1946

CANADA
LAW REPORTS

Supreme Court of Canada

REPORTERS

ARMAND GRENIER K.C.

S. EDWARD BOLTON K.C.

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1946

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Hon. THIBAUDEAU RINFRET C.J.C.
" " PATRICK KERWIN J.
" " ALBERT BLELLOCK HUDSON J.
" " ROBERT TASCHEREAU J.
" " IVAN CLEVELAND RAND J.
" " ROY LINDSAY KELLOCK J.
" " JAMES WILFRED ESTEY J.

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:

The Right Hon. Louis St-Laurent K.C.
The Right Hon. J. L. Ilsley K.C.

77529—1½

ERRATA

in volume 1946

Page 211. Line 4 should be: 1940 and hence was subject to income tax as provided

Page 440, f.n. (3) should be (1906) 38 Can. S.C.R. 27.

Page 600, at f.n. (6), add 50 before T.L.R.

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.

Braun v. *The Custodian* [1944] S.C.R. 339. Special leave to appeal refused, 18th March, 1946.

Canadian National (West Indies) Steamships, Limited v. *Canada and Dominion Sugar Company, Limited* [1945] S.C.R. 249. Appeal dismissed with costs, 24th October, 1946.

City of Montreal v. *Montreal Locomotive Works Limited and another* [1945] S.C.R. 621. Appeal dismissed with costs, 24th October, 1946.

Gray Coach Lines Ltd. v. *Payne* [1945] S.C.R. 614. Special leave to appeal refused, 28th February, 1946.

Hinkson v. *Harmes* [1943] S.C.R. 61. Appeal dismissed with costs, 13th May, 1946.

King, The, v. *British Columbia Electric Ry. Co. Ltd.* [1946] S.C.R. 235. Special leave to appeal granted, 21st March, 1946. Appeal dismissed with costs, 31st July, 1946.

King, The, v. *Dominion Engineering Co. Ltd.* [1944] S.C.R. 371. Appeal dismissed with costs, 10th October, 1946.

Oliver Blais Co. Ltd. v. *Yachuk* [1946] S.C.R. 1. Special leave to appeal and to cross appeal granted, 30th July, 1946.

Reference as to the Validity of Orders in Council of the 15th day of December, 1945, in relation to persons of the Japanese race [1946] S.C.R. 248. Special leave to appeal granted, 12th April, 1946. Appeal dismissed, 2nd December, 1946.

Secretary of State for Canada v. *Rothschild* [1946] S.C.R. 404. Special leave to appeal refused, 17th December, 1946.

Wrights' Canadian Ropes Ltd. v. *Minister of National Revenue* [1946] S.C.R. 139. Special leave to appeal granted, 18th June, 1946.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

THE OLIVER BLAIS COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

1945

*June 6, 7
*Nov. 28

AND

WILLIAM YACHUK, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, BY HIS NEXT FRIEND, TONY YACHUK, AND THE SAID TONY YACHUK, (PLAINTIFFS).. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Sale by defendant at its gasoline station of small quantity of gasoline to child, nine years of age, on his statement that it was wanted for his mother's car that was "stuck"—The child burned while playing with the gasoline—Whether defendant liable in damages—Whether contributory negligence of child—Contention of "ultimate" negligence or "last clear chance"—Apportionment of fault—Application of apportionment to child's father's claim for damages—Gasoline Handling Act, R.S.O. 1937, c. 332, s. 12; and Regulation 39 passed thereunder—Negligence Act, R.S.O. 1937, c. 115.

The infant plaintiff, nine years of age, accompanied by his brother, aged seven, came with an empty lard pail to an attendant at defendant's gasoline station and asked for and got five cents' worth of gasoline, saying that he wanted it for his mother's car that was "stuck down the street." In fact he wanted it for "playing Indians" with lighted bulrushes. The boys went away from, and out of sight of, the gasoline station, dipped a bulrush in the gasoline and lighted it, which resulted in severe burns to the infant plaintiff. He and his father sued defendant for damages. The trial Judge ([1944] 3 D.L.R. 615; [1944] O.W.N. 412) found that both defendant's attendant and the infant plaintiff were negligent and apportioned the degrees of fault

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

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at 25 per cent. against defendant and 75 per cent. against the infant plaintiff, and gave judgment against defendant for one quarter of the damages, which he assessed. The Court of Appeal for Ontario ([1945] O.R. 18; [1945] 1 D.L.R. 210) held that defendant should be held solely responsible and gave judgment against it for the full amount of the damages suffered (as assessed by the trial Judge). Defendant appealed to this Court, asking that the action be dismissed, or, in the alternative, that the judgment of the trial Judge be restored.

Held: *Per* the Chief Justice and Kerwin J: Defendant's appeal should be allowed and the action dismissed. *Per* Hudson and Estey JJ.: Defendant's appeal should be allowed and the judgment of the trial Judge restored. *Per* Rand J.: Defendant's appeal should be dismissed. In the result, the Court pronounced judgment allowing the appeal and restoring the judgment of the trial Judge.

Per the Chief Justice and Kerwin J.: Defendant's attendant did not act unreasonably or negligently. It would be putting too great a burden on the conduct of everyday affairs to hold that under all the circumstances of the case he was prohibited from selling the gasoline to the boys. As to the contention that defendant acted in breach of regulation 39, passed under *The Gasoline Handling Act,* R.S.O. 1937, c. 332, s. 12—Assuming the regulation to have been in force at the time (as to which no opinion was expressed), the facts brought the case within proviso (*b*) by which the regulation did not apply to "the delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved".

Per Hudson and Estey JJ.: The evidence supported the finding, as made in effect by the trial Judge, that defendant negligently placed in the hands of two young boys a dangerous substance, with respect to which their negligent conduct would be anticipated or foreseen by a reasonably careful person in the same or similar circumstances. (In the view taken of the facts, it was found unnecessary to deal with points raised with respect to *The Gasoline Handling Act* and Regulation 39 passed under it). On the other hand, the evidence and the trial Judge's opportunities at trial justified acceptance of his findings to the effect that the infant plaintiff appreciated the possibility of harmful consequences; that, having regard to his capacity, knowledge and experience, he was not, at the time of the accident, a child of tender years, as that phrase is understood and applied in law, but a boy beyond tender years, and therefore one whose conduct might constitute contributory negligence. The conduct of defendant, and that of the infant plaintiff, each constituted contributory negligence. The negligence of both was so intimately associated and "wrapped up" in causing the injury that the negligence of the infant plaintiff should not be held to be "ultimate" or the negligence of one who, notwithstanding defendant's negligence, had the last clear chance to avoid its consequences. Nor could defendant's contention that the infant plaintiff's conduct was "a conscious act of another volition" and constituted a *novus actus interveniens,* be maintained where, as here, the infant plaintiff's negligent conduct was a foreseeable consequence of defendant's own negligence. The infant plaintiff should recover damages from defendant on the basis of apportionment under *The*

Negligence Act, R.S.O. 1937, c. 115; and the trial Judge's apportionment of fault should be accepted; and, on a proper construction of that Act (discussed), the apportionment should apply to the father's damages.

Per Rand J.: Defendant should be held solely responsible. The giving of the gasoline to the two children was, in the circumstances, a negligent act towards them, a foreseeable consequence of which was injury to the infant plaintiff in the course of ordinary behaviour on his part. Having regard to the children's age, understanding, experience and self-control, a child's natural curiosity and the fascination for him of fire (in relation to which lies the chief danger of gasoline), they acted as ordinary children would be expected to act. The usual and expectable conduct in ordinary children of such years is, in relation to the legal standard of care, equivalent to prudent conduct in an adult; and just as prudent conduct gives rise to no legal responsibility for injurious consequences, so the normal conduct of average young children is exempt likewise.

APPEAL by the defendant The Oliver Blais Company Limited from the judgment of the Court of Appeal for Ontario (1) varying the judgment of the trial Judge, Urquhart J. (2).

The said defendant owned and operated a gasoline service station in the town of Kirkland Lake, Ontario. The action against it was for damages by reason of the sale to the infant plaintiff, a boy nine years of age, of a small quantity of gasoline in an empty lard pail, which gasoline, the infant plaintiff told the service station attendant, was to put in his mothers's car that was "stuck down the street", but which gasoline was in fact wanted for use in play, through which use it caught fire, and the infant plaintiff was seriously burned.

The material facts of the case are set out in the reasons for judgment in this Court now reported.

Urquhart J. found that both the service station attendant and the infant plaintiff were negligent and apportioned the degrees of fault at 25 per cent. against the defendant and 75 per cent. against the infant plaintiff. He assessed the damages to the infant plaintiff at $8,000 and the damages to his father, the other plaintiff, at $2,712.75; and gave judgment in favour of the infant plaintiff for $2,000 and in favour of his father for $678.19.

(1) [1945] O.R. 18; [1945] 1 D.L.R. 210.
(2) [1944] 3 D.L.R. 615; [1944] O.W.N. 412.

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The Court of Appeal held that the infant plaintiff should not have been found guilty of contributory negligence; and that the defendant should be held solely responsible for the accident; and, accepting the trial Judge's assessment of damages, gave judgment in favour of the infant plaintiff for $8,000 and in favour of his father for $2,712.75.

The defendant appealed to this Court, claiming that the action should be dismissed, or, in the alternative, that the judgment of Urquhart J. should be restored.

John J. Robinette K.C. for the appellant.

J. L. G. Keogh for the respondents.

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

KERWIN J.—On a summer day in 1940, William Yachuk was burned severely and an action was brought on his behalf against Oliver Blais Company Limited to recover damages therefor and by William's father for medical and other expenses. The circumstances are as follows.

William, nine years of age, and his brother, Victor, aged seven, had gathered at their home at Kirkland Lake, in the Province of Ontario, some bulrushes. Some days before, Victor had seen a moving picture depicting Indians with lighted torches, and the two boys conceived the idea of playing Indians and lighting the bulrushes, and, for that purpose, of securing gasoline. It was during the school holidays and their mother, who was confined to her bed as the result of illness, gave each of the boys five cents in order to buy chocolate milk. William spent his money for that purpose but Victor retained his for the purchase of the gasoline.

The two boys went to the defendants' gasoline station in Kirkland Lake and, while at the trial such a question was investigated, no issue is now raised as to the competence of the individual at the station with whom the boys conducted their business—a fifteen year old high school

boy by the name of Black. The two Yachuk boys presented themselves with an empty lard pail about four inches deep and four inches in diameter with a cover on it. William told Black that he wanted the gasoline to put in his mother's car which he stated "was stuck" down the street. While it is not important, the trial judge was unable to find who paid over the five cents but considered it probable that the five cents was handed over by the younger brother. Black asked if the gasoline were wanted for dry-cleaning, explaining that, if so, the gasoline had lead in it and was unsuitable for the purpose. William insisted for the second time that his mother's car was stuck down the street and that the gasoline was required for the car.

There was no car down the street. The boys went to a lane out of sight of the gasoline station and some distance away from it although in the general direction in which they had indicated that the motor car was stationed. William then sent his brother to their house for the bulrushes and some matches. Upon the brother's return, William dipped one of the bulrushes in the pail of gasoline, handed the dipped bulrush to the younger brother, and then lighted it. Upon its flaming up, Victor became afraid and tried to beat it out on the ground. At that time the boys were standing about four feet apart with the pail of gasoline open midway between them. The gasoline in the pail caught fire from the bulrush, splashed on the trousers which William was wearing, and these caught fire. William rolled on the ground in an effort to put out the flames and finally a man and a woman came with water and threw it on him. William was most seriously burned. The trial took place with a jury but, for reasons with which we are not concerned, the case was taken from them and the matters in issue were determined by the trial judge alone.

His finding that the defendants were negligent, with which finding the Court of Appeal agreed, is in these words:—

> I am firmly convinced, and I so find, that the defendant's agent Black could reasonably have anticipated, when selling the gasoline to the infant plaintiff accompanied by his brother, that these would, in all

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probability, use the same for some dangerous purpose likely to cause them injuries, and particularly might use the same for lighting something and thus run the danger of being injured.

I have no quarrel with this statement of the question to be answered or with the following question put by McRuer J.A. in the Court of Appeal:—

> Would not a private individual of common sense and ordinary intelligence, placed in the position in which Black was placed, and possessing the knowledge which must be attributed to him, have seen that there was likelihood of some injury happening to these two small boys in whose hands he had placed a quantity of gasoline in a lard pail, and would he not have thought it his plain duty to refuse to deliver it to them under the circumstances?

Gasoline is a dangerous substance unless handled with proper care. Irrespective of the question of certain provincial regulations mentioned hereafter, were the defendants under a duty not to sell the gasoline to the infants? Should Black have refused to sell the gasoline to William Yachuk because he should have anticipated that William (or his brother) might do, if not the identical thing that followed, something that would cause damage to himself?

The fact that no car required gasoline can make no difference in the decision of the initial problem presented for determination. We may suppose cases where the car was "stuck" and the mother of the boys had sent them to the gasoline station, or where, in addition to these facts, the mother had telephoned the station to make sure that the boys would be given the gasoline. Presuming that in the ordinary course of these supposed cases the boys would be out of sight of their mother and the service station attendant for a sufficient but not undue time, I have been unable to distinguish them from the one in hand.

Each case must depend upon its own circumstances and I therefore add that I have not overlooked the finding at the trial, concurred in by the Court of Appeal, that Black had a real doubt about the purpose for which the gasoline was going to be used. The trial judge believed Black as to the representation that had been made to him but continued that although Black says that

> he did not doubt that statement, I am of the opinion and I so find that Black had real doubts and misgivings (which were justified) as to the propriety of his sale. In the first place the sale was contrary to the express instructions of the manager of the defendants who, in instructing

the boy and probably considering his youth, had given him instructions that he was to sell gasoline only in a standard safety container. Secondly, it must or should have been a suspicious matter to him when two small boys with five cents came with an ordinary tin for the purpose of getting gas. If one boy had come alone it might have appeared to have been an errand but why would a mother send a large boy accompanied by a small brother for that purpose. That circumstance should have put Black on his guard. Black was only six years older than the oldest boy and he would undoubtedly have recollections of his own childhood and of the danger of playing with matches and the propensity of children to play with them and the general recklessness of children. In my opinion both the extraordinary nature of the transaction and the age of the boys involved, and the fact that he was putting in their hands a dangerous commodity which would cause damage if not handled with great care is such a circumstance that he might reasonably have anticipated that it would be used for an unauthorized and dangerous purpose.

As to the first reason given by the trial judge for his conclusion that Black had doubts as to the propriety of the sale, the manager's instructions were given, as the learned trial judge had previously pointed out, *ex abundanti cautela* because the particular regulation in question, if it were in force at the time, clearly permitted the sale in any metal container for the purpose of re-fueling a car to permit of its being moved. While Black may have doubted whether he should, in view of the manager's instructions, sell gasoline in the pail, I am unable to deduce from that that Black, as a reasonable man, should have foreseen that what occurred, or something similar thereto, might take place. Furthermore, I cannot agree that the smallness of the purchase and the fact that the two boys came together should have raised, or did raise, any doubt in Black's mind. My conclusion is that it would be putting too great a burden on the conduct of everyday affairs to hold that under all the circumstances of the case Black was prohibited from selling the gasoline to the boys.

This brings me to the regulations, which now require a closer examination because the respondents argue that they were breached. The regulations were passed under the authority of *The Gasoline Handling Act,* R.S.O. 1937, chapter 332, section 12 of which authorized the Lieutenant-Governor in Council to make regulations:—

(*j*) prescribing the construction, equipment and operation of conveyances and containers used for the transportation and storage of gasoline, kerosene and distillate.

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(*l*) generally for the better carrying out of the provisions of this Act.

It was under the Act as it thus stood that the following regulation was passed:—

39. Portable containers in which Class I liquids are sold or delivered to the public shall be of an approved metal safety type and a label shall be attached by the vendor in each case on which shall be printed in bold type a warning that the contents are dangerous and should not be exposed to fire or flame and should not be used for cleaning purposes in any building, provided that this regulation shall not apply to,—

(*a*) * * *

(*b*) the delivery in a metal container of gasoline required to refuel a motor vehicle to permit of its being moved.

In 1938 clause (*jj*) was added to section 12 of the Act so that the Lieutenant-Governor in Council was authorized to make regulations:—

(*jj*) prescribing the method, manner and equipment to be used in the handling, storing, selling and disposing of gasoline, kerosene and distillate.

The Court of Appeal concluded that at the time the regulations were promulgated section 39 thereof was not within the powers of the Lieutenant-Governor in Council, while the trial judge considered that, even if section 39 were authorized by the Act as it originally stood, the defendants were protected by the exception on the ground that the word "required", in the context in which it was found, meant "requested" instead of "needed" and that the exception should be thus interpreted in aid of the defendants. As to the word "refuel", he considered that it should be given the widest meaning and therefore all that would be involved would be the feeding of the fuel to the vehicle in any quantity which would enable it to be moved. I agree with the view of the trial judge on this point and say nothing as to that expressed by the Court of Appeal.

The respondents further contended that, in any event, regulation 39 had been made a rule of conduct by the appellants and that it should be considered in determining whether or not they were negligent. As I have already mentioned, the trial judge stated (and with that I agree) that the manager's instructions were given *ex abundanti cautela;* but moreover, the evidence shows that regulation was actually applied in the service station with due regard to the terms of proviso (*b*). Notwithstanding the superficial attractiveness of the argument, I adhere to the view that Black did not act unreasonably or negligently.

In the result, the appeal should be allowed and the action dismissed with costs throughout, including the costs of the first trial and of the first appeal to the Court of Appeal.

The judgment of Hudson and Estey JJ. was delivered by

ESTEY J.—On July 31st, 1940, the infant plaintiff (respondent), William Yachuk, just passed nine years of age, and his brother, Victor, about seven years of age, went to the defendant's (appellant's) service station at Kirkland Lake with a small lard pail and purchased five cents' worth of gasoline "for my mother's car that is stuck down the street". In fact, they wanted and did use the gasoline to burn bulrushes, in the course of which the infant plaintiff was so burned about his feet and legs as to leave him with a permanent injury.

The infant plaintiff, William Yachuk, claims general damages for the injuries which he suffered to his person, and his father, as plaintiff, claims for medical, surgical and nursing, and other expenses which he incurred with respect to the infant plaintiff as a consequence of the injury. The learned trial judge found both parties negligent and assessed the infant plaintiff with 75 per cent. of the fault and the defendant with 25 per cent. The Appellate Court placed the entire responsibility upon the defendant and directed judgment in favour of the plaintiffs for the full amount of the damages as found by the learned trial judge—for the infant plaintiff $8,000, and his father $2,712.75.

The learned trial judge, with respect to the defendant company, found as follows:

> I have no doubt that the defendant, therefore, by the act of its agent, was negligent in selling the gas to the boys and that such negligence caused or contributed to the injuries the plaintiff sustained.
>
> * * * the negligence consisted of selling such a small quantity of gasoline to two young boys without more investigation, selling in a dangerous container, contrary to express instructions and with no investigation of any sort and without attempting to give the boys a safety container or even looking for one about the station.
>
> I am firmly convinced and I so find that the defendant's agent Black could reasonably have anticipated, when selling the gasoline to the infant plaintiff accompanied by his brother, that these would, in all probability, use the same for some dangerous purpose likely to cause them injuries, and particularly might use the same for lighting something and thus run the danger of being injured.

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With respect to the infant plaintiff, William Yachuk, the learned trial judge found as follows:

> The accident, of course, occurred nearly four years ago, but casting back my mind from the present I would say that when the plaintiff was nine years and one month old, he was a mentally alert, bright young fellow, standing well in the grades of his school and extremely intelligent, and I have no hesitation in finding that he would be quite capable of being guilty of contributory negligence in the abstract and also in respect of the handling of gasoline and gasoline fires. He knew the danger of matches. His father had gasoline in his workshop, which was attached to the house. The plaintiff admitted that he had before the occurrence watched gasoline in his father's torch and had been with his father on a job or two, had seen his father lighting his torch and knew that there was gasoline in it, and had been told by his father to keep away from the torch. His father would not allow the children into the workshop. I have no doubt that the boy fully appreciated that gasoline was a dangerous substance, and had considerable knowledge that it burned in no ordinary manner.
>
> In lighting the bulrush as he did, in the proximity of a can of gasoline, the consequences of which I think he ought to have foreseen, he was guilty of negligence, and while it is true that the subsequent act of the brother in attempting to extinguish the bulrush by beating it on the ground actually touched off the gasoline in the can, really causing the accident, it was the negligence of the plaintiff that started the train of events which caused his injuries, after the two boys had the can of gasoline in the lane, and had got the bulrush and the matches, and, therefore, his negligence contributed materially to the accident.

The Court of Appeal agreed with the learned trial judge in his finding of negligence with respect to the appellant. The appellant (defendant) in this Court, however, contended that the learned judges in both courts erred in so finding and submitted that, Black having acted on the falsehood of William Yachuk, it follows that the use made of the gasoline by the infant plaintiff would not have been foreseen or anticipated by a reasonable man acting in the same or similar circumstances.

Black had been carefully instructed by his employer with respect to the selling of gasoline. He had read the placard of the Department of Highways posted on the wall of the service station entitled "Warning re Gasoline". He also knew that the regulations permitted the delivery of gasoline in a metal container to refuel a motor vehicle; but notwithstanding these regulations, he admits, and the manager of the service station corroborates, that he was specifically told, with respect to small retail sales, that no gaso-

line was to leave the property except in a safety can, a can specially designed which they had at the filling station and with which he was familiar.

It is significant, in view of the foregoing, that immediately he was asked by the boys to sell them five cents' worth of gasoline "for my mother's car that is stuck down the street", he deposed: "Well I thought for a minute", and then asked them if they wanted it for "dry cleaning". He asked this twice, but they persisted it was for their mother's car. Then, when he handed the five cents to the assistant manager, he explained that two boys had purchased gasoline and then asked: "That is all right, isn't it?" and received the answer: "Yes, as far as I know." At the trial, following this evidence, he is asked the question: "Did you have any doubt in your mind?" He answered: "No, I was just—in a way—I mean it is a small quantity and that and I just thought the boys were still nearby and I could have got them then, and he seemed to think everything was all right so I let it go."

He made no inquiry with respect to the type or location of the automobile, nor indeed did he ask any of a number of appropriate questions that the circumstances would immediately suggest. He contented himself with a warning not to use the gasoline for dry cleaning purposes.

Black himself was a boy of about fourteen or fifteen years of age at the time of this accident. He was therefore in law an infant and subject to the standard of a reasonable boy acting in the same or similar circumstances. The learned trial judge found him negligent and the evidence supports that finding, but it is not entirely his personal conduct or negligence, however blameworthy that may be, that is here in question. At the time of his employment he was not allowed to work at the pumps. After a period of instruction and experience about the garage he was deemed competent by his employer and placed in charge of the pumps to sell gasoline to the public. It would appear that as a boy of his age he had not acquired the confidence of one older and more experienced, and, therefore, immediately called the nature of the transac-

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tion to the attention of the assistant manager and received such an assurance that he did not call the boys back.

The evidence supports the finding that the defendant has negligently placed in the hands of two young boys a dangerous substance, with respect to which their negligent conduct would be anticipated or foreseen by a reasonably careful person in the same or similar circumstances. It was conduct within the range or field that a reasonable person would expect of a boy who, while exercising a degree of reason and discretion, is still influenced and directed by those natural instincts common to boys who act in a spirit of adventure or, as in this case, in imitation of the Indians who, with lighted torches, they observed in the movies.

Then with respect to the infant plaintiff and his younger brother, they had decided to burn bulrushes as had the Indians in the movies. They desired gasoline for the purpose, and taking a coffee jar went to a filling station where they were refused gasoline because of the container. They returned with a tin lard pail to the same vendor and were again refused. They crossed the street to the defendant's station where they purchased five cents' worth of gasoline, the infant respondent explaining that they desired it for "my mother's car that is stuck down the street". They then went back for the bulrushes, and taking them to a lane the infant plaintiff dipped a bulrush into the gasoline and lighted same. At some time prior to lighting the bulrush he decided to call on two of his friends and remarked to his younger brother: "If John and Max are not home I don't think we should light them". They were in fact not home, but nevertheless the bulrush was lighted. It burned vigorously; the younger boy in his endeavour to put it out by beating it on the ground ignited the nearby can of gasoline. Somehow the clothing of the infant plaintiff caught fire causing his injuries.

The learned trial judge has found that the infant respondent was not a child of tender years, as that phrase is understood and applied in law, but rather a boy beyond that age and therefore one whose conduct may constitute contri-

butory negligence. The learned judges in the Court of Appeal have concluded otherwise. Their view is that "he had the limited knowledge in regard to gasoline indicated by the learned trial Judge", but were of the opinion that the record discloses

> no evidence to indicate that he knew that gasoline would flare up, that the fumes would be likely to ignite and cause the gasoline in the pail to burn, or that the younger boy would likely become terror stricken and beat the flaming torch on the ground in the vicinity of the open gasoline can.

With great respect, I cannot avoid the conclusion that the prime reason they wanted the gasoline was because they knew it would flare up, and while, no doubt, they did not anticipate precisely what happened, the infant plaintiff did appreciate the possibility of harmful consequences, as evidenced both by the remark he made to his younger brother with regard to the two boys they called for: "If John and Max are not home I don't think we should light them", as well as his conduct throughout. His father was a plumber, who had a shop in part of his house, where he had gasoline. As the learned trial judge commented, the infant plaintiff had been with his father upon a job or two, had seen his father lighting the torch, and had been warned to keep away from it. These factors are evidence in support of the finding of the learned trial judge, who had the opportunity of observing and estimating his capacity, knowledge and experience. It is, in the language of Chief Justice Anglin, "eminently an issue for determination by a trial judge" (*Bouvier* v. *Fee* (1)). With great respect to the learned judges who entertain a contrary view, I think it should be accepted in this case.

If the infant be held an infant of tender years, then I agree that there is an inconsistency, as pointed out by the learned judges of the Appellate Court, in a finding of negligence on the part of the appellant and contributory negligence on the part of the infant respondent, but I do not think this inconsistency exists where the child is held to be beyond tender years. The quotation from *Lynch* v. *Nurdin* (2) quoted by the learned judges of the Court of Appeal appears to indicate the position and the limit of the suggested inconsistency. It may be found where the child is

(1) [1932] S.C.R. 118, at 120. (2) (1841) 1 Q.B. 29 at 38.

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of tender years and "merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse", and again, "the child acting without prudence or thought". The Court was there dealing with a child between six and seven years of age, but here we have a boy of nine who impressed the learned trial judge with his capacity, knowledge and experience to the extent that he found him a boy beyond tender years and therefore one whose conduct may constitute contributory negligence. If in fact, having regard to his age, capacity, knowledge and experience, his conduct be found to constitute contributory negligence, he is in the same position as anyone else whose conduct constitutes contributory negligence. In the same case, *Lynch* v. *Nurdin* (1), where they were dealing with infants of tender years, Denman C.J. incorporates the following in his judgment:

> If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.

This was quoted with approval by Mr. Justice Anglin (later Chief Justice) in *Geall* v. *Dominion Creosoting Co.* (2).

In my opinion, as intimated above, the infant respondent did, upon his own evidence, disclose sufficient knowledge of gasoline and a concern with respect to the possibilities of danger arising out of his own course of conduct to support a finding that he did not exercise that care which a reasonably careful boy of nine years, of his capacity, knowledge and experience, would have exercised under the same or similar circumstances.

The negligent conduct of the appellant in delivering the gasoline as he did had not spent or exhausted itself but remained an operative and effective force when that of the infant respondent joined therewith to effect the unfortunate injury. The conduct of both parties constitutes contributory negligence.

The appellant further submits that if both parties have been negligent, the infant respondent's negligence under the circumstances should be classed as ultimate

(1) (1841) 1 Q.B. 29. (2) (1917) 55 Can. S.C.R. 587, at 611.

negligence, or as the negligence of one who, notwithstanding the appellant's negligence, had the last clear chance to avoid the consequences of that negligence.

The authorities indicate that, while the time factor is important, it is not conclusive. Not only must the negligence be subsequent, but it must be severable or independent in order to be classed as "ultimate" or "last clear chance". It is difficult to describe the defendant's negligence as severable from that of the infant plaintiff when the latter received the gasoline in a container that the defendant regarded, as evidenced by the instructions given to its agent, as not reasonably safe for such a purpose, even in the case of an adult.

I have found no case which would hold that the appellant was relieved of liability when the negligent conduct which he contends was ultimate negligence was a foreseeable consequence arising out of his own negligent conduct. It seems contrary to principle that the appellant, having placed a dangerous substance in other than a safety container in the hands of a boy whose negligent conduct was foreseeable, should escape liability by contending that, while he knew or ought to have known that injurious consequences would follow, nevertheless he is not liable because that foreseeable negligent conduct resulted in injury. In my opinion, the negligence of both parties is so intimately associated and "wrapped up" in the production of the injury that the negligence of the infant respondent should not be described as "ultimate" or as "last clear chance".

Then the appellant submits that the negligent "conduct of the infant plaintiff was 'a conscious act of another volition' and constituted a *novus actus interveniens*".

> What has been called the conscious act of another volition may remove liability from one who has been previously negligent if it is proved that in fact that conscious act was the real cause which brought the injury about, but not if it is left in doubt whether the conscious act was the real cause or not, nor if such a conscious act was one of the possible events which there was a duty on the part of the negligent person to guard against.

Halsbury, 2nd Ed. Vol. 23, p. 594, par. 845.

Then again:

> If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence.

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Greer L. J., *Haynes* v. *Harwood* (1).

The appellant, in support of this contention, submitted two decisions: *Dominion Natural Gas Company* v. *Collins and Perkins* (2), and *Scott* v. *Philp* (3). In the former the defendant company's negligence was held to be the proximate cause, and in the latter the defendant was relieved of liability because the negligent intermeddling with the defendant's automobile by a boy nine years of age was not a foreseeable consequence, but in that case Chief Justice Meredith, in the course of his judgment, at p. 518 states:

> I am of opinion that there was no evidence to warrant the conclusion that the appellant ought, as a reasonable man, to have anticipated that which the boy did, and that negligence on his part was not established.

The authorities appear conclusive that this contention of the appellant cannot be maintained, where, as in this case, the negligent conduct of the infant respondent was a foreseeable consequence of its own negligence.

The respondents (plaintiffs) contend that the defendant (appellant) violated Regulation 39 (*b*) passed under *The Gasoline Handling Act,* R.S.O. 1937, Chapter 332, section 12, as that section was amended in 1938. In my view of the facts of this case, it is not necessary to deal with the points raised with respect to this legislation.

It follows that the infant plaintiff, because of the contributory negligence rule, would not succeed at common law, but it is that rule which has been modified by the Ontario *Negligence Act.* Under the latter he may recover damages on the basis of apportionment, he being one whose fault or neglect contributed to the loss or damage.

Then should the father's damages be apportioned? *The Negligence Act,* R.S.O. 1937, Chap. 115, has modified the defence of contributory negligence and provided in certain cases for the apportionment of damages.

> 2. (1) Where damages have been caused or contributed to by the fault or neglect of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent, and, except as provided by subsections 2 and 3, where two or more persons are found at fault or negligent, they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

(1) [1935] 1 K.B. 146, at 156.
(2) [1909] A.C. 640.
(3) (1922) 52 Ont. L.R. 513.

This section specifically provides for the apportionment of damages as between the parties who by their fault or neglect have contributed to the loss or damage. While the father was in no way associated with the events that inflicted the injury suffered by the infant plaintiff, it must not be overlooked that, although a separate and distinct cause of action, his has been regarded as a consequential or dependent action and treated upon much the same basis as the infant. The contributory negligence of the latter was a bar to his recovery at common law. It seems, therefore, to follow that under *The Negligence Act* the principle that his action is affected by the negligence of the infant should be recognized and his damages therefore apportioned on the same basis as that of the infant.

It seems, further, that this is consistent with the conclusion arrived at in *Littley* v. *Brooks and Canadian National Railway Co.* (1), where the damages recovered by the plaintiffs under the *Fatal Accidents Act,* R.S.O. 1927, c. 183 ("Lord Campbell's Act"), were apportioned because of the provisions of the *Contributory Negligence Act* under which that case was decided.

This view appears to be strengthened by a consideration of the other provision in this section for one who is not at fault or neglect and therefore does not contribute to the loss or damage but is described as a "person suffering loss or damage for such fault or negligence". The damage suffered by such a person is not apportioned, and for the whole amount he has a joint and several claim against those who are at fault or negligent. If the father be classified as such a person he would have, under this statute, a joint and several claim against the appellant, his infant son and co-respondent, for his expenditure in discharging the duty which the law imposes upon him as parent. This duty to provide necessaries to his infant is imposed because of the relationship of parent and child and the dependency and inability of the child to provide for himself. *Banks* v. *Shedden Forwarding Co.* (2); *Young* v. *Town of Gravenhurst* (3). Under section 242 of the *Criminal Code* the criminal responsibility is defined and, *inter alia,* that the infant be under sixteen years of age,

(1) [1932] S.C.R. 462.
(2) (1906) 11 Ont. L.R. 483.
(3) (1911) 24 Ont. L.R. 467.

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a member of the parent's household and the necessaries required in order to preserve the life or the health of the child. While this does not impose a civil obligation, in a case such as this where the civil obligation exists it has been recognized as proper to consider such a provision when determining what is required under certain circumstances.

The Negligence Act modifies the defence of contributory negligence and provides for the apportionment of the damages between those at fault or neglect. It preserves to those who, as a consequence of that fault or neglect, suffer loss or damage without fault or neglect on their part, their common law right to a joint and several claim against these contributors. The common law never contemplated the parent having a claim against his infant for expenditures incurred in providing the necessaries for the preservation of that infant's health and life. I do not think under the language of this statute we should attribute to the legislature an intention to give to the parent a joint and several claim against his infant for the discharge of his parental duty. Such a construction is incompatible with the reason and basis of his obligation, and apart from express words to that effect, or words which necessarily imply that result, this construction ought not to be adopted.

The learned trial judge has determined the degree in which the parties hereto are respectively found to be at fault or negligent by apportioning to the plaintiff 75 per cent. of the fault and the defendant with 25 per cent. The determination of the degree of fault or neglect appears to be a question which the trial judge is in a much better position to estimate than an appellate court which must rely entirely upon the printed record. There does not appear to be any manifest error in law or fact involved in the apportionment, and, in my opinion, it should not be disturbed.

In my opinion, the appeal should be allowed and the judgment of the learned trial judge restored. The respondent should have his costs in the Supreme Court of Ontario, including the costs of the former trial and appeal. The appellant should have his costs of appeal to this Court, but there should be no costs to either party of the appeal or cross-appeal to the Court of Appeal on the second occasion.

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RAND J.—That the giving of the gasoline to the two children was, in the circumstances, a negligent act towards them, I do not doubt. Gasoline is a highly dangerous substance which requires special care in handling. Its chief danger is in relation to fire; and the fascination of fire for children is proverbial. One who sets such a danger in motion is held to responsibility for all consequences that in the foresight of a prudent person may result.

But that probability in this case arose not from special circumstances or from responsible volition on the children's part. Having regard to their age, understanding, experience and self-control, they acted as ordinary children would be expected to act. In this their natural curiosity and the intractable impulse "to see what would happen," in the opportunity furnished by the act of the station attendant, played their part. The usual and expectable conduct in ordinary children of such years—and I agree with the Court of Appeal that the evidence does not place the respondent on a higher level than that—is, in relation to the legal standard of care, equivalent to prudent conduct in an adult; and just as prudent conduct gives rise to no legal responsibility for injurious consequences, so the normal conduct of average young children is exempt likewise.

There was here, therefore, an act done by the appellants, a foreseeable consequence of which was injury to the respondent in the course of ordinary behaviour on his part; and the liability of the appellants in such circumstances would seem to be clear.

I would dismiss the appeal with costs.

Appeal allowed and judgment of the trial Judge restored. Costs as awarded in the judgment of Hudson and Estey JJ.

Solicitors for the appellant: *O'Meara & Burns.*

Solicitors for the respondents: *Bench, Keogh, Grass & Cavers.*

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*Oct. 5, 6, 7, 8
*Nov. 28

FERNAND SAVARD AND ROGER LIZOTTE ..... } APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

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

Criminal law—Subsection (2) of s. 69 Cr. C.—Prosecution of a common purpose by several persons—Police officers attempting to effect arrest of person charged with conspiracy—Firing almost simultaneous by three of them while in pursuit of the latter—Only one shot causing death—Two officers charged with manslaughter under subs. (2)—Verdict of guilty affirmed by majority of appellate court—Whether evidence sufficient to justify such finding—Direction by trial judge that subs. (2) applied—Misdirection rendering verdict defective and void—New trial ordered by dissenting judgments—Power of this Court on appeal—Not limited to opinion expressed by dissent—Acquittal of accused can be pronounced by this Court—Granting of new trial may place accused a second time in jeopardy—Jurisdiction—Grounds of dissent—This Court justified to look into reasons for judgment of dissenting judges of appellate court.

