policy moneys paid in respect of the loss through war risk; and it was claimed by the representative of the shareholders in the association owning the vessel and also by some of the individual shareholders. The effective defendants were the Estonian State Steamship Line, who contended that, the *Vapper* being among vessels which were nationalized under Estonian law in July, 1940, the plaintiffs were divested of their rights, which became vested in the Estonian State Steamship Line, who were accordingly entitled to receive the money.

Upon appeal before Lord Justice Scott, Lord Justice Tucker and Lord Justice Cohen (2), the judgment of Mr. Justice Atkinson was upheld. In the reasons of Lord Justice Scott, at p. 111, he said:—

> If the decree did apply, the legislation involved taking 75 per cent of the moneys without compensation, and English law treats as penal foreign legislation providing for compulsory acquisition of assets situate in this country, and *a fortiori* of assets which consist of *choses in action* enforceable only in English Courts, unless that legislation provides for just compensation; and 25 per cent of money cannot be just compensation.

Lord Justice Tucker, at p. 113, held that the decree did not have the effect of nationalizing the ship, the *Vapper*, as the final process of nationalization, to wit, the drawing up of a nationalization deed and transfer balance sheet, which effects the transfer of the enterprise and its assets, had not been undertaken with regard to the association or the Tallina Shipping Company. He added:—

> As a matter of construction I would, moreover, have thought that in the absence of express words, which are lacking, these decrees—although perhaps on their face purporting to transfer ships outside the jurisdiction—would not suffice to effect the assignment of a *chose in action*

(1) 79 Ll.L. Rep. 245. (2) (1947) 80 Ll.L. Rep. 99.

situate in a foreign country * * * This decree of October 8th is legislation which could only be enacted by the Supreme Soviet of the Estonian Soviet Socialist Republic.

In the *Vapper* case evidence had been adduced that the decree was unconstitutional and, in that respect, Lord Justice Tucker added:—

> This reasoning appears on the face of it to be correct and in the absence of any evidence to the contrary must, I think, be accepted.

In *Government of the Republic of Spain et al* v. *National Bank of Scotland, Ltd.* (1), the Court of Session was seized with a somewhat similar case in connection with a claim of the Republic of Spain. In the course of the judgment of the Lord Justice-Clerk (Aitchison), the following appears at p. 426:—

> If the Decree of Requisition of the Spanish Government fell to be regarded as a confiscatory or penal law it could have no validity outside Spanish territory, and the Courts of this country, in accordance with an accepted rule of international law, would not grant their aid to the execution.

The action was dismissed.

Reference might also be made to the decision of the Court of Appeal in *The Jupiter* (No. 3), (2), that the nationalization decrees had no effect on property not situate within the territory of the U.S.S.R.; that the *Jupiter* was not at the date when the decrees were promulgated within the territory of either of the Republics which later, with others, formed the U.S.S.R., and the appeal was dismissed.

I would also like to refer to *Lorentzen* v. *Lydden & Co. Ltd.* (3), where Atkinson J. decided that a decree of the Norwegian Government had an extra-territorial effect and operated to pass the ownership of the *chose in action,* which was situate in England, to the curator appointed by the Norwegian Government, and that, therefore, the curator was entitled to maintain the action, but on the ground that the decree was not of a confiscatory character; if it had been, effect would not have been given to the decree.

On the whole, the respondent, or plaintiff, in this case had the onus of proving its right to claim the moneys in Court. In my opinion, it has completely failed to do so.

(1) [1939] S.C. 413.
(2) [1927] P. 250.
(3) [1942] 2 K.B. 202.

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Rinfret C.J.

The decrees relied on by it were declared illegal and unconstitutional by the English Court of Appeal in the *Talinna case*. It may be doubted whether their language was sufficient to vest the steamship *Elise* in the respondent. In the *Talinna case* it was held that they lacked the necessary wording to make them effective in that respect; and, further, that they were incomplete in the sense that the last stage to give them force of law had not been proceeded with. At the material time the *Elise* was in the Port of Saint John, Canada, a foreign country. She was then in possession of the appellants and the respondent never got possession of the ship, nor any control of her, before the ship was sold by the Marshal. The proceedings herein were instituted after the sale and were not directed against the ship herself, but against the proceeds of the sale, then deposited in a Canadian Admiralty Court.

Moreover, the decrees are of an evident confiscatory nature and, even if they purport to have extra-territorial effect, they cannot be recognized by a foreign country, under the well-established principles of international law. Quite independent of their illegality and unconstitutionality, they are not of such a character that they could be recognized in a British Court of Law.

For these reasons, the appeal should be maintained and the proceedings of the respondent dismissed. There should be an order that the proceeds of the sale of the *Elise* in Court should be paid out to Laane and Baltser except that the Registrar's fees, the Court Stenographer's costs and the total amount of the costs of the Solicitor for the Custodian of Enemy Alien Property (all of which I refer to in my judgment) should first be paid out of the fund, the balance going to the appellants as aforesaid. The appellants are entitled to their costs against the respondents in this Court and below.

KERWIN J. (Concurred in by Estey J.):—This is an appeal by Ado Laane and Frederick Baltser against a judgment of the Exchequer Court, New Brunswick Admiralty District, directing that the proceeds of the sale of the steamship *Elise,* now in Court, be paid out to the parties in the proportion of one-fourth to the appellants and three-quarters to the respondents, after the deduction

and the costs of the solicitor for the Custodian of Enemy Property.

The action was fought on the basis of a statement of admissions signed on behalf of the parties, together with the documents thereto attached. From this statement it appears that the *Elise* was owned by the defendants (the present appellants), who did business in co-partnership at Parnu, in the Republic of Estonia, where the ship was registered. It left the Republic prior to July, 1939, and never returned. During 1940 it sailed between the United Kingdom and Canada, arriving on one of its trips at Saint John, New Brunswick, on August 15, 1940. While there in port, it was arrested by virtue of several processes issued out of the Exchequer Court and it was ordered sold, the sale taking place on January 25, 1941. The sum of $88,000 was realized and, after satisfying the claims against the steamship, there was a balance on hand in Court amounting to $43,709.08, together with bank interest from December 31, 1945. Proceedings were taken by the plaintiff, The Estonian State Cargo & Passenger Steamship Line, claiming these proceeds and an appearance was entered on behalf of Laane and Baltser.

Prior to the execution of the admissions, the following letter was received by the solicitor for the appellants from the Secretary of State for External Affairs of Canada:—

Re: Estonian State Cargo and Passenger Steamship Line *v.* Proceeds of the Steamship *ELISE*.

Your letter of December 23 encloses four questions put jointly by you and Mr. C. F. Inches, representing all the parties to this action. You desire my answers to these questions for production to the court in this case.

Question 1. Does the Government of Canada recognize the right of the Council of Peoples' Commissars of U.S.S.R. or any other authority of the U.S.S.R., to make decrees purporting to be effectual in Estonia?

Answer: The Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics, but does not recognize this *de jure*. The question of the effect of a Soviet decree is for the Court to decide.

Question 2. Does the Government of Canada recognize the existence of the Republic of Estonia as constituted prior to June 1940, and if not when did such recognition cease?

Answer: The Government of Canada does not recognize *de facto* the Republic of Estonia as constituted prior to June 1940. The Republic of Estonia as constituted prior to June 1940, has ceased *de facto* to have any effective existence.

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Kerwin J.

Question 3. Does the Government of Canada recognize that the Republic of Estonia has entered the Union of Soviet Socialist Republics, and if so, as from what date, and is such entry recognized as being *de facto* or *de jure?*

Answer: The Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics but has not recognized this *de jure*. It is not possible for the Government of Canada to attach a date to this recognition.

Question 4. Does the Government of Canada recognize the Government of the Estonian Soviet Socialist Republic, and if so, from what date.

Answer: The Government of Canada recognizes the Government of the Estonian Soviet Socialist Republic to be the *de facto* government of Estonia but does not recognize it as the *de jure* government of Estonia. It is not possible for the Government of Canada to attach a date to this recognition.

Sincerely Yours
LOUIS S. ST. LAURENT
Secretary of State for External Affairs.

The statement of agreed facts was then completed, containing the following admissions. Prior to June 17, 1940, there existed the Republic of Estonia, the existence of which, and the government of which, was recognized by the Government of Canada. On or about that date, a new government was established in Estonia known as the Estonian Soviet Socialist Republic, hereafter called the E.S.S.R. This E.S.S.R. became a constituent republic of the Union of Soviet Socialist Republics (Soviet Russia), hereafter referred to as U.S.S.R., and according to the letter from the Secretary of State for External Affairs was recognized as such by the Government of Canada *de facto* but not *de jure* but, as appears from the letter, without it being possible to attach a date to this recognition.

On August 28, 1940, a new constitution of the E.S.S.R. was published, of which article 6 declares water transportation to be state property. On August 1, 1940, the newly established government passed a decree or regulation concerning the movement of ships. Considerable discussion occurred in the Court below and at bar as to the precise meaning and effect of paragraph 11 of the admissions, which reads as follows:—

11. That on October 8, 1940, there was passed a decree of the Presidium of the Provisional Supreme Soviet of the E.S.S.R. on Nationalization of Shipping Enterprises and Seagoing Ships and Riverboats, Section 1 of which purports to nationalize, *inter alia*, the Steamship *ELISE* "wheresoever it may be" and Section 2 of which fixes the amount of compensation to be 25 per cent of its value; a copy of this Decree is hereto annexed marked "C".

Coupled with this must be read paragraphs 18 and 19:—

18. The plaintiff alleges that on the basis of the facts herein recited and admitted, as a matter of law, the decrees and statute of the *de facto* Government hereinabove referred to, nationalized the said steamship and entitle the plaintiff to maintain this action and to receive the said proceeds; and the defendants deny this allegation, contending that as a matter of law, based upon the said facts herein recited and admitted, the said decrees do not have the effect alleged by the plaintiff and that the said statute and decrees are (*a*) acts of a *de facto* government only, (*b*) confiscatory in nature and not recognized by our law as effective in transferring property outside of the jurisdiction of the promulgating authority and (*c*) are contrary to the constitution of Estonia as it existed prior to June 17, 1940.

19. That the questions at issue between the plaintiff and defendant, are:

(1) Were the Decrees and Statutes herein recited effective in nationalizing the steamship *ELISE* and transferring ownership to the plaintiff herein?

(2) Is the Plaintiff entitled to maintain the action and receive the proceeds?

Other paragraphs in the admissions show that the plaintiff is a corporation organized under the laws of the U.S.S.R. and no question really arises as to its right to sue. As of June 17, 1940, and on the respective dates of the decrees above mentioned, Laane and Baltser were admittedly citizens of Estonia, residing and domiciled therein.

Reading paragraphs 11, 18 and 19 together, I concur with the trial judge that without it being necessary to call evidence to prove the applicable law, the parties have agreed that the decree of October 8, 1940, nationalized the *Elise* "wheresoever it may be" and fixed the compensation therefor at 25 per cent of its value. This construction is borne out by the proceedings that were taken with a view of taking evidence by commission and then abandoned in view of the agreed statement of facts. I also agree that the affidavit of Mr. Kaiv expresses an opinion with respect to the law of the former Republic of Estonia as constituted prior to June, 1940. The answer of the Secretary of State for External Affairs to question 2 shows that such republic has ceased to have any effective existence and Mr. Kaiv's opinion is therefore irrelevant.

The effect of such a nationalization decree in the Courts of Canada is a different matter. On October 8, 1940, the ship was not in the jurisdiction of the new republic and,

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Kerwin J.

therefore, the decision in *Luther* v. *Sagor* (1), has no application as the goods there in question were at the date of the decree of the Russian Socialist Federal Soviet Republic within the jurisdiction of that country. Even a public ship in foreign waters is not, and is not treated as, territory of her own nation: *Chung Chi Cheung* v. *The King* (2). The authorities cited in a note to rule 54 in the 5th edition of Dicey's *Conflict of Laws* at page 212 establish that the Courts of this country have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal law of a foreign state. Confiscation of the property in England of the former King of Spain was considered as penal legislation in *Banco de Vizcaya* v. *Don Alfonso* (3). *Huntington* v. *Attrill* (4), referred to in the reasons for judgment in the Court below, was merely a decision that the action being by a subject to enforce in his own interest a liability imposed for the protection of his private rights was remedial and not penal. I quite agree that the decision in the *Jupiter* (No. 3), (5), was dealing with a decree which the Court found did not even purport to have extra-territorial operation, but the reasoning of the Lord Ordinary in *Government of Republic of Spain* v. *National Bank of Scotland* (6), and that of Lord Justice Scott in *A/S Tallinna Laevahius* v. *Estonia State S.S. Line* (7), appeal to me as being correct statements of the law applicable.

In my view the decree of October 8, 1940, is of a confiscatory nature just as much as if the compensation had been fixed at one per centum. It is not in the same class as that considered by Atkinson J. in *Lorentzen* v. *Lydden & Co.* (8), where the Norwegian Government, on the eve of taking its departure for England, passed an Order in Council by which all ships registered in Norway, that were outside the German occupied area, were requisitioned, and it was provided that compensation should be fixed according to Norwegian law. Nor are we dealing with a case where a foreign government is in possession and attempts are made to implead it. The plaintiffs here bring the action, and the decree in question being of a confis-

(1) [1921] 3 K.B. 532.
(2) [1939] A.C. 160.
(3) [1935] 1 K.B. 140.
(4) [1893] A.C. 150.
(5) [1927] P. 122.
(6) [1939] S.C. 413 at 421.
(7) (1947) Ll. Rep. 99 at 111.
(8) [1942] 2 K.B. 202 at 212.

catory nature, the rule to be applied is correctly set forth in Cheshire's *Private International Law,* 3rd edition, p. 180: —"If the previous owner is in possession, his legal ownership is, in the view of English law, unaffected by the confiscatory legislation of a foreign sovereign."

For these reasons I would set aside the judgment *a quo* and substitute therefor an order that there be paid out of the proceeds in Court of the sale of the *Elise* the total amount of the Registrar's fees and Court Stenographer's costs and the total amount of the costs of the solicitor for the Custodian of Enemy Property (all of which are referred to in the judgment appealed from) and that the balance be paid out to Laane and Baltser. The appellants are entitled to their costs against the respondents in this Court and in the Exchequer Court.

RAND J.:—The facts as, for the purposes of this appeal, I assume them to be, can be shortly stated. The vessel *Elise* during the summer of 1940 was engaged in running between the United Kingdom and Canada. She was owned by the appellants, Laane & Baltser, Estonian citizens carrying on business in partnership at Parnu, Estonia, where the vessel was registered. In August, 1940, while at Saint John, New Brunswick, she was arrested for wages and detained until January 25, 1941, when she was sold under an order of the Admiralty Court.

In June, 1940, the U.S.S.R. occupied Estonia and on or about the 17th of that month a soviet government of the state was set up. In July, 1941, the country was invaded by German forces which maintained military control until driven out in September, 1944, when the former government re-assumed power. On October 8, 1940, a decree passed by the appropriate authority purported to nationalize all Estonian merchant vessels including those in foreign ports; on October 25th a decree of the Council of People's Commissars, U.S.S.R., of which Estonia was a constituent republic, provided for the organization of the Estonian State Steamship Line, which I take to be the respondent, and was followed by what is called a statute of the Line, setting up its constitution. The property in all state vessels thereupon became vested in the respondent.

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Rand J.

The *Elise* was at all times held by those in charge of her for the original owners. The respondent now lays claim to the balance of the proceeds from the sale.

The local Judge in Admiralty held the vessel to be *in transitu* as distinguished from being locally situate at Saint John, that the law applicable to her was that of her registry, Estonia, and that effect must accordingly be given to the decrees. Subject to a deduction of 25 per cent which the October decree provides as compensation for the taking, the funds in court were therefore awarded to the state corporation.

Whatever may be the significance or the legal consequences of a vessel being *in transitu* there can be no doubt that once a private ship is voluntarily brought within a country's territory it is submitted to the laws of that country. The jurisdiction arising is primary and fundamental; but the particular law to be applied to determine legal relations in respect of the vessel is quite another matter. But, whether viewed as recognition of legal effects of foreign law or as affirmative enforcement of foreign law, that its application is through the act and authority of the territorial state follows from the language of Chief Justice Marshall in *Schooner Exchange* v. *M'Fadden* (1):—

> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

There is the every-day attribution of the law of the domicile of a deceased person to the succession of moveable property in the foreign territorial jurisdiction; but that attribution lies within the determination of the territorial state and the law of the domicile may in a proper case be modified or disregarded: *Marjoribanks* v. *Askem* (2); *Re Selot's Trust* (3); *Dicey*, 5th Ed., 454 and 535. In such case, the territorial law, subject, it may be, to national interests such as the payment of local debts, vests vacant property in a new ownership; but it would be a contradiction of the original postulate to treat the foreign law as operating through its own jurisdictional efficacy. The result of so conceiving the legal effectuation may make little or no difference in the general run of cases, but it furnishes a guidance in such instances as the present which

(1) (1812) 7 Cranch, 116 at 136.
(2) [1930] 2 Ch. 259 at 275. (3) [1902] 1 Ch. 488.

the other conception does not appear to do. A like illustration is furnished by bankruptcy where the foreign jurisdiction lends such aid as it thinks proper to what is considered to be a desirable universal distribution of assets among creditors by recognizing the title of the assignee obtained in the principal administration: *Dicey,* 5th Ed., pp. 498-9.

Nor is the operation of the local law here affected by the principle of "immunity". That term connotes the negative aspect, abstention or forebearance of law and its processes. Here the local law must decide ownership to the fund in court and deliver possession of it as it would of the vessel. The principle is illustrated by cases in which the foreign sovereignty itself in some form enters the territorial jurisdiction.

In dealing with ships, there are, undoubtedly, special considerations to be taken into account. Registered vessels have not, ordinarily, an actual localization. They enter world commerce and in the interest of international commercial relations of great magnitude and complexity, rules of practical convenience commanding general assent are a virtual necessity. For that reason, the law of the registry has been accorded special regard, and in important respects it is accepted as governing the vessel: *Dicey,* 5th Ed., pp. 342, 348, 996 *et seq.*

But convenience and expediency are merely relevant factors in reaching the juridical determination; the application is by the territorial power and jurisdictionally with such modifications of a foreign rule as it pleases. It is what we should expect, therefore, that there are certain rules, more or less clearly defined, by which the enforcement in the domestic forum of a foreign law is refused.

It is now established that a common law jurisdiction will not enforce directly or indirectly the penal or the revenue laws of another state, to which Dicey in Rule 54, 5th Ed., adds, political law; and there is the general principle that no state will apply a law of another which offends against some fundamental morality or public policy.

The first question then is whether there is some such policy of New Brunswick with which the confirmation of the attempted acquisition of this vessel by Estonia would conflict. The taking of property for public purposes with-

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Rand J.

out compensation certainly clashes with our notions of the conditions which should attend the exercise of that power, and I should not view the proposed award of 25 per cent of the value as avoiding that conflict. The provincial law is invoked to effect the transfer of the appellant's property on those terms: and we must ask whether the considerations of international expediency so far transcend normal policy as to overcome the repugnance of our political conceptions toward such an act. I do not think they do.

The effect of the decrees bears elements also of analogy to the operation of a revenue law. A state imposes a tax as a small fraction of the property of its citizens, and it is taken for a public purpose. But whether the fraction is five or seventy-five per cent and even though limited to certain classes of property, coercion and public object are common to both cases. We refuse to aid a neighbour state in collecting the lesser exaction even though taxation is universally accepted as a proper state faculty; on what ground should we enforce the greater?

But there is what I think a still more important aspect in which the question is to be viewed. The acquisition of property here is not to be dissociated from the larger political policy of which it is in reality an incident. The matters before us evidence the fundamental change effected in the constitution of the Estonian state, of which that acquisition is only one, though an important, particular. What has been set up is a social organization in which the dominant position of the individual, as recognized in our polity, has been repudiated and in which the institution of private property, so far as that has to do with producing goods and services, has been abolished; and those functions, together with the existing means, taken over by the state. If at the time of the decrees every Estonian ship had been sunk, their principal purpose would still have been realized in vesting in the state, apart from ports and immoveable works in Estonia, the monopoly of carrying on shipping services.

What is asked of the foreign territorial law is, therefore, to aid in the execution of a fundamental political law of Estonia which serves no interest of the foreign state. The law of conflicts is concerned with the determination of rights in property and personal relations which are con-

ceived as distinct from the law under which they arise; but laws of the class in question are not migratory and are deemed to be operative only within their own territories. If the transfer of property by such a law of Estonia has been satisfied by the condition of territorial jurisdiction, the title will be recognized and enforced, as in England the similar decrees of Russia: *Luther* v. *Sagor* (1). But where that legislative basis is absent there is no warrant in international accommodation to call upon another state to exercise its sovereign power to supply the jurisdictional deficiency in completing such a political program: *Ingenohl* v. *Wing On & Co.* (2); *Carling* v. *The King* (3); *Emperor of Austria* v. *Day* (4); *Dicey,* 7th Ed. pp. 212, 214. *Lorentzen* v. *Lydden* (5) is quite distinguishable. There the King of Norway, as *parens patriae,* was empowered to act for his subjects held in an enemy occupied zone by taking steps necessary to the protection of their property rights. It was an administrative enactment with procedural incidents which involved no question of political policy.

I would, therefore, allow the appeal and direct judgment in favour of the appellants with costs in both courts.

KELLOCK J.:—It is admitted in this case that the steamship *Elise,* the proceeds of which are here in question, was prior to June 17, 1940, owned by the appellants and that by July of 1939 the ship had left the Republic of Estonia and had arrived at Saint John, N.B., on or about the 15th of August, 1940, without having returned at any time to Estonia. While at Saint John the vessel was arrested and ultimately sold in January, 1941. The admissions further state that on or about June 17, 1940, a new government was established in Estonia known as the Estonian Soviet Socialist Republic, referred to in the admissions as the E.S.S.R., and that the E.S.S.R. became a constituent republic of the Union of the Soviet Socialist Republics, being recognized by the Government of Canada *de facto* but not *de jure.*

The earliest relevant decree of this new state is that of October 8, 1940, which, according to the admissions, pur-

(1) [1921] 3 K.B. 532.
(2) (1927) 44 R.P.C. 343 at 359.
(3) [1931] A.C. 435.
(4) (1861) 3 De G.F. & J. 217; 45 E.R. 861.
(5) [1942] 2 K.B. 202.

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Kellock J.

ports to vest the title to the ship in the respondent. The decree entitles the owners to compensation fixed at twenty-five per cent of the *value* of the ship. Seventy-five per cent of the value is thus taken without compensation. The question at issue between the parties is the efficacy under the law of New Brunswick of this legislation.

In Dicey, 5th Ed., p. 610, note (*k*), it is stated that "if movables are outside the territory of a confiscating power then clearly the extra-territorial effect cannot be claimed as of right". Such effect depends upon the consent of the *lex situs; Schooner Exchange* v. *M'Fadden* (1). In my opinion the law of England or of New Brunswick accords no such consent. All of the decisions and expressions of judicial opinion to which we have been referred or which I have been able to find, support this view.

In *Barclay* v. *Russell* (2), the claim of the State of Maryland to bank stock in England which had been vested in trustees under legislation of the old colony of Maryland before the war of Independence, the claim being rested upon legislation of the state subsequent thereto, was denied. At page 434 the Lord Chancellor said:

> I find no general principle carrying it farther, than that the new-formed Government may invest itself with all the rights, that it can command: no farther.

In *Lecouturier* v. *Rey* (3), Lord Macnaghten said at 265:

> To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market.

Lord Loreburn L.C. said at p. 273:

> * * * but this property * * * is property situated in England, and must therefore be regulated and disposed of in accordance with the law of England.

In *Ingenohl* v. *Wing On & Co.* (4), it was held by the Privy Council, that the purchase from the American Custodian of Alien Property of a business in the Philippines, together with the good will and trade-marks, could not transfer to the purchaser the title to trade-marks or trade names in China. Earlier in the same year in the case

(1) (1812) 7 Cranch 116.
(2) (1797) 3 Ves. Tr. 423.
(3) [1910] A.C. 262.
(4) (1927) 44 R.P.C. 343.

Ingenohl v. *Olsen & Co.* (1), the Supreme Court of the United States had before it an appeal from a judgment of the Supreme Court of the Philippines arising out of the same sale in which the original owner of the Philippine business, who also carried on business at Hongkong, had obtained a judgment for costs against the defendants in an action brought to restrain the defendants from infringing the plaintiff's trade-marks in Hongkong.

In giving the opinion of the court Mr. Justice Holmes said at p. 544:

> A trade-mark started elsewhere would depend for its protection in Hongkong upon the law prevailing in Hongkong and would confer no rights except by the consent of that law * * * If the Alien Property Custodian purported to convey rights in English territory valid as against those whom the English law protects he exceeded the powers that were or could be given to him by the United States.

And at page 545:

> * * * but no principle requires the transfer to be given effect outside of the United States. * * *

In the *El Condado* (2), there was in question a claim by the Government of the Republic of Spain against the National Bank of Scotland for loss alleged to have been sustained by reason of the granting of an interim interdict at the instance of the defendants, under which the use of the steamship there in question had been lost to the plaintiff for a considerable period. The pursuer's claim to the ship was based on a decree of the Republic Government of Spain and it was alleged that the Spanish Consul at Glasgow had taken possession. The defence was, *inter alia*, that the decree was ineffectual to attach property outside Spanish territorial waters. In giving judgment at the trial Lord Jamieson said at p. 87:

> While our Courts will treat as binding legislation of a confiscatory character enacted by a foreign Government recognized by His Majesty's Government as a Sovereign Government so far as affecting property within the foreign Government's jurisdiction, such legislation will not be held to affect property situated in this country or out with the territory administered by such Government.

This judgment was upheld on appeal.

Again in *A.G. Der Manufacturen, I. A. Woronin etc.*, v. *Huth & Co.* (3), in an action brought by a Russian company against a firm of bankers in London claiming certain

(1) 273 U.S. 541.
(2) (1930) 63 Ll. L. Rep. 83.
(3) (1928) 79 Ll. L. Rep. 262.

1949

LAANE AND BALTSER v. ESTONIAN STATE CARGO & PASSENGER S.S. LINE

Kellock J.

war bonds and moneys which it was alleged the defendants held on behalf of the plaintiff company, the defendants' main contention was that by reason of certain Russian legislation either the company had ceased to exist or those claiming to initiate or ratify the issue of the writ in the name of the company had no right so to do.

It was held by Wright J., as he then was, that the confiscatory decrees there in question had no extra-territorial effect. He cited the opinion of Lord Cave, L.C., in *Employers' Liability Assce. Co.* v. *Sedgwick Collins & Co.*, (1), and that of Sargant L.J. in the Court of Appeal in the same case, (2), as well as that of Hill J. in the Court of Appeal in *The Jupiter* (No. 3), (3), *Lecouturier* v. *Rey* (4), and the cases cited in Dicey on Conflict of Laws, 4th Ed., page 576, note (*h*), now 5th Ed., page 610, note (*k*).

The case *A/S Tallinna, etc.* v. *Tallinna Shipping Co., Ltd. et al* (5), before Atkinson J. and on appeal, 80 Ll.L.R., page 99, was an interpleader issue to decide the title to certain policy moneys paid in respect of loss through war risk of the Estonian Steamship *Vapper* in July, 1945. The money was claimed by the plaintiffs and individual shareholders in the association owning the vessel. The effective defendants were the Estonian State Steamship Line, who contended that the *Vapper*, being among vessels nationalized under Estonian law in July, 1940, became vested in them. It was held that this legislation had not been proved, but in the course of his judgment Atkinson J. said at p. 256:

> There can be no question but that this legislation that followed was confiscatory in character, and it is well settled that our Courts will not give effect to legislation of that kind.

The judgment was upheld on appeal, 80 Ll.L.R., 99. In the view of Scott L.J., at p. 111, the legislation, had it been proved, was to be regarded as penal and non-enforceable. As to its penal character however, one might compare what was said by Viscount Haldane in *Ingenohl* v. *Wing On, supra* at 359, and to *Huntington* v. *Attrill* (6).

On the main question reference may also be made to of certain Registrar's fees and Court Stenographer's costs

(1) [1927] A.C. 95.
(2) [1926] 1 K.B. 1
(3) [1927] P. 122, 250.
(4) [1910] A.C. 262.
(5) 79 Ll. L. Rep. 245.
(6) [1893] A.C. 150.

the view of Viscount Cave and Lord Sumner in *Russian, etc. Bank* v. *Comptoir d'Escompte* (1), at 125, and of Lord Finlay at 137.

There remains for consideration the judgment of Atkinson J. in *Lorentzen* v. *Lydden & Co.* (2), at 202. In that case the Norwegian government had issued a decree requisitioning all ships registered in Norway situated outside the area occupied by the Germans and owned by, *inter alia,* a company carrying on business in that area. The decree provided however, for compensation to the owners. The curator appointed under the decree brought action on behalf of the owners of a vessel covered by its terms against the defendants, a firm carrying on business in London, to recover damages for breach by the latter of a contract of charter. The defendants denied any right in the curator to collect claims belonging to the owners of the vessel and denied the right of the Norwegian government by legislative or executive act to transfer the title to claims or other property situated in England. At page 215 Atkinson J. said:

> It seems to me that the English courts are entitled to take into consideration the following matters: that this is not a confiscatory decree, see art. 5 of the decree, that England and Norway are engaged together in a desperate war for their existence, and that public policy demands that effect should be given to this decree * * * It is not confiscatory, it is in the interests of public policy, and it is in accordance with the comity of nations.

Whatever may be the true basis upon which this judgment rests it was not regarded by Atkinson J. himself in the later case of the *Vapper* as being at all relevant to the decision in that case as it was not mentioned.

I would therefore allow the appeal and answer in favour of the appellants the questions asked. I concur in the order proposed by my brother Kerwin.

Appeal allowed.

Solicitor for the appellants: *J. Paul Barry.*

Solicitors for the respondent: *Inches & Hazen.*

---

(1) [1925] A.C. 112.

(2) [1942] 2 K.B. 202.

1949

*Feb. 15, 16.
*June 24.

JOHN TREMBLAY (PLAINTIFF).....APPELLANT;

AND

HECTOR BOUCHARD (DEFENDANT).....RESPONDENT.

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

Contract—Interpretation—Suspension of contract for supply of stone due to suspension of work on another contract—Whether contracts subordinated to each other—Whether performance rendered impossible—Whether consent to suspension—Breach—Art. 1202 C.C.

Respondent had a contract with the Government of Canada for the building of a dock and signed a separate contract with appellant for the supply of stones. Due to his inability to obtain the necessary timber in time, respondent was permitted by the Government to suspend temporarily the work. He therefore advised appellant, who had started delivering the stone, to suspend further deliveries until notified again. Appellant brought action for the annulment of his contract. This action was rejected by the Superior Court and by the Court of Appeal.

Held: Taschereau J. dissenting, that the contract for the stone was not subordinated to all the terms of the contract for the dock, and as appellant did not acquiesce in the suspension, and as it was not established by respondent that the execution of the work had been rendered impossible as required by art. 1202 *C.C.*, respondent was guilty of a breach of contract.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1) affirming, Bissonnette and Gagné JJ.A. dissenting, the judgment of the Superior Court, Edge J., dismissing appellant's action for breach of contract.

G. Monette K.C. and *H. D'Auteuil K.C.* for the appellant.

André Taschereau K.C. and *C. Noël* for the respondent.

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

THE CHIEF JUSTICE: Il s'agit d'interpréter et d'appliquer aux faits de la présente cause le contrat suivant:

Je soussigné m'engage à faire pour Hector Bouchard à savoir à lui livrer une certaine quantité de pierre. Le dit John Tremblay s'engage à livrer à Hector Bouchard toute la pierre qu'il aura besoin pour la cons-

*PRESENT:—The Chief Justice and Kerwin, Taschereau, Kellock and Locke JJ.

(1) Q.R. [1948] K.B. 490.

truction du quai de St-Siméon. Cette pierre sera rendue sur le quai en place. La pierre devra être acceptée par les ingénieurs du département et elle devra être livrée pour ne pas retarder les travaux. A la demande du dit Hector Bouchard. Le dit Hector Bouchard paiera au dit John Tremblay la somme de $1.75 la verge cube. Le paiement sera fait suivant les estimés des ingénieurs. Le dit John Tremblay fournira tout ce qui est nécessaire pour exécuter ce contrat.

Et nous avons signés.

Il est entendu que le contracteur du quai an fera mettre un cantitée qui luis fodras a ter et il la rendras e sest frais.

Hector Bouchard
John Tremblay.

L'appelant prétend que l'intimé a refusé de remplir ses obligations en vertu de ce contrat et il en demande la résiliation avec, en plus, le montant de $708.41 et "sous réserve pour le demandeur de tous ses recours ultérieurs pour dommages lorsque ceux-ci pourront être liquidés."

La Cour Supérieure a rejeté l'action et la Cour du Banc du Roi (en appel) (1) a confirmé le jugement "sans en admettre tous les considérants", les honorables juges Bissonnette et Gagné étant dissidents.

Le contrat plus haut reproduit était un sous-contrat par lequel l'appelant s'engageait à fournir et livrer à l'intimé une certaine quantité de pierre qui devait permettre à ce dernier de remplir un contrat principal pour la construction du quai à St-Siméon dans le comté de Charlevoix, que l'intimé avait signé avec Sa Majesté le Roi, représenté par le Ministre des Travaux Publics du Canada. La date de son achèvement avait été fixée au 20 juin 1947.

Pour l'exécution du contrat principal, l'intimé avait besoin de 650,000 pieds de bois. Le contrat principal pourvoyait que ce bois pouvait être: "pine, spruce or Douglas Fir".

Le contrat avec le Ministre des Travaux Publics comportait que l'intimé devait fournir à ses frais "every kind of labour, superintendence, services, tools, implements, machinery, plant, materials, articles and things necessary for the due execution and completion of all and every the works set out or referred to in the specification hereto annexed."

C'est donc à lui qu'il incombait de fournir le bois requis. Le Gouvernement Fédéral avait bien consenti à obtenir pour lui une certaine quantité de "Douglas Fir"; mais son obligation à cet égard était exclusivement telle qu'elle est

(1) Q.R. [1948] K.B. 490.

1949

TREMBLAY v. BOUCHARD

Rinfret C.J.

exprimée dans le contrat. En plus, le Ministre pouvait, de temps à autre, retarder ou suspendre les travaux; mais restait la question de savoir si, en l'espèce, telle suspension ordonnée ou consentie par le Ministre pouvait légalement affecter le sous-contrat. En fait, à la suite d'une visite d'inspection d'un monsieur Loignon, attaché au Département des Travaux Publics, et sur le rapport de ce dernier qui constata que, le 6 septembre 1946, l'intimé manquait de bois, et que celui qui avait été commandé par le Département arriverait trop tard pour que le contracteur se mette à l'ouvrage pour commencer les travaux de façon à se protéger avant l'hiver, l'achèvement du contrat qui avait été fixé au 20 juin 1947 fut, du consentement du Ministre, suspendu et, dès septembre 1946, les travaux furent arrêtés jusqu'au mois d'avril 1947. L'intimé en avertit l'appelant verbalement.

L'appelant avait confié à un monsieur Eugène Tremblay l'exécution de son contrat de pierre.

Le 17 août 1946 Eugène Tremblay lui demanda de lui dire immédiatement où il devait placer cette pierre parce que, disait-il "Bouchard ne prétend pas recevoir la pierre sur le quai au fur et à mesure qu'elle y arrive." En conséquence, il sommait l'appelant de lui indiquer l'endroit, en l'avertissant qu'à défaut par lui de le faire, il lui deviendrait impossible d'exécuter son contrat, et qu'il le tiendrait responsable de tous les dommages qu'il en souffrirait, car il ajoutait qu'il était organisé maintenant pour l'exécution du sous-contrat et qu'il lui fallait garder ses hommes et ses camions engagés.

Cette mise-en-demeure ne fut communiquée à l'intimé que le 24 septembre 1946, assez longtemps après que l'appelant avait été prévenu par l'intimé que les travaux étaient suspendus jusqu'au mois d'avril 1947.

En transmettant la lettre du 17 août venant du sous-contracteur Eugène Tremblay, l'appelant écrivit à l'intimé que le refus par ce dernier de recevoir la pierre ne faisait pas son affaire, car il avait fait "une dépense d'environ $600.00 pour l'organisation de l'exécution de ce contrat pour le charroyage d'ici au mois de novembre prochain". Il terminait sa lettre en disant: "Donc, si c'est possible, je

pourrais faire charroyer une bonne quantité de cette pierre sur le quai, immédiatement, étant donné que les bateaux sont arrêtés."

A cette lettre l'intimé répondit qu'il n'était pas possible de mettre une bonne quantité de pierre sur le quai, mais "et comme vous savez que les travaux du quai sont suspendus pour d'ici au mois d'avril, faute de manque de matériaux... pour aucune considération je ne vous permettrai à mettre une verge de pierre à terre ou sur le quai... Quand je serai prêt à la recevoir, je vous avertirai assez d'avance."

Évidemment, lorsqu'il écrivit sa lettre du 24 septembre, malgré qu'il avait été prévenu verbalement par l'intimé que les travaux étaient suspendus, comme il y fait allusion dans sa réponse, l'appelant ne considérait pas le contrat résilié par suite du délai que subissaient les travaux jusqu'au mois d'avril 1947, mais il se déclarait prêt à faire charroyer une bonne quantité de cette pierre sur le quai; et, lorsqu'il reçut la réponse de l'intimé lui réitérant par écrit l'information qu'il lui avait donnée que les travaux étaient suspendus jusqu'au mois d'avril, il n'insista pas. Il n'y eut aucune réponse de sa part à la lettre qu'il reçut alors de l'intimé; il ne persista pas à vouloir charroyer la pierre sur le quai; et ce n'est que le 4 mars 1947, par l'action qu'il intenta alors contre l'intimé, qu'il signifia à ce dernier qu'il entendait traiter la lettre du 28 septembre 1946 comme constituant un bris du contrat et que, par les conclusions de son action, il demanda que ce contrat fut annulé et qu'il réclama la somme de $708.41, représentant $385.00 pour deux cent verges de pierre déjà livrées et $323.41 de dommages.

A l'action de l'appelant, l'intimé plaida qu'il avait parfaitement le droit de suspendre les travaux, à la connaissance de l'appelant, et que cette suspension ne constituait pas une cause de résiliation. Il expliqua que la suspension des travaux avait été rendue nécessaire par le fait que le bois, dont il avait besoin pour la fabrication des cages utilisées dans la construction du quai, était un bois spécial appelé "Douglas Fir" qui pouvait être obtenu de Vancouver (Colombie-Britannique), par l'entremise du Département des Travaux Publics, que ce bois n'avait pas encore été livré

1949

TREMBLAY v. BOUCHARD

Rinfret C.J.

lors de l'institution de l'action, qu'il avait de ce fait été empêché de construire ses cages en bois, et, qu'à raison de cela, la suspension des travaux n'était en aucune manière due à sa faute, négligence ou incurie, mais à une cause en dehors de son contrôle.

Quant à la réclamation de $768.41, l'intimé fit l'objection que, en vertu de son contrat avec l'appelant, la pierre devait être acceptée par les ingénieurs du Département, et que le paiement ne devait en être fait que suivant les estimés de ces ingénieurs. Comme cette condition préalable n'avait pas été remplie et que, d'ailleurs, ce ne serait qu'au moment où la pierre serait empilée dans les cages en bois que les ingénieurs pourraient faire le mesurage, établir la quantité de pierre livrée et en estimer la valeur en argent, l'action du demandeur, de ce chef, n'était fondée ni en fait ni en droit et était pour le moins prématurée. C'est cette défense que la Cour Supérieure a accueillie.

Le jugement de cette Cour fait d'abord remarquer que le contrat entre les parties ne stipule aucun délai pour la livraison de la pierre, que, dès le 15 août 1946, l'intimé avisa l'appelant qu'il avait suspendu les opérations de construction du quai et que cette suspension fut subséquemment approuvée par le Département des Travaux Publics sur le rapport de son représentant, M. Loignon; qu'il est exact que dès lors les travaux ne pouvaient être continués sans que l'intimé ait sur place toute la quantité de bois nécessaire, à défaut de quoi les caissons que l'intimé aurait faits auraient été détruits par les glaces durant l'hiver; que la suspension des travaux, conséquemment, ne pouvait être imputable à l'intimé, qu'il devait être exonéré parce que l'exécution de ces travaux avait été rendue impossible par un obstacle imprévisible; que ce fait devait être considéré comme un cas de force majeure formant obstacle au même titre que tout événement naturel et que, par suite, l'intimé avait établi qu'il s'était trouvé dans l'impossibilité absolue d'exécuter son obligation.

Le jugement de la Cour Supérieure procède ensuite à constater que l'appelant n'avait pas fait la preuve d'une mise-en-demeure à l'intimé; qu'il ne pouvait lui réclamer le prix de la quantité de pierre déjà fournie et livrée parce

que cette pierre n'avait pas été acceptée ni estimée par les ingénieurs du Département des Travaux Publics, et que, de ce chef, l'action était prématurée.

A l'égard de l'appelant, aucun délai n'était stipulé dans le contrat, et l'attitude adoptée par l'intimé n'était pas résolutoire et absolue, mais seulement dilatoire. Les travaux du quai n'étaient pas abandonnés, ils n'étaient que suspendus jusqu'au mois d'avril 1947, en sorte que, tant à l'égard du contrat lui-même qu'à l'égard de la réclamation en dommages et à la demande de paiement de la pierre livrée, les conclusions de l'appelant étaient prématurées.

En confirmant ce jugement, la majorité de la Cour du Banc du Roi (en appel) (1) a été d'avis que l'appelant s'était trouvé en présence d'un contrat principal dont l'exécution impliquait des suspensions et des retards, et qu'en convenant de coopérer comme il l'a fait, comme fournisseur de pierre pour l'exécution de ce contrat principal, il s'était assujetti d'avance aux délais et suspensions que comportait l'exécution de ce contrat principal.

L'ordre du Département avait sanctionné cette nécessité d'un arrêt, sans que l'on puisse dire qu'il y avait eu négligence ou faute de l'intimé. L'appelant avait, quant à la durée et aux termes d'exécution de son contrat, accepté ce que pour autant comportait et impliquait le contrat principal. Le sous-contrat dépendait du contrat principal dont l'appelant connaissait l'ampleur et était au courant des conditions. C'est d'ailleurs ce qu'il dit dans son témoignage. Il s'était soumis d'avance aux données de ce contrat principal.

Or, il est acquis que la suspension des travaux a été rendue nécessaire par une pénurie du bois requis; et la preuve ne laisse aucun doute; elle est positive et bien claire que le bois qui devait venir de la Colombie-Britannique, par l'entremise du Département, n'avait pu arriver à temps. En plus, l'arrêt forcé des travaux n'était que temporaire. Il ne s'agissait que d'une interruption jusqu'au mois d'avril suivant, ce qui était raisonnable eu égard à la nature et à l'ampleur de l'entreprise.

L'intimé n'était pas tenu d'accepter la pierre sur le quai. Cette stipulation dans le sous-contrat avait été faite au

(1) Q.R. [1948] K.B. 490.

1949

TREMBLAY v. BOUCHARD

Rinfret C.J.

profit de l'intimé qui pouvait en tirer ou non le bénéfice; et, au surplus, d'après le sous-contrat, la pierre devait être livrée "à la demande du dit Hector Bouchard".

De l'avis de la majorité de la Cour, (1) l'action était prématurée en tant qu'il y allait du prix même de la pierre déjà livrée, puisque l'appelant avait poursuivi sans attendre que cette pierre fut mesurée comme elle devait l'être; et, quant à la résiliation avec dommages, sa demande était non fondée puisque l'appelant s'était trouvé en face d'une suspension temporaire à laquelle il était tenu et à laquelle il s'était implicitement soumis.

Messieurs les Juges Marchand et McDougall déclarèrent qu'ils s'accordaient avec le Juge en Chef de la province pour l'admission des motifs ci-dessus de confirmer le jugement de la Cour Supérieure.

M. le Juge Bissonnette interpréta la défense de l'intimé comme reposant sur le cas fortuit ou la force majeure, de sorte que le litige devait se restreindre à l'application de l'article 1202 du *code civil*:

> 1202. Lorsque l'exécution d'une obligation de faire une chose est devenue impossible sans le fait ou la faute du débiteur, et avant qu'il soit en demeure, l'obligation est éteinte, et les deux parties sont libérées; mais si l'obligation a été exécutée en partie au profit du créancier, ce dernier est obligé jusqu'à concurrence du profit qu'il en reçoit.

Il considéra la lettre de l'intimé en date du 28 septembre 1946 comme "plus significative que n'aurait pu faire toute sommation ou notification." Dès lors, le droit de l'appelant à demander l'annulation du contrat et le paiement du profit qu'en a retiré l'intimé était né, actuel et recevable.

D'après lui, il était nettement prouvé que l'ingénieur du Ministère des Travaux Publics avait estimé la quantité minimum de pierre charroyée par le sous-traitant de l'appelant pour le compte de l'intimé; il avait fait deux mesurages: celui du 6 septembre 1946, indiquant environ 170 verges cubes, et, après l'institution de l'action, il avait trouvé au printemps de 1947, 182 verges cubes.

Le savant juge estimait donc que l'appelant avait le droit de faire constater l'extinction de l'obligation et de recouvrer la partie du contrat qu'il avait exécutée.

(1) Q.R. [1948] K.B. 490.

1949

TREMBLAY v. BOUCHARD

Rinfret C.J.

L'intimé, en refusant les livraisons de pierre et en ajoutant qu'il ne les reprendrait qu'en avril 1947, rendait pour l'appelant l'exécution du contrat impossible, puisque les parties avaient admis, au cours de l'instruction, que nulle livraison ne pouvait, à cause de l'intempérie de la saison, se faire durant les mois d'avril, mai et juin 1947.

Par suite, il ne pouvait trouver aucune justification juridique quelconque pour s'opposer à la demande d'annulation.

Pour M. le Juge Gagné également, la lettre du 28 septembre dispensait l'appelant de toute mise-en-demeure.

Il se pourrait, dit-il, que la pénurie du bois rendait impossible la construction des cages et leur placement à l'endroit désigné, avant l'hiver, de sorte que les glaces les eussent emportées, mais encore fallait-il qu'il prouve l'impossibilité de se procurer du bois en quantité suffisante. L'appelant ne s'en est nullement informé ni à Québec, ni à Montréal, ni ailleurs. Il n'a nullement prouvé qu'il ait fait la moindre démarche pour obtenir ce bois, et rien ne laissait entendre dans la preuve que l'on ne pouvait se procurer, à défaut de Douglas Fir, les autres sortes de bois (pine and spruce) prévus par le contrat.

Il est vrai que l'on avait montré le contrat du Gouvernement à l'appelant et qu'il reconnaissait avoir pris connaissance des clauses qui pouvaient l'intéresser; mais il ressort précisément de ces clauses que si l'appelant ne s'était pas préparé à tranporter toute la pierre requise dans le cours de l'été et de l'automne de 1946, il se serait exposé à de graves responsabilités, car la preuve établit clairement qu'entre décembre et le mois de juin 1947, le charroyage de la pierre dans la région était impossible.

La cause de la suspension des travaux que l'intimé a invoquée: l'impossibilité de se procurer du bois, n'est nullement établie, et l'intervention du Ministre ou de l'autorité publique n'est pas alléguée.

Monsieur le Juge Gagné s'accorde donc avec Monsieur le Juge Bissonnette pour être d'avis que l'appelant avait droit à l'annulation du contrat par lequel il s'était engagé à fournir la pierre requise pour le quai de St-Siméon.

Il croit que l'appelant a également droit au paiement de la pierre livrée. L'intimé s'y opposait en invoquant la clause du sous-contrat que le paiement ne devait être fait

1949

TREMBLAY v. BOUCHARD

Rinfret C.J.

que suivant les estimés des ingénieurs; qu'il n'y avait pas eu d'estimés avant l'action. Mais déjà Loignon avait mesuré la quantité de pierre livrée dès le mois de septembre, et il avait trouvé 170 verges. Au printemps suivant, il déclarait avoir trouvé 182 verges dans les caissons. L'appelant aurait donc le droit de réclamer le paiement qu'il en demandait, soit $318.50. Mais, d'autre part, il n'a pas établi les prétendus dommages qu'il a réclamés, et M. le Juge Gagné déclare se dispenser d'exprimer une opinion sur l'existence en sa faveur d'un droit à des dommages.

Le sous-contrat entre l'appelant et l'intimé présentait sans doute quelques difficultés d'interprétation, parce qu'il a été écrit par deux parties qui n'étaient pas au courant de la loi et qui, par surcroît, n'avaient évidemment qu'une notion plutôt imparfaite de l'orthographe et de la rédaction. Je ne crois pas cependant que l'on puisse arriver à la conclusion que l'appelant était soumis à toutes les conditions du contrat principal. L'on peut dire que cela était quant à la quantité de pierre qu'il devait livrer, également quant à l'acceptation de cette pierre par les ingénieurs du Département; également quant aux délais dans lesquels cette pierre devait être livrée pour ne "pas retarder les travaux". Cela impliquait qu'il avait pris connaissance de la clause du contrat principal fixant la date de l'achèvement de ces travaux du quai.

Les mots: "à la demande du dit Hector Bouchard" sont ceux qui présentent le plus d'ambiguïté, parce qu'ils n'indiquent pas d'une façon très claire à quelle partie du sous-contrat ils s'appliquent. L'interprétation la plus vraisemblable serait celle que la pierre devait être livrée pour ne pas retarder les travaux, suivant la demande qu'en ferait l'intimé.

Quant à la clause qui fut ajoutée après coup, il est difficile de ne pas en conclure que l'intimé ("contracteur du quai") avait la liberté de faire mettre une quantité de pierre à terre sur le quai. Mais, comme le dit le Juge en Chef dans ses notes en Cour d'Appel, c'était là une clause en faveur de l'intimé. La seule conséquence était que s'il demandait à l'appelant de livrer une certaine quantité de pierre sur le quai, il lui incombait également de la placer dans les cages à ses frais.

En plus, l'admission de l'appelant qu'il prit connaissance du contrat principal avant de signer, est limitée par la façon dont la question lui a été posée.