The appellants, members of the Royal Canadian Mounted Police, had, on May 7, 1944, together with another constable by the name of Massicotte and a corporal Dubé who was in charge, gone to the village of St. Lambert, situated at some thirty miles from the city of Quebec, for the purpose of apprehending one Georges Guénette wanted on a charge of having conspired with others to assist one Plante to escape from the custody of a peace officer, some ten or more attempts having previously been made. These constables and three others had made on the same day an earlier trip and, after having searched the premises of Guénette's father unsuccessfully, decided to return to their headquarters in the city of Quebec. After proceeding some distance, the four abovenamed constables turned about and went back to St. Lambert on the chance that Guénette might have returned to his father's house thinking that the coast was clear. Corporal Dubé stationed the appellant Lizotte and Massicotte outside the house, while he himself entered it followed by the appellant Savard. While so engaged, Dube's attention was attracted by a sound upstairs and he went up just in time to see Guénette jump from a window. Savard immediately ran from the house in pursuit of Guénette, and, seeing he was losing ground, and as Guénette ignored his calls to stop, he fired four shots in the air from his revolver. As Guénette still paid no attention, Savard lowered his revolver toward a point approximately, so he says, six feet to the left of Guénette so that the latter would not only hear the bullet but see the spurt of the ground where it hit. As Savard fired this fifth shot, Guénette was in the act of jumping a fence, at a distance of more than two hundred feet from the house, and, as he reached the

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

other side, he appeared to bend forward with the left hand resting on the fence and the right hand on the ground. He then straightened himself and ran for a distance of approximately seventy-eight feet where he stumbled and fell face down. According to medical evidence, he was then dead or died very shortly thereafter. The appellant Lizotte and Massicotte also ran in pursuit of Guénette, Lizotte firing one shot in the air and a second one toward a point, he says, some thirty feet to Guénette's right and Massicotte also firing one shot in Guénette's direction. The indictment charged that the appellants "have together and illegally inflicted corporal wounds which caused the death of (Guénette), thus committing manslaughter." In view of the uncertainty as to the identity of the person who had fired the fatal shot (only one bullet hit Guénette), counsel for the Crown at the opening of the trial declared expressly that the case fell within the provisions of subsection 2 of s. 69 Cr. C., and they submitted to the jury that the appellants had formed a common intention to bring about the arrest of Guénette by any means, that such intention involved an unlawful purpose, namely, the use of force beyond the limits permitted by section 43 Cr. C., that each of the appellants was an accomplice in the commission of a crime by one or the other and that it was immaterial which of them actually fired the fatal shot, as the death of Guénette was or ought to have been known to each of them to have been a probable consequence. Counsel for the Crown further submitted that the common wrongful intention originated from the acts of the appellants and their companions and the incidents occurring during their trip, which showed a fixed purpose to use more violence than necessary to take Guénette into custody, or that the common intent started to be illegal at the moment of the simultaneous firing by the appellants and Massicotte. The trial judge after having read subsection 2 of section 69 Cr. C., charged the jury in so many words that it applied; he also stated that there was no illegality attaching to the appellants' conduct prior to the moment of the firing, but that the illegality then started, if the jury was of the opinion that they had then used undue violence (s. 43 Cr. C.). The appellants were found guilty and condemned respectively to twelve and nine months' imprisonment. The conviction was affirmed by a majority of the appellate court, the two dissenting judges being of the opinion that a new trial should be granted.

Held that the appeal should be allowed, the convictions quashed and the appellants be discharged. There is no evidence upon which a finding could be made that the appellants formed at any time a common wrongful intention as required by subsection 2 of section 69 Cr. C.—Moreover the erroneous directions given by the trial judge have necessarily influenced the jury's minds and have totally rendered defective and void the conclusion they have reached.—Their verdict, being thus illegal, must be quashed.

Counsel for the Crown also contended that, if the verdict was held to be illegal, the only remedy this Court could grant would be an order for a new trial, as the Court could not go beyond what was directed by the dissenting judgments: the appellants could then be proceeded against individually under subsection (1) of section 69 Cr. C. or additional evidence might be forthcoming which would make subsection (2) applicable.

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Held that, in a case like the present, such an order ought not to be made, so as to permit an entirely new case to be made against the appellants. While the existence of a dissent on a question of law (s. 1023 Cr. C.) is a condition precedent for an appeal to this Court, the Court once seized of the appeal is not limited to the remedy considered appropriate in the dissent, but has complete jurisdiction to direct the remedy which in its opinion the Court appealed from ought to have granted (s. 1024 Cr. C.). Under the circumstances of the case and in view of the manner the case was deliberately proceeded with by the Crown, the granting of a new trial would violate the fundamental right of an accused not to be placed for a second time in jeopardy. *Manchuk* v. *the King* ([1938] S.C.R. 341 and *Wexler* v. *The King* [1939] S.C.R. 350) foll.

Per The Chief Justice and Kerwin and Taschereau JJ. The Supreme Court of Canada, when given jurisdiction to entertain an appeal on any question of law on which there has been dissent in the court of appeal (section 1023 Cr. C.), is justified, whether grounds of dissent are specified or not in the formal judgment of that court, to look into the reasons for judgment of the dissenting judges in order to find the grounds of dissent.—*Reinblatt* v. *The King* ((1933) S.C.R. 694) foll.

APPEAL by the appellants from a judgment by a majority of the Court of King's Bench, appeal side, province of Quebec, affirming a verdict of guilty rendered by a jury in a trial of manslaughter, the dissenting judgments ordering a new trial.

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

Lucien H. Gendron K.C., Gérald Fauteux K.C. and *Mark Drouin K.C.* for the appellants.

Antoine Rivard K.C. and *Noël Dorion K.C.* for the respondent.

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

TASCHEREAU J.:—Les appelants Fernand Savard et Roger Lizotte, tous deux de la Gendarmerie Royale canadienne, ont été traduits devant la Cour d'Assises à Québec, pour répondre à l'accusation d'avoir:—

ensemble illégalement causé des lésions corporelles qui ont entraîné la mort de Georges Guénette commettant par là un crime d'homicide involontaire (manslaughter).

Trouvés coupables, ils furent condamnés respectivement à douze et à neuf mois de prison, et ce verdict du jury fut confirmé par la Cour du Banc du Roi. MM. les juges Francœur et E. Stuart McDougall, qui étaient dissidents, auraient accordé un nouveau procès.

Dans le jugement formel de la Cour du Banc du Roi, la dissidence de M. le juge Francœur est exprimée dans les termes suivants:—

(*a*) Admission au cours du procès de preuve illégale;
(*b*) Direction erronée en droit sur l'interprétation de l'article 69 du Code Criminel.

Et celle de M. le juge McDougall se lit ainsi:—

that,

(*a*) the accused were deprived of their right to challenge peremptorily the number of jurors allowed by law;
(*b*) that the presiding judge committed an error in law in instructing the jury that subsection 2 of section 69 of the Criminal Code applied;
(*c*) that the presiding judge further erred in law in instructing the jury that evidence declared by him to be irrelevant as to the guilt of the accused would be helpful and could be accepted by the jury to indicate an atmosphere or "climat spécial" surrounding the actions of the accused.

Ces deux mêmes juges de la Cour du Banc du Roi, dans leurs raisons où cette Cour peut également chercher des motifs de dissidence, en sont également venus à la conclusion qu'il n'y a aucune preuve qui puisse justifier l'application de l'article 69, paragraphe 2, Code Criminel.

Georges Guénette, Roland Fontaine et Edouard Bernard étaient tous trois accusés d'avoir conspiré ensemble afin de faire évader un nommé Hervé Plante, détenu par Gordon P. Coutu, qui avait antérieurement procédé à son arrestation. Le mandat avait été émis par M. le juge Laetare Roy, de la Cour des Sessions de la Paix à Québec, le 3 mars 1943, mais le 6 mai 1944, il n'avait pas encore été exécuté. Durant au delà de 14 mois, les prévenus avaient réussi à dépister les policiers, qui avaient fait plus de dix voyages à St-Lambert, dans le comté de Lévis, mais chaque fois, leurs recherches étaient demeurées infructueuses.

Dans l'après-midi du 6 mai 1944, le caporal Turgeon, en charge du détachement de la Gendarmerie Royale à Québec, décida de faire une nouvelle tentative afin d'opérer ces arrestations. Il donna instruction au constable Dubé, accompagné de six constables, dont les appelants, de se

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rendre à St-Lambert, et c'est au cours de leurs recherches que Georges Guénette fut tué d'une balle de revolver. Et comme conséquence de cette tragédie, Savard et Lizotte furent accusés d'homicide involontaire coupable.

Durant cette nuit du 6 au 7 mai, les constables firent deux autres voyages à St-Lambert. Quelques incidents, qui se produisirent au cours du premier, doivent nécessairement être mentionnés, car il en sera question plus loin, lorsque nous examinerons certains aspects légaux de la cause, que les parties ont discutés au cours de l'audition.

En arrivant à St-Lambert, Dubé aperçut une automobile qui filait vers l'autre extrémité du village, dans la direction de St-Isidore. Croyant que cette voiture pouvait être occupée par les trois personnes recherchées, il la suivit, mais après s'être rendu compte que les passagers n'étaient pas ceux qu'il désirait appréhender, il leur permit de continuer leur route. Mais la preuve révèle qu'avant de leur donner cette autorisation, l'un des constables non identifié dans l'automobile de Dubé aurait dit aux passagers, parmi lesquels se trouvait un nommé Baillargeon:—"Si vous n'aviez pas arrêté, nous aurions tiré."

Lorsque Dubé revint avec ses deux compagnons au village de St-Lambert, il donna instruction à trois constables, Lizotte, Desjardins et Emond de se rendre chez Fontaine et Edouard Bernard, tous deux également recherchés, pendant que lui-même avec d'autres iraient chez Guénette. Chez Fontaine, l'un des constables serait entré dans la chambre de mademoiselle Jeannette Fontaine, et lui aurait dit:—"Je regrette de vous déranger". Elle aurait répondu, d'après son témoignage:—"Vous vous fatiguez encore pour rien ce matin". Et ce même constable aurait répondu à son tour:—"Vous croyez que nous nous fatiguons pour rien, peut-être que d'autres seront fatigués avant longtemps".

Durant ce temps, les autres constables qui n'étaient pas allés chez Fontaine firent des recherches dans la maison de Guénette et dans les environs. Dubé rapporte qu'après qu'il eût fouillé en vain la maison, le père Guénette lui dit qu'il n'avait pas vu son fils depuis quinze jours, qu'il venait rarement à la maison, qu'il avait perdu toute influence sur lui et qu'il était bien décidé à ne pas être pris vivant.

Dubé décida alors de retourner à Québec, mais à la sortie de la maison de Guénette, il rencontra le constable Massicotte qui, au second étage de la grange de Guénette, avait trouvé une couverture et un oreiller. Il s'était rendu compte que ce lit improvisé avait été récemment occupé, car l'oreiller était encore chaud. On fit alors d'autres recherches dans la direction de la rivière Chaudière, mais sans résultat.

Au cours du voyage de retour vers Québec, Dubé s'avisa de revenir à la maison de Guénette accompagné de trois constables, Massicotte, Savard et Lizotte, tandis que les autres devaient continuer leur route vers la ville. En arrivant à St-Lambert, il plaça ses hommes à des points stratégiques autour de la maison de Guénette, y pénétra lui-même et demanda au père Guénette si son fils était revenu. C'est à ce moment qu'il entendit un bruit provenant de l'étage supérieur, où il monta, et vit Georges Guénette, l'homme qu'il recherchait, sautant par une fenêtre du côté ouest de la maison. Massicotte, Savard et Lizotte partirent alors à sa poursuite vers la rivière, où les constables, lors de leur visite précédente, avaient remarqué des embarcations.

Guénette, qui avait une avance d'environ cinquante pieds et qui gagnait toujours du terrain, refusa de s'arrêter, malgré les ordres qu'on lui intimait, continua sa course à travers le champ fraîchement labouré et sauta la clôture en y posant la main gauche, de sorte qu'il avait les pieds dans une position horizontale à la droite de son corps. Savard était au centre derrière lui; il avait Lizotte à sa droite, placé dans le chemin Brochu, et Massicotte à sa gauche. C'est pendant cette course que les trois constables firent feu. Savard tira cinq coups de son revolver 45, Massicotte un seul d'un revolver de même calibre et Lizotte deux coups, d'un revolver 38. Tous d'après leurs témoignages tirèrent en l'air, sauf Savard et Lizotte qui tirèrent chacun un coup, vers le sol, mais à côté de Guénette, afin de l'impressionner davantage et le convaincre qu'il était préférable de se rendre.

Après avoir sauté cette clôture, située à 225 pieds de sa résidence, Guénette parcourut encore 78 pieds et là, après avoir fait une hésitation, il tomba la face contre terre. La

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preuve médicale révèle qu'il dût mourir à ce moment ou quelques instants plus tard. La balle, qui avait pénétré au dessus du rein gauche, était sortie dans la région du poumon droit. Le docteur Gilbert, de Charny, le premier qui constata la mort, exprima l'opinion que la balle devait provenir d'un revolver calibre 38, car cette dernière pouvait être introduite plus facilement dans l'orifice de la blessure. Cependant, cette prétention n'est pas admise par l'un des médecins de la Couronne.

Ce résumé de la preuve, peut-être trop long, est cependant nécessaire pour bien situer le litige et pour déterminer les questions légales qui nous sont actuellement soumises et que l'on trouve dans le jugement formel de la Cour du Banc du Roi et les raisons écrites des juges dissidents.

La Couronne a fait reposer sa cause devant le jury sur le paragraphe 2 de l'article 69 du Code Criminel. C'est aussi la directive donnée par le juge présidant le procès. Cet article se lit ainsi:—

69. (2) Quand plusieurs personnes forment ensemble le projet de faire quelque chose d'illégal, et de s'entraider dans ce projet, chacune d'elles est complice de toute infraction commise par l'une d'entre elles dans la poursuite de leur but commun, si elles savaient ou devaient savoir que la commission de cette infraction devait être la conséquence probable de la poursuite de leur but commun.

Une seule balle a frappé Guénette, et, comme il était assez problématique de dire qui avait tiré cette balle, on a voulu, par le jeu de l'article 69, paragraphe 2, faire disparaître cette difficulté de l'esprit du jury, en leur disant que les accusés faisaient partie d'un complot illégal, que chacun d'eux était complice d'une infraction commise par l'un ou l'autre des constables et qu'il était en conséquence immatériel de déterminer qui avait tiré le coup fatal.

Au cours du procès qui eut lieu à Québec, le procureur de la Couronne, expliquant la cause au jury, fit un résumé de la preuve qu'il désirait lui soumettre, et lui dit:—

Vous aurez à juger, messieurs les jurés, si les deux agents n'étaient pas alors engagés dans *la poursuite de buts illégaux*: l'arrestation de Guénette sans mandat entre leurs mains et le recours à des moyens aussi radicaux pour l'exécution de leur mission. Dans l'affirmative, la Couronne vous soumettra qu'en droit les *deux accusés doivent répondre de la mort de Guénette.*

Plus tard, lorsque la preuve de la Couronne fut terminée, la défense présenta une motion de non-lieu de la part de l'accusé Lizotte, et dans la réplique de l'avocat de la Couronne, on y trouve ce qui suit:—

Les jurés décideront si, à un moment donné, cette expédition, qui a pu paraître commencée avec des buts légaux, est devenue *une expédition illégale.*

A la conclusion du procès, lors de sa plaidoirie au jury, l'un des avocats de la Couronne s'exprima ainsi:—

C'est que cette loi a été faite précisément pour prévoir de ces cas comme celui qui nous occupe actuellement, lorsqu'une, deux, trois ou quatre personnes, ensemble, dans un même but, commettent des actes illégaux; *ils sont tous ensemble responsables des conséquences,* et c'est *pour cela qu'il importe peu de savoir si c'est la balle de Lizotte ou de Savard qui a tué.*

Ce qu'il importe de savoir, c'est si ces deux-là, ou ces trois-là ou quatre-là, ensemble, ne s'étaient pas réunis pour faire de la poursuite de Guénette une opération qui est devenue illégale du moment où ils ont commencé à tirer. Guénette ne serait pas mort aujourd'hui.

Ce n'est pas ensemble qu'ils ont tiré. C'est parce qu'ensemble ils ont pris des moyens illégaux pour arriver à leur fin avec illégalité, *que l'article 69, paragraphe 2, trouve son application.*

Et plus tard, un second avocat de la Couronne dit à son tour:—

L'invention de Lizotte pour essayer de chercher ailleurs le coupable est une invention qui ne tient pas debout; d'autant plus que, même si c'était vrai, ces deux personnes *étaient engagées dans la poursuite de moyens communs qui étaient des moyens illégaux, et au même titre que celui qui aurait vraisemblablement tiré, ils sont coupables de manslaughter,* ils sont coupables de la mort qu'on leur impute de Guénette.

Et, dans son adresse au jury, le juge donne la direction légale suivante:—

L'article 69, paragraphe 2, s'applique. Je l'affirme et j'y reviendrai plus tard.

Ailleurs, il dit:—

Devez-vous trouver une différence de responsabilité entre l'accusé Savard et entre l'accusé Lizotte, si vous en venez à un verdict de culpabilité?

Et après avoir cité l'article 69, paragraphe 2, du Code Criminel, l'honorable juge continue:—

Me Gendron soutient que cet article ne s'applique pas. Malheureusement, je ne puis partager son opinion. *Le paragraphe 2 s'applique. L'illégalité commença* au moment où ils, les accusés, et le constable Massicotte, *se mirent ensemble à tirer dans la poursuite de leur but commun, contrairement à la loi,* si vous jugez qu'ils abusèrent de la violence.

L'entente est devenue illégale au cours de l'exécution, tousjours si les accusés excédèrent, d'après vous les moyens raisonnables et causèrent la mort—article 43 C. Cr.

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D'après ces textes que je viens de citer, les constables poursuivaient donc des buts illégaux, leur expédition qui à l'origine a pu paraître légale serait *devenue une expédition illégale, au moment où les deux appelants et Massicotte ont commencé à tirer.* Comme conséquence, en vertu des dispositions de l'article 69, paragraphe 2, tous ceux qui ont fait feu sont coupables au même degré, quel que soit celui qui ait tué Guénette. C'est bien là la théorie de la Couronne, admise par le juge au cours du procès.

Pour que l'article 69, paragraphe 2, s'applique, il faut de toute nécessité qu'il y ait entente de poursuivre un but illégal. C'est l'élément essentiel qui entraînera la culpabilité de tous, si l'un d'eux commet une infraction dans la poursuite de ce but.

Or, il importe donc de se demander quel projet illégal avaient conçu les accusés, quel acte défendu par la loi ils avaient projeté de poser; où, quand et comment ils se sont concertés pour qu'ils tombent sous le coup de l'article que je viens de citer.

Lors de l'audition de la cause devant cette Cour, le procureur de la Couronne a tenté d'établir que le projet de commettre un acte illégal n'était pas nécessairement né sur le terrain de Guénette au moment où les constables ont commencé à faire feu, mais que les actes des appelants et de leurs compagnons, au cours du trajet de Québec à St-Lambert, démontraient l'intention bien arrêtée d'user de plus de violence qu'il n'était nécessaire pour procéder à l'arrestation de Guénette. Il y aurait donc eu complot de commettre un acte illégal, et l'illégalité de cet acte consisterait dans la violation de l'article 43 du Code Criminel, qui se lit ainsi:—

> 43. Tout individu, qui opère légalement l'arrestation d'un autre pour quelque cause autre qu'une infraction mentionnée en l'article qui précède, est justifiable, si celui qu'il cherche à arrêter tente de se soustraire par la fuite à cette arrestation, d'employer la force nécessaire pour empêcher son évasion, sauf si cette évasion peut être empêchée par des moyens raisonnables sans recourir à la violence; mais cette force ne doit être destinée ni de nature à causer la mort ou des lésions corporelles graves.

Cette prétention doit être rejetée pour deux raisons. La première, c'est qu'elle n'a jamais été soumise au jury, qui n'a pas eu à se prononcer sur ce point, et qui en a été empêché par les directives mêmes du juge, qui lui a dit que l'illégalité avait commencé au moment même où les

coups de feu ont été tirés. La seconde raison qui motive le rejet de cette prétention, c'est qu'il n'y a aucune preuve au dossier qui puisse justifier un jury, instruit de ses devoirs, d'en arriver légalement à une semblable conclusion.

Pour essayer d'établir l'intention commune des constables de faire usage d'une force plus que nécessaire, on a invoqué l'incident qui est arrivé lorsqu'un constable aurait dit aux passagers de l'automobile Baillargeon: "Si vous n'aviez pas arrêté, nous aurions tiré". Et on a relevé aussi la conversation entre le constable non identifié qui aurait dit à mademoiselle Fontaine:

> Vous croyez que nous nous fatiguons pour rien, peut-être que d'autres seront fatigués avant longtemps.

Ces faits ne sont pas pertinents à la cause, et leur récit devant le jury était inadmissible. Ces paroles ont été prononcées hors la présence des accusés et ne peuvent en aucune façon servir de preuve contre eux.

Je n'ignore pas que lorsqu'il s'agit de conspiration, des déclarations faites par l'un des conspirateurs, hors la présence des autres, peuvent en certains cas, servir de preuve contre tous les conspirateurs; mais encore faut-il qu'il existe quelque connexité entre ces déclarations et la poursuite du but commun qui, dans le cas actuel, aurait conduit à la mort de Guénette. De plus, cette règle que je viens de citer, et qui dans notre droit constitue une exception, est basée sur la théorie qui veut que dans le cas de conspiration, vu qu'il y a unité de volonté, la déclaration de l'un est censée être la déclaration de tous. Pour que la léclaration de l'un puisse ainsi servir contre les autres, il faut donc prouver par des preuves additionnelles que celui contre qui on veut s'en servir était partie au complot. Cette autre preuve dans le cas présent fait totalement défaut.

Ces deux faits sont les seuls que la Couronne a invoqués pour démontrer l'existence d'un complot antérieur. Il me semble qu'elle a failli dans sa tentative de convaincre la Cour de l'existence de cette entente préalable de commettre un acte illégal.

D'ailleurs, dans sa charge au jury, le juge a dit que le témoignage de Baillargeon ne pouvait pas incriminer les deux accusés, et il a aussi ajouté que le témoignage de mademoiselle Fontaine ne pouvait pas non plus avoir

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d'influence sur la cause. Il a cependant autorisé le jury à prendre connaissance de la déclaration faite à Baillargeon, non pas parce qu'elle peut relier les accusés à la tragédie qui est arrivée, mais seulement afin de "se mettre dans une atmosphère ou un climat spécial". Si je m'accorde avec le juge quand il dit que la preuve de ces deux incidents ne peut incriminer les deux accusés, je diffère entièrement d'opinion avec lui quant à sa seconde remarque. La preuve est pertinente ou non. Comme elle ne l'est pas, elle n'aurait pas dû être soumise au jury, et encore moins pour le justifier au cours d'un procès criminel de se placer dans un "climat spécial", ce qui à mon sens constitue une nouvelle et bien étonnante théorie.

La Couronne elle-même ne semble pas convaincue de l'existence de ce plan préconçu par les constables pour faire usage d'une violence déraisonnable, car elle dit dans son factum:—

> The expedition was without any doubt legal in its purpose, etc.

Et le juge dit au jury:—

> L'entente est devenue illégale au cours de l'exécution.

Evidemment, le but de cette expédition était légal. On se rendait à St-Lambert pour exécuter le mandat émis contre Guénette et les autres par M. le juge Lætare Roy. Rien dans la preuve ne peut laisser supposer que les constables aient eu des intentions criminelles, qu'ils aient voulu faire autre chose que de mettre à exécution, par des moyens légaux, l'ordre légal du magistrat.

Il reste, comme le juge l'a dit au jury, et comme d'ailleurs la Couronne elle-même l'a prétendu au cours du procès, que l'entente serait devenue illégale au cours de l'expédition. Le complot illégal existerait donc, et son fait constitutif serait que les accusés et leurs compagnons auraient fait feu presque simultanément, pour forcer Guénette à arrêter sa course.

Mais la simultanéité de ces coups de feu est-elle bien la preuve d'une résolution concertée et arrêtée, agréée par tous, de poser un acte illégal?

Je sais bien, et la jurisprudence et les auteurs l'enseignent, que le complot n'a pas besoin toujours de longue préparation, et même qu'en certains cas, il peut être établi par la preuve de certains faits, qui démontrent chez plu-

sieurs l'existence d'une volonté commune d'agir illégalement. Mais la seule résolution concertée, qu'elle soit préalable ou sur-le-champ, n'est pas suffisante; pour qu'il y ait crime, il faut le dessein, l'intention de commettre un acte illégal, qui est une circonstance nécessaire à la criminalité. Sans doute, les trois constables qui poursuivaient Guénette se sont entendus, tacitement on autrement, pour tirer des coups de feu dans l'air ou sur le sol, afin d'inspirer au fugitif une crainte salutaire, qui peut-être le pousserait à se livrer aux officiers de justice, et cette entente demeure jusqu'ici dans les cadres de la stricte légalité. Rien en effet ne défend à des constables, autorisés à porter des armes, de s'en servir pour les fins que je viens de mentionner.

Dans le cas présent, six coups ont été tirés en l'air, et deux dans la direction du sol. Qu'au cours de la poursuite d'un but légal, qui était l'arrestation de Guénette, une balle égarée ou non, provenant de l'arme de l'un des poursuivants, frappe la victime, n'indique pas qu'il y ait unité de but entre tous les policiers pour commettre un acte illégal, et qu'il s'ensuive que, par l'opération de l'article 69, paragraphe 2, tous soient tenus responsables de l'imprudence criminelle de l'un, si imprudence criminelle il y a véritablement. Cet acte isolé ne peut certes pas démontrer un concert de volontés confondues en une volonté unique et commune, de commettre un acte illégal et qui marquerait les actes de tous du sceau de la criminalité. Tout au plus indique-t-il l'agissement d'une seule personne qui, sans doute, peut être le résultat d'une négligence ou d'une imprudence criminelle, si on y rencontre les éléments voulus, ou encore le simple résultat d'un accident qui n'entraînerait aucune responsabilité.

On sait que le complot criminel est un crime par lui-même, qu'il est complet, et par conséquent punissable, sans qu'il soit nécessaire de prouver un commencement d'exécution. Le législateur a considéré la résolution arrêtée de plusieurs personnes de commettre un crime, sans même que le crime ne soit commis, comme une menace envers la société, qui justifie cette dernière représentée par l'Etat de se placer en légitime défense et d'exercer une action répressive. Si Guénette n'eut pas été frappé, il est certain

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que personne n'eût songé alors à voir dans les actes des constables qui tiraient en l'air, pour procéder à cette arrestation, les éléments du complot. Et cependant, d'après la théorie de la Couronne, ces constables eussent été des criminels qui, sans réaliser la fin poursuivie, étaient tout de même tous des conspirateurs qui avaient dans l'esprit des intentions perverses.

Or, c'est parce qu'on a dit au jury qu'il y avait complot et que l'article 69 (2) s'appliquait; c'est parce qu'on lui a enseigné que l'acte isolé de l'un entraînait la responsabilité de l'autre; et c'est parce qu'instruit qu'il n'avait pas à se demander qui avait tiré la balle qui a causé la mort de Guénette, que le jury a rendu un verdict que la loi du pays n'autorise pas. C'est cette directive erronée, qui a nécessairement influencé le jury et qui viole totalement la conclusion à laquelle il est arrivé. Je suis clairement d'opinion, comme d'ailleurs MM. les juges Francœur et McDougall le disent dans leurs notes dissidentes, qu'il n'y a aucune preuve qui puisse justifier l'existence d'un semblable complot criminel, et par conséquent, l'application de l'article 69 (2). Entaché d'illégalité, ce verdict doit être cassé.

Mais la Couronne soutient que, même si le verdict est illégal, cette Cour ne peut pas accorder plus que les juges dissidents de la Cour du Banc du Roi n'ont accordé, soit un nouveau procès. Je ne puis admettre cette prétention, que je crois erronée en droit. La juridiction de cette Cour est limitée évidemment aux questions de droit sur lesquelles il y a eu dissidence en Cour du Banc du Roi. L'une de ces dissidences était qu'on avait donné à l'article 69 (2) du Code Criminel une interprétation erronée, et avec cette dissidence, je suis d'accord.

Mais il est du devoir de cette Cour, lorsqu'elle croit une dissidence bien fondée, de procéder à rendre le jugement qui aurait dû être prononcé, et, pour atteindre ce but, elle tient ses pouvoirs de l'article 1024 du Code Criminel, qui dit:—

1024. La Cour Suprême du Canada établit à cet égard la règle ou rend l'ordonnance qui lui semble juste, soit aux fins de confirmer le jugement de culpabilité ou d'accorder un nouveau procès, soit autrement, soit aux fins d'accueillir ou de refuser cette demande, et établit toutes autres règles et décerne toutes autres ordonnances nécessaires pour mettre cette règle ou ordonnance à effet.

La question de droit qui donne juridiction à cette Cour, qui en réalité la saisit du litige, est formulée par la Cour du Banc du Roi, mais le remède qui doit être apporté, quand elle est jugée fondée, est du ressort de cette Cour, qui peut et doit alors rendre l'ordonnance que requiert la justice. (*Manchuk* v. *The King* (1)).

Mais si cette Cour a ce pouvoir d'accorder un remède différent de celui que les juges dissidents de la Cour du Banc du Roi ont cru juste d'appliquer, doit-elle exercer ce droit, ou ordonner qu'il y ait un nouveau procès? Je pense bien qu'il y aurait lieu à un nouveau procès, si la Couronne, ayant soumis la cause qu'elle a présentée au jury, avait demandé subsidiairement de déterminer la culpabilité de l'un des accusés, au cas où l'article 69 (2) ne s'appliquerait pas, et si le juge, refusant de donner cette dernière instruction, avait avisé le jury que seul 69 (2) trouvait son application. Alors, évidemment, dans le cas d'un acquittement, la Couronne, n'ayant pas obtenu la justice qu'elle demandait, aurait pu invoquer ce grief et obtenir un nouveau procès.

Mais, dans le cas qui nous occupe, c'est l'inverse qui se présente. La Couronne a soumis que l'article 69 (2) s'appliquait. C'est le fondement même de sa prétention; toute sa cause repose sur cette théorie, et c'est ainsi qu'elle a voulu que les accusés fussent jugés. Alors qu'elle est intimée devant cette Cour et qu'il est établi que sa première tentative d'obtenir une condamnation doit nécessairement faillir, elle demande la permission de recommencer le procès, en soumettant les mêmes faits ou des faits additionnels. Ceci ne peut pas être accordé.

Les appelants ont été en péril déjà, au cours de ce premier procès. Ils ont été jugés devant une cour compétente par douze de leurs pairs; ils ont répondu à une accusation légalement portée, à laquelle ils ont plaidé, et le procès s'est instruit suivant les soumissions légales de la Couronne que le tribunal a acceptées.

Il est un principe de droit criminel, qui date de temps immémoriaux, qu'un accusé ne peut pas être "in jeopardy" deux fois. Cette doctrine est aujourd'hui universellement reconnue et sanctionnée par les tribunaux. Même si personnellement j'entretenais des doutes sur cette question, je serais lié par une décision de cette Cour, rendue il y a

(1) [1938] S.C.R. 341.

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quelques années. En effet, dans la cause de *Wexler* v. *The King* (1) où la Cour du Banc du Roi de la province de Québec avait ordonné un nouveau procès, cette Cour a prononcé l'acquittement, et le principe posé dans cette cause-là doit nous guider dans la détermination de celle-ci. Comme le disait alors Sir Lyman Duff, juge en chef:—

To set aside a verdict of acquittal in such circumstances, merely because the case for the Crown might, on a possible view of the evidence, have been put upon another footing would, it appears to me, introduce a most dangerous practice; a practice not, I think, sanctioned by the statute.

Et M. le juge Kerwin s'exprimait ainsi:—

The real point for determination is whether, after an accused person has been tried on a charge of murder and acquitted, the Crown is entitled to an order for a new trial in order to present an entirely new case against him.

An appeal is given the Crown by the 1930 amendment to section 1013 of the Code "on any ground of appeal which involves a question of law alone." Assuming, without deciding, that the pertinent question here is one of law, the Crown's contention is not entitled to prevail.

Je crois donc, pour les raisons ci-dessus, que l'appel doit être maintenu et que les accusés doivent être libérés. Etant donné cette conclusion à laquelle j'arrive, il est inutile de discuter les autres moyens d'appel qui ont été soulevés.

RAND J.—The case against the accused, advisedly and exclusively presented by the Crown to the jury, was this: the use of arms by way of shooting in the air or the ground was in the circumstances an unnecessary use of force and hence illegal; from its commencement, it constituted an unlawful common purpose affecting all those taking part in it; and each officer became, under ss. 2 of sec. 69 of the Criminal Code, responsible for the consequences of that use of arms by the others. This dispensed with the consideration by the jury of the question whose shot brought the deceased down.

The following excerpts from the address of Crown counsel summarize the position taken:

Admettons, pour le bénéfice de la discussion et sans rien retirer de ce que j'ai dit jusqu'à présent, que, jusqu'à la fuite de Guénette, tout est parfait, tout est légal. Guénette saute, ils partent à courir après, c'est ce qu'ils doivent faire; ils sont mal organisés; parce qu'ils sont mal organisés, ils vont être obligés de sauter des barrières, ça ne fait rien, c'est leur faute, ils sont mal organisés; à un moment donné, ils se mettent à tirer.

(1) [1939] S.C.R. 350.

De ce moment, Votre Seigneurie, tous ensemble et d'un commun accord, Lizotte et Savard ont ensemble décidé, dans la poursuite du but commun, d'employer des moyens illégaux. De ce moment-là il y a entre eux une entente qui est devenue une entente illégale.

* * *

C'est que cette loi a été faite précisément pour prévoir de ces cas comme celui qui nous occupe actuellement, lorsqu'une, deux, trois ou quatre personnes, ensemble, commettent ensemble, dans un même but, des actes illégaux; ils sont tous ensemble responsables des conséquences, et c'est pour ça qu'il importe peu de savoir si c'est la balle de Lizotte ou de Savard qui a tué.

The trial judge adopting the same view instructed the jury that ss. 2 applied and that the only question was accident or not, in the following language:

L'article 69, paragraphe 2, s'applique. Je l'affirme et j'y reviendrai plus tard.

* * *

Comme il ne s'agissait que d'une question de droit qui n'intéressait pas le jury, parce que je déciderais le contraire de la prétention de Me Gendron, que je voulais simplement discuter ses arguments, une traduction eut été inutile et n'eut servi qu'à créer de la confusion.

Je n'ai pas traduit plus loin pour le jury que les citations qui appuyaient mon opinion. Il est clair que la Couronne doit faire sa preuve. C'est une question de faits pour le jury de dire si elle l'a fait ou non. S'il s'agissait d'un accident ou non.

* * *

Devez-vous trouver une différence de responsabilité entre l'accusé Savard et l'accusé Lizotte, si vous en venez au verdict de culpabilité?

* * *

Me Gendron soutient que cet article ne s'applique pas. Malheureusement, je ne puis partager son opinion. Le paragraphe 2 s'applique. L'illégalité commence au moment où ils, les accusés et le constable Massicotte, se mirent ensemble à tirer dans la poursuite de leur but commun, contrairement à la loi, si vous jugez qu'ils abusèrent de la violence.

It is desirable for the moment to consider the circumstances in relation to sec. 69, which is enacted in these words:

69. Accessories, principals, etc.—Every one is a party to and guilty of an offence who

(*a*) actually commits it;

(*b*) does or omits an act for the purpose of aiding any person to commit the offence;

(*c*) abets any person in commission of the offence; or

(*d*) counsels or procures any person to commit the offence.

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2. Common intention by several persons.—If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

Two conditions are seen to be essential to bring the common purpose charged within ss. 2: that it was unlawful and that the shooting of the deceased ought to have been known to be a probable consequence of it. It was of course open to the Crown, under the first subsection, to seek at the same time to hold individually responsible the officer whose shot actually struck the deceased; but that course, as I have intimated, was deliberately put aside. One reason for this was virtually conceded: the conviction of both accused was sought, but as only one bullet struck the deceased, resort to ss. 2 was necessary. There was also serious doubt of which one of the eight shots fired from three guns, all of the others admittedly into the air or the ground, was fatal; but consistently with the case submitted the trial judge, over the objections of the accused, gave the instruction quoted. It was not suggested that the accused intended to hit the victim, and accident might have arisen from a ricochet or from the officer stumbling on uneven ground at the moment of firing.

I am unable to agree that in the circumstances the use made of arms for such a purpose could be found or held to be unlawful. Failing illegality, it becomes unnecessary to consider whether the accused could be found liable for the death as a probable consequence. The direction that ss. 2 applied was therefore an error that vitiates the conviction and it must be set aside.

On the argument, the actual theory laid before the jury was confused with a purpose, formed when the detachment set out from Quebec, to bring back the deceased if necessary by the use of any force short of taking life, even though in excess of that permitted by section 43, and that this involved the accused in the shot that caused the death. The short answer to this is that there was not a tittle of evidence by which it could have been supported. Even less was there any evidence to justify the view that such a purpose arose at the moment of the firing.

The question now is whether the Crown should be permitted to submit to another jury the alternative view, the individual responsibility of each of the accused, which in the first instance it deliberately refrained from presenting. In that situation we are governed by a judgment of this Court, (*Wexler* v. *The King* (1)) in which it was laid down that such a proceeding would violate the fundamental right of an accused not to be placed for a second time in jeopardy.

It was urged that it would be contrary to the public interest that such a serious consequence through force, excessive in fact, in making an arrest, should escape punishment. I do not consider whether or not there was evidence on which the jury could have found whose act struck the deceased down. The guilt or innocence of either accused is not relevant to the question with which I am now dealing. What the *Wexler* case (1) declares is the principle that in such circumstances the interest of the accused becomes the paramount public interest; that, however serious the occurrence may have been, and disregarding all question of guilt or innocence, the Crown having failed on an hypothesis which was fairly and unexceptionably to itself tried out, is not on the same set of facts and on a view open to it but rejected on the first trial to be permitted a second opportunity to try to fasten guilt upon an accused. The *Wexler* case (1) was an appeal from an acquittal, but there is no difference in principle between that and a conviction on a basis for which there was no support in law or in fact. And once it is clear that the conviction cannot stand, justice requires the same treatment in the one case as in the other.