Il a répondu oui à cette question qui était dans les termes suivants: "Vous avez pris connaissance avant le 15 mai de ce contrat et des clauses, du moins celles qui vous intéressent comme sous-contracteur?" L'on ne peut en déduire plus que la question comporte, et cela veut donc dire que l'appelant n'avait pris connaissance que des clauses qui pouvaient l'intéresser.

Ce serait sans doute exiger beaucoup de l'appelant, eu égard à l'instruction sommaire que laisse entrevoir son témoignage, ainsi que le sous-contrat qu'il a rédigé, que de déduire de sa réponse qu'il aurait pu comprendre toute la portée du contrat principal, même en en prenant une certaine connaissance. L'enquête n'a pas poussé l'investigation plus loin. L'appelant s'est contenté de répondre oui à la question reproduite plus haut, et la preuve qu'on pourrait en tirer s'en est arrêtée là. L'on ne lui a pas demandé si, pour prendre connaissance de ce contrat, il s'était fait aider de quelqu'un. En plus, ce contrat est très long; il occupe 38 pages du case et il est en anglais. Il doit forcément rester un doute sérieux sur la question de savoir si, même en en prenant connaissance, l'appelant a pu se rendre compte des obligations que comportait ce contrat.

Je ne puis, pour ma part, en arriver à la conclusion qu'il ait entendu se soumettre aux termes de ce contrat en connaissance de cause. Il a pu comprendre que la date de l'achèvement du quai était fixée et qu'il était tenu de fournir la pierre dont l'intimé aurait besoin pour la construction de ce quai, de façon à ne pas retarder les travaux. Mais même à cet égard il pouvait s'en rapporter à la demande qu'en ferait l'intimé. Ce ne serait peut-être pas trop élargir le sens du sous-contrat que de dire qu'il pouvait se fier à cette demande de l'intimé, et que si, par suite du défaut d'une demande, les livraisons de l'appelant eussent retardé les travaux, il eut pu objecter qu'il s'était contenté d'attendre la demande de l'intimé.

Bref, je crois que ce serait voir la situation d'une façon beaucoup trop lourde pour l'appelant que de lui imposer

1949

TREMBLAY v. BOUCHARD

Rinfret C.J.

le retard, le délai ou la suspension que le Ministre s'était réservé le droit d'accorder en vertu de l'article 47 du contrat principal.

Je suis d'avis que l'on doit tenir pour acquis que l'appelant n'a pas eu connaissance de cette clause et que, conséquemment, son sous-contrat n'y a pas été subordonné.

Il reste en plus que, comme le fait remarquer M. le Juge Gagné dans ses notes, l'intervention du Ministre ou de l'autorité publique n'est pas invoquée dans la défense de l'intimé. Elle se contente d'alléguer que le bois qu'il attendait, et qui avait été obtenu de Vancouver par l'entremise du Ministre des Travaux Publics, n'avait pas été livré vers le 15 août 1946, ni même à la date de l'institution de l'action, et qu'il s'en est suivi que les cages en bois n'ont pas été construites à raison de cette cause qui était en dehors de son contrôle. Mais le Département des Travaux Publics qui avait bien offert ses bons offices pour obtenir ce bois pour l'appelant, n'y était pas tenu par le contrat principal; et, de plus, cette excuse de l'appelant ne s'adressait qu'au bois connu sous le nom de "Douglas Fir". Il se peut que ce dernier bois ne pouvait venir que de la Colombie-Britannique, mais le contrat stipulait que les travaux pouvaient également employer d'autres bois: "pine or spruce". Il n'a pas été mis en preuve que l'intimé n'aurait pu se procurer ces deux autres bois. Il n'a fait aucune démarche pour se les procurer. En les employant, il aurait pu satisfaire aux exigences de son contrat de la même façon qu'en employant du Douglas Fir. Il s'en suit que l'excuse qu'il a donnée pour expliquer la suspension de ses travaux n'était pas valable à raison du contrat principal qu'il avait signé. Il ne peut donc pas demander à l'appelant d'accepter une pareille excuse pour lui-même. Il en résulte que l'intimé n'a pas établi que l'exécution de son obligation était devenue impossible sans son fait ou sa faute.

C'était à lui qu'incombait la preuve que cette exécution était devenue impossible. Pour y réussir et invoquer l'article 1202 du *code civil,* il eut fallu qu'il prouvât que, en plus, il n'avait pas pu se procurer du "pine" ou du "spruce". Il ne l'a pas fait.

L'on ne peut donc en venir à la conclusion qu'il a réussi à satisfaire la Cour qu'il s'est trouvé dans l'impossibilité absolue d'exécuter son obligation. Or, c'était là ce qu'il devait prouver s'il voulait bénéficier de l'article 1202 du *code civil*. Sur ce point, la loi et la doctrine sont bien claires. Pour invoquer l'impossibilité d'exécuter son obligation, celui qui veut s'en prévaloir est tenu d'établir l'existence d'une impossibilité absolue; et non seulement d'une impossibilité pour lui-même, mais d'une impossibilité qui affecte toute autre personne.

Cette Cour en a décidé ainsi dans la cause de *Rivet* v. *La Corporation du Village de St-Joseph* (1). Au cours de ce jugement elle a référé à la doctrine telle qu'elle est exposée par Mourlon, Marcadé, Pothier et Laurent, et à ce qu'exprime Mignault, vol. 5, p. 671. Une partie du jugé du rapport *re Rivet* se lit comme suit:

> While articles 1200 and 1202 C.C. enact that, when the performance of an obligation to do has become impossible, the obligation is extinguished and both parties are liberated, in order that such a rule may be applied, it is not sufficient to establish that the performance would be extremely difficult, but it must be shown that it is *absolutely* impossible, i.e., that there exists an insurmontable obstacle which could not be foreseen.

L'intimé a donc failli dans la tâche qu'il avait de prouver l'impossibilité d'exécution requise en vertu de l'article 1202 du *code civil* pour se libérer de ses obligations envers l'appelant. Ce dernier n'était pas obligé d'accepter la condition que le contrat serait suspendu jusqu'au mois d'avril 1947 avec, en plus, tel qu'établi par la preuve, qu'en ce qui le concernait, cela reportait sa possibilité de charroyer la pierre au moins jusqu'au mois de juin 1947, vu que, avant cela, il était admis que ce charroyage était impossible durant les mois antérieurs. La lettre du 28 septembre 1946 disait clairement que l'intimé ne continuerait pas ses travaux avant le printemps de 1947 et que, dans l'intervalle, il n'accepterait de pierre ni de lui ni de son sous-traitant Eugène Tremblay. Il n'était pas obligé d'accepter ces conditions et l'intimé n'a pas réussi à établir qu'il avait des raisons valables et légales pour se libérer des obligations qui résultaient du contrat qu'il avait passé avec l'appelant.

L'appelant avait donc le droit de traiter le contrat comme enfreint par l'intimé; *Dupré Quarries Ltd.* v. *Arthur Dupré* (2); il eut pu intenter son action immédiatement après

(1) [1932] S.C.R. 1.

(2) [1934] S.C.R. 528 at 533.

1949

TREMBLAY v. BOUCHARD

Rinfret C.J.

avoir reçu la lettre du 28 septembre 1946. Il ne l'a fait qu'au mois de mars 1947, mais l'on ne saurait être justifié de décider que ce délai constituait un acquiescement à la suspension des travaux que voulait lui imposer l'intimé. Son action devait donc être maintenue et le contrat intervenu entre les parties le 16 mai 1946, devait être annulé. Il avait également le droit de réclamer le montant de $318.50 pour le prix de la pierre qu'il avait livrée jusque-là. Les deux juges dissidents en appel ont été d'avis qu'il n'avait pas établi le montant de dommages qu'il a réclamé en plus, et je ne vois pas de raison d'en venir à une conclusion différente de la leur. Dans sa déclaration, l'appelant a déclaré qu'il se réservait "tous ses recours ultérieurs pour dommages lorsque ceux-ci pourront être liquidés". Les juges dissidents dans la Cour du Banc du Roi ont préféré se dispenser d'exprimer une opinion sur l'existence en sa faveur d'un droit à des dommages. Il est évident que, comme eux, je n'entreprendrais pas non plus d'exprimer une opinion là-dessus, mais l'appelant a demandé que nous insérions dans notre jugement cette réserve qu'il a exprimée dans ses conclusions. Il a semblé, à l'audition, qu'il n'y aurait pas d'objection à faire cette insertion pourvu qu'elle fût rédigée de façon à protéger les droits de l'intimé sur ce point. Cette Cour a déjà eu l'occasion de faire l'examen de cette question dans la cause de *The City of Montreal* v. *McGee* (1), où il fut décidé que, dans une action de ce genre, où il n'y a qu'une cause d'action, les dommages doivent être estimés une fois pour toutes, et que, lorsque les dommages ont déjà été attribués, aucune nouvelle action ne peut être maintenue pour des dommages ultérieurs, même résultant d'une façon imprévue de la cause originaire.

Je me contente pour le moment de signaler que la réserve que nous a demandée l'appelant ne peut dès lors être interprétée comme une admission qu'il peut encore réclamer les dommages qu'il s'est réservé le droit de demander plus tard. Dans les conclusions de son action, il est inséré une réclamation pour certains dommages, que les juges dissidents en appel lui ont refusés, et que le présent jugement ne

(1) 30 S.C.R. 582.

lui accorde pas. Il ne faudrait donc pas que la réserve insérée dans notre jugement puisse être regardée comme une reconnaissance de ses droits sur ce point.

Le jugement de cette Cour lui réservant ce recours, doit, par conséquent, être entendu comme n'impliquant aucune opinion sur la prétention de l'appelant qu'il a subi d'autres dommages que ceux qu'il a réclamés dans l'action actuelle, ou, après avoir institué cette action, qu'il puisse encore réclamer dans l'avenir des dommages qui, d'après lui, n'étaient pas encore liquidés au moment de l'institution de l'action. Dans cette réserve, il devrait être déclaré que, sous ce rapport, l'intimé conserve absolument tous ses droits de défense.

TASCHEREAU, J. (*dissenting*): Malgré une rédaction qui laisse à désirer, les droits et obligations des deux parties, qui résultent du contrat intervenu le 15 mai 1946, me paraissent clairs. Le contrat se lit de la façon suivante:

La Malbaie, 15 mai 1946.

Contrat:

Je soussigné m'engage à faire pour Hector Bouchard à savoir lui livrer une certaine quantité de pierre. Le dit John Tremblay s'engage à livrer à Hector Bouchard toute la pierre *qu'il aura besoin* pour la construction du quai de St-Siméon. Cette pierre sera rendu *sur le quai* en place. La pierre devra être acceptée par les ingénieurs du département et elle devra être livrée pour ne pas retarder les travaux. *A la demande du dit Hector Bouchard.* Le dit Hector Bouchard paiera au dit John Tremblay la somme de $1.75 la verge cube. Le paiement sera fait suivant les estimés des ingénieurs. Le dit John Tremblay fournira tout ce qui est nécessaire pour exécuter le contrat.

Et nous avons signés.

Il est entendu que le contracteur du quai en fera mettre une cantitée qui luis fodras a ter et il la rendras e sest frais.

Hector Bouchard
John Tremblay.

L'intimé avait le 22 avril 1946, passé avec le Gouvernement Fédéral un contrat en vertu duquel il s'engageait pour la somme de $182,368 à faire certaines réparations au quai de St-Siméon, comté de Chalevoix (P.Q.). Les travaux devaient être terminés le 20 juin 1947, et c'est afin d'obtenir la pierre nécessaire à l'exécution de ce contrat que l'intimé a signé avec l'appelant la convention ci-dessus.

En vertu des termes de cet écrit, l'appelant s'oblige à délivrer à l'intimé toute la pierre dont ce dernier aura

1949

TREMBLAY v. BOUCHARD

Taschereau J.

besoin pour la construction du quai, et il s'oblige de la livrer *à la demande du contracteur principal,* sur le quai "en place".

L'intimé devait fournir tout le bois nécessaire, suivant les spécifications, mais il est arrivé subséquemment qu'à cause de la rareté du bois, l'intimé, contracteur principal, a obtenu du Gouvernement Fédéral un délai jusqu'au printemps suivant pour terminer ses travaux.

L'appelant, pressé par un sous-contracteur du nom de Eugène Tremblay, de qui il achetait la pierre en question, communiqua avec l'intimé le 24 septembre 1946, pour lui demander d'accepter livraison d'une "bonne quantité de pierre" sur le quai. A cette date, les caissons où la pierre devait être déposée n'étaient pas construits, à cause du manque de bois, et en conséquence, l'intimé n'avait pas encore besoin de cette pierre. L'appelant avait été mis au courant de ces faits, il savait que le délai pour la confection des travaux avait été étendu au mois d'avril 1948, et il en fut de nouveau avisé par lettre en date du 28 septembre. Le 4 mars 1947, l'appelant institua une action contre le défendeur, dans laquelle il demande que le contrat du 16 mai 1946 soit annulé, et où il réclame également la somme de $708.41. Cette action fut rejetée par la Cour Supérieure et ce jugement fut confirmé par la Cour d'Appel, (1) les honorables Juges Bissonnette et Gagné dissidents.

Je suis d'opinion que ces jugements doivent être confirmés et que l'action doit être rejetée.

L'appelant connaissait les principaux termes du contrat entre l'intimé et le Gouvernement Fédéral. Il savait en conséquence que les travaux devaient être terminés le 20 juin 1947, mais la preuve révèle également qu'il savait aussi que ce terme avait été prolongé au mois d'avril 1948, à cause du manque de bois requis pour la construction des caissons. A la date de la mise en demeure du 24 septembre 1946, l'intimé n'avait donc pas besoin de pierre sur le quai de St-Siméon, et il avait le droit, en s'autorisant des termes mêmes du contrat, de refuser d'en accepter. C'est "à la demande dudit Hector Bouchard", l'intimé,

(1) Q.R. [1948] K.B. 490.

que la pierre doit être livrée, et non pas quand il pourrait plaire à l'appelant de le faire. On comprend facilement pourquoi cette clause a été mise dans le contrat. L'intimé, contracteur principal, pouvait être soumis à des éventualités imprévisibles, à des contingences sur lesquelles il ne pouvait exercer aucun contrôle; il est sage qu'il ait stipulé que la pierre serait livrée à *sa demande,* c'est-à-dire quand il en aurait besoin. C'est ce droit qu'il a exercé dans le cas présent, et je ne vois rien qui puisse me justifier de l'en empêcher. Il n'a pas refusé définitivement la pierre; il ne s'est pas objecté à remplir les obligations que son contrat lui impose; il a simplement retardé la date de la livraison, comme il s'en était réservé le droit.

Évidemment, il ne pourrait pas abuser de son droit, et retarder indéfiniment la livraison de la marchandise. La règle est bien établie que dans des cas semblables, l'acheteur doit signifier la date de la livraison dans un délai raisonnable, *étant donné les circonstances.* Quelques autorités suffiront pour appuyer ce principe. *Vide*: *Ford* v. *Cotesworth* (1):

> Whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances.

Dans *Ellis* v. *Thompson* (2), Alderson, B. dit:

> The correct mode of ascertaining what reasonable time is in such a case is by placing the Court and Jury in the same situation as the contracting parties themselves were in at the time they made the contract; that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made and under which the contract took place. By so doing you enable the Court and Jury to form a safer conclusion as to what is the reasonable time which the law implies and within which the contract is to be performed.

Leake "on contracts" à la page 200, s'exprime de la façon suivante:

> Under a written contract for the sale of goods appointing the time for payment, but silent as to the time for delivery; and, therefore, presumptively importing delivery within a reasonable time upon credit, evidence was held admissible of a usage in the trade, that the delivery should be made concurrently with the payment and could not be demanded before.

(1) L.R. 4 Q.B. 133. (2) 3 M. 2 W. 445.

1949

TREMBLAY v. BOUCHARD

Taschereau J.

Et dans *Chapman* v. *Larin* (1), commentant les autorités ci-dessus, l'honorable Juge Ritchie s'exprime de la façon suivante:

And I can discover nothing in the law of the Province of *Quebec* at variance with these principles, which, after all, are only the principles of common law and common justice.

Je suis clairement d'opinion que les circonstances de la présente cause justifiaient l'intimé de retarder la date de la livraison de la pierre, et d'informer l'appelant comme il l'a fait dans sa lettre du 28 septembre: "Quand je serai prêt à la recevoir, je vous avertirai assez d'avance". Il affirmait un droit que le contrat lui conférait. Je ne crois pas que l'article 1202 *C.C.* qui détermine dans quelles circonstances les parties sont libérées de leurs obligations respectives, quand il y a impossibilité d'exécution, trouve dans l'occurrence son application. L'intimé doit réussir non pas parce qu'il y a impossibilité pour lui d'accepter livraison de la pierre, mais bien parce qu'il a le droit par les termes mêmes de son contrat, d'en retarder temporairement la livraison.

Pour cette raison, je suis d'avis que le présent appel doit être rejeté avec dépens.

The judgment of Kellock and Locke JJ. was delivered by

KELLOCK, J.: The action out of which this appeal arises was brought for the annulment of a contract for the supply by the appellant to the respondent of certain stone, required by the latter for the building of a dock under a contract with the Dominion government dated 22nd April, 1946. The government contract provided that:—

The new cribs shall be built early enough so as to be in readiness to be sunk on the 1st of September and their construction to be continued without interruption as to have them completed on or before 1st December, 1946.

The sub-contract between the parties is dated the 15th of May, 1946, and is as follows:—

La Malbaie, 15 mai 1946.

Contrat:

Je soussigné m'engage à faire pour Hector Bouchard à savoir à lui livrer une certaine quantité de pierre. Le dit John Tremblay s'engage à livrer à Hector Bouchard tout la pierre qu'il aura besoin pour la construction du quai de St-Siméon. Cette pierre sera rendu sur le quai en place. La pierre devra être acceptée par les ingénieurs du département et elle devra être livrée pour ne pas retarder les travaux. A la demande du dit

(1) 4 S.C.R. 358.

Hector Bouchard. Le dit Hector Bouchard paiera au dit John Tremblay la somme de $1.75 la verge cube. Le paiement sera fait suivant les estimés des ingénieurs. Le dit John Tremblay fournira tout ce qui est nécessaire pour exécuter le contrat.

Et nous avons signés.

Il est entendu que le contracteur du quai an fera mettre un cantitée qui luis fodras a ter et il la rendras e sest frais.

Hector Bouchard
John Tremblay.

Under the terms of the main contract the respondent was obliged to furnish all the material, including timber, required for its execution and it was by reason of the fact that sufficient timber was not forthcoming that the difficulty between the parties arose. With respect to the timber, although it appears that the government arranged for the purchase of some Douglas fir, the respondent in his factum says "that at the time of the signing of the contract between himself and the appellant, i.e., on the 15th of May, 1946, although he hoped the Department would supply this wood on time to enable him to meet the schedule laid down in the main contract by the department, he had no assurance that this wood would be supplied on time to enable him to do so". It is not suggested that this situation was explained to the appellant.

Some time before the 15th of August the respondent realized that this arrangement for the supply of timber had fallen down and that he did not have and would not have the timber necessary for the cribs to enable him to have them built in the fall of 1946 as required by the government contract. He therefore approached the government and obtained a suspension of time for the completion of this work until the following spring. Provision was made in the terms of the government contract by which the Minister of Public Works might enlarge the time for the performance of any work called for by the contract.

In the meantime the appellant had arranged with one, Eugène Tremblay, to supply the necessary stone and the appellant had gone to some outlay himself in preparation for the carrying out of his contract. When the respondent made his arrangement with the government for a suspension of the work, he advised Eugène Tremblay not to make any deliveries. Following this, on the 17th of August, Eugène Tremblay wrote the appellant advising him of this situation

1949

TREMBLAY v. BOUCHARD

Kellock J.

and stating that in default of receiving delivery instructions from the appellant, it would be probably impossible for him to carry out his contract and he would hold the appellant liable in damages.

Nothing further appears to have transpired until the 24th of September, 1946, when the appellant wrote the respondent. With this letter there was enclosed a copy of Eugène Tremblay's letter of the 17th of August. As something depends upon the construction of the appellant's letter I reproduce it in full:

St-Siméon, 24 septembre 1946.

M. Hector Bouchard, Conct.,
La Malbaie, P.Q.
Cher Monsieur:

Je vous envoie sous ce pli une copie d'une mise-en-demeure par le sous-contracteur Eugène Tremblay, alors comme vous savez cela ne fait pas mon affaire car j'ai fait une dépense d'environ $600.00 pour l'organisation de l'exécution de ce contrat, pour le charroyage d'ici au mois de novembre prochain.

Donc si c'est possible je pourrais faire charroyer une bonne quantité de cette pierre sur le quai, immédiatement, étant donné que les bateaux arrêttès.

Espérant vous lire à ce sujet par prochain courrier.

Votre tout dévoué,
John Tremblay,
Par

To this the respondent replied on the 28th of September. The letter is as follows:—

Mon. John Tremblay,
Contracteur,
St-Siméon.
Cher Monsieur:

En réponse à votre lettre, je dois vous dire que vous n'êtes pas sérieux quand vous me demandez s'il serait possible de mettre une bonne quantité de pierre sur le quai, quand vous savez qu'il faut l'espace du quai pour faire les travaux et comme vous savez que les travaux du quai sont suspendus, pour d'ici au mois d'avril, faute de manque de matériaux, je vous avais demandé de me charroyer environ 60 vgs. et à mon absence d'après votre compte, vous en avez mis sur le quai 220 vgs. que j'ai été obligé de mouver et j'ai payé pour cela M. Tremblay.

Pour aucune considération je ne vous permettrai à mettre une vge. de pierre à terre ou sur le quai.

Quand je serai prêt à la recevoir je vous avertirai assez d'avance. Aux sujets des dommages que votre sous-contracteur et vos hommes sont à rien faire, il y a trois semaines je lui ai offert et à vous aussi le déchargement de mon bois et vous et votre sous-contracteur l'avez refusé, me disant que vous avez pas le temps. Je crois que vous n'êtes pas sérieux. Encore.

Bien à vous,
Hector Bouchard.

The majority in the Court of Appeal (1) took the view that the appellant was bound by the terms of the government contract and, accordingly, was bound to acquiesce in the extension of the time granted by the government and to deliver the stone as required within the period so extended.

The appellant gave evidence that before executing the sub-contract he knew "de ce contrat et des clauses, du moins celles qui vous intéressent comme sous-contracteur". He contends, however, that the contract between himself and the respondent did not bind him to extensions which might be granted by the government, and in any event, not to an extension brought about by the default of the respondent himself. Appellant contends accordingly that the letter of the 28th of September, 1946, was a repudiation of the obligations of the respondent under the contract which entitled him to sue for damages.

In my opinion the effect of the contract of May 15, 1946, was not to render the appellant liable to all the terms of the head contract. I think the effect of the sub-contract was to fix the quantity of stone to be delivered by the appellant, but that so far as time for performance was concerned, what was contemplated by the parties and accepted as the basis of the sub-contract, was the time fixed by the main contract for the completion of the cribs, namely, between the first of September and the first of December, 1946. In my opinion the wording of the contract that the stone "devra être livrée pour ne pas retarder les travaux. A la demande du dit Hector Bouchard" means that the stone was to be delivered within the period September first to December first, and that the appellant was to be at all times ready within that period to make delivery as and when required by the respondent so as not to delay the work in connection with the cribs during that period. I do not find anything in this language or anywhere else in the sub-contract which expressly or impliedly includes in it any term by which the appellant was bound, notwithstanding any suspension, however long, which might be arranged between the respondent and the government, to continue to hold himself liable to make delivery. I think therefore that, subject to the contention next to be men-

(1) Q.R. [1948] K.B. 490.

1949

TREMBLAY v. BOUCHARD

Kellock J.

tioned, the respondent was guilty of a breach of contract in taking the position that he would not permit the appellant to deliver until the respondent called for stone in the spring of 1947.

It is further contended on behalf of the respondent that in his letter of the 24th of September, 1946, the appellant did not take the position that the contract was at an end by reason of the communication made by the respondent to Eugène Tremblay, but that the letter proceeds upon the view that the sub-contract was still subsisting and that the appellant was acquiescing in the suspension. If this contention were sound, there would be much to be said for the view that when the respondent by his letter of the 28th of September, 1946, declined to accede to the appellant's request contained in the letter of the 24th of September, the respondent was entitled to assume that thereafter the appellant was acquiescing in the situation, as no reply was made by the appellant to the last mentioned letter. I think, however, that there is nothing in the letter of the 24th of September which bears out the respondent's contention, but on the contrary, the appellant expressly says in reference to the communication he had received from Eugène Tremblay that the situation, resulting from the respondent's refusal to allow Eugène Tremblay to deliver stone, did not suit him because he had gone to considerable expense to arrange for the transportation of the stone called for by the sub-contract in the period ending with the following November. I think therefore the letter indicates that the appellant was standing on his rights under his contract and that when the respondent reiterated his repudiation on the 28th of September by asserting that the work would not proceed until the following April, the appellant was entitled to sue for damages for breach after the expiration of the time of performance provided by the sub-contract. While the respondent may have been entitled subsequent to the 28th of September to change his mind and call for delivery of the stone, provided he did so within a reasonable time so as to permit of the stone being delivered within the period contemplated by the parties, he did not do so and I see nothing, even although it were alleged, and it is not alleged, upon which the respondent can rely to assert that

the appellant led him to believe that he was acquiescing in any extension of time for the performance of the contract. In my opinion therefore, the appellant is entitled to succeed in his claim with respect to annulment.

Some time prior to the 24th of September, 1946, stone to the value of $385.00 had been delivered and I think the appellant is entitled to this also. Counsel for the appellant indicated on the argument that with respect to damages by reason of the refusal of the respondent to accept delivery of any further stone he was not in a position to ask in the present proceedings to have those damages assessed as he did not know the quantity of stone required to complete the contract. He asked for a reserve of rights with respect to such damages. The respondent indicated that if a further action were taken to recover such damages he would desire to contend that the appellant ought to have had his right to damages determined once and for all in the present action. Both parties concur in the view that any reserve should not be framed so as to take away from the appellant rights, if any, which he may have outside the present action or, on the other hand, to take away from the respondent any defence to such an action. I think therefore, that the appeal should be allowed with costs here and below and that there should be a declaration that this judgment is without prejudice to such rights, if any, as the appellant may have to sue for damages for which he did not claim in this action, and without prejudice also, to any right which the respondent may have to contend that all rights of action on the part of the appellant by reason of the breach by the respondent of the contract between the parties were capable of being asserted only in the present action and are therefore barred by the present judgment.

Appeal allowed with costs.

Solicitor for the appellant: *Henri D'Auteuil.*

Solicitor for the respondent: *St-Laurent, Taschereau, St-Laurent & Noël.*

1949

*Feb. 11
*Jun. 24

CARDEN S. BAGG.....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Undistributed income of company—Reduction and readjustment of capital stock—Whether undistributed income capitalized—Income War Tax Act, R.S.C. 1927, c. 97, s. 15, 16.

Having an undistributed income on hand, a company, by Supplementary Letters Patent, reduced its capital by cancelling 200 unissued shares of a par value of $100 each and by reducing the par value of 1,800 issued shares from $100 each to $44 each. These 1,800 shares were then converted into 1,800 preferred shares of a par value of $40 each and 1,800 common shares of a par value of $4 each. The Minister of National Revenue, treating the readjustment as effecting a capitalization of income, assessed a tax on appellant, as shareholder of the company, in respect of his share of that income received through the capitalization.

Held, The Chief Justice and Kellock J. dissenting, that the readjustment of the company's capital stock resulted in the undistributed income being capitalized within the meaning of sec. 15 of the Income War Tax Act.

APPEAL from the judgment of the Exchequer Court of Canada (1), O'Connor J., affirming the decision of the Minister of National Revenue confirming an assessment made under the Income War Tax Act.

Hazen Hansard K.C. for the appellant.

John Ahern K.C. and *T. Z. Boles K.C.* for the respondent.

THE CHIEF JUSTICE (dissenting):—The appellant filed an Income Tax Return showing his income for the year ended 31st December, 1938. He received a Notice of Assessment upon that return on the 26th of October, 1942.

He lodged with the Minister of National Revenue a Notice of Appeal dated the 20th of November, 1942, in which objection was taken to the assessed tax for the reasons therein set forth.

The respondent affirmed the assessment on the ground that in 1938 the appellant owned 518 shares of Domestic

*PRESENT: The Chief Justice and Kerwin, Rand, Kellock and Estey JJ.

(1) [1948] Ex. C.R. 244.

Gas Appliances Limited which were reduced or redeemed in that year within the meaning of Subsection 1 of Section 16 of the Act, and therefore the appellant was deemed to have received a dividend according to the provisions of that subsection.

Notice of the decision of the Minister was given to the appellant pursuant to Section 59 of the Act, wherein it was stated that the decision was based on the facts presently before the Minister.

On the 12th of February 1945, a Notice of Dissatisfaction was filed by the appellant through his solicitors, stating that the appellant desired his appeal to be set down for trial.

The effect of the decision of the Minister was that a tax in the sum of $6,887.64 should be levied upon the appellant in respect of his income for the year 1938, said sum including an additional tax of $2,288.06 and $587.78 for interest arising out of the addition made by the Notice of Assessment to the income of the appellant.

In the Notice of Dissatisfaction the reasons in support of the appeal are stated as being:

The appellant was the owner of 518 shares of the par value of $100 each of Domestic Gas Appliances Limited (hereinafter referred to as the "Company") of which 1,800 shares were outstanding and fully paid and non-assessable.

By Supplementary Letters Patent dated 3rd June, 1938, granted to the Company under the Dominion Companies' Act, all these outstanding shares were converted into 1,800 preferred shares of a par value of $40 each and 1,800 common shares of a par value of $4.00 each, and the remaining paid up capital of the Company, which was then lost or unrepresented by available assets, was cancelled. Accordingly the appellant became the owner of 518 preferred shares of the par value of $40 each and 518 common shares of the par value of $4.00 each. Subsequently all of the outstanding preferred shares of the Company were redeemed and the redemption price paid, namely: par plus a premium of 1 per cent, there being no dividends declared prior to the redemption date and then remaining unpaid. As an incident to the redemption of all of the preferred shares, the Company made application for Supplementary Letters Patent reducing the capital stock of the Company by the

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Rinfret C.J.

cancellation of all of the 1,800 preferred shares of the par value of $40 each, and these Supplementary Letters Patent decreasing the capital stock were issued on October 8, 1938. In the decision of the Minister, it is said that the 518 shares of the Company owned by the appellant in 1938 were reduced or redeemed within the meaning of Subsection 1 of Section 16 of the Act.

The appellant contended that the subsection in question does not contain any definition of the words "reduce" or "redeem", nor is any to be found in the *Income War Tax Act*.

The operation whereby the appellant became the holder of 518 preferred shares was, according to him, merely a conversion of the 518 shares theretofore held by him. Nothing was bought back or recovered by the Company. That "reduce" or "redeem" is something different from "convert" may be seen by the fact that Subsection 1 of Section 16 was amended by Section 15, Chapter 14 of the Statutes of 1943-44 by the insertion therein of the words "or converts any class of the capital stock or shares thereof into any other class of capital stock, shares or other security therefor".

A perusal of the Supplementary Letters Patent dated June 3, 1938, will, it is contended, show that the preferred shares thereby created, on being reduced or redeemed, were not entitled to participate in the assets of the Company beyond the amount paid up thereon (i.e. $40 per share) plus a fixed premium of 1 per cent of the par value and a defined rate of dividend of 5 per cent per annum.

It is clear that the preferred shares were of a class coming within the provisions of Subsection 2 of Section 16; and it was alleged accordingly that Subsection 1 of Section 16 did not apply to the redemption of the preferred shares which were held by the appellant after issue of the Supplementary Letters Patent, and that the appellant, upon such redemption, could not be deemed to have received a dividend under such subsection.

The conclusions of the Notice of Dissatisfaction were therefore, for those reasons, that the additional tax assessed, namely $2,288.06, and $587.78 for interest, was unlawfully imposed and should be cancelled and the assessment set aside.

After the reply of the Minister to the Notice of Appeal, it was ordered that formal pleadings be filed in this cause. It was upon these pleadings that the appellant was tried before the Exchequer Court of Canada (1).

The allegation of the statement of defence filed by the respondent was that on June 3, 1938, the Company had on hand undistributed income in the amount of $38,091.61 or $21.15 for each of the original common shares, which undistributed income, as a result of the reduction or redemption, was deemed to be received by the shareholders of the Company, including the appellant herein, and became properly taxable pursuant to Subsection 1 of Section 16 of the *Income War Tax Act*. In the alternative, if the shares of the Company were not reduced or redeemed as aforesaid, in any case, as a result of the re-adjustment of the capital stock of the Company, in accordance with the Supplementary Letters Patent, the whole of the said undistributed income was capitalized and is therefore properly taxable in the hands of the shareholders of the Company, pursuant to Section 15 of the *Income War Tax Act*.

The respondent claimed therefore that, as of June 3, 1938, the appellant received an amount of $10,055.70, by way of the undistributed income of the Company, and was properly taxable thereon in the year 1938; that the assessment should therefore be affirmed and the appeal from the Minister's decision dismissed.

For the purposes of this case, the appellant admitted that on the 3rd day of June, 1938, the Company had an undistributed income in the amount of $38,091.61 mentioned in the Statement of Defence of the respondent.

The authorized capital of the Company was $200,000 divided into 2,000 shares of a par value of $100 each, of which, as of the 3rd of June 1938, 1800 had been issued as fully paid up.

Included in the capital assets was an item of good will of $180,000. Between 1921 and 1937 there were several write-offs of goodwill, totalling $140,000, and each in turn was charged to surplus.

(1) [1948] Ex. C.R. 244.

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Rinfret C.J.

This resulted in a reduction of capital from $180,000 to $40,000 and changed a surplus of $38,091.61 into a deficit of $101,908.39.

The Company's return for the year 1938 and the appellant's return for the same year were made accordingly; but it was only, as we were told, in the year 1941 that these write-offs of good will were disallowed by the Department. These disallowances resulted, from a taxation view point, in the Company having undistributed income of $38,091.61. As result of the Supplementary Letters Patent dated the 3rd of June 1938, the authorized capital was decreased from $200,000 to $79,200.

(*a*) By cancelling the 200 unissued shares of a par value of $100 each and

(*b*) by cancelling paid-up capital to the extent of $56 per share upon each of the said 1800 issued shares and thereby reducing the par value of the said 1800 issued shares from $100 per share to $44 per share.

The Supplementary Letters Patent of the 3rd of June 1938 further authorized the Company to convert the 1,800 issued shares of the capital stock of the par value of $44 each into 1,800 preferred shares of a par value of $40 each, and 1,800 common shares of a par value of $4 each. They added that the authorized capital stock of the Company should be $79,200 divided into the above mentioned shares, "subject to the increase of such capital stock under the provisions of the *Companies' Act.*"

Then, the Supplementary Letters Patent of the 3rd of June deal with the rights, permits, privileges, limitations, terms and conditions which the preferred shares shall carry and be subject to.

Subsequent Supplementary Letters Patent were issued on the 8th of October 1938. They recite that the operations authorized by the Supplementary Letters Patent dated the 3rd of June 1938 had been carried out, that the original Letters Patent incorporating the Company (30th December 1918), as amended by Supplementary Letters Patent granted on the 7th of February 1929, were amended and varied by adding thereto the private Companies' clauses and thereby converting the Company from a public Company into a private Company.

Accordingly, these later Supplementary Letters Patent (8th October 1938) decree that the authorized capital stock of the Company shall be $7,200 divided into 1,800 issued common shares of the par value of $4 each "subject to the increase of such capital stock under the provisions of the *Companies' Act*." In view of that fact, the decrease to that amount of capital stock was effected by the cancellation of the paid-up capital represented by the 1,800 issued preferred shares at a par value of $40 each, which had been redeemed.

The relevant sections of the Act are as follows:—

(15). When, as a result of the reorganization of a corporation or the readjustment of its capital stock, the whole or any part of its undistributed income is capitalized, the amount capitalized shall be deemed to be distributed as a dividend during the year in which the reorganization or readjustment takes place and the shareholders of the said corporation shall be deemed to receive such dividend in proportion to their interest in the capital stock of the corporation or in the class of capital stock affected.

(16). Where a corporation having undistributed income on hand reduces or redeems any class of the capital stock or shares thereof, the amount received by any shareholders by virtue of the reduction shall, to the extent to which such shareholder would be entitled to participate in such undistributed income on a total distribution thereof at the time of such reduction, be deemed to be a dividend and to be income received by such shareholder.

16 (2). The provisions of this section shall not apply to any class of stock which, by the instrument authorizing the issue of such class, is not entitled on being reduced or redeemed to participate in the assets of the corporation beyond the amount paid up thereon plus any fixed premium and a defined rate of dividend nor to a reduction of capital effected before the sixteenth day of April, one thousand nine hundred and twenty-six.

The evidence showed that the undistributed income ($38,091.61) did not appear in either of the annual statements of the Company, that nothing was done with the undistributed income on the reduction and conversion, that the net assets behind the stock of the Company, as disclosed by the audited statement as of December 31, 1937, amounted to $75,000; and that there was no material change in the net assets behind the stock of the Company after the reduction and conversion of the 3rd of June, 1938, and prior to the redemption which took place on the 30th July 1938; that there was no reduction in the number of shares, but there was a reduction in the face value of $100,800; that all the shareholders received on the 3rd

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Rinfret C.J.

day of June, 1938, was a certificate for one preferred share of the par value of $40, and a certificate for one common share of the par value of $4 in exchange for a certificate of one common share of the par value of $100; that the new shares were issued as fully paid up.

No amount in money was paid to or received by the shareholders. The Assistant Chief Auditor, Corporation Assessor in the Montreal office of the respondent, explained that as the Company had written off goodwill in the amount of $140,000 between 1922 and 1937, leaving $40,000 out of the original capital of $180,000, the write-offs of goodwill, from a taxation standpoint, reduced the surplus in the books of the Company; but, as the write-offs were disallowed, that resulted in an undistributed income of $38,000 and that, in his opinion, the share capital reduced to $79,200 consisted of $40,000 being the balance left of the original capital plus the undistributed income of $38,091.61.

That opinion of the Assistant Chief Auditor, in my humble view, takes no account of the fact that if the write-offs were disallowed, it follows that the amount of those write-offs ($140,000), in the result, no longer reduced the original capital of $180,000 to the balance of $40,000.

As consequence of the disallowance by the officers of the Department of the respondent, the original capital was reduced only to the extent of the write-offs which were allowed. And, as the write-offs allowed amounted to $100,000, what was left of the original capital was not $40,000 but $80,000 in round figures, or, to accept the figures of the Company, $79,200 which is precisely what the Supplementary Letters Patent of the 3rd of June 1938 authorized, and what the Supplementary Letters Patent of the 8th of October 1938 recognized. The latter Supplementary Letters Patent, taking into consideration the redemption of the preferred shares of the par value of $40 each, which had been issued in the meantime, consequent upon the authorization contained in the former Supplementary Letters Patent, decreed that the capital stock of the Company shall, in the future, be $7,200 divided into 1,800 issued common shares of the par value of $4 each.

It may be said, in passing, that, with respect, the learned trial judge in the Exchequer Court (1), wrongly assumed

(1) [1948] Ex. C.R. 244.

that the disallowance by the Department had been made in each of the years in which the write-offs of goodwill had been made. The evidence shows that it was only in 1941, or three years after the returns made by the Company and by the appellant, that the write-offs were disallowed. However, he recognizes that the sole date and transaction in issue is that of the 3rd of June 1938.

The learned judge therefore asks himself whether the appellant received "an amount by virtue of the reduction" which took place on the 3rd of June 1938, within the meaning of Section 16 (1). He comes to the conclusion that that subsection does not apply; but his view was that as the preferred shares were reduced on 31st July 1938, they then came within the class defined in Subsection 2 of Section 16, and he expressed the opinion that Subsection 2 refers to the shares issued on conversion and not to the original shares. The second question examined by the learned judge was whether the undistributed income was "capitalized" as a result of the reduction and conversion of June 3, 1938, within the meaning of Section 15.

On that point he says that the appellant contended first that if the undistributed income was capitalized, it was capitalized between 1922 and 1937, when the capital asset of goodwill was written-off.

To this the learned judge declares that the Company may add undistributed income to capital by increasing the paid-up capital in each share, thereby increasing the par value of each share. He also says that, in his opinion, "using the undistributed income for the purpose of writing off goodwill did not capitalize it".

The appellant's second contention was that the reduction and conversion did not capitalize the undistributed income. To this the learned judge begins by stating: "it is correct that on the reduction the unissued shares were cancelled and no new additional shares were issued and the paid-up capital in each share was in part cancelled and not increased". But, in his opinion, the reduction did result in the capitalizing of the undistributed income. It is there that I find myself unable to follow the reasoning contained in the judgment appealed from. In my view, the learned judge then confused assets with capital. The judgment is to the effect that if the Petition for the Supplementary

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Rinfret C.J.

Letters Patent had disclosed that $140,000 had been lost or was unrepresented by assets and the capital remaining was only $40,000, although the Company had in addition undistributed income of $38,091.61, the capital stock would have been decreased to $40,000 and not $79,200. And he goes on to say: "this would have been accomplished by cancelling the 200 unissued shares and by cancelling paid-up capital of $77.15 per share of the 1,800 issued shares, thereby reducing the par value of each from $100 to approximately $22.85. If the Company then desired to convert the undistributed income into capital, the capital stock would then have been increased from $40,000 to $79,200 by increasing the paid-up capital to the extent of $21.15 per share upon each of the 1,800 shares, thereby increasing the par value from $28.25 to $44.00 per share of the said 1,800 shares."

But, as the learned judge himself says: "that procedure did not take place". And I regret that I can not follow the reasoning which the learned judge deduces from that finding of fact. He asserts that the Company represented that the loss was only $100,800 and not $140,000, and that $79,200 was represented by available assets "whereas only $40,000 was represented by available assets." And he then comes on to say that, as a result, it was clear that the same position was reached as if the capital stock had first been decreased to $40,000 and then increased to $79,200 by first cancelling the paid-up capital in each of the issued 1,800 shares of $77.15 and then increasing the paid-up capital in each share by $21.15.

But, of course, to that reasoning it must first be observed that the Company, when it petitioned for the Supplementary Letters Patent of the 3rd of June 1938, could not represent anything else than it did, since at that time the disallowance of write-offs had not yet taken place. It was made by the Department only in 1941. At the date of the petition and of the issue of the Supplementary Letters Patent of the 3rd of June 1938, the Company represented the facts exactly as they then appeared in its books; and, upon that representation, it was authorized to decrease its capital stock from the sum of $200,000 to the sum of $79,200, by cancelling paid-up capital to the extent of

$56 per share, it being stated that $100,800 had been lost or was unrepresented by available assets. The Company was further authorized to convert the 1,800 issued shares of the capital stock of the par value of $44 each into 1,800 preferred shares of the par value of $40 each, and 1,800 common shares of the par value of $4 each.

The Company did exactly what they had been authorized to do by the Supplementary Letters Patent of the 3rd of June 1938. And the representation it made to obtain that authorization was strictly in accordance with the facts and figures as they then appeared in its books.

Furthermore, on the 31st of July 1938, the Company redeemed the preferred shares. The capital stock of the Company was thereby brought down to the $7,200 divided into 1,800 issued common shares of the par value of $4 each; and this was taken to be henceforth the authorized capital stock of the Company in accordance with the Supplementary Letters Patent of the 8th of October 1938.

The learned trial judge very properly recognized this by saying that under the Letters Patent the paid-up capital upon each share was $44, as a result of the cancellation of the paid-up capital to the extent of $56 upon each share. But it was exactly what the Company had been authorized to do by those Supplementary Letters Patent.

It would appear therefore, first that the learned judge, by his judgment, assumes a state of facts contrary to that which was recognized by the Supplementary Letters Patent, and to what actually took place.

In my view, he could not base the conclusions of his judgment on what he thinks that the Company should have done or might have done, instead of what the Company actually did, and did in accordance with the authorization granted to it by the Supplementary Letters Patent.

In other words, he can not declare that what is stated in these Supplementary Letters Patent, as the true capital resulting from the operations authorized thereby, was not in fact the true capital; and that if the Company had acted otherwise, the result would have been different.

It seems to me that we must truly accept the authorization contained in the Supplementary Letters Patent as they are stated therein. They decree that by the operation

1949

BAGG
v.
MINISTER OF
NATIONAL
REVENUE

Rinfret C.J.

thus authorized, the capital of the Company would be and was reduced to $79,200; and it is not here nor there to say that only $40,000 was represented by available assets.

There is no evidence to establish that statement in the judgment appealed from and, moreover, that statement is directly contrary to what is stated in the Supplementary Letters Patent and what was authorized. It should be sufficient to add that, even if at that time the write-offs had already been disallowed, the disallowance only amounted to decreasing the write-offs by $40,000, which would mean that instead of having properly written off $140,000 of the goodwill asset, the Company should have written off $100,000; and the asset of goodwill back of the capital was therefore $79,200 instead of only $40,000. The result must then be as stated in the representations of the Company to the Secretary of State, and in the Supplementary Letters Patent consequently issued, that the capital remained at the figure of $79,200.

But the Department in 1941, when disallowing the write-offs, elected to treat the amount whereby they were disallowed not as a reduction in the capital, but as an amount representing undistributed income. Not to say anything of the arbitrary method whereby a sum of $40,000 re-added to the goodwill asset was transformed into an amount of undistributed income, even then accepting that method (as the Company did), whether you call it increased goodwill asset or undistributed income, still it can not be said that that amount did not represent available assets whereby the capital reduced to $79,200 was guaranteed.

I confess my inability to follow the reasoning of the Department that a disallowance of the writing off of some part of the goodwill asset could result in the creation of that amount of undistributed income.

The capital, as authorized by the Supplementary Letters Patent, as a result of the disallowance of the writing off, was merely brought down to $79,200, and not to $40,000.

However, the appellant also contended that if we are to admit that the $38,091.61 was undistributed income before the reduction, it remained undistributed income

after the reduction and reconversion, and that it was not converted into capital by the reduction.

There again, if we are to accept that contention, it would not follow at all that such undistributed income was capitalized on the reduction, nor that the operation was thereby brought under Section 15 of the Act. There was no reorganization of the corporation. Even if we say that the operation amounted to a "readjustment of the capital stock", the undistributed income having remained so after the reduction and conversion, as is assumed in this argument, cannot be treated as having been converted into capital by the reduction or as having been "capitalized". Therefore, Section 15 does not apply.

As to Section 16 (1) the judgment appealed from is to the effect that it does not apply to the facts of the present case, and I agree with that conclusion.

It is not perhaps decisive that in 1943 by Statute 7, Geo. VI, Ch. 14, Section 16 (1) was amended in order to insert the words: "or converts any class of the capital stock or shares thereof into any other class of capital stock, shares or other security thereof, the amount or the value of any consideration or right" etc.

It is apparent that the amendment was to cover exactly the situation that we have in the present case. It may be said that if the amendment was made, it was because the Section as it read previously did not cover the case sought to be met by the amendment. If that were so, *cadit quaestio*. If however it is argued that the amendment was made only to make the matter clearer or indisputable, my answer to that would be that as Section 16 (1) read previously, it did not cover the precise case that we have here. As for Section 16 (2), its purpose is only to exclude from the application of Section 16 (1) certain cases which are not the case now before us.

For these reasons, I would allow the appeal, set aside the judgment appealed from, declare that the assessment made against the appellant was illegally imposed, and declare that in the return of the appellant nothing should be added in respect of the conversion of shares of the capital stock of Domestic Gas Appliances Limited, the whole with costs against the respondent both in this Court and in the lower Court.

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Kerwin J.

KERWIN J.:—Mr. Carden S. Bagg appeals against a decision of the Exchequer Court (1) affirming the assessment against him under the *Income War Tax Act* in respect of his income for the year 1938. The first dispute involves what the respondent contends was the capitalization of the undistributed income of Domestic Gas Appliances Limited (of which the appellant was a shareholder) as a result of the readjustment of its capital stock in 1938 and is based upon section 15 of the Act as it stood at the relevant time:

> 15. When, as a result of the reorganization of a corporation or the readjustment of its capital stock, the whole or any part of its undistributed income is capitalized, the amount capitalized shall be deemed to be distributed as a dividend during the year in which the reorganization or readjustment takes place and the shareholders of the said corporation shall be deemed to receive such dividend in proportion to their interest in the capital stock of the corporation or in the class of capital stock affected.

The Company, incorporated by letters patent under the *Dominion Companies Act*, had an authorized capital of $200,000 divided into 2,000 shares of $100 each, of which 1,800 had been issued and of which the appellant was the owner of 518. On June 3, 1938, supplementary letters patent were issued doing two things:—

1. The authorized capital was decreased from $200,000 to $79,200, such decrease being effected
   (*a*) by cancelling the 200 unissued shares of a par value of $100 each and
   (*b*) by cancelling a paid-up capital to the extent of $56 per share upon each of the said 1,800 issued shares and thereby reducing the par value of the said 1,800 issued shares from $100 per share to $44 per share.
2. The said 1,800 issued shares of the par value of $44 each were converted into 1,800 preferred shares of a par value of $40 each and 1,800 common shares of a par value of $4 each.

In accordance with the supplementary letters patent, the 518 shares owned by the appellant were converted in 1938 into 518 preferred shares of a par value of $40 each and 518 common shares of a par value of $4 each. Still later in the same year the preferred shares, and in 1941 the common shares, were redeemed. In the latter year, the Minister ascertained that while $140,000 for goodwill

(1) [1948] Ex. C.R. 244.

had been originally included in the company's capital assets, that sum had been entirely written off by the Company in various amounts between 1922 and 1937. He, thereupon, disallowed the various items making up the total. The result of this was that in 1938, immediately before the supplementary letters patent, the Company had a surplus of $38,091.61, which, as between the parties to these proceedings, was formally admitted to be undistributed income.