I would therefore allow the appeal and quash the convictions.

KELLOCK J.—This is an appeal from the judgment or order of the Court of King's Bench, appeal side, of the province of Quebec, pronounced the 28th day of June, 1945, Francœur and Stuart McDougall JJ. dissenting, which affirmed the conviction of the appellants, upon a charge of manslaughter following the verdict of a jury.

(1) [1939] S.C.R. 350; 72 C.C.C. 1.

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The dissents as expressed in the formal judgment are as follows:

Messieurs les juges Francœur et Stuart McDougall, dissidents, casseraient le verdict, annuleraient les sentences et ordonneraient un nouveau procès; M. le juge Francœur pour les motifs suivants:

(*a*) Admission au cours du procès de preuve illégale;

(*b*) Direction erronée en droit sur l'interprétation de l'article 69 du Code Criminel.

Stuart McDougall J., dissenting, being of opinion that the verdict should be quashed and that a new trial should be ordered on the grounds:

(*a*) that the accused were deprived of their right to challenge peremptorily the number of jurors allowed by law;

(*b*) that the presiding judge committed an error in law in instructing the jury that subsection 2 of section 69 of the Criminal Code applied; and

(*c*) that the presiding judge further erred in law in instructing the jury that evidence declared by him to be irrelevant as to the guilt of the accused would be helpful and could be accepted by the jury to indicate an atmosphere or "climat spécial" surrounding the actions of the accused.

The facts in substance are as follows:

The appellants, members of the Royal Canadian Mounted Police, Lizotte being a temporary constable, had, on May 7, 1944, together with another constable by the name of Massicotte and a corporal Dubé, who was in charge, gone to the village of St. Lambert for the purpose of apprehending the deceased, Georges Guénette, wanted on a charge of having conspired with others to assist one Hervé Plante to escape from the custody of a peace officer. A number of unsuccessful attempts, some ten or more it is said, had already been made by the police to effect Guénette's arrest. On the day in question, these constables and others had made an earlier trip to the village and after having searched the premises of Guénette's father unsuccessfully, had set out on the return to their headquarters in the city of Quebec. After proceeding some distance toward Quebec, the four named constables on the orders of Dubé turned about and went back to St. Lambert on the chance that Guénette might have returned to his father's house thinking that the coast was clear. The evidence indicates that Guénette had in fact, at the time of the earlier visit, been sleeping in his father's barn, but had managed to make his escape.

Corporal Dubé stationed Lizotte and Massicotte outside the house, which was situated on the south side of a road known as the Brochu Road, while he himself entered the house followed by Savard. While so engaged, Dubé's attention was attracted by a sound upstairs and he proceeded up the stairs just in time to see Guénette jump from a window on the west side of the house. Savard immediately ran from the house in pursuit of Guénette who ran westerly through a ploughed field behind the house extending for a distance of 255 feet to a fence which separated the Guénette property from the property of Brochu, further to the west. Brochu's land in turn extends some 300 feet to a river.

As Savard pursued Guénette, he says he was losing ground, and as Guénette ignored his calls to stop, he fired four shots in the air from the ·45 calibre revolver which he carried. As Guénette still paid no attention, Savard says he lowered his revolver and fired toward a point approximately 6 feet to the left of Guénette with the idea that the latter would not only hear the bullet but see the spurt of the ground where it hit. At this time, he was some 40 or 50 feet approximately in a direct line, parallel with the road, behind Guénette. As Savard fired this fifth shot, Guénette was in the act of jumping the fence into the Brochu field and as he reached the other side, he appeared to bend forward with the left hand resting on the fence and the right hand on the ground. He then straightened himself and ran somewhat more toward the south, but still westerly, for a distance of approximately 78 feet where he stumbled and fell face down. According to the medical evidence, he was then dead or died very shortly thereafter. This evidence by itself might very well indicate that Savard's last bullet had hit Guénette. There is, however, other evidence to be mentioned.

Lizotte had been stationed on the Brochu Road on the north side of the Guénette house, while Massicotte had been instructed by Dubé to post himself in a line with Lizotte on the south side of the house between the house and the barn to the west. Massicotte, however, testified that these instructions had been changed and that Dubé had assigned him to a post on the highway running north

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and south, east of the Guénette house. This change in instructions is, however, denied by Dubé. Lizotte, from his post on the Brochu Road, on observing Guénette jump from the window, tried to get over the fence separating the Guénette property from the road but was unable to do so. He then ran westerly on the road and fired one shot in the air and a second in a westerly direction down the road toward a point, he says, approximately 30 to 35 feet to the north of Guénette and to the latter's right. After he had fired these two shots, he heard someone behind him say "tire-le" (shoot at him) and then a shot from the same direction. At that moment, Guénette who had just jumped the fence appeared to throw himself backwards. The words "tire-le" were also heard by a Crown witness, Larochelle by name.

Massicotte's evidence is that, from his position on the highway east of the house, he heard Lizotte call to someone and he, Massicotte, thereupon ran after Savard in the field in pursuit of Guénette. However, three other Crown witnesses, namely, Larochelle, Brochu and Guénette Sr. describe having seen two constables running on the Brochu Road and both Dubé and Savard say they did not see Massicotte in the field where Savard was. This evidence of Massicotte was evidently regarded as so unsatisfactory by the Crown that Crown counsel told the jury that Massicotte had not done as he said but had in fact run after Lizotte on the Brochu Road. Larochelle further testified that one of the two constables on the Brochu Road had lowered his arm and fired in Guénette's direction and that the constable who did so was wearing a soldier's cap. Lizotte was in civilian attire and bareheaded while Massicotte was in uniform. There is evidence indicating that Lizotte's last shot and the shot fired by Massicotte were both fired after Savard's fifth shot. The Crown does not and did not at any time suggest that the words "tire-le" were spoken by Lizotte. Accordingly, if the evidence of Larochelle and Lizotte is trustworthy on this point, these words must have been spoken by Massicotte.

When the body was examined by a doctor at the hospital to which it was taken by the constables, Massi-

cotte asked the doctor to insert at the penetration point of the wound a ·45 and a ·38 calibre bullet. This was done and the doctor then told Massicotte that it was a ·38 which had caused the death because that bullet could be introduced more easily into the opening than the ·45. Both Massicotte and Savard carried ·45's, while Lizotte carried a ·38. Before the wound was further examined, the body was placed in the hands of an undertaker, who sewed up the wound. One of the Crown experts, who later examined the body, stated that in his opinion the bullet which caused the death was a ·45. The experiment at the hospital by the doctor who first examined Guénette was not communicated to Savard, who was evidently then of the opinion that it was a bullet from his pistol which had caused the death. Savard said, however, that he did not hear the words "tire-le" nor any shot after the fifth shot he fired. He says that, when he heard shots from the Brochu Road, he called out to stop shooting.

The indictment charged that the appellants,

> Ensemble et illégalement causé des lésions corporelles qui ont entraîné la mort de Georges Guénette, commettant par là un crime d'homicide involontaire.

It becomes important to observe the course followed by the Crown's advisers and the way in which the case went to the jury. As stated in the factum of the respondents, Crown counsel at the opening of the trial declared expressly that the case fell within the provisions of section 69 (2) of the Criminal Code, and it is common ground that the trial judge so charged the jury on the request of counsel for the Crown so to do. The case did not go to the jury in any sense as within the first subsection of section 69. As put by counsel for the respondent in their factum:

> If there was evidence in the case that Lizotte or Savard had been provoked, advised, aided or counselled to commit that offence, it would have been the duty of the judge to quote and explain that first part of section 69. The judge did not think that the evidence in the case justified him to do so. It is hard to say that he then, on this point, made a mistake.

In the factum of the Crown it is also stated that:—

> It is established that the two accused not only drew their revolvers and fired, pointing them at the sky, but also aimed at Guénette.

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The Crown also submitted the evidence of the witness Larochelle that a constable wearing a soldier's hat on the Brochu Road had fired at Guénette. As already mentioned, this evidence, if accepted, points to Massicotte. Further, it appears that the bullet which killed Guénette entered the body at the left side of the back in the vicinity of the eleventh rib and passed out at the level of the fourth rib some six inches higher, the direction of the bullet through the body being to some degree from left to right. Guénette in jumping the fence had placed one hand on the top rail and had vaulted over it with his feet toward the Brochu Road. As he reached the ground, his back might well have presented a target to a person firing from the road quite consistent with the location and direction of the wound, while it is not so easy, perhaps, to visualize how such a wound could have been caused by a person in the position of Savard, who is said to have been approximately in a straight line behind him. It is impossible, however, to be dogmatic with regard to this matter, and this is the view taken by St. Jacques J. in the Court of King's Bench.

The uncertainty as to the identity of the person who had fired the fatal shot (only one bullet hit Guénette), and the fact that the Crown did not suggest that Lizotte was the person who had used the words "tire-le" and that in the opinion of counsel for the Crown there was no evidence that Lizotte or Savard had been "provoked, advised, aided or counselled" to commit the offence were no doubt the considerations which dictated the course followed in proceeding under subsection (2). This being the view of the Crown's advisers, that course was not other than proper. The important point is that the decision was made after full consideration of all the facts and followed after all the evidence had been placed before the jury.

Section 69 reads as follows:

(1) Every one is a party to and guilty of an offence who

(*a*) actually commits it;

(*b*) does or omits an act for the purpose of aiding any person to commit the offence;

(*c*) abets any person in commission of the offence; or

(*d*) counsels or procures any person to commit the offence

(2) If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecu-

tion of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

In the course of his charge, the learned trial judge read subsection 2 to the jury and told them in so many words that it applied. He did not, however, explain the subsection or direct the jury as to how it was to be applied to the facts in evidence according as they might determine them to be. In so doing, he took away from the jury, in my opinion, the question as to whether or not there was in fact any intention such as the subsection requires. This appears more clearly from a reading of the charge, to parts of which I will presently refer.

The theory of the Crown with regard to the application of subsection (2) was that the appellants had formed a common intention to bring about the arrest of Guénette by any means; that such intention involved an unlawful purpose, namely, the use of force beyond the limits permitted by section 43 of the Criminal Code; and that it was immaterial which of them actually fired the fatal shot, as the death of Guénette was or ought to have been known to each of them to have been a probable consequence. I am content, without determining the point, to deal with the case on the footing that the subsection may be so applied.

The learned trial judge, as will appear, charged the jury that there was no illegality in any way attaching to the appellants' conduct that day prior to the moment when the actual firing commenced. The way in which he told them it was open to them to convict from that time on I shall now refer to. Counsel for the Crown who, as already stated, requested the learned trial judge to charge on the basis of subsection (2), did not object to the charge and must be taken to have been satisfied with it.

Coming to the charge itself, I quote:

Je crois, messieurs les jurés, que je vous ai fait un résumé aussi fidèle que possible de la preuve, d'après les nombreuses notes que j'ai prises et la transcription de certains témoignages. Je vous ai exposé le droit suivant ce que je crois les principes du code, son sens littéral, le sens commun et ma façon de lire la loi. C'est le cadre. Vous avez, par les faits, le tableau, l'ambiance, l'atmosphère, le climat en un mot. C'est à vous maintenant de décider si les accusés sont coupables ou non. Je vous

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le répète: vous êtes maîtres des faits, et si je les avais rapportés erronément, vous n'êtes pas tenus de me suivre. C'est votre opinion, c'est votre conviction seule qui compte.

Les accusés ont-ils, usant de leur discrétion, suivant les ordres reçus, abusé de leur port d'armes, et aux termes de la loi, fait un excès de violence?

Les accusés auraient-ils pu opérer l'arrestation, comme dit le code, par des moyens raisonnables, sans recourir à violence? Les accusés auraient-ils pu arrêter Georges Guénette ce matin-là, en le cernant, en se jetant sur lui, sans recourir aux armes à feu? Ont-ils été négligents, de négligence grossière et ont-ils dépassé les limites de leurs pouvoirs, en se servant de revolvers, qui, sous prétexte de l'avertir, le couchèrent dans un champ et lui enlevèrent la vie? Georges Guénette pouvait-il se sauver bien loin, seul contre quatre gendarmes armés et qui avaient avec eux une automobile? Si vous en venez à cette conclusion, qui est uniquement de votre province, vous devez les trouver coupables, suivant l'accusation portée.

Les accusés ont-ils fait leur devoir, sont-ils restés dans les limites de la loi, n'ont-ils commis aucun excès, est-ce un accident? Si vous en venez à cette conclusion, vous devez les acquitter.

Devez-vous trouver une différence de responsabilité entre l'accusé Savard et l'accusé Lizotte, si vous en venez au verdict de culpabilité?

C'est ici que l'article 69 du Code Pénal, paragraphe 2, a son application:

"Quand plusieurs personnes forment ensemble le projet de faire quelque chose d'illégal et de s'entraider dans ce projet, chacune d'elles est complice de toute infraction commise par l'une d'entre elles dans la poursuite de leur but commun, si elles savaient ou devaient savoir que la commission de cette infraction devait être la conséquence probable de la poursuite de leur but commun."

Me Gendron soutient que cet article ne s'applique pas. Malheureusement, je ne puis partager son opinion. Le paragraphe 2 s'applique. L'illégalité commença au moment où ils, les accusés et le constable Massicotte, se mirent ensemble à tirer dans la poursuite de leur but commun, contrairement à la loi, si vous jugez qu'ils abusèrent de la violence.

L'entente est devenue illégale au cours de l'exécution, toujours si les accusés excédèrent, d'après vous, les moyens raisonnables et causèrent la mort—article 43 C. Cr.

Il me reste à vous dire que le doute est en faveur des accusés. Quand on parle de doute, il faut que ce soit un doute raisonnable qui entraîne la conviction, c'est-à-dire, que si vous n'êtes pas logiquement et raisonnablement sûrs que les accusés soient coupables, votre devoir est de les acquitter.

In the above, the jury are told these four things:

(1) If they thought that the appellants could have effected the arrest by means other than by resorting to their firearms or if they were guilty of gross negligence in resorting to their firearms, they had gone beyond the limits of section 43 Cr. C. and the jury must find them guilty as charged.

(2) If, in the opinion of the jury, the appellants did not exceed the limits of section 43, Cr. C. then the death was an accident and the appellants should be acquitted.

(3) They need not differentiate between Savard and Lizotte in arriving at their verdict under (1) above in view of the provisions of section 69 (2).

(4) The unlawful intention within the meaning of subsection 2 arose when the appellants started to fire, if, in the opinion of the jury, the appellants transgressed the limits of section 43.

Section 43 Cr. C. is as follows:

> Every one proceeding lawfully to arrest any person for any cause other than an offence in the last section mentioned is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner, if such force is neither intended nor likely to cause death or grevious bodily harm.

Assuming that the theory of the Crown as previously set out correctly interprets the provisions of section 69 (2) as applied to the case at bar, the question of fact as to the existence or non-existence of a common wrongful intention on the part of the appellants was completely taken away from the jury by the charge. They were told that the guilt of the appellants was dependent merely upon a finding that the appellants had gone beyond that which is authorized by section 43. This, of course, is completely erroneous and sufficient of itself to vitiate the verdict and direct a new trial.

However, in my opinion, that course cannot be followed as it is impossible to find in the record any evidence supporting the existence of a common intention on the part of the appellants to prosecute any unlawful purpose within the meaning of subsection (2) even had the jury been properly charged. The learned trial judge charged the jury, as already mentioned, and I think correctly, that there was no illegality until the instant when the firing commenced. Accepting that, I agree with the learned dissenting judges in the court below that there is nothing from which it can be established that either of the appellants acted other than independently and as a result of the circumstances which came into existence during the attempt to make the arrest after Guénette

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was sighted. There is no evidence upon which a finding could be made that the appellants formed at that time any common wrongful intention as required by the subsection.

Notwithstanding the position taken by the Crown at the trial, Mr. Rivard now argues that there was evidence showing that the appellants had formed a wrongful intention prior to the time when the firing commenced.

For the purpose of showing that *the whole expedition* was illegal, Mr. Rivard endeavoured to make use of the fact that the constables did not have with them the warrant for Guénette's arrest. The evidence shows that this was due to a mistake on the part of corporal Dubé. Unknown to him, the file at headquarters had been split into two parts, and, when leaving Quebec for St. Lambert, he had picked up what he thought was the complete file, but in fact, the papers he took with him did not include the warrant. However, the learned trial judge told the jury that this fact made no difference so far as the appellants were concerned and specifically instructed the jury that, in considering their verdict, they were to leave the question of the presence or absence of the warrant out of consideration. I think the learned trial judge was right and I do not think, therefore, that any point can be made of this.

Mr. Rivard next called our attention to an incident which occurred when the constables arrived at the village in the early morning for the first time. An automobile was observed by Dubé on the village street and he gave chase. After some trouble, he managed to place his car in its path and to bring it to a stop. Some conversation took place between the occupants of the two cars, and one Baillargeon, the driver of the other automobile, deposed at the trial that one of the constables, he would not say which, in the course of this conversation had said that if Baillargeon had not stopped the constables would have fired. There is some question as to whether this conversation took place in the presence of Savard, but I am content to assume his presence. The learned trial judge charged the jury that legally this conversation had no bearing upon the case, but he told the jury it was a circumstance which might give them what the learned

trial judge called the "atmosphere" or "special climate" of the case. This was, in my opinion, highly improper. The incident was either evidence against the appellants or it was not. There is no middle ground and the charge of the learned judge on this point amounts to a direction that the jury might draw a conclusion unfavourable to the accused from something which was not evidence at all. In my opinion, the learned trial judge was right in holding that the incident was inadmissible as evidence.

Mr. Rivard now seeks to use this incident for the purpose of his present argument, namely, as showing the existence of a common wrongful intention on the part of the appellants prior to the moment of the firing. If in fact such an intention did exist at that time, then it must have been on the part of Dubé and Massicotte and Savard, who were in the police car at the time. Lizotte was not in that car but was in the other car with three other constables in another part of the village. If Lizotte was also a party to this wrongful intention, surely the other constables in the car with him must also have been parties. It is remarkable, therefore, if Mr. Rivard be right, why none of the other constables, and more especially why Dubé and Massicotte, were not charged. It seems apparent that this contention is an afterthought. It was not entertained by counsel for the Crown when the case was placed before the jury.

Apart from this, this incident has no relevancy to the charge upon which the appellants were tried. The argument is that when the remark was made, the constables thought that Guénette might have been in the Baillargeon car, and if they were willing to fire then, it would be some evidence, the weight being for the jury, that they intended to fire later when they did in fact sight Guénette and he did not stop. The incident is not capable of being the foundation for the inference sought to be drawn from it. There is nothing in the remark which would properly permit the inference to be drawn that the firing would be with intent to do other than warn, and the Crown's case would not be advanced.

The third circumstance relied upon by Mr. Rivard in support of his argument was a conversation between one of the constables and a Miss Fontaine, which took place also

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at the time of the first visit to the village, while some of the constables were engaged in searching the home of her father. Miss Fontaine said to this constable something to the effect that the constables were tiring themselves that morning. His reply, according to Miss Fontaine, was to the effect that that might be so, but others would soon be tired. This evidence, in my opinion, was also inadmissible. Neither of the appellants were present when the words were spoken. The trial judge permitted this evidence to be given but directed the jury that it did not incriminate the appellants and that they were not responsible for something spoken when they were not present. Following this, however, he told the jury that it was for them to decide whether or not the words were spoken. This was equally objectionable to his treatment of the Baillargeon incident. Even if it were the fact that both appellants were present when the statement was made, the statement, in my opinion, is completely colourless and innocuous, and incapable of being the basis of an inference that there was on the part of the appellants any such intention as is now contended for.

In my opinion, therefore, as already stated, there is no evidence anywhere to support the argument now put forward by Mr. Rivard.

When a conviction is set aside on the ground that there is no evidence to support it, the result ordinarily is that the accused must be acquitted. The Crown contends, however, that there should be a new trial, and, of course, that is what is directed by the dissenting judgments. The argument is that the appellants should now be proceeded against at the proposed new trial under section 69 (1) or, that additional evidence might be forthcoming which would make section 69 (2) applicable. Such an order, however, cannot be made. Section 1024 provides:

(1) The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect.

(2) Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court of Canada during which such affirmance takes place, or the session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court of Canada or a judge thereof.

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(3) The judgment of the Supreme Court of Canada shall, in all cases, be final and conclusive.

(4) Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

While the existence of a dissent on a question of law, as provided by section 1023, is a condition precedent for an appeal to this Court, in a case like the present, this Court, once seized of the appeal is not limited to the remedy considered appropriate in the dissent, but has complete jurisdiction to direct the remedy which, in its opinion, the Court appealed from ought to have granted. In *Manchuk* v. *The King* (1), Duff C.J.C. said:

> We have concluded after full consideration that by force of section 1024 coupled with the enactments of the *Supreme Court Act* this Court has authority not only to order a new trial or to quash the conviction and direct the discharge of the prisoner. * * *

Having this jurisdiction then, what is the duty of the Court in the circumstances here present? In my opinion it would not be proper to direct a new trial. Even had the jury been properly instructed under section 69 (2), there is no evidence, as I have pointed out, upon which the appellants could properly have been convicted. The case was deliberately proceeded with upon a theory of guilt under a certain provision of the Criminal Code which now turns out to be one which the evidence entirely fails to justify. Merely because it is suggested that upon some other possible view of the evidence some other provision of the Code might apply (which the Crown deliberately determined at the trial did not apply), or because the Crown might be able to adduce further evidence are not circumstances which would make it proper to do otherwise than to acquit. I think the principle of the decision in *Wexler* v. *The King* (2) prevents our making such an order as the Crown now asks for. I would therefore allow the appeal and quash the convictions. It is not necessary in the circumstances that I deal with any of the other grounds of dissent.

Appeal allowed, convictions quashed and appellants discharged.

(1) [1938] S.C.R. 341, at 349. (2) [1939] S.C.R. 350.

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*Nov. 1
*Dec. 21

BATTLE PHARMACEUTICALS..... APPELLANT;

AND

THE BRITISH DRUG HOUSES, LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade Mark—Whether registered word mark "Multivims" should be expunged from register as being "similar" to previously registered word mark "Multivite"—The Unfair Competition Act, 1932 (Dom., 22-23 Geo. V, c. 38), ss. 2 (k) (o), 26, 52—Governing principle in determining question of similarity—Nature of evidence with regard to likelihood of confusion.

This Court affirmed the holding of Thorson J., [1944] Ex. C.R. 239, that appellant's registration of the word mark "Multivims" for use in association with wares described as "A multiple vitamin and mineral tablet" should be expunged from the register of trade marks kept under *The Unfair Competition Act, 1932* (Dom., 22-23, Geo. V, c. 38), on the ground that, within the meaning of s. 26 of said Act, said word mark was "similar" to the word mark "Multivite" previously registered by respondent for use in association with wares described as "A Preparation for Medicinal use of the Vitamins A, D, C and 'B' Complex", and was used "in connection with similar wares".

The question as to similarity must be determined as a matter of first impression. Any confusion would be in the person who only knows the one word, and has, perhaps, an imperfect recollection of it. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with aimed clarity. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to his wants (*Aristoc Ld.* v. *Rysta Ld.*, [1945] A.C. 68, at 86).

A witness may not state his opinion as to the effect the use of a mark would have, or be likely to have, on the mind of someone else, as that is the very point to be determined; but he may testify as to the effect the use of the mark in dispute would have on his own mind, which is one of the circumstances to be considered by the court.

APPEAL from the judgment of Thorson J., President of the Exchequer Court of Canada (1), ordering that the appellant's registration of the word mark "Multivims" on May 7, 1943, for use in association with wares described as

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

(1) [1944] Ex. C.R. 239; [1944] 4 D.L.R. 577; 4 Fox Pat. C. 93.

"A multiple vitamin and mineral tablet be expunged from the Register of Trade Marks maintained under *The Unfair Competition Act, 1932* (Dom. 22-23 Geo. V, c. 38), on the ground that, within the meaning of s. 26 of the said Act, the said word mark was "similar" to the word mark "Multivite" registered by the respondent on March 26, 1936, for use in association with wares described as "A Preparation for Medicinal use of the Vitamins A, D, C and 'B' Complex", and that the two marks were used "in connection with similar wares."

Rutledge C. Greig for the appellant.

Christopher Robinson for the respondent.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal from a judgment of the Exchequer Court rendered on an application to it under section 52 of *The Unfair Competition Act, 1932,* by the respondent, The British Drug Houses, Limited, for an order striking from the register of trade marks an entry therein of May 7th, 1943, recording the trade mark "Multivims" as a word mark applied to a multiple vitamin and mineral tablet. That trade mark was recorded in the name of the appellant, Battle Pharmaceuticals. The respondent had, on March 26th, 1936, been recorded in the register as the owner of "Multivite" as a word mark applied to a preparation for medicinal use of the vitamins A, D, C and B complex.

The basis of the application is that the 1943 entry on the register did not accurately express or define the rights of the present appellant existing as of the date of the application to the Exchequer Court by the respondent. Those rights depend upon the question whether the word mark "Multivims" was registrable under section 26 of the Act, by the applicable provisions of which such word mark was registrable if it "(*f*) is not similar to * * * some other word mark already registered for use in connection with similar wares."

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It is not denied that the two word marks are used in connection with similar wares, but the appellant disputes the conclusion of the Exchequer Court that the word mark "Multivims" is "similar" to the word mark "Multivite". By clause (*o*) of section 2:—

> "Word mark" 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.

By section 2 (*k*):—

> "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.

The onus is upon the applicant in these proceedings, the present respondent. *Proctor & Gamble Co. of Canada Ltd.* v. *LeHave Creamery Co. Ltd.* (1). The question must be determined by any judge upon whom the responsibility is cast as a matter of first impression and decisions upon disputes as to other trade marks are of no assistance except in so far as some principle is enunciated. Such a decision is that of the House of Lords in *Aristoc Ld.* v. *Rysta Ld.* (2). That case arose out of an application to the Registrar of Trade Marks for registration of a trade mark under the Imperial *Trade Marks Act,* chapter 22 of 1938. The Assistant Comptroller, acting for the Registrar, had issued his decision authorizing the application to proceed. Farwell J. discharged that order and directed the Registrar not to proceed with the registration. The Court of Appeal, with Lord Justice Luxmoore dissenting, reversed the order of Farwell J., holding that the registration should be allowed. The House of Lords unanimously reversed the order of the Court of Appeal and restored the order of Farwell J. Several questions were discussed before the Assistant Comptroller and the various courts but we are concerned only with the one arising under section 12 of the Act as to whether the trade mark sought to be registered so nearly resembled a trade mark already on the register as to be

(1) [1943] S.C.R. 433, at 438. (2) [1945] A.C. 68.

likely to deceive or cause confusion. Although under that section the onus is on the applicant for registration, in view of the definition of "similar" in paragraph (*k*) of section 2 of our Act, the inquiry to be made on an application under section 52 thereof is in essence the same as that under section 12 of the Imperial Act.

The principle adopted by the House of Lords on that point is the same as has governed this Court in proceedings under section 52 of *The Unfair Competition Act* and it is found in a passage in the dissenting judgment of Lord Justice Luxmoore in the Court of Appeal, which was accepted in the House of Lords by all the peers as a fair statement of the duty cast upon the court. The passage referred to appears in the speech of Viscount Maugham at page 86 of the report:—

> The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of s. 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

Applying that principle to the case at bar, we are satisfied that the President of the Exchquer Court came to the right conclusion. The sound of the two words is such as would be likely to cause users of the wares to confuse the two, that is "to infer that the same person assumed responsibility for their character or quality". We agree that a witness may not state his opinion as to the effect the use of a mark would have, or would be likely to have, on the mind of someone else because, as stated in the *Proctor and Gamble* case (1), that is the very point to be determined in the proceedings, but that he may testify as to the effect the use of the mark in dispute would have on his own mind. That is one of the circumstances to be considered by the court.

(1) [1943] S.C.R. 433.

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The only other argument advanced on behalf of the appellant was that users of the wares of the parties to which the registered trade marks applied would be more careful than usual because of the fact that they would be purchasing articles intended for medicinal purposes. However, all such articles are not sold on a doctor's prescription, and in connection with sales without such a prescription the confusion already adverted to is likely to occur.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Rutledge C. Greig.*

Solicitors for the respondent: *Smart & Biggar.*

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*Oct. 23, 24, 25

*Dec. 21

ALFRED W. EANSOR (PLAINTIFF).. APPELLANT;

AND

NORMAN D. EANSOR, LLOYD C. EANSOR AND T. J. EANSOR & SONS LIMITED (DEFENDANTS).... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Specific performance—Alleged contract for sale of shares in company—Borrowings by shareholders from company to purchase shares—Companies Act, R.S.O., 1937, c. 251, s. 96—Effect thereof in consideration of question of granting specific performance.

A.E., N.E. and L.E., brothers, were the directors of a company in which each of them held, in his own name, 176 shares. They were also entitled, as the residuary legatees named in the will of their deceased father (of which will they were the executors), to share equally in 176 shares of the company held by their father's estate. The said shares and three shares held, one each, by the wives of said brothers (all fully paid up) were all the issued shares of the company.

A.E. sued N.E. for specific performance of an alleged agreement for sale to A.E. by N.E. of his shares, including (so A.E. claimed) the 176 shares in N.E.'s name and also his one-third interest in the shares held by his father's estate, making in all 234⅔ shares. N.E. alleged

*PRESENT:—Kerwin, Hudson, Rand, Kellock and Estey JJ.

that, though a sale by him to the company of the 176 shares held in his name had been proposed before it was learned that the company could not purchase its own shares, no agreement such as alleged by A.E. had ever been made, and if any such agreement had been made it was for not more than 176 shares; and he contended that, in any event, it was not a case where specific performance should be ordered. L.E. and the company were (on application in the action) added as party defendants.

Payments had been made to N.E., extending over a period of more than three years, by cheques of the company, charged in its books against A.E. and L.E. as (according to heading of the account) loans to them jointly for the purpose of purchasing stock of the company from N.E. It was contended that this method of payment involved loans to shareholders contrary to s. 96 of *The Companies Act,* R.S.O. 1937, c. 251, and, therefore, specific performance of the alleged agreement should not be granted; also that (if, as contended, the loans had not been repaid) it would be inequitable to grant specific performance because that would compel N.E. to part with his shares and yet remain liable to the company (under said s. 96) for the purchase money so loaned.

The trial Judge found that there was a binding contract between A.E. and N.E. for the sale by N.E. to A.E. of 234⅔ shares, and ordered specific performance, and ordered that on conveyance of the shares to A.E., he should hold them as trustee for himself and L.E. in equal shares (in accordance with what the trial Judge found had been agreed) and should transfer to L.E. 117⅓ shares. He also, as expressed in clause 5 of the formal judgment, ordered that the sum of $798.20 (by which amount he found that N.E. had been overpaid for the shares) should be a personal debt of N.E. to the company and that in the company's books the indebtedness to it of A.E. and L.E. should be reduced by that amount.

The Court of Appeal for Ontario set aside the judgment at trial and dismissed the action, holding that by the evidence no binding contract was established for the sale of any shares from N.E. to A.E.

On appeal to this Court:

Held: On the evidence, and having regard to the trial Judge's findings, the judgment at trial should be restored; except clause 5 thereof (above mentioned), which should be deleted from the judgment.

It was proper (in view of findings at trial restored by this Court) that the order for specific performance should cover N.E.'s interest in the shares held by his father's estate. *Per* Kerwin J.: There was nothing to prevent a court of equity from acting *in personam* and directing N.E. to do whatever was necessary to carry out his contract, particularly when he had been paid for the shares. *Per* Hudson, Rand, Kellock and Estey JJ.: N.E. was in a position to deal with his interest in the estate's shares and no question arose in the action as to title or inability to convey.

Per Kerwin J.: It was unnecessary in the present appeal to consider the effect of s. 96 of the Ontario *Companies Act.* N.E. had been paid and it could make no difference to him whence the money came. A.E. did not rely upon any illegal act as part of his cause of action.

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The contention against the granting of specific performance because of possible personal responsibility of N.E. under s. 96 should be given no effect as a bar to the judgment granted at trial, in view of the fact that N.E. was one of the prime movers; and in this view, it was unnecessary to consider whether or not the loans by the company had been repaid.

Per Hudson, Rand, Kellock and Estey JJ.: While s. 96 of the Ontario *Companies Act* prohibits loans to shareholders, it provides its own penalty for disobedience and produces no other result. In any event, there is nothing in s. 96 which affected the contract here in question, to which the company was not a party. N.E. would have no responsibility under s. 96 for loans made up to the time he knew they were being made; if he chose to assent to further loans thereafter and thus incurred liability, that was not a consideration which would make it inequitable to decree specific performance against him. But taking the matter on the basis of the trial Judge's finding, that N.E. knew the facts from the time of the first loan, it might be that N.E. would have a right to be indemnified by A.E. and L.E. in respect of any liability he might have to the company in respect of the purchase price of the shares, but that was a matter which should be left to be determined when the point arose and the issue was properly defined.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario, which, reversing the judgment of the trial Judge, Urquhart J., dismissed the plaintiff's action, which was brought for specific performance of an alleged agreement for sale to the plaintiff by the defendant Norman D. Eansor of shares in the defendant company. The trial Judge found that there was a binding contract between the plaintiff and the said defendant for the sale by the latter to the plaintiff of 234⅔ shares, and ordered specific performance thereof; and ordered that, on conveyance of the shares to the plaintiff, he should hold them as trustee for himself and the defendant Lloyd C. Eansor in equal shares (in accordance with what the trial Judge found had been agreed) and should transfer to the said Lloyd C. Eansor 117⅓ shares. He also, as expressed in clause 5 of the formal judgment, declared that the defendant Norman D. Eansor was personally indebted to the defendant company in the sum of $798.20 (by which amount the trial Judge found that the said Norman D. Eansor had been overpaid for the shares) and ordered that the records of the defendant company be altered to make the said Norman D. Eansor a debtor of the company in that sum and be further altered to reduce the indebtedness

of the plaintiff and the defendant Lloyd C. Eansor to the company by the said amount. The trial Judge's judgment was set aside by the Court of Appeal for Ontario (Robertson C.J.O., Henderson and Gillanders JJ.A.), which held that by the evidence no binding contract was established for the sale of any shares from the defendant Norman D. Eansor to the plaintiff, and the action should be dismissed. The plaintiff appealed to this Court.

The material facts of the case and the questions in issue in this appeal are fully discussed in the reasons for judgment in this Court now reported.

S. L. Springsteen K.C. and *J. E. McKeon K.C.* for the appellant.

J. R. Cartwright K.C. and *R. S. Riddell K.C.* for the respondents Norman D. Eansor and Lloyd C. Eansor.

K. Laird for the respondent T. J. Eansor & Sons Ltd.

KERWIN J.—This is an appeal by the plaintiff, Alfred W. Eansor, against the judgment of the Court of Appeal for Ontario reversing the judgment at the trial and dismissing the action. The appellant and his brothers, Norman D. Eansor and Lloyd C. Eansor, two of the respondents, were shareholders and directors of the third respondent, T. J. Eansor and Sons, Limited, which carries on, in the City of Windsor, a business of fabricators of structural steel and ornamental iron. This business had been commenced by the father of the three brothers, T. J. Eansor, who took the sons into business with him and, in 1928, had the respondent company incorporated. The father died in 1931, and at the time of the events giving rise to the present action there were 707 issued shares of the capital stock of the company, all fully paid-up. Each of the sons held 176 shares, the estate of the father, under whose will the three sons are executors, held the same number and, of the remaining three shares, one was held by each of the respective wives of the sons.

In June, 1939, the bankers of the company insisted that something should be done to remedy the latter's unsatisfactory financial position. The local bank manager im-

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posed two conditions before the bank would continue to carry the company's account. As stated by the Chief Justice of Ontario, one of these conditions was that one of the brothers should retire from the company's employ, but the other, not mentioned by the Chief Justice, was that the one who retired should dispose of his holdings in the company. This is of particular significance in connection with a consideration of the balance of the evidence given at the trial and of the exhibits.

A meeting was held in June, 1939, at which Norman D. Eansor volunteered to be the one to retire and at that time, according to his evidence, he offered to sell to the company the 176 shares standing in his name. On the other hand, the plaintiff says that what Norman offered to sell to him was his entire interest in the capital stock of the company and, no matter what expression was used, the trial judge has found on conflicting evidence, therein preferring the testimony of the plaintiff to that of Norman and Lloyd, that that was the bargain. This finding should not be disturbed and, for the reasons assigned by the trial judge, the evidence of Mr. Scarff, the company's auditor, and the form of a draft agreement prepared by Mr. Riddell do not militate against it. Mr. Riddell was not a witness.

While the pleadings appear to have been disregarded at the trial, the statement of claim alleges that "the purchase price of the said shares was to be based on the book value per share outstanding." At the trial the plaintiff testified that this was the book value as of January 31, 1939, the company's financial year ending on the 31st of January. While Lloyd Eansor stated that Norman had offered to sell only 176 shares, and those to the company itself, he testified that the purchase price was to be based on the book value at the end of each of the company's financial years. On this latter point alone, the trial judge accepted the evidence of Lloyd, and while we were pressed at the argument with the contention that a court could not direct specific performance of a contract one of whose terms was not only not testified to by the plaintiff but which was negatived by him, there is nothing to prevent a trial judge accepting some of the evidence of a party and rejecting a part.

There is no doubt that at this first meeting the time for payment by the plaintiff was not specified and this for the very good reason that the plaintiff went to the meeting with the idea of selling out his own interest in the company and retiring from its activities. When Norman volunteered to retire and sell, the plaintiff was not in a position to say how he could finance the matter, but my conclusion upon the evidence, agreeing therein with that of the trial judge, is that the method of payment was agreed upon at a subsequent meeting. The testimony as to the date of this later meeting was conflicting but I have come to the conclusion that it was, as the plaintiff testified and the trial judge found, in July, 1939, and not in the following year. The Chief Justice of Ontario, while not determining the matter, apparently leaned to the other conclusion but, if the view I have expressed be correct, it becomes of particular significance, as I am compelled to disagree with the learned Chief Justice that the evidence of the plaintiff as to what occurred at the two meetings did not establish any contract. I agree with the trial judge that there was a bargain whereby the plaintiff agreed to buy and Norman agreed to sell all the latter's shares in the company, including those to which he was entitled as his distributive share of the residue of his father's estate, and that such bargain was for an amount per share to be figured according to each annual statement of the company. The shares were to be paid for at the rate of thirty-five to sixty dollars per week.

Payments were made to Norman in accordance with this arrangement by cheques of the company, signed by Norman and the plaintiff. They were charged in the books of the company as loans to the plaintiff and Lloyd and over a period of more than three years Norman received in this manner the sum of $13,088.92. According to the terms of the contract which I find was entered into, it is evident that Norman was over-paid for the 176 shares held in his own name and one-third of the shares held in his father's estate to the extent of $798.20.

The first of these cheques is dated July 7, 1939—Norman having ceased his connection with the company on June 30 of that year in accordance with the arrangement. On the

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back of this and all the other cheques, down to and including the last one dated October 30, 1942, is a printed endorsement "This cheque is in settlement of the following." Following this on the back of the first cheque is the typewritten notation "Payment from A. W. Eansor and L. C. Eansor in accordance with agreement—$178.52". The notation on the back of the cheque of July 28, 1939, is "Charge to A. W. Eansor and L. C. Eansor re: Purchase of stock from N. D. Eansor." In January, 1941, Norman approached the plaintiff, who was ill at his home, and suggested that he, Norman, be taken back in his old position, which request was refused. It was agreed, however, that Norman might go back as a mechanic, which he did, but in the plaintiff's absence he soon worked himself into a position of managerial authority. The significance to be attached to his return to the company is that the cheques continued to be issued and the entries made in the company's ledger under the heading "Loans to A. W. Eansor and L. C. Eansor jointly for the purpose of purchasing T. J. Eansor & Sons Limited stock from N. D. Eansor". The typewritten notation on the back of each cheque, in most cases and almost invariably from January, 1941, to the end, read:—"Payment on account re purchase of T. J. Eansor & Sons Ltd. stock."

It is inconceivable that Norman ever really thought that he was selling only 176 shares and these to the company. Unless, therefore, he is able to escape from his bargain there is no reason why a judgment for specific performance should not go against him in favour of the plaintiff and that he be ordered to convey the $234\frac{3}{4}$ shares in the capital stock in the company to the plaintiff and be enjoined from otherwise transferring them.

The position of the estate of T. J. Eansor was examined and while it appeared from the will that the three brothers were entitled to the residuary estate, it was said that in July, 1939, all the pecuniary bequests had not been paid; that the 176 shares held by the estate stood in the name of the executors and that, therefore, Norman never owned nor was he possessed of his one-third of those shares. Hence it followed, according to the argument, that the Court could not make an order that these shares, or any part of them,

should be transferred by Norman to the plaintiff. The executors as such are not, of course, parties to the action but there is nothing to prevent a court of equity from acting *in personam* and directing Norman to do whatever is necessary to carry out his contract to sell his one-third of the estate's shares to the plaintiff, particularly when, as has been shown above, he has been paid for them.

It was then said that the loans made by the company to the appellant and Lloyd were illegal as being in contravention of section 96 of the Ontario *Companies Act,* R.S.O. 1937, c. 251:—

> 96. No loan shall be made by the company to any shareholder, and if such a loan is made all directors and other officers of the company making the same and in any wise assenting thereto shall be jointly and severally liable to the company for the amount thereof, and also to third parties to the extent of such loan with interest, for all debts of the company contracted from the time of the making of the loan to that of the repayment thereof.

Whatever may be the effect of that section in a properly constituted action, I think it unnecessary to consider it in the present appeal. So far as Norman is concerned, he has been paid and it can make no difference to him whence the money came. The plaintiff does not rely upon any illegal act as part of his cause of action.

It was then urged that as a director Norman might in the future be held personally responsible under the section and that a court of equity under those circumstances should not decree specific performance. In view of the fact that Norman was one of the prime movers, I am unable to attach any weight to that argument or to consider it a bar to the judgment granted at the trial. In this view of the matter, it is unnecessary to consider what was argued with great force by Mr. Cartwright that the loans were not repaid by the declaration of a dividend. In my opinion, it makes no difference whether they were repaid or not.

As pointed out by the Chief Justice of Ontario, the action was originally brought by the plaintiff against Norman only. It was on the application of Lloyd C. Eansor and the company, and that of Norman, that the first two named were added as parties defendants to enable the Court to effectually and completely adjudicate upon the matters involved in the action. The company submitted its rights

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to the Court and Lloyd adopted as his defence that already entered by Norman. That formal defence alleged that it was agreed among the three directors that he, Norman, would sell his stock to the company to the extent of 176 shares. Notwithstanding Lloyd's acceptance of this defence, he had acquiesced from the time he first learned of it, in the charging on the books of the company as a loan to himself as well as to the plaintiff, the various amounts paid from time to time by the company to Norman. While counsel for the appellant before us did not agree that the appellant should hold as trustee for Lloyd in equal shares with the appellant, clause 4 of the formal judgment at the trial so declaring was the proper order to make. It is difficult, however, to justify clause 5 whereby the amount of the overpayment to Norman, $798.20, is ordered to be a personal debt of Norman to the company, and the company's books are directed to be altered so as to reduce the liability of the plaintiff and Lloyd to the company by that sum.

I would allow the appeal and restore the judgment at the trial with the exception of clause 5. Norman should pay the company its costs of the appeal to the Court of Appeal and to this Court and Norman and Lloyd should pay the appellant his costs in each of those Courts.

The judgment of Hudson, Rand, Kellock and Estey JJ. was delivered by

KELLOCK J.—This is an appeal by the plaintiff from an order of the Court of Appeal for Ontario, dated the 21st day of November, 1944, allowing an appeal by the respondent Norman D. Eansor from the judgment at trial in favour of the appellant. The action as originally brought was between the two above named parties only, and the claim was for specific performance of an alleged contract for the purchase by the appellant from the said respondent of 234⅔ shares of the capital stock of the respondent company, the price as put in the statement of claim "to be based on the book value per share outstanding." The statement of claim further alleged that on the basis of the respective book values of the company's shares in each of the fiscal years 1939 to 1942 as set out in the pleading, a

certain number of shares each year amounting in all to the above total of 234⅔ shares had been paid for by the appellant.

The statement of defence of the respondent Norman Eansor, subsequently adopted by the respondent Lloyd Eansor, alleged that in the year 1939, it was agreed by and between the directors of the respondent company (the appellant and the two individual respondents) that the respondent Norman Eansor would sell 176 shares to the respondent company at "book value" and further that certain monies were paid by the respondent company to the respondent Norman Eansor on account of this purchase. It was then alleged that during the early part of the following year, the directors learned that the company could not purchase its own stock and "the plaintiff thereupon instructed the company's auditors to set up the monies already paid to the defendant on account of the sale of the said stock, as a loan made by the company to the plaintiff and his brother and co-director, Lloyd C. Eansor." The pleading alleged that the defendant, Norman Eansor, "is agreeable to transferring the said 176 shares of the capital stock of the company to the person or persons entitled thereto and doth hereby bring into Court, duly endorsed, the said 176 shares to abide the decision of this Honourable Court." It is further alleged that at the time the respondent Norman Eansor agreed to sell the said stock, only 176 shares had been issued to him and "he was not in a position to sell or to agree to sell any more than the said 176 shares."

It will be noticed that no question is raised in the statement of defence with regard to the price alleged in the statement of claim, but rather it is agreed that the price was the "book value." It is inconceivable that, had there been any variance between the parties in their understanding as to "book value", the statement of defence would not have raised that issue. Far from doing so, the defence brings the 176 shares into Court for delivery to the person or persons determined by the Court to be the purchaser or purchasers. Moreover, if there could be said to be any ambiguity on the point, the evidence of the respondent Norman Eansor makes it clear that the only book value he dis-

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cussed at any time was as set out in the statement of claim, although he says it was "talked of" but not agreed to. His pleading, however, says it was agreed to, and his co-defendant, Lloyd Eansor, who adopted this statement of defence, says this was the price agreed upon.

It is implicit also in the statement of defence that on discovery that the respondent company could not purchase its own shares, it was arranged that the loan should be made by the company to the appellant and the respondent Lloyd Eansor and they became substituted as purchasers. In my opinion, therefore, the issues raised by the statement of defence upon which the parties went down to trial were two; namely, (1) whether the contract was as alleged by the appellant, one covering the sale of 234⅔ shares, or as alleged by the individual respondents, for the sale of 176 shares only, and (2) whether, as alleged by the appellant, he alone was the purchaser, or, as alleged by the respondents Norman and Lloyd Eansor, they were the purchasers.

At all material times, each of the three individual parties to the action had 176 shares registered in their respective names, and the estate of their father, the late T. J. Eansor, held another block of the same number. The father had died in the year 1931, appointing the three sons to be executors and trustees of his estate. They were also residuary beneficiaries. The shares were not specifically bequeathed.

It appears that, as the result of pressure from the respondent company's bank in June, 1939, it became necessary that one of the brothers, all of whom were in the employ of the company, should retire from the business in order to decrease expense. It is also suggested on the part of the appellant that there was another object, namely, to eliminate friction. In any event, at a meeting on June 15, 1939, between the three brothers and two bank representatives, the respondent Norman Eansor offered to be the one to retire. As stated in evidence by the appellant, Norman "offered his stock for sale with no conditions except that the price to be paid for it was the book value of the stock as of the close of the fiscal year just preceding, which was January 31, 1939." The appellant, whose evidence,

with one exception, is accepted by the trial judge, says that he immediately accepted this offer, and that the terms of payment were left to be agreed upon at a subsequent meeting, which, according to him, took place on the 4th of July, 1939. The respondent Norman Eansor says that the terms of payment were agreed upon; namely, a minimum of $35 per week, with an additional amount monthly which he required in order to meet certain obligations of his in connection with insurance and real estate. Counsel for the individual respondents does not contest this point but expressly admits that these terms of payment were agreed upon. Commencing on the 7th of July, 1939, the respondent Norman Eansor received company cheques for these instalments approximately weekly between that date and the 30th of October, 1942, signed by himself and the appellant as officers of the respondent company and which he endorsed. These endorsements were couched in varying language, such as, "Payment from A. W. Eansor and Lloyd C. Eansor in accordance with agreement," "Charge A. W. Eansor and L. C. Eansor as per agreement—$35 re stock purchase.", and "Charge account of A. W. Eansor and L. C. Eansor, re purchase of stock as per agreement." On the same date as the first of these cheques, namely, July 7, 1939, an account was opened on the books of the respondent company in which this and all succeeding cheques were charged to the appellant and the respondent Lloyd Eansor, the heading of the account reading, "Loans to A. W. Eansor and L. C. Eansor jointly for the purpose of purchasing T. J. Eansor & Sons Limited stock from N. D. Eansor."

The point upon which the learned trial judge prefers the evidence of the respondent Lloyd C. Eansor to that of the appellant is that the basis of the price was not the book value as of the 31st of January, 1939, as stated by the appellant in his evidence, but the book value of the shares at the end of each year while the payments continued, as alleged in the statement of claim. It is, to say the least, unusual that a plaintiff should come into court alleging in his pleading a contract embodying certain terms and in his evidence state that one of the important terms was not as pleaded, and it is not surprising that counsel

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for the respondents made much of this, although, as already pointed out, the statement of defence of the individual respondents accepts on this point the statement of claim. While the appellant in his evidence stated more than once that the original agreement was on the basis of the book value as at the 31st of January, 1939, he also stated, and this evidence is not mentioned by the trial judge, that "as we went along we used the increased value as the company came back. For instance, in the year following January 31, 1940, the book value of the shares at that time would be used for the stock that was purchased in the calendar year 1940 or in the fiscal year—". The appellant thus agrees that the price as stated by Lloyd Eansor was adopted by the parties. When it is considered that the only other suggested price is $80 per share put forward by the respondent Norman Eansor, which the trial judge rejects, I do not think the discrepancy as to the time when the basis of the price was agreed upon prevents effect being given to it. I come back to the pleadings where no issue is raised as to that being the basis of the price. In my opinion, therefore, the respondents fail in the contention that no contract at all resulted because the basis of the price was not agreed upon. Such a contention formed no part of the instructions given by the individual respondents to their solicitor for the defence of the action and a passage between counsel for the individual respondents and the learned trial judge at an early stage of the trial is significant:

His LORDSHIP: Is there any question about 176 shares Norman has not got and has not conveyed—

Mr. RIDDELL: I do not just understand your Lordship. Each of the brothers have 176 shares.

His LORDSHIP: Norman has this money. Surely in justice he has to convey the shares.

Mr. RIDDELL: We bring them into Court endorsed to turn them over to the plaintiff to the extent of 176 shares.

His LORDSHIP: So the fight is only about the extra 58⅔ shares?

Mr. RIDDELL: Yes, the fight is only about the extra 58⅔ shares.

Immediately following the above, there follows:

His LORDSHIP: This money pays for a lot more than 176 shares.

Mr. RIDDELL: If the selling price is as stated by the plaintiff.

The last comment was, no doubt, prompted by the appellant's evidence with regard to this term, but, so far

as the pleadings are concerned, it was new. If counsel had in mind the $80 figure later put forward by the respondent Norman Eansor, this had formed no part of the instructions he had received when he prepared the defence.

Turning to the other issue; namely, as to whether or not there was a contract for the sale of 234⅔ shares as alleged by the appellant and as found by the learned trial judge, it is important to bear in mind the circumstances existing in June, 1939, at the time of the matters here in question. At that time, as already pointed out, the late T. J. Eansor had been dead approximately eight years. His will provided for a total of $5,300 in pecuniary legacies, the balance of his estate being directed to be divided equally among the three sons. The position of the estate is not shown as of 1939, but as of the 31st of December, 1942, the assets are shown as in excess of $70,000, the liabilities, apart from mortgages on two parcels of real estate, being negligible. At that time, it would appear that all the pecuniary bequests had been paid. The three brothers, as already mentioned, were employed by and participating in the direction of the business. The company had been incorporated in 1928, but the business had existed as a partnership as far back as the year 1917. According to the evidence of the appellant, the company was treated as a "family corporation" for income tax purposes and continued to be run after incorporation as though it were a partnership. This, of course, does not affect the fact that the company was not a partnership, but it is significant when considered with all the evidence as to what the parties had in mind at the time the negotiations with respect to the sale of the stock took place. The appellant stated in evidence that the estate stock was always considered as being the "personal stock" of the brothers ever since the death of the father. Norman Eansor says that in the discussion as to the sale of the shares, he does not know whether he mentioned 176 or not, but he says that he does know that what he said he was selling was "whatever he possessed" and he agreed to retire from the company. It would be very natural for these three brothers, the father having been dead for eight years, they having operated and been employed in the business all that time, to have considered as

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their own an aliquot number of the estate shares, when there were assets apart from the shares with which to pay the pecuniary legacies. I should think the trial judge was quite justified in coming to the conclusion that when Norman agreed to sell "whatever he possessed" there was no misunderstanding between him and the appellant as to the number of shares under consideration. It is significant that, following the meeting of June 30, 1939, when the bargain was made, subject to arranging the terms of payment, the following day Norman Eansor came to the appellant and said that for certain reasons he would like it not to be known that he had left the employ of the company and he therefore asked that his resignation as director or officer of the company should not be asked for. The learned trial judge is of the opinion that both the individual respondents, in alleging that the bargain was as to 176 shares only, are now reasoning back from the fact that that was all they each had respectively registered in their own names.

The meeting, which the appellant says took place on the 4th of July, 1939, but which the respondents Norman and Lloyd Eansor say did not take place until the following year, was held in the office of Mr. Riddell, solicitor in these proceedings for the individual respondents, but who was then acting for the appellant as well. Mr. Riddell at the meeting was instructed by the appellant to "draw up an agreement and send it to me and if it were satisfactory we would go through it and sign it and put it into execution." Mr. Riddell did prepare such a document. This is Exhibit 1 and bears date "—day of May, 1940." The document as drawn by Mr. Riddell provides for a sale by the respondent Norman Eansor of 176 shares, of which he is the registered owner, at prices established by the annual balance sheets so that shares purchased during the year 1939 would be paid for on the basis of the value established by the balance sheet of January 31, 1939, and so on from year to year. This is the basis alleged in the statement of claim. Mr. Riddell was not called as witness, but Mr. Scarff, as member of the firm of auditors of the respondent company, was called.

As to the date of meeting in Mr. Riddell's office, Mr. Scarff says that he did remember being present in Mr. Riddell's office with the three brothers and the solicitor and he fixes the date as towards the end of April or early in May, 1940. He has no recollection or record of being present at such a meeting in 1939. He bases his recollection upon the fact that it was during the course of his firm's audit of the company's accounts when he received some information from a member of his staff conducting this audit. Following this conversation, he met the appellant who explained the difficulties which had been experienced with the bank and that, following discussions with the bank, it had been considered advisable for one of the brothers to retire from the business and that it had been agreed that the company would buy his stock. Mr. Scarff says that he pointed out to the appellant that a company could not purchase its own stock without reducing its capital and that the appellant's reply was that they had to satisfy the bank and so would have to make other arrangements. He then says there was a discussion as to the means of bringing about the desired result by purchase of the stock by the other shareholders, and that as the three brothers, although shareholders, had been in receipt of loans from the company, if they were all agreeable that might be a means of arranging the purchase. He told the appellant that they should see the company's solicitor. The appellant thereupon informed him that an appointment would be made with the solicitor to discuss the matter and this led up to the meeting in Mr. Riddell's office. It is plain from the evidence of the bank manager and his assistant and from the correspondence that the pressure from the bank had come to a head in June, 1939, and had taken the form of an ultimatum. The discussion as to the purchase of the respondent Norman Eansor's shares by the company also took place in June, 1939, and the instalment payments were arranged before the 7th of July of that year and the loan was set up on the books of the company as a loan to the two brothers as purchasers. The respondent Norman Eansor said in his evidence that it was "shortly after" the meeting of the 30th of June, 1939, that the instalment payments were agreed upon and

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the respondent Lloyd Eansor says that he remembers being present in the solicitor's office in 1939 with the appellant and Scarff It seems reasonably clear, therefore, that Mr. Scarff must have been speaking of the period following the audit for the year ending January 31, 1939, and that his recollection is defective to that extent. The learned trial judge does not fix the date of this meeting and does not rely upon the recollection of Mr. Scarff as to the conversation at that meeting having been limited to the sale of 176 shares.

With regard to the meeting itself, the appellant stated that Mr. Riddell at the beginning of the meeting had enquired as to the number of shares issued and the persons to whom they had been issued and that he, the appellant, had described how the outstanding shares were held. The learned trial judge finds that the explanation as to the mention of the 176 shares in the draft document as given by the appellant is correct, namely, that Mr. Riddell had assumed from the fact that the respondent Norman Eansor was the registered holder of 176 only, that that was all he was selling. I think, therefore, that the learned trial judge was justified on all the evidence in the conclusion to which he came, that the sale was a sale of all the shares in which the respondent Norman Eansor was interested.

Counsel for the respondents, other than the respondent company, contends that, on the evidence of the appellant himself when instructing Mr. Riddell with regard to the document, it is clear there was at that time no concluded agreement at all and that the verbal communications were subject to the settlement and execution of a document. The appellant says that it was almost a year between the meeting of July 4, 1939, and the actual drafting of the agreement by Mr. Riddell. The other evidence to which I have referred indicates this also. In the meantime, Norman Eansor was being paid in the neighbourhood of $350 monthly and the terms of the contract already pointed out had in fact been agreed upon. The appellant, whose evidence the learned trial judge accepts, says that they never operated under the draft document at all but under the earlier verbal agreement. I do not think, therefore,

that the appellant's reference to the draft agreement to be drawn by the solicitor should be construed as indicating that no agreement had in fact been entered into, nor that it was a term of the verbal agreement that the putting of the agreement into writing was itself a condition or term of the bargain.

It is contended on behalf of the respondents that it is an objection to the contract alleged by the appellant that as the estate's shares had not been distributed, the respondent Norman Eansor was not in a position to sell or offer for sale $\frac{1}{3}$ of the shares in the estate. I think it is a sufficient answer to this contention that this respondent was in a position to deal with his interest in the estate's shares and that no question arises in this action as to title or inability to convey. It has been found that the parties were *ad idem* as to the number of shares under consideration.

With regard to the question as to whether the appellant alone, or the appellant and the respondent Lloyd Eansor, were the purchasers, the trial judge adopted the view that the contract originally was one in which the appellant alone was purchaser, but that there was a subsequent agreement in which the appellant was to give one-half of the purchased shares to Lloyd.

It is clear that in his talk with Scarff between the two meetings of June 15 and July 4, 1939, the appellant had determined to make the purchase for himself and his brother Lloyd. Scarff says that at the conclusion of that discussion the appellant said the purchase "would have to be by himself and his brother Lloyd." The very first cheque of July 7, 1939, bears the endorsement "Payment from A. W. Eansor and L. C. Eansor in accordance with agreement." The respondent Lloyd Eansor says, however, that he did not know of the loan to himself and the appellant until he was going over the books in the fall of 1941 or 1942 and he then agreed to it. His co-respondent, Norman, says he did not know of the loan until January, 1941. This statement is not accepted by the learned trial judge, who finds that this respondent was fully aware at all times of the borrowing and that the money borrowed from the company was being used to pay him. Whether Lloyd Eansor also knew at the same time, the learned

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trial judge does not say. However, the finding of the trial judge is that the bargain for the purchase and sale was one made between the appellant and the respondent Norman Eansor alone, and the arrangement to give Lloyd Eansor a share in the purchase, of which the loan to him and the appellant was a part, was subsequent to the agreement of purchase and sale. The trial judge apparently believes that the appellant, whom he describes as "a clean-cut business man", made up his mind to finance the purchase by a loan from the company after he had accepted the respondent Norman's offer to sell on June 30 and before the settling of the terms of payment on July 4, but that he did not communicate to either of the brothers his intention with respect to the loan to himself and Lloyd until sometime before the first payment was actually made on July 7. I think, therefore, that the true view is that taken by the learned trial judge and that the appellant constituted himself a trustee as to one-half the benefits of the contract and that the respondent Lloyd Easnor assented thereto, with the full knowledge of the respondent Norman. The respondent Lloyd Eansor took the position in this Court, which he also took in the Court of Appeal, that although he opposed the appellant's claim, nevertheless, if a contract for the purchase were established, he was entitled to one-half of the shares.

The individual respondents further contend that as the method of payment for the shares involved loans to shareholders contrary to the provisions of section 96 of the Ontario *Companies Act*, R.S.O. 1937, Chap. 251, the result is that the contract now in question cannot be enforced.

The section provides:

> No loan shall be made by the company to any shareholder, and if such a loan is made all directors and other officers of the company making the same and in any wise assenting thereto shall be jointly and severally liable to the company for the amount thereof, and also to third parties to the extent of such loan with interest, for all debts of the company contracted from the time of the making of the loan to that of the repayment thereof.

In my opinion, while the section prohibits loans to shareholders, it provides its own penalty for disobedience and produces no other result. The section expressly recognizes the continued existence of the debt, as the liability

of the directors and officers imposed by the section continues only until the "repayment" of the loan. The loan then continues until it is repaid. It would be absurd, in my opinion, to suggest that the result of the section is that the transaction is void and that there is no debt to be recovered by the company. The whole object of the section, in my opinion, is to safeguard the assets of the company which would be defeated if the monies lent could not be recovered from the borrowers, and the directors and officers, as might well be the case, were insolvent. I see nothing, in any event, in the section which affects the contract here in question to which the company was not a party. The situation is not unlike that dealt with in *Spink (Bournemouth) Limited* v. *Spink* (1), although that case arose under quite different statutory provisions.

Mr. Cartwright finally argued that it would be inequitable to grant specific performance in this case, because to do so would compel the respondent Norman Eansor to part with his shares and yet remain liable to the respondent company for the purchase money advanced contrary to the provisions of section 96. If the respondent Norman Eansor did not know of the advances until January, 1941, he would have no responsibility for the advances up to that time, as it is not every director who is, by the section, made responsible but only "all directors * * * making the same and in any wise assenting thereto." If he chose to assent to further advances thereafter and thus incurred liability, I do not think that is a consideration which would make it inequitable to decree specific performance against him. Taking the matter, however, on the basis of the finding of the learned trial judge, namely, that this respondent knew the facts from the time of the first advance, it may be that this respondent would have a right to be indemnified by the appellant and the respondent Lloyd Eansor in respect of any liability he may have to the respondent company in respect of the purchase price of the shares, but that is a matter which should be left to be determined when the point arises and the issue is properly defined.

(1) [1936] 1 Ch. 544.

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I would allow the appeal and restore, with the exception of paragraph 5, the judgment of the learned trial judge. I would delete paragraph 5 altogether and leave the parties to deal with its subject matter as they may be advised. The appellant should have his costs in the Court of Appeal and in this Court against the respondents, other than the respondent company, as the respondent Lloyd Eansor, although he recovers shares, nevertheless made common cause against the appellant. I see no reason for the respondent company having been added as a party and I would give to that respondent its costs throughout against the respondent Norman Eansor.

Appeal allowed with costs.

Solicitors for the appellant: *McTague, Springsteen & McKeon.*

Solicitor for the respondents Norman D. Eansor and Lloyd C. Eansor: *R. S. Riddell.*

Solicitors for the respondent T. J. Eansor & Sons Ltd.: *Martin & Laird.*

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*Oct. 11

*Dec. 21

PETER BERUBE (PLAINTIFF)..... APPELLANT;

AND

ANNIE J. E. CAMERON AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Landlord and tenant—Real property—Tenancy at will—Quieting possession—Payment of taxes only by tenant—Whether paid as rent—Whether prevents running of statute of limitation—Proper inference from the agreement—Limitation of Actions Act, R.S.A. 1942, c. 133, ss. 29, 30.

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

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Since 1921 or 1922, the appellant had been a tenant of a quarter section of land situated not far from the city of Edmonton under an informal arrangement with a bank's manager, apparently acting as agent for the respondents who lived in Scotland, such land having been in the possession of one John Cameron until his death some time prior to 1920. The certificate of title had been since 1906 in the name of the respondents, executors of the estate of one Lewis A. Cameron. In 1931, after the death of the manager, on interviewing the bank's assistant-manager as to what he should do about the land, the appellant was told "to stay with it and pay the taxes." He thereafter paid the taxes each year direct to the municipality, disregarding the bank, and has had undisturbed possession of the land ever since. The appellant, in 1943, sued for a declaration that he had acquired the right to ownership under the *Limitation of Actions Act* and for a judgment that he be quieted in possession of the land. The trial judge held that the agreement created a tenancy at will, that there was no agreement that the payment of taxes was a payment of rent, that the provisions of the statute of limitation operated and the appellant was entitled to the relief claimed. The Appellate Division reversed that decision and, though agreeing with the trial judge that there was a tenancy at will, held that on the facts it should be inferred that the taxes were to be paid as rent and that their payment each year interrupted the running of the limitation period under the Act.

Held, affirming the judgment appealed from ([1945] 2 W.W.R. 243), Hudson and Taschereau JJ. dissenting, that under the circumstances the proper inference to be drawn from the agreement was that the payment of the taxes each year was in effect a payment of rent in an amount equal to the taxes and that upon the occasion of each payment the appellant admitted ownership to rest in the respondents. Therefore such payment interrupted the running of the limitation period.

Per Hudson J. (dissenting).—Payment by the appellant of the taxes each year under the circumstances cannot be construed as a payment of rent, and the judgment of the trial judge should be restored.

Per Taschereau J. (dissenting).—There must be a formal agreement, or a state of facts known to the parties from which an agreement may be inferred, that the taxes are paid as rent. Failing these requirements, there is no acknowledgment of title and the statute operates. In the present case, there is no evidence of such an agreement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Hugh John Macdonald J. (2), and dismissing the appellant's action.

H. G. Johnson for the appellant.

F. C. Jamieson K.C. for the respondents.

(1) [1945] 2 W.W.R. 243; [1945] 3 D.L.R. 336.
(2) [1945] 1 W.W.R. 377; [1945] 3 D.L.R. 336.

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THE CHIEF JUSTICE.—This is an appeal from the Appellate Division of the Supreme Court of Alberta which set aside the judgment of Mr. Justice H. J. Macdonald on the trial of the action in which the plaintiff claimed title to a quarter section of land by reason of adverse possession. The learned trial judge gave judgment for the plaintiff-appellant; but the Appellate Division reversed the trial judge's decision and dismissed the appellant's action.

The quarter section in question is situated not far from the city of Edmonton. It had been in the possession of John Cameron until his death some time prior to 1920. The certificate of title has stood in the name of the present respondents since it was issued in the year 1906.

Some time in either 1921 or 1922, the appellant rented this quarter section from Mr. Buchanan, the manager of the Canadian Bank of Commerce, Edmonton South, who apparently was acting as agent for the respondents, and from year to year thereafter he continued to rent this land from Mr. Buchanan and later from Mr. Clarke who succeeded Mr. Buchanan as manager of the branch of the bank.

The Bank represented first Lewis Alexander Cameron, of Inverness, Scotland, deceased, and later the executors of the latter's estate who were registered as owners. Neither the deceased nor any of the executors ever were in Alberta.

The rental varied from time to time. Each year up to and including 1931, the rent was paid to the manager of the Bank as agent for the owners.

In 1930 and 1931 the amount of rental paid approximated the taxes payable.

After the death of bank manager Clarke in 1931, so the appellant says, he went to see the assistant-manager because Mr. Clarke was gone and asked him "what I should do with the place" and "he told me to keep it, pay the taxes". This statement was repeated several times by the appellant during his testimony at trial and on examination for discovery which was used by the respondent at trial as part of his case.

The appellant occupied the land and paid the taxes down to the date of the trial.

The appellant's action is for a declaration that he has acquired the right to ownership under the *Limitation of Actions Act*.

The judgment in the trial court for the appellant held that no inference could be made that there was an agreement to pay the taxes not merely as taxes but as rent.

The issue therefore was as to the meaning of the words used by the assistant manager in 1931.

The respondent's position is that the appellant agreed to pay and did pay such taxes as rent, thus preventing the operation of the statute of Limitation.

In his judgment, MacDonald J. had said:

> I think that parties may agree that the rent payable for the use of lands shall be the payment of taxes direct to the taxing authorities and, in such a case, my view is that taxes so agreed to be paid and paid should for all purposes be regarded as rent.

Speaking for the Appellate Division, Ford J.A. approved that language.

Applying the principles of law so stated to what took place between the appellant and the assistant manager, it is quite clear that the agreement between them was

> that taxes so agreed to be paid and paid, shall for all purposes be regarded as rent.

If the appellant had not agreed to pay the taxes, he would not have been allowed to stay on the land. (See Weaver, "Limitations of Actions" p. 67).

As pointed out by Ford J.A., the taxes were a compensation or "retribution" having all the attributes of rent.

And under those circumstances, the payment of taxes became "an acknowledgment made by the tenant to the lord of his fealty for forfeiture". (See Woodfall, 23rd ed., p. 491).

I agree with the Appellate Division that the proper inference is that the agreement was that the taxes were payable as rent. The payment was a periodical one and cannot be accounted for upon any ground other than that it was to be paid as compensation for the use of the land and to create or continue the relationship of landlord and tenant. (*East* v. *Clarke* (1); *Sullivan* v. *Sweeney* (2)).

(1) (1915) 33 O.L.R. 624, at 629, 630.

(2) (1908) 4 E.L.R. 492, at 494.

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It follows that the payment of taxes prevented the operation of the statute of Limitation.

The appeal should be dismissed with costs.

HUDSON J. (dissenting).—The defendants respondents are the registered owners of a quarter section of land in the province of Alberta. The appellant commenced this action on the 8th of April, 1943, alleging that since prior to the 1st of January, 1933, he had been and still was in continuous and uninterrupted possession of the said lands, and that such possession had at all times been adverse to the defendants, and that no proceedings had been taken by the defendants to recover the lands and that the right and title of the defendants thereto had been extinguished. He claimed a declaration that he was entitled to the exclusive right to use the lands and a judgment that he be quieted in possession.

The defendants pleaded among other defences, not now in question, that the plaintiff held the said lands as their tenant from year to year and he had continued to pay rent under the terms of such tenancy.

The action was tried before Mr. Justice H. J. MacDonald and in his judgment he has stated the facts as follows:

> The plaintiff first went into possession of the land in either 1921 or 1922, having made an agreement to rent the premises from the Canadian Bank of Commerce at South Edmonton, which bank was agent for the owners. The renting was done in an informal manner, and there was no written lease.
>
> The rental for some years was in a fluctuating amount, depending on the crops. Each year up to and including 1931 the rent was paid in cash to the manager of the Canadian Bank of Commerce at South Edmonton as agent for the owners. In 1930 and 1931 the amount of rental paid approximated the taxes against the land.
>
> For the first few years of the tenancy one Buchanan was the bank manager and he was succeeded by one Clark, who died in 1931.
>
> After the death of Clark the plaintiff went to the Bank in 1931 to see about the land. He spoke to the assistant manager, Illingworth, who apparently could not locate the records respecting the land. Of that interview the plaintiff states on discovery: "I went to the bank and ask them what I am going to do with the land and they told me to stay with it and pay the taxes." Following that interview the plaintiff paid the taxes each year direct to the municipality and completely disregarded the Bank. Illingworth did not give evidence at the trial.

The plaintiff has had exclusive and undisturbed possession of the land since 1931.

Previous to 1931 the tenancy was a yearly one, but in 1931 the tenancy became, in my view, a tenancy at will.

On these facts the learned judge took the view that the arrangement created a tenancy at will, that the payment of taxes by the plaintiff was not a payment of rent and that, for this reason, the provisions of the statute of Limitation of Alberta operated and the plaintiff was entitled to the relief claimed.

On appeal to the Appellate Division, this decision was reversed, the judgment of the Court being given by Mr. Justice Ford. He also held that there was a tenancy at will and did not differ from the trial judge as to the interpretation of the statute but held that on the facts it should be inferred that there was an agreement that the taxes should be paid as rent, and as the evidence showed that the plaintiff had paid the taxes in each year the defendants' right had not been extinguished.

The relevant statute is *The Limitation of Actions Act*, chapter 133, R.S.A., 1942, and sections 18, 29 and 30 are as follows:

18. No person shall take proceedings to recover any land but within ten years after the time at which the right to do so first accrued to some person through whom he claims (hereinafter called "predecessor") or if the right did not accrue to a predecessor then within ten years next after the time at which the right first accrued to the person taking the proceeding (hereinafter called "claimant").

29. Where any person is in possession of any land or in receipt of the profits thereof as tenant from year to year, or other period, without any lease in writing, the right of the claimant or his predecessor to take proceedings to recover the land shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time (prior to his right to take proceedings being barred under any other provisions of this Act) when any rent payable in respect of the tenancy was received by the claimant or his predecessor of the agent of either, whichever last happens.

30. (1) Where any person is in possession of any land or in receipt of the profits thereof as tenant at will, the right of the claimant or his predecessor to take proceedings to recover the land shall be deemed to have first accrued either at the determination of the tenancy, or at the expiration of one year next after its commencement, at which time, if the tenant was then in possession, the tenancy shall be deemed to have been determined.

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With these should also be read section 45 (3) of the Act, as follows:—

45. (3) The receipt of the rent payable by any tenant at will, tenant from year to year or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act.

In Woodfall on Landlord and Tenant, 24th ed. p. 283, referring to the corresponding sections of the English Act, it is stated:

It will be observed that this section (corresponding to Alberta sec. 30 (1)) says nothing of the payment or non-payment of rent by the tenant at will, and verbally operates in favour of such tenant although he may have been paying rent during the whole tenancy at will. The judicial opinion has been expressed that so absurd a result may be avoided by construing each successive payment of rent as an acknowledgment of title in the landlord, and the suggestion has also been made that the Legislature assumed that no rent is paid. Either of these solutions, however, is open to objection; the former because it is only an acknowledgment in writing which operates in favour of the landlord; the latter because the *casus omissus* in a statute cannot be supplied.

The difficulty referred to in Woodfall is only partially removed by the introduction into the Alberta Act, sec. 45 (3), of the words "tenant at will". However, the general effect of the provisions, I think, can be taken to be stated adequately in a judgment of the Judicial Committee of the Privy Council in the case of *Day* v. *Day* (1). This was an appeal from New South Wales, where the English statute had been adopted. In the judgment of the Committee, at p. 761, it is stated:

When the Statute has once begun to run, it would seem on principle that it could not cease to run unless the real owner, whom the Statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him.

I think it is clear from this statement of the Privy Council and the wording of the relevant sections of the statute that it is *the receipt of rent by the owner,* and not merely a payment by the person in occupation, which interrupts the running of the statute. A mere acknowledgment by the tenant, not in writing as required by the statute, is insufficient.

There must be a positive reciprocal recognition of the continuance of the relationship.

(1) (1871) L.R. 3 P.C. 751.

The question then is: did the defendants receive rent from the plaintiff subsequent to the year 1932?

Nothing was paid to the owners, nor to anyone authorized to act on their behalf. The arrangement with the bank was of an indefinite and tentative character. The facts stated by the learned trial judge should be supplemented by a further statement in the evidence of Bérubé at the trial, as follows:,,

Q. Did you go back to the bank?—A. I did.

Q. For what purpose?—A. Well, I went in to see the assistant manager, because Mr. Clark was gone, and I asked him what I should do with the place, and he told me to keep it, pay the taxes. I asked him if he had any record of the owner or something like that, to see if we could get something out of them, but he said they had no record of any kind; the manager, the assistant manager of the bank.