The appellant does not deny that within the meaning of section 15 there was a readjustment of the Company's capital stock by the supplementary letters patent on June 3, 1938, but contends that the $38,091.61 undistributed income was not capitalized as a result of the readjustment. The Company's balance sheet as at December 31, 1938, which was filed as Exhibit 2, shows $9,100.31 of assets, made up of cash in bank, accounts receivable, and deferred charges. On the liability side is $1,097.43 for accounts payable, and provision for income taxes, and then, under the head "Capital Stock" appears the following:—

Preferred 5 per cent Non-cumulative Shares—	
Authorized and Issued—	
1,800 Shares of $40 each	72,000
Less	
Redeemed during year	72,000
Common—	
Authorized and Issued—	
1,800 Shares of $4 each	7,200

We are not concerned with the redemption of the $72,000 preferred shares which occurred in the year 1938 some time after June 3rd, except to note that that redemption must have been carried out by paying the necessary sum in cash. A comparison of Exhibit 2 with Exhibit 1, which is the Company's balance sheet as of December 31, 1937, makes it apparent that if one had been prepared as of June 2, 1938, it would have shown $72,000 more on the assets side and on the liabilities side would have appeared preferred shares of the same amount without a deduction for the redemption. Making allowance for an operation of five months in place of twelve, the total assets would thus have been approximately $81,100.31.

1949

BAGG v. MINISTER OF NATIONAL REVENUE

Kerwin J.

It is true that at that time, as a result of the various write offs, the Company showed on its books a substantial deficit and that the disallowance by the Minister had not then occurred, but the Company, itself, by the supplementary letters patent reduced its capital by approximately the amount of the deficit and, as I have already stated, for the purposes of this case the appellant admits that the Company had on hand $38,091.61 undistributed income. Under section 15, the two questions to be determined are whether that income was capitalized and, if so, was it as a result of the readjustment of the Company's capital stock. The answers to both depend upon what the Company did and the evidence of William Edward Johnson makes that matter clear. The charter of the Company was surrendered in 1941 but he had been an accountant with the Company and was called as a witness by the appellant to state that no payment was made by the Company to the shareholders as a result of the readjustment,—apparently having in mind the provisions of section 16 of the Act. But the first two questions and the answers thereto on his cross-examination are as follows:—

Q. Can you tell us what happened to the undistributed income of $38,091.61 which existed at the date when the change in the capital set-up of the Company took place?

A. Could I have that question again? (Question read by reporter). Well, the effect of the letters patent which were issued was to reduce or write off the capital of the Company by $100,800, thereby reducing the capital to $79,000, or $77,000. I just do not recall the amount. Now, you asked me what happened to the $38,000. Well it is assumed then that $38,000 still remained in the Company and formed part of the $79,000.

Q. That is right? the $38,000 formed part of the $79,000? A. That is right.

If the problem be treated as one of fact, the testimony of this witness is conclusive and, in so far as they are matters of law, upon the fact deposed to by him, that the Company changed the undistributed income into capital, the answer in law is that that change or capitalization was as a result of the readjustment of June 3, 1938.

The conclusion renders it unnecessary to consider the provisions of section 16. The appeal should be dismissed with costs.

RAND, J.:—The question in this appeal is whether the company in reducing its share capital brought about a capitalization of undistributed income within the meaning

of section 15 of the Income Tax Act and the answer has been left by the parties to be drawn from the barest skeleton of fact.

The original capital of the company was $200,000 divided into 2,000 shares of $100 each. Of these, 1,800 were issued as paid up and the original capital assets as set forth on the balance sheet included an item of $140,000 for goodwill. From time to time between 1921 and 1937 this amount was written off, but the details do not appear. On June 3, 1938 following an application under section 61 of the *Companies' Act* supplementary letters patent effected a reduction of capital, first of the 200 unissued shares and then of the paid-up par value of the 1,800 shares from $100 to $44. This new capital of $79,200 was in turn converted into 1,800 shares of preferred stock of a par value of $40 and 1,800 shares of common stock of a par value of $4, all paid up. The letters empowered the company to redeem the preferred shares at a premium of 1 per cent and converted it from a public to a private company. On June 18, 1938 a resolution providing for the redemption of the preferred shares was passed, and following the redemption application was made and letters patent issued for a further and corresponding reduction of capital.

Some time after the readjustment in 1938, the income authorities reviewing the accounts of the company found that on June 3, 1938 when the first supplementary letters issued there was $38,091.61 of undistributed income in the assets of the company; and treating the readjustment and conversion as effecting a capitalization of this income. which I take to mean profit, assessed a tax on the petitioner, a shareholder in the company, in respect of his share of that income received through the capitalization.

An increase of capital assets may be effected in several ways, but where the shares are of one class only with the same rights, I see no reason why the company by such action as was taken here, cannot appropriate profits to lost capital. Whether it does so is a question of intention, and it must appear that the appropriation was to be irrevocable.

The limited accounts before us indicate that there was no profit reserve and that all the assets were treated as a blended mass. The accumulated income was part of those assets and it represents the difference between the $140,000

1949

BAGG
v.
MINISTER OF
NATIONAL
REVENUE

Rand J.

of goodwill apparently written off and the debit balance in assets and liabilities of $101,908.39 shown as of June 30, 1938. Whether from these facts an actual intention to make a provisional or temporary appropriation to capital can be inferred is doubtful: certainly it was not specific and nothing binding on the company took place: and the power to revoke would remain until an act has made the appropriation definitive; *Stanley* v. *Read* (1). The admission of the appellant confirms that view. All we have up to this point is, therefore, the disappearance of the goodwill item and the absence of a profit reserve.

But the petition for reduction contained certain representations. It was represented as the ground for reduction that capital "had been lost or was no longer represented by available assets". The loss was stated to be $100,800 The original resolution to reduce was passed on May 6, 1938 and the debit balance on June 30, 1938 as mentioned was $101,108.39. No doubt the actual amount represented as loss was dictated by its being the amount that would permit the nearest approximation to the value of the actual assets by a reduced capital with a par value in whole dollars.

But the implication of the petition is that the remaining capital is intact, and that the new share capital of $79,200 is represented by that value of existing capital assets: that what was stated to be lost was all that was lost. Such a representation necessarily involves the final commitment of the undistributed profits, or, as the matters appeared to the shareholders at the time, of all the then existing assets of the company, to capital; and the company cannot now be heard to say the contrary.

That this was the result intended seems to be confirmed by what followed. Between June 18 and September 20, 1938 the preferred shares with premium, amounting in all to $72,720, were redeemed. By new supplementary letters patent the share capital on October 8, 1938 was further reduced to $7,200, consisting of the 1,800 shares of common stock. This amount again was the approximate value of the then total assets and the implied representation is again that they are capital assets.

(1) (1924) 2 Ch. 1.

The question my be raised whether the effect of the petition was not merely to destroy a power to change an existing state of things, namely, a *de facto* capitalization indicated by the form of the balance sheet which must be taken as confirmed in time. But section 15 strikes at a final and conclusive appropriation which the readjustment brings about. Until the moment of the new letters that clearly did not take place; at that moment it did; and to treat the effect as suggested would, in my opinion, be to make too subtle a distinction as to the nature of the so-called power to revoke, which, in other situations involving special and conflicting interests in relation to profits, might prove embarrassing: to treat, in other words, the loss of the continuing right to deal with the profits as such, where there has been no specific application to capital, as effecting a piecemeal appropriation at the times of the various balance sheets over a period of many years.

In these circumstances the evidence is conclusive that the reduction of June 3rd involved the irrevocable appropriation of the undistributed profits to capital and was, therefore, a capitalization within the meaning of section 15.

I would, therefore, dismiss the appeal with costs.

KELLOCK, J. (dissenting):—The appellant, prior to the 3rd of June, 1938, was the owner of 518 shares of a par value of $100 each, of the capital stock of a Dominion company whose authorized capital was 2,000 shares, of which 1,800 had been issued. On the last mentioned date, by supplementary letters patent, the authorized capital was decreased from $200,000 to $79,200, such decrease being effected, (*a*) by cancelling the 200 unissued shares; (*b*) by cancelling paid up capital to the extent of $56 per share on each of the outstanding 1,800 issued shares, thus reducing the par value of each share to $44 per share; and (*c*), by converting the 1,800 issued shares of the par value of $44 into 1,800 preferred shares of the par value of $40 and 1,800 common shares of the par value of $4. These letters were issued upon it having been made to appear to the Secretary of State that paid up capital to the extent of

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Kellock J.

the reduction in the paid up issued shares was "lost or unrepresented by available assets" pursuant to 24-25 Geo. V, cap. 33, sec. 49 (1) (*b*).

Subsequently, in 1941, the respondent, in determining the net income of the appellant for income tax purposes, for the year 1938, added a sum of $10,955.70, being $21.15 in respect of each of the original 518 shares of stock held by the appellant. The company, over a period of years, commencing in 1922, had written off capital to the extent of $140,000 represented by good-will, and $38,091.61 of the above amount had been written off against undistributed profits. The income tax assessors took the stand that the obsorption of these profits against good-will would not be recognized by the Crown. The result of this ruling was that the company, so far as the tax on income of the appellant as a shareholder was concerned, had on hand at the date of the letters patent this sum of $38,091.61 of undistributed profits.

The claim of the respondent, on this set of facts, was that this last mentioned sum had been "capitalized", within the meaning of section 15 of the *Income War Tax Act*, as the result of the readjustment brought about by the supplementary letters patent and this contention was sustained by the Exchequer Court (1). The court held however, that section 16, upon which the Crown had at first relied, had no application. For the purposes of the proceedings, the appellant accepted the ruling of the assessors.

Sections 15 and 16 above mentioned are as follows:

15. When, as a result of the reorganization of a corporation or the readjustment of its capital stock, the whole or any part of its undistributed income is capitalized, the amount capitalized shall be deemed to be distributed as a dividend during the year in which the reorganization or readjustment takes place and the shareholders of the said corporation shall be deemed to receive such dividend in proportion to their interest in the capital stock of the corporation or in the class of capital stock affected.

16. When a corporation having undistributed income on hand reduces or redeems any class of the capital stock or shares thereof, the amount received by any shareholder by virtue of the reduction shall, to the extent to which such shareholder would be entitled to participate in such undistributed income on a total distribution thereof at the time of such reduction, be deemed to be dividend and to be income received by such shareholder.

16 (2). The provisions of this section shall not apply to any class of stock which, by the instrument authorizing the issue of such class, is

(1) [1948] Ex. C.R. 244.

not entitled on being reduced or redeemed to participate in the assets of the corporation beyond the amount paid up thereon plus any fixed premium and a defined rate of dividend nor to a reduction of capital effected before the sixteenth day of April, one thousand nine hundred and twenty-six.

With respect to section 15, the appellant does not contend that there had not been a "readjustment" of the capital stock of the company by reason of the supplementary letters patent, but he denies that any part of the undistributed income, if capitalized, had been capitalized *as a result* of the readjustment.

There is, perhaps, some difficulty in arriving at the exact facts, but in my view the case was fought out below upon the basis that, to the extent of the $38,091.61 here in question, the write-offs of good-will totalling $140,000 had been made against earned income. That the figure of $38,091.61 of undistributed income was produced by the action of the income tax authorities in disallowing these write-offs of good-will is established by the evidence of the only witness called on behalf of the respondent. He testified as follows:

Q. And that is what, you say, produced an undistributed income of $38,000? A. No; I say that by disallowing these write-offs, then we arrive at $38,000.

Q. And you say that is undistributed income? A. That is right.

That it was common ground that the write-offs above referred to were made, pro tanto, out of earned income appears firstly, in the argument of counsel for the respondent at trial and, secondly, in the reasons for judgment of the learned trial judge (1). In his argument counsel for the Crown said:

Notwithstanding the apparent disappearance of the $140,000 in capital by the writing off of an equal amount, there must have been some other items in the company's set-up to compensate for part of this loss, the difference between $40,000 and the new capital of $79,200. There must have been something there. What is it? Mr. Gregory told us that it was this undistributed income of $38,000; and he was not contradicted on that point by Mr. Johnson of the company. I think it is common ground that the new capital of $79,200 was made up by the balance remaining of the original capital, $40,000 and this undistributed income of $38,000. Therefore this $38,000 became capitalized. Instead of appearing *in the books of the company* as an earned surplus or undistributed income, *it was transferred to the capital account. It was capitalized.*

(1) [1948] Ex. C.R. 244.

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Kellock J.

I shall deal later with that part of the above contention which refers to the composition of the "new capital".

That nothing was done so far as the company was concerned, on or after the 3rd of June, 1938, in the way of capitalization of the sum in question is expressly dealt with in the evidence of the company's auditor, who, in speaking with respect to the period commencing on that date, gave the following evidence:

Q. And you are familiar with the statements and the books of the Company, are you not? A. Yes.

Q. From those statements and those books can you tell the Court whether or not there was anything done on the books or in the statements which in any way represented a capitalization of any part of that undistributed income at that time? A. There was nothing done that I know of.

As to the understanding of the learned trial judge (1) that he was called upon to deal with the case on the above basis, I quote the following extracts from his reasons:

The appellant contends first that if the undistributed income was capitalized, it was capitalized between 1922 and 1937. That is, that it was capitalized *when the earned surplus was used for the purpose of writing off the capital asset of good-will.*

Again:

In my opinion *using the undistributed income for the purpose of writing off good-will* did not capitalize it.

Further, in referring to the supplementary letters patent, the learned trial judge said:

But in fact the good-will had been written off in the sum of $140,000. And the capital stock was to be decreased to $79,200 on the basis that this sum had not been lost, but on the contrary was represented by assets. Now that arose from the fact that *the company regarded the sum of $38,091.61 as capital* and "used" it as capital and *represented it to be capital in the Petition* to the Secretary of State. And that position is quite in accordance with the first contention of the appellant that *it was capitalized when it was used for the purpose of writing off good-will.*

These facts as thus stated by the learned trial judge (1) are expressly adopted by the respondent in its factum, which states:

The facts are set out in detail in the reasons for judgment.

It thus appears that so far as the company was concerned it had, over the years, in fact written off capital of $140,000, of which $38,091.61 had been written off against income, thus producing a deficit in capital account of $101,908.39. The refusal on the part of the income tax authorities to

(1) [1948] Ex. C.R. 244.

recognize this use of the $38,091.61 was with relation to the *appellant's income* for the year 1938. It is not shown that the company itself acquiesced, or indeed, that this ruling was one with which it was in any way concerned, and it is, in my opinion, important to bear in mind that the situation which is to be taken as fact as between the parties to these proceedings, was not at all the actual facts upon which either the company or the Secretary of State acted, the one in applying for, and the other in issuing the supplementary letters patent.

This being the position, what is it upon which the respondent relies as establishing that this sum of $38,091.61, which it insists was undistributed income immediately before the issue of the letters patent, became capital immediately thereafter? It is undoubted that the letters patent reduced the amount paid up on the outstanding shares but how did the letters produce a metamorphosis in the character of the $38,091.61? According to the evidence quoted above, the company did nothing.

Such a change must, in the first place, depend upon some act of the company with the intention of appropriating income to capital. The only act of the company in appropriating this sum to capital took place in the years before June 3, 1938, and this is the very thing the respondent refuses to recognize. How then can the respondent take the position that an act of the company before June 3, 1938, which, in order to clothe the sum in question with the character of income it will not recognize, can be used on or after that date to constitute an appropriation to capital? It is not shown that if the company had applied for the supplementary letters patent on the basis of the state of facts the Crown now insists upon, the company, on its part, or the Secretary of State, would have demanded that the write-offs of the $140,000 of good-will should, to the extent of the undistributed income on hand, be made good out of income. Such an appropriation will not invariably be insisted on; *Poole* v. *National Bank of China* (1); Re *Rowland and Marwood's Steamship Co.* (2). If the Crown had come into court on the theory that, while the company had in fact written off the amount in question out of profits, it could at any time reverse this action, but

(1) [1907] A.C. 229. (2) 51 Sol. J. 131.

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Kellock J.

had lost that right by an express or implied representation on the grant of the supplementary letters that it would not do so, it would have been open to the appellant to show, if he could, that the original appropriation had been irrevocable or became so before June 3, 1938. This, however, was not the issue and, in my opinion, such an issue is not to be disposed of on the evidence adduced.

I think therefore, the Crown's contention with respect to section 15, as applied to the facts which it insists upon, cannot prevail. The issue of the letters patent reduced the amount paid up on the issued capital stock but, in my opinion, it did nothing more.

In fact the only argument addressed to this court on behalf of the Crown in support of its contention under section 15 is thus expressed in its factum:

> 19. The original authorized capital of the company was $200,000 divided into 2,000 shares of the par value of $100 each, of which, as of the 3rd day of June, 1938, 1,800 shares had been issued as fully paid up.
>
> 20. Included in the capital assets was an item of good-will in the amount of $140,000. Between the years 1921 and 1937 there were several write-offs of the good-will of the company totalling $140,000. This resulted in a reduction of capital from $180,000 to $40,000. However, by the above mentioned Supplementary Letters Patent the *capital stock* of the Company was reduced to only $79,200.
>
> 21. It is submitted therefore that the *difference* between the above mentioned amounts of $40,000 and $79,200 must be represented *by the undistributed income* admitted by the company to be in its hands as of 3rd June, 1938, with the result that such undistributed income was capitalized within the meaning of section 15 of the *Income War Tax Act.*

If it is taken to be the fact, as the Crown insists, that immediately before the letters patent the assets of the company included $38,091.61 of undistributed income, the reduction in the par value of the capital stock had nothing to do with capitalizing those profits. They were *assets* but it is, in my opinion, a complete non-sequitur to say that merely by the writing down of the par value of the shares, that which was a revenue asset became a *capital asset.*

The argument, in my opinion, begs the question in dispute.

With respect to section 16, it may be questioned whether the language "reduces . . . any class of the capital stock or shares thereof" contemplates a reduction in the par value of the shares outstanding. Assuming, however, that the subsection would extend so far, I do not think it can

be said that the appellant received anything "by virtue of the reduction" in question in this case. As already pointed out, it is not shown as a matter of evidence that these undivided profits did not in fact remain as a fund to which resort might be made by the company for dividends. If that be so, the fund might become the subject of a dividend or dividends in the future, but that had not taken place at any time material to these proceedings.

I would allow the appeal with costs here and below.

ESTEY, J.:—This appeal is from a judgment in the Exchequer Court (1) affirming a decision of the Minister of National Revenue requiring the appellant to pay income tax on the sum of $10,955.70, being the sum of $21.15 on each of 518 shares of capital stock which the appellant held in Domestic Gas Appliances Limited.

The Domestic Gas Appliances Limited, hereafter called "the company" was formed in 1919 with an authorized capital of 2,000 shares at a par value of $100, of which 1,800 shares had been issued and were outstanding on June 3, 1938. When formed the company included in its assets an item of $140,000 as good-will which during the period from 1921 to 1937 had been written off and as of June 3, 1938, the company had tangible assets to the value of $79,200. In its balance sheet of December 31, 1937, the assets are listed under three headings, cash in bank, accounts receivable and an amount owing from a trust company.

As of June 3, 1938, Supplementary Letters Patent were issued confirming the cancellation of the 200 unissued shares and a reduction of the 1,800 to $44 per share ($79,200) on the basis that the $56 per share "has been lost or is unrepresented by available assets." These Supplementary Letters Patent also confirmed the conversion of these 1,800 shares into 1,800 preferred shares at a par value of $40 and 1,800 common shares at a par value of $4 each. The company by this operation reduced its outstanding share capital to the amount of $79,200 being the equivalent of the actual value of its assets.

It was also provided in these Supplementary Letters Patent that the company might on resolution of the direc-

(1) [1948] Ex. C.R. 244.

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Estey J.

tors redeem all or any of the preferred shares outstanding on payment of $40 plus a premium of one per cent and an amount equal to dividends declared prior to the redemption date and then remaining unpaid. In fact in 1938 these preferred shares were redeemed and the common shares taken up in the course of its liquidation in 1941.

The appellant prior to June 3, 1938, had 518 shares at a par value of $100 each and after the issue of the Supplementary Letters Patent had 518 preferred shares at a par value of $40 each and 518 common shares at a par value of $4 each.

In 1941 the auditors of the Department of National Revenue examined the books of the company, disallowed certain items as written off and determined that as of June 3, 1938, the company had $38,091.61 undistributed income. The Department of National Revenue takes the position that this sum of $38,091.61 was capitalized by virtue of the steps taken and confirmed by the Supplementary Letters Patent and that within the meaning of sec. 15 of the *Income War Tax Act* the appellant must be deemed to have received his share thereof through the allotment to him of the new shares of stock. The judgment (1) here appealed from confirms that view.

The foregoing steps confirmed by the Supplementary Letters Patent effected a change in the capital structure of the company that constituted a readjustment of its capital stock within the meaning of sec. 15.

15. When, as a result of the reorganization of a corporation or the readjustment of its capital stock, the whole or any part of its undistributed income is capitalized, the amount capitalized shall be deemed to be distributed as a dividend during the year in which the reorganization or readjustment takes place and the shareholders of the said corporation shall be deemed to receive such dividend in proportion to their interest in the capital stock of the corporation or in the class of capital stock affected.

If the amount of $38,091.61 undistributed income by virtue of the same steps was capitalized then within the meaning of the foregoing sec. 15 this amount "shall be deemed to be distributed as a dividend" and the appellant as a shareholder of the said company "shall be deemed" to have received his proportion of such dividend.

(1) [1948] Ex. C.R. 244.

The respondent submits that the sole effect of the steps confirmed by the Supplementary Letters Patent was to reduce the par value of the outstanding shares in the company from $100 to $44 per original unit in recognition of the fact that $56 par value thus cancelled had "been lost" or was "unrepresented by available assets." Under this submission the $38,091.61 must be regarded either as having been capitalized in the course of the write-offs or that it remained as undistributed income after the issue of the Supplementary Letters Patent.

The chief assistant auditor of the Department of National Revenue explained that the company in writing off the $140,000 good-will had turned the surplus of undistributed income into a deficit of $101,908.39 and that the undistributed income disappeared in the write-off of good-will. The auditor of the company stated, when his attention was directed to the item of $38,091.61, that it was "not reflected" on the company's balance sheet of December 31, 1937. He also stated, "In my opinion, as a result of the Supplementary Letters Patent no amount was capitalized as of that time" and that he entertained this opinion because "if any amount was capitalized it had been capitalized prior to the date of the Supplementary Letters Patent." This is the evidence relative to previous capitalization. It is not supported by any formal action on the part of the company other than what may be assumed to have taken place at directors' and shareholders' meetings where the accounts are passed. It rather suggests that in the books of the company some change had been made that effected in that sense a capitalization. Any change so effected does not prevent the company taking such action with respect to the assets so dealt with as it may deem desirable. In this case the appellant was a substantial shareholder and has formally admitted, for the purposes of this case "that on the 3rd day of June, 1938, Domestic Gas Appliances Limited had an undistributed income in the amount of $38,091.61." Under all these circumstances, it cannot be held that the item had been capitalized in a manner binding upon the company prior to the 3rd of June, 1938.

The petition to the Secretary of State praying the issue of these Letters Patent was not placed in evidence. The

1949

BAGG
v.
MINISTER OF NATIONAL REVENUE

Estey J.

letters disclose, however, an intent and purpose on the part of the company to adjust its outstanding and fully paid share capital to the value of the "available assets." These assets as disclosed by its balance sheet on December 31, 1937, consisted of cash in bank, accounts receivable and an amount owing from a trust company. As the auditor stated, the amount of $38,091.61 was "not reflected" on the balance sheet. It is, however, not suggested that the amount was not there as an asset. He further intimated that no change material to the issues here under consideration was effected between December 31, 1937, and June 3, 1938.

It is the value of the "available assets" that constitutes the sum of $79,200. The company possesses no other assets and while this sum is not specifically referred to as capital or income in the Supplementary Letters Patent, it is clear that it alone is the total asset behind the stock. The undistributed income in the sum of $38,091.61 is part of this fund which in the readjustment as confirmed by the Supplementary Letters Patent has become the total capital asset of the company. This conclusion seems unavoidable unless you import back into the capital account some fictitious item or items which would then restore the condition removed by the steps confirmed by the Letters Patent.

In this adjustment the shareholders have received no money, but what in substance has taken place is the elimination of all fictitious items in the capital structure, first by replacing them with the undistributed income, and when that was exhausted by a readjustment of the capital stock to an amount equal to the actual value of its total assets.

Further, these Supplementary Letters Patent read as a whole, and particularly that portion stating that the reduction of $100,800 in the capital stock was made upon the basis that it "has been lost or is unrepresented by available assets," indicate that the company was readjusting its capital structure in a manner that in a commercial sense left no part of its available assets as a potential fund of income for the payment of dividends but rather as a capital fund upon which dividends as earned might be paid.

This view is confirmed by the accountant of the company. He stated that the capital of the company was reduced to $79,000 or $77,000, he could not remember which, and that he assumed the $38,000 still remained in the company and formed part of the $79,000. If, therefore, the $79,000 was capital and the $38,000 was part of it, the accountant believed the company had capitalized the $38,000.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Montgomery, McMichael, Common, Howard, Forsyth & Ker.*

Solicitor for the respondent: *T. Z. Boles.*

PAUL FULLER (DEFENDANT).....APPELLANT;

AND

JOHN NICKEL, ROBERT MOORE AND BERTHA MOORE (PLAINTIFFS) } RESPONDENTS.

1949
*Apr. 28, 29
*Jun. 24

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Motor vehicles—Negligence—Collision at night between truck and car—Truck without required clearance lights and of illegal width—Duty to keep to right of center line—Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, s. 47(1).

In a collision at night between appellant's truck and a car driven by respondent, the whole left side of the car was practically ripped off by contact with the overhanging box of the truck. The truck was not equipped with the clearance lights required by bylaw and was 3½ inches wider than the legal width. The trial judge found that the respondent had not discharged the onus of showing that the infractions of the law contributed to the accident or that the appellant was otherwise guilty of negligence which was a *causa causans*. The Court of Appeal reversed this judgment and found that the probable cause of the accident was the absence of clearance lights, a fact well known to the appellant, coupled with the illegal width of the truck.

*PRESENT: The Chief Justice and Kerwin, Taschereau, Estey and Locke JJ.

1949

FULLER v. NICKEL ET AL

Held: Taschereau J. dissenting, that the absence of clearance lights on the truck was not the *causa causans*, but that the accident would not have happened if respondent had complied with sec. 47(1) of the Vehicles and Highway Traffic Act to keep to the right of the center line.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the decision of McLaurin J. dismissing the action for damages.

R. L. Fenerty for the appellant.

C. E. Smith K.C. for the respondents.

THE CHIEF JUSTICE:—I agree with my brother Estey and would allow the appeal and restore the judgment of the trial judge, with costs throughout.

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

ESTEY J.:—The respondent John Nickel with several persons, including the respondents Mr. and Mrs. Moore, as passengers at about 1.30 on the morning of July 3, 1945, was driving a 1938 Plymouth Sedan westward toward Acme in the Province of Alberta when he collided with an International 1939 1½-ton truck owned and driven eastward by the appellant.

The gravelled portion of the road was about 25 feet in width and at this point straight. There were no other vehicles in the immediate vicinity and a slight shower shortly before the collision left the gravel damp.

The respondent Nickel, as a consequence of his serious injuries, was unconscious for some time after the accident and at the trial had no recollection of any of the events immediately preceding or at the time of the collision. The respondents Mr. and Mrs. Moore were seated in the back seat of the automobile behind the driver and observed neither the on-coming truck nor the precise course of the automobile. Klassen, who owned the automobile, was sitting in the front seat on the north side. He deposed that he saw headlights of what he thought was another automobile and aside from observing that the speedometer of his automobile indicated a speed of 28 m.p.h. and that Nickel was driving within a foot or so from the north

(1) (1949) 1 W.W.R. 62.

shoulder "didn't give it much of a thought." Buist, who was in the back seat just behind Klassen, saw the headlights a half mile away and corroborated Klassen that his automobile was close to the north shoulder of the road.

The appellant had two passengers in his truck and was proceeding at a speed of 25 m.p.h. He knew his clearance lights were not working and for that reason, as he said, upon seeing the lights of the on-coming automobile half a mile away he switched his lights on low beam and kept over close to the south shoulder. He concluded that the automobile had lots of room to pass but, he says, "the car kept coming on and it crashed into me." Evidence that after the accident certain tracks were identified as made by the truck near the edge of the gravel for a distance of 20-30 feet was not accepted by the learned trial Judge. Appellant had gone into Calgary in the morning with a load of hogs and was returning with ten head of cattle. The measurements of the rack of his truck disclosed that it was 3½ inches wider than that permitted by law (without a permit and no permit had been obtained).

Sec. 47(1) of the *Vehicles and Highway Traffic Act* (R.S.A. 1942, c. 275) provides:

> 47. (1) Any person acting as the driver of a vehicle shall when meeting another vehicle keep his vehicle at all times to the right of the centre line of the highway.

The witnesses from the respective vehicles deposed that both drivers had complied with the foregoing statutory provision and that each, at the time of the accident, was well over on its own side of the road. If these witnesses were correct, having regard to the width of the road, the collision could not have taken place. That it did take place is conclusive of the fact that one or both of these groups of witnesses were mistaken. It is clear, however, that the automobile touched and slightly dented the north front fender of the truck and knocked the hub cap off the north front wheel, and that the box of the truck stripped the south side of the automobile and the latter turned a semi-circle and stopped facing south-east on the road while the truck went on a distance of 20 feet to the north shoulder of the road.

Constable Ross of the R.C.M.P. arrived about an hour after the accident. There had in the meantime been a

1949

FULLER v. NICKEL ET AL

Estey J.

good deal of traffic and many of the marks made by these vehicles had been obliterated. He did, however, find a few feet of truck tire marks 5 feet 9 inches from the south shoulder of the road that corresponded with those of the truck. Upon the assumption that these might be the marks of the south tires of the truck the evidence disclosed that the northern-most edge of the truck would still be 1 foot 11½ inches south of the centre of the highway. If, on the other hand, these were the north tire marks of the truck then the truck was proceeding even further south of the centre, but if, of course, they were not the marks of the truck they are of no assistance in determining the issue in this case. Constable Ross also found skid marks upon the gravelled portion showing that the automobile as a consequence of the impact had made a semi-circle and stopped facing south-east, that approximately 9 feet of the northern portion of the road as one passed through the area of the collision showed no automobile marks whatever. He also found the door of the automobile and to the west of it two gouge marks in the road to the north of the centre. His impression was that the door made at least one of these gouges.

The fact that no tire marks were found on the north side, and the skid marks of the automobile tend rather to contradict the evidence on behalf of the respondents as to the position of their automobile. It was in all of these circumstances that the learned trial Judge found:

> I find myself after consideration unable to choose between the conflicting evidence of the parties and as the onus is on the plaintiffs to establish negligence on the part of the defendant, I am obliged to dismiss the action with costs . . .

The Appellate Court (1) reversed the judgment at trial, directed judgment for respondents and a reference back to the learned trial Judge to assess the damages and, for that purpose, with liberty to hear further evidence. Mr. Justice O'Connor (1), who wrote the judgment in the Appellate Court, stated:

> Having regard to the character of the evidence and the fact that the plaintiff was unable to give any assistance, I find myself unable to hold that the trial Judge was wrong in his conclusion, namely, a finding of inability to determine which or that either of the vehicles was on its wrong side of the road, but I am clearly of opinion that he was wrong in discarding the fact of negligence on the part of the defendant in respect to the condition of his truck.

(1) (1949) 1 W.W.R. 62.

This reference to the condition of the truck is in regard to the excess of $3\frac{1}{2}$ inches in the width of the rack and particularly to the absence of clearance lights.

The learned trial Judge stated:

> There is no way of ascertaining whether Nickel was confused or affected by these infractions by the defendant. As far as the evidence of his passengers goes, it might be inferred that he was not.

In the Appellate Court, after referring to Klassen's statement, "I had no other inclination except it was a car which just had two lights on," and to Buist's somewhat similar evidence, the reasons for judgment continued:

> Any inference would be that Nickel had the same opinion whereas if he had seen by clearance lights that it was not an ordinary automobile but was a large truck he would be likely to assure himself that he was far enough away to avoid it, and the absence of clearance lights which was well known to the defendant, would seem to be a very probable contributing cause to the collision.

It may be assumed that the absence of clearance lights justified Klassen and Buist in concluding appellant's vehicle was an automobile rather than a truck, but it is significant that they did not determine the position of the automobile either from the position of the truck or the absence of clearance lights. It was from their observation of the automobile in relation to the shoulder of the road that led them to conclude that Nickel was driving so close to the north shoulder that the possibility of a collision never occurred to them. They do not suggest that the appellant's truck was on the north or wrong side of the road. Neither is such suggested by any measurements, marks or debris found upon the highway after the collision. In fact the debris and marks found and the measurements made by Constable Ross tend rather to support the conclusion that the truck was on its own or south side of the road. With great respect, there does not appear to be anything in the evidence of Klassen or Buist upon which an inference might be supported that Nickel had determined his course upon the absence of the clearance lights. He probably did conclude it was an automobile and in that event it was his duty under sec. 47(1) "to keep his vehicle at all times to the right of the centre line of the highway." If Nickel had complied with sec. 47(1) no collision would have occurred, as there is no evidence to suggest that the truck was ever on the north or wrong side of the road,

1949

FULLER v. NICKEL ET AL

Estey J.

while in this connection the evidence of Constable Ross is significant that a space of 9 feet from the north shoulder of the gravelled portion of the road indicated no traffic marks although the condition of the road was such that it would have disclosed them had they been made.

The appellant's infractions of the *Vehicles and Highway Traffic Act*, both in failing to display clearance lights and having upon his truck a rack 3½ inches too wide, may justify the imposition of penalties, but in fixing the responsibility for a collision in an action between parties they are important only if they constitute a direct cause of that collision. *The City of Vancouver* v. *Burchill* (1); *Forbes* v. *Coca-Cola Co. of Canada and Guiteau* (2); affirmed without discussion of this point in *Coca-Cola Co. of Canada and Guiteau* v. *Forbes* (3).

The burden of proof rested upon the respondents to establish that the negligence of the appellant was a direct cause of the collision. In view of the contradictory character of the evidence and the conclusions of the learned trial Judge, the observations of Lord Macmillan in *Jones* v. *G.W. Ry.* (4), are appropriate:

> If the evidence established only that the accident was possibly due to the negligence to which the plaintiffs seek to assign it, their case is not proved. To justify the verdict which they have obtained the evidence must be such that the attribution of the accident to that cause may reasonably be inferred. If a case such as this is left in the position that nothing has been proved to render more probable any one of two or more theories of the accident, then the plaintiff has failed to discharge the burden of proof incumbent upon him. He has left the case in equilibrium, and the Court is not entitled to incline the balance one way or the other.

The issues in this case are entirely questions of fact. Even though the learned trial Judge did not pass upon credibility except as to the brother and father of the appellant, he had an opportunity to observe the witnesses which gave him an advantage in determining the value of the evidence, which is denied to an Appellate Court.

As stated by Lord Shaw of Dunfermline in *Clarke* v. *Edinburgh and District Tramways Co.* (5):

> . . . witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the

(1) [1932] S.C.R. 620.
(2) (1941) 3 W.W.R. 909.
(3) [1942] S.C.R. 366.
(4) (1930) 47 T.L.R. 39 at 45.
(5) (1919) S.C. (H.L.) 35 at 36.

nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page.

In *Kinloch* v. *Young* (1) Lord Loreburn, L.C., stated at p. 4:

> But this House and other Courts of appeal have always to remember that the Judge of first instance has had the opportunity of watching the demeanour of witnesses—that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any Court of appeal. Even the most minute study by a Court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say.

The contention of the respondents that even if the automobile was not upon its own side of the road the appellant, having seen the lights of the automobile half a mile away, should have avoided the collision is not established. The essential question again is just where were these vehicles, which upon the evidence cannot be determined. Moreover, one possibility supported by some evidence is that the truck was proceeding at a moderate rate close to the south edge of the gravelled portion of the road. If that were correct the only other step the appellant might have taken was to stop—even that might not have avoided a collision unless the automobile stopped or turned further to the north. It cannot be said upon the evidence that the appellant did not reasonably anticipate that the automobile would turn to the north in compliance with the statutory requirement of sec. 47(1). This particular point does not appear to have been canvassed in the evidence and upon the whole there is no evidence that justifies the conclusion that the appellant's conduct was a direct cause of the collision.

Counsel for both parties cited *The King* v. *Demers* (2). That case, as so many of this type, depends upon its own facts. There an automobile collided with that portion of a scraper extending beyond the red lights displayed upon a truck owned and operated by the Department of Highways. The learned trial Judge found both parties at fault and apportioned the liability. The Crown appealed and both in the Appellate Court and in this Court the judgment at trial was affirmed on the basis that the evidence supported it. In the Nickel case the learned trial Judge

(1) (1911) S.C. (H.L.) 1 at 4. (2) [1935] S.C.R. 485.

1949

FULLER v. NICKEL ET AL

Estey J.

was of the opinion that the evidence was so contradictory he could not conclude the respondents (plaintiffs) had proved a case.

The judgment of the learned trial Judge should be restored and this appeal allowed with costs.

TASCHEREAU J. (dissenting):—This appeal arises out of an automobile accident which occurred on the highway one and one-half miles east of the Village of Acme, in the Province of Alberta. At about 1:30 a.m. one of the respondents, John Nickel, driving east-west on a twenty-five feet wide highway, collided with a motor truck coming from the opposite direction, and owned and operated by the appellant. John Nickel and the two other respondents who were with him in the automobile, were seriously injured.

The trial judge found himself unable to choose between the conflicting evidence of the parties, and as the onus was on the plaintiffs to establish negligence, he dismissed the action with costs. The Court of Appeal (1) unanimously allowed the appeal, and referred the case back to the trial judge for assessment of damages.

The evidence is contradictory. Nickel, the driver, sustained a fractured skull. He suffered a loss of memory and has no recollection of anything that happened. But three of his passengers testified that he was driving on the right side of the road. The defendant Fuller and his brother who was sitting with him in the front seat of the truck, and their father who was following in his own car, swore that the truck was being driven on the right side. Nickel's car was going at a speed of twenty-eight miles an hour, and the truck at approximately twenty-five miles. The learned trial judge disregarded any suggestion that Nickel was not sober and unable to drive an automobile.

It is common ground that the truck had its headlights on, and that the total width between the outside edges of these head-lamps was forty-eight inches, while the width between the inside edges was thirty-two inches. It is also common ground that the total width of the box of the truck was ninety-nine and one-half inches, and that there were no clearance lamps, one on each side of the front and

(1) (1949) 1 W.W.R. 62.

one on each side of the rear, placed as near the top as practicable. The truck was therefore being driven on the highway in violation of the two following regulations:

It shall be illegal for any person to drive without permission of the Board upon any public highway, any vehicle which with the load carried thereon exceeds ninety-six (96) inches in width or one hundred and fifty (150) inches in height from the pavement or road surface; or any vehicle, including tractors with semi-trailer units exceeding the wheelbase length of thirty-five (35) feet, or any other combination of vehicles coupled together exceeding a total length of fifty (50) feet.

Clearance Lamps. Every Public Service Vehicle or Commercial Vehicle having a width, including the road thereon, in excess of eighty (80) inches at any part, shall carry four clearance lamps in a conspicuous position as near the top as practicable, one on each side of the front which shall cast a green light only, and one on each side of the rear which shall cast a red light only. The lights so used shall be visible in normal atmospheric conditions from a distance of at least five hundred (500) feet and during the period between sunset and sunrise or at any time when the atmospheric conditions are such that objects on the public highway are not plainly visible at a distance of three hundred (300) feet, the same clearance lamps shall be alight.

The appellant was driving his truck on a public highway, and it is not disputed that the truck exceeded the allowed width of ninety-six inches, by three and one-half inches.

Counsel for the appellant strongly urged that the marks seen on the south side of the road were a sure indication that the truck was being driven entirely on the right of the centre line of the highway. These marks which were only eight to ten feet long are not however as revealing as suggested by the appellant. The truck which came to a stop on the north side of the road, travelled approximately seventy-five yards or more after the accident, and there is nothing to show that the place where they were seen, is opposite the place where the accident happened. Moreover, there was a heavy traffic on that particular highway that same night, and the evidence does not disclose that they are the marks of the truck. The trial judge himself does not seem to believe that the evidence on this point is conclusive. He says in his reasons for judgment:—

If the marks observed by Ross represent the position of the right dual wheels of the truck, then the extreme left side of the truck was to the right of the centre line. Exhibit 5 contains the measurements necessary to make this calculation, and Ross' figure of 5 ft. 9 inches from the south shoulder should probably be reduced because a foot or two of this distance could not be regarded as a travelable portion of the road.

If the learned trial judge had thought that these marks had really been made by the truck, he would surely not

1949

FULLER v. NICKEL ET AL

Taschereau J.

have said that the evidence was so conflicting, that it was impossible to choose. Moreover, they have been observed at a distance of five feet nine inches from the extreme south shoulder of the road. The distance between the outer edges of the outer hind wheels is eighty-two inches. That would mean that the left hind wheels were at a distance of twelve feet and seven inches from the south shoulder, and therefore, over the centre line. To this must be added more than ten inches being the overhanging portion of the box over the rear wheels. But an attempt has been made to show that Ross took his measurements from a point which was not on the travelling portion of the road. I have come to the conclusion that this evidence is unsatisfactory and cannot help the Court to reach a conclusion.

As already stated, the respondent John Nickel was unfortunately unable, on account of his injury, to give his version of the accident, but from the known facts, I think it is possible to draw the logical inference to reach a proper conclusion.

Charlesworth, The Law of Negligence, 2nd ed., says at page 22:

> There is evidence of negligence if the facts proved and the inferences to be drawn from them are more consistent with negligence on the part of the Defendant than with other causes.

And at page 22 also (footnote (*e*)) he adds:—

> It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is *reasonable probability* that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to.

In *Grand Trunk Railway Co. of Canada* v. *Griffith* (1), Mr. Justice Duff as he then was says:

> I will not put in my own words the second observation; but will quote the words of the Lord Chancellor in Richard Evans & Co. *v.* Astley (3):
>
> > "It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but courts, like individuals, habitually act *upon a balance of probabilities.*"

(1) 45 S.C.R. 387.

In a more recent case, *New York Life Ins. Co.* v. *Schlitt* (1), it was said at page 300:—

> All the circumstances of the case, as revealed by the evidence, lead me to the conclusion that the respondent has brought himself within the provisions of the double indemnity clause of the policy. In *Jerome* v. *Prudential Insurance Company of America* (1939, 6 Ins. L.R. 59), Rose C.J. said: "Nothing, practically, can be proved to a demonstration, and courts act daily, and must act, upon a *balancing of probabilities.*"

The appellant was driving a truck having a width of ninety-nine and one-half inches, or eight feet nine and one-half inches. At the least the left side of his truck was very near the centre line, if not overhanging, he was driving without clearance lights, a truck wider than the width authorized by the regulations, and in view of the absence of clearance lights, it is fair to assume that the driver of the passenger car was deceived as to the exact location of the truck on the highway. The two head-lights of the truck between which there was only a distance of thirty-two inches, would rather indicate to an oncoming motorist, that he would meet an ordinary passenger car, having a normal width. There was nothing to warn an ordinary prudent man, that the vehicle that was coming, had a width of nearly nine feet, and that he had to take additional precautions. This violation of the regulations constituted a menace on the highway, and Nickel had the right to assume that the law was being observed. As it has been said by Lord Atkinson in *Toronto Railway Company* v. *The King* (2):

> But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.

In *Baldwin* v. *Bell* (3), Mr. Justice Cannon speaking for the majority of the Court, dealt with a case where some of the circumstances were quite similar to those with which we have to deal. At page 5, he says:—

> We agree with the trial judge that the real cause of the accident was the overhanging rack which occupied more space than would *an ordinary motor car.* We also believe that in the parallel position which the two cars occupied at the time of the accident, the plaintiff would have suffered no injury, had it not been for the overhanging of the rack on the respondent's truck.

(1) [1945] S.C.R. 300.
(2) [1908] A.C. 269.
(3) [1935] S.C.R. 1.

1949

FULLER
v.
NICKEL
ET AL

Taschereau J.

The appellant drove his car in such a manner as to pass safely the vehicle coming in the opposite direction, if it had been of ordinary, and not of abnormal width.

At the foot of page 5, Mr. Justice Cannon adds:—

The care to be exercised must depend on the *nature of the vehicle,* the character of the highway and the general circumstances of the case.

At the foot of page 6, he further says:

We therefore reach the conclusion that the defendant Hay owed a special duty under the circumstances of the case, on a foggy night, to the appellant, on account of the *wide vehicle under* his control.

In the case of *His Majesty The King* v. *Demers* (1), the statement of facts at the same page is the following:—

On the evening of the 18th July, 1929, the respondent's late husband, Lucien Robillard, while driving his automobile on the Sherbrooke-Magog highway, and approaching Magog, met a tractor belonging to the Department of Roads, which was towing a scraper designed to level the surface of the road. One part of the scraper extended about ten or twelve inches farther to the left than the side of the tractor, and it is assumed that the deceased collided with that part of the scraper, as a result of which he lost control of his machine, which turned over three times and did not come to a stop until it had reached a distance of 200 feet behind the tractor. The driver, the late Robillard, was almost instantly killed.

And at page 486, Sir Lyman Duff says:—

I agree with the learned trial judge that the arrangement of the lights upon the vehicle that Bolduc, the servant of the Roads Department, was driving, when the mishap occurred in which the husband of the respondent lost his life, was calculated to mislead the drivers of automobiles met with on the road; and that the servants of the Road Department were guilty of actionable negligence in proceeding along the road in such circumstances.

I have come to the conclusion that under the circumstances of this case, taking into account the width of the truck, the determining cause of this accident is the failure by the appellant to have clearance lights as provided for by the regulations, which are obviously enacted to prevent accidents on the highways. If the appellant had complied with the regulations, the driver of the passenger car would have seen the overhanging edges of this truck, and the accident would have been avoided.

I agree with the conclusions reached by the Court of Appeal, and I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty, McGillivray & Robertson.*

Solicitors for the respondents: *Smith, Egbert & Smith.*

(1) [1935] S.C.R. 485.

HIS MAJESTY THE KING..... APPELLANT; 1948 *Nov. 26, 29

AND

IRVING AIR CHUTE INC ..... RESPONDENT. 1949 *April 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Reasonable compensation for use of an invention by the Crown—Principles to be applied by Commissioner of Patents in conducting inquiry to determine amount of payment for such use—The Patent Act, 1935, S. of C., 1935, c. 32, s. 19—Order in Council P.C. 6982, dated December 4, 1940.

Where the Government of Canada has made use of any patented invention and the Commissioner of Patents is required, as provided by s. 19 of *The Patent Act, 1935,* to report such sum as he considers reasonable compensation for the use thereof—

Held: that, in conducting the necessary inquiry the Commissioner, in the absence of regulations to the contrary, must determine the scope thereof and the extent of disclosure required.

Held: also, that the compensation to be paid should be determined by what, under normal conditions in the market, would be paid to a willing licensor by a willing licensee bargaining on equal terms. This will involve an examination of the prior art to determine the value of the advance made by the patent in question.

Held: further, that the Commissioner in determining compensation based his award on a wrong principle, therefore the case should be returned to him to continue his inquiry applying thereto the principles set out in the judgment of this Court.

APPEAL by the Crown from the judgment of Thorson J., President of the Exchequer Court of Canada, (1), allowing an appeal to that Court from a report of the Commissioner of Patents.

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

E. G. Gowling K.C. and *Gordon F. Henderson* for the appellant.

Christopher Robinson and *Eric L. Medcalf* for the respondent.

THE CHIEF JUSTICE.—The respondent was the owner of five Canadian patents. It petitioned the Commissioner of Patents to report a reasonable compensation payable

(1) 1947 Ex. C.R. 278.

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

1949

THE KING v. IRVING AIR CHUTE INC.

Rinfret C.J.

to it pursuant to the provisions of Order in Council P.C. 6982 of the 4th of December, 1940, by reason of the use by His Majesty and Switlik Canadian Parachute, Limited, of inventions covered by the five patents. The latter company had received a letter of idemnity from His Majesty under such Order in Council whereby His Majesty became responsible to pay to the patentee reasonable compensation for the use of the inventions.

The Order in Council provided that His Majesty shall pay to the owner of any patent, used in the manner above mentioned, such compensation as the Commissioner of Patents reports to be reasonable for the use aforesaid of the invention or design covered by such patent or registered industrial design, and that any decision hereunder of the Commissioner of Patents shall be subject to appeal to the Exchequer Court.

The Order in Council refers to Section 19 of the *Patent Act*, 1935. It will be convenient to reproduce that section now.

> 19. The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof, and any decision of the Commissioner, under this section shall be subject to appeal to the Exchequer Court.

The Commissioner of Patents reported that a reasonable royalty for the use of the inventions would be $2 per parachute pack, comprising the body harness and container, and a royalty of 25 cents for container replacements and $1.75 for harness replacements.

The royalty per unit was fixed on the finding of the Commissioner that a royalty rate of five per cent on the first five thousand parachutes and 3.75 per cent on those in excess of five thousand was a reasonable royalty in the circumstances, and that the base upon which rate should be calculated to achieve a reasonable royalty per unit was $52, representing the cost of the harness and the container. He excluded from the base the cost of certain items shown by the prior art.

The learned President of the Exchequer Court allowed the appeal and fixed a royalty per unit of $8 (1). In fixing such amount, the learned President affirmed the report of the Commissioner that a royalty rate of 5 per cent on the

(1) [1947] Ex. C.R. 278.

first five thousand parachutes and 3.75 per cent on those produced in excess of five thousand was a reasonable royalty rate in the circumstances. He held, however, that the royalty rate should be based upon the selling price of the parachute, including the canopy and other items rejected by the Commissioner, namely $200. The President declined to consider the prior art in determining the scope of the claims.

The evidence adduced by the respondent before the Commissioner of Patents consisted of an affidavit of the president of the respondent company and seven exhibits thereto. The affidavit and exhibits sought to establish a royalty rate of 10 per cent with a reduction to 7½ per cent for parachutes in excess of ten thousand based on the selling price of parachutes. Exhibit 1 to the affidavit related to the countries in which the respondent had corresponding patents. Exhibits 2 to 6 were royalty agreements made by the respondent under peace-time conditions with proposed manufacturers of parachutes in various countries.

The appellant submitted in evidence a binder of prior art applicable to each of the five patents relied upon by the respondent. Evidence was given by an employee of the Department of Finance on the cost of producing parachutes.

The number of parachutes ordered by the appellant up to the commencement of the proceedings was 55,682. Compensation is payable up to the date of the institution of these proceedings for the use of 47,720 parachutes.

The parties agreed as to certain facts and admissions introduced at the hearing before the Commissioner.