There is no evidence that the defendants were advised of this conversation or that it received their approval. In any event, there was no obligation imposed upon them. The plaintiff had no security of tenure. He was liable to ejectment at any time, with no more than a right to remove his chattels and probably the emblements.

In 1932 and each year thereafter the plaintiff received tax notices from the municipality. He was not under a personal liability to the municipality to pay these amounts but, if the taxes were not paid, the municipality had a right to distrain on his chattels on the farm.

The relevent provisions of the *Municipal Act* applicable during the period in question are found in the *Municipal District Act* of Alberta 1926, chap. 41, secs. 355, 356 and 357 (1) (*b*), as follows:

355. Where taxes are due in respect of any land occupied by a tenant the secretary-treasurer may give such tenant notice in writing requiring him to pay to him the rent of the premises as it becomes due from time to time the amount of the taxes due and unpaid and costs; and the secretary-treasurer shall have the same authority as the landlord of the premises would have to collect such rent by distress or otherwise to the amount of such unpaid taxes and costs; but nothing in this section contained shall prevent or impair any other remedy for the recovery of the taxes or any portion thereof from such tenant or from any other person liable therefor.

356. Any tenant or purchaser may deduct from his rent or moneys payable under his contract of purchase, any taxes paid by him which as between him and his landlord or vendor (as the case may be) the latter ought to pay.

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357. (1) In case taxes which are a lien upon the land remain unpaid for one month after the mailing of the tax notice hereinbefore provided for, the secretary-treasurer may levy the same with costs by distress as a landlord may recover rent in arrears upon

* * *

(*b*) the interest of any taxable person or any occupier in any goods or chattels found on the land, including his interest in any goods or chattels to the possession of which he is entitled under a contract for purchase or any contract by which he may become the owner thereof upon performance of any condition.

In the statutes of 1941 there were some additional provisions creating a lien for taxes on growing crops. They are all incorporated in the Revised Statutes of Alberta 1942, chap. 92.

The plaintiff paid the taxes each year and the question is whether or not such a payment under the circumstances can be construed as a payment to the defendants of rent. Section 2 (*h*) of the statute contains a definition of rent as follows:

rent means a rent service or rents received upon a demise.

This definition does not greatly aid in answering the question which, after all, is in the nature of a question of fact. I have not been able to satisfy myself that the learned trial judge was wrong in holding that there was no rent received by the defendants from the plaintiff and, for that reason, would allow the appeal and restore the judgment at the trial, with costs here and below.

TASCHEREAU J. (dissenting).—The Appellate Division of the Supreme Court of Alberta, setting aside the judgment of the Honourable Mr. Justice H. J. MacDonald, dismissed the appellant's action, in which he claimed title to a quarter section of land by reason of adverse possession.

This piece of land which is situate near the city of Edmonton, had been in the possession of John Cameron until 1920, but the certificate of title is, since 1906, in the name of the respondents, who are the executors of the estate of the late Lewis Alexander Cameron.

In 1921, the appellant rented this quarter section from Mr. Buchanan, who was then manager of the Canadian Bank of Commerce, and who was obviously acting for the

respondents who lived in Scotland. Later, when Mr. Buchanan left the Bank, the appellant dealt with his successor Mr. Clarke, until the time of his death in 1931.

The amount of the rent varied from year to year, depending on the condition of the land and the value of the grain, and certain years, it happened that it was approximately equal to the amount of the taxes.

In 1931, when Mr. Clarke died, the appellant interviewed Mr. Illingworth, the assistant-manager of the Bank, in order to know what should be his future guidance. Here is the conversation that took place:—

> Well, I went in to see the Assistant-Manager because Mr. Clarke was gone, and I asked him what I should do with the place, and he told me to keep it, pay the taxes. I asked him if he had any record of the owner, or something like that, to see if we could get something out of them, but he said they had no record of any kind.

Up to that time, the appellant had paid his rent to the manager of the Bank, but did not bother with the payment of taxes, which of course, was the owner's concern. But, following the conversation he had with Mr. Illingworth, he went to the offices of the municipality and the school district, and paid the taxes directly to them, and continued each year thereafter. From that time to the date of the present action the appellant has remained in exclusive and uninterrupted possession of the land.

It is the contention of the respondents that the payment of the taxes by the appellant amounted to an acknowledgment of their title and must be considered as a rental for the occupation of the land. There is no doubt, as the learned trial judge said, that parties may agree that the rent payable for the use of lands may be the payment of taxes direct to the taxing authorities, and in such a case, the taxes, so agreed to be paid and paid, must for all purposes be regarded as rent.

The cases that have been cited may be distinguished from this one, because the facts were different. But the concensus of opinion clearly points to the necessity of an agreement, or to a state of facts known to the parties, from which an agreement may be inferred, that the taxes are paid as rent. Failing these requirements, there is no acknowledgment of title and the statute operates.

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But in the present case I fail to see such an agreement, which may prevent the statute from running in favour of the appellant. When Mr. Illingworth and the appellant met at the office of the Canadian Bank of Commerce, there was no agreement that the taxes should be paid *as rent*. There was not even an agreement as to the terms of the lease between the appellant and the respondents or an authorized agent on the latter's behalf. Mr. Illingworth had no knowledge whatever of the matter, and he surely could not change an agreement to pay a fluctuating rent, dependent on the value of grain, to an agreement to pay taxes as rent. The most that may be gathered from the interview between Mr. Illingworth and the appellant is a suggestion by the former, that the latter should keep possession of the land and pay the taxes.

The appellant had no other alternative but to do so. Although he was under no personal obligation, the chattels and the crop were subject to distress, and the necessary condition of his occupancy was to make the payments that he has made.

In the conversation that took place with Mr. Illingworth, I cannot find the necessary ingredients of a bilateral agreement binding upon the appellant and the respondents.

I should allow the appeal with costs throughout.

RAND J.—The appellant claims title to a quarter section of land under the provisions of the *Limitation of Actions Act*, chap. 133, R.S.A. 1942 and on the basis of the following facts. From 1922 until 1931 he occupied the land for which he paid a fluctuating rent related somewhat to the crop harvested and at times ranging about the amount of taxes payable. The occupancy was arranged through the Bank of Commerce at Edmonton representing the owners in the United Kingdom. On the death in 1931 of the manager who had dealt with the matter, the appellant raised the question with the assistant manager as to "what I should do with the place" and he was told "to keep it, pay the taxes." From then on he continued to farm the land and to pay the taxes direct. From 1931 to 1936 the assessments were made in the name of the registered owner and notices sent to the bank: but from 1936 to 1943 the

name of the appellant was added to the assessment roll, and notices of assessment and of taxation were sent only to him. That imposed no liability on him for the taxes.

The following excerpts from his evidence show the mode in which the arrangement from the beginning was carried out:

Q. How long were you to be in possession? Was it one year, two years?—A. Well, one year at a time, I guess.

Q. One year at a time. How did you pay the rent?—A. Well, now I don't remember exactly how I did it. I know some years I paid in the Spring of the year, with paying taxes, and the rest in the Fall.

* * *

Q. Do you know how much the rent was the first year?—A. No, I don't.

Q. You would not be able to give me an approximate idea?—A. Well, I know some years I only paid about the taxes.

* * *

Q. What year did you last pay rent to the Bank?—A. Well, last year I think it was 1929. '29, yes.

Q. The last year that you paid rent?—A. Paid the rent, except—well, some of the taxes, you see.

Q. Who did you pay the amount of the taxes to?—A. To Mr. Clarke.

Q. To Mr. Clarke?—A. Yes.

Q. And you think that in 1930 you paid the amount of the taxes to Mr. Clarke?—A. About that, yes.

Q. To Mr. Clarke, yes?—A. Yes, to Mr. Clarke.

Q. What about 1931?—A. About the same thing; because the grain wasn't worth anything.

Q. What year did Mr. Clarke die, do you know?—A. If I remember right it was 1931.

* * *

On those facts I agree with Ford J.A. that the appellant in 1931 was allowed in effect to continue his relation to the land which had been going on for nine years, and to pay for the use of it on the basis of the taxes for each year. He cannot now be heard to say that the taxes which were thereafter paid were not as against him a payment of rent, made on the landlord's request to his creditor. In that view the statute is unavailing to him: *East* v. *Clarke* (1).

I would therefore dismiss the appeal with costs.

ESTEY J.—The appellant (plaintiff) asks a declaration for exclusive use and quiet possession of the Northwest quarter of Section 7, Township 51, Range 23, West of the

(1) (1915) 33 O.L.R. 624.

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4th Meridian, under the provisions of the *Limitation of Actions Act*, 1942, R.S.A., ch. 133. Section 18 of this Act reads:

> No person shall take proceedings to recover any land but within ten years next after the time at which the right to do so first accrued to some person through whom he claims (hereinafter called "predecessor") or if the right did not accrue to a predecessor then within ten years next after the time at which the right first accrued to the person taking the proceeding (hereinafter called "claimant").

The respondents (defendants) are the executors of the late Lewis Alexander Cameron, who reside in Scotland and have been registered owners of this land since the 13th of November, 1906.

The appellant alleges that he has been in continuous and uninterrupted possession of these said lands since 1921 or 1922 and that since January 1st, 1933, he has held the land under circumstances that entitle him to claim the land under the above mentioned statute.

In the year 1921 or 1922 he rented this land through the Canadian Bank of Commerce in Edmonton, as agent for the registered owners. In each year up to and including 1931 his practice was to call at the bank and agree upon the amount of the rent for the following year. He has no record of these yearly payments but said they varied. He deposed in part:

> Q. Do you know how much the rent was the first year?—A. No, I don't.
>
> Q. You would not be able to give me an approximate idea?—A. Well, I know some years I only paid about the taxes.
>
> Q. About the amount of the taxes?—A. Some years and some years I paid more. It depends what shape the land was, and the price of the grain.

Then in 1929 or 1930 he wanted to drop it altogether "because you see there was no money for me", but Mr. Clarke, then manager of the bank, "said to work on it, it would not cost you anything only the taxes". In 1931 Mr. Clarke died and the appellant interviewed the assistant manager, who told him "to stay with it and pay the taxes", and added that he (the assistant manager) had no record of the matter.

The assistant manager was not called as a witness. Upon the appellant's evidence as to the conversation between himself and the assistant manager it is obvious that the

latter knew nothing thereof and acted entirely on what the appellant told him. As a consequence, he said: "keep it, pay the taxes". He used in effect the same terms as Mr. Clarke. The inference appears unavoidable that they were but continuing the terms arranged with Mr. Clarke under which the appellant admits he was a tenant from year to year. As to the payment of taxes prior to 1931 the appellant deposes as follows:

Q. Now, when Clark and Buchanan were handling this land for the plaintiff you did not pay the taxes direct to the Municipality or the school? —A. I don't think so.

* * *

Q. * * * Did you ever pay the taxes to the Municipality before 1931? —A. I don't think so. I don't remember, anyhow.

Q. You have no recollection?—A. I don't think I did for that quarter.

In view of this evidence on the part of the appellant himself I do not think the place of payment can be accepted as an important factor in this case.

The secretary-treasurer establishes the fact that throughout the period the taxes were assessed to the respondents as registered owners, as indeed the provisions of the *Municipal Districts Act* (1942), R.S.A. ch. 151, required. The Act does not impose any direct personal liability upon the tenant for these taxes. It does provide that these taxes shall constitute a lien upon the crops and if recovery be had thereunder the tenant may deduct the amount he pays from the rent. A further provision gives to the Municipal District the right after notice to require the tenant to pay the rent up to the amount of the taxes to the Municipal District. These provisions, however, were never invoked as the appellant in each year until 1944 paid the taxes but he was never personally liable therefor to the Municipal District.

The appellant admits that prior to his conversation with the assistant manager in 1931 he was a tenant from year to year. Thereafter whether he continued, as the courts below held, a tenant at will under section 30, or whether the annual payments made him a tenant from

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year to year under section 29 makes no difference under the facts of this case. Section 45 (3) of the Act reads as follows:

45. (3) The receipt of the rent payable by any tenant at will, tenant from year to year or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act.

Therefore the statutory period never did commence in favour of the appellant if the payment of the annual taxes constituted a payment of rent, as such a payment on his part would be an acknowledgment of ownership in the executors.

In reality the parties have carried on under much the same arrangements except that no conversation has taken place in each year with respect to the amount of the rent. The important factors appear to be that prior to 1931 the appellant had paid at different years only the amount of the taxes, and was not sure that he may not have paid even in some of those years these taxes direct to the Municipal District. In all of those years he admits he was a tenant from year to year. Moreover, he was never personally liable for the taxes while the respondents have at all times material been personally liable therefor.

These factors distinguish this from many of the cases cited by the appellant. In *Finch* v. *Gilray* (5) the rent was $6 per month and the taxes, and the tenant was assessed as owner for the taxes. In *Bowman* v. *Watts* (1), the tenant was assessed as owner for the taxes. In *Boone* v. *Martin* (2), the tenant agreed to pay an amount of money as rent and the taxes.

In paying the taxes he was discharging his obligation to the respondents and in turn their obligation to the Municipal District. The appellant's position in this case is that of the tenant in *East* v. *Clarke* (3) and *Sullivan* v. *Sweeney* (4).

The cases where rent is reserved and in addition covenants for the payment of taxes are quite distinguishable from the present case where taxes only are specified as compensation for the use of the land. Under the circum-

(1) (1909) 13 O.W.R. 481.
(2) (1920) 47 O.L.R. 205.
(3) (1915) 33 O.L.R. 624.
(4) (1908) 4 E.L.R. 492.
(5) (1889) 16 O.A.R. 484.

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stances of this case, particularly where the obligation to pay the taxes rested at all times upon the owner, the only reasonable construction is that as between the parties they have agreed to pay an amount equal to the taxes.

Then too, the onus of proof rests upon the appellant to establish his right to this land under the statute, *Handley* v. *Archibald* (1). Upon the appellant's own evidence, reviewed in the light of the relationship that obtained between the parties throughout, the payment of the taxes in each year was in effect a payment of rent in an amount equal to the taxes and that upon the occasion of each payment he admitted ownership to rest in the respondents.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Duncan, Cross & Johnson.*

Solicitors for the respondents: *Rutherford, Becker & Newton.*

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* Oct. 10, 11
* Dec. 21

HELEN PAHARA AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

MIKE PAHARA (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Trusts and trustees—Husband and wife—Property, acquired through joint efforts of husband, wife and children, purchased in name of husband —Reciprocal will of husband and wife—Statements with respect to alleged agreement for benefit of survivor and children—Properties transferred by husband to wife—Whether presumption of gifts to wife—Death of wife leaving will disposing of whole properties to daughters—Whether wife trustee for husband alone or for all children and husband equally.

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

(1) (1899) 30 Can. S.C.R. 130.

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The respondent, a coal miner, and his wife accumulated over a period of forty years, through slavish work and judicious thriftiness, considerable property consisting of city and farm lands, stock and equipment. With the exception of $700, which soon after their marriage was received by him from the sale of property in Europe, all the moneys with which the properties were gradually acquired by him were savings from his wages or the profits from his business shrewdness and the joint labours of himself, wife and five children in farming and dairying operations. In 1933, the respondent transferred to his wife all the titles to the lands then in his name. He testified, in explanation, that he did so at her desire and repeated request and because of a long standing agreement between them that the entire property was for the benefit of both while they lived and for the survivor whichever it might be and because in 1910 a reciprocal will had been signed by them under which each left all his or her property to the other, these facts making him regardless of the one in whom titles to the property would show. This reciprocal will was not produced, but the trial judge found that it had been made. The respondent did not know until his wife's death that such will had been revoked. By a new will made a few hours before her death, the wife gave substantially the whole of the estate to their two daughters, the appellants, with a request that they provide for the respondent during his lifetime. An action was brought by the husband, the statement of claim asking for a declaration that the property the wife purported to dispose of by will was in fact his property or in the alternative that he was entitled to a life estate in it. The trial judge held that all the property, lands and personalty had been and was the property of the respondent and that as to the transferred realty the testatrix was merely a trustee for him; but, on appeal, that judgment was modified to a trust for all the children and the husband equally. An appeal and a cross-appeal were brought before this Court by both interests.

Held, reversing the judgment of the Appellate Division ([1945] 1 W.W.R. 134) and restoring the judgment of the trial judge ([1944] 3 W.W.R. 100), that the circumstances of the case with the evidence of the respondent accepted by the trial judge both establish that the properties registered in the name of the wife were held in trust by her for her husband and furnish the rebuttal to any presumption of gift to the wife.

Per The Chief Justice and Kerwin, Hudson and Rand JJ:—The aim the respondent, in making the conveyances, had in mind, and the deceased understood, was, according to the evidence that regardless of the title to particular parcels each should hold the family lands for the benefit of both and the survivor. As against the wife, there was a trust, either express or implied in fact, of interests that can be called entireties which it is a fraud on the part of those who now represent her to repudiate. Against the unjust enrichment following that fraud, an equitable right to restitution is raised in favour of the respondent in the right which he originally sustained toward the property. This results from the operation of law and is consequently outside the prohibitions of the Statute of Frauds.

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Per Hudson and Estey JJ.—Upon the whole of the evidence, it has been established that the survivor should have the entire property and that it would be eventually for the benefit of the family, but there was no evidence of any intention to create an immediate beneficial interest in the members of the family.—Statement, with respect to the family to have the benefit of the estate, remained at all times a mere expression of an intention or a wish, but never was there any suggestion that the survivor should not be in a position to deal with the property as he or she might care to: under the authorities, words of this type do not create a trust.

APPEAL and CROSS-APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), modifying the judgment of the trial judge, Ives C.J. (2).

S. J. Helman K.C. for the appellants.

A. G. Virtue K.C. for the respondent.

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

RAND J:—This is a contest between members of a family. The individual appellants are the daughters of the respondent, and there are also three sons. The mother died in 1942. Over a period of forty years the father and mother, by slavish work, had accumulated considerable property near Lethbridge, Alberta, and substantially the whole of it is claimed by the appellants under the will of their mother which was made a few hours before her death, and the material provisions of which are as follows:

I give, devise and bequeath unto my son, Alex Pahara, the farm land described as SW 19-9-20W 4th Mer., being the land which he is now farming.

I give, devise and bequeath the sum of one thousand ($1000.00) dollars, to be paid from my life insurance, to my husband, Mike Pahara.

I give, devise and bequeath all my houses and properties situated in Lethbridge, Alberta, being six (6) in number, my irrigated farm home property, my dry lands and all farm machinery and equipment and all livestock and all other personal property of whatsoever nature and description, unto my daughters, Helen Pahara and Annie Petrunia, in equal shares. And I request my daughters to take care of and provide for the necessities of my husband Mike Pahara, during his lifetime.

I give unto my said daughters, Helen Pahara and Annie Petrunia, the tract of land comprising twenty-eight (28) acres, to hold in trust for my son, Mike Pahara, Jr., and to give him the use thereof during his lifetime subject to the payment by him of the taxes, water rates and other charges each year levied and assessed against the said lands.

(1) [1945] 1 W.W.R. 134; [1945] 1 D.L.R. 763.
(2) [1944] 3 W.W.R. 100.

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All the rest and residue of my estate, property and effects, both real and personal, I give, devise and bequeath unto my 2 daughters and 3 sons in equal shares.

The respondent and the deceased were married in 1900. Until 1924 he worked in coal mines near Lethbridge. As early as 1904 he purchased lots in that city on which he built two houses. These were sold in 1910 at a good profit. Other lots were purchased in 1909 and in the following year. Later he acquired a homestead. In 1917 he bought an irrigated quarter section which became the family home. In the next fifteen years he had purchased and paid for another quarter section of dry land and 28 acres of irrigated land; and had entered into two contracts of purchase, one for a half section and the other for a quarter section, on which at the death of his wife there remained owing approximately the market value of each. During all of these years, he was gradually stocking the home farm with cattle, horses and equipment. All of this, with the exception of a sum of $700.00 or thereabouts received by him from the sale of property in Europe, was the product chiefly of his own industry and business shrewdness.

The first lots were registered in his own name as were about half of those later acquired as well as the homestead and one quarter section. The home farm, although contracted for in his name, was transferred from the vendor to his wife. The contract for the irrigated tract of 28 acres was in their joint names, but title issued in her's only. His remaining interests in the foregoing properties, except the homestead which had been sold, were transferred to the deceased in 1933. The contract for the half section was made in the names of both and that of the quarter section in his alone.

His wife with the help of the daughters sold and delivered milk under a licence which at times was issued to the father and at other times to the deceased. The buying and selling of the cattle, horses and equipment were done by the husband. There is a disclaimer by the appellants of a number of horses and a few insignificant items of personal property. With these exceptions and the two outstanding land contracts, the appellants claim that the entire product of the family effort over the forty

years belonged exclusively to the deceased, and the respondent at the age of 67 years finds himself virtually penniless.

Although he can read and write in Hungarian, in English he does not read and can write only his signature. Until about 1924 a bank account was carried in his name, but from then on until at least 1941 the whole of the family income was deposited in and disbursements made through an account in the name of the deceased.

His explanation of how it was that his wife had become the owner of property which he had worked for and managed and had been the chief factor in accumulating was, first that it was always understood between them that the property was for the benefit of both while they lived and for the survivor whichever it might be; that some time before the first World War a reciprocal will had been signed by them in which each gave to the other all their property, and that that fact made him regardless of the one in whom the titles to the property from time to time stood; and the persistent importuning of his wife for the transfers to her, implying that, under the circumstances, it was the easier course to comply with than resist. The trial judge found that such a will had been made.

The situation was, therefore, the not unusual one of an industrious family working together and bringing all earnings into a common fund under the direction of the parents. Both the trial judge and the Appellate Division have found that there was never any intention on the part of the respondent that his wife should enjoy the sole beneficial interest in the properties placed in her name, and with those findings I am entirely in accord. The trial judge found a trust for the respondent, but on appeal this was modified to a trust for all of the children and the husband equally, and from that holding appeals are brought here by both interests.

I think the whole of the evidence makes it clear that what the respondent in making the conveyances had in mind and the deceased understood was that regardless of the title to particular parcels each should hold the family lands for the benefit of both and the survivor. The

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motive for formal ownership is often complex, sometimes elusive and frequently hidden; there can be little doubt that the deceased was property-minded; but the accepted and avowable intention of the parties to preserve to both what they had together produced and to leave to the survivor the final responsibility of family distribution clearly appears. That such a purpose might exist in the husband only in intention or that, as trust, was not enforceable against him does not in the conditions of their life affect the understanding on which the various properties were conveyed to and accepted by his wife. As against her, there was a trust, either express or implied in fact, of interests that can be called entireties which it is a fraud on the part of those who now represent her to repudiate. Against the unjust enrichment following that fraud, an equitable right to restitution is raised in favour of the respondent in the right which he originally sustained toward the property. This results from the operation of law and is consequently outside the prohibitions of the Statute of Frauds. Whether his original right is an exclusive or a joint and survivor beneficial interest is in the circumstances academic.

The transfers of 1933 are challenged as intended to delay or hinder as creditor the vendor of the quarter section still unpaid for; but both courts below have found against this, and with that finding I agree. Whether the respondent has not in any event availed himself of a *locus penitentiae* in view of the continuing existence of the debt and has not as well met any presumption of the fact of delaying or hindering, need not therefore be considered: Duff J. (as he then was) in *Scheuerman* v. *Scheuerman* (1).

It was contended by Mr. Helman in his able argument that there has been no corroboration as required by the Alberta *Evidence Act,* but, as the courts below have held, the whole circumstances of the life of this couple are a corroboration of the respondent's case: *Cole* v. *Cole* (2). The reciprocal will gave him assurance that the joint interest which was all he desired was likewise the desire of his wife and that their intention was thus secured; that

(1) [1916] 52 Can. S.C.R. 625, at 636.
(2) [1944] S.C.R. 166.

was the purpose of the will, not that it should be a formal counter-control to a complete surrender of property that was in substance his. If his wife had lived to see the two outstanding contracts fully paid up, it is not an extravagant speculation that the titles as in the case of the other farm lands would have gone to her. I cannot accept the view that such a man would voluntarily and completely divest himself of all right in the property he originated and in largest measure accumulated, and expose himself to the possibility of destitution when his working days were over.

The same circumstances with the evidence of the respondent, accepted by the trial judge, both establish the trust and furnish the rebuttal to any presumption of gift to the wife. It is really inaccurate to speak of an advancement of the entire property of a husband to his wife; an advancement is essentially a share, and here the transfers were in substance of an entire establishment.

The appeal should, therefore, be dismissed and the cross-appeal allowed for the restoration of the trial judgment. The costs of the trial should be paid out of the property, but the respondent is entitled to the costs of both appeal and cross-appeal.

HUDSON J.—For the reasons given by the learned trial judge and those given by my brothers Rand and Estey, I would dismiss the appeal and allow the cross-appeal, both with costs.

ESTEY J.—The learned trial judge found that the several parcels of real estate registered in the name of the late Mary Pahara were held in trust by her for her husband, the respondent, Mike Pahara. The appellate court agreed with the learned trial judge in all his findings of fact but varied his judgment by directing that the late Mary Pahara held the real estate in trust for the respondent and members of his family. As regards the personalty both courts agreed that it had at all times been and remained the property of the respondent, except certain items to which the plaintiff made no claim.

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The appellants do not seek to set aside these concurrent findings of fact, but contend that, accepting these facts as found, the evidence does not establish that a trust was created by testimony clear, satisfactory and convincing, or such as to bring the existence of a trust within that range of reasonable certainty required by the law; that there is no corroboration as required by section 12 of the Alberta *Evidence Act,* which reads as follows:

12. In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by some other material evidence.

and further, that there was no writing as required by the Statute of Frauds.

The judgment of the learned trial judge is reported (1). It gives a very thorough review of the facts, which have been accepted by the appellate court (2). The evidence is abundantly clear that a trust existed. The terms of this trust are not at all complicated, and in my opinion are repeatedly and clearly stated by the respondent.

The respondent states that about the time he transferred his first property to his wife a will was made signed by both of them. This will could not be found, but he stated that under the will it was provided that in the event of death of either of them all the property was left to the other. That thereafter all transfers of his property to his late wife were made at her request and upon the basis of the understanding embodied in this will, and the further understanding that should he ever need them they would be transferred to him.

His evidence that such a will existed and as to its contents was corroborated by John Pahara whose evidence was accepted by the learned trial judge. John Pahara states that when he was assisting his mother in framing her marriage certificate he read this will, which had been kept with the marriage certificate in a trunk where many papers were kept relevant to the family business. This

(1) [1944] 3 W.W.R. 100. (2) [1945] 1 W.W.R. 134.

evidence on the part of John Pahara constitutes other material evidence corroborating that of the respondent: *Thompson* v. *Coulter* (1).

Then further, with respect to corroboration, Taschereau C.J., in *McDonald* v. *McDonald* (2), states:

> The statute (Ontario Act corresponding to Alberta sec. 12) does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the trust of the fact deposed to, are, in law, corroborative evidence.

The respondent and his late wife, Mary Pahara, were married in 1900. The respondent provided the initial capital. By the thrift and labour of his wife and himself, and later his family, they accumulated a substantial estate. Apart from signing his name he can neither read nor write. In the early days he had a bank account in his own name, but in the early 20's an account was opened in his wife's name and thereafter it was through that bank account that all business was transacted. The money from any and all sources was paid into that account and bills paid therefrom, regardless of the type of obligation or what member of the family incurred same. Neither salary nor wages were paid to any member of the family but each received sufficient for his necessities out of that account. Nor was there any change with respect thereto when in 1933 several properties were transferred to the late Mary Pahara; nor when she made the will in 1935, nor indeed up to the time of her death on July 9th, 1942. The disbursements for all purposes and for all the family were made from that account.

The late Mary Pahara was constantly asking her husband to transfer his property to her, which from time to time he did, but I have found no act upon her part where she asserted ownership until she drew the two wills hereinafter mentioned.

Counsel for the appellants contended that prior to 1933 the then parcels of real estate were held in equal number by the husband and wife. Two factors are in this connection important. On the basis of value there was no

(1) (1903) 34 Can. S.C.R. 261.

(2) (1902) 33 Can. S.C.R. 145, at 152.

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equality in the holdings of the respective parties. Then when he desired to expend money thereon and for that purpose money had to be borrowed the titles were transferred by the parties as the conditions of the loan dictated.

Moreover, the transfers of the respective properties made no difference with respect to the operation thereof. The respondent continued to direct all operations and was at all times dealt with as the owner of the property. The cattle and horses were branded with brands registered in his name; he purchased land, machinery and livestock; he effected trades and made sales and in every respect he acted as owner while his late wife made the payments from the bank account.

All these circumstances corroborate the evidence of the respondent that the property was not transferred to her in her own right but was held in trust.

It is significant under all the circumstances of this case that in 1935, when they had accumulated a very substantial estate, that the late Mary Pahara should make a will leaving all of the property to her children and making no provision for her husband. Moreover, that she should do all this without any mention thereof to her husband. Then again, she executes another will immediately before her death, the effect of which, apart from a life interest in twenty-eight acres to her son Mike Pahara Jr., gives all the property, real and personal, to her daughters, Helen Pahara and Annie Petrunia, and merely provided with respect to her husband,

> And I request my daughters to take care of and provide for the necessities of my husband Mike Pahara, during his lifetime.

It is also significant that while the respondent, Mike Pahara, knew nothing of either of these wills until after her death, immediately he did learn of them he proceeded at once to ascertain their contents and to take the position which he maintained at this trial. In my opinion every circumstance corroborates the position expressed by Mike Pahara at the trial and supports the statement of the learned trial judge that,

> the whole conduct of their married life corroborates the Plaintiff's evidence that the property from time to time acquired was for the benefit of them all.

The appellants allege that any property transferred by the respondent to his late wife was for a "good and valuable consideration". An examination of the transfers discloses that in some instances the property was purchased in the name of the respondent and the transfer made direct from the vendor to his late wife. Sometimes the respondent would take title and later transfer the same to his late wife. The properties were usually purchased upon terms extending payments of the purchase price over a period of years. The important fact is that in every case the payments were made from the one bank account and that, as already intimated, the taking of title in one or the other made no difference with respect to the operation and management of the property.

It is not suggested that his late wife ever made any contribution toward the purchase price of these properties which could be earmarked as her own separate money or property. The purchase price in all cases was realized from the respondent's wages earned apart from any operations on his own or from the farm and associated operations. The initial funds were supplied by the respondent and he never ceased to manage, direct and carry on these operations as owner. It is true that his late wife at all times worked hard and assisted him and no doubt contributed materially to his success.

Money received by a married woman out of the proceeds of her husband's business, or saved by her out of money given by him for household purposes, dress or the like, and invested by her in her own name, belongs to her husband. *Barrack* v. *McCulloch* (1).

This paragraph has often been quoted with approval. A perusal of the *Married Women's Act,* 1942, R.S.A. c. 30 does not contain a provision contrary to the foregoing.

It is also contended that the respondent cannot now obtain retransfer of these lands, particularly those transferred in 1933, because they were made for the purpose of hindering, delaying and defeating his creditors and in particular Mr. Ingram, to whom, at the time of the transfer, he was then in default in a matter of about $850. The only evidence brought forward to support the allegation are some statements alleged to have been made by the respondent which do not, as found by the learned trial

(1) (1886) 3 Kay & J. 110.

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judge, establish such to be the fact. The essential point is that it is the appellants who make this allegation and who seek to establish it. Such an allegation was not made by the respondent nor was it necessary to his case. The fact is he denied any such reasons for such transfers and said they were made for the same reason as those given prior thereto.

The appellants allege non-compliance with section 7 of the Statute of Frauds. It is found that the deceased wife held the property in trust and it is not with her and therefore not with her executors to rely upon the Statute of Frauds to deny to the cestui que trust the benefit of the trust. As stated by Lindley L. J. in *Rochefoucauld* v. *Boustead* (1):

It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud. It is a fraud on the part of a person to whom land is conveyed as a trustee and who knows it was so conveyed to deny the trust and claim the land himself.

There is a concurrent finding of fact with respect to the chattel property that at all times it was the respondent's, and the evidence entirely supports this conclusion.

The learned trial judge held that the respondent was the beneficiary under the trust. The Appellate Division varied the decision that he and the five children were beneficiaries and that each was entitled to an undivided 1/6 share. The only trust alleged is that in favour of the respondent, which is denied by the defence but an alternative trust in favour of the children is not suggested.

It is true that in the course of his evidence the respondent states:

No, when I married never make anything like that at all, but in 1909 when I bought them lots she asked me about it and I said all right, "But if I going to die," she said that is mine then; if I am die that is hers; it is all for the family to have the benefit of it.

And again:

Well, we always figure like this, if any one die that is belong to other one then, belong to whole family to have the benefit of it.

Statements to this effect are repeated from time to time in the course of his evidence.

(1) [1897] 1 Ch. D. 196, at 206.

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Upon the whole of the evidence it is clear that the survivor should have the entire property and that it would be eventually for the benefit of the family, but I cannot find evidence of any intention to create an immediate beneficial interest in the members of the family. Although the date of the will is not established, it is clear that it was made at a time when the children were very young.

This statement with respect to the family remained at all times a mere expression of an intention or a wish, but never was there any suggestion that the survivor should not be in a position to deal with the property as he or she might care to. Under the authorities words of this type do not create a trust. *Lambe* v. *Eames* (1); *Hill* v. *Hill* (2); *In re Hill: Public Trustee* v. *O'Donnell* (3).

In my opinion the judgment of the learned trial judge should be restored, this appeal dismissed with costs and the cross-appeal allowed with costs.

Appeal dismissed and cross-appeal allowed, with costs.

Solicitors for the appellants: *Helman & Mahaffy.*

Solicitor for the respondent: *A. G. Virtue.*

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*Oct. 25, 26
*Dec. 21

THE RURAL MUNICIPALITY OF ST. VITAL (DEFENDANT)..... } APPELLANT;

AND

THE CITY OF WINNIPEG (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Taxation (municipal)—Exemptions—Land, acquired by city, situate outside its limits—Operated as public golf course—Whether exempt from municipal taxation by municipality where land is situate—Whether used for "public park purposes"—Whether held for "the public use of the city"—Whether school taxes are included in "municipal taxation"—The Winnipeg Charter, Man. S., 1918, c. 120, s. 4 and s.s. 14 of s. 700 (now Man. S., 1940, c. 81).—The Municipal Act, R.S.M., 1940, c. 141.

*PRESENT:—Hudson, Taschereau, Rand, Kellock and Estey JJ.

(1) (1871) 6 Ch. App. 597.
(2) [1897] 1 Q.B. 483.
(3) [1923] 2 Ch. D. 259.

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The land in question in this case, situated within the territorial boundaries of the appellant rural municipality, was acquired by the city respondent under powers contained in its charter and operated for it by its public parks board as part of a public golf course open to anyone, whether a resident of the city or not, paying green fees. The question for decision in this appeal is the validity of tax levies imposed on such land by the appellant municipality.

Held, affirming the judgment of the Court of Appeal ([1945] 1 W.W.R. 161), that the land was used for "public park purposes" within the meaning of section 4 of the Winnipeg charter and exempt thereunder from taxation by the appellant rural municipality.

Held, also, that such land was held "for the public use of the city" within the meaning of subsection 14 of section 700 of the charter, and therefor was forming "part of the city". Rand and Kellock JJ. *contra.*

Per Rand and Kellock JJ.—School taxes are included in "municipal taxation", as that language is used in section 4 of the respondent city's charter.—*Per* Hudson, Taschereau and Estey JJ.—Assuming that there was no exemption from school taxes, it would be no answer to the respondent's action where both municipal and school taxes together form the levy and basis of the tax sale by the appellant.

APPEAL from a judgment of a majority of the Court of Appeal for Manitoba (1), affirming the judgment of the trial judge, McPherson C.J. K.B. (2), and maintaining the respondent city's action.

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

Angus McDonald for the appellant.

G. F. D. Bond for the respondent.

The judgment of Hudson, Taschereau and Estey JJ. was delivered by

HUDSON J.—The city of Winnipeg owns land lying within the territorial boundaries of the appellant municipality, as defined by the *Municipal Boundaries Act* of Manitoba. The question for decision in this appeal is the validity of tax levies imposed on such land by the municipality.

It is admitted that the land in question forms part of what is known as Windsor Park Golf Course, and that it was acquired by the city under powers contained in its

(1) [1945] 1 W.W.R. 161; [1945] 1 D.L.R. 708.
(2) [1944] 2 W.W.R. 217.

charter. This golf course is maintained and operated by the Public Parks Board of the city as a public golf course open to anyone (whether a resident of Winnipeg or not) paying the green fees and obeying the rules of the course. No taxes were levied against the land from the year 1924, when the plaintiff city acquired same, until 1939, but in that year and in 1940 a levy was made for both municipal and school taxes. The plaintiff did not pay the amount so levied and on the 18th of September, 1941, the defendant sold the lands for non-payment of the taxes and, as permitted by the Manitoba statutes, itself purchased the same at the tax sale. The plaintiff failed to redeem within one year and, as a consequence, the defendant municipality applied to the District Registrar for a certificate of title. The city then under protest paid to the District Registrar the sum of $1,751.40 to redeem the land and prevent the issue of a certificate of title.

In its statement of claim the plaintiff alleges that the land was not taxable and that the defendant's proceedings for assessment and levy were defective in form. The claim is for a declaration that the lands were exempt, that the assessment and levy were illegal and void, and for an order against the defendant for payment of the sum of $1,751.40. The defendant in reply asserted its right to impose the taxes and the regularity of its proceedings.

The action was tried before Chief Justice McPherson, then of the Court of King's Bench, and he found for the plaintiff and awarded the relief claimed in the statement of claim. This was affirmed in the Court of Appeal by a majority of four to one; Mr. Justice Dysart sitting *ad hoc* dissented.

In order to impose the taxes, the municipality must have clear statutory power to do so.

The powers and the government of the city of Winnipeg are provided for by a special charter, S.M., 1918, c. 120; that of most other municipalities in Manitoba, including the appellant, by general municipal and assessment Acts, which do not apply to Winnipeg, except in the case of special provisions expressly or impliedly made applicable by the *Municipal Act*, S.M., 1933, c. 57, sec. 2 (*h*), and the *Assessment Act* of 1934.

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The legislation primarily relied on by the municipality is found in the *Assessment Act*, S.M., 1934, c. 49, sec. 3 (1):

All lands shall be liable to taxation by a municipality subject to the following exemptions:

Neither parks nor golf courses are specified under the heading of exemptions.

It is further provided by section 6:

Property owned by a municipality, but situate within the bounds of another municipality, shall, unless exempted therefrom, be liable to assessment and taxation by the latter municipality.

The lands in question fall within the territorial boundaries of the municipality, as defined by the *Municipal Act*.

However, it is provided in the Winnipeg Charter, sec. 700 (14):

700. The city may pass by-laws not inconsistent with the provisions of any Dominion or Provincial statutes:

(14) For acquiring and holding, by purchase or otherwise, for the public use of the city, lands situate outside its limits; and such land so acquired shall form part of the city.

It is contended on behalf of the municipality that section 700 (14) does no more than include the land within the city for administrative purposes, and secondly, that this golf course which is used only by those who play golf is not for public use within the meaning of the section.

As to the first of these objections, no good reason was given why a restricted meaning should be given to the words of the Legislature. Moreover, if we look at the corresponding section in the *Municipal Act*, S.M., 1933, 57, sec. 385 (*b*), we find that the Legislature thought it necessary to expressly authorize such taxation. The difference between the sections is not accidental. It survived careful scrutiny by the Legislature in several revisions of these statutes in the past forty years.

As to the second objection, the expression "public use" must be taken, I think, to include any such use as by the manner of place and time reasonably may be said to promote the health, welfare or happiness of citizens, or any substantial number of them.

The city, through its Public Parks Board, is given express powers to provide facilities for all forms of recreation. Sec. 835 of the *Municipal Act* is as follows:

The parks board may provide facilities for all forms of recreation and may, from time to time, pass by-laws for the use, regulation, protection, government, and operations of the same and the charges for admission thereto or use thereof.

In England, without such a specific provision, it has been held that a municipal golf course was within the proper field of municipal governmental activities: *Mitcham Golf Course Trustees* v. *Ereault* (1).

This view is supported by many decisions of the courts in the United States, some of which are referred to by Mr. Justice Bergman in his judgment. In the case of *Shoemaker* v. *United States* (2), the Supreme Court unanimously held that the land taken for a public park was taken for a public use.

I am, therefore, of opinion, that neither objection to the application of sec. 700 (14) can be sustained and that for this reason the appeal fails.

It was also contended on behalf of the city that the land is exempt under sec. 4 of the city charter which is as follows:

> All lands used for public park purposes or exhibition grounds, now or hereafter owned by the city, which are situate outside the territorial limits of the city, shall be exempt from municipal taxation by any municipality in which such lands are situate.

The property in question has all the characteristics usually associated with the term "park". It has an extended area with trees, shrubs and lawns and in itself is admirably suited for outdoor pleasures and recreation. It thus falls within the dictionary meaning of the word "park". Oxford Dictionary:

> An enclosed piece of ground of considerable extent, usually within or adjoining a city or town, ornamentally laid out and devoted to public recreation.

Stroud's Judicial Dictionary:

> The modern definition of "park" is an enclosed (private or public) space of ground set apart for ornament, or to afford the benefit of air, exercise or amusement.

However, the exemption is of lands "used for public park purposes" and it is contended on behalf of the municipality that its *use* exclusively as a golf course where only golf players are admitted and required to pay green fees, deprives it of the character of a public park.

Chief Justice McPherson and the majority or the Court of Appeal were of the opinion that this limitation on the use of the property did not alter its essential character and that it still remained a public park and was used as such.

(1) [1937] 3 All. E.R. 450. (2) (1893) 147 U.S. 282.

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Counsel for the municipality in his factum raises a point which does not appear to have received the attention of the courts below. He refers to sec. 802 of the *Municipal Act* which is as follows:

> All parks, boulevards, avenues and drives and approaches thereto or streets connecting the same, dedicated to public use in any municipality where this division is adopted, shall be open to the public free of all charge, subject to such rules and regulations as the Parks Board makes as to the use thereof.

It is, of course, admitted that under sec. 835 of the *Municipal Act,* already quoted, the Parks Board has the right to provide facilities for all forms of recreations and might pass by-laws for the use, regulation and operation of same, and the charges for admission thereto or use thereof.

It is suggested that, although there is an apparent conflict, there is room for the application of both, that is, that a public park might have within it areas used for particular forms of recreation where charges might be made, but that this does not extend to a case where the use of the whole park is confined to the one form of recreation and where fees are exacted for the use thereof.

It was pointed out in the court below that the city of Winnipeg has a park system consisting of many parks, only two of which are devoted exclusively to golf, that golf is a game which requires a large space and that the practical use of the course is necesssarily confined to those who play the game.

I am of opinion that under the circumstances here the restriction placed upon the use of the Windsor Park Golf course are authorized by the concluding words of section 802 and that the land in question should be held to be used for public park purposes, within the meaning of section 4 of the charter.

It was also submitted that there was no exemption from school taxes but, even if this were so, it would be no answer to the present action where both municipal and school taxes together form the levy and basis of the tax sale by defendant.

The city also contended that there were irregularities in the assessment and tax notices which vitiated the taxa-

tion and the sale. Having come to the conclusion that the appeal should be dismissed for the reasons already stated, it is not necessary to discuss this.

I think the appeal should be dismissed with costs.

The judgment of Rand and Kellock JJ. was delivered by

KELLOCK J.—This is an appeal by the Rural Municipality from the judgment or order of the Court of Appeal of Manitoba, dated the 15th of January, 1945, dismissing its appeal from a judgment of the Court of King's Bench in favour of the respondent. The action was brought for the recovery of the sum of $1,751.40 paid under protest by the respondent to the appellant to prevent the registration of the appellant as owner of certain park lands of the respondent situate within the territorial limits of the appellant and which the appellant had purported to sell to itself for certain arrears of taxes in respect of alleged assessments for the years 1939 and 1940. The respondent denied that under the relevant legislation the lands in question were assessable by the appellant. Respondent alleged that the lands had been purchased by it in 1924, and had since that time been held as part of a system of parks operated by the Public Parks Board of the city pursuant to the provisions of the *Municipal Act* R.S.M. 1940, c. 141.

The legislation relied upon by the respondent in support of its claim to exemption are sections 4 and 700 (14) of the Winnipeg Charter, S.M. 1918, c. 120, which read as follows:

4. All lands used for public park purposes or exhibition grounds, now or hereafter owned by the city, which are situate outside the territorial limits of the city, shall be exempt from municipal taxation by any municipality in which such lands are situate.

700. The city may pass by-laws not inconsistent with the provisions of any Dominion or Provincial statutes;

* * *

(14) For acquiring and holding, by purchase or otherwise, for the public use of the city, lands situate outside its limits; and such land so acquired shall form part of the city;

Appellant says that section 4 is inapplicable for the reason that, as it contends, the respondent is not operating a public park on the lands within the meaning of the legislation and in any event "municipal taxation" does

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not include school taxes. As to section 700 (14), appellant contends that the words " shall form part of the city" mean no more than that the lands belong to the respondent but are not exempt from taxation and that in any event the lands in question are not held "for the public use" of the respondent, within the meaning of the subsection. It will be convenient to consider first sec. 700 (14) and as to whether or not the lands here in question are within this legislation.

As far back as 1882, the then charter of the respondent, 45 Victoria, c. 56, sec. 147, enabled its council to pass by-laws for acquiring such lands as might be required for the use of the city, within or without its limits for the purpose of establishing cemeteries and parks as well as "for any purpose whatsoever." The power so given might be exercised compulsorily.

In 1884 the section was recast in the charter of that year and appears as sec. 149 (116) of 47 Victoria, c. 78. As recast, it would appear to authorize a voluntary acquisition only. By sec. 234 of c. 11 of the *Municipal Act* of the same year, provision was made for compulsory acquisition of any lands

> that may be necessary for *public use* of the inhabitants of such municipality or for any municipal purposes whatsoever, which said lands, it is hereby declared to be lawful for such municipality to expropriate for such purposes.

In 1886, the *Municipal Act,* 49 Victoria, c. 52, was passed in substitution for both Acts of 1884, which were thereby repealed.

Sec. 347 (1) of the Act of 1886 authorized the acquisition of land (presumably inside the municipality only) for "the use" of the corporation. This provision is still to be found in sec. 385 (*a*) of the *Municipal Act* of 1933, c. 57. Subsection 18 of sec. 347 authorized by-laws "for accepting or purchasing" land, inside or outside the municipality, for public cemeteries only. Parks are not mentioned. The by-law is to declare in express terms the purpose for which the land is acquired. It is provided that when acquired, the land, although outside, is to become part of the municipality acquiring it and ceases to be part of the municipality to which it formerly belonged. The power to acquire does not include the power to take com-

pulsorily. Sec. 349 (45) would appear to be the original ancestor of sec. 700 (14) of 1918, unless it can be said that it arose out of sec. 234 of 47 Victoria, c. 11. Sec. 349 (45), however, unlike sec. 700 (14) of the 1918 Act, provides that land acquired under its provisions

> shall not form part of the municipality of such city or town, but shall continue and remain as of the municipality where situate.

Nowhere in the Act of 1886 are parks spoken of and this would appear to have been an omission which was remedied in 1888. It may be noted in passing that the *Public Parks Act* was not passed until 1890, 55 Victoria, c. 31.

In this state of the legislation, it would seem clear as to lands acquired by the respondent outside its boundaries, for the purposes of a cemetery, that such lands would not, in the contemplation of the legislature, have been "for the public use of the municipality" for the reason not only that lands for cemeteries were specially dealt with, but that lands acquired for the "public use" continued, by virtue of the express terms of sec. 349 (45), to remain part of the municipality where situate, while lands acquired for the purposes of a cemetery under 347 (18) became part of the municipality acquiring them.

In 1888, by sec. 51 of 51 Victoria, c. 27, a new section, section 431A, was added and made applicable to the respondent only. This section provided for acquisition by the respondent by purchase or compulsorily, of lands inside or outside its boundaries for the purposes of cemeteries or parks. Not only did this section supply the omission as to lands for park purposes, but it gave the city *compulsory* powers as to acquiring lands in outlying municipalities for cemetery purposes, which had not been given by the Act of 1886.

In 1890, a new *Municipal Act*, 53 Victoria, c. 51, was passed. Sec. 347 (18) of 1886 became 375 (18); sec. 349 (45) became 376 (18) but a change was made and lands acquired under this provision were to become part of the city, town or village acquiring them. Sec. 431A became sec. 473.

In the revision of 1891 the *Municipal Act* became chapter 100. Sec. 375 (18) of 1890 became sec. 603 (*c*); sec. 376 (18) became sec. 602 and sec. 431A became sec. 571.

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In 1902, a new Winnipeg charter was passed; 1-2 Edward VII, c. 77. Sec. 571 of 1891 became sec. 691 of the new Act. Sec. 603 (*c*) became sec. 703 (11); and sec. 602 became sec. 703 (4) (5) (6), but in the legislation of 1902 the provision making outlying lands acquired for cemeteries part of the city acquiring them, which had persisted down to 1891, was dropped. The situation then with respect to cemetery lands outside the city became just the reverse of what it had been under the Act of 1886, but as in 1886 outside lands for cemeteries could not be within the "public use" clause because the former were to become part of the city while the latter were to remain part of the outside municipality, so in 1902 cemetery lands could not be within the "public use" clause because unlike the latter they were not to be part of the city but to remain part of the outside municipality. In my opinion, this had always been true of outside lands acquired for park purposes. They had never at any time been declared to be part of the city. But if it could have been argued before 1891 that outlying park lands, although the subject of special legislation, were nonetheless within the "public use" clause, no such argument in my opinion could have been accepted after the legislation of that year. The legislature, by continuing to legislate with respect to outlying parks and cemeteries by the same provision in sec. 691, and by dropping from sec. 703 (4) the provision of the old section 602 that cemetery lands were to become part of the city indicated that parks and cemeteries were on the same footing and remained part of the municipality where they lay. If that be true, neither could be considered as within the "public use" provision.

The enactment of sec. 4 in 1912 supports the conclusion arrived at. Its enactment indicates that such lands were considered subject to assessment and taxation in the municipality where situate and if they were to be exempted legislation was necessary for the purpose. Section 12 of the *Assessment Act,* R.S.M., 1902, c. 117, provided that

> any property owned by a municipality, but situate within the bounds of another municipality, shall be liable to assessment and taxation by the municipality within which it is situate, unless the same be exempted from taxation by the Council of the municipalty within which such property is situated.

I do not think, therefore, that it can be said, as contended by respondent, that section 4 of 1912 was an unnecessary enactment. To complete the statutory history, section 703 (4) (5) and (6) of 1902 became sec. 700 (6) (7) and (8) of 1918 and section 691 became section 696.

Coming then to section 4 of 1918, the appellant submits that the lands in question are not "used for public park purposes" within the meaning of the section and that therefore there is no exemption. Counsel contends that the existence of by-law 25 of the Public Parks Board of the respondent prevents the lands in question from being considered as a public park or used for public park purposes. By-law 25 is as follows:

1. No person other than employees of the Board shall be permitted upon any golf course provided or operated by the Public Parks Board of the city of Winnipeg unless and until he or she shall have paid or caused to be paid the admission fee provided from time to time by the by-laws of the said Board;

2. No person other than employees of the said Board shall be permitted on any golf course for any purpose other than the playing of the game of golf and subject to the rules and regulations which may from time to time be prescribed by said Board * * * etc. etc.

4. Any person found guilty of an offence against any of the provisions of this by-law, shall, for every such offence, be liable to a fine not exceeding twenty-five ($25) dollars or he may be imprisoned with or without hard labour for a term not exceeding ten days.

It is stated, in the formal admissions filed, that the lands are

maintained and operated by the Public Parks Board of the city of Winnipeg for the plaintiff as a public golf course open to anyone paying the green fees and obeying the rules of the course whether a resident of Winnipeg or not.

Prior to 1933, the Public Parks Board of the respondent had been constituted under the provisions of the *Public Parks Act* which goes back to 55 Victoria, c. 31. In 1933, this Act became Division III of the *Municipal Act*, 23 George V, c. 57, sections 797 to 848 inclusive.

It is to be observed that the title of Division III is "Public Parks." These provisions of the statute become applicable to any municipality upon adoption in the prescribed manner and are applicable here.

Sec. 802 prescribes that all parks shall be open to the public free of all charge

subject to such rules, by-laws and regulations as the Parks Board makes as to the use thereof.

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The Board, by sec. 818 (1), is authorized to pass by-laws for, among other things, the "use," and "regulation" of the parks. By sec. 835, it is provided that the Parks Board may provide facilities for all forms of recreation, and may from time to time pass by-laws for the use, regulation, protection, government and operations of the same and the charges for admission thereto or use thereof. In my opinion, these provisions authorize the operation of the golf course here in question and the appellant's objection is not maintainable.

There remains to be considered the question as to whether or not school taxes are included in "municipal taxation" as that language is used in section 4. Appellant contends they are not. In *Canadian Pacific Railway Company* v. *The city of Winnipeg* (1), this Court held that a by-law of the city of Winnipeg passed in 1881 exempting the Railway Company' lands from

> all municipal taxes, rates and levies, and assessments of every nature and kind

included school taxes in the exemption. In giving the judgment of the Court, Sedgewick J., at page 564, accepted the definition of "municipal taxes" as

> taxes imposed by the governing body of the municipality for the purposes of the municipality

and that

> taxes imposed for the support of schools in a municipality in my view are taxes for the purposes of the municipality

He also said

> I submit that any taxation by a municipal body for the purpose of raising money to relieve itself from a municipal obligation is taxation for a municipal purpose. The obligation of imposing this tax and of collecting it was one of the city's legislative burdens. Relief from that burden must therefore necessarily be a municipal purpose and the moneys raised therefor a municipal tax.

Under the legislation there considered, the school trustees had the right of determining without question the amount to be raised for public school purposes and of authoritatively calling upon the city authorities to collect and hand over that amount, while the latter authorities were under an absolute obligation to obey the behests in that regard of the school trustees.

What did the legislature intend by the use of the phrase "municipal taxation" in the legislation of 1912? The *Assessment Act*, R.S.M. 1902, c. 117, with some amend-

(1) (1900) 30 Can. S.C.R. 558.

ments to which I shall refer, is the legislation to be considered in the determination of the question. This statute governed the assessability and taxability of lands in rural municipalities, including the appellant. Sec. 5 provides that all lands and personal property shall be liable to "municipal taxation" subject to certain exemptions therein specified, among which is clause (*b*) reading, "lands vested in or held in trust for *any* municipality." However, owing to the provisions of sec. 12 of the statute already referred to, this clause is not important and was amended in the revision of 1913 to make the two provisions harmonize. Sec. 13, as amended in 1911 by 1 George V, c. 32, sec. 1, provides for the valuation of all the ratable property in the municipality and for the making of an assessment roll. By sec. 118, it is provided that after the final revision of the assessment roll and the passing of the by-law levying the rate, the clerk of each municipality is to make out a general tax roll in which he shall enter all the land and taxable property in the municipality comprised in the assessment roll, and he is to set down in the roll the amount of each rate in separate columns with the name or object of each such rate, such as "local rate" or "town rate" or "school rate" or otherwise as the case may require, and the amount for which the person is chargeable for each purpose respectively and the total amount required to be collected from or paid by such person or property on the assessment of that year for "all the purposes" for which a levy is required to be made in a municipality, and every rate, the purposes of which are required by law or by the by-law imposing it to be kept distinct and accounted for separately shall be so entered and calculated separately. There would appear to be no doubt that school taxes are by this legislation considered as but a part of the municipal taxes as a whole. By sec. 48 (*c*) of the *Public Schools Act*, R.S.M., 1902, c. 143, trustees of rural school districts had the duty of applying to the municipal council annually for the levying and collecting by rate of all sums required in connection with schools. Reference may also be made to sec. 145 of the *Municipal Assessment Act* which made provision for the recovery by execution of "any school

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or other taxes," and to sec. 151 which authorizes the municipality by by-law to remit either in whole or in part "any taxes" upon certain grounds shown.

It would appear clear from these provisions that when the legislature provided in 1912 for the exemption of Winnipeg park lands in other municipalities from "municipal taxation" it intended to include all items included in that term by the statute which dealt with such matters, namely, the *Municipal Assessment Act*. I do not think that the provisions of section 139 of the *Public Schools Act*, R.S.M., 1902, c. 143, affect the matter. Section 136 of that statute obliged the Council of each rural municipality to levy on the taxable property in each school district the sum of money required by the school district in addition to the legislative grant and the general municipal levy provided for by sec. 130. Section 139 provides that the taxable property in the municipality for school purposes shall include all property liable to "municipal taxation" and also

> all property which has heretofor been or may hereafter be exempted by the municipal council from municipal taxation but not from school taxation. No municipal council shall have the right to exempt any property whatsoever from school taxation.

This section does differentiate between "municipal taxation" and "school taxation" but refers to the exercise by a municipal council of its power to exempt lands and prohibits the council from exempting lands from school taxation. The present problem does not concern any action by a municipal council, but merely as to what was intended by the legislature by its use of the phrase "municipal taxation." It might be argued that by reference to sec. 5 (*g*) of the *Municipal Assessment Act* which exempts from "municipal taxation" all lands "legally exempted from taxation by a by-law of the municipal corporation" that the word "taxation" in that clause and the phrase "municipal taxation" at the beginning of the section have the same meaning as the same phrase when used in sec. 139 of the *Public Schools Act*. In view of the other sections of the *Municipal Assessment Act* to which I have referred, it seems to me that this is not the correct interpretation, and that sec. 139 above was intended merely to operate as a restriction on the municipal council's power of exemption and is not to be used in support of the argument above set

forth. We were not referred to any subsequent legislation which affects this view and I have not been able to find any. The problem in the case at bar is not the same as that under consideration in *L'Institut de Notre Dame des Missions* v. *Brandon* (1), and *Ontario Power Company of Niagara Falls* v. *Municipal Corporation of Stamford* (2), which dealt with legislation validating municipal by-laws.

I do not think that sec. 828 (3) of the *Municipal Act* of 1933 which enacts that

> lands acquired by a Parks Board outside the municipality may be exempted from taxes, but not from school taxes, by the municipality where situate

can interfere with the operation of sec. 4 of the Winnipeg Charter. It is a section of general application and permissive in character.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Angus McDonald.*

Solicitor for the respondent: *R. W. Wydeman.*

MARY FLORENCE DAVIDSON (PLAINTIFF) ..... APPELLANT;

AND

WARREN ASA DAVIDSON (DEFENDANT) ..... RESPONDENT.

1945
*Oct. 5

1946
*Jan. 24

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Real Property—Judgments—Unregistered transfer of land in British Columbia by registered owner—Recovery and registration of judgments against registered owner subsequent to the transfer—Whether judgments attached to the land—Land Registry Act, R.S.B.C. 1936, c. 140; Execution Act, R.S.B.C. 1936, c. 91.

The registered owner of land in British Columbia executed and delivered a transfer of it. The transfer was not registered nor was an application made to register it. Subsequently to the transfer, judgments were recovered against said registered owner, which were registered.

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

(1) [1938] 3 D.L.R. 712. (2) [1916] 1 A.C. 529.

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It was *held* (affirming decision of the Court of Appeal for British Columbia, [1945] 2 W.W.R. 576) that the judgments did not form a lien or charge against the land.

Provisions of the *Land Registry Act*, R.S.B.C. 1936, c. 140, and of the *Execution Act*, R.S.B.C., c. 91, discussed, and cases reviewed. Said statutes have not changed the common law rule that the execution creditor can only attach that interest which exists in the execution debtor; and, the registered owner having disposed of his entire interest at a time prior to the judgments, there was no interest upon which the judgments could attach.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1) setting aside the order of Wilson J. in so far as it directed the sale of certain lands, in question in the present appeal.

The defendant was the registered owner of the said lands. In June, 1935, he executed and delivered a transfer of the said lands to Minto Trading & Development Company Ltd. This transfer was not registered, nor was an application made to register it.

The plaintiff recovered two judgments against the defendant, one in January, 1939, which was registered in July, 1943, and one in March, 1944, which was registered in March, 1944.

Wilson J., confirming the report of the District Registrar at Vancouver (made on an order of reference applied for by the plaintiff), ordered that the said lands be sold for the purpose of satisfying the said judgments. An appeal by the defendant was allowed by the Court of Appeal for British Columbia, which set aside the order of Wilson J. in so far as it directed the sale of the lands now in question. Special leave to appeal to the Supreme Court of Canada was granted to the plaintiff by the Court of Appeal for British Columbia.

The said Minto Trading & Development Company Ltd. consented to an order that it be joined as a party (respondent) on the appeal to the Supreme Court of Canada.

H. R. Bray K.C. for the appellant.

Alfred Bull K.C. for the respondent.

(1) [1945] 2 W.W.R. 576.

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

ESTEY J.—The appellant holds against the respondent two judgments registered respectively on the 23rd day of July, 1943, and the 30th day of March, 1944, in the Kamloops Land Registration District in the Province of British Columbia.

The respondent has been, at all times material to these proceedings, the registered owner of the lands in question under a Certificate of Indefeasible Title dated the 9th day of November, 1936, and issued out of the Kamloops Land Registration District.

The District Registrar at Vancouver has, after hearing the interested parties, certified

that the interest of the said judgment debtor liable to be sold under and to satisfy the said judgment consists of the entire fee, being the entire right, title and interest registered in the name of the judgment debtor under the said Certificates of Indefeasible Title and standing in his name upon the records of the said Land Registry Office * * *

He then specified the lands in question.

This certificate was confirmed by the Honourable Mr. Justice Wilson, whose decision was reversed in the Court of Appeal. A further appeal is now taken to this Court.

The respondent's contention is that prior to the registration of the judgments he had executed and delivered a transfer of these lands to the Minto Trading and Development Company Limited in payment of 20,000 shares of stock allotted to him by that company. This instrument of transfer was executed and delivered on June 10th, 1935, and as a consequence he contends that since that time he has had no beneficial interest in the said lands. The company has never applied for registration of this transfer, nor does it now indicate any intention with respect thereto.

At common law "an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor": *per* Strong C. J., *Jellett* v. *Wilkie* (1).

The important issue, therefore, is what interest the judgment debtor had at the time the executions were registered in the Land Registry Office, or more particu-

(1) (1896) 26 Can. S.C.R. 282, at 288.

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larly in this case, what is the significance and effect of the delivery by the respondent of the transfer duly executed to the Minto Trading and Development Company Limited. The determination of this question must be had from the provisions of the *Land Registry Act.*

The following section of the *Land Registry Act,* R.S.B.C. 1936, Ch. 140, is relevant:

> 34. Except as against the person making the same, no instrument * * * purporting to transfer, charge, deal with, or affect land or any estate or interest therein, shall become operative to pass any estate or interest, either at law or in equity, in the land * * * until the instrument is registered in compliance with the provisions of this Act; * * *

The respondent relies upon the decision of *Entwisle* v. *Lenz & Leiser* (1). There the holder of an unregistered transfer brought action to have the judgment registered against the land, since the execution and delivery of the transfer, removed as a cloud upon his title. The learned trial judge decided under the then section 74 (now section 34 of the *Land Registry Act*) in favour of the execution creditor. His decision was reversed in the Court of Appeal where the learned judges did not discuss the provisions of the *Land Registry Act,* but rested their decision upon section 3 of the *Judgments Act,* R.S.B.C. 1899, Ch. 33 (now section 35, *Execution Act,* R.S.B.C. 1936, Ch. 91):

> Immediately upon any judgment being entered or recovered in this province, the judgment may be registered in any or all of the Land Registry Offices in the province, and from the time of registering the same the judgment shall form a lien and charge on all the lands of the judgment debtor in the several land registration districts in which the judgment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of the judgment the judgment creditor may, if he wishes to do so, forthwith proceed upon the lien and charge thereby created.

This section was construed in the *Entwisle* case (1) as effecting no change in the common law. Somewhat similar statutes have been so construed. *Eyre* v. *McDowell* (2); *Case* v. *Bartlett* (3).

The *Entwisle* case (1) was criticized but not overruled in *Bank of Hamilton* v. *Hartery* (4). The criticism was based upon the provisions with respect to the effect of registration under the *Land Registry Act.* In 1921 cer-

(1) (1908) 14 B.C.R. 51.
(2) (1861) 9 H.L.C. 619.
(3) (1898) 12 Man. R. 280, at 286.
(4) (1919) 58 Can. S.C.R. 338.

tain amendments were made to that Act. Counsel for the respondent submits that at least some of these amendments were made, as a consequence of the criticism in this Court, for the purpose of clarifying the statute and continuing the law as laid down in *Entwisle* v. *Lenz & Leiser* (1). That was the view of the majority of the learned judges in *Gregg* v. *Palmer* (2).

One of the 1921 amendments inserted at the beginning of section 34 the words: "Except as against the person making the same". The section prior to that amendment read in part:

> No instrument * * * purporting to transfer * * * shall pass any estate or interest, either at law or in equity, in the land * * * until the instrument is registered * * *

It is apparent that prior to the insertion of these words the statute emphasized the importance of registration and it provided for what Lord Moulton described as "the absoluteness of the effect of the registration", *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.* (3). It was, no doubt, the criticism of the *Entwisle* case (1) that brought to the attention of the legislature this conflict between section 34 and the decision in the *Entwisle* case (1). This conclusion is strengthened by the fact that section 34 had remained in the statutes without amendment since prior to the *Entwisle* decision (1) in 1908, but immediately following that criticism it was amended.

These words, "except as against the person making the same", expressly make operative an unregistered instrument against the party making the same. Therefore, the transfer executed by the respondent was operative to transfer to the Minto Trading and Development Company Limited whatever estate, either at law or in equity, he was in possession of. As a consequence the respondent, as execution debtor, had prior to the registration of this judgment divested himself of his interest in the land here in question. The conclusion, therefore, appears to be well founded that the legislature by this amendment has continued the decision in the *Entwisle* case (1) as law in British Columbia.

(1) (1908) 14 B.C.R. 51.
(2) (1932) 45 B.C.R. 267.
(3) [1913] A.C. 491, at 504.

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The Minto Trading and Development Company Limited is not asking to have the transfer registered under sections 175, 176 and 177 of the *Land Registry Act*, as enacted in 1921. They were, however, enacted at the same time as the words inserted in section 34 and may be helpful in understanding the meaning and effect of these words inserted at the beginning of section 34. Sections 175, 176 and 177 have to do with judgments in relation to those who apply for registration as owner or holder of a charge. A judgment is different from other encumbrances in that as registered it constitutes a blanket charge upon all the lands of the judgment debtor in that Land Registration District. Because of this a different system of registration is adopted and all judgments are listed under the name of the judgment debtor in a "Register of Judgments". Under this system questions arise with respect to the identity of owners and judgment debtors, for which a summary procedure is essential. But these sections go beyond the decision of such issues. In section 175 it expressly contemplates

where application has been made to the Registrar to register the applicant as owner of land * * * and there is a judgment registered against the grantor of the fee-simple * * *

Then in section 176,

* * * any judgment creditor * * * shall be entitled to be paid * * * as costs of investigating the bona fides of the claim of the applicant that he is entitled to priority to the judgment.

Then in section 177 it is provided that where the instrument is entitled "to priority over the registered judgment" the Court may nevertheless allow costs to the judgment creditor

if in the opinion of the Court the judgment creditor was justified under the circumstances * * * in requiring the applicant to have judicially established the bona fides and validity of the execution of the instrument under which the applicant claims.

These sections indicate that upon such applications the question of priority shall be determined, a matter which, prior to the amendments of 1921, was settled by the provisions of the sections corresponding to sections 34, 36 and 37. Indeed, the implication appears to be that, if the instrument is found to be *bona fide* and validly executed, it is entitled to priority over the judgment creditor under circumstances such as obtain in this case.

These statutory provisions, read, as they must be, in association with section 34, retain the common law rule with respect to rights of judgment creditors. Under that rule the execution creditor can only attach that interest which exists in the execution debtor. The respondent having disposed of his entire interest before the registration of the judgment, this judgment cannot attach the land in question as certified by the Registrar.

The learned judge, in confirming the District Registrar's report, based his judgment upon the amendment made to the *Land Registry Act* in 1913 to the then section 22, now section 37. The material portion of that amendment substituted "conclusive evidence at law and in equity" for the words "conclusive evidence in all Courts of Justice". With deference to the learned trial judge, this amendment does not appear to effect the change which he suggests. All the Courts having to do with these matters apply the rules and principles of both law and equity. Moreover, it appears that the amendments made in 1921 and already discussed deal more specifically with the subject and if section 37 (section 22 in 1913) was intended to effect such a change as suggested by the learned trial judge, the legislature would, no doubt, have further amended that section in 1921.

In my opinion, the appeal should be dismissed with costs.

KELLOCK J.—This is an appeal from the order of the Court of Appeal for British Columbia dated 27th April, 1945, allowing an appeal by the respondents from the judgment or order of Wilson J. dated October 25, 1944, giving directions for the sale of certain lands of which the respondent Warren Asa Davidson is the registered owner and of which the respondent company holds an unregistered transfer.

The facts briefly are, that on the 10th of June, 1935, the respondent Warren Asa Davidson conveyed the lands in question to the respondent company but the transfer was not registered and to date no application to register has been made by the transferee. On the 23rd of January, 1939, the appellant, who is the wife of the respondent Warren Asa Davidson, obtained judgment against her husband, which judgment was registered in the proper land

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registration office on the 23rd of July, 1943. On the 27th of March, 1944, the appellant obtained another judgment against her husband, which in turn she registered on the 30th of March, 1944.

Pursuant to the provisions of section 38 of the *Execution Act*, R.S.B.C. 1936, Cap. 91, an application was made by the appellant to the Chief Justice of British Columbia, by whom an order was made on the 16th of May, 1944, referring the matter to the Registrar of the Supreme Court for the purpose of ascertaining what lands of the judgment debtor were liable to be sold pursuant to the provisions of the statute in order to realize the amount of the judgments. It was pursuant to this order that the report of the Registrar was made, upon which the later proceedings already mentioned were founded. The issue throughout the proceedings was as to whether or not the interest of the registered owner in the lands was subject to sale irrespective of the unregistered transfer.

Sec. 38 already referred to provides that where any judgment creditor has registered a judgment in a Land Registry Office, a motion may be made by him calling upon the judgment debtor and upon any trustee or other person having the legal estate in the land in question, to show cause why any land in the land registration district in which the judgment is registered, or the interest therein of the judgment debtor, or a competent part of the land, should not be sold to realize the amount payable under the judgment. Sec. 39 provides that upon such an application such proceedings shall be had either in a summary way or by the trial of an issue, or by enquiry before an officer of the Court, or by an action or otherwise, for the purpose of ascertaining "the truth of the matters in question, and whether the lands, or the interest therein of the judgment debtor, are liable for the satisfaction of the judgment." By sec. 35 provision is made for the registration of a judgment and the section enacts that

> from the time of registering the same the judgment shall form a lien and charge on all the lands of the judgment debtor in the several land registration districts in which the judgment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of the judgment the judgment creditor may, if he wishes to do so, forthwith proceed upon the lien and charge thereby created.

By sec. 40, it is provided that upon any application made under sec. 38 there shall be included in the order a reference to a District Registrar of the Supreme Court to find what lands are liable to be sold under the judgment, and what are the nature and particulars of the interest of the judgment debtor in the lands and of his title thereto, and what judgments form a lien and charge against the lands and the priorities between the judgments, to determine how the proceeds of the sale shall be distributed, and to report all such findings to the Court. It is further provided that the District Registrar shall cause all persons affected by his enquiries to be served with notice. The Registrar's report is subject to confirmation by a Judge of the Supreme Court, and all persons affected thereby shall have notice of the application for confirmation. By sec. 42 provision is made for an order for sale consequent upon the report of the Registrar, and by sec. 43 it is provided that where it appears on any application for an order for sale that there may be persons interested in the land to be sold whose names are unknown to the judgment creditor, the Court may direct advertisements calling upon all persons claiming to be interested in the land to come in and establish their claims within a limited time after which such persons shall be debarred.

In *Jellett* v. *Wilkie* (1), Strong, C. J., giving the judgment of the Court, said at p. 288:

> No proposition of law can be more amply supported by authority than that which the respondents invoke as the basis of the judgment under appeal, namely, that an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor.

In that case, it was held that this rule of law was not affected by the provisions of sec. 94 of the *Territories Real Property Act* there in question and that an execution creditor who had registered his writ of execution before registration of transfers from the registered owner bearing date prior to the date of registration of the execution was subject to the transfer.

It is contended on behalf of the appellant that by reason of the provisions of sections 34 and 37 of the *Land Registry Act,* R.S.B.C. 1936, Cap. 140, the rule of law

(1) (1896) 26 Can. S.C.R. 282.

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applied in *Jellett's* case (1) is not applicable in the case at bar. Sec. 34 enacts in brief, so far as is relevant, that, except as against the person making the same, no instrument purporting to transfer land shall become operative to pass any estate or interest, either at law or in equity, in the land until the instrument is registered in compliance with the provisions of the Act, but such instrument shall confer on the transferee and on every person claiming through or under him the right to apply to have the instrument registered, and to use the names of all parties to the instrument in any proceedings incidental to registration. By sec. 37 it is provided that every Certificate of Indefeasible Title issued under the Act shall be received in evidence in all Courts of Justice in the province without proof of seal or signature and so long as it remains in force and uncancelled shall be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that the person named in the certificate is seized of an estate in fee-simple in the land therein described against the whole world, subject to certain exceptions. One of these is clause (*g*): "any *lis pendens* or mechanic's lien, judgment, caveat, or other charge * * * registered since the date of the application for registration."

In *Entwistle* v. *Lenz* (2), the Court of Appeal of British Columbia held, having regard to the predecessor of sec. 35 of the *Execution Act*, that an execution registered prior to an unregistered conveyance made before judgment was obtained, was subsequent in priority to the conveyance and allowed an appeal from the judgment of the trial judge who had held that sec. 74 of the *Land Registry Act* of 1906, 6 Edward VII, Cap. 23, gave the execution priority. That section, which is the predecessor of the present sec. 34, differed in some respects from the present section in that it did not have the words "except as against the person making the same" at the beginning of the section, and instead of providing as at present that the unregistered transfer should not "become operative to pass" provided that it "should not pass." It was also without the provision giving the unregistered transferee the right to use the names of the parties to the instrument in proceedings for registration.

(1) (1896) 26 Can. S.C.R. 282. (2) (1908) 14 B.C.R. 51.

This decision was adversely commented upon by Anglin J., with whom Mignault J. agreed, in *Bank of Hamilton* v. *Hartery* (1). The Court in the last mentioned case had to deal, not with an execution and a competing unregistered transfer, but with a mortgage and a judgment both of which had in fact been registered, and as that situation was specifically dealt with by sec. 73 of the then *Land Registry Act,* namely, R.S.B.C. 1911, Cap. 127, it was not necessary to deal with the soundness of the judgment in the *Entwisle* case (2). The judgment of the Court of Appeal in the *Entwisle* case (2) proceeded upon the view that the registered owner who had made the unregistered transfer was merely the holder of the dry legal estate and that the beneficial interest had passed to the transferee notwithstanding the provisions of sec. 74.