It will be observed that P.C. 6982 does not prescribe any fixed procedure before the Commissioner.

The appellant asked leave to introduce further evidence before the Exchequer Court. The motion was rejected except that two further prior art patents were admitted. The President held that the Exchequer Court, being a Court of Appeal, should not consider the matter *de novo*.

In its answer to the petition the appellant admitted the validity of the patents and use by His Majesty for the purpose of the hearing.

1949

THE KING v. IRVING AIR CHUTE INC.

Rinfret C.J.

The grounds for appeal to this Court are based on the following alleged errors in the judgment of the learned President of the Exchequer Court:—

1. The learned President refused to consider the prior art in ascertaining the inventions for which reasonable compensation is payable with the result that compensation was fixed with respect to the art as a whole rather than on the contribution to the art made by the inventors.

2. Compensation was fixed on the value of parachutes rather than the inventions.

3. The learned President held that the breadth or narrowness of the claims in the patents in issue could not be relevant.

4. The learned President failed to appreciate that a claim in a patent is an instrument of limitation.

5. The learned President failed to distinguish the authorities applicable to the determination of the validity of claims from cases relating to the fixing of compensation.

6. The learned President gave undue weight to authorities relating to the payment of damages for infringement in determining compensation for a statutory right to use an invention.

7. The learned President failed to appreciate the significance of s. 33 of *The Patent Act,* 1935.

8. The learned President based compensation on the selling price of the parachute rather than on cost price as based by the Commissioner.

In its petition the respondent relied on five patents covering inventions used by the Crown.

Patent No. 255,164 was issued to the respondent for a period of eighteen years from the 3rd of November, 1925, on an invention entitled "Body Harness for Aviators". The basis of the invention is a relationship of straps constituting a body harness, the straps consisting of a U-shaped main supporting strap. This patent expired on the 3rd of November, 1943.

Patent No. 273,872 also issued to the respondent for a period of eighteen years from the 13th of September, 1927, was on an invention entitled "Parachute Pack", and expired on the 13th of September, 1945.

Patent No. 304,445 was issued to the respondent on an invention for a period of eighteen years from the 30th of September, 1930. The invention relates particularly to a parachute apparatus having a coupling means in the pack enabling ready attachment between pack and harness. The coupling means constitutes an improvement in detachable packs. The patent expired on the 30th September, 1948.

Patent No. 355,200 issued to the respondent for a period of eighteen years from the 7th of January, 1936, was on an invention which relates particularly to an adapter and

adjusting means and to an improvement in the strap means to which a connector may be attached. A second feature is the provision of a strap means to fit into the quick release. This patent is still in force and will not expire until the 7th of January, 1954.

Patent No. 355,647 was issued to the respondent on an invention for a period of eighteen years from the 28th of January, 1936. The invention consists of a keeper or coupling device. The coupling means consists of a metallic portion holding the snap fastener in position. The keeper means consists of a metallic spring-like gripping socket and holds the snap fasteners of the harness in a fixed position. This patent is still in force and will not expire until the 28th of January, 1954.

I do not find it necessary to go into the details of the several claims in these five patents. There is no doubt that the true nature of the claim is that it should be considered as an instrument of limitation. In *Electric and Musical Industries, Ld. et al* v. *Lissen, Ld.* (1), Lord Russell of Killowen at p. 39 stated:—

> The function of the claim is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers. Their primary object is to limit and not to extend the monopoly. What is not claimed is disclaimed.

and at p. 41:

> The office of a claim is to define and limit with precision what it is which is claimed to have been invented and therefore patented.

Unquestionably in considering the report which he must make to the Government of Canada and in order to arrive at a reasonable compensation for the use of the patented invention, the Commissioner must give due regard to the real invention—the contribution or step in advance which the patentee has made—and the due effect of this consideration should not be obscured by the language in which the claim is clothed. (*Herman* v. *Youngstown Car Mfg. Co.* 216 Fed., 604).

Moreover, the ambit of the invention must be circumscribed by the claims at the end of the specification. It is to these claims that the public are entitled to look in order to ascertain the limits of the monopoly granted.

(1) (1939) 58 R.P.C. 23.

1949

THE KING v. IRVING AIR CHUTE INC.

Rinfret C.J.

Smith Incubator Co. v. *Seiling* (1), per Duff, C.J. See also the quotations from authorities in *The B.V.D. Co. Ltd.* v. *Canadian Celanese, Ltd.* (2).

In this case it is unnecessary to examine the patents from the point of view of their validity, because the latter has been admitted by the appellant and the respondent accepted that admission and acted upon it in the case.

Now, it should be said that in combination patents the novelty, or the advance, for which the patent is granted, is the combination itself, quite independent of the elements which compose it. (See *Harrison et al* v. *The Anderston Foundry Co.*) (3).

It follows that the Commissioner, in basing his award upon rates representing only the cost of the harness and the container, and excluding from the basis the cost of certain items shown by the prior art, established the amount of the compensation to be paid to the respondent on a wrong principle. The patents were issued for the complete article represented by the combination and not solely for the harness and the container. This would follow the principle set forth in *Meters, Ld.* v. *Metropolitan Gas Meters, Ld.* (4) and in this Court in *Colonial Fastener Co. Ltd. et al* v. *Lightning Fasterner Co. Ltd.* (5).

The respondent was entitled to compensation on the basis of the complete parachute equipment, as such was the article for which the patents were granted and not solely the harness and the container.

I would think, therefore, that by calculating the royalty per unit limited to the harness and the container and not calculated on the complete parachute, the Commissioner acted upon a wrong principle. This gave the respondent the necessary justification for appealing to the Exchequer Court by force of Section 19 of the *Patent Act*. If, therefore, the learned President in his judgment had proceeded on the ground that the Commissioner's report was based on such wrong principle, I would think that his judgment should be upheld; but, in allowing the appeal, the learned President himself proceeded on what I think, with respect, were other wrong principles. After all, all that he did in his judgment was to apply the rates already adopted by

(1) [1937] S.C.R. 251 at 255.
(2) [1937] S.C.R. 221 at 234.
(3) (1875-76) 1 App. Cas. 574 at 590.
(4) (1911) 28 R.P.C. 157.
(5) [1937] S.C.R. 36 at 41.

the Commissioner to the whole article instead of only to some component parts of it and, as a result, to fix a royalty per unit of $8, stating that such an amount per parachute equipment unit would, having regard to the circumstances, including wartime conditions, be reasonable compensation to the respondent for the use by Switlik of the inventions covered by the patents.

But, not only did the learned President increase the royalty per unit and fix the rate at $8—he applied it to the amount of the selling price of the parachute equipment instead of to the cost price, which was the basis adopted by the Commissioner. In doing so, the President had absolutely no other evidence than Mr. Waite's affidavit already referred to, and which also was the only evidence of value placed before the Commissioner. Indeed, a motion was made on behalf of the appellant for leave to introduce, on the hearing of the appeal before the learned President, evidence that the devices disclosed in certain patents are practical and useful devices, and also for leave to introduce, on the said hearing, certain patents as part of the prior art relating to other patents. This application for leave was made under Rule 30 of the General Rules and Orders of the Exchequer Court which provides that the Court in any appeal shall have full discretionary power to receive and hear further evidence.

From the affidavit of Gordon Fripp Henderson filed by him in support of the application on behalf of the appellant, it appears that leave was sought to bring expert opinion before the Court in order to meet certain statements made by counsel for the petitioner (respondent) in the course of his argument before the Commissioner of Patents.

In a written judgment dated the 9th of February, 1944, the learned President stated that, as he understood the matter, the statements made by counsel for the petitioner merely drew counsel's own inferences from the material that was before the Commissioner. The President saw no good reason why the respondent (the appellant in the Supreme Court of Canada) should have the right, on an appeal, to meet such inferences by expert evidence which could have been called before the Commissioner. He was of the opinion that there was not sufficient ground shown

1949

THE KING v. IRVING AIR CHUTE INC.

Rinfret C.J.

by the Crown to support that part of the application and it was accordingly refused. In my opinion the learned President acted properly in that respect.

The learned President went on to say that the Court reserved its right to require further evidence if on the hearing of the appeal it should deem such further evidence necessary.

As to the second part of the application requesting leave to introduce, on the hearing of the appeal, certain patents, which were not before the Commissioner, Mr. Henderson's affidavit showed that these patents had been brought to his attention since the date of the hearing before the Commissioner. As no objection was raised by counsel for the appellant in the Exchequer Court (respondent in the Supreme Court of Canada) to the introduction of these patents, the learned President, in the circumstances, granted that part of the application.

Therefore, the only other evidence placed before the Exchequer Court consisted of these additional patents, introduced to show the status of the prior art. But when the learned President came to consider the judgment he should render he arrived at the conclusion that the Commissioner had erred and had applied the wrong principle by referring at all to the prior art and also upon that ground he allowed the appeal. With respect, I am unable to agree. Evidently, in the circumstances, the prior art was not to be looked at for the purpose of discovering whether the patents had been anticipated and were therefore invalid. This became unnecessary from the moment the Crown admitted the validity of the patents. But, to my mind, the Commissioner very properly referred to the prior art in order to ascertain the importance of the advances made by the patents owned by the respondent company. That was an element in fixing the value of the patents and the compensation to which the respondent was entitled. In that respect my opinion is, therefore, that the judgment *a quo* is wrong when it said that in considering the prior art for the limited purpose above mentioned the Commissioner acted upon a wrong principle.

It would follow, therefore, that the Commissioner erred when, in estimating the compensation to be paid to the respondent, he applied the rate to be adopted by him

only to the harness and the container. He should have applied it to the value of the whole parachute equipment.

On the other hand the learned President erred in deciding that the Commissioner should not have referred to the prior art, which, of course, the Commissioner considered not for the purpose of reaching a conclusion that the patents were invalid, but for the purpose of ascertaining the importance of the advance made by the patents of the respondent. The result is that the jugment of the learned President cannot be upheld on this latter ground.

But, with due respect, the learned President made another fundamental error. Having come to the conclusion that the report of the Commissioner was based on a wrong principle, he himself proceeded to fix what he considered a reasonable compensation for the use of the respondent's patents. This, in my view, he could not do, both on the factual material before him and on legal grounds. By Section 19 of the *Patent Act* the Commissioner of Patents is the *persona designata* to report to the Government of Canada the reasonable compensation for the use of any patented invention used by the Government. That section ascribes the power and duty to fix a reasonable compensation to the Commissioner alone. True, it adds that the decision of the Commissioner "shall be subject to the appeal to the Exchequer Court"; but these words are not in any way different from the right of appeal from an arbitrator's award in, let us say, railway matters. There is a right of appeal in those matters, but it has always been considered that such right is limited to the question whether the arbitrator proceeded on a wrong principle, or whether there had been irregularities or illegalities in the course of the arbitrator's proceedings. I do not see any distinction that can be made in the material sense between the report of the Commissioner of Patents and the award of a railway arbitrator.

In *Canadian National Railway Co. v. Harricana Gold Mine, Inc.* (1) Kerwin J., delivering the judgment of the majority of the Court, at p. 393 said:—

> There is no doubt that this Court will not interfere on a mere question of quantum unless it is satisfied that the amount allowed is clearly excessive or just as clearly too small. *The King* v. *Trudel* (2) (from which decision leave to appeal to the Privy Council was refused). In my opinion the allowance in the present case is clearly excessive. What is

(1) [1943] S.C.R. 382.

(2) (1914) 49 Can. S.C.R. 501.

1949

THE KING
v.
IRVING AIR CHUTE INC.

Rinfret, C.J.

more important, however, is that in fixing the value of the lands expropriated as if they had been subdivided into lots, the trial judge proceeded upon a wrong principle and that is always a ground upon which this Court will set aside an award.

In many cases the matter would be remitted to the Exchequer Court of Canada but in order to save the parties that expense, I have examined the record and, by piecing together certain bits of evidence, I have concluded that sufficient appears to warrant an allowance of $250 per acre.

In *The King v. Northumberland Ferries, Ltd.* (1), the procedure outlined by Kerwin J. as being the one usually followed, was adopted by the full Court. It having been found that the trial judge had erred in applying a wrong principle in reaching his award, the case was returned to the Exchequer Court for the purpose of ascertaining the value on the proper basis. It is true that one of the grounds for so acting was that the evidence in the record was insufficient to enable the Court to ascertain the value; but I think it can be stated that in expropriation cases such as the *Northumberland case* and such as the present case, the rule is that once the appellate court comes to the conclusion that the arbitrator has based his award on a wrong principle, the court will not, of itself, proceed to determine the true amount upon the principles which should have been adopted, but will return the case to the arbitrator (in the present instance, the Commissioner of Patents) so that he may ascertain the value on the proper basis as directed by the appellate court. *Cedars Rapids Manufacturing and Power Co. v Lacoste et al* (2).

In addition to the question of law there is the further point against the procedure adopted by the learned President that he had not before him sufficient evidence to enable him to modify the amount of compensation fixed by the Commissioner.

For these reasons the appeal should be allowed and the case returned to the Commissioner of Patents in order to enable him to report to the Government the proper compensation which it should pay for the use of the respondent's patents in accordance with the present judgment. The appellant should have no costs throughout.

TASCHEREAU, J.—I would allow the appeal without costs, and refer the case back to the Commissioner of Patents.

(1) [1945] S.C.R. 458.

(2) [1914] A.C. 569.

RAND, J.—Section 19 of the *Patent Act*, 1935 provides:—

> The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof, and any decision of the Commissioner under this section shall be subject to the appeal to the Exchequer Court.

The function of the Commissioner, in such a case, is administrative with judicial features: he is to report: he does not sit as an umpire between litigants: he is to conduct an inquiry in the course of which he may resort to any source of information relevant to his purpose. There is no question then of onus on any party interested, whether Crown or patentees; but obviously they will have the right to present to the Commissioner whatever may be pertinent to the object in view. The extent of the matter on which the report is based is primarily for the Commissioner; the report is his and so in general must be the strength of its justification; but the provision of appeal necessarily implies a superintendence in the courts to ensure the observance of fundamental requirements in the determination of the property rights of the subject against the State.

The principle applied in the course of administering a similar provision of the *Patents Act* of Great Britain is that reasonable compensation means such price or consideration "as would be arrived at between a willing licensor and a willing licensee bargaining on equal terms": First Report of Commission printed in *Awards to Inventors*, Graham, p. 114. It is one that has long been applied in certain cases of expropriation and ultimately rests on the judgment of the tribunal drawn from all of the surrounding circumstances.

Where, as here, the patents are held independently of any governmental relation and are for a safety means in public transportation where danger risks are high, there has been presumably a commercial judgment of the money value of the improvements covered by the patents which would be of cardinal importance to the adjudication. The Crown, in answer to the details of contracts between the respondent and various third persons containing terms including royalties payable by licensees for manufacture and sale with exclusive privileges, brought before the Commissioner the specifications of over sixty-five patents

1949

THE KING v. IRVING AIR CHUTE INC.

Rand J.

dealing with parachutes and issued between 1912 and 1934; and it was on the footing of such material that the award of the Commissioner was made.

Mr. Gowling contends that the compensation is to represent the fair value of the real inventions in the combinations presented here, and that unless the advance in the art which they have made is ascertained that value cannot be estimated. I think this contention sound, but I cannot agree that the mode of establishing it adopted before the Commissioner is sufficient. There is no evidence beyond the specifications that any one of these inventions ever saw actual use; and from that paper foundation to ask a tribunal not only to deduce the new benefits conferred by them but also to determine their value is in the absence of evidence that no other source of assistance is available, to place upon it a task which the statute does not contemplate.

Where, as here, there is commercial competition in patented instrumentalities, the whole field of commercial result is open. The competitive prices, their relation to the function of the particular devices and to the efficiency of competing devices, their market demand, and in short the entire commercial data of the business, would be direct and realistic evidence of relative values and consequently of related royalties. Such a survey would furnish authoritative information of the value of ideas which have survived the tests of use and practicality. After all, demonstrated utility remains the arbiter of commercial value; neither technical skill nor subtle solution can of itself furnish that measure.

There is another aspect to be taken into account. The parties are to deal with each other on equal terms. Considering that, in the absence of a statutory provision, the granted monopoly would not apply against the Crown, the compensation is a recognition that the inventor should receive fair compensation for his own creation even when the Crown is making use of it for public purposes. But it would be incompatible with that conception to allow him to exploit the emergencies of that public. On the other hand, the same principle will not exact from an inventor a greater relative contribution to the country's necessities than from any other citizen. The terms, there-

fore, should disregard national exigencies and be ascertained as if in normal conditions and as if the State like an individual were at liberty to bargain or not as it might see fit.

There is also the consideration that the inventions with which we are concerned are related primarily to human safety, to the elimination of all possible risks to which persons using airplanes may be exposed. The commercial judgment of preference for one contrivance as against another may be based upon a relatively small difference in dependability or in risks met; but because of the objective sought, that difference may take on marked significance and importance and become associated with the entire means employed. Such a judgment will reflect also those practical insights which emerge in experience as well as the relation of the necessities of safety to those of cost. Such a working and balanced understanding would seem to me to be a most reliable source from which to draw the conclusion which the statute requires.

I am unable to follow either the Commissioner or the President of the Exchequer Court in the preliminary ascertainment of a rate or percentage as something in some degree absolute which will thereafter be applied to a subsequently ascertained base money value. What the inventor is to receive is a sum of money related to the invention used; and the base value, whether cost or selling price of either the whole or part of the apparatus embodying the invention, is obviously bound up with the rate or percentage to be used. Base values as in practice adopted are limited in number and can be accurately ascertained; and being fixed upon, the important question, to which the evidential matters are relevant, becomes that of the highly variable percentage.

The foregoing conception of the function of the Commissioner and of the considerations which should guide him in estimating the compensation was not, I think, fully applied in what was an inquiry of some difficulty. I think, therefore, it should be referred back to the Commissioner to take such further evidence of the nature indicated as he may consider necessary. There will be no costs in this Court or in the Exchequer Court.

1949

THE KING
v.
IRVING AIR CHUTE INC.

Estey, J.

ESTEY, J.—The Government of Canada in September 1940 under sec. 19 of the *Patent Act*, S. of C. 1935, c. 32, and Order in Council P.C. 6982/40, authorized the Switlik Canadian Parachute Limited in manufacturing parachutes for war purposes to use five inventions patented in Canada and owned by the respondent. These inventions were in relation to the body harness, the pack or container of parachutes.

Neither the Government's authority nor the validity of the patents is questioned in these proceedings. The only issue is the amount of compensation the Government must pay for having authorized the use of these inventions under Order in Council P.C. 6982, which in part provides:

* * * but His Majesty shall pay to the owner of any such patent * * * such compensation as the Commissioner of Patents reports to be reasonable for the use aforesaid of the invention or design * * *

The report of the Commissioner of Patents under the foregoing was varied upon an appeal to the Exchequer Court.

The Switlik Canadian Parachute Limited used these inventions in the manufacture of 55,682 parachutes but as 7,962 were purchased at an agreed price including the royalty, only the balance of 47,720 are concerned in this litigation.

The learned President of the Exchequer Court confirmed the finding of the Commissioner of Patents that the appellant should pay a rate of 5 per cent on the first 5,000 parachutes produced and 3.75 per cent on those in excess of 5,000. While, however, the Commissioner held these rates should be computed on the cost of the harness and container, which he found to be $52, the learned President held that they should be computed on the selling price of the entire parachute, which he stated to be approximately $200. In the result the Commissioner of Patents fixed a flat rate of $2 per parachute while the learned President fixed the rate at $8 per parachute.

I am in agreement with the learned President that the Commissioner erred in applying the provisions of sec. 33 of the *Patent Act*. This section provides that one who obtains an improvement patent acquires thereby no

right to make, sell or use the original invention. No such question is raised in these proceedings and this section has no relevancy.

The patentee himself may grant to another a license to make, sell or use his patented inventions. In the circumstances of this case the Crown in exercising its authority under sec. 19 and Order in Council P.C. 6982 may with propriety be described as a statutory licensee. The position of the Crown as such was commented upon by the Royal Commission in Great Britain charged with fixing terms for the use by the Government of inventions under sec. 29 of the *Patent & Designs Act,* 1907 (7 Edw. VII, c. 29 as amended): Graham, *Awards to Inventors,* p. 114. The positions of the compulsory licensee and the Government exercising its authority under sec. 29 while not identical are sufficiently alike in regard to the ascertainment of the compensation as to make the decisions under the former helpful. *Consolidated Wafer Co. Ltd. v. International Cone Co. Ltd.,* (1); *Celotex Corp. et al v. Donnacona Paper Co.* (2); *In the Matter of Applications by Brownie Wireless Co. Ld.,* (3); *National Electric Signalling Co. et al v. U.S.* (4).

These authorities, and others that might be cited, make it clear that the royalty may be upon the cost price or the selling price. It may be so much per unit or, indeed, a fixed amount. These are but methods of assessing or expressing the compensation as determined. Mr. Justice Luxmoore in the *Brownie* Case, *supra,* would fix the compensation by determining "how much are manufacturers who are anxious to make and deal with the patented article on commercial lines ready and willing to pay." The Royal Commission on Awards to Inventors at p. 114 stated:

> But, when and so far as the Crown had admittedly decided to avail itself of this statutory license, and the only remaining question is as to the terms of user, the proper interpretation of the section would seem to be that such a fair and reasonable price or consideration should be fixed for the user as would be arrived at between a willing licensor and willing licensee bargaining on equal terms.

The Royal Commission fixes the terms of user upon the basis of a fair and reasonable price or consideration. It will be observed in Canada that under Order in Council P.C. 6982 the Commissioner of Patents is asked to fix

(1) [1927] S.C.R. 300.
(2) (1929) 2 C.P.R. 36.
(3) (1929) 46 R.P.C. 457.
(4) 58 USPQ 417.

1949

THE KING v. IRVING AIR CHUTE INC.

Estey, J.

"such compensation." It may well be that when some specific item is in question the precise construction of the word "compensation" must as here used be determined, but such is not here raised nor does it detract from the fact that in general the same items would be included under both statutes.

The foregoing tests indicate both what the amount should be and, where a competitive market exists, the method by which it might be determined. Under the circumstances of war there was no such market but the Government in effect asks the Commissioner to reconstruct a market by selecting and giving consideration to all the items that the willing licensee and willing licensor bargaining in that market would take into account. The amount so computed is at least contemplated by the foregoing Order in Council.

The Commissioner of Patents in fixing the royalty of 5 per cent and 3.75 per cent considered the terms of the many agreements the respondent had made with foreign governments and companies. These agreements were exhibited to the affidavit of the president of the respondent company, the last paragraph of which stated:

> THAT from my experience in negotiating the above mentioned royalty contracts and other negotiations with manufacturers in the United States I am able to say that in the industry of manufacturing parachutes a royalty of 10 per cent of the selling price is regarded as a reasonable royalty, subject to a reduction to 7½ per cent on any parachutes in excess of 10,000 per year.

These agreements were made prior to the war when production was relatively small and at least some of which were negotiated under such commercial relationships as to largely eliminate the competitive factor. The Commissioner of Patents concluded that the patentees were satisfied with the annual revenue derived from parachutes prior to the war and accepted that annual revenue as a fair index in computing the new royalty. He then took into consideration the increased number of parachutes under the circumstances of war and determined the royalty of 5 per cent on the first 5,000 parachutes and 3.75 per cent on the cost price of the harness and container. This would not appear to be a determination of the royalty upon a basis of the foregoing tests suggested in either the *Brownie*

Case or the Royal Commission on Awards to Inventors. The terms of these contracts might well be considered but only as one item along with the others.

That which is regarded as the most important factor in determining the compensation under the circumstances that here obtain is the value of the inventions as used in the parachutes. This must depend upon what advantage the incorporation of these inventions in a parachute gives over those parachutes in which they are not embodied. The value of that advantage would be determined under normal conditions in the market "between a willing licensor and willing licensee bargaining on equal terms." It here cannot be determined by a mere perusal of the specifications of earlier patents. Such a perusal may be useful in determining the extent and nature of the difference between that which existed prior to and that which existed after the inventions in question, but the commercial usefulness and the value of the one over the other is a matter of evidence directed to the use and utility of the inventions in question over those which existed prior thereto. This involves an examination of the prior art not to determine what advance had been made in the art but the value of the utility of that advance made by the patents in question.

The Commissioner, proceeding as he did without regard to the tests above-mentioned, proceeded upon a wrong principle. The learned President, while recognizing the importance of use and utility, sought to determine compensation by adopting the royalty as fixed by the Commissioner and then computing the compensation on the basis of the selling price; in doing so he did not subject the relevant facts to the tests above suggested. Indeed, as I view the principle that underlies the determination of the compensation, the main consideration is the value of the inventions as essential parts of the completed parachute as compared with parachutes without them. This, as already intimated, involves a question of evidence that was not before either the Commissioner or the learned President.

It is essential that the inventions be accurately defined. This definition is found in the claim. The Commissioner treated all as improvement patents. The learned President held at least three to be combination patents. These three were Nos. 255,164, 273,872 and 304,455. On this issue I am in agreement with the learned President.

1949

THE KING v. IRVING AIR CHUTE INC.

Estey, J.

I am also in agreement with the view that the whole matter should be remitted to the Commissioner for the purpose of determining the compensation.

The appeal should be allowed without costs.

LOCKE J.—The record of the proceedings held before the Commissioner of Patents does not disclose the nature of the arrangements under which Switlick Canadian Parachute Limited manufactured the body harness, parachute packs and other parachute apparatus which gives rise to the claim. Under sec. 19 of the *Patent Act,* 1935, the Government of Canada may at any time use any patented invention and is required to pay to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof. In the award of the Commissioner he refers to Order-in-Council P.C. 6982 made on December 4, 1940, as amended by P.C. 11081 on December 8, 1942, whereby it was provided, *inter alia,* that if the Minister of Munitions and Supply on behalf of His Majesty should agree to indemnify any person, firm or corporation against any claims or proceedings for the infringement of any patent, no claim should be instituted by the patentee for infringement, but His Majesty is required to pay to the owner of the patent such compensation as the Commissioner of Patents reports to be reasonable for the use of the invention. This Order-in-Council was passed under the powers granted by the *War Measures Act* and provided in like manner as does s. 19 that the decision of the Commissioner should be subject to appeal to the Exchequer Court. In the absence of any evidence in the record, I assume it to be the case that the Switlick Company as the nominee of the Crown manufactured the equipment and that the matter is to be treated as an inquiry under s. 19.

By s. 4 of the *Patent Act,* 1935, the Commissioner of Patents in the discharge of his duties under the Act is vested with all the powers that may be given by the *Inquiries Act* to a commissioner appointed under Part 2 thereof. There were apparently at the time this inquiry was made in 1943 no rules prescribing the procedure to be followed. In the absence of any such regulations, the Irving Air Chute Company Inc. filed a petition in which, after asserting that it was the owner of the five Canadian

patents hereafter more particularly referred to, it was alleged that His Majesty had purchased large numbers of articles covered by the said patents from the Switlick Company and had agreed to indemnify that company against any claim for infringement and had thus become liable to the petitioner under the Order-in-Council to pay such compensation as the Commissioner might report to be reasonable for the use of the inventions. The petition alleged further that His Majesty had also purchased large numbers of articles covered by the patents from the petitioner and had by contract agreed to pay for such articles an amount specified and, in addition, such amount by way of royalty as should be determined to be payable in respect of the articles manufactured by Switlick. This document was not in the nature of a pleading and in the absence of any applicable rules no answer was required on behalf of His Majesty, though the situation would now be otherwise under the *Patent Rules,* 1948. However, a document in the nature of an answer was filed admitting the validity of the patents and that the inventions claimed had been used by His Majesty and stating certain other matters relevant to a consideration of the value of the inventions covered by the patents in question. S. 19 of the *Patent Act,* 1935, in my opinion, contemplates an inquiry by the Commissioner of the nature of those usually conducted by commissioners appointed under the *Inquiries Act.* In such an inquiry, in the absence of regulations to the contrary, its scope and the extent of the disclosure required should be determined by the Commissioner. The present proceeding appears to have been conducted as if it was in the nature of an ordinary action where the petitioner assumed the position of a plaintiff and the Crown that of a defendant and, in the result, the inquiry has been far from complete and did not, in my opinion, provide the Commissioner with the information requisite to enable him to properly discharge his duties.

The petitioning company is incorporated in the United States and has its principal office at Buffalo, N.Y. In support of its claim an affidavit of George Waite was filed which disclosed, *inter alia,* that free type parachutes and harness embodying what were designated as basic inventions covered by two of the patents in question are standard

1949

THE KING v. IRVING AIR CHUTE INC.

Locke J.

equipment in the Air Forces and commercial air services in at least thirty-six countries and for many years were the only free type parachutes used or issued there and that in all of the said countries, except the United States, the improvements covered by what were called the subsequent patents are embodied in the standard free type parachutes so used. The affidavit further stated that the company had "effective contracts" made with concerns in Austria, Canada, Sweden and Finland, France, Spain, Yugoslavia and Great Britain calling for royalties computed as a percentage of the selling price of the parachute equipment varying from 7½ per cent to 12½ per cent in the case of all of these countries other than Spain, where the existing contract provided for a royalty of $30 per unit. All of the contracts referred to were made prior to the outbreak of the war in 1939. In the case of the Canadian and British contracts, the former was made by the petitioner with Irving Air Chute Ltd., a Canadian corporation having its principal office at Fort Erie, Ont., which, it is perhaps fair to assume, was a subsidiary of the petitioner; and in the case of the latter with a subsidiary, by name Irving Air Chute Company of Great Britain, which company in turn contracted with the British Government. In the case of the French contract which was said to have been executed in 1935, the identity of the licensee is not disclosed by the affidavit. Whether the licensees in France, Austria, Sweden or Finland, Spain or Yugoslavia, or any of them, were subsidiaries of the petitioning company is not stated. Evidence of existing royalty agreements, assuming that the patents which the licensees were permitted to utilize were for the inventions covered by the five Canadian patents in question or some of them, was relevant but, in the absence of more information than was given by the affidavit of Mr. Waite and by the documents produced, its weight was very slight. Where the arrangements were made with wholly owned or controlled subsidiaries of the petitioning company, the disclosure of the stipulated royalties might not afford any accurate indication of what could be realized for the use of the inventions in the market. The British contract made by the petitioner was admittedly with its subsidiary and while the nature of the arrangement between the British subsidiary and the British

Government for the supply of this equipment, in anticipation of the outbreak of the war and during its progress, would have been of material assistance this information was not given. These are matters which, in my opinion, should have been fully inquired into to enable the Commissioner to properly discharge his duties. In addition to producing these contracts, Mr. Waite stated in his affidavit that in the industry of manufacturing parachutes a royalty of ten per cent of the selling price was regarded as a reasonable royalty, subject to a reduction of 7½ per cent on parachutes produced in excess of 10,000 a year.

In addition to this material, written admissions made by the parties were filed with the Commissioner which included a statement that the price of a parachute before the war was about $325, and that in the contract of September 18, 1940, made between the petitioner and the Crown the price was $175 plus sales tax and royalty. In addition, the petitioner admitted that prior to the date of any of the patents in question harnesses of various kinds for parachute packs were known, that various forms of packs for parachutes were known and canopies of various forms and that none of the claims of the patents in question contained claims to the canopy itself, but asserted that they did contain claims to the canopy in certain designated combinations. It was also shown, as might be expected, that there had been a tremendous increase in production of parachutes for the Air Force after 1939. Between 1935 and 1939, 1,138 parachutes of all types had been purchased while between October 1939 and September 1943, 55,682 had been ordered.

On behalf of the Crown the material submitted to the Commissioner consisted of the admissions above referred to, the evidence of an accountant as to the manufacturing costs of both the Switlick Company and the Fort Erie Company and the production and filing of copies of a large number of patents issued in Canada and elsewhere to other patentees of parachutes and parachute equipment. As to these, no inquiry was made as to their practical utility or whether any of the equipment was being or had been manufactured under the patents, or as to the price at which the equipment could be produced, or the terms upon which licenses could be obtained to use any of the patents produced.

1949

THE KING v. IRVING AIR CHUTE INC.

Locke J.

In my opinion, the inquiry made in this matter was quite inadequate. I think the rule adopted by the Royal Commission appointed in England to determine the nature of the awards to be made to inventors of whose inventions the Crown had made use during the period of hostilities is the proper one to be followed by the Commissioner in discharging his duties under sec. 19. According to the first report of that Commission which is contained in Mr. J. P. Graham's work *Awards to Inventors*, the principle upon which the Commissioners proceeded was that a fair and reasonable consideration for such user should be such an amount of money as would be arrived at between a willing licensor and a willing licensee bargaining on equal terms. The burden of obtaining the information necessary to enable the Commissioner to come to a sound conclusion lay upon him, in the absence of regulations to the contrary, and not upon the parties to the dispute.

The proceedings before the Commissioner are not in the nature of claims for infringement. The five Canadian patents in question were all issued and have remained subject to the right of user reserved to the Crown on terms that reasonable compensation for any such use should be paid. The petitioner, judging from the material filed, considered that such compensation should be computed as a percentage of the selling price of the complete parachute for the reason that it is said that in commercial practice royalties computed in this manner are paid. Other than the statement of Mr. Waite, information as to this is entirely lacking. Since the Commissioner is charged with the duty of seeing that the petitioner receives fair treatment, full information as to this should be obtained. I find difficulty in appreciating why the compensation payable by the Crown under circumstances such as these should be determined in this manner. The petitioner claims no patent right in the main parachute, the pilot parachute or the kit bag and these, in so far as the petitioner was concerned, might have been manufactured for the Crown by some other contractor with impunity. An examination of the cost figures submitted shows that a large proportion of the cost of manufacturing the complete parachute lies in these three items and presumably a like proportion of the selling price would be

attributable to them. If the quantum of the compensation is to be fixed as a percentage of the selling price, it is presumably that portion of the selling price attributable to that portion of the equipment, the manufacture of which would in the case of a commercial manufacturer amount to an infringement of the patent, and if it is computed upon this basis substantially the same result is produced as the award of the Commissioner.

I think, however, without expressing any opinion as to quantum, that to restrict the compensation to the percentage awarded by the Commissioner on either the cost or the selling price of the body harness, accessories and container only, may well result in an inadequate award. There is no principle of law which required the Commissioner to determine the amount of the compensation as a percentage of either the cost or the selling price of the entire parachute apparatus or of any part of it. The cost of producing an improvement to a patented article or producing a part of a machine, the use of which may amount in combination with other known equipment to a patentable invention, is not necessarily a factor in determining its worth. In the Royal Commission's first report to the British Government, mention is made of a claim dealt with before it for the use of an attachment to the Vicker's gun which in practice enable the rate of firing to be at least doubled, and so was of the utmost value in the short bursts of fire between fighting aeroplanes and which was adopted as standard equipment. The cost of the attachment averaged about 10 s. 6 d. and any ordinary percentage of the rate allowed in commercial practice would have been grossly inadequate. The award made was the sum of £10,000. As to such of the patents in question here as were admittedly for improvements only, the result of their use, for all the evidence indicates, may have been to convert a dangerous and cumbrous piece of equipment into one of the very highest value and, if that were so, I do not consider that the cost of manufacturing such improvement or the price at which it was purchased by the Crown should be used as a yardstick to determine what was fair compensation for its use.

The Commissioner was, in my opinion, entitled to examine the other patents filed with him but the inquiry

1949

THE KING
v.
IRVING AIR CHUTE INC.

Locke J.

should have extended to ascertaining whether the parachutes and parachute equipment referred to had proven practical in use, whether they were available or might have been made available at the outset of the war and, if so, upon what terms. Assuming there was other available satisfactory equipment, a comparison of it with the parachute equipment using the inventions of the petitioner would be of assistance in estimating the value of the petitioner's patent in use. While under s. 29 of *The Patents and Designs Acts,* 1907-1939, which provides in part that a patent shall have to all intents the like effect as against His Majesty the King as it has against a subject, it might be arguable that a claim for loss of profits or other damages might lie in England, there can be nothing of that kind here, in my opinion, under s. 19 of the *Patent Act,* 1935. The claim of the petitioner in the present matter is not for damages for infringement but to settle the amount of the reasonable compensation for the user of the inventions by the Crown in the exercise of the right reserved. In determining the compensation the Commissioner of Patents is at liberty, in my opinion, to make either a lump sum award, as was done in the case of the invention for the improvement of the Vicker's machine gun, or a fixed sum per unit of the parachute equipment in question, or a percentage of either the cost or the selling price of either the entire equipment or of the body harness, accessories and container only, provided the Commissioner is of the opinion that this method would result in the payment of reasonable compensation for the use of the patents upon the basis above indicated. In the award of the Commissioner the following passage appears:

> The annual revenue derived from parachutes prior to the war was apparently acceptable to the patentees and that annual revenue may be taken as a fair index in computing the new royalty.

and this view appears to have affected the quantum of the award. The amount of the annual revenue realized (presumably by the appellant before the war) was irrelevant to the inquiry, in my opinion.

I would allow this appeal and set aside the judgment of the Exchequer Court and refer the matter back to the Commissioner of Patents to continue his inquiry for the purpose of obtaining whatever information he considers

necessary to determine the difficult question which has been referred to him, upon the principle above indicated. Under the circumstances there should be no costs either of this appeal or in the Exchequer Court.

Appeal allowed without costs and case referred back to Commissioner of Patents in accordance with the reasons of the members of the Court.

Solicitors for the appellant: *Gowling, MacTavish, Watt, Osborne & Henderson.*

Solicitors for the respondent: *Smart & Biggar.*

1949
*Apr. 26
*Jun. 24

WARE'S TAXI LIMITED AND ELIZABETH DOETS (DEFENDANTS) } APPELLANTS

AND

CAROL ANN GILLIHAM ET AL (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Motor vehicles—School Taxi—Negligence—Degree of care required—Child falling through opened door—Safety devices—Supervision—Allurement.

The five year old respondent fell out of appellant's taxi, when the door opened, as she was being transported from school in pursuance of a contract between the school and the appellant taxi company. The taxi was a 4 door sedan, the door had the standard push button lock and there was no evidence of any defect in it or in the door. The trial judge and the Court of Appeal found that the infant plaintiff or one of the other children in the car must have played with the plunger and opened the door. There was evidence that the plaintiff had on previous occasions fiddled with the push button. On the day of the accident, while the car was stopped, the driver had noticed the plaintiff playing with the button and had ordered her to cease and to stand back from the door. The child obeyed and the driver made sure that the button was down and the door securely locked and fastened. The trial judge dismissed the action and the Appellate Division reversed his decision and ordered a new trial limited to an assessment of damages.

*PRESENT: The Chief Justice and Kerwin, Rand, Estey and Locke JJ.

1949

WARE'S TAXI LIMITED v. GILLIHAM

Held, affirming the Appellate Division (Rand and Locke JJ. dissenting), that the appellant was negligent in conveying these children in this 4 door sedan without safety devices and no greater degree of supervision than could be exercised under the circumstances by the driver, as the push button and the handle constituted an allurement to the children and a reasonable man should have anticipated this attraction and the resulting danger.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the dismissal of the action by McLaurin J. and ordering a new trial limited to the assessment of damages.

L. R. Fenerty for the appellants.

A. W. Hobbs for the respondents.

THE CHIEF JUSTICE:—I agree with my brother Estey and would dismiss the appeal with costs.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.:—This is an action for damages arising out of an injury suffered by Carol Ann Gilliham, daughter of the respondent Ernest James Gilliham, when she fell out of a taxi owned by the appellant Ware's Taxi Limited while it was proceeding on Centre Street near 2nd Avenue in the City of Calgary at about 5.15 p.m. on the 17th of June, 1946.

Carol, about five years of age, was attending the Christopher Robin Kindergarten and Preparatory School in Calgary. Fees charged by this school covered the cost and thereby it assumed the responsibility of conveying the children to and from the school and their respective homes. In February 1946 in discharge of that responsibility the school entered into a contract with Ware's Taxi Limited to convey the children in the morning, at noon and after school. The school is not a party to this action and therefore any question as to its liability or the terms of the contract between it and the appellant Ware's Taxi Limited is not in issue. The appellants, therefore, accepted these children, from about three to six years of age (with possibly a few up to eight), as passengers and were thereby under a duty to exercise reasonable care in their conveyance. The appellant Ware's Taxi Limited employed in this work

(1) (1948) 2 W.W.R. 991.

some four or five taxis about four and a half hours per school day. At other times these taxis were used in their regular taxi service.

The taxi in question was a 1942 4-door Dodge Sedan. Each of the doors was equipped with the usual handle for opening as well as a push button which when down locked the door in a manner that prevented it being opened from either the inside or the outside. Miss Doets, an experienced driver who had been transporting the children since the contract was made in February, deposed that she was always careful to see that the push button was down before starting the automobile.

It was under the terms of the above contract that on the afternoon in question the appellant Elizabeth Doets, employed by appellant Ware's Taxi Limited, was driving the taxi. She left the school with some seven or eight children in the taxi. Two or three had already been left at their respective homes leaving about five in the taxi when proceeding along Centre Street Miss Doets noticed Carol playing with the push button on the right rear door. She "told her to stand away from the door and she did." Miss Doets at that time made certain the push button was down and continued. When she had gone about a block that door opened and Carol fell out suffering the injuries for which damages are here claimed.

In both the Trial and Appellate Court (1) it has been accepted as a fact that Carol or one of the other girls had raised the push button and operated the handle permitting the door to open. The push button, the handle and locking device on the door, so far as the evidence discloses, were in good condition. When, therefore, the doors were closed and the push button down the children were safe but if the push button was raised and the handle moved the door would open.

The question is therefore whether the push button and handle constituted an allurement to these children and should a reasonable man anticipate both that they would attract children, who, if they meddled therewith, would be in a position of peril. As stated by Lord Macnaghten in *Cooke's Case* (2), is the push button and the handle "attractive to children and dangerous as a plaything?"

(1) (1948) 2 W.W.R. 991. (2) [1909] A.C. 229.

1949

WARE'S TAXI LIMITED v. GILLIHAM

Estey, J.

> Every person must be taken to know that children are likely to meddle with what comes within their reach, and this knowledge may impose a relatively higher degree of duty to take care on any one who leaves that which may be dangerous, if meddled with, in a place where it is probable that children will reach it, than if there was no such probability.

Halsbury, Vol. 23, p. 584.

It must therefore be assumed that Ware's Taxi Limited and its employees were aware of the natural curiosity of children which would lead them to investigate whatever might attract and was within their reach in the automobile.

Hamilton, L.J., later Lord Sumner, in *Latham* v. *R. Johnson & Nephew Ltd.* (1), stated:

> What property must the chattel possess to make the consideration of its attractiveness to children relevant? It must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation.

This push button was within easy reach of every child in the rear seat of the automobile. Moreover, that it could be raised up and pushed down was made evident to each child every time the driver of the automobile opened or closed that door. The operation of the push button and the handle were being constantly brought to their attention. In these circumstances it would be expected that the children would be drawn toward them and "heedlessly to put them in operation."

Moreover, that there is a danger or a circumstance of peril when children are placed in the rear seat of a 4-door sedan is supported by the evidence. Some parents take the precaution to purchase the 2-door type. Other parents, however, equip their 4-door sedans with safety devices and prior to the war and again at least in 1947 some of these devices were upon the market. Three of them were before the Court at the trial. An automobile could be equipped with the most expensive of these for about $10. Moreover, these devices were not complicated and anyone with mechanical ability could place a workable device upon an automobile which would insure the door remaining closed even if the children should meddle or play with the push button and the handle.

A representative of another taxi company called as a witness said, "we have at times transported children" from two other kindergartens without either a safety device

(1) (1913) 1 K.B. 398 at 419.

upon the rear doors or any supervision. A taxi owner called as a witness stated that he had transported children for two organizations in Calgary, one for a period of two years and the other four months, using eight cars and making four trips per day. He had only the push buttons without any safety device upon the rear doors. The children, however, that he transported were of ages from four to ten years. He stated that the younger children were placed in the front seat with the driver, and then, "we do make a point to have the old children look after the doors," or as he again stated, "we put a couple of the older kiddies to watch it." The appellants took the precaution of placing the younger children in the front seat but this left children usually up to six years of age entirely by themselves in the back seat with only such supervision as the driver in the circumstances might find it possible to exercise.

The foregoing indicates that parents and at least one taxi owner appreciate the need for either safety devices or supervision when young children are being conveyed in a 4-door sedan. That these devices have been developed and placed upon the market would suggest that the apprehension of danger is generally recognized.

The possibility of an automobile rear door opening without being meddled with is very remote. The precautions suggested above are taken because of the propensity of small children to meddle with that which attracts them. It would, therefore, appear that a reasonable man, assuming an obligation to transport children from the ages of about three to six years in a 4-door sedan equipped with push button and door handle, as in this case, would foresee the possibility of these small children meddling or playing with the push button and the handle and foresee the danger or peril consequent upon their doing so and would take such precautions as would either prevent them playing with the push button and the handle, or if they did so, remove the possibility of dangerous consequences ensuing.

The conduct of Carol in meddling with the push button while the automobile was en route on the day in question, and upon previous occasions when she had reached her destination and was anxious to get out to play, was

1949

WARE'S TAXI LIMITED v. GILLIHAM

Estey, J.

important only in so far as it may have drawn the attention of appellants to this possible danger and to indicate the natural propensity of children. She being a child of about five years of age her conduct would not be accepted as constituting in law contributory negligence. *Merritt* v. *Hepenstal* (1); Beven on Negligence, 4th ed., p. 196.

The appellants also submitted that they were using taxi cabs with standard or approved equipment which would negative the negligence here alleged on their part. That they were using the standard or approved equipment for the transportation of other than young children is not here in issue. Counsel on appellants' behalf cited *MacLeod* v. *Roe* (2), where the provision of standard equipment for customers was held under the circumstances to be sufficient. In that case the principle applied in *McDaniel* v. *Vancouver General Hospital* (3) was followed. In the latter the defendant acted in accord with the "general approved practice." The appellant Ware's Taxi Limited had been operating under this contract from February to June. A representative of another taxi company deposed that they transported children "at times," while a taxi owner who had the longest experience in transporting children did provide some supervision. This evidence does not establish either that there is any "general approved practice" or that there is what may be properly described as standard equipment for the transportation of young children in 4-door sedan automobiles, and therefore it cannot be contended that the appellant Ware's Taxi Limited was acting within the scope of either of the foregoing cases.

Neither can the appellants' submission that they were acting in accord with the custom among taxi companies in using this 4-door sedan in the transportation of these children be accepted. It is true that evidence of established practice or custom may be adduced for the purpose of rebutting an allegation of negligence but in order to establish such it must have been a practice over a long period of years. In the case cited by appellants of *Rothschild* v. *The Royal Mail Steam Packet Co.* (4), Pollock, C.B., referred to the particular mode of conveyance "for a great

(1) (1896) 25 S.C.R. 150.
(2) [1947] S.C.R. 420.
(3) (1934) 3 W.W.R. 619.
(4) (1852) 18 L.T.R. 334.

number of years," and in *Hart* v. *Lancashire and Yorkshire Ry Co.* (1), the period was twenty years. The evidence here does not establish any such custom or practice.

It would appear that *Shrimpton* v. *Hertfordshire County Council* (2) is more in point. There a child was injured while being transported in a school conveyance. The jury found that it was negligence not to provide supervision other than that of the driver. The Lord Chancellor (Loreburn) stated at p. 147:

> They (the jury) have found that it was not a reasonable and proper way for the county council to convey children to school in this vehicle without a conductor or some adult person to take care of them. It is said that there is no evidence in support of this finding. To my mind it is a question which any man of the world can answer by the exercise of his own common sense and his knowledge of life.

It would therefore appear that the appellants in conveying the children in the above described 4-door sedan, without safety devices and no greater degree of supervision than could be exercised under the circumstances by the driver, were negligent.

In reversing the judgment at trial dismissing respondents' action the Appellate Court ordered a new trial limited to an assessment of damages. In my opinion the judgment of the Appellate Division should be affirmed and the appeal dismissed with costs.

The dissenting judgment of Rand and Locke JJ. was delivered by

RAND J.:—The facts out of which this appeal (3) arises have been stated, and I will not repeat them. It is, I think, unquestioned that from the standpoint of the actual undertaking of the appellant there was no failure in performance. Both the school authorities and the parents of the respondent, as well, I have no doubt, as all the other parents, were fully aware that the children were being carried in a taxicab with ordinary safety devices, though under the care and oversight of a selected chauffeur. This had continued for over six months during which the automobile would be at each home and at the school four times on every school day.

The serious question then is whether the standard of care imposed by law on such a relation called for further

(1) (1869) 21 L.T.R. 261.
(2) (1911) 104 L.T.R. 145.
(3) (1942) 2 W.W.R. 991.

1949

WARE'S TAXI LIMITED v. GILLIHAM

Rand J.

mechanical or other devices or an attendant. If the terms of the actual undertaking were inadequate, the safety of a child could not be jeopardized even with the consent of his guardians. The test is what the reasonable and prudent person, if his mind was directed to the matter, would accept as being all that could fairly be required in the circumstances. That judgment, of course, would take into account the potential dangers from speed and movement in the traffic conditions in which the automobile moved and the means of safety by which the child was protected against them.

Ordinarily a reasonably intelligent parent can be taken to foresee all risks likely or remotely possible to his young child in any situation more sensitively than another and if we find parents uniformly, freely and voluntarily accepting a course of conduct in others involving risks to their young children, could there be a better test of the reasonableness or sufficiency of the actual care in the particular case? That principle was applied by this Court in the case of *Ouellet* v. *Cloutier* (1). There, a young boy had gone to a neighbouring farm where threshing was in progress. He was standing on the floor of a shed in the presence of the owner, the defendant, a few feet from the machinery as it was slowing down at the end of the day. In a moment of wilfulness he darted to the moving belt and in endeavouring to slow it down caught his hand on the wheel and was injured. The defendant was acquitted of negligence because he had acted as the boy's father in the same situation would have done. Similarly here: the act of the child was not the expectable or likely act: it was a conceivable act, no doubt, but as done it was wilful and impulsive and in the circumstances beyond the range of reasonable anticipation that called for added safeguard.

Now, although the acquiescence by the parents in the carriage of their children in the manner adopted here may not be conclusive of that standard, yet when associated as it is with the acceptance of similar services both in Calgary and other places in Canada and in the absence of a syllable of evidence gainst it, I feel bound to find its security to be reasonable: it was adequate to the risks.