Since the decision in *Hartery's* case (1), the *Land Registry Act* was amended and consolidated in 1921 by Cap. 26 of the statutes of that year and the differences already pointed out as between the present sec. 34 and old sec. 74 were then made.

In 1932, the Court of Appeal of British Columbia in the case *Gregg* v. *Palmer* (3), held, Macdonald C.J.B.C. and Galliher J.A. dissenting, that as between an applicant to register a mortgage and a registered judgment creditor the former was entitled to priority. The majority held that the decision in *Hartery's* case (1) did not apply, (1) because in that case, as already pointed out, the mortgage had been registered, while in *Gregg's* case (3) the mortgagee had merely applied to register, and (2) because of the changes in the legislation since the decision in *Hartery's* case (1). Since the decision in *Gregg's* case (3), there has been a further revision of the statutes in British Columbia and the relevant provisions of both the *Execution Act* and the *Land Registry Act* have been re-enacted without change.

In my opinion, the question raised by the present appeal is to be determined adversely to the appellant. Notwithstanding the provisions upon which the appellant relies, I think that the conclusion to which one must come by virtue of the presence in the statute of Part IX deal-

(1) (1919) 58 Can. S.C.R. 338. (2) (1908) 14 B.C.R. 51.
(3) (1932) 45 B.C.R. 267.

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ing with "judgments" is that in such circumstances as are here present the judgment attaches only upon the interest of the execution debtor in the lands subject to the unregistered transfer. Sections 174 to 177 appear to be based upon that view of the statute.

By sec. 175 it is provided that where application has been made to the Land Registrar to register the applicant as owner of land and there is a judgment registered against the grantor, the Registrar may in his discretion cause a notice to be given to the judgment creditor of his intention at the expiration of a time fixed by the notice to effect registration in pursuance of the application. If the judgment creditor claims a lien upon the lands covered by the application, he is required, within the time fixed by the notice, to follow the procedure for enforcing his charge defined in sections 38 to 44 of the *Execution Act* and to register a certificate of *lis pendens,* otherwise the Registrar may register the applicant free from the judgment. By sec. 176, it is provided that where the above notice is served and it appears that the title of the applicant for registration is founded upon an instrument executed more than one month before the application for registration the judgment creditor is entitled to be paid by the applicant $5 as costs of investigating "the bona fides of the claim of the applicant that he is entitled to priority to the judgment." Sec. 177 provides that where proceedings are taken under sections 38 to 44 of the *Execution Act*

and fail by reason of the finding of the Court that the instrument under which the applicant for registration * * * claims is entitled to priority over the registered judgment, the Court may, in its discretion, dismiss the proceedings without costs, or allow costs to the judgment creditor, if in the opinion of the Court the judgment creditor was justified under the circumstances, including the delay in application for registration, in requiring the applicant to have judicially established *the bona fides and validity of the execution of the instrument* under which the applicant claims.

If mere priority in point of time in registration of a judgment entitled the judgment creditor to priority over an unregistered transfer were sufficient, I find it impossible to give any meaning to the sections just referred to. As I have said, I think the only meaning that can be given to them in such a case as the present is that where

there is no question between the parties, apart from the time of the execution of the transfer and the time of the registration of the judgment, the former is entitled to priority. It may be noted that no question arises, as in *Hartery's* case (1), under the provisions of the present section 42 of the Act, as it is not a case of competing registered charges.,

It may be pointed out that, while sec. 177 of the Act was not in force at the time of the decision in *Hartery's* case (1), provisions similar to or identical with sections 174 to 176 were, however, in the statute before that case was decided; see Statutes of British Columbia, 1914, Cap. 43, sec. 70; 1916, Cap. 32, sections 27 and 28. These provisions, however, were not dealt with in the judgments in that case, but they were, however, drawn to the attention of the Court in the factum of the respondent. It is true that in the case at bar sec. 175, subsection 1, is predicated upon an application for registration having been made by the holder of the unregistered conveyance, but although no such application has as yet been made by the respondent company, I do not think this fact affects the result. The judgment creditor has taken the proceedings he was entitled to take under the *Execution Act* which are the same proceedings the respondent company would have to call upon the appellant to take if the company desired to apply for registration and to obtain priority over the appellant's judgments. I do not think the appellant can take the position, if otherwise sound, that under the provisions of sections 34 and 37 of the *Land Registry Act* she is entitled to priority and that Part IX of the Act may not be looked at because of the fact that there is no application on the part of the respondent company to register. The result of this would be that the respondent company would be left free to apply to register under the provisions of Part IX, in which event I do not think the fact that proceedings had already been taken at the instance of the judgment creditor under the *Execution Act* would constitute an estoppel so as to prevent the provisions of Part IX having their due application with a resulting priority in favour of the respondent company. I think that, not-

(1) (1919) 58 Can. S.C.R. 338.

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withstanding there is no application to register on the part of the respondent company, the sections included in Part IX may be looked at for the purpose of interpreting the statute as a whole, and when this is done the result is, in my opinion, as already stated.

In his judgment in the case at bar, Wilson J. pointed out that at the time of the decision in the *Lenz* case (1) the predecessor of the present sec. 37 (then sec. 81 of 6 Edward VII, Cap. 23, referred to by Wilson J. as R.S.B.C. 1911, Cap. 127, sec. 22) provided that a certificate of indefeasible title should be "conclusive evidence in all Courts of Justice" that the person named therein was seized of an estate in fee simple, and that some five years after the decision in that case, by 3 George V, Cap. 36, sec. 8, the subsection was amended by substituting for the words above quoted the following, namely, "conclusive evidence *at law and in equity* as against His Majesty and all persons whomsoever." In the opinion of Wilson J., this change indicated an intention on the part of the legislature contrary to the decision in *Lenz's* case (1), founded, as it was, upon the view that the holder of the unregistered transfer held the beneficial title. In the opinion of Wilson J., the amendment of 1913 was intended to prevent such a view being taken thereafter and to render the certificate of title conclusive evidence that not only the legal estate but the beneficial estate remained in the registered owner. It was also pointed out by Wilson J. that *Hartery's* case (2) was a decision on facts differing from those existing in *Lenz's* case (1) and decided on that ground and that the facts in the case at bar are similar to those in *Lenz's* case (1), and different from the facts in *Gregg's* case (3). He also pointed out what I have already mentioned, namely, that while in the judgments in *Gregg* v. *Palmer* (3), Part IX of the *Land Registry Act* or its predecessor was necessarily taken into consideration, the Part is predicated upon an application to register on the part of the holder of the unregistered instrument. He was of the opinion that those sections could not be invoked in the case at bar, and for that reason and also because of the difference in facts, he did not consider that the decision in *Gregg* v. *Palmer* (3) applied. He did consider that he

(1) (1908) 14 B.C.R. 51.
(2) (1919) 58 Can. S.C.R. 338.
(3) (1932) 45 B.C.R. 267.

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was bound by *Lenz's* case (1), but in view of the amendment of 1913, he thought his decision should now be in favour of the judgment creditor. In the Court of Appeal, the appeal was allowed. O'Halloran J. A., giving the judgment of the Court, dealt only with the amendment of 1913 and held that, read in its context, it did not change the meaning of the section.

But for the presence in the statute of the group of sections included in Part IX, there would be much, in my view, to be said in favour of the contention upon which the appellant rests her case. However, it is not necessary to express any final view on this question, in view of the conclusion to which I have come by reason of the presence in the statute of Part IX, which proceeds upon the basis that the result of proceedings by a judgment creditor under sections 38 et seq. of the *Execution Act,* where there is no lack of *bona fides* attaching to the unregistered conveyance and the latter is validly executed, is to give priority to the unregistered conveyance and that this priority is effective under the *Land Registry Act.*

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *T. E. Wilson.*

Solicitor for the respondent: *J. C. Ralston.*

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

AND

CARL A. ANDERSON (SUPPLIANT) ..... } RESPONDENT.

1945

*Oct. 3, 4

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*Jan. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Motor vehicles—Negligence—Motor truck at street intersection turning left from westward course and colliding with passing motor car going westward—Responsibility for accident—Duties of drivers—Insufficiency of turning signal—Horn of passing vehicle not sounded.

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

(1) (1908) 14 B.C.R. 51.

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The suppliant claimed damages against the Crown for injury suffered in a collision between his taxi, driven by him, and an army truck, driven by a member of the Canadian Army Service Corps, about 7.45 a.m. on January 28, 1944, in the city of Vancouver. The army truck, which had been going westward on Georgia street, turned left to go south on Bute street and struck the taxi which, going westward on Georgia street, was in the course of passing the truck on the truck's left side. The truck was a right-hand drive vehicle, and its driver, who was alone and did not see the taxi, extended his arm to the right, but this was not seen by the suppliant. The suppliant in proceeding to pass did not sound his horn.

Held (affirming judgment of Angers J. in the Exchequer Court): Having regard to all the circumstances (discussed), the accident was caused solely by negligence of the driver of the army truck.

Per the Chief Justice and Kerwin and Estey JJ.: The truck-driver violated the provisions of s. 3 (*j*) of the regulations passed under the *Motor-vehicle Act*, R.S.B.C. 1936, c. 195, in not ascertaining if the turn could be made in safety and in failing to give a signal plainly visible. The suppliant was entitled to rely upon compliance with such provisions.

Per Rand and Kellock JJ.: The truck-driver failed completely to take any precaution to see whether or not the turn could be made safely; and this, apart altogether from any statutory provision, was negligence. The suppliant, while obliged to keep a proper look-out, and it was not shown he did not, was not bound to anticipate that the truck would turn into Bute street in the absence of any indication that such was its driver's intention.

Per curiam: In the circumstances in question, it was not "reasonably necessary" (s. 3 (*h*) of said regulations) for the suppliant to sound his horn.

APPEAL on behalf of His Majesty the King from the judgment of Angers J. in the Exchequer Court of Canada in favour of the suppliant (the present respondent) for damages ($2,422.10) resulting from personal injuries to the suppliant caused by a collision of an army motor truck, driven by a private in the Canadian Army Service Corps, with a motor car driven by the suppliant, at or near the intersection of Georgia street and Bute street in the city of Vancouver, British Columbia, at or about 7.45 a.m. on January 28, 1944. Angers J. held that the accident was due solely to the negligence of the driver of the army vehicle.

R. Forsyth K.C. for the appellant.

C. K. Guild K.C. for the respondent.

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The judgment of the Chief Justice and Kerwin and Estey JJ. was delivered by

ESTEY J.—This is an appeal from a judgment after trial in the Exchequer Court in which the respondent (suppliant) taxi driver claims damages against His Majesty for injury suffered in a collision between his taxi and an army motor vehicle.

The learned trial judge found: "I have come to the conclusion that the accident is due solely to the negligence of the driver of the Army vehicle" in that he failed to give "a visible signal to the driver of the taxi". He accordingly directed judgment for the respondent (suppliant in the Exchequer Court) in the sum of $2,422.10. The appellant (respondent in the Exchequer Court) asks that this Court reverse that finding of fact and find that the respondent's conduct constituted negligence, either ultimate or contributory.

The army vehicle, driven by a member of the armed services, was proceeding westward on Georgia street in the City of Vancouver at about 7.45 on a frosty morning, the 28th of January, 1944. The city lights were still on; the street was hard surfaced and at the time described by some as slippery. He was alone in this right-hand drive army vehicle and proceeding at a speed which he estimated not to be in excess of 15 m.p.h. at any time and at the time of impact about 8 to 10 m.p.h. Other evidence suggests he was going a little faster, perhaps 20 to 25 m.p.h. As he was "just getting into the intersection" of Georgia and Bute streets he made a turn to the south. He admits that, notwithstanding his motor vehicle was equipped with a rear-view mirror, he did so without looking to ascertain if any vehicle was at or near this point. Moreover, he did so without giving any signal except to extend his arm on the right side where he knew it could not be seen by a driver of an over-taking motor-car upon his left. Immediately he started to make this turn he collided with the respondent's taxi, then in the course of passing him on the south side, as it was proceeding in the same direction westward on Georgia street.

There were only three parties who saw the accident: the respective drivers and the passenger in the taxi. The

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respondent, the driver of the taxi, was taking a passenger to work. He was driving at 25 to 30 m.p.h. near the centre of Georgia street and noticed the army vehicle when it was about 100 to 150 feet from Bute street and about 10 or 15 feet in front of him but to his right. Because the army truck was to his right and proceeding in the same direction, he did not change his speed, alter his course or sound his horn. As he was passing the army vehicle, and when the front of his taxi was approximately 3 or 4 feet from the front end of the army vehicle, the latter made a "fast turn" to his left and collided with the right front door of the taxi. The respondent suffered serious personal injuries, the passenger was rendered unconscious and the taxi damaged.

The passenger sitting in the front seat on the right-hand side saw nothing to attract his attention. He said:

> We were not going very fast * * * the truck was on our right side * * * we were just starting to go by it * * * Well we were going along the street, as I remember it, we seemed to be coming up onto the corner, and there was a truck on our right, and the next thing I realized we were sort of lifted up in the air and pushed across the street into a building, and from then on I don't know because I was knocked out.

Certain photographs were placed in evidence and these corroborated the statements of the respondent, his passenger and Constable Vance that the right front door of the taxi was damaged by contact with a front tire of the army vehicle.

Constable Vance of the Vancouver Police Force and Capt. Edwards of the Royal Canadian Army Service Corps arrived very soon after the accident and independently examined the tracks of the respective vehicles. They were able to trace the tracks of both vehicles approximately 20 or 30 feet eastward from the intersection and agreed that the vehicles were proceeding more or less parallel. They disagreed entirely with respect to the point of impact. Constable Vance found skid marks made by the taxi 20 to 30 feet east of the east curb line of Bute street and fixed that as the point of impact. Capt. Edwards found some dirt near the yellow line about 8 feet west from the east curb line of Bute street and he fixed that as the point of impact. Both felt that the marks of the respective vehicles justified or corroborated their conclusions as to the point of impact.

The respondent thought the collision occurred when he had "not quite" reached the intersection, and the driver of the motor vehicle thought it happened "when I got into the interestion I just started my left turn." It is impossible upon the evidence to reconcile these statements and with regard to which the learned trial judge made no specific finding either with respect to the point of impact or the credibility of the respective witnesses, no doubt because in his opinion the sole cause of the collision was the negligent conduct on the part of the driver of the army vehicle.

That the driver of the army vehicle was negligent there can be no doubt. He admits that he turned south without giving any signal evidencing his intention to do so, and without looking to ascertain if there was any traffic nearby. In this he violated the express provisions of section 3 (*j*) of the regulations passed under the provisions of the Motor-vehicle Act, R.S.B.C. 1936, Chap. 195:

3. (*j*). Before turning, stopping, or changing the course on the highway of any motor-vehicle, and before turning such vehicle when starting the same, it shall be the duty of the operator thereof first to ascertain whether there is sufficient space for such movement to be made in safety, and the operator shall give a signal plainly visible to the operators of other vehicles of his intention to turn, stop, or change his course. Such signal shall be given either by the use of the hand and arm or by the use of an approved mechanical or electrical device:

The word "highway" is defined to include "every * * * street, lane * * * used by the general public for the passage of vehicles." In my opinion, therefore, the appellant's servant violated the express provisions of section 3 (*j*) and his conduct in this regard constitutes negligence.

The respondent on his part was entitled to rely upon the appellant complying with these provisions of section 3 (*j*), "to ascertain" if the turn could be made "in safety" and also "give a signal plainly visible". *Carter* v. *Van Camp* (1); *Toronto Railway Co.* v. *King* (2), where Lord Atkinson stated:

It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. 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

(1) [1930] S.C.R. 156. (2) [1908] A.C. 260 at 269.

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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.

The appellant contended that the respondent's failure to see the warning painted on the rear of the army vehicle, "Caution Right Hand Drive Vehicle—No Signals", was evidence of his failure to keep a proper look-out. The only evidence, however, with respect to this caution sign is that it was "dirty", "smeared as though they had been used for a period of time". In fact there is no evidence that a reasonable driver in the position of the respondent could have seen these words. The respondent was not asked specifically as to whether he did see them. He admits, however, seeing the army vehicle but concluded that, as it was to his right, there was plenty of room for both to continue on their respective courses, and further that immediately he saw the army vehicle turn toward the south, he "tried to swing with it" but "he [driver of the army vehicle] turned too fast".

The appellant also contended that the driver of the taxi was negligent in not sounding his horn. The respondent admits that he did not sound his horn. The regulation with respect thereto, as passed pursuant to the *Motor-vehicle Act* (R.S.B.C. 1936, Chap. 195) and amendments thereto, includes the following as a part of paragraph 3 (*h*):

> The motor-vehicle shall be equipped with a suitable horn, * * * and the same shall be sounded whenever it is reasonably necessary as a signal or warning to any person of the approach of the motor-vehicle; * * *

What is "reasonably necessary" is a question of fact upon which point the learned trial judge in this case has made no finding. While I do not minimize the importance of sounding a horn under other circumstances, the evidence in this case, having regard to the width of the street, the absence of other traffic, the conduct of the respective drivers and the doubt as to their east-west position on Georgia street, does not establish a case of reasonable necessity therefor and consequently does not warrant a finding of negligence on the part of the respondent taxi driver.

The evidence establishes that the respondent was driving at a reasonable speed, maintaining a careful look-out and approaching the intersection with such care and

caution that he would have adjusted his course to meet any condition that might reasonably have been anticipated, including the giving of a signal evidencing a turn to the left at the intersection. On the other hand, the army driver, without either looking into his rear-view mirrors or giving any signal, turned left just after entering the intersection. It therefore appears to me that the evidence does not establish a case of contributory negligence on the part of the respondent, but rather supports the finding of the learned trial judge that it was the failure of the driver of the army vehicle to give a "visible signal to the driver of the taxi" which caused this accident.

It is unnecessary, in view of the foregoing, to consider the submissions made relative to the by-laws of the City of Vancouver and District Routine Order No. 122. Insofar as either or both of these submissions may be applicable, they merely add to or strengthen the conclusions already arrived at.

In my opinion, the judgment of the learned trial judge should be affirmed and this appeal dismissed with costs.

The judgment of Rand and Kellock JJ. was delivered by

KELLOCK J.—In my opinion, it is not possible in this case to absolve the driver of the appellant's truck of negligence. This vehicle, an army truck, was so constructed that the driver could not see to his rear through the truck but had to depend for his knowledge of traffic approaching from the rear upon two mirrors projecting from either side of the windshield. Admittedly, the driver made a left-hand turn for the purpose of proceeding south on Bute street without knowing anything as to the presence or absence of traffic to his rear and without looking in either mirror. While he gave a signal with his right hand on that side of the truck, this could not be observed by the respondent. The driver failed completely to take any precaution to see whether or not the turn could be made safely before proceeding to execute it. Apart altogether from any statutory provision, this, in my opinion, was negligence. The enquiry then resolves itself into one as to whether or not there was any negligence on the part of the respondent.

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The respondent said that he first observed the truck when at a distance of from 100 to 150 feet from Bute street. At that time, the truck was from 10 to 15 feet in front of his taxi-cab, but well to the right and close to the north curb on Georgia street, a wide street measuring 50 feet from curb to curb. The respondent said that his taxi cab was proceeding north of the centre line of the street, the two vehicles being separated by from 3 to 4 feet. The respondent said his speed was between 25 to 30 miles per hour but closer to the former figure, while the truck was travelling somewhat more slowly and that when the front end of the taxi cab was approximately 3 to 5 feet from the front of the truck, the vehicles not having "quite" reached the intersection, the truck turned quickly to its left. The respondent says that he also swung to the left, but could not get away from the truck which struck the right front door of the taxi cab with its left front wheel.

I do not think any point can be made of the fact that the respondent first observed the truck at the time above mentioned. At that time, it was well to his right and the two vehicles were some distance east of the point where any change in course was made by either.

The main contention on behalf of the appellant was that the respondent's taxi cab was endeavouring to pass the truck south of the centre line of Georgia street, as the two vehicles approached the intersection. It is said that the respondent ought not to have pursued such a course at that point but ought to have had his vehicle under control in anticipation of the possibility of the vehicle ahead turning into Bute street, and that in fact the respondent had been warned of such an intention on the part of the truck by the action of the truck driver in pulling his vehicle over toward the centre of Georgia street as he approached the intersection before he actually made the left-hand turn. This contention raises a question of fact and depends upon the proper view to be taken of the evidence.

The driver of the truck deposed that at no time had he travelled at a speed in excess of 15 miles an hour and that as he approached the intersection he slowed down to between 8 and 10 miles an hour and pulled over from the centre of the north half of the street to within 2

feet of the centre line at a point from 20 to 30 feet east of the property line on the east side of Bute street, which in turn, is 18 feet easterly from the east curb. He says that when he got into the intersection, he made his left-hand turn and the collision then occurred. He admits that the collision took place between the left front corner of his vehicle and the front door of the taxi cab and that it is possible that the point of impact may have been further to the east than he stated. If this evidence be accurate, the truck travelled a maximum of only 38 feet from the point where it began its inclination to the point of impact. The witness, Edwards, called on behalf of the appellant, who came on the scene after the accident, stated that he followed the tracks of the truck and that at a point 20 to 30 feet east of the east curb of Bute street they were from 2 to 3 feet north of the centre line. His evidence is not very clear, as he follows this statement up by saying that these marks were "right at the yellow line" and so continued up to the point 8 feet west of the east curb when they showed a decided turn to the left. On his evidence, there is only the one deviation from a straight course, namely, after the truck had entered the intersection, so that this witness has nothing to say about any earlier change of course on the part of the truck. He also says that he followed the marks of the taxi cab from a point 20 to 30 feet east of the east curb of Bute street to the point where the taxi cab came to rest against the building at the southwest corner of the intersection. This witness said that at the most easterly point where these marks began, one wheel was between 3 and 4 feet south of the centre line of Georgia street while the other was approximately 1 foot north of that line. He says these tracks travelled in a straight line until about 8 feet west of the east curb of Bute street where he found some dirt on the roadway where he says the marks moved slightly south of their original direction. Without taking into consideration the evidence of the respondent's witness, Vance, who places the marks of the vehicles in a different position, it is plain that, even giving full effect to the evidence of the truck driver, the first alteration of his course and the ultimate turn into the intersection all took place within a maximum

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of 38 feet. When it is remembered that the taxi cab at 25 miles an hour would cover this distance in slightly over one second and the truck at 10 miles an hour would cover the same distance in something over two seconds, it is evident that the taxi cab in the position in which it found itself had no sufficient warning of the actual turn. It may well be that the learned trial judge was of opinion that the truck was proceeding faster than its driver would admit. I do not think that the respondent was bound to anticipate that the truck would turn into Bute street in the absence of any indication that such was the intention of its driver. That is not to say that the respondent was not at all times obliged to keep a proper lookout. It is not shown he did not.

It was also argued on behalf of the appellant that the respondent was negligent in not sounding his horn. I do not think, in the circumstances, there was any obligation on the respondent to sound his horn. The two vehicles, prior to the sudden change of course of the truck, were proceeding westerly on the north side of this wide city street, the one overtaking the other at a speed which was not excessive. In the absence of some warning of a change of course on the part of the vehicle ahead, I see no reason why the horn of the respondent should have been sounded. There is nothing in the relevant statutory provision, regulation 3 (*h*) passed pursuant to R.S.B.C. 1936, c. 195, to require it. According to the respondent, the front of his taxi cab was from 3 to 5 feet only from the front of the truck when the left turn was made. The taxi in that position could easily have been seen by the truck driver had he looked. In all these circumstances, I do not think it was "reasonably" necessary that the horn of the taxi cab should have been sounded and if not reasonably necessary the blowing of the horn was prohibited by the same regulation.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *F. P. Varcoe (solicitor for the Attorney-General of Canada); R. V. Prenter.*

Solicitor for the respondent: *W. S. Lane.*

WRIGHTS' CANADIAN ROPES LIMITED ..... } APPELLANT; 1945 *Oct. 9

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT. 1946 *Jan. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income Tax—Income War Tax Act (R.S.C. 1927, c. 97, and amendments) —Deductions in computing income—Sums paid by taxpaying company to another company as commissions for performance of obligations assumed by latter under agreement—Disallowance in large part by Minister of National Revenue of such sums as deductions—Whether Minister acted under, and applicability of, s. 6 (1) (i) or s. 6 (2) of Act—Whether Minister's discretion under s. 6 (2) properly exercised—Complaint that report of local inspector of taxation to Minister was not shown to taxpayer or transmitted to be filed in Exchequer Court—Whether function falling upon Minister was within his power of delegation to Deputy Minister of National Revenue for Taxation.

Appellant, a company incorporated under the Dominion *Companies Act*, 49·86 per cent. of whose shares were held by a certain English company, made an agreement with the English company in 1935, whereby, in consideration of performance of obligations assumed by the latter (not to sell in Western Canada, to transmit to appellant orders received from that territory, to select and test products supplied to appellant, to furnish information and technical knowledge, and to advise), appellant agreed to pay to the English company a commission of 5 per cent. upon all cash received in respect of the net selling price of certain products both manufactured and sold by appellant after the date of the agreement. Pursuant to the agreement, appellant paid to the English company in 1940, 1941 and 1942, commissions of $17,381.94, $29,325.85, and $39,480.91, respectively, for which it claimed deductions in computing its income under the Dominion *Income War Tax Act*. The sums were disallowed as deductions except as to the sum of $7,500 in each year. From such disallowance, as affirmed by the Minister of National Revenue (acting by the Deputy Minister of National Revenue for Taxation), appellant appealed to the Exchequer Court. Its appeal was dismissed ([1945] Ex. C.R. 174); and it appealed to this Court. It contended (*inter alia*) that the commissions were an obligation imposed by a valid contract; that on the evidence they were reasonable and there was no evidence to the contrary; that s. 6 (1) (*i*) of said Act governed and that as the English company did not control appellant, no disallowance was warranted; that s. 6 (2) was not applicable; and that in any case the Minister's discretion was not properly exercised; that a report to the Minister from the local inspector of taxation should have been before the Exchequer Court, to give opportunity to appellant to controvert any statements therein; that the function falling upon the Minister was not within his power of delegation to the Deputy Minister.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Kellock and Estey JJ.

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Held (Kerwin J. dissenting): The appeal should be allowed and the matter referred back to the Minister to be dealt with by him according to the reasons of the majority of the Court.

Per the Chief Justice: In view of an admission, binding respondent, as to the proportion of shares in appellant held by the English company, appellant must be taken not to be controlled directly or indirectly by the English company, and therefore the disallowance of the deductions was not authorized under s. 6 (1) (*i*) of the Act, the provisions of which were applicable to the case, and the Minister could not act under s. 6 (2) in contravention of what was prescribed under s. 6 (1) (*i*); further, there was evidence, uncontradicted, that the advice and services of the English company were worth the amounts paid; further, s. 6 (2) did not apply to the facts: the sums claimed as deductions were not "expenses" within the meaning of s. 6 (2) (which contemplates expenses in the ordinary course of business); they were the price or consideration of the contract and of the due performance by the English company of its obligations; without them there would have been no contract and appellant would not have been in business. (The opinion was expressed that the assessment should be set aside to all intents and purposes, but, in view of conclusions by Hudson, Kellock and Estey JJ. that the matter should be referred back to the Minister, such disposition was agreed to).

Per Hudson J.: S. 6 (1) (*i*) of the Act did not exclude the exercise of the Minister's discretion under s. 6 (2) under which he proceeded. The sums for which appellant claimed deductions could not be considered as part of its "net profit or gain" under s. 3, and there should be special reasons to support the disallowance. The Minister's ruling did not disclose reasons. The Court should know the reasons, so as to decide whether or not they are based on sound and fundamental principles. The report of the local inspector should have been before the Court under s. 63 (*g*) of the Act; appellant was entitled to see it and reply to it. The matter should be referred back to the Minister for reconsideration.

Per Kellock J.: Having regard to the matters for which the commissions were paid, s. 6 (1) (*i*) did not apply; and the Minister did not purport to act under it but expressly acted under s. 6 (2). His discretion under s. 6 (2) should be exercised on proper legal principles. Appellant had a statutory right to have deducted, in the computation of its net profits or gains, "expenses wholly, exclusively and necessarily laid out or expended" for the purpose of earning those profits or gains. For the Minister to disallow any excess over what was reasonable or normal for appellant's business, he first had to determine what was reasonable or normal. His formal decision threw no light as to the grounds upon which it rested. He could not ignore the agreement between appellant and the English company nor its legal consequences; and there was nothing before the Court upon which it could be said that there was any unreasonableness attaching to the commissions or to the agreement to pay them. What evidence there was, was to the contrary. The ground of the Minister's decision was unexplained and his decision was made to appear as a purely arbitrary one. Whether the local inspector's report disclosed grounds for the Minister's decision the

Court had no means of knowing. Therefore it was the duty of the Court to refer the case back to the Minister. Further, s. 63 (*g*) of the Act made the report of the local inspector evidence, and appellant was entitled to have it produced to him before the assessments were made and to have an opportunity to meet whatever it contained; and his not having been accorded this right was in itself a ground for setting aside the assessments and sending the case back for further consideration.

Per Estey J.: The Minister acted under s. 6 (2) of the Act, as stated in his decision and the correspondence; also s. 6 (1) (*i*) was inappropriate, in view of the matters for which the commissions were paid; moreover, there was no evidence before the Minister upon which he could determine by whom appellant was controlled "directly or indirectly" within the provision in s. 6 (1) (*i*). The Minister's discretion under s. 6 (2) is a judicial discretion, to be exercised on proper legal principles. Apart from the local inspector's report, which was not produced before the Court, there were no facts before the Minister which provided a basis upon which a discretionary determination could be made that the items in question were excessive within the terms of s. 6 (2). The said report, admitted by the Deputy Minister to have contained representations from the taxpayer, was "relative to the assessment" and should have been filed as required by s. 63 (*g*) of the Act. As it was not so filed, and also as further information might well have been requested from and given by appellant, the case should be referred back to the Deputy Minister as provided under s. 65 (2) of the Act.

Per Kerwin J., dissenting: On the evidence it could not be said definitely that appellant was not "controlled directly or indirectly" by the English company within the meaning of s. 6 (1) (*i*) of the Act; in any event, s. 6 (2) (enacted in its present form subsequently to the enactment of s. 6 (1) (*i*)) conferred upon the Minister a power which he might exercise even if appellant had been able to bring itself within s. 6 (1) (*i*), and that power is a purely administrative one. Even if it were held to be of a quasi-judicial nature, appellant was given a fair opportunity to be heard and to make its representations, and there was nothing to indicate that the discretion was not exercised on proper legal principles. Appellant's payments to the English company fell within the term "expense" in s. 6 (2). As the substantial matter in the appeal to the Deputy Minister (acting for the Minister) was the same as what was involved in the exercise of his discretion, the decision in *Local Government Board* v. *Arlidge*, [1915] A.C. 120, not only justifies but requires a decision that he was not obliged to produce any report from the local inspector.

It was held (*per* Kerwin, Hudson, Kellock and Estey JJ.; the Chief Justice not expressly dealing with the matter) that the Minister's duty in this case came within his power of delegation under s. 75 (2) of the Act.

APPEAL from the judgment of the Honourable Mr. Justice Cameron, Deputy Judge of the Exchequer Court of Canada (1), dismissing the present appellant's appeal

(1) [1945] Ex. C.R. 174; [1945] 4 D.L.R. 94; [1945] C.T.C. 177.

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from the affirmance by the Minister of National Revenue (acting by the Deputy Minister of National Revenue for Taxation) of the assessment made against the appellant in respect of income tax and excess profits tax for the years 1940, 1941 and 1942, which assessment disallowed (except as to the sum of $7,500 for each year), as deductions in computing the appellant's taxable income, sums paid ($17,381.94 in 1940; $29,325.85 in 1941; and $39,480.91 in 1942) by the appellant to Wrights' Ropes Limited, of Birmingham, England, as commissions pursuant to the provisions of an agreement dated 12th September, 1935.

The material facts of the case and the questions involved in the appeal are sufficiently stated in the reasons for judgment in this Court now reported.

By the judgment of the Court (Kerwin J dissenting), the appeal was allowed with costs, and the matter was referred back to the Minister to be dealt with by him according to the reasons of the majority of the Court. (The matter of costs in the Exchequer Court, overlooked when the reasons were first given, was later spoken to, and the Judges forming the majority of the Court decided that there be added to their reasons a holding that the appellant was entitled to its costs in the Exchequer Court).

H. R. Bray K.C. for the appellant.

R. Forsyth K.C. and *H. H. Stikeman* for the respondent.

THE CHIEF JUSTICE.—The Appeal Case states the present litigation as follows:—

(1) This is an appeal by the appellant from the judgment of the Honourable Mr. Justice J.C.A. Cameron delivered on the 3rd day of August, 1945, on an appeal by the appellant from the decision of the Honourable the Minister of National Revenue affirming the assessment made against the appellant under the provisions of The Income War Tax Act in respect of its taxable income and in respect of Excess Profits Tax for the years 1940, 1941 and 1942.

(2) Pursuant to the provisions of an Agreement made between the appellant and Wrights' Ropes Limited of Birmingham, England, dated September 12, 1935, the appellant has made certain annual payments to Wrights' Ropes Limited.

* * *

(12) From the said judgment the appellant appeals to the Supreme Court of Canada.

The reasons for appeal as given in the notice of appeal from the assessment, were as follows:

(1) That the commissions paid by the appellant to Wrights' Ropes Limited were an obligation imposed on the appellant by a valid contract.

(2) That the opinion of the Minister herein was not based on a consideration of the facts.

(3) That the opinion of the Minister herein was unreasonable and was not formulated in accordance with the law.

(4) That no opportunity has been given to the appellant to refute any material that may have been laid before the Minister of National Revenue or the Commissioner of Income Tax relative to the said assessment and which may be prejudicial to the interests of the appellant.

The decision of the Minister of National Revenue was that, having duly considered the facts and having exercised his discretion under the provisions of subsection 2 of section 6 of the *Income War Tax Act,* he affirmed the assessment and disallowed the sums already mentioned paid to Wrights' Ropes Limited of Birmingham, as expenses or deductions for the purposes of the said Act. "Therefore, on these and related grounds and by reason of other provisions of the Income War Tax Act and Excess Profits Tax Act," said assessment was affirmed.

Subsequent to the filing of a Notice of Dissatisfaction, the case was carried to the Exchequer Court of Canada, where the judgment was that the appeal failed and should be dismissed with costs.

The appellant is incorporated under the Dominion *Companies Act.*

The sections of the *Income War Tax Act* having to do with the issues raised are as follows:—

Section 6 (1):

In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

* * *

(i) any sums charged by any company or organization outside of Canada to a Canadian company, branch or organization, in respect of management fees or services or for the right to use patents, processes or formulae presently known or yet to be discovered, or in connection with the letting or leasing of anything used in Canada, irrespective of whether a price or charge is agreed upon or otherwise; but only if the company or organization to which such sums are payable, or the company in Canada, is controlled directly or indirectly by any company or group of companies or persons within or without Canada, which are affiliated one with the other by the holding of shares or by agreements or

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otherwise; provided that a portion of any such charges may be allowed as a deduction if the Minister is satisfied that such charges are reasonable for services actually rendered or for the use of anything actually used in Canada.

Section 6 (2):

The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

The Excess Profits Tax Act, 1940, provides as follows:

Section 8:

In computing the amount of profits to be assessed, subsections one and two of section six of the *Income War Tax Act* shall, *mutatis mutandis,* apply as if enacted in this Act * * *

The payments claimed by the appellant as deductible expenses were made pursuant to paragraph (5) of the agreement between the appellant and the Birmingham company and the evidence establishes that the payments were made in fact in accordance with said agreement. Paragraph (5) reads as follows:

In consideration of the due performance by Wrights' of their obligations under this Agreement the Canadian Company will pay to Wrights' a commission at the rate of five per centum upon all cash received in respect of the net selling price of all wire ropes both manufactured and sold by the Canadian Company after the date of this Agreement * * *

There is no dispute that the amounts paid by the appellant to the Birmingham company were an obligation imposed by a valid contract. The learned trial judge was of the opinion that the assessments were made, in so far as the matters in dispute are concerned, under section 6 (2) and not under section 6 (1) (*i*). He said that was clearly established by the letter of August 13, 1943, and by the decision of the Minister, dated September 26, 1944.

The contention of the appellant is that the Minister should have considered the matter under section 6 (1) (*i*) of the Act and should have found:

(1) That the commissions paid by the appellant to the English company were in respect of the matters mentioned in the first part of the subsection and

(2) That the appellant was not controlled by Wrights' Ropes Limited and

(3) That, therefore, as the items claimed as deductions were not paid to a controlling company, they could not be disallowed, but, in fact, should be allowed in full.

The learned trial judge, however, found that the evidence was not at all clear that the appellant was not controlled by the English company.

There is, however, in the record a consent signed on behalf of both parties whereby they agreed that at all times pertinent to the issues in this appeal, Wrights' Ropes Limited held 49·86 per cent. of the shares and not 50 per cent. of the shares of the appellant.

This was an admission binding the respondent; and it seems, therefore, difficult to understand why the judgment of the learned trial judge expresses a doubt as to that fact.

It would follow that section 6 (1) (*i*) does apply to the case under consideration, for the appellant, as a result of the consent so filed by the parties, must be taken not to be controlled directly or indirectly by the English company. It is only when the Canadian company is controlled by the company without Canada that a deduction of the sums charged by the company outside of Canada for "services" shall not be allowed as a deduction.

Nor in my view can it be said that, irrespective of the provisions contained in section 6 (1) (*i*), the Minister may disallow the deduction under section 6 (2).