If it had been feasible by adding a convenient device that had become generally used as an additional precaution,

(1) [1947] S.C.R. 521.

a new element in the realized standard would have been added; but although two or three mechanisms have appeared on the market, which were claimed not to have been available during the time in question, the public have not taken them up. The door, of course, might be locked with a key, but there are flaws in all perfection of one dimension, and in that case there would be not only intolerable inconvenience but also new dangers in case of accident.

It is an everyday occurrence in Canada and the United States that parents set off in their automobiles with young children in the rear seat. It is frequent that little ones "pile in" for a short pleasure trip. The doors uniformly, as in this case, have double catches and safety lock and within that protection they enjoy the ride. It would confound a neighbour who with the consent of a parent had taken a young child along with his own for a short run to find himself the victim of a crippling lawsuit because in a moment of wantonness the young child had opened a car door and fallen out. And the duty of care toward such a child in that case would in this respect be the same as in this. Settled over this physical security of lock and catches is the presence of the adult who exercises the authority and oversight of the parent. That was the case here. But the most assiduous surveillance is not absolute insurance against impulse or perversity; there is always an irreducible margin. With insignificant exceptions, children are sufficiently within control by what was furnished here just as they are within their own home, and no other accident of this nature, so far as known, had ever before happened in Alberta; and the searches of counsel have not revealed a similar reported instance in the many services of this sort carried on in the United States.

The injury to the child may be a permanent scar upon a young life, but unfortunately in the multiplying risks and perils of this age these misfortunes occasionally happen as their inevitable result. But I can imagine no sounder or more realistic appraisal of reasonable safety than the long continued acceptance by parents of protective conditions against hazards into which they allow their children to be taken by strangers. Even hindsight supports that

1949

WARE'S TAXI LIMITED v. GILLIHAM

Rand J.

here because for some time after the accident the child continued to be carried under the same conditions in the taxi.

In the reasons of Ford, J.A. in the Court of Appeal (1), the principle of allurement as applied in *Cooke* v. *Midland Railway* (2) is invoked, but I am bound to say that I cannot see that it is appropriate to the facts. In *Latham* v. *Johnson* (3), Hamilton, L.J. enquires into the qualities or characteristics of the thing or article which give to it the incriminating attractiveness. On p. 419 he says that the chattel "must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be;" and later that "it must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation." There is nothing of that sort here. The safety catch is merely the small button which is pressed down to prevent the handle of the door from being used and pulled up to release it: in itself it is quite harmless. What opened the door was the pressing down of the handle. I think it quite out of the question to speak of these ordinary and familiar bits of mechanism, with which certainly the child here was thoroughly well acquainted, as "fascinating and fatal." The principle is aimed against setting a trap for children, treating them in this respect as governed by an irresistible curiosity or desire or impulse, quite analogous to the holding out of bait to an animal.

I agree, therefore, with McLaurin, J. who tried the case. The appeal must be allowed and the action dismissed with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellants: *Cairns & Howard.*

Solicitors for the respondents: *Patterson, Hobbs & Patterson.*

---

(1) (1948) 2 W.W.R. 991.
(2) [1909] A.C. 229.
(3) (1913) 1 K.B. 398.

WALTER GRANT.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1949
*Mar. 23
*Apr. 12

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION.

Criminal Law—Accused charged with manslaughter arising out of operation of motor vehicle—Trial judge directed jury to return verdict of not guilty of manslaughter and to consider if reckless driving proven—Whether jury satisfied itself that accused was not guilty of manslaughter, and since this a condition precedent, whether it had jurisdiction to consider offence of reckless driving—Criminal Code, ss. 285 (6), 951 (3).

Section 951 (3) of the *Criminal Code* provides that, upon a charge of manslaughter arising out of the operation of a motor vehicle, the jury if satisfied that the accused is not guilty of manslaughter but is guilty of an offence under s. 285 (6), may find him guilty of that offence.

The appellant was charged with manslaughter arising out of the operation of a motor vehicle. The trial judge in charging the jury told them there was no evidence to support the manslaughter charge and directed that they bring in a verdict of not guilty on that count but left with them to determine whether or not the appellant was guilty of reckless driving.

Held: that the jury in returning a verdict of not guilty of manslaughter, followed the judge's direction on a question of law as it was their duty to do; therefore the terms of the statute were met and their verdict meant that, although acting in conformity with the judge's direction and their duty, the jury was satisfied that the accused was not guilty of manslaughter.

APPEAL by the accused from the judgment of the Supreme Court of New Brunswick, Appeal Division (1) which dismissed his appeal, (Richards C.J. dissenting), from a conviction and sentence for reckless driving.

R. V. Limerick for the appellant.

H. W. Hickman for the respondent.

THE CHIEF JUSTICE:—I have had the privilege of reading the reasons of my brother Kerwin, and I fully agree with them.

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

(1) (1948) 92 Can. C.C. 366.

1949

GRANT
v.
THE KING

Rinfret, C.J.

The appellant contends that the words "if they are satisfied that the accused is not guilty of manslaughter", as applied to the jury in subsection (3) of section 951 of the *Criminal Code,* should be construed as introducing into the *Code* an entirely different procedure from that which obtains in respect of any other offence dealt with in the *Code.*

It is too clear for words that upon the trial of an indictable offence the law is the province of the presiding judge and the findings of fact are the province of the jury. Indeed the jury has no other jurisdiction but to decide the facts, and in matters of law they must follow the directions of the judge.

The learned counsel for the appellant herein would have this court decide that the use in subsection (3) of section 951 of the words "if" (they the jury are) "satisfied that the accused is not guilty of manslaughter" brought into the *Code* an entirely different intention of Parliament, and that these words should be held to mean that the jury alone is to announce its decision that the accused is not guilty of manslaughter and the trial judge, in the instance, is deprived of any right to pronounce upon the law and to direct the jury in accordance with the law.

In the present case, the learned judge charged the jury to the effect that there was no evidence to support the charge of manslaughter and directed the jury to find a verdict of not guilty on that charge. Counsel for the appellant accordingly contends that that was contrary to the provisions of subsection (3) of section 951, and for that reason the trial was abortive.

In doing what he did the learned judge followed the practice outlined by this Court in *Walker* v. *The King* (1), where it was decided that "the proper practice is for the trial judge to direct the jury to acquit" insofar as the charge of manslaughter was concerned. See also *The King* v. *Comba* (2).

The contention of the appellant's counsel would really lead to the conclusion that subsection (3) of section 951 should be treated as a law by itself and should not be governed by the other sections of the *Criminal Code.* But, although subsection (3) is new law, adopted by Parliament in 1938, it is, nevertheless, a part of the *Criminal Code;*

(1) [1939] S.C.R. 214. (2) [1938] S.C.R. 396.

and, of course, standing by itself, it would not be workable, unless all the sections of the *Code* are considered to be applicable to it and to the method and procedure whereby it is to be operated.

As was pointed out in *The Queen* v. *Morris* (1), at p. 95:

> It must be remembered that it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law.

And in *Craies on Statute Law,* 3rd edition, p. 112, it is stated that "to alter any clearly established principle of law a distinct and positive legislative enactment is necessary." Such a rule was applied in this Court in the case of *La Banque Canadienne Nationale* v. *Carette* (2).

It is quite clear, therefore, that there is nothing in subsection (3) of section 951 indicating the intention of the legislator to submit charges within that subsection to be dealt with in the criminal machinery in a way different from that which obtains in all other criminal cases.

In returning a verdict of not guilty on the charge of manslaughter, of course, the jury in the present case was following the direction of the presiding judge on a question of law, to wit, on his statement that there was no evidence adduced in the case to support a charge of manslaughter, but in doing so they were acting in accordance with their duty, as it has always been understood, in the application of the *Criminal Code* in this country; and their verdict that the appellant was not guilty of manslaughter meant that they were satisfied with that result within the meaning of subsection (3).

The appeal should be dismissed.

The judgment of Kerwin, Rand and Kellock, JJ. was delivered by:

KERWIN J.: The appellant was charged with manslaughter by wilful misconduct while driving an automobile on the public highway. There had been a previous trial, at which there was a disagreement of the jury. On the second trial, the appellant called no evidence and in his address to the jury, counsel for the Crown stated that there was no evidence sufficient to justify a verdict of manslaughter but suggested that the appellant might be found guilty under subsection 6 of section 285 of driving

(1) (1867) C.C.R. 90.
(2) [1931] S.C.R. 33.

1949

GRANT v. THE KING

Kerwin J.

recklessly or in a manner dangerous to the public. The trial judge agreed with the statement of Crown counsel and while it is argued that in his charge he withdrew manslaughter from the jury, what he actually did was to direct the jury that they must bring in a verdict of not guilty. In so doing, he was following the proper practice, where he decides there is no evidence to go to the jury: *Walker* v. *The King* (1).

The only point in the appeal may be put thus. Since the trial judge removed from the jury any consideration of the evidence on the manslaughter charge, it cannot be said, in the words of subsection 3 of section 951, that the jury were "satisfied that the accused is not guilty of manslaughter." It is true that in returning a verdict of not guilty of that charge, the jury were only obeying the directions of the judge on a question of law but as it was their duty to follow those directions, the terms of the statute are met; that is, although acting in conformity with the judge's directions and their duty, the jury were satisfied that the accused was not guilty of manslaughter.

The appeal should be dismissed.

TASCHEREAU J.: Section 951(3) of the *Criminal Code* reads as follows:

(3) Upon a charge of manslaughter arising out of the operation of a motor vehicle the jury, and in the province of Alberta a judge having jurisdiction and sitting without a jury, if *satisfied* that the accused is not guilty of manslaughter but is guilty of an offence under subsection six of section two hundred and eighty-five may find him guilty of that offence and such conviction shall be a bar to further prosecution for any offence arising out of the same facts.

The "included offence" in the above section is the following:

285(6) Every one who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence and liable

(*a*) upon indictment to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand dollars or to both such imprisonment and fine; or

(*b*) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred dollars or to both such imprisonment and fine.

(1) [1939] S.C.R. 214 at 216.

The appellant was charged with manslaughter arising out of the operation of a motor vehicle, and he was tried before Mr. Justice Leblanc and jury, in September, 1948. At the conclusion of the evidence for the prosecution, the learned trial judge withdrew from the consideration of the jury the charge of manslaughter, and directed them to find the accused "not guilty" of manslaughter. He further added: "There is no more charge of manslaughter for you to consider". The jury retired and the appellant was found guilty of "reckless driving", which is the offence described in section 285(6) Cr. C. This conviction was upheld by the Court of Appeal, Chief Justice Richards dissenting (1).

It is submitted on behalf of the appellant, that the jury had no jurisdiction to render such a verdict, because before reaching such a conclusion, the jury must *satisfy* themselves that the accused was not guilty of manslaughter, and as the consideration of a finding on the manslaughter charge had been withdrawn from the jury, there was no jurisdiction to consider "reckless driving".

I am of the opinion that this contention fails. It is the duty of the trial judge, when the evidence does not disclose an offence, to withdraw the charge from the jury, and it is also the duty of the jury to accept the direction of the judge. The words found in section 951(3) that "the jury * * * if *satisfied* that the accused is not guilty of manslaughter but is guilty of an offence under subsection (6) of section 285 etc." do not mean only that the jury may be *satisfied* that the facts do not reveal a crime of manslaughter; these words also mean that the jury may be *satisfied* that in law there is no manslaughter, and the trial judge is the only competent authority to advise them on that matter. This is what happened in the present case, and the jury having been *satisfied* that in law there was no offence of manslaughter, could properly bring in a verdict of reckless driving.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: *Limerick & Limerick.*

Solicitor for the respondent: *H. W. Hickman.*

(1) 92 Can. C.C. 366.

1949
*Feb. 28
*April 12

JOHN HERBERT ROE.....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA

Criminal Law—Lottery, Conducting of—Criminal Code, s. 236(1) (c)—Offences under first and second part clause (c) distinguished—Red River (Barrel) Derby.

Section 236 of the *Criminal Code,* is to the effect that every one who does any of the things described in the section is guilty of an indictable offence. Subsection (*c*) is divided into two parts. The first part applies to a person who conducts or manages any scheme for the purpose of determining who, or the holders of what tickets are, the winners of any property so proposed to be disposed of. The second part applies to every person who conducts or manages any scheme by which any person upon payment of any sum of money shall become entitled under such scheme to receive from the person conducting or managing such scheme a larger sum of money than the sum paid by reason of the fact that other persons have paid any sum under such scheme.

In construing subsection (*c*), it must be read with the preceding subsections and therefore the words "so * * * disposed of" in the first part refer to the scheme indicated in the preceding subsections, that is, "by some mode of chance". The second part of subsection (*c*) however, stands alone. It does not refer to chance, or to mixed skill and chance, and the receiving of money is not subordinate to any of these elements. The rule of *ejusdem generis* therefor does not apply to it.

Since in the charge, preferred under the first part of subsection (*c*), there was mixed skill and chance, there was no offence, and the appeal as to it should be allowed.

As to the charge preferred under the second part of the subsection, the admission of the appellant that winning estimators will receive a larger sum of money than that paid for their tickets because the non-winning estimators have contributed to the scheme, brings it within the prohibition of the Statute and the appeal as to it should therefore be dismissed.

APPEAL from a decision of the Court of Appeal for Manitoba (1) which allowed an appeal by the Crown against the dismissal by a magistrate of two charges laid against the appellant for conducting a lottery in violation of s. 236 (1) (*c*) of the *Criminal Code,* R.S.C. 1927, c. 36,

*PRESENT:—Kerwin, Taschereau, Rand, Estey and Locke JJ.

(1) [1948] 2. W.W.R. 1000.

as enacted by 1943-44, c. 23, s. 8. (Dysart and Richards JJ.A., dissenting in part, would have dismissed the appeal as to the first charge.)

W. B. Scarth for the appellant.

W. J. Johnston for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—The appellant was acquitted by Magistrate D. G. Potter in the Provincial Police Court at Winnipeg, in Manitoba, of the two following charges under section 236 (*c*) of the *Criminal Code* of Canada.

First charge: That John Herbert Roe, between the first day of March, 1948, and the eighth day of March, 1948, at the City of Winnipeg, in the Province of Manitoba, unlawfully did manage a certain scheme, to wit The Canadian Tourist Club Red River (Barrel) Derby, for the purpose of determining which holders of what tickets are the winners of certain property, to wit money proposed to be disposed of by mode of chance, contrary to section 236 (*c*) of the *Criminal Code* of Canada.

Second charge: That John Herbert Roe, between the first day of March, 1948, and the eighth day of March, 1948, at the City of Winnipeg, in the Province of Manitoba, unlawfully did manage a scheme by which a person upon payment of a sum of money becomes entitled, under such scheme, to receive from the said John Herbert Roe, the person managing such scheme, a larger sum of money than the sum paid by reason of the fact that other persons have paid a sum of money under such scheme, contrary to section 236 (*c*) of the *Criminal Code* of Canada.

The learned magistrate reached the conclusion, that as the scheme managed and conducted by The Canadian Tourist Club, of which the appellant was the secretary, involved a certain degree of skill, there were no offences, and he dismissed both charges.

The Court of Appeal allowed both appeals and fined the appellant $25 on each, or in default of payment, 30 days imprisonment. On the first charge, however, Dysart and Richards JJ. would have dismissed the appeal. The appellant now appeals to this Court. (*Criminal Code* 1023 (2)).

The scheme which gave rise to the present proceedings is fully explained in the statement filed at the trial by the appellant himself.

The appellant manages a club in Room 26, Marlborough Hotel, in the City of Winnipeg, in the Province of Manitoba, which is known as The Canadian Tourist Club

1949

ROE
v.
THE KING

Taschereau J.

Red River (Barrel) Derby. At the time the ice was to leave the Red River, approximately on the 10th of April, 1948, an oaken barrel of 45 gallon capacity, with 300 pounds of ballast, was to be placed in the Red River at the International Boundary at Emerson, then, carried by the river current to Norwood Bridge in the City of Winnipeg, and during its entire route it was to be convoyed by a party in a canoe or boat, to guard it against becoming beached on the shore or snagged or caught in bushes or other obstacles. The exact period of time taken by the barrel in its journey was to be recorded by the promotors of the scheme and their engineers. Tickets were then being sold at fifty cents each, and the purchaser of a ticket was entitled to make one estimate as to the time the barrel would take to make its journey. Attached to each ticket was a coupon which constituted Class "B" membership in The Canadian Tourist Club for 1948, and each coupon bore a serial number identical to the serial number on the ticket to which it was attached. This membership entitled the member to attend Club meetings and functions and take part therein, but did not entitle him to vote. The name and address of the purchaser were recorded on the stub of the ticket, and the purchase price, the sum of fifty cents, was forwarded by the particular vendor of that ticket to the scheme headquarters in Winnipeg, the copy and ticket being retained by the ticket purchaser. The purchaser was then at liberty to fill in on the ticket, his estimate of the time the barrel would take to make its journey, and was asked to forward such estimate to The Canadian Tourist Club, before 6 P.M. April 7, 1948.

Before the charges were laid against the appellant, quite a number of these tickets had already been sold, and it was understood that the sale of these tickets would cease prior to the day the barrel was to be released on its journey. After the barrel had completed its journey, and the exact travelling time ascertained, the ticket holder who had made the closest estimate of the time taken, was to be declared the winner, and awarded first prize, the next nearest second prize, and so on as set out on the back of the ticket. It was also admitted by Mr. Roe that the winners would receive from the scheme, a larger sum of

money than that paid for their tickets, by reason of the fact that other non-winning ticket holders contributed to the scheme.

Dealing with the first charge, there can be no doubt, I think, that there is an element of chance in determining the exact period of time that the barrel would take to cover the 105 miles, which is the approximate distance between the International Boundary at Emerson, and Norwood Bridge in the City of Winnipeg.

It is of course obvious that on its journey, the barrel may wander from bank to bank of the river, depending on the wind and the current, and it is therefore impossible to calculate in advance the exact distance which the barrel will cover, and a participant in that scheme has therefore to resort to guess work. But, there is also an element of skill. The evidence reveals that with the information as to the distance of the course, namely 105 miles, and the average speed of the current, namely 1·92 miles per hour, an experienced Red River navigator would be in a much better position to estimate the number of hours it would take to cover the course than one entirely unacquainted with the Red River. A person capable of computing figures and putting his experience into figures would have a great advantage over the ordinary individual. Mr. Walter M. Scott, a professional engineer, testified that a 45 gallon capacity barrel, containing 300 pounds of water would be two-thirds full, and that if he were asked to make an estimate of the time such a barrel would take to float down the Red River from the point already mentioned to Norwood Bridge, he would take into consideration the distance, the average velocity of the current, the wind effect and the effect of eddies or cross currents. It is also his opinion and I believe it to be sound, that a Red River navigator would have a much better chance of making a correct estimate than one unaccustomed to the River. I believe that a man who has a reasonable knowledge of mathematics to allow him to compute and put on paper his own considerations, might make a reasonable estimation of the time the barrel would take to cover the course. There is, therefore, in my opinion a mixed element of chance and skill involved in this scheme.

1949

ROE
v.
THE KING

Taschereau J.

The first charge is based on the first part of section 236(*c*) of the *Criminal Code,* but this section must be read with sections 236, 236(*a*) and 236(*b*) and 236(*bb*). Section 236 is to the effect that every one who does any of the things described in the six subsections of that section, is guilty of an indictable offence. Subsection 236(*a*) deals with the making of any scheme for disposing of any property * * * *"by any mode of chance"*. Subsections 236(*b*) and 236(*bb*) deal respectively with the selling and transmitting of tickets *for any such scheme.* Section 236(*c*) under which the accused was prosecuted is divided into two parts. The first part has been in the Code for many years and the second was added in 1935. The first part applies to a person who "conducts or manages any scheme * * * for the purpose of determining who, or the holders of what * * * tickets * * * are the winners of any property *so proposed to be * * * disposed of"*.

It is clear to me that the words "so * * * disposed of" refer to the scheme indicated in the preceding subsections, that is, "by some mode of chance". If there is merely skill or a mixed element of skill and chance, there is no offence.

In *Rex* v. *Regina Agricultural and Industrial Exhibition* (1) Mr. Justice Martin said at page 135:

> Under sec. 236 (*a*) and under similar provisions contained in early statutes in Canada dealing with similar matters, and under the lottery Acts of England, it has been held that "a mode of chance" involves the absence of any skill; in other words, if it is found that skill enters into the estimates or guesses, there cannot be a conviction under the section.

At page 138, Mr. Justice Martin further says:

> Once it is admitted that a person of better judgment and better powers of observation might make a closer estimate, it is at once plain that skill plays a part, and the matter cannot be a "mode of chance".

The case of *Bailey* v. *The King* (2) has been cited, but for the following reasons given by Mr. Justice Dysart (3) I do not think that it applies:

> And in *Bailey* v. *The King*, 1938 S.C.R. 427, the Supreme Court of Canada, confirming a decision of the Appeal Court of Ontario, upheld a conviction of a drug store keeper for operating a "skill puzzle board". The board offered prizes for all correct answers to listed questions on obscure points of fact—which questions could have been answered with unfailing accuracy if the player would make adequate research. The Court, applying its "knowledge of the usual everyday

(1) [1932] 2 W.W.R. 131.
(2) [1938] S.C.R. 427.
(3) [1948] 2 W.W.R. 1000 at 1009.

custom of mankind", held that "the ordinary person entering the store would pay "ten cents" "for the chance of winning a prize, without critically examining the questions and returning later with a correct answer or answers" to one or more of them, and that therefore *the price was paid not for skill, but for chance, or at least for mixed chance and skill.* In that case, it is to be noted the issue was different from the issue in the present case. There the question was whether or not the accused was guilty under s. 986 (2) of having on his premises "a means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting"; here the issue under s. 236 (1) (*c*) is whether or not the accused was guilty of conducting a scheme, not of mixed chance and skill, but of chance solely. By upholding that conviction, the Supreme Court did not even pretend to say that the "skill puzzle board" was not a game involving some skill.

I agree with the above observations and I, therefore, come to the conclusion that as to the first charge, the appeal should be allowed.

The second charge is laid under the second part of subsection (*c*) which, as already stated, was introduced in the Code in 1935. It applies to every person who conducts or manages any scheme, by which any person, upon payment of any sum of money, shall become entitled under such scheme to receive from the person conducting or managing such scheme, a larger sum of money than the sum paid, by reason of the fact that other persons have paid any sum of money under such scheme. This part of section 236 (*c*) which stands alone, does not refer to chance, or to mixed chance and skill. The receiving of money is not subordinated to any of these elements. The larger sum of money is paid to the winner by reason of the fact that other persons have paid money under the scheme.

To my mind, the rule of *"ejusdem generis"* does not apply. The admission signed by the appellant that the winning estimators will receive a larger sum of money than that paid for their tickets, because other non-winning estimators have contributed to the scheme, brings the case within the prohibition of the Statute.

I would dismiss the appeal on the second charge.

Appeal allowed as to the first charge and conviction quashed. Appeal as to second charge dismissed.

Solicitors for the appellant: *Thompson & Scarth.*

Solicitor for the respondent: *J. O. McLenaghen.*

1949

*Mar. 23, 24
*May 9

WILLIAM CLARENCE CULLEN .....APPELLANT;

AND

HIS MAJESTY THE KING .....DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO

Criminal law—Appeals by Attorney General—Whether Crown Counsel's failure to object to misdirection in charge to jury bars Crown's right of appeal—The Criminal Code, R.S.C. 1927, c. 36, s. 1013(4), as enacted by 1930, c. 11, s. 28.

Section 1013(4) of the *Criminal Code* provides that: "Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone."

The appellant was acquitted by a jury of a charge laid under s. 276(*a*), and of a second charge laid under s. 292 (*a*), of the *Criminal Code*. The Attorney General of Ontario as provided by s. 1013 (4) of the *Code* (*supra*) appealed, and the Court of Appeal for Ontario allowed the appeal, set aside the verdict, and ordered a new trial. On appeal to this Court—

Held: (Rand J. dissenting), that the proper rule to be followed by an appellate court upon an appeal by an attorney general under s. 1013 (4) from a verdict of acquittal is that the onus is on the Crown to satisfy the Court that the verdict would not necessarily have been the same if there had been no error in law in the trial judge's charge, and that here such onus had been discharged.

Held: also, that there is no rule of law nor of practice that failure of counsel, whether for an accused or for the Crown, to object to a charge to a jury on the grounds of misdirection is of necessity a bar to the right of appeal. No such rule applicable in all circumstances exists, and in the circumstances of the present case, such failure by Crown counsel did not affect the right of appeal.

Per: Rand J., (dissenting), "Any ground of appeal", referred to in s. 1013 (4) of the *Code*, must be limited to matters in which the course of the Crown is thwarted or impeded unwarrantably by the Court. It does not arise from misdirection or non-direction where no objection was taken by Crown Counsel at the trial and there are no circumstances implicating the accused in that action.

APPEAL by the accused from the judgment of the Court of Appeal for Ontario, (1), allowing an appeal by

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

(1) [1949] O.R. 10.

the Attorney General for Ontario against the accused's acquittal by a jury on charges under ss. 276 (*a*) and 292 (*a*) of the *Criminal Code*, R.S.C., 1927, c. 36.

Wilfred Judson K.C. and *John W. Graham* for the appellant.

W. B. Common K.C. for the respondent.

The judgment of the Chief Justice, Taschereau and Locke, JJ. was delivered by:

LOCKE, J.:—The charges against the appellant were laid under secs. 276 (*a*) and 292 (*a*) of the *Criminal Code* and the evidence adduced by the Crown, if believed, proved the commission of both offences. The girl, Doreen McMunn, aged seventeen, gave evidence that she had been induced by the appellant to go with him to a room in a hotel in Perth and that there he had beaten her severely, choked her into a state of unconsciousness, attempted to rape her and indecently assaulted her. Doctor Hagyard, a physician practising in Perth, had examined the girl on the day following the assault and found a lot of bruising on the right side of her face, her right lip cut, her neck badly swollen and her chest so badly bruised and swollen that he expected that some of the ribs or the breast bone might have been fractured. In addition to these injuries, the upper part of her arms was swollen and bruised and there was a great deal of bruising on the right side of her neck and, in the opinion of the Doctor, the force applied to her neck must have been so severe as to cause unconsciousness. Further evidence as to her injuries was given by the witness Nagle who came to the hotel room in response to the girl's cry for help and found her with a cut on her lip and on one of her eyes and the room in a state of disorder. The Chief of Police who came to the room shortly thereafter and saw the girl observed the cut on her lip and red welts on both sides of her neck. In addition to this evidence, a statement made by the appellant to the Chief of Police was put in evidence: this was to the effect that he had come to Perth that day, that he had been drinking and that while he remembered that Doreen McMunn had been in his room he did not remember what had happened or seeing the Police or leaving the hotel. He made no statement regarding the alleged offences.

1949

CULLEN
v.
THE KING

Locke J.

In the charge to the jury the learned trial judge instructed them in part as follows:—

> Now as I understand the defence to both these charges, it is that the girl consented and secondly, the accused's condition from drinking, that he was drunk and so drunk that he did not know what he was doing.

and again:—

> Now, counsel for the defence has referred to several things substantiating, as he presents the defence that there was consent—oh yes, there is also this, that he mentioned there is no corroboration of the essentials to this offence and it is my duty, I think, to charge you that it is unsafe—I don't know there is any statute that says you must have corroboration in connection with either of these two charges, but speaking as a matter of common sense and common experience and observation and practice in the courts, it is the duty of the judge to tell you that it is dangerous, it is unsafe, to convict on the evidence of the girl alone, unless it is corroborated by other evidence implicating the accused as to the offence charged. That doesn't mean that everything, that all the essentials must be corroborated but there must be corroboration to the extent that you feel, you find there is indication of implication of his guilt of the offence charged. Now, as to both these charges, I think as to both of them, if the girl consented that is a defence with the exception I think, and my attention will be drawn to what I am saying later if it is thought I am wrong, as to the first charge, that is the one with intent to commit rape choking so as to render unconscious or incapable of resistance, that if the consent there is brought about by threats and fear so that you find, you feel you should find, it is not a real consent, then it isn't consent. Now, in this matter of consent, the mere fact the girl puts up some resistance it seems to me doesn't necessarily indicate that she has not consented. She might make a mild sort of physical protest not wanting to indicate too readily a surrender of her virtue and still be willing enough that the action occur. The point for you to decide is whether or not in fact on the evidence you believe there was or was not consent, on the conduct and evidence otherwise pertinent to that.

While the learned trial judge thus informed the jury that one of the defences was that the accused was so drunk he did not know what he was doing, the only evidence on the point was that of the Chief of Police who said that it was evident that the man had been drinking but that he was quite steady on his feet, his speech was quite normal and, in the officer's opinion, he was not intoxicated. As to those portions of the charge dealing with the necessity for corroboration, the learned trial judge was clearly in error. There was in law no necessity for corroboration but, had there been, there was ample corroboration in the evidence of the doctor and of Nagle and the Chief of Police of material parts of the girl's story implicating the

accused. This the trial judge failed to point out to the jury. As to the instructions on the question of consent, I agree with Mr. Justice Hogg that consent would not be a defence to either charge. There were other material defects in the charge mentioned in the Notice of Appeal given by the Attorney-General but it appears to me to be unnecessary to consider them.

At the conclusion of the judge's charge, counsel for the Crown made no objection to it and the case went to the jury who acquitted the appellant on both charges. The important question to be determined upon this appeal is as to whether the failure to object to the charge bars the right of appeal given to the Attorney-General under sec. 1013 (4) of the *Code*.

The right of appeal to the Court of Appeal against any judgment or verdict of acquittal in a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone was first given by s. 28, c. 11, Statutes of Canada 1930. As to the manner of the exercise of the right thus given to the Attorney-General, subsection 5, enacted at the same time, provided that the procedure upon such an appeal and the powers of the Court of Appeal, including the power to grant a new trial, should *mutatis mutandis,* in so far as the same are applicable to appeals upon a question of law alone, be similar to the procedure prescribed and the powers given by ss. 1012 to 1021 of the *Code* and to the rules of court passed pursuant thereto and to s. 576. The powers of the court on an appeal by the Attorney-General are thus clearly defined as co-extensive with its powers in dealing with a question of law on an appeal from conviction. In the case of an appeal by a convicted person, a failure on the part of his counsel to object to the admissibility of material evidence was held not to prejudice his right of appeal from a conviction in *Rex* v. *William Stirland* (1). The rule in civil matters was stated by Duff J. as he then was, in delivering the judgment of the full Court of British Columbia in *Scott* v. *Fernie* (2). In that action which was to recover damages for negligence, questions apparently approved by counsel for both parties were submitted to a jury and a verdict found for the

(1) (1943) 30 Cr. App. R. 40. (2) (1904) 11 B.C.R. 91.

1949

CULLEN v. THE KING

Locke J.

plaintiff. The defendant appealed, asserting as one of the grounds that a further issue of fact should have been submitted. Duff J. there said:

> It is, perhaps, needless to say that in these circumstances, but for the legislation hereinafter referred to (i.e. s. 66 of the *Supreme Court Act* of British Columbia, 1904), the rule long established, which holds a litigant to a position deliberately assumed by his counsel at the trial, would preclude in this Court any discussion of the sufficiency of the findings to support the judgment. The rule is no mere technicality of practice; but the particular application of a sound and all-important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

In *Spencer* v. *Field* (1), the judgment of Davis J. with which Duff C.J.C. and Hudson J. concurred, expressly approved what had been said in *Scott* v. *Fernie* and referred to "the long established rule which holds a litigant to a position deliberately assumed by his counsel at the trial." In *Wexler* v. *The King* (2), the application of sec. 1013(4) of the *Code* was considered by this Court. The appellant had been tried on a charge of murder and the case presented by the Crown against him was that he had intentionally shot a woman with the intention of killing her. The contention of the defence was that the shooting was the result of an accident and the trial judge instructed the jury that if they believed the account given by the accused he was entitled to be acquitted, and this instruction was accepted by both counsel as correctly stating the single issue of fact which was to be put before the jury. The jury returned a verdict of not guilty but on an appeal the verdict was set aside and a new trial directed on the ground that the trial judge had erred in omitting to instruct the jury first, that from certain facts disclosed by the evidence of the appellant the jury might have convicted the accused of murder under s. 259(*c*) and (*d*) of the *Code*, and secondly, that the accused having in his charge a loaded firearm and being bound to take reasonable precautions to avoid danger to human life, the jury might have convicted the accused of manslaughter under ss. 247 and 252(2). Counsel for the Crown in this Court stated that the only issue which counsel for the Crown intended to put before the jury was that in fact put before them. Sir Lyman Duff C.J. in delivering judgment allowing the

(1) [1939] S.C.R. 36. (2) [1939] S.C.R. 350.

appeal said that the point was not merely that the Crown did not take exception to the learned judge's charge, but that the conduct of the trial with respect to the single issue of fact which was raised by the case put forward by the Crown was admittedly unimpeachable and that the jury had been told by the Crown that the determination of that issue in favour of the accused would entitle him to an acquittal. Kerwin J. who delivered the judgment of the majority of the Court, and with whose reasons the Chief Justice also agreed, said that the real point to be determined was whether the Crown was entitled to an order for a new trial in order to present an entirely new case against the accused and pointed out that during the course of the trial nothing of the nature then sought for the first time to be advanced had been submitted for the consideration of the jury.

In *Rex* v. *Munroe* (1), the Attorney-General appealed from the acquittal of Munroe, who had been charged with arson, on the ground of misdirection, although no objection was taken by the Crown to the charge at the trial. Sloan J.A., now Chief Justice of British Columbia, was of the opinion that, while the failure of counsel for an accused to object to a charge was not necessarily fatal to the right of the convicted appellant to raise the issue on appeal, this did not apply in favour of the Crown on an appeal from an acquittal, saying in part:

> Whether the prisoner is defended or undefended when Crown counsel elects to go to the jury without objection to the charge, then he is, in my opinion, bound by the resultant verdict.

and referred to the decision of this Court in *Wexler's case* (2). Martin C.J.B.C. agreed with Sloan J.A. and said that the practical and grave consequences of allowing such an appeal for misdirection where no objection had been made would be that the Crown "will get a new trial because of its own oversight at the expense of the accused" and said further that, in his opinion, the Court should decline to entertain the appeal because to do so would be to violate a long and well established principle of fundamental justice. MacDonald J.A. said that he preferred not to join in the view expressed by the Chief Justice that failure to object was fatal to the Crown's case and McQuarrie J.A. and O'Halloran J.A. agreed with him.

(1) (1939) 54 B.C.R. 481. (2) [1939] S.C.R. 350.

1949

CULLEN v. THE KING

Locke J.

However, in *Rex* v. *Fleming* (1), the Court of Appeal for British Columbia held that the failure of Crown counsel to object to the judge's charge was a fatal objection to an appeal from an acquittal on the ground of misdirection and expressly approved the judgments of Martin C.J.B.C. and Sloan J.A. in *Munroe's case*. In *Rex* v. *Rasmussen* (2), Barry C.J.K.B. expressed the opinion that the failure to object to a charge on the ground of non-direction did not affect the right of appeal, though no objection was made at the time.

There is no rule of law nor, in my opinion, of practice that failure of counsel, either for an accused or for the Crown or in civil matters for a litigant, to object to a charge to the jury on the ground of misdirection, is of necessity a bar to the right of appeal. No such general rule applicable in all circumstances exists. In civil matters the true principle has been stated in *Scott* v. *Fernie* and *Spencer* v. *Field*. I do not think it can be said that in all criminal proceedings the principle applied in civil matters must be followed. The right of appeal given to the Attorney-General by the amendment of 1930 introduced a new principle into the administration of criminal justice, that is, that a man might under certain circumstances be tried again upon a criminal charge after having been acquitted. It would be, in my opinion, inadvisable to attempt to lay down a general rule in a matter of this nature. In the present case, the accused did not give evidence and called no witnesses and, from the terms of the charge, it is clear that it was the address of counsel for the accused that led the learned trial judge into giving the erroneous instructions on the questions of consent and corroboration. There is nothing to indicate what the nature of the supposed consent was. It can scarcely have been contended that this young girl had given her consent to being beaten, choked and indecently assaulted with violence, even if her consent would have been an answer to the charge. The Crown has discharged the onus cast upon it of satisfying the Court of Appeal that had the jury been properly instructed the verdict would not necessarily have been the same, a conclusion with which I entirely agree. The principle followed in the cases of

(1) (1945) 61 B.C.R. 464. (2) (1934) 62 Can. C.C. 217.

1949

CULLEN v. THE KING

Locke J.

Wexler, supra and of *Savard* and *Lizotte* (1) has here no application. Under these circumstances, I think the failure to object to the judge's charge does not affect the right of appeal.

This appeal should be dismissed.

KERWIN J.:—I would dismiss the appeal. I adhere to the view expressed by me in *White* v. *The King* (2), that the proper rule to be followed by an Appellate Court upon an appeal by an attorney general from an acquittal, even when such acquittal is by a jury, is that the onus is on the Crown to satisfy the Court that the verdict would not necessarily have been the same if there had been no error in law in the trial judge's charge.

As to the point that the Crown is deprived of an appeal where counsel for the Crown at the trial does not object to the judge's charge (as was the case here), I am of opinion that this result cannot follow in all cases. There may be circumstances where the result of such a failure on the part of Crown counsel would be fatal but not here.

RAND J. (dissenting):—The appellant was charged under section 276(*a*) of the *Criminal Code* with having attempted to render a young woman of 17½ years unconscious or incapable of resistance by choking her with intent to enable him to commit rape upon her. On the evidence presented by the prosecution he was acquitted. The Attorney-General thereupon appealed and a new trial was ordered.

The point of law on which the case comes to this Court is very simple. The acquittal was set aside because of what was considered serious misdirection and non-direction to the jury, as to which, however, there was no objection or request on the part of counsel representing the Crown; and the question is whether the Attorney-General in such a case can bring himself within the intendment of section 1013(4).

The right of appeal given to the Crown by that section is an innovation in the procedure of criminal law, and I have been unable to discover that it exists, certainly in the form in which the *Code* provides, in any other common law jurisdiction. It is such a striking departure from

(1) [1946] S.C.R. 20. (2) [1947] S.C.R. 268.

1949

CULLEN v. THE KING

Rand J.

fundamental principles of security for the individual that I find it necessary to examine the language of the statute in the background in which it ought I think to be interpreted.

The subsection reads:—

> Notwithstanding anything in this Act contained, the Attorney-General shall have the right to appeal to the Court of Appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

What then is "any ground of appeal"? What are the considerations necessary to a "ground of appeal" generally in the administration of law? That it is not equivalent to error in law *simpliciter* occurring in the course of proceedings, is, I should say, undoubted, but to come to any clear or definite answer to the question we must, I think, recall to mind the basic character of proceedings in judicature.

In the common pleas presented to courts, contests between individuals over conflicting claims, the theory of the common law is that the court resolves the dispute according to the law of the land, but in the role of an impartial arbiter: it is not of itself concerned in the merits of the conflict though it may be said to be so in the settlement of it. Either party may deal with or dispose of his private right by any of the modes recognized, including abandonment, as he pleases; he is likewise in command of his case before the tribunal, and he is bound by the presentation which he makes. He is presumed to know his legal rights, and if he stands by when he can and should object or protest against what is a disregard of prescribed rules, he is not, in general, permitted thereafter to complain of what he could then and there have had corrected or have protested. In other words, a ground of complaint must be based upon the denial of what in law he is entitled to and endeavours to assert: but being able to deal with his rights as he sees fit he will not be permitted to play fast and loose with the serious conduct of a tribunal exercising a vital function of government: Lord Halsbury in *Nevill* v. *Fine Art Co.* (1), at p. 76; *Scott* v. *Fernie* (2).

(1) [1897] A.C. 76.

(2) (1904) 11 B.C.R. 91.

In the administration of the criminal law, the pleas of the crown, however, the underlying conception is in some respects different. The King symbolizes the "fountain of justice", but at the same time there is committed to him in his executive capacity the functions of enforcing the public law against offenders. All prosecutions are in his name, i.e. they are "at the suit" of the King; and in a solemn proceeding it is determined by the "country" in the form of twelve fellow citizens, almost invariably representing the community in which the act has been committed and generally to which the accused belongs, whether or not the latter is guilty as charged. In that formal process the notion of an issue of "rights" in a civil sense is out of place.

The characterizing feature is the scope of executive discretion. Arising from the same source as the abrogated historical power of dispensation is the right of *nolle prosequi* preserved in effect by section 962 of the *Code,* by which the Attorney-General may, at any point up to judgment, stay proceedings; and notwithstanding the right of the subject to initiate prosecutions, this power obviously puts the Crown in command of all indictments: *Rex* v. *Edwards* (1). Then either before or after judgment the prerogative of pardon can be exercised. Finally there is the unchallengeable discretion to determine what evidence shall be presented and what not, what the form of the case put to the jury shall be and what not, what course of action shall be taken at any stage of the prosecution and what not, and just as clearly, what objections to the charge to the jury, either for what has been improperly stated or not stated at all, shall be taken or omitted. It is the matter and the form of fact which the Crown exhibits to the jury, either by way of evidence or address or of any other participation in the proceedings, including objection to or acquiescence in any act of the court, from which in the aspect of the prosecution the guilt or innocence of the accused is to be determined; and the Crown will not be held to have a ground of appeal where the matter complained of was that the trial judge had not put to the jury a case on the facts not asked for by the Crown and

(1) (1919) 2 W.W.R. 600.

1949

CULLEN v. THE KING

Rand J.

different from that to which the Crown limited itself: *Wexler* v. *The King* (1), followed in *Savard and Lizotte* v. *The King* (2), in which the conviction on the case put by the Crown and found by the jury could not be supported.

At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical power of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy. The position of the accused is in sharp contrast to that of the prosecution. He is charged with a violation of public law; but he is entitled to remain passive, and to have the charge proved if it can be proved only in accordance with those observances which the law for his protection has prescribed. The setting aside of a conviction or the granting of a new trial to a person who has been found guilty in circumstances in which there has been a failure in those essential requirements seems to me to be a necessary corollary of that right unless no substantial wrong has been done or unless by affirmative conduct on his part he can be said to have implicated himself in the impropriety later objected to.

But the abstention of the Crown in similar circumstances is quite another matter. Section 1013(4) does indeed give a right of appeal, but "any ground of appeal" must I think be limited to matters in which the course of the Crown is thwarted or impeded unwarrantably by the court. A failure on the part of crown counsel to object to improper or insufficient directions must arise either from a lack of appreciation of their objectionable character, or a deliberate decision for various reasons to allow matters to stand as they are. Are we then to say that that lack of appreciation is a "ground of appeal" sufficient to supersede such a fundamental rule as that against second jeopardy? And if the omission is deliberate, have we not immediately, in an appeal, what has been termed "playing fast and loose" with the court?

(1) [1939] S.C.R. 350. (2) [1946] S.C.R. 20.

If the ground of allowance of an appeal goes to the degree of failure on the part of the court, to the point say of apparent miscarriage, there is of course a corresponding delinquency on the part of crown counsel; and can that justify such an intolerable burden on the accused as necessarily follows? An innocent person may thus be subjected to a most crippling expense, to say nothing of the pain or humiliation. Criminal proceedings have not yet become a species of semi-respectable contests in which effects are in dollars and cents only. A prosecution is still too serious a matter to be assimilated with party litigation. The ruling which confirms the order of the court below in this case places the appeal of the Attorney-General on the same footing as that of the accused, and virtually identifies criminal with civil appeal. I quite agree that should the accused be involved with improper action by crown counsel wholly different considerations arise; but it is following a will-o-the-wisp justice, in cases in which, from a written record, the action of a jury seems inexplicable, to depart from principles long verified in experience. There is to be avoided, also, the danger of treating a case of this sort as being an adjudication between the victim and the accused. It is not that. What is being asserted is the paramount interest of the state in maintaining order and personal security. The safeguarding of that interest has been committed to public officers, and we must leave with them the manner in which it is to be vindicated. If they fail, they may call upon themselves public condemnation; but on the soundest considerations of policy, the course of judicial action should not be grounded on the court's reaction to the individual case. Surely an accused, as a condition of a definitive acquittal, is not to be forced to see that the charge is in order as against himself. He is entitled to say that he can be convicted only in accordance with the requirements of law; is he to be told that he can be acquitted only if the Attorney-General or his representative has done his duty as a court of appeal may conceive it?

In *Rex* v. *Munroe* (1), Sloan J.A., the present Chief Justice of British Columbia, came to the conclusion to

(1) (1939) 54 B.C.R. 481.

1949

CULLEN v. THE KING

Rand J.

which I am driven and with him Martin C.J. agreed. Their view was later followed unanimously by the Court of Appeal of that province in *Rex* v. *Fleming* (1).

For the foregoing reasons, I am of the opinion that the right of appeal given to the Attorney-General does not arise for misdirection or non-direction where no objection was taken by crown counsel at the trial and there are no circumstances implicating the accused in that action. I would, therefore, allow the appeal and restore the verdict of acquittal.

Appeal dismissed.

Solicitors for the appellant: *Daly, Thistle, Judson & McTaggart.*

Solicitor for the respondent: *W. B. Common.*

1949

*May 30

*Jun. 24

THE CITY OF MONTREAL (SUPPLIANT) . . . APPELLANT;

AND

HIS MAJESTY THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Petition of right—Motor vehicle—Collision between two vehicles—Gratuitous passengers suing one of the owners—Settlement made out of court—Whether amount of settlement recoverable from co-author if payment made by non responsible owner—Prescription—Arts. 1118, 2262 C.C.

Following a collision between appellant's fire pump and respondent's truck, the three gratuitous passengers of the truck sued appellant for damages for personal injuries. Only one of the actions was proceeded with and the jury's verdict, after assessing the damages, was that it was impossible to say that appellant was 100 per cent responsible. The trial judge did not render judgment on that verdict and eventually appellant settled the three claims out of court. Then appellant, by Petition of Right, claimed from respondent the amounts it had paid in these settlements together with the damages to the fire pump, alleging that respondent's employee was solely responsible for the collision. The Exchequer Court found that respondent was the only one responsible but that appellant's claim was prescribed under Art. 2262 C.C. except as to the damages to the pump.

*PRESENT. The Chief Justice and Kerwin, Taschereau, Kellock and Locke JJ.

(1) (1925) 61 B.C.R. 464; [1945] 4 D.L.R. 800.

Held: As there was no legal obligation for the appellant to indemnify the victims of the accident, since the respondent alone was responsible for the collision, the moneys paid by the appellant to the victims could not be recovered from the respondent.

Held, also that the prescription of an action based on Art. 1118 C.C. does not begin to run until the judgment liquidating the damages or, if no judgment, until payment of the debt by one of the codebtors, as it is only then that the codebtor can recover the share and portion due by his codebtor.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J., dismissing appellant's petition of right except as to damages to the fire pump on the ground that the appellant's claim was prescribed under Art. 2262 C.C.

D. A. McDonald, K.C., for the appellant.

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

The judgment of the Court was delivered by

TASCHEREAU, J.:—Le 12 avril 1944, une voiture à incendie, propriété de la ville de Montréal, est venue en collision avec un camion appartenant à l'intimée et conduit par Mlle Marguerite Thibault, qui était alors dans l'exercice de ses fonctions. Cette dernière conduisait bénévolement trois passagers, Shirley Harris, John Fleming et Eric Lawrence Brueton. Comme conséquence de cette collision, ces derniers ont été sérieusement blessés, et ont réclamé de la Cité de Montréal une compensation pour les blessures corporelles dont ils furent les victimes. Ils ont respectivement évalué leurs dommages à $14,284.96; $12,715.44 et $3,513.50.

Seule, l'action de Harris a été entendue devant la Cour Supérieure de Montréal. Le jury qui a été saisi de cette cause, en est arrivé à la conclusion que le demandeur avait souffert des dommages estimés à $8,699.96, mais a déclaré qu'il lui était impossible de dire que la Cité de Montréal était responsable de cet accident dans une proportion de 100 p. 100. Le juge présidant le procès n'a rendu aucun jugement pour confirmer ce verdict, et il en est résulté qu'un règlement est intervenu entre Harris et la Cité de Montréal pour la somme de $4,250.00. Les deux autres réclamations ont aussi été réglées pour $3,250.00 et $2,750.00. La Ville de Montréal, dans les trois cas, a payé les frais. Après avoir effectué ces paiements, l'appelante a produit devant

1949

CITY OF MONTREAL v. THE KING

Taschereau J.

la Cour d'Échiquier une réclamation contre Sa Majesté, au montant de $13,090.58, représentant les montants payés en satisfaction des règlements intervenus. A cette somme a été ajouté $369.53, valeur des dommages à la pompe à incendie.

La Pétition de Droit allègue que la faute de cet accident repose entièrement sur l'employée de l'intimée, conductrice du camion, et que la Ville de Montréal, ayant payé les montants ci-dessus mentionnés, a droit d'exercer en vertu de l'article 536 (B) de sa charte, une action en garantie contre l'intimée pour se faire indemniser des montants qu'elle a payés, en outre des dommages occasionnés à sa pompe à incendie.

La défense de Sa Majesté le Roi est que la Ville a payé ces montants pour satisfaire ses propres obligations, que cette réclamation est prescrite, sauf l'item de $369.53, et qu'il n'y a pas de lien de droit entre l'appelante et l'intimée. M. le Juge Angers de la Cour d'Échiquier en est venu à la conclusion que toute la responsabilité de ce malheureux accident reposait sur l'intimée, mais que la réclamation de la Ville, en remboursement des montants qu'elle avait payés était prescrite en vertu de l'article 2262 du *Code Civil*. Il n'a maintenu les conclusions de la Pétition de Droit que pour la somme de $369.53, car dans ce cas, ce ne serait pas la prescription d'une année, mais bien celle de deux années qui s'appliquerait.

Il importe d'abord d'examiner cette question de prescription.

L'action instituée par Harris contre la Cité de Montréal, est bien, pour employer l'expression du *Code Civil*, article 2262 (2), "une action pour injures corporelles", et elle se prescrit par un an. Comme conséquence des dommages qu'il a subis, Harris devait instituer son action contre la Ville, dans une année du fait dommageable. L'accident étant arrivé le 12 avril 1944, il était encore en conséquence dans les délais voulus, quand il a fait signifier son action à la Cité de Montréal, dans le cours du mois d'octobre 1944. Il a jugé à propos de ne pas exercer son recours contre Sa Majesté le Roi, qui serait conjointement et solidairement responsable avec la Cité de Montréal, si les deux étaient co-auteurs du délit dont les victimes ont souffert (*Code*

Civil, art. 1106). Mais il n'en a pas été ainsi; seul le recours contre la Ville a été exercé. La Ville a réglé et a payé les trois réclamations, entre mai et juillet 1945, et aujourd'hui, son action contre Sa Majesté le Roi ne peut être autre qu'une action récursoire, basée sur les dispositions de l'article 1118 du *Code Civil*, qui se lit ainsi:

1118. Le codébiteur d'une dette solidaire qui l'a payée en entier, ne peut répéter contre les autres que les parts et portions de chacun d'eux, encore qu'il soit spécialement subrogé aux droits du créancier.

Si l'un d'eux se trouve insolvable, la perte qu'occasionne son insolvabilité se répartit par contribution entre tous les autres codébiteurs solvables et celui qui a fait le paiement.

Alléguant que Sa Majesté est seule responsable de l'accident, la Ville réclame la totalité des montants qu'elle a payés en règlement. Je suis clairement d'opinion que cette action ne se prescrit pas par une année à partir de la date du fait dommageable ou du délit. La prescription ne commence à courir qu'à partir de la date où la Ville pouvait exercer son recours contre l'intimée. Si le verdict du jury avait été confirmé par un jugement, c'est à cette date que la prescription commençait à courir. Admettant que la Ville puisse exercer une réclamation, comme il n'y a pas eu de jugement, le jour *a quo* de la prescription est la date des paiements versés aux victimes. Contrairement à ce qui arrive dans les provinces de droit commun, dans la province de Québec, le juge adjugeant sur la réclamation d'une victime contre des co-auteurs d'un quasi-délit, ne détermine pas la proportion de responsabilité des défendeurs. Il déclare s'il y a responsabilité conjointe et solidaire, et c'est à partir de ce moment que l'article 1118 du *Code Civil* trouve son application. Il appartient alors à celui qui a payé la dette en totalité d'exercer son recours contre le co-débiteur de la dette solidaire. C'est d'ailleurs ce qui a été déterminé par cette Cour dans la cause récente de *Thériault* v. *Huctwith* (1), où il a été décidé:

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.

Dans la présente cause, il n'y a pas de jugement déclarant la solidarité entre les co-auteurs du quasi-délit, mais il n'est pas nécessaire que les tribunaux interviennent pour

(1) [1948] S.C.R. 92.

1949

CITY OF MONTREAL v. THE KING

Taschereau J.

que la solidarité existe. Du moment que les parties sont tenues solidairement, par l'opération de la loi, l'une des parties ainsi solidairement obligée, et de qui le paiement est réclamé, peut payer volontairement, et exercer contre son co-débiteur, les droits que lui confère l'article 1118 du *Code Civil*. C'est à la date où elle effectue ce paiement que naît son droit d'agir et qu'elle peut validement exercer son recours contre ceux qui sont solidairement tenus avec elle. Avant cela, le droit de l'un des co-débiteurs contre l'autre est plus qu'incertain. Il ne peut donc pas être susceptible de prescription.

Dans une cause de *Montreal Tramways* v. *Eversfield* (1), la Cour d'Appel de Québec a justement décidé ce qui suit:

> La prescription d'une action récursoire, par laquelle la compagnie des tramways de Montréal réclame au défendeur des dommages-intérêts qu'elle a été condamnée à payer à la victime d'une collision, a son point de départ à compter du jugement qui alloue les dommages-intérêts à la victime et non à compter de la collision.

Et à la page 556, M. le Juge Pratte s'exprime dans les termes suivants:

> Il me semble que le plus sûr moyen de vérifier si la prétention du défendeur est fondée ou non est de préciser la cause juridique de l'obligation que l'appelante demande au défendeur d'exécuter. Pourquoi ce dernier serait-il tenu de payer le montant réclamé? Serait-ce parce qu'il est responsable de l'accident allégué par la demanderesse? Il me paraît bien que non, puisque la seule allégation de cet accident et de la faute du défendeur ne suffirait pas à justifier la conclusion de la demande. Si la demande peut être accueillie, c'est uniquement à raison de l'obligation de payer alléguée par la demanderesse. C'est cette obligation de payer une dette que la demanderesse prétend être celle du défendeur, qui serait la cause juridique de l'obligation du défendeur. Il est bien certain que le quasi-délit imputé au défendeur a joué un rôle nécessaire dans la naissance de la créance de la demanderesse, mais ce n'est pas lui qui a été la cause juridique du droit que cette dernière entend exercer.

Ceci doit être, je crois, considéré comme la véritable jurisprudence de la province de Québec, si l'on tient compte surtout des remarques des autres collègues de M. le Juge Pratte dans la même cause. D'ailleurs, en France, la théorie est la même. Planiol et Ripert (Traité Pratique de Droit Civil, Vol. 7, page 685) s'expriment ainsi:

> Le point de départ exact du délai est en principe le jour où est ouverte l'action en justice et où le créancier a commencé à pouvoir l'intenter.

(1) Q.R. [1948] K.B. 545.

Un auteur plus ancien, parmi plusieurs autres, entretient la même opinion. Vide Vazeille, Traité de prescription, Vol. 2, page 221:

> Celui qui, par l'effet de la solidarité, paye pour d'autres, ne change pas la nature de leur dette. Sa reconnaissance interrompt la prescription, suivant l'article 2249; mais en payant il n'est que subrogé au droit des créanciers, pour la part de ses co-débiteurs, d'après l'article 1251; et si la prescription ne date plus contre eux *que du jour de ce paiement*, dans son nouveau cours, au moins elle n'est pas en termes différents; elle est toujours, comme pour le créancier primitif, de trente ans, pour le capital, et de cinq ans, pour les intérêts.

Dans le cas qui nous occupe, la cause juridique de l'obligation de Sa Majesté le Roi, n'est pas le quasi-délit qu'on lui impute, mais l'obligation que lui impose la loi, de rembourser à la Cité de Montréal un montant proportionné au degré de sa responsabilité.

Je suis d'opinion que le jugement du Conseil Privé dans la cause de *La Congrégation des Frères Maristes* v. *Regent Taxi* (1), ne s'applique pas. Dans cette cause, il n'était pas question de solidarité. Seul le Regent Taxi était l'auteur d'un unique délit, où il y avait deux victimes: Le frère blessé, et la Congrégation qui en souffrait des dommages. Il a été décidé que l'action des deux, étant de même nature, était sujette à la prescription d'une année à compter du fait dommageable. Le recours exercé n'était pas par action récursoire. Ici, la situation est entièrement différente. Il n'y a qu'une victime d'un quasi-délit dont il y aurait deux co-auteurs. Il ne s'agit pas de déterminer la relation juridique entre la victime et ceux qui lui ont causé des dommages, mais bien les droits que peuvent exercer l'un contre l'autre les auteurs solidaires du quasi-délit.

J'en viens donc à la conclusion que l'action de l'appelante n'est pas prescrite. Son droit de poursuivre Sa Majesté le Roi devant la Cour d'Échiquier est né non pas le jour de l'accident, soit le 12 avril 1944, mais bien dans le cours des mois de mai et juin 1945, date des paiements effectués. Or, comme la Pétition de Droit a été commencée le 23 juillet 1945, il en résulte que la prescription n'est pas acquise.

Vient ensuite la question de savoir si la Ville de Montréal est dans les conditions voulues pour exercer l'action récursoire qu'elle a intentée, et que dans sa Pétition de Droit elle appelle une action en garantie.

(1) [1932] A.C. 295.

1949

CITY OF MONTREAL v. THE KING

Taschereau J.

Le verdict qui a été rendu par le jury n'a fait qu'évaluer les dommages subis par Harris, mais à cause de son illégalité évidente, il ne pouvait être confirmé par un jugement de la Cour. La Ville n'a donc pas été condamnée à payer quoi que ce soit à Harris, ni aux deux autres réclamants, dont les actions ne sont pas venues devant les tribunaux. Le seul jugement qui détermine la responsabilité de cet accident, est le jugement de M. le Juge Angers, de la Cour d'Échiquier, qui la fait reposer entièrement sur Sa Hajesté le Roi.

En assumant qu'en vertu de la loi de la Cour d'Échiquier, semblable action puisse être instituée, comment la Ville non responsable de cet accident, peut-elle exercer un recours en garantie, ou instituer un action récursoire contre l'intimée? Le recours en garantie n'existe que pour se faire rembourser que ce que l'on est légalement tenu de payer (*Archibald* v. *Delisle* (1)), et l'action récursoire que l'on prétend exercer, ne serait ouverte à la demanderesse que si elle avait payé une dette à laquelle elle était tenue solidairement avec d'autres. Rien de cela n'existe dans le présent cas. Seule l'intimée est responsable de cet accident, et la Ville, absoute de toute faute par M. le Juge Angers, n'aurait dû rien payer. Elle ne peut pas demander à l'intimée le remboursement d'un paiement qu'elle n'était pas tenue de faire. Son action ne repose sur aucun principe juridique. Son obligation légale d'indemniser les victimes était un élément essentiel pour justifier sa réclamation, et les versements bénévoles qu'elle a faits, ne donnent pas ouverture aux conclusions de sa Pétition de Droit.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Pierre, Choquette, Berthiaume, Émard, Martineau, McDonald & Séguin.*

Solicitor for the respondent: *J. P. Charbonneau.*

---

(1) 25 S.C.R. 1.

1949

*June 6
*June 24

LABOUR RELATIONS BOARD OF SASKATCHEWAN (PETITIONER) .. } APPELLANT;

AND

JOHN EAST IRON WORKS LIMITED ..... } RESPONDENT.

MOTION FOR SPECIAL LEAVE TO APPEAL

Appeal—Jurisdiction—Where special leave to appeal refused by highest court of final resort in the province, "rights in future" must be economic rights; a judgment dealing with incidental matters involving condemnation in money does not give Supreme Court jurisdiction to grant leave to appeal—Supreme Court Act, R.S.C., 1927, c. 35, s. 41 (c) and (f).

The Labour Relations Board of Saskatchewan issued an order under *The Trade Union Act*, 1944, 2nd sess., c. 69, s. 5 (e) (Sask.), requiring the respondent to reinstate a discharged employee and to pay him the monetary loss suffered by reason of his discharge. Respondent applied to the Court of Appeal for Saskatchewan for a writ of *certiorari* to quash the order and that Court held (1), that s. 5 (e), which purported to empower the Board to issue the order was *ultra vires* since it purported to confer upon the Board judicial powers exercisable by the courts named in the *British North America Act*. In view of this finding the Court did not deal with other grounds raised in the application, namely, the alleged error in law on the part of the Board in fixing the monetary loss of the employee, and the alleged disqualification of the chairman of the Board on the ground of bias, in relation to the proceedings. On appeal to the Privy Council, (2), it was held that the Act was not *ultra vires* but the case was remitted to the Court of Appeal for a rehearing on the other grounds raised by respondent. On the rehearing the Court of Appeal held, (3), that the order of the Board should be quashed without the actual issue of the writ of *certiorari*. An application by the Board to appeal from this judgment to the Supreme Court of Canada was refused, (4), and the motion for special leave to appeal, now reported, was then made.

MOTION for special leave to appeal to the Supreme Court of Canada from a judgment of the Court of Appeal for Saskatchewan (4).

F. A. Brewin K.C. for the motion.

E. C. Leslie K.C. contra.

The judgment of the Court was delivered by:—

KERWIN J.:—This is a motion by the Labour Relations Board of Saskatchewan for leave to appeal to this Court

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

(1) [1948] 1 W.W.R. 81.
(2) [1948] 2 W.W.R. 1055.
(3) [1949] 1 W.W.R. 842.
(4) [1949] 2 W.W.R. 39.

1949

LABOUR RELATIONS BOARD OF SASKATCHEWAN v. JOHN EAST IRON WORKS LTD.

Kerwin J.

from a judgment of the Court of Appeal for Saskatchewan (1). Leave was refused by that Court, (2), and Mr. Brewin realized that he had to bring himself within clauses (*c*) or (*f*) of section 41 of *The Supreme Court Act*:—

> (*c*) the taking of any annual rent, customary or other fee, or, other matters by which rights in future of the parties may be affected; or
>
> (*f*) in cases which originated in a court of which the judges are appointed by the Governor General and in which the amount or value of the matter in controversy in the appeal will exceed the sum of one thousand dollars;

As to (*c*), the jurisprudence is well settled that the rights in future must be economic rights of the parties, and the mere fact, that, even in a case sought to be appealed to this Court, a judgment would deal with incidental matters involving a condemnation in money, would not give the Court jurisdiction to entertain the appeal: *Greenlees* v. *Attorney General for Canada,* (3).

The appellant thus having no economic interest cannot bring itself within (*f*).

There being no jurisdiction, the motion must be dismissed with costs.

Motion dismissed with costs.

1949

*Mar. 8, 9, 10, 11

*Oct. 4

GENERAL MOTORS CORPORATION.....APPELLANT;

AND

NORMAN WILLIAM BELLOWS.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-marks—"Frigidaire"—Whether an invented word—Whether distinctive per se—Whether descriptive—Proof of acquisition of secondary meaning required under The Trade Mark and Design Act; The Unfair Competition Act, 1932—Whether "Frozenaire" similar to "Frigidaire" —The Trade Mark and Design Act, R.S.C. 1927, c. 201, ss. 11 (e), 52 (1); The Unfair Competition Act, 1932, (Dom.) 1932, c. 38, ss. 2 (k), 23 (5), 29, 32, 52 (1).

*Present: Rinfret C.J., and Kerwin, Rand, Kellock and Locke JJ.

(1) [1949] 1 W.W.R. 842.

(2) [1949] 2 W.W.R. 39.

(3) [1946] S.C.R. 462 at 465.

The appellant appealed from a judgment of the Exchequer Court which dismissed its motion to expunge from the Register of Trade Marks the trade mark *"Frozenaire"* as applied to electric refrigerators and refrigeration on the ground that such trade mark was similar to the trade mark *"Frigidaire"* previously registered by appellant in respect of refrigeration apparatus. It further appealed from a judgment of that Court whereby a motion of the respondent to expunge from the Register the trade mark *"Frigidaire"* on the ground that it was descriptive, was allowed.

Held: (Rinfret C.J. and Kerwin J. dissenting), that *"Frigidaire"* is not an invented word but a combination of "frigid" and "air". It is not distinctive *per se* but is descriptive of the "character" of the article and the mark, without proof under r. 10 of the *Trade Mark and Design Act* that it had become distinctive by use, should have been rejected.

Held: also, that the evidence submitted in support of the application under *The Unfair Competition Act, 1932*, s. 29, that the mark had in fact become distinctive at the time of application for registration, was insufficient.

Per Rinfret C.J. and Kerwin J., dissenting,—Applying the principles laid down in *Lightning Fastener Co. Ltd.* v. *Canadian Goodrich Co. Ltd.* (1) to the evidence adduced in the present case, it should be held that *"Frigidaire"* was not descriptive within the meaning of the *Trade Mark and Design Act* and that the alternative application under *The Unfair Competition Act* should be dismissed with costs.

Held: further that the trade mark *"Frozenaire"* was not similar to the trade mark *"Frigidaire"* within the meaning of *The Unfair Competition Act, 1932*, s. 2 (*k*). *Aristoc Ld.* v. *Rysta Ld.* (2) applied.

Kellock J. was of opinion that *"Frozenaire"* was not properly registered under *The Unfair Competition Act* because of its descriptiveness in connection with the goods to which it was applied, and applying the principle laid down in *Paine* v. *Daniels* (3) would have directed that it be expunged from the Register.

APPEALS from two judgments of the Exchequer Court of Canada, the first of which (4) dismissed the appellant's motion to expunge from the Register of Trade Marks the trade mark *"Frozenaire"*; the second of which allowed the respondent's motion to expunge from the said Register the trade mark *"Frigidaire"* (5).

C. Robinson for the appellant.

H. G. Fox, K.C., and *G. F. Henderson* for the respondent.

The CHIEF JUSTICE and KERWIN, J. (dissenting in part): These are appeals from two judgments of the Exchequer Court of Canada. One judgment (6), rendered

(1) [1932] S.C.R. 189.
(2) [1945] A.C. 68.
(3) [1893] 2 Ch. 567.
(4) [1947] Ex. C.R. 658.
(5) [1948] Ex. C.R. 187.
(6) [1947] Ex. C.R. 568.

1949

GENERAL MOTORS CORP. v. BELLOWS

Rinfret, C.J.

on the 30th of August, 1947, dismissed the appellant's motion of December 19, 1946, to expunge from the Register of Trade Marks the trade mark *"Frozenaire"* (registration Number NS68/17883, as applied to electric refrigerators and refrigeration, which motion was made on the sole ground that such trade mark is similar to the trade mark *"Frigidaire"* registered by the appellant on January 24, 1933, in respect of refrigeration apparatus. The other judgment (1) was rendered on January 22, 1948. It allowed a motion of the respondent to expunge from the Register the above-mentioned registration of the trade mark *"Frigidaire"* on the ground that the said trade mark was descriptive of the character or the quality of the wares in association with which it has been used and registered, and then allowed an alternative motion by General Motors Corporation under section 29 of *The Unfair Competition Act*. General Motors Corporation appeals from the Order expunging *"Frigidaire"*, but no appeal is taken by Bellows from the Order made on the alternative motion.

Dealing first with the judgment in respect of the trade mark *"Frozenaire"*, on the strength of the judgment in this Court in *Battle Pharmaceuticals* v. *The British Drug Houses, Ltd.* (2), and on the principle laid down by the House of Lords in *Aristoc, Ld.* v. *Rysta, Ld.* (3), we think the appeal of the General Motors Corporation from that judgment should be dismissed with costs. According to those judgments the question of similarity must be determined as a matter of first impression, and the learned trial judge has dealt with that case by applying the principles laid down in the two judgments above mentioned.

We now turn to the appeal from the Order obtained by *"Frozenaire"* expunging the registration of the trade mark *"Frigidaire"*. The allegations state that the word *"Frigidaire"* is descriptive of the wares in connection with which it is used, that it lacks distinctiveness and, therefore, should not have been registered. The learned trial judge observed that the *Trade Mark and Design Act*, under which *"Frigidaire"* was registered, did not define what are "the essentials necessary to constitute a trade mark properly speaking", but that it was settled by the Judicial Com-

(1) [1948] Ex. C.R. 187.
(2) [1946] S.C.R. 50.
(3) [1945] A.C. 68.

mittee of the Privy Council in *Standard Ideal Company* v. *Standard Sanitary Manufacturing Company* (1), that "distinctiveness is the very essence of a trade mark". In that case Lord Macnaghten, delivering the judgment of the Privy Council, said at p. 84:—

> Now the word "standard" is a common English word. It seems to be used not infrequently by manufacturers and merchants in connection with the goods they put upon the market. So used it has no very precise or definite meaning * * *
>
> It seems to their Lordships perfectly clear that a common English word having reference to the character and quality of the goods in connection with which it is used and having no reference to anything else cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. Distinctiveness is the very essence of a trade mark * * * The result is in accordance with the decision of the Supreme Court of Canada in *Partlo* v. *Todd* (2), that the word though registered is not a valid trade mark.

It might be added that in *The Canadian Shredded Wheat Co. Ld.* v. *The Kellogg Co. of Canada, Ld.* (3), Lord Russell of Killowen, speaking for the Judicial Committee, at p. 142, pointed out that the effect of section 11 (*e*) of *The Trade Mark and Design Act,* R.S.C. 1927, chapter 201, under which Act *"Frigidaire"* was registered, is that a word is not registrable under that Act as a trade mark which is merely descriptive of the character and quality of the goods in connection with which it is used, citing the *Standard case supra* and *Channell* v. *Rombough* (4).

In the present case the learned judge found that the word *"Frigidaire"* was not a registrable mark under the general provisions of the Act, that it was not *per se* a distinctive word; that, on the contrary, it was at the time of registration merely a descriptive word, lacking that distinctiveness which is necessary to constitute a trade mark properly speaking, and that it should not have been registered under the general provisions of the Act. He noted that the respondent's predecessor in title had applied for registration of the mark in the United States under the Act of 1905, but the application was refused, it is said, on the ground that the word was descriptive, although subsequently it was registered under the Act of 1920 which forbids registration of any mark that could have been registered under the Act of 1905. The learned judge also

(1) [1911] A.C. 78.
(2) (1888) 17 Can. S.C.R. 196.
(3) (1938) 55. R.P.C. 125.
(4) [1924] S.C.R. 600.

1949

GENERAL MOTORS CORP. v. BELLOWS

Rinfret, C.J.

came to the conclusion that an invalid registration cannot become valid because of the acquisition of a secondary meaning after registration, thus becoming distinctive, and retain its registration. He pointed out that the new section 52 (1) changed the law as declared in the case of *The Bayer Company* v. *American Druggists Syndicate* (1), in which it was held that the authority to expunge (under the then section 42 of *The Trade Mark and Design Act*) "any entry made without sufficient cause" meant "without sufficient cause at the time of registration". The present section 52 (1) gives jurisdiction to the Exchequer Court to order that "any entry in the Register be struck out or amended on the ground that at the date of such application, (to wit on the application of the Registrar or any person interested) the entry as it appears on the Register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark."

The learned judge expressed the opinion that no evidence that a secondary meaning had been acquired subsequent to the registration can affect the question as to whether or not the mark, at the time of registration, was distinctive. He said:—

> If the registration was invalid, it remains invalid * * * Insofar, therefore, as the question of registrability arises, the inquiry must be directed to the time of the application for registration.

He accordingly granted the application to expunge the trade mark *"Frigidaire"*.

The appellant suggested in the Exchequer Court that *"Frigidaire"* was an invented word; that appears in the judgment of that Court. The learned trial judge rejected that contention and referred to Astbury J. in the application by the *Yalding Manufacturing Co. Ltd.* (2), where it was said that the mere fact that a new word, or a word which has not been included in the dictionaries, is produced, is not sufficient to make it an invented word within the meaning of the Statute. And Lord Halsbury's remarks in the *Solio case* (3), are quoted as follows:—

> I can quite understand suggesting other words—compound words or foreign words—as to which it would be impossible to say that they were invented words, although, perhaps, never seen before, or that they did not indicate the character or quality of the goods, although as words of the English tongue they had never been seen before.

(1) [1924] S. C. R. 558.
(2) (1916) 33 R.P.C. 285.
(3) (1898) 15 R.P.C. 476 at 483.

And Lord Herschell is quoted at p. 485:—

I do not think the combination of two English words is an invented word, even although the combination may not have been in use before, nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form.

And Lord Macnaghten at p. 486:—

The word must be really an invented word; nothing short of invention will do. On the other hand nothing more seems to be required * * * If it is "new and freshly coined" (to adopt an old and familiar quotation), it seems to me that it is no objection that it may be traced to a foreign source, or that it may contain a covert and skilful allusion to the character or quality of the goods.

And Lord Shand at p. 487:—

There must be invention, and not the appearance of invention only. It is not possible to define the extent of invention required, but the words I think should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an "invented" word; and a word would not be "invented" which, with some trifling addition or very trifling variation, still leaves the word one which is well-known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word.

Astbury J. concluded his remarks in the *Yalding Manufacturing Co. Ltd.* application *supra* by saying:—

Those passages show clearly that the mere fact that a word is previosuly unknown, or that it has not got into any technical Dictionary, is not sufficient to make it an invented word within the meaning of the Act.

Seeking to apply the principle established in that case, and also as a result of a judgment of the Court of Appeal by Smith L.J. in *Farbenfabriken Vormals Fried. Bayer and Co's. Application* (1), the learned trial judge concluded that the word *"Frigidaire"* was clearly not an invented word, but a combination of two well-known English words long in use; and to the eye and ear the same idea is conveyed, he says, by the composite word *"Frigidaire"* as by its two component parts—"frigid" and "aire(e)". He added:—

The respondent manufactures refrigerators and refrigeration apparatus, articles which by their nature are intended to produce frigid or cooled air to preserve perishable articles placed within the apparatus. I think that the word *"Frigidaire"*, used in connection with such goods, was used originally to describe and did, in fact, describe that character or quality of the respondent's goods and the purpose to which such goods were to be applied. It was, therefore, not a registrable mark under the general provisions of the Act."

(1) (1894) 11 R.P.C. 84.

1949

GENERAL MOTORS CORP. v. BELLOWS

Rinfret, C.J.

The learned judge accordingly held that the word *"Frigidaire"* was not *per se* a distinctive word; that, on the contrary, it was at the time of registration merely a descriptive word, lacking that distinctiveness which is necessary to constitute a trade mark properly speaking, and that it should never have been registered.

With due respect, we cannot read the judgments of Lord Halsbury, Lord Herschell, Lord Macnaghten and Lord Shand in the *Solio case supra* as having the meaning ascribed to them by the learned judge. They do say that it would be impossible to hold that words were invented, although, perhaps, they were never seen before; that a mere variation of the orthography or termination of a word would not be sufficient to constitute an invented word; and that it must be clearly and substantially different from any word in ordinary and common use—a mere combination of two known words would not be an "invented" word. But, in our opinion, these statements do not exclude the registrability of the word *"Frigidaire"* in the circumstances shown in the evidence. Moreover, special attention should be directed to the judgment of Lord Macnaghten, who says that nothing more than invention seems to be required and that, if it is "new and freshly coined", it seems that it is no objection that it may be traced to a foreign source, or that it may contain a covert and skilful allusion to the character or quality of the goods.

We, therefore, are forced to disagree with the conclusion reached by the learned trial judge when he says that, on the principle established in the *Solio case,* " *'Frigidaire'* is clearly not an invented word." We can hardly come to the conclusion that it is clearly not so, and, as precisely pointed out by Astbury J. in the *Yalding Manufacturing Co. Ltd. case,* we would at least say that it is frequently a difficult matter to determine whether or not a word is an invented word, as it is a matter on which different minds may reach different conclusions. Personally, applying the principles established by their Lordships in the *Solio case* to the word *"Frigidaire",* we reach a different conclusion from that arrived at by the learned trial judge in the present case.

We have it in evidence that the word *"Frigidaire"* was not in the dictionaries when it was adopted by the appel-

lant and up to that time it had never been used by the public and had never been seen before. We concede that, as a result of the decision in the *Solio case,* these two circumstances would not be sufficient to hold that *"Frigidaire"* was an invented word. We concede also that the word is a combination of two well-known English words, although the combination had not been used before; and that the mere variation of the orthography of the word "air" ("aire") is also not sufficient to constitute an invented word. But, on the other hand, as said by Lord Macnaghten, although the word *"Frigidaire"* may be traced to a foreign source, to wit, in fact that it may have been inspired by the "frigidarium" of the Romans—as to which no evidence can be found in the record—there has been no explanation offered as to how the predecessors of the appellant came to choose that word.

There remains the observation that the noble Lord makes in his judgment that a word may be none the less an invented word although "it may contain a covert and skilful allusion to the character or quality of the goods." And why should we say that *"Frigidaire"* describes the quality or character of the goods? We realize, of course, that it describes the air and it says that it is frigid, but, in our opinion, it does not describe the article, or the quality of the goods in connection with which it is used. It does not necessarily apply to a refrigerator. Up to the time when it was adopted by the predecessor of the appellant, the article or the goods in question were exclusively known as refrigerators. Nobody was using the word *"Frigidaire"*; and it is only since the word was invented by the owners of the mark that people started calling refrigerators *"Frigidaires"*.

In *Lightning Fastener Co. Ltd.* v. *Canadian Goodrich Co. Ltd.* (1), at 197, it is stated:—

> But, in order to deny registration of a word on the ground that it is descriptive, it must be shown that, at the date of the application (which is the date to be taken into consideration), the word was a descriptive name in current use, descriptive of the article itself as distinguished from a name exclusively distinctive of the merchandise of a particular dealer or manufacturer.

By the application of our decision in that case and upon the evidence adduced in the present, it should be held

(1) [1932] S.C.R. 189.

1949

GENERAL MOTORS CORP. v. BELLOWS

Rinfret, C.J.

that the word *"Frigidaire"* was not descriptive within the meaning of *The Trade Mark and Design Act* and that it should be allowed to remain on the Register.

The application of the appellant under section 29 of *The Unfair Competition Act, 1932,* was granted only as an alternative if the trial judge decided in favour of the respondent that the word *"Frigidaire"* was not registrable at the time when the registration of the mark took place on the 24th of January, 1933, under *The Trade Mark and Design Act.* The learned judge granted the latter application, because he came to the conclusion that *"Frigidaire"* should be expunged from the Register. As we come to a different conclusion, and as we are of opinion that on that point the appeal of the General Motors Corporation should be allowed, it follows that the order granting the application under section 29 disappears; it should be set aside and the second appeal of the General Motors Corporation should be allowed, with costs, and the respondent's application should be dismissed with costs. The alternative application under section 29 should be dismissed with costs.

The judgment of Rand and Locke JJ. was delivered by

RAND J.:—This appeal arises out of three applications between the parties in the Exchequer Court. The first was a motion by the appellant to expunge the word *"Frozenaire"*, the trade mark of the respondent, from the register, as being similar to its own previously registered mark *"Frigidaire"*; the respondent countered with a motion to remove the latter as being descriptive; whereupon the appellant applied under section 29 of the *Unfair Competition Act* for a declaration in the terms of that section. In the consolidated proceedings before Cameron J. the first motion was rejected; the word *"Frigidaire"* was held to be descriptive and was ordered to be struck off; and the declaration requested under section 29 was made. From this latter no appeal has been taken; but the appellant seeks a reversal of the other two orders.

The word "Frigidaire" as applied to mechanically operated refrigerators and refrigerating equipment of a wide variety was originally adopted in the United States about the year 1918 by the Frigidaire Corporation, the appellant's

predecessor in title. The word from then on was used in elaborate advertising, some of which was contained in magazines circulating in Canada, and the business developed to very large proportions. An application to register the mark in that country under the Act of 1905 was refused, a fact mentioned in *Frigidaire* v. *Carp* (1); but registration was later allowed under the Act of 1920. The significance of this, as stated in the case of *Albany Packing Co. Inc.* v. *Registrar of Trade Marks* (2) at 267, and not challenged here, lies in the fact that the Act of 1905 did not permit registration of descriptive words and only marks not registrable under that statute were within the 1920 legislation. From at least the early 'twenties, considerable local advertising was done in Canada, the volume of the business grew steadily, and on September 19, 1929, application for registration was made. After some delay of no materiality here, the entry was allowed on January 24, 1933; and from that time the products have become increasingly well-known throughout the Dominion.

The respondent's mark was registered for the same class of goods as of April 23, 1940, the date of application; but it is stated that the mark had been used by the respondent for several years before that time.

The Unfair Competition Act came into force in 1932, and by its terms the validity of the original entry of "Frigidaire" must be determined under the preceding enactment, the *Trade Marks Act*. The pertinent provision of the latter was section 11 which, among other things, provided that the Minister might refuse registration "(*e*) if the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking." Under a power to make regulations, rule 10 was promulgated:—

> 10. A Trade Mark consisting either of * * * a word having a direct reference to the character or quality of the goods in connection with which it is used, may be registered * * * upon furnishing the Commissioner with satisfactory evidence, * * * that the mark in question has, through long continued and extensive use thereof in Canada acquired a secondary meaning, and become adapted to distinguish the goods of the applicant.

This rule as specifying "essential particulars" of a trade mark was held by Sir Lyman Duff, speaking for himself

(1) (1936) 29 USPQ 49. (2) [1940] Ex.C.R. 256.

1949

GENERAL MOTORS CORP. v. BELLOWS

Rand J.

and Hudson J., to be within the power conferred: *Magazine Repeating Razor Company* v. *Schick* (1). In *Canadian Shredded Wheat* v. *Kellogg* (2), at p. 142 Lord Russell referring to s. 11 observes: "The effect of this provision is that a word is not registrable under the Act as a trade mark which is merely descriptive of the character or quality of the goods in connection with which it is used"; citing *Standard Ideal Co.* v. *Standard Sanitary Co.* (3).

The first question is, then, whether the word "Frigidaire" was properly placed on the register in 1933. The rule quoted illustrates the conflict early recognized by the courts before the subject matter came under legislation, i.e. between the appropriation by a trader of a word within the range of language that would ordinarily be used by traders to describe particular goods, and the right of other traders in the normal carrying on of their business to employ the same or similar words. In the technique of advertising, the more complex and expensive the goods are, the greater the imaginative seeking by those producing them for attractive and arresting words; but in fixing the limits of legislative protection the courts must balance the conflicting interests and avoid placing legitimate competition at an undue disadvantage in relation to language that is common to all.

Now, "Frigidaire" may be viewed either as a single word or a combination of words, but for the present purpose I cannot see that it makes any difference which is taken. The former might claim descent from the Latin *"frigidarium"*, meaning the cooling room in a Roman bath, and the Oxford dictionary shows an English use in 1706: but such an employment would be confined to classicists. That it is not an invented word is clear from the language of Lord Hershell in the Solio case (4), at p. 485. As a combination of "frigid" and "air", and not being distinctive *per se*, it is not only within the scope of the well-used vocabulary but particularly, I should say, within the immediate and inevitable, if not exclusive, category of terms that would first occur to the mind of an alert manufacturer of refrigerators bent on announcing his goods by means of suggestive words invitingly set up. Mr. Robinson argued that "Frigidaire" in this sense is not descriptive of the "character" of the

(1) [1940] S.C.R. 465.
(2) (1938) 55 R.P.C. 125.
(3) [1911] A.C. 78.
(4) (1898) 15 R.P.C. 476.

article, but I must say I can imagine no term more so. In our mastery of environment we have devoted a great deal of attention to foods, a most important treatment of which has been their preservation against high temperatures. What is the essence of the idea of a refrigerator? Unquestionably, that of cold air for preservation; not the precise mode of operation by which the conserving effect is achieved but the effect itself, which is the functional property of the article itself; all the rest is implied. The air must obviously be held within a container, but the result, however brought about, is what is looked at. If evidence of that were needed, it is furnished by the material filed in the case. Forty-five names are shown to have appeared in the trade of which the following are examples: "Iced-Aire", "Frigice", "North-Eaire", "Frostair", "Airgard", "Sanidaire", "Coolair" and "Friguator". These indicate that both words of the combination have some degree of effectiveness, and that would seem to follow from their commonness. The claim goes apparently to the monopoly of the word "aire". The affidavit of Shannon asserts that the company has taken successful proceedings against the use of "Ideal-Aire", "Filtaire", "Governaire"; and with a similar exclusiveness of adjectives signifying coldness in combinations, the company would have successfully withdrawn from use virtually the entire group of the most apt and descriptive words for this class of goods. The case contains a number of letters to third persons which make it evident that the appellant deems itself to have the equivalent of a copyright in the word mark and in each component; but that is not so; the trade mark monopoly is to protect the business of the appellant, not a proprietorship of the word itself. The mark, therefore, without proof under rule 10 that it had become distinctive by use, should have been rejected.

Mr. Robinson points out that if the Registrar had taken such a stand, the owner could at the time have attempted at least to bring the application within that rule, and that it is unfair at this time to permit the question to be raised. He cites Lord Dunedin in *re Reddaway & Co. Ltd.*, (1) at 36, to the effect that the Registrar's decision should not now be interfered with unless he has clearly

(1) (1926) 44 R.P.C. 27.

1949

GENERAL MOTORS CORP. v. BELLOWS

Rand J.

gone wrong. But that, I think, is precisely what has happened here; and the applicant must be taken to have assumed the risk involved in it.

It is next urged that the evidence submitted in support of the application under section 29 shows at the same time that the mark had in fact become distinctive at the time of the application in 1929, but I am unable to find it so. Between 1926 and 1929 these new units were being introduced into Canada; and keeping in mind the cost and the likely number of persons then interested in purchasing them, where natural ice was then and had always been the only means of domestic refrigeration, and commercial refrigeration, with the same means, in its early stages, the material is quite insufficient.

Mr. Robinson finally contended that as a declaration has been made under section 29 the original entry is preserved by the effect of section 52(1) which reads:

> The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

But I cannot interpret this language to do more than to allow the Court to deal with a properly registered mark as the exigencies of time may have affected it. In the other view, a retroactive validation would be given without restriction. A word mark may lose distinctiveness through, for instance, becoming the common name of the goods or from disuse or abandonment; and it is these changes leading to residual rights which the section envisages.

The question remains whether "Frozenaire" is objectionable as being similar to "Frigidaire". Clause (*k*) of section 2 thus defines "similar":

> "Similar," in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

With the elimination of the original entry "Frigidaire" the immediate question of similarity disappears; but the point has been dealt with on its merits by Cameron J. and

was argued fully and ably by both counsel before this Court. It would, I think, be both unfair to the parties and unsatisfactory generally not to deal with it here in a like manner, and I do so.

Mr. Fox submitted this basic consideration: that where a party has reached inside the common trade vocabulary for a word mark and seeks to prevent competitors from doing the same thing, the range of protection to be given him should be more limited than in the case of an invented or unique or non-descriptive word; and he has strong judicial support for that proposition: *Office Cleaning Services Ld.* v. *Westminster Window & General Cleaners Ld.*, (1), at 135; (2); *British Vacuum Co. Ltd.* v. *New Vacuum Company Co. Ltd.*, (3), at 321; *Aerators Limited* v. *Tollitt*, (4). In *Office Cleaning Services, supra,* Lord Simonds used this language:

> It comes in the end, I think, to no more than this, that where a trader adopts words in common use for his trade name, some risk of confusion is inevitable. But that risk must be run unless the first user is allowed unfairly to monopolize the words. The Court will accept comparatively small differences as sufficient to avert confusion. A greater degree of discrimination may fairly be expected from the public where a trade name consists wholly or in part of words descriptive of the articles to be sold or the services to be rendered.

No doubt there is a public interest against confusion of these marks, but on the other hand there is a like interest in the freedom of the individual trader in ordinary trade practices and in particular in using the main stock of the language. If the latter interest is disregarded, a single word might effect a wholesale appropriation of the only apt language available. Section 2(*k*) does not, as argued, exclude the consideration just mentioned; the language is, "so resembling each other or so clearly suggesting the idea conveyed by each other" that the contemporaneous use would mislead as to the person responsible for their character or quality. If that is taken to exclude a competing mark by which the same idea *simpliciter* is suggested, then no other trader could use words indicating the essential idea of a refrigerator. But the idea must not only be similar; it must also be of a nature as to link the article with the person who assumes the responsibility mentioned. How in this case could the idea conveyed by

(1) (1944) 61 R.P.C. 133.
(2) (1946) 63 R.P.C. 39.
(3) [1907] 2 Ch. 312.
(4) [1902] 2 Ch. 319.

1949

GENERAL MOTORS CORP. v. BELLOWS

Rand J.

"Frozenaire" of itself lead a person of ordinary understanding to infer a common responsibility for the goods of both marks? The idea of each is that conveyed by the common name "refrigerator" itself. If there is any confusion, it arises from resemblance in the sound or appearance of the words. But in determining that we must take into account the entire circumstances of the trade, including the prices, the class of people purchasing, and the ordinary manner in which they do that. As Cameron J. has pointed out, prospective purchasers deliberate before buying this somewhat high class apparatus; refrigerators are not hurriedly picked off a shelf; they represent a substantial purchase and to each transaction some degree of attention and consideration are given.

Do the words then in that situation lend themselves to the errors of faint impression or recollection of the average person who goes to their market? In this I agree with Cameron J. that they do not. The word "frigid" in the one case and "frozen" in the other colour the perceptive effect of the combinations. The former, although familiar in meaning, cannot be said to be of wide and frequent use; both as seen and heard, it is a term of more precise application from a more extended vocabulary. But "frozen" is a word of daily speech among the entire population and in the combination it is intimate and general. "Frigidaire" seems also to possess a slight degree of inherent aptness for the combination which tends to blend the two words and weaken the descriptiveness; while in "Frozenaire" the adjective loses none of its robust meaning and effect, if both are not, in fact, accentuated.

Similarity is to be dealt with, of course, on the assumption that "Frigidaire" has acquired a distinctive signification; but that circumstance here seems only to enhance the dissimilarity by weakening still further the conveyance of its primary meaning. In contrast to that, a certain ruggedness and familiarity in appearance, sound and idea of the components of "Frozenaire" rules out, in my opinion, any reasonable likelihood of the objectionable association.

Mr. Fox raised a further point that the mark "Frigidaire" was by virtue of section 23(5) a design mark and as the word in that view must be treated as "emptied of all meaning" (the *Schick* case, *supra*) there can be no question

of similarity; but I am unable so to construe the original registration. There is nothing to indicate any special form of lettering and that is all that could be suggested. Certainly to the public it was, at the beginning, a word conveying only its ordinary meaning and that would seem to be the best evidence that it is not accompanied by any feature of design.

I would, therefore, dismiss the appeal with costs.

KELLOCK, J. (dissenting in part): I agree that the appeal from the judgment expunging the mark "Frigidaire" should be dismissed for the reasons given by my brother Rand.

With respect to the appeal from the judgment dismissing the appellant's motion to expunge the mark "Frozenaire", that motion was based on the contention that the two marks were similar within the meaning of *The Unfair Competition Act, 1932*. However that may be, I think the law applicable is to be found in the judgment of Bowen L.J., in *Paine* v. *Daniells*, (1), at 584:

> The purity of the register of trade marks—if one may use the expression—is of much importance to trade in general, quite apart from the merits or demerits of particular litigants. If on a motion like the present the attention of the Court is called to an entry on the register of a trade-mark which cannot in law be justified as a trade-mark, it seems to me that the Court's duty may well be, *whatever the demerits of the applicant,* to purify the register and to expunge the illegal entry in the interests of trade, as was done in the *Stone Ale* case. As a rule, the Court on being seised of the matter would doubtless put an end to the existence of a trade-mark which could not possibly be justified by law.

If, as in my view, is the case, the word "Frigidaire" was not properly registered under the Act of 1906 because of its descriptiveness in connection with the goods to which it was applied, the same is even more true with respect to the word "Frozenaire" under the Act of 1932 and Mr. Fox, for the respondent, does not contend that in this view the jurisdiction to expunge does not exist, notwithstanding that the appellant did not base its application to expunge on that ground. No doubt the appellant did not do so because to have done so would have invited the attention of the court to the descriptiveness of his own client's mark. That circumstance, however, ought not to affect the duty to expunge.

(1) [1893] 2 Ch. 567.

1949

GENERAL MOTORS CORP. v. BELLOWS

Kellock J.

I would therefore allow the appeal and direct that the word "Frozenaire" be expunged, but without costs here or below.

Appeal from the judgment dismissing appellant's application to expunge "Frozenaire" from the Register of Trade Marks, dismissed with costs. Appeal from the judgment expunging "Frigidaire" from the Register, dismissed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitor for the respondent: *H. G. Fox.*

1949

*Oct. 17
*Oct. 26

ALBERT COUSINEAU ET AL (PLAINTIFFS) ..... } APPELLANTS;

AND

PIERRE COUSINEAU ET AL (DEFENDANTS) ..... } RESPONDENTS.

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

Appeal—Jurisdiction—Action for account to be rendered or in default for payment of a sum of money—Whether "amount in controversy"—Supreme Court Act, R.S.C. 1927, c. 35, ss. 39, 40.

Held: In an action asking for an account to be rendered or in default thereof for the payment of a sum of money, there is no "amount in controversy" as required by s. 39 of the *Supreme Court Act* on the question of whether an account should be rendered or not, and therefore no jurisdiction in this Court (*Mathieu* v. *Mathieu* [1926], S.C.R. 598); but if the question of whether an account should be rendered or not has been determined and the account rendered, then the only point at issue being whether a balance is due or not, this Court has jurisdiction if the sum claimed as residue including the interest thereon up to the date of the judgment appealed from, exceeds $2,000.

MOTION to quash for want of jurisdiction.

A. Laurendeau, K.C., for the motion.

G. Raymond contra.

---

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

1949

COUSINEAU v. COUSINEAU

Taschereau J.

The judgment of the Court was delivered by

TASCHEREAU J.:—Il s'agit d'une motion pour faire rejeter le présent appel, parce que cette Cour n'aurait pas juridiction pour l'entendre.

Les appelants, Albert et Joseph Cousineau, ont institué une action en reddition de compte contre les intimés, Pierre et Amédé Cousineau, ainsi que contre Napoléon Cousineau. Ils allèguent dans leur action que les intimés ont l'obligation légale de leur fournir un compte, parce que ces derniers auraient administré un fonds commun, auquel tous auraient contribué; ils concluent à ce que faute par les intimés de fournir le compte requis, ils soient condamnés conjointement à payer aux demandeurs la somme de $12,000, dont $8,000 au demandeur Albert Cousineau, et $4,000 au demandeur Joseph Cousineau.

Le juge de première instance a rejeté l'action contre Napoléon Cousineau, parce qu'il en est arrivé à la conclusion que ce dernier n'a jamais été administrateur de biens pour les demandeurs-appelants, mais il a ordonné aux défendeurs Pierre Cousineau et Amédé Cousineau de rendre un compte, dans un délai de trente jours. A défaut par eux de se conformer à cette ordonnance, le juge les a condamnés conjointement et solidairement, à payer à chacun des appelants la somme de $8,000.

Évidemment, il y avait erreur dans le dispositif de ce jugement en ce qui concerne la condamnation solidaire pour la somme de $8,000, et Joseph Cousineau a alors produit au dossier un *"retraxit"* afin de réduire le montant du jugement quant à lui, à $4,000, le maximum réclamé.

La Cour d'Appel en est arrivée à la conclusion que si, en matière de reddition de compte, la règle est à l'effet que le jugement doit se borner à ordonner la reddition de compte, cette règle toutefois doit subir un tempérament lorsque les parties ont transformé l'action en un véritable débat de comptes, et qu'elles ont mis devant le tribunal toutes les pièces justificatives. La Cour a été d'avis qu'il n'existait aucun reliquat, et que l'obligation ultérieure de rendre compte devenait inutile vu que par le débat engagé, par le consentement des parties, on en était arrivé à une solution immédiate et définitive. La Cour statue cependant que les demandeurs-appelants étaient justifiables d'insti-

1949

COUSINEAU v. COUSINEAU

Taschereau J.

tuer leur action suivant la forme et les exigences que la loi prescrit, et que les intimés ayant obtempéré à cette demande après le commencement des procédures, l'action des appelants est fondé dans la mesure où cela est nécessaire pour le recouvrement de leurs dépens. La Cour d'Appel en conséquence a infirmé le jugement de la Cour Supérieure, a accueilli l'action des intimés pour les dépens seulement, tout en refusant d'accorder les conclusions solidaires.

Les intimés soutiennent à l'appui de leur motion, que cette Cour n'a pas juridiction pour adjuger sur le présent appel, parce qu'il n'y aurait pas de montant en jeu. Leur procureur cite à l'appui de cette prétention, la cause de *Mathieu* v. *Mathieu* (1). Dans cette cause, M. le Juge Mercier de la Cour Supérieure, avait maintenu l'action de la demanderesse avec dépens et avait condamné le défendeur, exécuteur testamentaire d'une succession, à rendre un compte en justice de son administration. La Cour d'Appel avait confirmé ce jugement, et l'exécuteur testamentaire qui avait porté sa cause devant la Cour Suprême, a vu son appel rejeté sur motion, parce que cette Cour a décidé qu'elle n'avait pas juridiction.

Cette cause ne peut pas être considérée comme un précédent pour déterminer le sort du présent appel. Dans cette cause de *Mathieu* v. *Mathieu* (1), le défendeur avait été condamné à rendre compte de son administration, et il est clair que devant cette Cour, alors que les comptes n'avaient pas encore été débattus, et qu'aucun reliquat n'avait été établi, il n'y avait aucun intérêt pécuniaire en jeu. La Cour Supérieure, comme la Cour d'Appel, n'avaient eu à déterminer que le droit pour le demandeur d'exiger un compte, et l'obligation pour le défendeur de le rendre.

Mais dans le cas qui nous occupe, la situation est entièrement différente. Sur réception de l'action, la question débattue n'a pas été de savoir, comme la chose se décide généralement, si les défendeurs étaient dans l'obligation légale de fournir un compte ou non, mais ils ont produit des pièces justificatives, indiquant par là leur volonté de

(1) (1925) Q.R. 39 K.B. 235; [1926] S.C.R. 598.

rendre compte, et ils ont, d'après le jugement de la Cour d'Appel, établi qu'il n'y avait aucun reliquat qui appartenait aux demandeurs.

Quand la cause sera entendue au mérite devant cette Cour, il ne s'agira pas, comme dans le cas de *Mathieu* v. *Mathieu* (1), de déterminer si oui ou non, les défendeurs doivent un compte, ce qui n'entraînerait évidemment aucun intérêt pécuniaire. Mais le compte avec pièces justificatives ayant été produits déjà, il s'agira uniquement de déterminer si oui ou non, il y a reliquat, que les demandeurs-appelants dans leur action estiment à $12,000. Comme ce sera la seule question qu'il faudra juger, il s'ensuit qu'il y a un montant en jeu suffisant, pour donner juridiction à cette Cour.

Une autre question se présente. C'est celle de savoir si l'appelant Joseph Cousineau a personnellement l'intérêt requis pour justifier son appel. Il n'y a pas de doute qu'Albert Cousineau qui réclame contre les défendeurs conjointement, un reliquat de $8,000, a l'intérêt voulu, mais Joseph Cousineau ne réclame que la somme de $4,000 conjointement contre les deux défendeurs. Cette réclamation doit être divisée également entre les deux défendeurs, de sorte que l'intérêt de Joseph Cousineau ne serait que de $2,000, et n'excéderait pas le montant requis par les dispositions de l'article 39, de la *Loi de la Cour Suprême*, pour donner juridiction à cette Cour.

Je crois que cette prétention des défendeurs n'est pas fondée, car s'il est vrai que le capital réclamé comme reliquat par Joseph Cousineau contre les défendeurs individuellement, n'excède pas $2,000, il faut tenir compte des dispositions de l'article 40, qui permet d'inclure dans le montant de la réclamation, non seulement le capital, mais aussi l'intérêt accru antérieur à la date du prononcé du jugement dont il y a appel (*Tremblay* v. *Beaumont* (2)). Or, comme l'intérêt doit courir jusqu'à la date du jugement de la Cour d'Appel, et comme il faut l'ajouter au capital réclamé, il s'ensuit que le montant total qui fait l'objet du litige, en ce qui concerne Joseph Cousineau, est supérieur à $2,000.

La motion doit en conséquence être rejetée avec dépens.

Motion dismissed with costs.

(1) [1926] S.C.R. 598.

(2) [1946] S.C.R. 448.

1948
*June 13, 14
1949
*Oct. 4

BETWEEN

THE K.V.P. COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

EARL McKIE *et al.* (PLAINTIFFS) ... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Waters and Watercourses—Rights of Riparian Owners—New trial, discovery of new evidence as ground for—Jurisdiction to award damages in lieu of Injunction—The Supreme Court Act, R.S.C., 1927, c. 35, s. 68—Ontario Judicature Act, R.S.O., 1937, c. 100, s. 17.

The plaintiffs, lower riparian owners on the Spanish River, sued the defendant, the operator of a pulp and paper mill situate up the river at Espanola, Ontario, for pollution of the waters of the river by discharges from its mill. They secured a judgment in damages and an injunction restraining the defendant from depositing foreign substances in the river waters which alter the character or quality of the water to the injury of the plaintiffs. The Ontario Court of Appeal affirmed the judgment, subject to a variation in the form of the injunction granted.

The defendant appealed to this Court alleging error in the granting of the injunction when damages would have been an adequate remedy and prayed that a new trial be granted upon terms, limited to the issue as to whether an injunction should go.

Held: A new trial could not be granted as it had not been shown that new evidence had been found which the defendant could not have found by the exercise of reasonable diligence prior to the trial, and that if adduced, would be practically conclusive. *Varette* v. *Sainsbury* (1) applied.

Held: Also, that the provisions of the Ontario *Lakes and Rivers Improvement Act,* even if it purported to do so, would not enable this Court to give a judgment that was impossible in law at the time of the decision of the Court of Appeal, and that the amendment to s. 68 of the *Supreme Court Act* refers only to further evidence upon a question of fact. *Boulevard Heights* v. *Veilleux* (2).

Held: Further, that although under s. 17 of the *Ontario Judicature Act,* the Court has jurisdiction to award damages in lieu of an injunction, its discretion is governed by the consideration of whether the granting of damages would be a complete and adequate remedy, and since pollution has been shown to exist, it would not be, and the injunction should therefore, go. *Leeds Industrial Co-Operative Society Ltd.* v. *Slack* (3)—referred to.

Injunction ordered stayed for period of six months. *Stollmeyer* v. *Petroleum Development Co. Ltd.* (4) and *Stollmeyer* v. *Trinidad Lake Petroleum Co. Ltd.* (5) referred to.

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

(1) [1928] S.C.R. 72.
(2) (1916) 52 Can. S.C.R. 185.
(3) [1924] A.C. 851.
(4) [1918] A.C. 498.
(5) [1918] A.C. 485.

1949

K.V.P. Co. LTD. v. McKIE et al.

APPEAL from a judgment of the Court of Appeal for Ontario, (1) affirming with a variation as to the form of injunction granted, the judgment of McRuer, Chief Justice of the High Court of Ontario (2).

J. R. Cartwright K.C. and *J. J. Robinette K.C.* for the appellant.

A. W. Roebuck K.C. and *D. R. Walkinshaw* for the respondent.

The judgment of the Court was delivered by:

KERWIN, J.: The K.V.P. Company Limited appeals from five judgments of the Court of Appeal for Ontario (3) affirming, with a variation, the judgments of the Chief Justice of the High Court (4) granting the plaintiffs in each action damages for the pollution of the Spanish River, and an injunction. The variation is merely in the form of the injunction granted and counsel admitted that the form adopted by the Court of Appeal was taken from the order made in *Lingwood* v. *Stowmarket Co.* (5).

The respondents (plaintiffs) are owners of lands on the Spanish River, which flows into Lake Huron, and the appellant operates a pulp and paper mill higher up the river. While the respondents' lands are not particularly suitable for agriculture, some are farmed and are used to grow vegetables. The respondent in one action has a summer residence on his property; another has a grant of a water lot on the river so that in his case the injunction applies to the water flowing over his lands; and the lands of the others have cabins erected on them which, together with the house in some cases, are used for roomers and boarders in the tourist industry.

The trial judge found that the appellant had polluted the waters of the river and awarded the respondents damages of $450, $1,250, $300, $2,100, $1,000 and $500. The Court of Appeal agreed with these findings and the appellant does not now attack them. The sole point argued before us was as to the injunction.

The suggestion that there should be a new trial upon any terms that the Court might see fit to impose, limited

(1) [1949] 1 D.L.R.
(2) [1948] O.R. 398.
(3) [1949] 1 D.L.R. 39.
(4) [1948] O.R. 398.
(5) (1865) 1 Eq. 77 and 336.

1949

K.V.P. Co. LTD. v. McKIE et al.

Kerwin J.

to the issue as to whether an injunction should be granted, cannot be entertained as it is not shown in any way that new evidence had been found which could not have been discovered by the appellant by the exercise of reasonable diligence and that, if adduced, it would be practically conclusive: *Varette* v. *Sainsbury* (1). It was then argued that by section 30 of the *Lakes and Rivers Improvement Act,* R.S.O. 1937, chapter 45, as enacted by section 6 of chapter 48 of the Statutes of 1949, this Court is empowered to refuse to grant an injunction against the owner or occupier of a mill under certain named conditions, or to grant an injunction to take effect after such lapse of time or upon such terms and conditions or subject to such limitations or restrictions as may be deemed proper, or, in lieu of granting an injunction, to direct that the owner or occupant of the mill take such measures or perform such acts to prevent, avoid, lessen or diminish the injury, damage or interference complained of as may be deemed proper. Other provisions are made as to damages already suffered and as to subsequent damages. Reliance is placed upon subsection 2 by which it is provided that subsection 1, re-enacting section 30 of the original Act, shall apply to every action or proceeding in which an injunction is claimed in respect of any of the matters mentioned including every pending action and proceeding and including every action or proceeding in which an injunction has been granted and in which any appeal is "pending". The amended Act came into force on the day it received the Royal Assent, April 1, 1949, and while the judgment of the Court of Appeal was given November 22, 1948, it is contended that the appeal to this Court is "pending" within the meaning of the enactment.

It has been decided in *Boulevard Heights* v. *Veilleux* (2), that since section 46 of the *Supreme Court Act* provides that this Court may dismiss an appeal or give the judgment which the Court whose decision is appealed should have given, and since a provincial legislature may not extend the jurisdiction of this Court as conferred by Parliament, such a provision as the one here in question would not, even if it purported so to do, enable this Court to

(1) [1928] S.C.R. 72.

(2) (1915) 52 Can. S.C.R. 185.

give a judgment that was impossible in law at the time of the decision of the Court of Appeal. The 1949 Act is not an enactment declaratory of what the law was deemed to be. Mr. Cartwright sought to overcome this difficulty by pointing to the amendment to the *Supreme Court Act* in 1928 by which the following proviso was added to section 68:

> Provided that the Court may, in its discretion, on special grounds, and by special leave, receive further evidence upon any question of fact, such evidence to be taken in the manner authorized by this Act, either by oral examination in Court, by affidavit, or by deposition, as the Court may direct.

It is apparent that this refers only to further evidence upon any question of fact, and the decision in the *Boulevard Heights Case* therefore applies. Leave was asked to file an affidavit of Ralph A. Hayward under this proviso but leave has never yet been given thereunder and the circumstances are not such as to warrant making an order on this occasion.

It was next contended that on the evidence in the record and even without the 1949 amendment to the *Lakes and Rivers Improvement Act,* this Court should, in the circumstances, decline to grant an injunction and should confine the respondents to damages. The damages are those assessed by the trial judge and those to be fixed by the local master at Sudbury upon a reference directed to him to ascertain the damages sustained by the respondents from the date of trial "to the date that the injunction becomes effective", which date was fixed as the expiration of six months from the date of the trial judgment, April 15, 1948. Following the notice of appeal from the judgment of the Court of Appeal to this Court, the appellant obtained an order staying the operation of the injunction until the final determination of the appeal.

The rights of riparian owners have always been zealously guarded by the Court. It is unnecessary to discuss all the decisions referred to by Mr. Cartwright and it suffices to quote the remarks of Lord Sumner, speaking on behalf of the Judicial Committee, in *Stollmeyer* v. *Petroleum Development Company Limited* (1) at 499:

> The grant of an injunction is the proper remedy for a violation of right according to a current of authority, which is of many years' standing

(1) [1918] A.C. 498.

1949

K.V.P. Co. LTD. v. McKIE et al.

Kerwin J.

and is practically unbroken: *Imperial Gas Light and Coke Co.* v. *Broadbent* (1); *Pennington* v. *Brinsop Hall Coal Co.* (2). In *English* v. *Metropolitan Water Board* (3), there is a mere dictum to the contrary. The discretion of the Court in the grant of such injunctions is regularly exercised in this sense.

Section 17 of the *Ontario Judicature Act* provides:

> Where the Court has jurisdiction to entertain an application for an injunction against a breach of a covenant, contract or agreement or against the commission or continuance of a wrongful act, or for the specific performance of a covenant, contract or agreement, the Court may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as may be deemed just.

Under the precursor of this section, Lord Cairns' Act, 1858, the House of Lords decided in *Leeds Industrial Co-operative Society Limited* v. *Slack* (4), that jurisdiction was thereby conferred to award damages in lieu of an injunction in the case of a threatened injury, but Viscount Finlay, with whom Lord Birkenhead expressly agreed, and of whose judgment Lord Dunedin stated that "he has exactly expressed my views", pointed out at page 860 that the Courts have on more than one occasion expressed their determination to prevent any abuse of the Act by legalizing the commission of torts by any defendant who was able and willing to pay damages. He said it was sufficient to quote two passages from the reports, the first of which occurs in the judgment of Lord Justice Lindley in *Shelfer* v. *City of London Electric Co.* (5), and the second of which occurs in the judgment of Buckley J. in *Cowper* v. *Laidler* (6).

In *Canada Paper Co.* v. *Brown* (7), Duff J., in an obiter at page 252, stated that he was far from accepting a contention that considerations touching the effect of granting the injunction upon residents of the neighbourhood, and indeed upon the interests of the appellant company, were not considerations properly to be taken into account in deciding the question whether or not the remedy by injunction should be accorded the plaintiff under the law of Quebec. He continued, however, by pointing out that it

(1) (1859) 7 H.L. Cas. 600, 612.
(2) (1877) 5 Ch. D. 769.
(3) [1907] 1 K.B. 588, 603.
(4) [1924] A.C. 851.
(5) [1895] 1 Ch. 287, at 315-6.
(6) [1903] 2 Ch. 337 at 341.
(7) (1922) 63 Can. S.C.R. 243.

is a judicial discretion that is exercised, that is, one regulated in accordance with judicial principles as illustrated by the practice of the Courts in giving and withholding the remedy. In the subsequent case of *Gross* v. *Wright* (1), that same learned judge, in a case from the Province of British Columbia, stated that he had no doubt, as laid down by the Lord Justices in *Kennard* v. *Cory* (2), that the primary point for consideration in every case where the question is injunction or no injunction is whether or not the wrong complained of is a wrong "for which damages are the proper remedy" to use the phrase of Lindley L.J. in *London & Blackwall Ry. Co.* v. *Cross* (3), that is to say, a complete and adequate remedy.

Pollution has been shown to exist, damages would not be a complete and adequate remedy, and the Court's discretion should not be exercised against the "current of authority which is of many years' standing".

An injunction should, therefore, go but it is argued that this Court should adopt the course followed by the Judicial Committee in the *Stollmeyer Case,* referred to above. Before considering that case attention should be directed to the decision of the Judicial Committee immediately preceding in the case of *Stollmeyer* v. *Trinidad Lake Petroleum Co. Ltd.* (4). There it was held that an owner of land upon a stream flowing in a permanent defined channel, although fed exclusively by rain water running off the surface of the land in certain seasons, was entitled to have the natural flow of the water without sensible diminution or increase (subject to the lawful rights of upper riparian owners) and without sensible alteration in its character or quality. A stream of the above description flowed through lands, the whole of which belonged to the respondents with the exception of a plot situated at its mouth, which belonged to the appellants. The latter's land was unsuitable for agriculture and it was not used for any purpose. The respondents carried on upon their land the business of boring for oil, which was the sole industry of the locality, and diverted part of the water of the stream in order to supply water to other property, thereby sensibly diminishing the flow past appellants' land. They also, without

(1) [1923] S.C.R. 214 at 227.
(2) [1922] 2 Ch. 1.
(3) [1886] 31 Ch. D 354 at 369.
(4) [1918] A.C. 485.

1949

K.V.P. Co. LTD. v. McKIE et al.

Kerwin J.

negligence, caused a sensible pollution of the water by oil and salt. The appellants had suffered no pecuniary damage and the Trinidad Courts dismissed an action for damages and an injunction. The Judicial Committee decided that the appellant had suffered an injuria and was entitled to an injunction. The Judicial Committee made certain declarations as to the use of the water by the respondents and as to the pollution of the River Vessigny, and then gave leave to the appellants to apply for an injunction to the Court of first instance after a period of two years. In that case it will be noted that (1) the lands of the appellants were unsuited for agriculture; (2) the lands were not being used for anything; (3) the appellants had suffered no damage; (4) the Courts below had refused the injunction.

When we come to the subsequent case, we find that the respondent and the appellant were respectively upper and lower riparian owners upon the banks of a river in Trinidad and carried on upon their respective lands the business of boring for oil. The trial judge found that the respondents had polluted the water with both oil and salt, and awarded the appellant £50 damages but refused to grant an injunction. An appeal to the full Court against the refusal to grant an injunction was dismissed upon an equal division of opinion between the two members of the Court. The Judicial Committee reversed that decision and it was in the course of delivering the judgment of their Lordships that Lord Sumner used the language quoted above. At the conclusion he pointed out that the loss to the respondents would be out of all proportion to the appellant's gain and that, the respondents undertaking to pay from time to time such pecuniary damages as their work may be found to have caused to the appellant on inquiry before the Court of first instance, the operation of the injunction should be suspended for two years to give an ample opportunity to the respondents to carry out any works necessary to remove the causes of complaint with liberty to apply to the Court of first instance for a further suspension if special grounds could be shown.

The writs in the actions before us were issued in May and June, 1947, complaining of damages since May 1, 1946.

The actions were tried in December 1947 and judgment was given by the Chief Justice of the High Court on April 15, 1948. The judgment of the Court of Appeal was given November 22, 1948, and the appeals before us were argued on June 13 and 14, 1949. The lands of the respondents are being used; considerable damages have been awarded and the appellant has had before it the fact of the injunction since April 15, 1948. The two cases decided by the Judicial Committee are quite distinguishable but, under all the circumstances, we have concluded that the operation of the injunction should be stayed for a period of six months.

Subject to this variation, the appeal and the appellant's motion to introduce new evidence should be dismissed with costs. Notice of a motion had been given by the respondents for leave to file an affidavit of Maurice Adelman but the matter was not mentioned at the argument, and that motion should, therefore, be dismissed without costs.

Subject to a variation whereby the operation of the injunction is stayed for a period of six months, the appeal and the appellant's motion to introduce new evidence are dismissed with costs. The respondent's motion is dismissed with costs.

Solicitors for the appellant: *McGuire, Boles & Worrall.*

Solicitors for the respondents: *Bagwell & Walkinshaw.*

Reporter's Note: On November 21, 1949 the appellant moved before the Court for an Order to vary the judgment to allow it to apply to the High Court of Justice for a further suspension of the injunction in the event of the appellant being able to show special grounds. The Court, without calling on the respondent, dismissed the motion with costs.

Cartwright K.C. for the Motion.

C. F. Scott, contra.

1949

*June 9
*June 24

ATLANTIC SUGAR REFINERIES LIMITED ..... } APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income Tax—Whether profits resulting from short sales of raw sugar—taxable income or capital gain—Income War Tax Act, R.S.C., 1927, c. 97, s. 3.

The appellant, incorporated as a Dominion company, carries on the business of refining raw cane sugar at Saint John, New Brunswick. After the outbreak of war in September 1939 an abnormal demand for refined sugar arose and the appellant, in common with other Canadian refiners, and pursuant to the Government's request, undertook to meet the demand out of its stocks of refined sugar. As a result, its normal stocks of raw sugar were depleted, and to re-establish its position it purchased raw sugar for immediate delivery at a considerable advance on pre-war prices. A ceiling having been fixed on refined sugar prices, the appellant was faced with a prospective loss and to offset this, speculated in raw sugar futures on the stock exchange and made a profit of some $71,000. In its income return it treated the sum as a capital gain. The respondent however assessed it as taxable income under the *War Income Tax Act* and from that assessment the present appeal arose.

Held: That, even if it were the only transaction of that character, in the light of all the evidence, it was a part of the appellant's business and therefore a profit from its business or calling within the meaning of section 3 of the *Income War Tax Act*.

Imperial Tobacco Co. v. *Kelly,* [1943] 2 All E.R. 119; *Anderson Logging Co.* v. *The King* [1925] S.C.R. 45; *Ducker* v. *Rees Roturbo Development Syndicate,* [1929] A.C. 132, applied.

Held: Per Kellock and Locke JJ., that the short sales in question were in effect hedges against possible loss on the cash purchases made and being made in the course of carrying on the appellant's business the profits realized were properly classified as income.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson J., President, (1), dismissing the appeal of the appellant and affirming the assessment made by the respondent under the *Income War Tax Act* for the year 1939.

Salter A. Hayden K.C. and *J. W. Blain* for the appellant.

J. Ross Tolmie and *J. D. Boland* for the respondent.

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

(1) [1948] Ex. C.R. 622.

THE CHIEF JUSTICE:—I agree with my brother Kerwin and would dismiss the appeal with costs.

The judgment of Kerwin and Taschereau JJ. was delivered by:—

KERWIN J.:—This is an appeal by Atlantic Sugar Refineries Limited against a judgment of the Exchequer Court (1) affirming an assessment of appellant to income tax for the year 1939, and the point in issue is whether a profit admittedly made by the company from sales and purchases of raw sugar futures on the New York Coffee and Sugar Exchange comes within the words "profits from a trade or commercial or financial or other business or calling" in s. 3 of the *Income War Tax Act*.

The company was incorporated by letters patent under the *Dominion Companies Act* in 1932. It buys raw cane sugar in order to refine it and sell the product. As a rule it did not buy futures, the only two occasions being in 1937 and in 1939. While the circumstances of these two cases are entirely different, the intention in each, as stated by Mr. Seidensticker, the company's president and manager, was the same, i.e., to offset losses either actual or feared. His intention, and therefore the intention of the appellant, was to do something as part of the latter's business and to secure a profit.

The Court of Appeal in England decided in *Imperial Tobacco Co.* v. *Kelly* (2), that the intention with which a transaction was entered into is a feature that should be considered under the British Income Tax Act. That is an important matter under our Act but the whole sum of the circumstances must be taken into account in determining whether a profit arose as part of the taxpayer's business. A number of cases are referred to in the reasons for judgment in the Court below and they, with others, were discussed fully in argument before us. Some are on the point whether the individual or company concerned was carrying on any business and, as has been pointed out several times, a company comes into existence for some particular purpose and, therefore, different considerations apply to it than would apply to an individual. Other decisions consider what bearing upon the issue has the

(1) [1948] Ex. C.R. 622. (2) [1943] 2 All E.R. 119.

1949

ATLANTIC SUGAR REFINERIES LTD. v. MINISTER OF NATIONAL REVENUE

Kerwin J.

circumstance that it was an isolated transaction, and it is settled that the mere fact that that was so does not dispose of the matter. The present appeal, however, may be decided by applying the principles set forth in the decisions now mentioned.

In *Anderson Logging Co.* v. *The King* (1) Duff J., as he then was, at page 48, in delivering the judgment of this Court upon a question arising under the British Columbia *Income and Personal Property Taxation Act* (1921) 2nd sess., c. 48, stated that he assumed the tests which had been applied in the decisions of the Courts upon controversies arising under the Income Tax Acts of the United Kingdom were those by which the liability of the Anderson Logging Co. was to be determined. He continues:—

> The principle of these decisions can best be stated for our present purpose in the language of Lord Dunedin in his judgment delivered on behalf of the Judicial Committee, in *Commissioner of Taxes* v. *The Melbourne Trust, Ltd.* (2).
>
> It is common ground that a company, if a trading company and making profit, is assessable to income tax for that profit * * * The principle is correctly stated in the Scottish case quoted, *California Copper Syndicate* v. *Harris* (3). It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business;

or, in the language of the judgment from which this quotation is made, which follows in sequence after the passage cited:

> What is the line which separates the two classes of cases may be difficult to define and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

or, in the form adopted by Sankey J.—in *Beynon* v. *Ogg* (4)—from the argument of the Attorney General—was the profit in question

> a profit made in the operation of the appellant company's business?

(1) [1925] S.C.R. 45.
(2) [1914] A.C. 1001 at pp. 1009 and 1010.
(3) 6 F., 894; (1904) 5 T.C. 159.
(4) [1918] 7 T.C. 125 at p. 132.

The decision of this Court was affirmed by the Judicial Committee (1). In *Ducker* v. *Rees, Roturbo Development Syndicate* (2), the House of Lords unanimously stated (and adopted) the test in the *California Copper Syndicate Case* as being whether the amount in dispute was "a gain made in an operation of business in carrying out a scheme for profit making".

Bearing in mind the principles set forth in these decisions, what do we find in the present case? In 1939 the company found, as a result of the outbreak of war and the tendency of the public to buy more sugar, that there was a greater demand than would be expected for seasonable requirements. At the request of an administrative committee set up by the Canadian Government, or of the Sugar Controller when finally appointed, the appellant, as well as others in the sugar refinery business, endeavoured to secure more raw sugar than they ordinarily would at that particular time. The appellant purchased a considerable quantity over and above what its usual requirements would be and it was because of the loss that Mr. Seidensticker feared, that he decided on behalf of the Company to speculate in sugar futures on the New York Coffee and Sugar Exchange. As to these speculations, he testified: "I think it is difficult to disassociate them from what took place in the first instance," i.e. in 1937, and I agree with the view of the trial judge that it is impossible to do so. At page 32 of the record, Mr. Seidensticker stated:—

> The raw sugars were allocated to them at a definite price fixed by the Sugar Administrator. In the interval between this initial control and commercial control the necessity of the Atlantic Sugar Refinery responding to this demand to supply raw sugar and the need therefore of buying raw sugars to overcome the deficiencies which normally and naturally occurred resulted in my attempting to, in some fashion, recoup what I feared might be a consequent loss.

The company finding itself in an abnormal situation because of the various factors mentioned, Mr. Seidensticker decided to protect the appellant's financial interests by the operations on the Exchange. The company was not investing idle capital funds nor was it disposing of a capital asset. In no sense may it be said that the operations were unconnected with the appellant's business and it is at least an added circumstance that the speculation was made

(1) [1926] A.C. 140. (2) [1928] A.C. 132.

1949

ATLANTIC SUGAR REFINERIES LTD. v. MINISTER OF NATIONAL REVENUE

Kerwin J.

in raw sugar. Even if it were the only transaction of that character, it should be held, in the light of all the evidence, that it was part of the appellant's business or calling and therefore a profit from its business within section 3 of the Act.

The appeal should be dismissed with costs.

The judgment of Kellock and Locke JJ. was delivered by:—

LOCKE J.:—The matter to be determined is whether the profits earned on the short sale transactions in September and October 1939 were profits or gains from a trade, within the meaning of s. 3 of the *Income War Tax Act,* or from a speculation divorced from the ordinary trade or business of the company which should be classified as a capital gain.

While it was undoubtedly within the corporate powers of the appellant to buy and sell raw sugar, the evidence disclosed that its business was the purchase of this commodity, refining it and selling refined sugar, and that it was not its custome to hedge its purchases by transactions in the future market. On September 7th, 8th and 9th, 1939, the appellant made cash purchases of 15,515 tons of raw sugar for future delivery at prices considerably in excess of those theretofore paid. The necessity for these very large purchases was occasioned by the appellant company, together with other sugar refiners in Canada, complying with the request of the Canadian Government to supply out of their stocks the altogether abnormal demands for refined sugar consequent upon the anticipation of and the outbreak of the war. The resulting drain upon the raw sugar stocks of the refineries created the demand which caused the great increase in the price of raw sugar. On September 11th the appellant made its first short sales upon the New York Coffee and Sugar Exchange, and between that date and October the 9th it sold some 3,500 tons short. In giving evidence as to these transactions, Mr. Lewis Seidensticker, the president and manager of the company, said that these sales were not in the nature of hedges but speculative transactions entered into in the hope of recouping part at least of an anticipated loss in the purchases made at such high figures.

Explaining the circumstances under which the sales were made, the witness said that, expecting an operating loss, he consulted a broker in New York and on his advice "those transactions which have been submitted as descriptive of what took place on the New York Sugar Exchange were entered into and what would in any wise be termed a hedging transaction was defeated by the control which fixed the conditions and the price situation here while it in no wise influenced or affected the listing and movement of quotations on the raw sugar exchange." Later, being asked by the learned trial judge to explain this statement, the witness said that "anything that would have *led us to continue to function in the market towards hedging* was defeated by the control," but added that the transactions were really speculations and not intended as hedging operations.

The control referred to was that imposed by the Government under the *War Measures Act*: on October 2nd the Sugar Administrator first fixed the price of refined sugar and thereafter required the refiners to purchase raw sugars through him and the first of such purchases was made in this manner by the appellant on October 6th. According to Mr. Seidensticker, after October 2nd the refineries no longer acted as free agents. Of the short sales in question transactions aggregating 3,100 tons were made in September: those made after October 2nd aggregated only 400 tons and of these there was but one sale of a 50 ton lot after October 6th. According to the witness, in the ordinary case of a hedge, the selling for future delivery synchronizes with the purchase of the commodity while, in the present case, the short sales were made over the period of a month following the cash purchases. I think that this circumstance does not affect the matter to be determined. While not carried out contemporaneously with the purchases, the short sales were in effect a hedge by the company against a possible loss on the purchases made and it was only the imposition of control on October 2nd that rendered further hedging operations inadvisable. In trades where natural products are purchased in large quantities, hedging is a common, and in some cases, a necessary practice, and the cost of such operations in trades of this nature is properly allowable as an operating expense

1949

ATLANTIC SUGAR REFINERIES LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

of the business. Where, as in the present case, the trader elects to close out his short sales and take a profit, this is, in my opinion, properly classified as profit from carrying on the trade. Mr. Hayden contended that this was simply a speculation in raw sugar resulting in a capital profit such as might have resulted from a speculation in shares or some other commodity but, upon the evidence in this case, that position cannot, in my opinion, be supported.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McCarthy & McCarthy.*

Solicitor for the respondent: *A. A. McGrory.*

1949

*Feb. 3, 4
*Oct. 4

DIGGON-HIBBEN, LIMITED .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Large business—Compensation—What is to be determined—Value to owner—Disturbance claim—Compulsory taking—Exchequer Court Act, R.S.C. 1927, c. 34, s. 47—Expropriation Act, R.S.C. 1927, c. 64.

In an expropriation of property on which a large business was being carried on.

Held: That what is to be determined is the value to the owner as it existed at the time of the taking and not to the taker; this value includes all advantages which the land possesses and should take into account losses by reason of disturbance.

Held: Also, that s. 47 of the *Exchequer Court Act,* R.S.C. 1927, c. 34, neither declares the right of an owner to receive compensation nor defines the quantum but merely the date as of which the latter is to be determined.

Held: Further, that in the circumstances of this case an allowance of ten per cent of the value of the land for compulsory taking—although not a matter of right in all cases—should be made in addition to the amount awarded at the trial.

Per The Chief Justice and Locke J. (dissenting): An allowance of ten per cent for compulsory taking is not a matter of right and can only be justified as a part of the valuation and in the circumstances of this case should not be allowed.

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

Cedars Rapids Manufacturing and Power Co. v. *Lacoste* [1914] A.C. 569; *Pastoral Finance Assoc. Ltd.* v. *The Minister,* [1914] A.C. 1083; *Vyricherla Narayana* v. *The Revenue Officer,* [1939] A.C. 302; *Commissioners of Inland Revenue* v. *Glasgow and S.W.Ry.,* (1887) 12 A.C. 315 and *Irving Oil Co. Ltd.* v. *The King,* [1946] S.C.R. 551 referred to.

APPEAL from the judgment of the President of the Exchequer Court of Canada, Thorson J., awarding to the appellant the sum of $120,000 in full compensation for the property expropriated by the Crown under the *Expropriation Act,* R.S.C. 1927, c. 64. The Crown had offered $99,670, while appellant had claimed $232,165.34. The appellant appealed to this Court for an increase of the award granted by the Court below.

J. A. Byers for the appellant.

F. P. Varcoe, K.C. and *W. R. Jackett* for the respondent.

THE CHIEF JUSTICE (dissenting): I agree with the reasons of my brother Locke and would dismiss the appeal with costs.

The judgment of Taschereau and Rand JJ. was delivered by

RAND J.: In the case of *Irving Oil Company* v. *The King* (1), it was held that while an allowance of 10 per cent for compulsory taking is not a matter of right, in circumstances presenting difficulty or uncertainty in appraising values, such as were found there, the practice of making that allowance applied. Similar circumstances are present here; in fact in the general character of the two situations there is no difference whatever. For that reason, I think the allowance should be made. The value of the land has not been specifically found by the President of the Exchequer Court, but a consideration of his reasons satisfies me that he had in mind something in the neighbourhood of $100,000. I would, therefore, add $10,000 to the amount awarded by him.

In the course of the trial and in his reasons, the President expressed certain views on that rule for determining compensation which defines it as the value of the land to the owner. This formulation not only contrasts the value to the owner as distinguished from the value to the taker, but

(1) [1946] S.C.R. 551.

1949

DIGGON-HIBBEN LTD. v. THE KING

Rand J.

embodies another sense; i.e. the content of value to the owner as against other possible owners. In *Pastoral Finance Association* v. *The Minister* (1), Lord Moulton stated it in the latter aspect in these words:

> Probably the most practical form in which the matter can be put is that they (the owners) were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.

The question arises here in connection with the claim for disturbance of possession, including expenses of moving, damages to or loss of fixtures, and for interruption of business generally. The debate is whether these are to be taken as elements of the value of the land to the owner or items of an independent claim for damages. There is no serious dispute that they should be allowed; that they must be such as can be brought within the scope of the "value of the land to the owner" has not been questioned; and what is at issue in the particular items is in reality a conceptual refinement which is devoid of practical significance.

In *Vyricherla Narayana* v. *The Revenue Officer* (2), Lord Romer observed that the statement, "value to the owner" was not, in strictness, accurate. The land, for instance, he said, may have for the vendor a sentimental value far in excess of its market value. Accepting this as a proper correction in verbal accuracy, it does not affect the rule as adopted in this country, because value of that sort has never been taken to be within it. But I should remark that the precise question before Lord Romer was the basis of compensation when the only possible purchaser was the expropriating authority.

It would seem, however, that the meaning of Lord Moulton's language has been somewhat misconceived by the President. In the present case these questions were asked:

> Q. Are you able to express an opinion as to whether a purchaser would be willing to pay more than $98,670 for the property in view of the fact that the defendant would suffer some loss or disturbance rather than fail to get the property?
>
> A. No, I think that would be—the defendant might not then be a willing vendor.
>
> Q. How much do you think a prospective purchaser who is anxious to get the property might be prepared to pay to the vendor in view of the disturbance factors that are present?
>
> A. Yes, I think he would pay more for it.

(1) [1914] A.C. 1083. (2) [1939] A.C. 302.

And in the reasons there is the following:

In arriving at this valuation, Mr. Winslow did not take any disturbance to the defendant into account, but expressed the opinion that an anxious purchaser might be willing to meet the owner's disturbance claims by paying from $10,000 to $20,000 more than the amount of his valuation sooner than fail to obtain the property.

It is obvious that the purchaser will pay according to the strength or value of his interest or his "anxiety" to obtain the property and to nothing else. He is not concerned with the consequences of disturbance to the owner. The statement means, as Mr. Varcoe on the argument frankly conceded, that the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it. It is assumed, in the situation here, that he is to continue in business. In this we have no need of an imaginary market, purchase, or interest; we have the real interest of the owner, and its measurement in value is the task for the Court. The rule applies to cases such as this where the possibilities of the land for which the claim is made are actually realized by the owner in the use to which he has put it: *Irving Oil Company* v. *The King* (*supra*). A compensation statute should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbour's should be required for public purposes; and this Court in the case mentioned was confirmed in its conception of the rule by the fact that in the definition of the word "land" in the Expropriation Act the word "damages" is included, a word which does not appear in the definition clause of the English Act. But all such subsidiary items involved in the disturbance of possession and the direct result of the forcible taking become embraced within the actual value of the land to the owner as fully as any other feature of it. I do not mean to imply that this rule is a formula for all cases. There are so many different situations to be met in the use of lands, that in some of them, as for example, those calling for reinstatement, or that dealt with in The Prince's Street Gardens Arbitration, reported in Cripps on Compensation, 8th Ed., at p. 916, in both

1949

DIGGON-HIBBEN LTD. v. THE KING

Rand J.

of which values other than commercial or economic are present, its application would be difficult if not impossible. Section 47 of the *Exchequer Court Act* has been drawn into the question. In *Toronto* v. *Brown* (1), Duff, J. in a review of characteristic authority, treats a right to compensation as the necessary implication and assumption of the Expropriation Act, in which, if I may say so, I think him entirely right. Section 47 is a procedural provision which, likewise assuming that right, fixes the time as of which the compensation is to be ascertained; but that it is intended to constitute the provision from which alone the right arises and that it contains a precise and restrictive definition of the compensation to be made is an interpretation for which neither in its history nor in its language is there any warrant.

I would, therefore, allow the appeal with costs and vary the judgment below by adding to it the sum of $10,000.

ESTEY J.: His Majesty The King in the right of the Dominion of Canada under the provisions of the *Expropriation Act*, R.S.C. 1927, c. 64, as of February 18, 1946, expropriated lots 1599, 1600, 1601 and 1602 in the City of Victoria.

The appellant owned these lots and thereon conducted a wholesale and retail business in books, stationery, business supplies, office furniture, a lending library, and also operated printing presses and equipment for catering to many types of printing requirements.

Section 23 of the *Expropriation Act* provides:

> 23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property.

Section 2(*d*) of the *Expropriation Act* defines "land" as follows:

> 2. In this Act, unless the context otherwise requires:
>
> . . . . . .
>
> (*d*) "land" includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act.

(1) (1917) 55 S.C.R. 153 at 189.

When the parties failed to agree as to the compensation the Attorney-General for Canada commenced these proceedings under sec. 19(*a*) of the *Exchequer Court Act*:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(*a*) Every claim against the Crown for property taken for any public purpose.

Then sec. 47 of the *Exchequer Court Act* specifies that the value shall be determined as of the date the property was taken.

The decision in *Irving Oil Co. Ltd.* v. *The King* (1) determines the issues in this case. There, as here, a business was operated on the premises and it was held, in accord with the established principles, that the compensation awarded included the value of the land, the cost of moving and other expenses and damages (as this word is used in 2(*d*)) and 10 per cent for compulsory taking. Kerwin, J., with whom the Chief Justice agreed stated at p. 556:

. . . the principle in this class of case is that the displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense for which compensation was claimed was directly attributable to the taking of the lands.

Rand J., at p. 561:

The clause "shall stand in the stead of such land or property" can only mean that, with the compensation money in the hands of the owner, he is in the equivalent position of holding his land or property instead of the money. He is, therefore, under that section, in the sense indicated, to be made economically whole.

The well-known cases of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (2) and *Pastoral Finance Assoc. Ltd.* v. *The Minister* (3) were cited and followed. It is the value to the owner and not the market value or value to the purchaser that must be determined. In the determination of that value to the owner various items may be considered and these will vary according to the circumstances of particular cases. The total of the items that may properly be taken into account determines the value to the owner. *Commissioners of Inland Revenue* v. *Glasgow and S.W. Ry.* (4). There the land was acquired under statutory authority and the jury in assessing the compensation made the award under three headings. The precise question there determined was that the £9499 8s. 3d.,

(1) [1946] S.C.R. 551.
(2) [1914] A.C. 569.
(3) [1914] A.C. 1083.
(4) (1887) 12 A.C. 315.

1949

DIGGON-HIBBEN LTD. v. THE KING

Estey, J.

being the compensation for loss of business, should be regarded as part of the consideration in determining the stamp duty. Lord Halsbury at p. 321 stated:

> Now the language of the legislature is this—that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as "damages for loss of business" or "compensation for the goodwill" taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation.

The learned President with respect to the property accepted the evidence of Mr. Winslow. There was a substantial difference in the values expressed but Mr. Winslow was not at great variance with some others. In any event, the learned President heard the witnesses and had the benefit of a view of the premises, and I think his conclusion with respect to the value of the property should be accepted:

> I was very favourably impressed by the evidence given by Mr. Winslow on behalf of the defendant. He made a valuation of the property as a whole of $98,670.
>
> . . . . . .
>
> Having regard to the evidence given, the opinions of the experts, the view taken by the Court and the arguments of counsel, and having taken into account the various factors and elements of value that have been brought to the attention of the Court, including the defendant's claims for disturbance, I have come to the conclusion that if I were to award the defendant the sum of $120,000 for the expropriated property this would adequately cover every element of value that could properly be taken into account, and at the same time meet the tests of value that the governing cases lay down. I think that a prudent purchaser, anxious to obtain the property, might well have been willing to pay that amount rather than fail to obtain it.

The learned President considered the losses and expenses under the heading of "Disturbance Allowance" and stated he would not fix the amount thereof higher than $20,000. The items claimed under this heading by the appellant totalled $99,714. The first of $4,000 covered surveys, plans and appraisals and executive time searching for suitable premises. The evidence disclosed that much of this work was undertaken in order to effect improvements in the general conduct of the business quite apart from

any question of expropriation. Even if in an appropriate case some such an allowance might have been made, the evidence here does not establish the actual work and the cost thereof in that connection. In fact the appellant's witness admitted that only a minor part thereof was claimed and suggested the amount of $850 but did not in any way indicate what this covered or how it was computed. I am therefore in agreement with the learned President's refusal to allow this amount.

The balance of $95,714 included actual moving expenses and increased cost resulting from moving. Since the hearing before the learned President the appellant has altered its plans with the result that counsel reduced many and abandoned certain of the items that were pressed before the learned President, until the items, apart from those to be immediately discussed, totalled between $20,000 and $25,000.

The other items making up the total of $95,714 consisted mainly of claims based upon an estimated loss of sales and consequent loss of profits over a period of five years. A perusal of the evidence submitted to establish this loss is not convincing apart from that incurred in the actual moving and allowed for under a separate heading. In fact the secretary-treasurer of the appellant when asked: "The move might be beneficial?" replied: "I admit that possibility also but I put in a figure because there is a possibility of a loss." Moreover, counsel for the appellant informed us that since the hearing other premises have been obtained which it may be assumed are more satisfactory. Quite apart from this latter factor, however, I am in agreement with the learned President that upon the evidence the items are not established and cannot be allowed.

The learned President made no allowance for compulsory taking. He apparently adopted a valuation of the property at about $100,000 and stated that he could not fix the disturbance allowance higher than $20,000 and allowed as a total compensation $120,000.

The allowance for compulsory taking is founded upon a long established practice in the Courts and is granted as part of the compensation. It is a factor in the compensation separate and apart from what would be included as

1949

DIGGON-HIBBEN LTD. v. THE KING

Estey, J.

disturbance allowance. So well established was the practice in Great Britain that as early as 1890 when it was deemed undesirable to make this allowance in connection with certain properties a statute was enacted to that effect (s. 21, of the *Housing of the Working Classes Act,* 1890, 53 & 54 Vict., c. 70). It was there provided that when land was taken in an unhealthy area no "additional allowance in respect of compulsory purchase" shall be made. The distinction between the allowance for disturbance and that for compulsory taking was emphasized in Great Britain in 1919 with the passage of the Acquisition of Land (*Assessment of Compensation Act,* 1919) where in sec. 2(1) it is specifically provided that an allowance for compulsory taking is not permitted under that Act while in sec. 2(6) it is specifically provided that rule 2 should not affect the allowance for disturbance. This provision is dealt with in *Horn* v. *Sunderland Corp.* (1). In this Court the allowance for compulsory taking was granted in *Irving Oil Co. Ltd.* v. *The King* (2) and prior thereto in *The King* v. *Trudel* (3); *The King* v. *Hunting, et al* (4); *The King* v. *Hearn* (5).

The amount allowed may be varied and there are cases where, having regard to the circumstances, no allowance should be made, but, with great respect, the circumstances in this case do not distinguish it from these cases in which an amount for compulsory taking was allowed. This amount is computed on a percentage of the value of the land, and therefore the sum of $120,000 should be altered by adding thereto the sum of $10,000 for compulsory taking.

The judgment appealed from should be so varied and the appellant should have its costs of this appeal.

LOCKE J. (dissenting): This is an appeal from a judgment of the Exchequer Court whereby it was found that the amount of compensation to which the appellant was entitled for its property in the City of Victoria, expropriated by the Crown under the provisions of the *Expropriation Act,* R.S.C. 1927, cap. 64, was the sum of $120,000. The lands taken consisted of Lots 1599, 1600, 1601 and

(1) (1941) 2 K.B. 26.
(2) [1946] S.C.R. 551.
(3) (1914) 49 S.C.R. 501.
(4) (1917) 32 D.L.R. 331.
(5) (1917) 55 S.C.R. 562.

1602, constituting a rectangular block having a sixty foot frontage on Government Street and a like frontage on Langley Street. Upon this property there was a two-story building wherein the appellant has carried on since 1919 the business of a wholesale and retail dealer in books, stationery, office furniture and other like supplies, and has operated a printing establishment. The information filed by the Crown alleged that a sum of $99,670 was sufficient to compensate for the taking of the said lands and premises and for the loss and damage alleged to have been caused by such taking. The appellant by its defence asserted that it was entitled to the sum of $232,165.34 and interest. Particulars of this claim furnished by the appellant were as follows:

1. Value to the owner of the said lands and premises and compulsory dispossession of the same	$132,451.00
2. Surveys, plans and search for new and suitable premises	4,000.00
3. Actual moving costs resulting from the expropriation	41,710.31
4. Increased costs of operations resulting from the removal	54,004.03
	$232,165.34

As to the value to be assigned to the land, the buildings and certain fixtures forming part of the freehold which the appellant would be unable to remove and as to the value of which there was no conflict, there was the usual wide divergence of opinion among the expert witnesses called. For the owners, Mr. George A. Okell, a former city assessor for the City of Victoria, was of the opinion that if $10,000 to $15,000 was spent upon the building the revenue returns from rental would justify a valuation of from $180,000 to $185,000, while admitting that at the time of expropriation in 1946, when business rentals were subject to the Rental Regulations, he did not think it could have been sold for that amount. The building on the property was a composite of three buildings erected on Lots 1599, 1600 and 1601 some forty or fifty years ago, and a structure erected on Lot 1602 in 1932 at a cost of

1949

DIGGON-HIBBEN LTD. v. THE KING

Locke J.

$8,000. As to these buildings, Mr. Charles F. Dawson, District Resident Architect at Victoria of the Department of Public Works for Canada, was of the opinion that they had outlived their usefulness. He had examined them and estimated that in 1946, at the time of the expropriation, it would have cost $54,349 to replace them with similar new construction and considered that from that figure there should be a deduction of 40 per cent for depreciation In addition, the witness estimated the value of the boiler room on the property, which was of more recent construction, at $5,000 and the value of the fixtures which would be left by the appellant when vacating at $10,750. Mr. James G. Watts, an employee of an appraisal company, estimated the depreciated value of the buildings as approximately $52,000. Of the witnesses called for the Crown, Mr. F. E. Winslow, the local manager of the Royal Trust Company and who had occupied that position for something more than thirty years, considered the market value of the property, including the fixtures, to have been $98,750 as of the date of the expropriation. He further expressed the opinion that a purchaser anxious to obtain the property might have paid from $10,000 to $20,000 in excess of that amount for vacant possession. Mr. F. B. J. Stephenson, the manager of a company engaged in the real estate business in Victoria and who had been engaged in that occupation for some thirty years, valued the property at $102,970, including his own valuation of the fixtures of $7,500, and expressed the opinion that he could have sold the property for that amount in February, 1946. Mr. H. C. Holmes who had had a long experience in real estate in Victoria, arrived at a valuation of $110,000 basing this on what he considered would be the net rental return from the property, which he considered would be roughly 4 per cent of the figure mentioned. In addition to this evidence, it was shown that the property was assessed by the City of Victoria at $38,870 and that upon the books of the appellant company the land was carried at $15,805.14 and the building at $30,784.22, a total of $46,589.36, against which depreciation had been taken over the years in the amount of $7,728.11, showing a net book value of $38,861.25.

In the particulars of the appellant's claim to the amount claimed for the lands and premises there was added an amount for compulsory dispossession, the total being $132,451. The remainder of the claim consisted of three items, the first being for surveys, plans and expenditures in searching for new and suitable premises in the sum of $4,000. Under a general heading purporting to show actual moving costs, in addition to estimated cartage of $1,200, there were large items such as a prospective lag in sales in the appellant's new premises during the first year of $25,000, an estimated loss of gross income on sales during a period of from five to ten days while moving in the sum of $5,809.15 and an estimated loss of 10 per cent on five years advertising in the sum of $2,500. It was shown that in anticipation of the expropriation the appellant had been able to acquire other premises on the east side of Government Street within a block of its present location known as the Five Sisters Block where all of its activities other than the operation of the printing plant could be properly accommodated, and that nearby it had been able to acquire a suitable building for the printing establishment. The third item designated "Increased Costs resulting from Moving" claimed at $54,004.03 consisted of an estimate of the additional costs of operation in the new premises for five years.

The learned trial judge, while finding that the appellant would undoubtedly suffer some loss through the disturbance resulting from having to move its business, considered that the claims made were excessive. As to the item of $4,000 for surveys, plans and search for new and suitable premises, he considered that the claim was not proven, except in respect of certain items which might be taxable as part of the costs of the proceedings. As to the claim under the heading "Actual Moving Costs", he considered the items for loss of fixtures in moving, for a 10 per cent loss on five years advertising, and the claim for loss of sales during the first year should be excluded, and that the item of $5,809.15 for loss of gross sales during moving was excessive. As to the item for loss of fixtures in moving in the amount of $1,424.53, the claim was abandoned in the argument before this Court and no evidence was given as to the net loss which would result from the

1949

DIGGON-HIBBEN LTD. v. THE KING

Locke J.

anticipated lag in sales or as to the net profit lost by reason of the anticipated loss of gross income on sales during the period of moving. As to the claim for increased costs of operation resulting from the removal, the learned trial judge found that no such claim had been substantiated and that, while there would be some loss through moving and some increased cost of operation due to the fact that the printing plant would be operated in a different building from the retail store and at a distance from it, against such loss and increased expenses there would be several offsetting advantages. The evidence established, in his opinion, that the Five Sisters property was more valuable for the appellant's purposes than its old location and he thought it probable that the losses from disturbance and the increased cost of operation would be more than offset by the resulting advantages of better premises and a better location. While considering that in determining the compensation he was not required to fix the amount of the defendant's claim for disturbance under the various headings separately, he said that, if he were, he could not fairly fix the amount higher than $20,000.

The principle to be followed in determining the compensation to be paid to an owner whose property is compulsorily taken cannot be more briefly or clearly expressed than in the judgments of the Judicial Committee in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1) and in *Pastoral Finance Association* v. *The Minister* (2). It is the value to the owner as it existed at the date of the taking and not the value to the taker which is to be determined. That value consists in all advantages which the land possesses, present or future, and it is their present value that is to be determined. As stated by Lord Moulton in the *Pastoral Finance* case (2), probably the most practical form in which the matter can be put is that the owner is entitled to be paid what a prudent man in his position would have been willing to pay for the land sooner than fail to obtain it. This formula was applied by Duff J. in *Lake Erie and Northern Railway Company* v. *Bradford and Galt Golf and Country Club* (3), and has been consistently followed in the decisions of this Court. It is a thing of value capable of being expressed in money for

(1) [1914] A.C. 569.
(2) [1914] A.C. 1083.
(3) (1917) 32 D.L.R. 219, 229.

the owner to be permitted to continue in possession in the operation of his business and to avoid the cost of moving and such disruption as might be caused by having to do so. That value is clearly to be included in determining what the property is worth to the owner (*Commissioners of Inland Revenue* v. *Glasgow and South Western Railway Company* (1); *Horne* v. *Sunderland* (2)). In addition, if a business location is a particularly favourable one in which to carry on operations for the owner and another equally satisfactory location is unobtainable, the lands have an added value to him, the present worth of which should be calculated. In the present matter, the claimant sought to establish by evidence that the property expropriated was a more favourable place for the carrying on of its business than the Five Sisters property situated on the opposite side of Government about a block away, but there was evidence on the point indicating that the contrary was the case, which the learned trial judge has seen fit to accept. The claim that the value of the expropriated premises should be increased on the ground that it was a more profitable location for the operation of the appellant's business than other available property failed. Admittedly, moving costs would be incurred and while no evidence was given as to what loss of profit would be suffered during the five- or ten-day period of moving, the evidence merely being that of the estimated loss of gross income on sales during the period, undoubtedly some loss would be caused. It has been made clear in the reasons for judgment that a substantial allowance has been made for what may be called disturbance, in determining the value of the property to the owner. Whether the learned trial judge intended to indicate by the statement that, if he were required to fix the amount of the claim for disturbance separately he could not fairly fix the amount higher than $20,000, this amount formed part of the value assigned to the property is not clear. I agree that it was unnecessary to itemize the various amounts the sum of which totalled the amount awarded. It is clear that consideration has been given to the various factors which might be relevant in determining the value of this property to the owner and I think no case has been made for interference with the amount of the award.

(1) (1887) 12 A.C. 315, 323. (2) (1941) 2 K.B. 26, 32.

1949

DIGGON-HIBBEN LTD. v. THE KING

Locke J.

In the reasons for judgment of the learned trial judge it is said, *inter alia,* that the standard by which the right to compensation for property expropriated is to be measured is prescribed by section 47 of the *Exchequer Court Act.* In my opinion, this is error. The section which is one of a group falling under the heading "Rules for Adjudicating upon Claims" does nothing more than to declare the date as of which the value of the land taken is to be determined. It had its origin in sec. 17 of the *Government Railways Act* 1881 which read:

> The arbitrators, in estimating and awarding the amount to be paid to any claimant for injury done to any land or property and in estimating the amount to be paid for lands taken by the Minister under this Act, or taken by the proper authority under any former Act, shall estimate or assess the value thereof at the time when the injury complained of was occasioned, and not the value of the adjoining lands at the time of making their award.

In the *Official Arbitrators Act,* cap. 40, R.S.C. 1886 (with minor changes which did not affect its meaning), the section was reenacted as sec. 16. When the latter statute was repealed by the *Supreme and Exchequer Court Acts,* cap. 16, Statutes of 1887, these provisions were reenacted in sec. 32, omitting the words "and not according to the value of the adjoining lands at the time of making their award", which were apparently regarded as redundant, and in this form are continued in sec. 47 of the present *Act.* The terms of the section, as originally enacted, indicate clearly the purpose of the section and its meaning has not been affected, in my opinion, by the omission of the above mentioned words. If I were of the opinion that the learned trial judge in determining the quantum of the compensation awarded had considered that this was limited in any manner by anything in sec. 47, I would consider that the award should be set aside and that there should be a rehearing, but I think it is clear from the context that this is not so. While indicating his opinion that sec. 47 limited the amount of the compensation, the learned trial judge proceeded to say that under its terms it was the value to the owner which was to be determined and while I disagree with his opinion that the matter is affected by sec. 47 except in the manner indicated, in the result it is clear that this has not affected the quantum of the award.

(1) (1917-18) 56 S.C.R. 376.

1949

DIGGON-HIBBEN LTD. v. THE KING

Locke J.

As to the claim for an allowance of ten per cent for compulsory taking, this is not a matter of right (*The King v. Larivée*) (1) and can only be justified as a part of the valuation (Cripps on Compensation, 8th Ed. p. 213) and in the circumstances of this case there should be, in my opinion, no such addition to the award.

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Moresby, Farr, Byers & Moresby.*

Solicitors for the respondent: *Straith, Pringle, Ruttan & Gouge.*

1949

*May 3, 4
*Oct. 31

IN THE MATTER OF THE ESTATE OF Dr. GEORGE ALEXANDER FLEET, DECEASED.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

THE ROYAL TRUST COMPANY ET AL. ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Succession duty—Obligation under antenuptial contract to pay a sum of money in consideration of renunciation of community and dower—Obligation not discharged prior to death of obligor—Whether obligation is a "succession"—Whether a debt deductible—Whether "consideration in money or money's worth"—Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, ss. 2(m), 3(1) (j), 8(2) (a).

By antenuptial contract made in 1916, the husband obligated himself during the existence of his intended marriage, to pay his wife $20,000, in consideration of her renunciation of community and dower. This sum remained unpaid at the husband's death in 1943. His executors claimed to deduct this from the value of his estate for the purpose of the *Succession Duty Act* of the Dominion. The deduction was disallowed by the Minister but restored by the Exchequer Court.

Held, (Kerwin J. dissenting), that the agreement did not fall within the definition of "succession" in s. 2(*m*) of the *Dominion Succession Duty Act.*

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

1949

IN RE *Fleet Estate*

MINISTER OF NATIONAL REVENUE v. THE ROYAL TRUST CO. *et al.*

Held, further, (Kerwin J. dissenting), that property transferred or agreed to be transferred in consideration of marriage, prior to April 29, 1941, is not deemed to be a "succession" under s. 3(1) (*j*) of the *Act*.

Per The Chief Justice and Taschereau J.: The renunciation of community and dower is a "consideration in money or money's worth" within the meaning of s. 8(2) (*a*).

Per Kerwin J. (dissenting): As the widow became entitled upon the husband's death, it is a "succession" within s. 2(*m*) of the *Act*. It is not a debt under s. 8(2) (*a*), because it was not created "for full consideration in money or money's worth".

APPEAL from the judgment of the Exchequer Court of Canada (1), Cameron J., reversing the decision of the Minister of National Revenue confirming an assessment made under the *Dominion Succession Duty Act*.

J. G. McEntyre and *R. G. Decary* for the appellant.

C. A. Hale, K.C., for the respondents.

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

TASCHEREAU, J.:—The Minister of National Revenue appeals from a judgment of the Exchequer Court of Canada (1) rendered on the 28th of October, 1947, maintaining the respondents' appeal from an assessment of succession duties upon the estate of the late Doctor George Alexander Fleet, in his lifetime of the City of Montreal.

Doctor Fleet died on the 23rd of April, 1943, and in his Will, appointed the Royal Trust Company and his wife, Helena Ada Dawes as executors of his estate, valued at $115,562.81. Doctor Fleet and his wife, both domiciled in the City of Montreal in the Province of Quebec, were married on June 1st, 1916, and on May 25th of the same year, they executed before John F. Reddy of Montreal, N.P., a marriage contract which stipulated separation of property and an obligation by Doctor Fleet to pay to his wife during their marriage, the sum of $20,000. It was further provided that in the event of such sum not having been paid during the marriage, and in the event of his wife surviving him, she would immediately upon his death have the right to receive from his estate, payment of the said sum with interest at the rate of six per centum from the date of the death.

(1) [1948] Ex. C.R. 34.

The executors filed with the Minister of National Revenue, as provided for by the *Dominion Succession Duty Act*, a statement showing the assets and liabilities of the estate, and in which the sum of $20,000, which had not been paid during the lifetime of the deceased, appeared as a liability. The Minister disallowed this sum as a debt of the estate, and Mr. Justice Cameron (1) allowed the appeal of the respondents, holding that the sum of $20,000 did not form part of the succession, was not a part of the taxable estate and not subject therefore to duty. It is from the setting aside of this assessment that the Minister of National Revenue now appeals.

The marriage contract stipulates that no community of property shall at any time exist between the parties, that there shall be no dower, and that in consideration of the renunciation by the wife to community and dower, the husband promised and obliged himself to pay to his wife during the existence of the marriage, a sum of $20,000. The marriage contract also contained the following paragraph:—

AND PROVIDED that in the event of the said obligation not being paid or satisfied during the existence of said marriage and that the said party of the second part should survive the said party of the first part, she, the said party of the second part, shall immediately upon the decease of the said party of the first part have the right to demand, collect and receive from the Estate of the said party of the first part payment of the said sum of Twenty Thousand dollars, which, in such case, shall bear interest from the date of the decease of the said party of the first part at the rate of six per centum per annum.

The relevant sections of the *Dominion Succession Duty Act* are the following:—

2. (*m*) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:

(1) [1948] Ex. C.R. 34.

1949

IN RE *Fleet Estate*

MINISTER OF NATIONAL REVENUE v. THE ROYAL TRUST CO. *et al.*

Taschereau J.

(*j*) property transferred to *or* settled on *or* agreed to be transferred to or settled on any person or persons whatsoever on or after the twenty-ninth day of April, one thousand nine hundred and forty-one, and *within three years of the death,* by the deceased person, in consideration of marriage;

8. (2) Notwithstanding anything contained in the last preceding subsection allowance shall not be made,

(*a*) for any debt incurred by the deceased or encumbrance created by a disposition made by him unless such debt or encumbrance was created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and to be paid out of his estate;

Dealing first with the claim of the executors that the promise of the husband to pay $20,000 was "a debt incurred by the deceased created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit" was subject to an allowance, the learned trial judge held that it was not. He came to the conclusion that at the time of the marriage contract, neither party possessed any assets of any real value, and that Mrs. Fleet in surrendering her rights to community and to dower, did not give to her husband, nor did he receive, full consideration in money or money's worth in return for the obligation to pay $20,000. He held that in order to determine that full consideration had been received, reference must be made to the facts as they existed at the time of the contract, and not to the facts existing twenty-seven years later.

In renouncing community of property, the wife abandoned one-half ownership in the earnings of her husband, as a physician and surgeon, and therefore gave up her potential rights to one-half ownership in the entire estate, which at the time of her husband's death amounted to $115,562.81. In renouncing the customary dower, she also abandoned a potential right to the usufruct of one-half of the immovables which belonged to her husband at the time of the marriage, and of one-half of those which might have accrued to him during the marriage, from his father, mother, or other ascendants. (C.C. 1434.)

In consideration of these renunciations, Mrs. Fleet was promised $20,000. I find it impossible to say that the obligation of the husband to pay this $20,000 is a mere debt contracted by him without consideration. It is admitted by all parties that this obligation was created *bona*

fide, and I am quite satisfied that there was ample consideration. The husband promised to pay $20,000, and the wife agreed not to claim an amount which eventually proved to be much larger than what the estate now owes her. She also waived her right to dispose by Will of half of her husband's property, if she had predeceased him, which would have meant a partition of Doctor Fleet's whole assets during his lifetime.

Marriage contracts often contain gratuitous provisions, which of course in certain cases may be taxable, but they also very frequently contain covenants which are not of the same character. In the present case, the agreement entered into was bilateral, onerous, and I find that the essential element of gratuitousness necessary to constitute a gift, is absent. The jurisprudence and the teachings of the authors are unanimous on this point. Vide *Turgeon* v. *Shannon* (1); *Simpson* v. *Thomas* (2); *Filion* v. *Beaujeu* (3); *Huot* v. *Bienvenue* (4); *Lapointe* v. *Larochelle* (5); *Royal Trust Company* v. *The King* (7).

In *Sabourin* v. *Périard* (1), it was held:—

Where a wife sues the testamentary executor of her husband claiming $2,000 under the marriage contract and the payment is refused on the ground that the marriage contract was never registered, the action should be maintained if it appears that the wife in renouncing her dower renounced to more than she would have received otherwise and the obligation to pay the amount claimed became an onerous one and consequently did not require to be registered.

At page 43, Mr. Justice Mackinnon says:—

Although the word "donation" is found in the clause of the marriage contract stipulating the payment to the plaintiff of an amount of $2,000 this in no way changes the nature of the contract. The plaintiff in renouncing her dower renounced to more than she was to receive and the obligation undertaken by her husband in the marriage contract became an onerous one.

At pages 44 and 45, Mr. Justice Bissonnette expresses his views as follows:—

Comme M. le juge Mackinnon le démontre à mon entière satisfaction, la convention particulière et inusitée que contient le contrat de mariage est bilatérale et onéreuse, de sorte qu'elle échappe aux exigences ordinaires de l'enregistrement des donations. Au surplus, la preuve que le dossier nous apporte écarte davantage tout doute, puisqu'elle révèle la remise de prestations synallagmatiques, apparemment plus lourdes pour la donataire que pour le donateur.

(1) 20 S.C. (Que.) 135.
(2) 4 R.L. (Que.) 465.
(3) 5 L.C.J. 128.
(4) 33 S.C.R. 370.
(5) 74 S.C. (Que.) 75.
(6) 79 S.C. (Que.) 304.
(7) Q.R. [1947] K.B. 34.

1949

IN RE *Fleet Estate*

MINISTER OF NATIONAL REVENUE *v.* THE ROYAL TRUST CO. *et al.*

Taschereau J.

Par cette preuve, toute présomption de gratuité qui s'attache aux clauses habituelles des conventions matrimoniales est non seulement détruite, mais cette stipulation, bien que qualifiée de donation, devient une convention à titre onéreux, parce que l'élément essentiel de libéralité ne s'y retrouve pas.

It will also be interesting to consult the following authors:—

Dalloz, Répertoire Pratique (1912, Vol. Donation, t. 4, pages 519 and 520) where the learned author says:—

3. La donation est un acte essentiellement gratuit; néanmoins, elle peut être faite avec stipulation de certaines charges. Dans ce cas même, la donation ne cesse pas d'être considérée comme une transmission à titre gratuit, et est soumise, par conséquent, à toutes les règles des donations entre vifs.

Cependant, si la charge imposée au donataire égale l'avantage qu'il retire de la donation, il n'y a plus de libéralité, et l'acte, bien que qualifié de donation, constitue une convention à titre onéreux, sans, d'ailleurs, qu'il y ait à distinguer suivant que les charges sont imposées au profit du donateur ou au profit d'un tiers,—Jugé, en ce sens, que l'acte qualifié donation, qui impose au donataire des charges ou des services d'une valeur équivalente ou sensiblement égale à celle des biens donnés, peut être considéré comme constituant, en réalité, un contrat à titre onéreux.

Planiol, Droit Civil, (8th ed., p. 491, para. 2505) says:—

2505. *Donations onéreuses*—Une donation n'est pas toujours entièrement gratuite; souvent des charges diverses sont imposées au donataire; on a alors une donation avec charges ou donation sub modo. L'existence de ces charges peut diminuer ou même détruire complètement le caractère gratuit de l'acte. Voyez ce qui en est dit ci-dessous, nos. 3009 et suiv.

I, therefore, have to come to the conclusion that in 1916, Doctor Fleet contracted "a debt in good faith, for full consideration in money or money's worth for his own use or benefit", and that the second part of section 8 (2) (*a*) of the *Act* applies. With deference I cannot agree on this point with the trial judge, although I fully concur with him in the other reasons that he gives in his judgment.

I have cited supra the definition given in the *Act,* in section 2 (m), of the word "succession". The last words of this definition are the following: "and also includes any disposition of property deemed by this *Act* to be included in a succession". Section 3 enumerates several dispositions of property deemed to be included in a succession, and subsection (*j*) says that "property transferred to or settled on or agreed to be transferred to or settled on any person or persons whatsoever on or after the twenty-ninth day of April, one thousand nine hundred and forty-one, and

within three years of the death, by the deceased person, in consideration of marriage" is deemed to be included in a succession. It follows that if, in consideration of marriage, property is transferred after the twenty-ninth day of April, one thousand nine hundred and forty-one, and within three years of the death, the amount of the property thus transferred is taxable. It is also logical to say that if the property is transferred in consideration of marriage, before the twenty-ninth day of April, one thousand nine hundred and forty-one, the property transferred is not subject to duty; and nobody could successfully argue that if Doctor Fleet had paid to his wife before the above mentioned date, the $20,000 that he had promised in his marriage contract to pay her, the Minister of National Revenue would be entitled to claim succession duties at the death of Doctor Fleet. But, section 3 (1) (*j*) does not apply only to property which is actually transferred; it applies also to property settled on *or agreed to be transferred* in consideration of marriage. It seems therefore clear to me that Doctor Fleet having, before the twenty-ninth day of April, one thousand nine hundred and forty-one, and obviously within three years prior to his death, agreed to transfer $20,000 to his wife in consideration of marriage, this amount is excluded from duty. The agreement made between the parties is by law, put on the same footing as a complete transfer. In virtue of this section 3 (1) (*j*), the amount thus agreed to be transferred is property which is not deemed to be included in the succession.

It has been further argued that the agreement falls within the definition of "succession" contained in section 2 (*m*). The mere reading of 2 (*m*) will show that this contention cannot prevail. As the learned trial judge said, this sum of $20,000 is not payable to Mrs. Fleet by devolution by law, nor did she become beneficially entitled thereto upon the death of Doctor Fleet. The agreement was made in 1916 and she became beneficially entitled thereto on that date or, in any event, during the lifetime of Doctor Fleet as the contract provided. It was not by reason of Doctor Fleet's death that the money was payable to her.

1949

IN RE *Fleet Estate*

MINISTER OF NATIONAL REVENUE v. THE ROYAL TRUST CO. *et al.*

Taschereau J.

It has also been contended that alternatively the disposition here made falls within the dispositions deemed to be included in a succession, by subsections (*a*), (*b*) or (*d*) of section 3. These subsections read as follows:—

(*a*) Property and income therefrom voluntarily transferred by grant, bargain or gift, or by any form or manner of transfer made in general contemplation of the death of the grantor, bargainor or donor, and with or without regard to the imminence of such death, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or the effect of which is that any person becomes beneficially entitled in possession or expectancy to such property or income;

(*b*) property taken as a *donatio mortis causa*;

(*d*) property taken under a gift whenever ade of which actual and bona fide possession and enjoyment shall not have been assumed by the donee or by a trustee for the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise;

These sections have no application. Under (*a*), in order that the property may be deemed a succession, it has to be voluntarily transferred by grant, bargain or gift, or made in general contemplation of the death of the grantor. Here, no property was transferred; there was merely an agreement to pay later. The agreement was not entered in general contemplation of death, it was made in contemplation of marriage. It cannot be said either that it falls under subsection (*b*) as being property taken as a "*donatio mortis causa.*" The elements which are necessary to constitute a donation *mortis causa* have been dealt with by the learned trial judge, and none of these elements can be found in the agreement that has been entered into. As to (*d*), it is clear that it cannot apply.

I, therefore, come to the conclusion that this appeal should be dismissed with costs.

KERWIN J. (dissenting):—This is an appeal by the Minister of National Revenue against a judgment of the Exchequer Court (1) allowing the respondents' appeal from an assessment of succession duties upon the estate of the late Dr. George Alexander Fleet. The respondents are the executors of Dr. Fleet who was domiciled and resident at the City of Montreal, in the Province of Quebec, and who died April 23rd, 1943. The point to be determined depends upon the construction of the *Dominion Succession Duty*

(1) [1948] Ex.C.R. 34.

Act, chapter 14 of the Statutes of 1940-1941, which came into force June 14th, 1941, and of a marriage contract executed May 25th, 1916, between Dr. Fleet and Helena A. Dawes, the parties to which were married on June 1st of the same year.

At the time of the execution of the contract and of the marriage, both parties were without any substantial assets. The contract stipulated separation of property. Miss Dawes possessed certain personal effects and jewellery, and it was agreed that all goods, chattels, household furniture, moveables and effects at any time found in and garnishing the parties' common domicile should belong to the wife, and there was a covenant by the husband to pay his wife during the existence of the marriage the sum of $10,000 for the purpose of purchasing such goods. The right to dower was renounced. Clause 5 of the contract provided in part as follows:—

> In consideration of the stipulation that no community of property is to exist between said parties and further in consideration of the renunciation to dower hereinabove made by the said party of the second part, the said party of the first part doth hereby promise and oblige himself to pay to the said party of the second part during the existence of said intended marriage, the sum of Twenty Thousand dollars, but as an obligation on the part of the said party of the first part purely and solely in favour of the said Miss Helena Ada Dawes said party of the second part.
>
> AND PROVIDED that in the event of the said obligation not being paid or satisfied during the existence of said marriage and that the said party of the second part should survive the said party of the first part, she, the said party of the second part, shall immediately upon the decease of the said party of the first part have the right to demand, collect and receive from the Estate of the said party of the first part payment of the said sum of Twenty Thousand dollars, which, in such case, shall bear interest from the date of the decease of the said party of the first part at the rate of six per centum per annum.

It was also agreed that the obligation on the part of Dr. Fleet to pay the sum of $10,000 was purely personal to and exclusively in favour of the wife and that, in the event of her predeceasing her husband before the sum should have been paid her, her representatives should have no claim in respect thereto.

By his Will, Dr. Fleet directed his executors to pay his debts, including such indebtedness, if any, as might remain unpaid under the contract. No part having been paid in his lifetime, his executors, in filing a return under the *Act,*

1949

IN RE *Fleet Estate*

MINISTER OF NATIONAL REVENUE v. THE ROYAL TRUST CO. *et al.*

Kerwin J.

claimed that the total amount should be deducted from the value of his estate which, due to the doctor's own efforts since his marriage, amounted to about $130,000. This deduction was disallowed by the Minister but was restored by the Exchequer Court (1).

Under section 6 of the *Act*, subject to the exemptions mentioned in section 7 (with which we are not concerned), there is to be assessed, levied and paid, at the rates provided for in the first schedule, duties (*inter alia*) upon or in respect of the succession to all real or immoveable property situated in Canada, and all personal property wherever situated, of a deceased domiciled in a province of Canada. By section 2 (*d*) "deceased" means a person dying after the coming into force of the *Act*, and by section 2 (*m*):—

> (*m*) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

The trial judge decided that the widow did not "become beneficially entitled" to the $20,000 "upon the death" of Dr. Fleet. "The agreement" he states "was made in 1916 and she became beneficially entitled thereto on that date or in any event during the lifetime of Dr. Fleet as the contract provided. It was not by reason of his death that the money was payable to her."

With respect, I am unable to agree. Upon the husband's death, "the event has occurred upon which (her) title accrued", per Jessel M.R., in *Attorney General* v. *Noyes* (2) and, as it is put by Lord Justice Brett in the same case, at 141:—"The condition which has not happened is not to be regarded." Lord Justice Cotton, the third member of the Court of Appeal, expressed a similar opinion. The point there decided was that as the succession under a certain settlement actually took effect on the death of the settlor, succession duty was payable upon the whole of the fund and not merely on the income of it for the period

(1) [1948] Ex.C.R. 34. (2) (1881) 8 Q.B.D. 125.

between the death of the settlor and the end of a term when the beneficiaries would have become entitled, in any event, to the *corpus*. The circumstances were quite different from those before us but the same reasoning should be applied.

Section 2 (*m*) corresponds sufficiently to section 2 of the *British Succession Duty Act,* 1853, to make opposite the remarks of Lord Macnaghten in *Northumberland* v. *Attorney General* (1):—"It is clear the terms "disposition" and "devolution" must have been intended to comprehend and exhaust every conceivable mode by which property can pass, whether by act of parties or by act of law." Leaving aside the question of sales, section 2 (*m*) of our *Act* is wide enough to cover dispositions made for value.

Section 2 (*m*) states that "succession" *means* certain things and also *includes* any disposition of property deemed by the *Act* to be included in a succession, thereby referring to section 3:—

> 3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:—

Here follow certain provisions which enlarge the definition of "succession" in section 2 (*m*) so as to bring into the revenue cases not covered by 2 (*m*). While I am conscious of the warning given by the Judicial Committee in *Attorney General of Ontario* v. *Perry* (2) in considering the *Ontario Succession Duty Act,* to proceed with caution in applying decisions upon British taxing statutes as amended from time to time to enactments elsewhere that appear full grown, the proper relationship of section 2 (*m*) and section 3 is that pointed out by Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* (3). After referring to the principle on which the *Finance Act* of 1894 was founded, he proceeds:—

> Sect. 1 gives effect to that principle. Subject to certain exceptions or savings, it imposes a duty called estate duty upon the principal value of all property "settled or not settled" which passes on death. Sect. 2 is merely subsidiary and supplemental. It was intended apparently to sweep in a few cases which were thought perhaps to be within the spirit though not within the letter of the proposed enactment, or else were supposed likely to lead to evasion if not made equally subject to estate duty. Sect. 2 therefore declares that the expression "property passing on the

(1) [1905] A.C. 406 at 410.
(2) (1934) 4 D.L.R. 65.
(3) [1899] A.C. 198 at 211.

1949

IN RE *Fleet Estate*

MINISTER OF NATIONAL REVENUE v. THE ROYAL TRUST CO. *et al.*

Kerwin J.

death of the deceased" shall be "deemed to include" property classified under four different heads, to no one of which rightly understood is that expression literally applicable.

Lord Davey, at page 128, agreed, although whether the case fell within the first or second section, he arrived at the same result. The Earl of Halsbury was of the same opinion (p. 207).

In this view, it is unnecessary to consider whether the marriage contract falls within section 3 (*j*):—

> (*j*) property transferred to or settled on or agreed to be transferred to or settled on any person or persons whatsoever on or after the twenty-ninth day of April, one thousand nine hundred and forty-one, and within three years of the death, by the deceased person, in consideration of marriage;

However, arguments have been advanced as to the meaning of this provision and it is advisable that they should be dealt with. Contrary to the submission of the appellant, my view is that the date, April 29th, 1941, applies not only to transfers and settlements but also to agreements therefor. But I am unable to agree with the respondent's contention that 3 (*j*) is a special category, applying to all transfers and agreements therefor made in consideration of marriage, and that unless such an agreement falls within 3 (*j*), it must be taken out of 2 (*m*). It is to be recollected that the *Act* came into force June 14th, 1941; that it applies only to the death of a deceased occurring thereafter; and that April 29th, 1941, is the date on which the Budget of that year was introduced in the House of Commons. It had been held by the Judicial Committee in *A.G. for Ontario* v. *Perry* (*supra*) that marriage was a good and valuable consideration for the transfer of property, and that such a transfer did not constitute a gift within a section of the *Ontario Succession Duty Act*. In the *Dominion Act*, the main provision as to successions upon which duties are levied is found in section 2 (*m*), which, however, requires the beneficiary to become beneficially entitled to property upon the death of the deceased. A transfer made in consideration of marriage, presumably not being a gift under one of the earlier paragraphs of section 3, Parliament decided in 3 (*j*) to make provision as to such transfers. Any property actually transferred in consideration of marriage before April 29th, 1941, and property so transferred after that date but more than three years prior to the death, is

not covered. Neither of these cases falls within 2 (*m*) because the beneficiary did not become entitled upon a deceased's death and they are not touched by 3 (*j*) which requires a transfer after April 29th, 1941, and within three years of the death.

Parliament also dealt in section 3 (*j*) with agreements to transfer or settle in consideration of marriage. As I have already stated, to me, the natural reading of the clause applies the date April 29th, 1941, to these agreements. If A agreed to transfer in consideration of marriage and, as in the case before us, the beneficiary becomes entitled upon A's death, section 2 (*m*) applies. However, there would be no succession within 2 (*m*) if the agreement was to transfer, not at A's death but at some date which turned out to be after such death, as, for instance, if the agreement were to transfer at the expiration of ten years and A died before that time arrived. Parliament provided for such a situation by 3 (*j*).

While Dr. Fleet's marriage contract falls within section 2 (*m*), the $20,000 would be a debt for which an allowance should be made pursuant to subsection 1 of section 8:—

> In determining the aggregate net value and dutiable value respectively, an allowance shall be made for debts and encumbrances . . .

unless it falls within the terms of subsection 2 (*a*) of section 8, which reads as follows:—

> (2) Notwithstanding anything contained in the last preceding subsection allowance shall not be made,—
>
> (*a*) for any debt incurred by the deceased or encumbrance created by a disposition made by him unless such debt or encumbrance was created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and to be paid out of his estate;

The words "for full consideration in money or money's worth" appear in section 17 of the *British Succession Duty Act*, and in a consideration of them in *Floyer* v. *Bankes* (1), the Lord Chancellor, Lord Westbury, at page 312, points out:—"Marriage is by the law of England a valuable consideration for a contract and that of the highest kind; but property arising under a contract in consideration of marriage is not excepted even in favour of persons coming directly within that consideration." Accordingly, a marriage contract or settlement being a "disposition" within

(1) (1863) 3 De G. J. 2 S. 306.

1949

IN RE *Fleet Estate*

MINISTER OF NATIONAL REVENUE v. THE ROYAL TRUST CO. *et al.*

Kerwin J.

section 2 of the *British Act*, it has been held that money payable thereunder upon death is subject to succession duty since the contract or settlement was not made for valuable consideration in money or money's worth. This has been held to be so in respect of (*a*) a sum which a father covenanted in his daughter's marriage contract to pay at the first term after his death to her trustees: *Lord Advocate* v. *Roberts' Trustees* (1); (*b*) a sum which a bridegroom bound himself in his ante-nuptial contract to pay after his death to his children: *Lord Advocate* v. *Maiklam's Trustees* (1878) Court of Session, not reported but referred to in Green's Death Duties, 2nd edition, at page 420, and in Hanson's Death Duties, 9th edition, at 578.

These decisions should be followed in the present case under our *Act* and none the less although the marriage contract was executed in Quebec. It may be taken that the jurisprudence and doctrine in that province are that such a contract is bilateral and onerous, and not gratuitous; but granting all that and admittting that the $20,000 was a debt created *bona fide*, it should be held that it was not created "for full consideration in money or money's worth". The appeal should be allowed with costs in both Courts and the decision of the Minister affirmed.

The judgment of Rand and Estey JJ. was delivered by

RAND, J.:—The Crown claims succession duty in respect of the sum of $20,000 which accrued to the respondent, Dawes, on the death of her husband in the following circumstances. They were married June 1st, 1916. On May 25th, a week before, they had entered into a marriage contract by which, among other things, it was agreed (*a*) that community of property should not exist between them, (*b*) that they should be separate as to property, (*c*) that there should be no dower for either wife or children, and (*d*), in consideration of the stipulation that community should not exist and the renunciation of dower, the husband obliged himself to pay to the wife during marriage the sum of $20,000. If payment should not have been so made, the wife, surviving the husband, would be entitled to collect from his estate, with interest from that date until payment; but should the wife predecease the

(1) (1857) 20 Dunl. (Ct. of Sess. 449, 452).

husband, the obligation would thereupon become void. The husband died on April 23rd, 1943, without having paid over any part of the money.

That Article 1257 of the *Civil Code* permits such a provision in a marriage contract is undoubted:—

...toutes sortes de conventions, même celles qui seraient nulles dans tout autre acte entrevifs;

and specifically:—

...la donation de biens futurs.

Then section 777 by the last paragraph provides:—

...la donation ...d'une somme d'argent ou autre chose non déterminée que le donateur promet payer ou livrer, dessaisit le donateur en ce sens qu'il devient débiteur du donataire.

The contract, therefore, creates an obligation which, apart from any question of registration, is a créance against the husband and his estate in favour of his wife, and which, in the absence of statutory provision to the contrary, as in the case of the *Bankruptcy Act*, ranks the wife as a creditor; in *re Denis B. Viger, insolvent* (1): in *re Morin, ex parte Hamil* (2): in *re Cameron, ex parte Hebert* (3). The obligation must, however, be distinguished from the legal result where a community exists but a special sum is agreed upon as the value of the wife's share. In that case, upon dissolution of the community the property right becomes realized, subject only to the limitation; the community is preserved for all purposes except the quantum. Here we have separation of goods, the right of the wife to prove with other creditors of her husband, and the termination of the obligation should she predecease him.

That being its nature, is it a "disposition" within the meaning of that word in s. 2 (*m*) of the *Dominion Succession Act*?

The decisive consideration is the meaning to be attributed to s. 3 (1) (*j*) of that *Act*. The paragraph is as follows:—

(*j*) property transferred to or settled on or agreed to be transferred to or settled on any person or persons whatsoever on or after the twenty-ninth day of April, one thousand nine hundred and forty-one, and within three years of the death, by the deceased person, in consideration of marriage;

and the crucial language, "or agreed to be transferred, etc.". The Crown's contention is that s. 3 must be taken to be an

(1) 16 R.L. (Que.) 565.
(2) 17 Q.L.R. 30.
(3) 3 C.B.R. 771.

1949

IN RE *Fleet Estate*

MINISTER OF NATIONAL REVENUE v. THE ROYAL TRUST CO. *et al.*

Rand J.

enlargement of the definition of "succession" in s. 2 (*m*) and that I think is so; but so far as it assumes that if transfers dealt with in s. 3 had become effective "on the death" of the deceased they would be within the definition, it is not fully warranted. For instance, paragraph (*h*) is a benefit accruing upon a death, but it must, I should say, be taken as outside the definition: *Fryer* v. *Morland* (1).

If paragraph (*j*) by itself is capable of a clear and rational meaning, I must first examine its effect before assuming any particular scope to s. 2 (*m*). The opening language "all transfers or settlements", taking the latter to mean an immediate beneficial vesting, in relation to the periods specified, presents no initial difficulty. The draftsman has not been precise in the language "within three years of the death" if he intended "prior to" as in paragraph (*c*) or "before" in (*d*); but I take it that he did. Then come the words "or agrees to transfer, etc.". Counsel protests that these cannot mean that the agreement itself is to be made after April 29th, 1941, and within the three years of death; but I have not been able to gather just what he thought they did mean. The whole clause was no doubt drawn without an adequate conception of what was intended. For instance, is there to be any distinction in transfers between cases where the marriage contract was made before 1941 and those made afterwards? Without suggesting or examining other possible situations, I think the reasons behind the paragraph and its meaning can be deduced from the purpose and indicated considerations of the statute. Elderly men not infrequently marry but to permit them to withdraw their property from the taxation by transfers of it to their wives is against the policy of the *Act*. To prevent that subtraction, Parliament has closed the opportunity to make it within three years before death. Certainly the agreement, the marriage and the transfer may and in many cases do take place virtually as one event; in other cases the last may remain unexecuted at death: but both classes are brought under the condemnation. The property may or may not have been agreed to pass on death, but that fact would not be material. The necessary implication from this is that property so passing on death would not come within any other section. It is

(1) 3 Ch. D. 675 at 685.

not sufficient to say there is overlapping between ss. 2 (*m*) and 3; this is a precise description of property of a special category and it cannot be taken as *ex abundantia cautela,* nor the words treated as being so absurdly superfluous. I construe the paragraph then to deal only with agreements made after April 29th, 1941, and within three years before the death of the deceased person, regardless of whether the transfer is made before or after the death, and that only transfers made pursuant to such agreements are intended to be deemed successions. From that, under the maxim *expressio unius est exclusio alterius,* it follows that an agreement made prior to 1941, though becoming effective on death, is not a succession and not subject to the taxation.

It is argued that *prima facie* the obligation comes within the language of 2 (*m*) and it must be taken to be taxable unless shown to be excluded by some other provision. No doubt there is force in this contention. But we must bear in mind, as Jessel, M.R. remarked in *Fryer* v. *Morland,* (*supra*), that underlying the *Act* is the conception that it provides for a tax on successions by gratuitous title: "that a man gets something on the death of the prior owner either by way of settlement or by way of gift or descent and thereby gets a profit" upon a death. He adds: "the only exception I can find to that principle is that a marriage consideration is treated as if it were a gratuitous title for this purpose." It is pertinent also that the terms "predecessor" and "successor" apply to s. 3 but not expressly to 2 (*m*) in which the word "death" is not restricted to the person from whom the property is derived; and in the same case the view of Jessel, M.R. was that property transferred for valuable consideration could not be said to be "derived" from the owner.

It is argued also that s. 8 (2) (*a*) brings all such transmissions within 2 (*m*) as not being for a consideration in money or money's worth. I agree that although marriage is a valuable consideration it is not consideration in money or money's worth. But s. 8 (2) (*a*) has nothing whatever to do with successions; it provides merely for certain deductions from gross value to ascertain aggregate net value and dutiable value for the purpose of determining the rates of tax on successions. There is no warrant for the inference that all aggregate value is represented by succession, and

1949

IN RE *Fleet Estate*

MINISTER OF NATIONAL REVENUE v. THE ROYAL TRUST CO. *et al.*

Rand J.

of course dutiable value is that of succession already found. An obligation might be payable out of assets in priority to bequests even though not deductible for the purpose of determining rates of taxation or successions.

English decisions must be applied to this *Act* with caution: *Attorney-General of Ontario* v. *Perry* (1). For example, in *Floyer* v. *Bankes* (2), in which Lord Westbury used the oft-quoted language of distinction between valuable consideration and that for money or money's worth, what was being considered was s. 17 of the *Act* of 1853, in which the latter words were used in relation to obligations payable on death; they defined exemptions from successions and, with other language of the statute, implied that all transmissions, unless for consideration of money or money's worth, were intended to be subject to the tax. This is the section to which Jessel, M.R. doubtless had reference when he made the remark quoted on marriage consideration. The draftsman of the Dominion statute has refashioned the provisions of the English Acts, and we must take it as we find it. Section 8 (2) (*a*) has its analogue in s. 7 of the *Finance Act*, 1894, which deals not with successions, but with aggregate value for the purposes of an estate tax. There is nothing in the *Canadian Act* that expressly exempts *bona fide* sales, as in s. 7 of the *Act* of 1853; nor does the definition of "predecessor" help except as already considered: but the implication of s. 3 (1) (*k*) and the object of the *Act* are sufficient for that purpose. The implication of paragraph (*j*) does, I think, the like office for marriage consideration; and the juxtaposition of these two provisions seems to me to strengthen that conclusion.

But this strife with interpretation by itself is significant support for the respondent. A taxing statute must make reasonably clear the intention to impose the tax; but apart conceivably from the mind of the draftsman, I cannot find that it has been made so in this case.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. G. McEntyre.*

Solicitors for the respondents: *Laverty, Hale & Laverty.*

(1) (1934) 4 D.L.R. 65. (2) 46 E.R. 654.

GEORGE KENT (PLAINTIFF) ..... APPELLANT;

AND

CHARLOTTE BELL and ARCHIBALD BELL (DEFENDANTS) ..... RESPONDENTS.

1949

*June 14
*Oct. 4

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Master and Servant—Tenant injured assisting landlord's husband with repairs—No agreement for wages—Liability of landlord—Of landlord's husband—Whether tenant a servant—Invitee—Volunteer or volunteer with interest.

The appellant was a tenant of premises owned by the respondent wife. The latter, to meet the needs of the tenant, had undertaken to enlarge the upper part of the house. The husband respondent, acting for his wife, commenced the work, and asked the tenant to assist him. The tenant, although regularly employed, replied he "guessed he would have to help". While descending from the roof at the direction of the husband, he placed his weight on a facia board that was insecurely nailed to the end of the joists; it gave way and he fell to the ground, sustaining serious and permanent injuries.

Held: That the tenant was not a volunteer. The work was entirely that of the landlord. The tenant approached it as an independent party conferring a benefit that had been sought; he was giving his services but not surrendering himself as an employee, the landlord therefore became liable to the tenant for the negligence of her agent, the husband.

Hayward v. *Drury Lane Theatre* [1917] 2 K.B. 899, followed.

Held: Also, that the finding of the trial judge that the husband had been negligent in creating a trap, reversed by the Court of Appeal, was amply supported by the evidence and nothing had been shown to warrant its reversal.

Appeal allowed and judgment at trial restored.

APPEAL from a judgment of the Court of Appeal for Ontario (Henderson, Roach and Hogg JJ.A., Roach J.A., dissenting) (1), which set aside the judgment of the trial judge, Wilson J. by which it was adjudged that the plaintiff recover from the defendants the sum of $5,271.75.

J. J. Robinette, K.C., for the appellant.

J. R. Cartwright, K.C., for the respondent.

The judgment of the Court was delivered by

RAND J.:—The facts of this case are simple. The appellant was a tenant of premises owned by the respondent

(1) [1946] O.R. 743; [1947] 1 D.L.R. 115.

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

1949

KENT v. BELL

Rand J.

wife. The latter, to meet the needs of the tenant, had undertaken to enlarge the upper part of the house. The husband, acting for his wife, with two helpers commenced the work and had been at it a day when he asked the tenant to assist him on the next afternoon, Saturday, in order to have as much work as possible done for the weekend. Although the tenant had a regular employment at which he would have worked that afternoon, his reply was that he "guessed he would have to help". Accordingly he presented himself and entered upon the work. While descending from the roof, at the direction of the husband, he placed his weight on a facia board that was insecurely nailed to the ends of the joists; it gave way and in the fall he was badly injured.

The trial judge found the husband to have been negligent in creating a trap, and this finding was reversed by the Court of Appeal (1), Roach, J.A. dissenting. With the greatest respect for the majority opinion, I agree with the finding at the trial; the evidence was ample to support it, and nothing has been shown to warrant its reversal. The judgment against the husband must, therefore, be restored.

A more involved question is raised in the claim against the wife. I am unable to find a contract of employment between the parties. There was an interest in both the tenant and the landlord in having the addition made; and the tenant's consent to "help" excludes, in the circumstances, an implied promise on the part of the wife through the husband to remunerate him.

The question, then, is, on what terms did the appellant engage in the work? Mr. Cartwright contends that he is a mere volunteer and as such is in no better position than a fellow servant, on which footing his claim would fail. Whether taking the appellant to have assumed the relation of an employee, the negligence could be viewed as a failure on the part of the master to furnish and maintain reasonably safe plant and working conditions within the rule laid down in *Marchment* v. *Borgstrom* (2), it is unnecessary to determine, because that is not, in my opinion, the true interpretation of the circumstances.

(1) [1946] O.R. 743; [1947] 1 D.L.R. 115.

(2) [1942] S.C.R. 374.

A volunteer does no doubt submit himself to the risks of the work he enters upon to the extent at least accepted by an actual employee, but the tenant here was not a volunteer. He had acquiesced with some reluctance in the request that he give the afternoon to the work. But he was under no obligation either to enter upon it or to continue at it, and conversely the respondents were free to dispense with his assistance at any time they saw fit. It was, therefore, a situation in which the tenant, having an interest in the completion of the work, gratuitously gave his services to the landlord on the latter's request, and the inquiry is, what legal incidents attached to the relation so entered upon?

The assumption of certain risks by the workman, including that of the negligence of fellow servants, is deemed to result from the presumed intention of the parties; and as the question here is that of such assumption, it must be determined in the same manner. Being free to continue or not as he pleased, and being concerned with his own interest, it is, I think, impossible to presume that he can be taken to have agreed to accept the risk of the negligence of the others engaged on the work. If the terms had been spelled out in detail, can we imagine the tenant; in such a position, doing so? I think not. The work was entirely that of the landlord; the tenant approached it as an independent party conferring a benefit that had been sought; he was giving his service but not surrendering himself as an employee. His own interest led him to do the first, but it held him from the second.

That was the view taken by the Court of Appeal in *Hayward* v. *Drury Lane Theatre* (1). In that case, a dancer willing to be employed and the company interested in her ability, but neither being under any obligation, entered into and took part in a rehearsal. In the course of it, she was told to stand on a staircase. It was defective and fell and she was injured. The Court reviewing the cases of *Degg* v. *Midland Railway* (2), in which the person injured was a volunteer; *Holmes* v. *Northeastern Railway Company* (3), where the victim was a consignee who undertook to help to move the car containing his goods to a place

(1) [1917] 2 K.B. 899.
(2) (1857) 1 H. & N. 773.
(3) (1869) L.R. 4 Ex. 254, and (1871) 6 Ex. 123.

1949

KENT v. BELL

Rand J.

of delivery; and *Johnson* v. *Lindsay* (1); held her not to be a volunteer and found that her participation had not involved an acceptance of the risk of negligence of the employees with whom she was associated. In *Johnson* v. *Lindsay,* Lord Herschel stated the position of volunteers thus:— "These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was himself in his service, the definition of common employment is not open to him. Such service need not, of course, be permanent or for any defined term. The general servant of *A* may for a time or on a particular occasion be the servant of *B*, and a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such. This, as has been pointed out, is the position of a volunteer. * * * The exemption can never be applicable when there is no relation between the parties from which such an undertaking can be implied. * * * I do not see how such an obligation can arise otherwise than from some contractual relation." Applying the principles of these cases to the circumstances here, the landlord becomes liable to the tenant for the negligence of her agent, the husband.

The appeal must, therefore, be allowed and the judgment at trial restored with costs here and in the Court of Appeal.

Appeal allowed and judgment at trial restored with costs here and in the Court of Appeal.

Solicitors for the Appellant: *Kerr and Kerr.*

Solicitors for the Respondent: *Clunis and Kee.*

---

(1) [1891] A.C. 371 at 377

1949

GEORGE W. MORLEY (PLAINTIFF).....APPELLANT;

*Oct. 14
*Oct. 15

AND

HARVEY FORSTER *et al* (DEFENDANTS).RESPONDENTS.

MOTION FOR APPROVAL OF SECURITY UNDER SECTION 70 OF *The Supreme Court Act*

Function of Court under The Supreme Court Act, R.S.C., 1927, c. 35, s. 70.

Held: Under section 70 of *The Supreme Court Act,* the function of the Court from whose judgment the appellant is about to appeal, or of this Court, or a judge of either Court, is to inquire as to the sufficiency of the security tendered. On such an application, an applicant should not be deprived of any right to appeal he may possess.

MOTION by appellant for leave to renew application to have security approved by Court of Appeal, to stay execution on the bill of costs of the respondents before the Court of Appeal, and for an order that the respondents pay the costs of some motions.

Further MOTION to excuse the appellant from complying with any or all of the provisions of the Rules of the Supreme Court of Canada, and, in particular, to dispense him from filing the Certificate of Security referred to in Rule 10, and to have the arguments on behalf of both parties heard on the day the Motion is heard.

George W. Morley, in person, for the motion.

G. T. Walsh, K.C., contra.

The Court having heard the appellant, without calling on Walsh K.C., reserved judgment.

THE COURT:—Upon motion by the appellant on October 17th of this year for leave to appeal from a judgment of the Court of Appeal for Ontario, this Court, on the assumption that leave was necessary, refused the application. The appellant now moves to excuse him from filing the certificate of security referred to in Rule 10 of the Rules of this Court and for leave to renew his application to have the security approved by the Court of Appeal for

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

1949

MORLEY v. FORSTER et al.

Ontario or a judge thereof, or for approval of the security by this Court. We have no power so to order and the applications must be dismissed with costs.

The appellant insists that the amount or value of the matter in controversy in the appeal exceeds two thousand dollars. Even if we had jurisdiction, it would be impossible on the material before us to make a pronouncement upon that question. It was pointed out that the appellant applied some time ago to a judge of the Court of Appeal for Ontario for approval of security and that that application was refused because, as it is stated in the formal order, "it appearing that leave to appeal is necessary". We are now told that the circumstances were not made clear to the learned judge who heard the application. In any event, under section 70 of the *Supreme Court Act,* the function of the Court from whose judgment the appellant is about to appeal, or of this Court, or a judge of either Court, on such an application is to inquire as to the sufficiency of the security tendered. In view of the appellant's contention that the necessary amount is in controversy in the appeal, he may yet be able to find means to bring the matter before the Court of Appeal for Ontario or a judge thereof with the view of the granting of an application for approval of the security tendered by him.

While we have already refused leave to appeal, if the appellant is entitled as of right to appeal, he should not be deprived of that right on a motion to approve the security. If security is approved, it is still open to the respondents to move to quash for lack of jurisdiction.

INDEX

CRIMINAL LAW—*Continued*

the appeal should be dismissed. *Held* also, that the first statement was incriminating and not exculpatory (The Chief Justice and Taschereau J. *contra*). *Held* further, that the dictum in *Gach* v. *The King* [1943] S.C.R. 254 that "when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given" was obiter: *Ibrahim* v. *The King* [1914] A.C. 599 and *Prosko* v. *The King* 63 S.C.R. 226 followed. (The Chief Justice and Taschereau J. expressing the opinion that the *Gach* case had no application to the present case as, in their view, the first statement was exculpatory.) *Per* Estey J. (dissenting): The first statement was incriminating and the trial judge misdirected himself to the effect that the statement was exculpatory and not evidence against the accused. That though a warning was given prior to the second statement, it was immediately followed by questions and incidents which were not sufficiently disclosed by the evidence to justify a conclusion that the statement was voluntarily made. BOUDREAU v. THE KING..... **262**

6.——*Assault occasioning bodily harm—Accused owner of premises on which acts occurred—As hotel keeper he retained two suitcases for rent due by former roomer—Friends tried to obtain them without paying—Whether injured person a trespasser with intent to commit a wrong or an invitee—Right of accused to resist—Degree of force permissible to repel assault—Hotel Keepers Act, R.S.M. 1940, c. 98—Criminal Code, ss. 57, 290.* The accused, being the proprietor of a rooming house, retained two suitcases belonging to a former woman roomer as security for unpaid rent. Four of her friends decided to obtain them without paying the rent. On arriving at the house one remained outside in a taxi and the three others went into the room occupied by the accused and his wife and when their purpose was known a fight started and the accused hit one of them with a hammer, fracturing his skull. The accused was convicted in police court of assault occasioning bodily harm, the magistrate holding that the men were not trespassers. The Court of Appeal being equally divided, his appeal was dismissed. *Held:* The failure of the trial judge to appreciate that the men were wrongdoers and under the circumstances trespassers, as well as his failure to direct himself as to the effect of sec. 57 of the *Criminal Code* under which the accused had the right to resist provided he did not use more force than was necessary, amounted to misdirection and therefore a new trial ordered. NYKOLYN v. THE KING..... **392**

7.——*Accused charged with manslaughter arising out of operation of motor vehicle—Trial judge directed jury to return verdict of not guilty of manslaughter and to consider if reckless driving proven—Whether jury satisfied itself that accused was not guilty of manslaughter, and since this a condition precedent, whether it had jurisdiction to consider offence of reckless driving—Criminal Code, ss. 285 (6), 951 (3).* Section 951 (3) of the *Criminal Code* provides that, upon a charge of manslaughter arising out of the operation of a motor vehicle, the jury if satisfied that the accused is not guilty of manslaughter but is guilty of an offence under s. 285 (6), may find him guilty of that offence. The appellant was charged with manslaughter arising out of the operation of a motor vehicle. The trial judge in charging the jury told them there was no evidence to support the manslaughter charge and directed that they bring in a verdict of not guilty on that count but left with them to determine whether or not the appellant was guilty of reckless driving. *Held:* that the jury in returning a verdict of not guilty of manslaughter, followed the judge's direction on a question of law as it was their duty to do; therefore the terms of the statute were met and their verdict meant that, although acting in conformity with the judge's direction and their duty, the jury was satisfied that the accused was not guilty of manslaughter. GRANT *v.* THE KING..... **647**

8.——*Lottery, Conducting of—Criminal Code, s. 236(1) (c)—Offences under first and second part clause (c) distinguished—Red River (Barrel) Derby.* Section 236 of the *Criminal Code*, is to the effect that every one who does any of the things described in the section is guilty of an indictable offence. Subsection *(c)* is divided into two parts. The first part applies to a person who conducts or manages any scheme for the purpose of determining who, or the holders of what tickets are, the winners of any property so proposed to be disposed of. The second part applies to every person who conducts or manages any scheme by which any person upon payment of any sum of money shall become entitled under such scheme to receive from the person conducting or managing such scheme a larger sum of money than the sum paid by reason of the fact that other persons have paid any sum under such scheme. In construing subsection *(c)*, it must be read with the preceding subsections and therefore the words "so * * * disposed of" in the first part refer to the scheme indicated in the preceding subsections, that is, "by some mode of chance". The second part of subsection *(c)* however, stands alone. It does not refer to chance, or to mixed skill and chance, and the receiving of money is not subordinate to any of these elements. The rule of *ejusdem generis* therefore does not apply to it. Since in the charge, preferred under the first part of subsection *(c)*, there was mixed skill and chance, there was no offence, and

TRADE MARK—*Descriptive word—Laudatory epithet not subject of monopoly — The Unfair Competition Act, 1932, (Can.) 1932, c. 38, ss. 1, 2 (d), (k), (l), (m), (o), 26, 27 and 29—Practice—The Exchequer Court Act, R.S.C., 1929, c. 34, s. 56—The Exchequer Court Rules—rules 36, 37, 41 and 300.*—The respondent in proceedings taken under section 29 of *The Unfair Competition*