If the case is covered by section 6 (1) (*i*), with due respect, it can not come under 6 (2); it is already provided for and that is the end of it. I can not see how the Minister can act under section 6 (2) in contravention of what is prescribed under section 6 (1) (*i*).

I can not find any good reason for excluding section 6 (1) (*i*) as the learned trial judge has done and, to my mind, that would be sufficient to allow the appeal, because the sums paid by the appellant to the English company in respect of services were not paid to a company controlling the appellant, and it is of no concern to inquire what services were supplied, how frequently they were supplied or how important they were.

However, the managing director testified that the advice and services were worth the amounts paid and his evidence was not contradicted.

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But further and in any event, I can not see my way to apply section 6 (2) to the present case.

The section says:

> The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

Of course, the discretion must be exercised on proper legal principles. (*Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1)).

Whatever may be said about the question whether the record discloses that, in the premises, the Minister exercised or not his discretion, I am distinctly of opinion that section 6 (2) does not apply to the facts herein.

What the Minister may disallow is "any expense".

The sums claimed as deduction by the appellant are not expenses within the meaning of the section, they were sums paid by the appellant as a condition *sine qua non* of the agreement between it and the English company. These sums were the price or consideration of the contract and of the due performance by the English company of its obligations under the agreement. No other consideration moving from the Canadian company to the English company was either contained or represented in the agreement. Without them, there would have been no contract at all. It is the essential condition of its very existence. But for the payment so agreed upon and made by the appellant to the English company, there would have been no contract; and but for that contract, the appellant would not have been in business.

The effect of the Minister's decision is really to nullify the consideration clause in the agreement and to leave the latter in a modified or amended form to which, of course, the parties never agreed.

I fail to see where in section 6 (2) the Minister found the power and authority to act as he has done.

The sums paid by the appellant were not expenses in the ordinary course of their business, and those are the expenses which are contemplated by section 6 (2).

Here, the sums which the Minister refused to allow as deductions constitute the very price and the only price

(1) [1940] A.C. 127).

paid by the appellant for the contract which they made with the English company; and I am unable to read section 6 (2) as being intended to cover a case such as this.

Both therefore for the reason that under 6 (1) (*i*) the appellant has been proved and indeed admitted not to be controlled by the English company and, as a consequence, the sums paid by the appellant are properly deductible and can not be disallowed, but also because, in any event, section 6 (2) does not apply to the present case, I am of opinion that the appeal should be allowed with costs and that the assessment should accordingly be set aside to all intents and purposes; but, in view of the conclusions reached by the other Members of the Court who think that the matter should be referred back to the Minister under the provisions of section 65 (2) of the Act, I will agree with them in the disposition of the present case.

KERWIN J. (dissenting).—This is an appeal by Wrights' Canadian Ropes Limited, a company incorporated under the Dominion *Companies Act,* from a judgment of the Exchequer Court dismissing its appeal from the respondent's affirmation of the appellant's assessments for the years 1940, 1941 and 1942, wherein commissions paid by the appellant to an English company called Wrights' Ropes Limited, Birmingham, were disallowed as deductions from income for those years, except as to the sum of $7,500 in each year.

The commissions were paid pursuant to an agreement dated September 12th, 1935, between Wrights' Ropes Limited, Birmingham, (Wrights'), Charles Hirst and Son Ltd. (Hirst's) and the appellant, which agreement was supplemental to an earlier one dated May 19th, 1931. The pertinent terms are, I think, fairly summarized in the appellant's factum and I transcribe them substantially as follows:—

(*a*) The English company should not sell wire rope in Western Canada (west of the Ontario-Manitoba boundary).

(*b*) Any orders from Western Canada received by the English company to be transmitted by it to the appellant.

(*c*) The English company must select and test all wire purchased by the appellant from Hirst's.

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(*d*) The English company is to place at the disposal of the appellant, at request, all its technical knowledge and generally advise the appellant on manufacture and marketing.

(*e*) In payment for such services and for territory, the appellant is to pay the English company a commission of 5 per cent. on all sales made by it of its manufactured product.

Pursuant thereto the following amounts were paid to Wrights' by the appellant: in 1940, $17,381.94; in 1941, $29,325.85; in 1942, $39,480.91; and these were claimed by the appellant as deductions from income in its returns for those years. On August 13th, 1943, the Inspector of Income Tax at Vancouver notified the appellant that the Minister of National Revenue was about to exercise his discretion under subsection 2 of section 6 and subsection 2 of section 75 of the *Income War Tax Act* in connection with these payments and invited the appellant to submit written representations for consideration. The appellant in reply forwarded the agreements of 19th May, 1931, and 12th September, 1935.

On October 9th, 1943, the Inspector further notified the appellant that it was proposed to recommend to the Minister that commissions paid to Wrights' (called by the Inspector "the controlling company") in 1940, 1941 and 1942 be disallowed as deductions except as to the sum of $7,500 in each year. The appellant replied on 21st October, 1943, that it had nothing further to add but on 29th October, 1943, it advised the Inspector that Wrights' did not have the controlling interest in the appellant company but held fifty per cent. of the shares, the other fifty per cent. being held by Hirst's.

The Minister by the Deputy Minister of National Revenue for Taxation exercised his discretion in the manner suggested and on 10th May, 1944, notices of assessment were mailed to the appellant, all payments to Wrights' by way of commissions on sales being disallowed as deductions except for the sum of $7,500 in each year.

The appellant gave notice of appeal on 29th May, 1944, and on 26th September, 1944, the Minister of National Revenue, acting by the Deputy Minister, affirmed the as-

sessments. On 11th October, 1944, the appellant filed his Notice of Dissatisfaction and, by Reply dated 8th January, 1945, the Minister, again through the Deputy Minister, affirmed the assessments as levied. From that affirmation an appeal was taken to the Exchequer Court.

A formal admission in writing was filed in that Court, signed by the solicitors for both parties, that Wrights' held 49·86 per cent. of the shares referred to in the letter of October 29th, 1943, and not 50 per cent. as therein stated. It was proved at the trial that there was no relation between Wrights' and Hirst's "as far as stock interest goes." The appellant desired that these two matters be shown in order to avail itself, if possible, of subsection 1, paragraph (*i*), of section 6 of the *Income War Tax Act*. The Deputy Judge of the Exchequer Court, Cameron J., decided that it did not apply but that the discretion of the Minister, conferred on him by subsection 2 of section 6, had been properly exercised. These two enactments read as follows:—

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*i*) any sums charged by any company or organization outside of Canada to a Canadian company, branch or organization, in respect of management fees or services or for the right to use patents, processes or formulae presently known or yet to be discovered, or in connection with the letting or leasing of anything used in Canada, irrespective of whether a price or charge is agreed upon or otherwise; but only if the company or organization to which such sums are payable, or the company in Canada, is controlled directly or indirectly by any company or group of companies or persons within or without Canada, which are affiliated one with the other by the holding of shares or by agreements or otherwise; provided that a portion of any such charges may be allowed as a deduction if the Minister is satisfied that such charges are reasonable for services actually rendered or for the use of anything actually used in Canada;

2. The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

For the appellant it is argued that subsection 2 is a general provision which is inapplicable because the circumstances bring the case within the special category dealt with in paragraph (*i*) of subsection 1. Related to the facts of this case that paragraph, it is said, means

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this:—In computing profits or gains, a deduction is not to be allowed for management fees or services charged by a company outside of Canada to a Canadian company although by the proviso power is given the Minister to allow as a deduction a portion of any such fees or services; however, by virtue of the middle part of the paragraph, introduced by the words "but only", the prohibition does not apply at all if direct or indirect control of the Canadian company by the receiving company (outside of Canada) is lacking. It is said that the English company does not control the appellant directly or indirectly since it holds only 49·86 per cent. of the total issued capital stock of fifteen hundred shares. It is pointed out that it is admitted that the payments to the English company were made in pursuance of a valid contract and, therefore, it is argued, while subsection 1, paragraph (*i*), of section 6 is in negative terms, these payments should be allowed.

Now, in the first place, the "sums charged" shall not be allowed as a deduction if either the receiving company or the paying company is controlled "by any company or group of companies or persons within or without Canada, which are affiliated one with the other by the holding of shares or by agreements or otherwise." The mere fact that Wrights' does not own a majority of the shares of the appellant and that there was no relation between Wrights' and Hirst's "as far as stock interest goes" is not sufficient to bring the appellant within the negative words of subsection 1, paragraph (*i*). Furthermore, it may be noted that the only other shareholders of the appellant are three residents of Canada and in the agreement of May 19th, 1931, at which time the appellant was known as William Cooke and Co. (Canada) Limited (for brevity called "Cooke's"), it was recited that "Wrights' and their nominees hold one-half of the issued share capital in Cooke's, and Hirst's and their nominees hold the other half of such issued capital." Because of these additional factors, I agree with the Deputy Judge that it cannot be said definitely that the appellant is not "controlled directly or indirectly" by Wrights' within the meaning of the paragraph.

In any event, paragraph (*i*) was already in the Act, having been enacted in 1935, when subsection 2 was passed in 1940. It is true that subsection 2 was enacted in lieu of an earlier subsection 2 but the wording thereof is so different and the powers conferred upon the Minister by the present subsection are so greatly extended that it must be taken as a later expression of the will of Parliament. A comparison of the present wording of subsection 2 given above with the earlier enactment transcribed below, will, I think, make the matter clearer:—

2. The Minister may disallow as an expense the whole or any portion of any salary, bonus, commission or director's fee which in his opinion is in excess of what is reasonable for the services performed.

Therefore, by subsection 2 of section 6, Parliament conferred upon the Minister a power which he might exercise even if the appellant had been able to bring itself within paragraph (*i*), and that power is a purely administrative one. Even if it were held to be of a quasi-judicial nature, the appellant was given a fair opportunity to be heard and to make its representations, and there is nothing to indicate that the discretion was not exercised on proper legal principles. The fact that subsection 3 of section 6 concludes "The decision of the Minister on any question arising under this subsection shall be final and conclusive", and that subsection 4 ends with the sentence, "The determination of the Minister hereunder shall be final and conclusive", cannot alter the construction of subsection 2, Subsections 3 and 4 deal with entirely different matters and it will be time enough to deal with the effect of the concluding sentences therein when the occasion arises. The payments made to Wrights' fall within the term "expense" in subsection 2; if this were not so, the appellant would have difficulty in showing that they were disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

It was argued that since the sum of $7,500 was allowed in each year, although the three years differed widely in volume of sales as reflected in income, it was evident that the discretion had not been properly exercised, but

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the answer is that the Deputy Minister might very well consider that, whatever the volume, the amount allowed was reasonable or normal for the appellant's business.

It was contended that the Minister was not empowered to delegate his duty under section 59 of considering the appeal from the original assessment. In order to appreciate this argument, it is necessary, first of all, to refer to subsection 2 of section 75:

> 2. The Minister may make any regulations deemed necessary for carrying this Act into effect, and may thereby authorize the Commissioner of Income Tax to exercise such of the powers conferred by this Act upon the Minister, as may, in the opinion of the Minister, be conveniently exercised by the Commissioner of Income Tax.

In accordance therewith the Minister, on August 8th, 1940, signed the following authorization to the Commissioner of Income Tax:—

> To whom it may concern:
>
> Be it hereby known that under and by virtue of the provisions of the Income War Tax Act, and particularly section 75 thereof, and the provisions of the Excess Profits Tax Act, 1940, and particularly section 14 thereof, that I do hereby authorize the Commissioner of Income Tax to exercise the powers conferred by the said Acts upon me, as fully and effectively as I could do myself, as I am of the opinion that such powers may be the more conveniently exercised by the said Commissioner of Income Tax.
>
> Dated at Ottawa this 8th day of August, A.D. 1940.
>
> (sgd) COLIN GIBSON,
>
> Minister of National Revenue.

By section 1 of chapter 24 of the Statutes of 1943-44, authority was given the Governor in Council to appoint a Deputy Minister of National Revenue for Taxation and it was provided that wherever in any statute, regulation, authorization or order there appears the expression "Commissioner of Income Tax", the said statute, regulation, authorization or order shall be read and construed as if the expression "Deputy Minister of National Revenue for Taxation" were substituted therefor. It is not disputed that Mr. C. Fraser Elliott was the Commissioner of Income Tax and is now the Deputy Minister of National Revenue for Taxation, nor is it denied, if subsection 2 of section 6 applies so as to permit the Minister to exercise the discretion referred to therein, that such discretion could be exercised by the Deputy Minister in making the original assessment.

Having received notice of that original assessment, the appellant company objected to the amount thereof and duly served a notice of appeal upon the Minister. It is at this stage that section 59 may be conveniently looked at:—

> 59. Upon receipt of the said notice of appeal, the Minister shall duly consider the same and shall affirm or amend the assessment appealed against and shall notify the appellant of his decision by registered post.

Now, the discretion having in fact been exercised under subsection 2 of section 6 by the Deputy Minister and the notice of assessment having been given by him on behalf of the Minister, the argument is that section 59, in enacting that "the Minister shall duly consider" the appeal, imposed a duty upon him which could not be delegated under the permission given by subsection 2 of section 75 to the Minister to authorize the person who is now the Deputy Minister to exercise "powers" conferred by the Act upon the Minister. Counsel for the appellant drew a distinction between powers and what he described as a duty under section 59. While it is true that a duty in the sense of an obligation is imposed upon the Minister by that section, it is none the less true that the powers thereby invested in him to hear the appeal must be included within the powers that he is authorized to delegate by subsection 2 of section 75.

The final contention on behalf of the appellant is that in deciding the appeal the Deputy Minister improperly received evidence not known or made available to the appellant and that no opportunity was given it to controvert the facts or statements, the subject matter of that evidence. It is made abundantly clear in the examination for discovery of Mr. Elliott, which was put in at the trial, that in hearing the appeal under section 59 he had before him nothing but what he had already considered in exercising the discretion under subsection 2 of section 6, excepting, of course, matters to which the appellant drew his attention. The material included one or more reports from the Vancouver inspector. In connection with the appeal certain remarks in *The King*

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v. *Noxzema Chemical Company of Canada, Ltd.* (1) may be reiterated and emphasized. While that case was concerned with the *Special War Revenue Act,* reference was made to the decision of the Judicial Committee in *Pioneer Laundry* v. *Minister of National Revenue* (2), where the *Income War Tax Act* was in question although in connection with a decision of the Minister as to depreciation under section 5 (*a*) as it then stood. It was pointed out at page 185 of the *Noxzema* case (1) that while there was no appeal provided for in terms from such a decision, there was an appeal from the determination as to the amount of taxes to be paid. Similarly, in the present case, while there is no appeal from the exercise of discretion under subsection 2 of section 6, there is an appeal from the assessment to the Deputy Minister and ultimately to the Courts. On my construction of the relevant provisions, the substantial matter in the appeal to the Deputy Minister was the same as what was involved in the exercise of the discretion, and the decision of the House of Lords in *Local Government Board* v. *Arlidge* (3) not only justifies but requires a decision that the Deputy Minister is not obliged to produce any report from the Inspector.

This is the conclusion at which the local judge arrived in the present case, although he stated that it was not without some doubt, in view of the following extract from the speech of Lord Loreburn in *Board of Education* v. *Rice* (4):—

> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

As the local judge pointed out, the decision in the *Rice* case (5) was referred to with approval by Davis J. in the *Noxzema* case (1).

The decisions in the *Rice* (5) and *Arlidge* (3) cases must be read together. The former illustrates the principle that any power conferred upon a Government Department by statute must be exercised in strict conformity

(1) [1942] S.C.R. 178.
(2) [1940] A.C. 127.
(3) [1915] A.C. 120.
(4) [1911] A.C. 179, at 182.
(5) [1911] A.C. 179.

with the terms of the statute, and that any action by such department, which is not so exercised, should be treated by a court of law as invalid. Lord Loreburn's speech, including the extract copied above, was referred to in the *Arlidge* case (1) but all the peers had no difficulty in holding that although the appeal to the local Government Board under the *Housing, Town Planning, etc., Act,* 1909, required the Board to act judicially, there was no obligation upon it to produce a report made to it by one of its inspectors. This is particularly applicable in the present case when, as I have already indicated, the appeal to the Deputy Minister really involved the same matter as had come before him when exercising the discretion conferred by subsection 2 of section 6. This disposes of the last contention advanced on behalf of the appellant.

The discretion was exercised not only in connection with income tax but also excess profits tax, as section 8 of *The Excess Profits Tax Act, 1940,* provides:—

> 8. In computing the amount of profits to be assessed, subsections one and two of section six of the *Income War Tax Act* shall, *mutatis mutandis,* apply as if enacted in this Act and no deduction shall be allowed in respect of the following:
>
> (*a*) the tax payable under this Act in respect of any taxation period;
>
> (*b*) any expense which the Minister in his discretion may determine to be in excess of what is reasonable and normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the amount of profits.

By virtue of section 14 of that Act, subsection 2 of section 75 of the *Income War Tax Act* applies, *mutatis mutandis,* to matters arising under the provisions of the former. What has been said with reference to the income tax assessment applies equally to the excess profits tax assessment.

The appeal should be dismissed with costs.

HUDSON J.—The question for decision in this appeal is whether or not certain sums of money paid out of earnings by the appellant company could properly be

(1) [1915] A.C. 120.

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disallowed by the Minister under section 6 (2) of the *Income War Tax Act* and section 8 of *The Excess Profits Tax Act, 1940*. The sections read as follows:

Sec. 6 (2):

The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

Sec. 8:

In computing the amount of profits to be assessed, subsections one and two of section six of the *Income War Tax Act* shall, *mutatis mutandis*, apply as if enacted in this Act and no deduction shall be allowed in respect of the following:

* * *

(*b*) any expense which the Minister in his discretion may determine to be in excess of what is reasonable and normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the amount of profits.

The facts in evidence are set forth in the judgment of the Court below.

It appears that the payments in question were all made in fulfilment of legal obligations arising under the terms of agreements made by the appellant with two other companies some years prior to the taxation years in question. The evidence does not indicate any inadequacy in consideration for the payments made, nor is there any suggestion of fraud.

The Minister professed to act under the provisions of the above sections 6 (2) and 8, but gives no reasons for his decision.

The Court is warranted in interfering with the exercise of the Minister's discretion if such discretion has not been exercised in accordance with "sound and fundamental principles": see *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1); *The King* v. *Noxzema Chemical Co. of Canada Ltd.* (2).

On the facts before us it would appear that the taxes in question were imposed in respect of moneys received by the appellant but which it was in effect legally bound to pay to third parties. Such payments could not be con-

(1) [1939] S.C.R. 1, [1940] A.C. 127.

(2) [1942] S.C.R. 178.

sidered as part of the "net profit or gain" of the appellant under section 3 of the *Income War Tax Act,* and there should be special reasons to support such a departure from this general rule as appears here.

The ruling of the Minister does not disclose any reasons. No doubt he had what appeared to him perfectly sound reasons for his decision, but none are before us. It is not for the Court to weigh the reasons but we are entitled to know what they are, so that we may decide whether or not they are based on sound and fundamental principles.

The Minister also had before him a report from the local Inspector of Taxation but that report's contents is not in evidence. It may have had an important bearing on his decision. It should have been before the Court. Section 63 (*g*) of the Act provides:

Proceedings in Exchequer Court.

63. Within two months from the date of the mailing of the said reply, the Minister shall cause to be transmitted to the registrar of the Exchequer Court of Canada, to be filed in the said Court, typewritten copies of the following documents:

* * *

(*g*) All other documents and papers relative to the assessment under appeal.

It was strongly contended on behalf of the appellant that this document should have been before the Court on the appeal, so that evidence could be given on its behalf in rebuttal to any statements and such answers to arguments advanced which it thought advisable.

It was argued on behalf of the Minister that there was no duty on the part of the Minister to produce a document such as this, which was in its nature confidential.

There are many good reasons for not compelling the production of such report. These reasons are set forth in the various opinions of the judges in England in the case of *Local Government Board* v. *Arlidge* (1), but these, I think, are not applicable to the case here and, in any event, as the report should be before the Court under the provision of section 63 (*g*) of our Act, the appellant would have a right to see it and make such reply as it deems advisable.

(1) [1915] A.C. 120.

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It was also contended by the appellant that the provisions of section 6 (1) (*i*) and section 6 (2), in so far as they were applicable to the case at bar, were mutually exclusive. The Minister proceeded under section 6 (2) and I am satisfied that in the present case section 6 (1) (*i*) does not in any way exclude the exercise of discretion under the former section.

The appellant also contended that the Minister had no power to delegate his authority to decide this matter, but that, I think, is disposed of by section 75 (2) of the Act.

The matter should be referred back to the Minister for reconsideration under the provisions of section 65 (2) of the Act. The appellant should have the costs of this appeal.

KELLOCK J.—This is an appeal from the judgment of the Exchequer Court, Cameron J., dated 3rd of August, 1945, dismissing an appeal by the appellant from the decision of the Minister of National Revenue which in turn affirmed an assessment made against the appellant for income and excess profits taxes for the years 1940, 1941 and 1942. In those years commissions of $17,381.94, $29,325.85 and $39,480.91, respectively, were paid by the appellant to an English company, Wrights' Ropes Limited, upon the terms of an agreement in writing between them. In lieu of these amounts, a uniform sum of $7,500 was allowed in respect of each year as an expense in determining the taxable income or profits of the appellant and the excess over that amount was disallowed. Before the assessments were made, all apparently being made at the same time, the local Inspector of Income Tax at Vancouver wrote the appellant on the 13th of August, 1943, saying that "by virtue of the powers vested in the Minister under subsection 2 of section 6 and subsection 2 of section 75 of the Income War Tax Act, discretion is about to be exercised" in connection with the "commission on sale of wire rope manufactured, paid to Wrights' Ropes Limited." The appellant was invited to submit written representations for consideration. Following this, the appellant sent to the local Inspector copies of two agreements dated respectively May 19, 1931, and

September 12, 1935, under the latter of which the commissions had been paid. On the 9th of October, 1943, the local Inspector advised the appellant that he proposed to recommend to the Minister the action ultimately adopted and invited further representations, either verbal or written, to be made before the 15th of October. To this letter the appellant replied that it had nothing further to add, but by letter of the 29th of October the appellant referred to the letter of October 9th in which the Inspector had referred to the commissions as having been paid to the "controlling" company. In answer the appellant stated that this was not a correct statement, as the English company did not have a controlling interest in the appellant but held 50 per cent. of the shares, the other 50 per cent. being held by another English company, also party to the agreements, namely, Charles Hirst & Sons Limited. It now appears that the real situation with regard to the ownership of shares in the appellant company is that Wrights' Ropes Limited held 49·86 per cent. and not 50 per cent.

It is not necessary to refer with particularity to the course of proceedings followed subsequent to the assessments. The contentions of the appellant are in substance, (1) that sec. 6 (1) (*i*) governs and that, as the English company, Wrights' Ropes Limited, hereinafter referred to as Wrights', does not control the appellant, the clause does not warrant any disallowance; (2) that subsection 2 of sec. 6 is not applicable as the two provisions are mutually exclusive; (3) whether the Minister acted under subsection (1) (*i*) or subsection 2, he was performing a quasi-judicial function and the discretion was not properly exercised; (4) that the Minister acted upon evidence not known or made available to the appellant and which the appellant had no opportunity of controverting; and (5) that section 75 (2) authorizes the Minister to delegate "powers," whereas the function falling upon the Minister under section 6 (2) was a "duty" and therefore not within the power of delegation.

Dealing with the first contention, my opinion is that subsection (1) (*i*) of section 6 does not apply. Under the agreement of 12th of September, 1935, which displaced the earlier agreement except as to rights already accrued under that agreement, the appellant became obligated

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to pay to Wrights' a commission of 5 per cent. upon its cash receipts from the sale of wire ropes in consideration "of the due performance by Wrights' of their obligations" under the agreement. Wrights' was a manufacturer of wire ropes and prior to the date of the first agreement was engaged in selling them in Western Canada. By the first agreement, Wrights' transferred this business to the appellant and agreed to stay out of the territory and to refer all enquiries and orders to the appellant. Under the later agreement, which was entered into after the business had been transferred to the appellant, Wrights' agreed (*a*) not to supply for sale or sell any wire ropes in Western Canada, (*b*) to refer all enquiries or orders from Western Canada to the appellant, (*c*) with respect to any enquiry for goods which the appellant should be unable or unwilling to fill and which could be manufactured by Wrights', the appellant was to act as agent for Wrights' in connection with such business and Wrights' was to pay the latter a commission, (*d*) Wrights' was to pay the appellant a commission in respect of sales which might be made by a former agent of Wrights' out of stocks still remaining in the hands of that agent, (*e*) Wrights' were to act as technical advisors of the appellant, (*f*) to supply the appellant with information, and (*g*) to supervise the supply by the Hirst Company to the appellant of goods ordered by the appellant from Hirst's. These terms appear to be identical with those contained in the first agreement.

Accordingly, the sums payable by the appellant to Wrights' were not merely paid "in respect of management fees or services" and it is not shown and no doubt could not be shown how much of the sums were so paid. There is nothing in either agreement as to rights to use patented processes or formulae or in connection with the letting or leasing of anything from the one company to the other, so that it could not be argued that the last part of the subsection could have any application. Accordingly, in my opinion, for the reasons given, the subsection has no application at all and it is not necessary to consider the question of control of the appellant company. It is apparent from the correspondence already referred to and from the formal decision of the Minister

on the appeal to him from the assessments, that the Minister was of the same view and did not purport to act under the provisions of subsection (1) (*i*) but expressly under subsection 2.

It will be convenient at this point to consider the appellant's fourth contention. It was shown in evidence that in reaching his decision, the Minister, or rather the Deputy Minister acting for him, had before him a report of the local Inspector which was not made known to the appellant. Counsel for the respondent objected in the course of the proceedings in the Exchequer Court to its production and it was not produced. The decision of the Minister states that he has duly considered the facts as set forth in the Notice of Appeal "and matters thereto related." The document also states that "notice of such decision is hereby given pursuant to Section 59 of the Act and is based on the facts presently before the Minister."

Before us the respondent contended that the decision of the House of Lords in *Local Government Board* v. *Arlidge* (1) supported the stand taken and that the appellant was not entitled to see the report.

In my opinion, the answer to this contention is to be found in the *Income War Tax Act* itself. The Act by sec. 60 provides for an appeal to the Exchequer Court of Canada and sec. 63 imposes upon the Minister the obligation of causing to be transmitted to the registrar of the Court for filing in that Court a number of documents including "all other documents and papers relative to the assessment under appeal" (clause *g*). I know of no statutory provision derogating from the imperative terms of this section. The *Arlidge* case (1) involved quite different statutory provisions and, when the reasons for judgment in that case are examined, their relevancy to the legislation under consideration in the case at bar, in my opinion, disappears. In *Arlidge's* case (1), it was decided, among other things, that a report made by an Inspector of the Local Government Board to that Board upon a public inquiry held by him into the matter there in question, namely, the refusal of a local authority to determine a previous order made by it for the closing of a dwelling house of the respondent's, need not be produced to the respondent in connection with

(1) [1915] A.C. 120.

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his appeal to the Board from that refusal. Before the legislation there in question, such an appeal had been to quarter sessions but a change was made by the Act of 1909 which provided that the appeal should go to the Board. The Act also provided that in the case of an appeal, the procedure as to everything, including costs, was to be such as the Board might by its rules determine, provided that the rules should provide that the Board should not dismiss any appeal without having first held a public local inquiry.

Prior to this legislation, the Board was already in existence as a Department of State, and the evidence established that the holding of local inquiries by the Board was directed under many other statutes and that it had always been the practice of the Board to treat the reports of their Inspectors on such inquiries as confidential documents for their own use. The House of Lords held that Parliament in enacting the 1909 legislation must have intended that the existing procedure of the Board should continue to be followed. Lord Haldane at p. 132 said:

> Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, *in the absence of any declaration to the contrary,* to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently.

Lord Moulton at p. 150 said:

> Parliament has wisely laid down certan rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. These rules are beyond the criticism of the Courts, and it is not their business to add to or to take away from them, or even to discuss whether in the opinion of the individual members of the Court they are adequate or not.

Lord Parmoor at p. 143 said:

> It was well known in 1909 that the Local Government Board did not in ordinary cases publish the reports of inspectors before whom local enquiries were held. Unless an opposite intention is declared, or can be inferred, a statutory form of procedure should be construed so as to conform with prevailing practice.

However, he also said at p. 144:

If the report of the inspector could be regarded as *in the nature of evidence* tendered either by the local authority or the owner of the premises, there would be a strong reason for publicity. In my opinion it is nothing of the kind, and is simply a step in the statutory procedure for enabling an administrative body, such as the Local Government Board, to hear effectively an appeal against the order of the local authority.

In the case at bar, the Statute by section 63 (*g*) has, in my view, made the report of the local Inspector here in question, evidence. *Arlidge's* case (1), therefore, is an authority in favour of the appellant rather than in favour of the respondent.

In *Board of Education* v. *Rice* (2), Lord Loreburn at p. 182 said:

Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy *for correcting or contradicting any relevant statement* prejudical to their view.

In *The King* v. *Noxzema Chemical Company of Canada Ltd.* (3), Davis J. said at p. 180:

If, on the other hand, the function of the Minister under the section may be said to be of a quasi-judicial nature, even then all that was necessary was that the taxpayer be given a fair opportunity to be heard in the controversy; and to *correct or to contradict any relevant statement prejudicial to its interests.*

It is admitted by the respondent that the Minister, or his Deputy, was acting in the case of the appellant in a quasi-judicial character. In my opinion, therefore, the appellant was entitled to have produced to him before the assessments were made, the report in question and to have an opportunity to meet whatever it con-

(1) [1915] A.C. 120.
(2) [1911] A.C. 179.
(3) [1942] S.C.R. 178.

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tained. It could not be contended it was not a document "relative" to the assessment under appeal. Not having been accorded this right, I think the appeal must be allowed and the assessments set aside on this ground alone and the case be sent back for further consideration to the court below were nothing more involved in the appeal.

Coming to the appellant's third contention, this involves the question of the proper construction of subsection 2 of sec. 6. It reads as follows:

> The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

Section 8 (*b*) of *The Excess Profits Tax Act, 1940,* is virtually in the same terms. As already mentioned, it is not disputed, but rather expressly admitted, by the respondent that the duty cast upon the Minister under this provision is of a quasi-judicial nature. In his factum counsel for the respondent says:

> In deciding the appeal, the Court must determine that the assessment was made in accordance with the law. To do this, it must be ascertained that the assessment was issued in compliance with all the statutory provisions of the two Acts and that *no general rules of law outside the statutes* have been contravened. The only statutory requirements in question are those above quoted [i.e. Sec. 6 (2) and Sec. 8 (*b*)], and the only *extra statutory rules* which must be considered are those governing the exercise of the discretion of the Minister of National Revenue conferred upon him by Sec. 6 (2) of the Income War Tax Act and Sec. 8 (*b*) of the Excess Profits Tax Act, 1940. It is submitted that if the statutory requirements and the rules of law regarding the exercise of ministerial discretion have been properly observed throughout, there can be no alternative but to hold that, since the discretion was properly exercised, it cannot be interfered with and that the assesssment was properly levied.

The factum further states as follows:

> That this is one of the cardinal rules of the proper exercise of discretion is indicated by Lord Thankerton, L.C., in the judgment of the Privy Council in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1), where he says "That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles".

The respondent contends that the discretion was exercised by the Minister in accordance with the requirements so stated and was not "arbitrary, vague or fanciful, but

(1) [1940] A.C. 127, at 136.

legal and regular". The language quoted is to be found in the judgment of Lord Halsbury in *Sharp* v. *Wakefield* (1), to which I shall later refer.

In the *Pioneer Laundry* case (2) a claim for depreciation in connection with certain machinery of the taxpayer had been disallowed on the ground that the machinery had been the subject of an allowance for depreciation of approximately 100 per cent. while in the hands of a former owner. In the view of the Department on the facts there present, although the former owner and the then owner were separate legal entities, there had been no actual change in ownership of the machinery, and therefore nothing could be allowed. In his judgment in this Court, which was approved by the Privy Council, Davis J. at p. 4 referred to the opening words of the definition of "income" in sec. 3, viz., the annual "net" profit or gain and to sections 5 (*a*) and 6 (*b*) of the *Income War Tax Act* as they then stood. Section 5 provided that:

> Income as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) Such reasonable amount as the Minister in his discretion may allow for depreciation, * * *

Section 6 (*b*), then as now, provided that in computing the amount of the profits or gains to be assessed, a deduction should not be allowed in respect of any depreciation, depletion or obsolescence except as otherwise provided by the Act. Davis J. held that under these provisions the taxpayer was entitled, in the language of the statute, to an exemption or deduction in "such reasonable amount as the Minister in his discretion may allow for depreciation", which involved, in his opinion, "an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles." He referred to sec. 60 which gives a right of appeal, and stated that the exercise of the Minister's discretion would not be interfered with unless it was "manifestly against sound and fundamental principles." At p. 6 he said:

> If the Court is of the opinion that in a given case the Minister or his Commissioner has, however unintentionally, failed to apply what the Court regards as fundamental principles, the Court ought not to hesitate to interfere;

(1) [1891] A.C. 173, at 179.
(2) [1939] S.C.R. 1; [1940] A.C. 127.

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and at p. 8:

> The *Income War Tax Act* gives a right of appeal from the Minister's decisions and while there is no statutory limitation upon the appellate jurisdiction, normally the Court would not interfere with the exercise of a discretion by the Minister except on grounds of law.

He held that in that case, the Minister had exercised his discretion upon wrong principles of law.

In the Privy Council (1), Lord Thankerton at p. 136 said:

> The taxpayer has a statutory right to an allowance in respect of depreciation during the accounting year on which the assessment in dispute is based. The Minister has a duty to fix a reasonable amount in respect of that allowance and, so far from the decision of the Minister being purely administrative and final, a right of appeal is conferred on a dissatisfied taxpayer; but it is equally clear that the Court would not interfere with the decision unless—as Davis J. states—"it was manifestly against sound and fundamental principles."

Under the legislation in question in the *Pioneer* case, therefore, it was held that, (1) the taxpayer was given a right to an allowance in respect of depreciation, and (2) a duty was imposed upon the Minister to fix a reasonable amount therefor, (3) such duty was not purely administrative, but required the Minister to give effect to the evidence before him in accordance with relevant legal principles.

In the case at bar the appellant, by sec. 6 (*a*), is given a statutory right to have deducted in the computation of its "net" profits or gains, "expenses wholly, exclusively and necessarily laid out or expended" for the purpose of earning those profits or gains. In order that the Minister might disallow any excess over what was reasonable or normal for the appellant's business, he first had to determine what was reasonable or normal. The legislation here applicable, therefore, is in principle the same as that in question in the case just cited. In my opinion, therefore, the respondent was well advised in taking the view of the law set out in his factum to which I have referred.

In *Sharp* v. *Wakefield* (2), Lord Halsbury said:

> "Discretion" means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's* case (3); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular.

(1) [1940] A.C. 127.
(2) [1891] A.C. 173, at 179.
(3) (1598) 5 Rep. 100, a.

One of the facts before the Minister in exercising the duty cast upon him by the Statute was the agreement under which the commissions were paid. It was not open to the Minister to ignore the agreement nor its legal consequences. Accordingly, upon what evidence or upon what ground could he refuse to give effect to it, assuming its *bona fides?* The Statute does not say that the Minister may disallow the excess over what is reasonable or normal for the "class" of business carried on by the taxpayer. When the Statute means that, it says so; sec. 23B. It is not shown that the appellant had ever paid any other commissions than those to Wrights' Ropes Limited and there is, therefore, no standard by which the commissions here in question can be shown to have been abnormal with respect to its business. Accordingly, the disallowance can only have been based on unreasonableness. The formal decision of the Minister throws no light as to the grounds upon which it was rested. The document reads:

> The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notice of Appeal, and matters thereto related and, having exercised his discretion under the provisions of Subsection 2 of Section 6 of the Income War Tax Act, hereby affirms the said assessment wherein $9,881.94 of the commission of $17,381.94 in the year 1940, $21,825.85 of the commission of $29,325.85 in 1941 and $31,980.91 of the commission of $39,480.91 in 1942 paid to Wrights' Ropes Limited of Birmingham were disallowed as expenses or deductions for the purposes of the said Act. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act and Excess Profits Tax Act said Assessments are affirmed.
>
> NOTICE of such decision is hereby given pursuant to Section 59 of the Act and is based on the facts presently before the Minister.

One receives no help in this regard from a perusal of the respondent's factum nor the argument of counsel. It is merely contended that the discretion was properly exercised in accordance with the relevant authorities but the actual principle applied is not stated nor in any way indicated. There is nothing shown upon which anyone can say that there is any unreasonableness attaching to the commissions or to the agreement to pay them. Want of *bona fides* is not suggested. Nor is it suggested that the issued shares of the appellant were at the time of the first agreement all in the hands of Wrights' and the Hirst Company or their nominees and that these companies caused the appel-

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lant to make an improvident bargain for their own purposes. Moreover, any such suggestion is negatived by the evidence. In cross-examination of a witness for the appellant, the witness said that the technical information supplied the appellant by Wrights' was, in the opinion of the witness, by itself commensurate in value with the commissions paid. No other evidence was adduced on the point. This same witness was also asked: "This $7,500, is that the amount allowed to you by the Munitions and Supply in connection with your contracts?" The answer was: "I will have to refer to my file on that question." Counsel for the respondent must have been instructed with regard to the subject-matter of this question, but it was not followed up or developed in any way and there is no other evidence with regard to it. The Court is left to wonder whether something of this nature entered into the making of the assessments. They cannot be supported, however, on a mere suggestion of this kind. The ground of decision, therefore, is unexplained and the decision itself is made to appear as a purely arbitrary one.

If the present were a case of disallowance of expenses for advertising or for travelling or of similar items within the control of the taxpayer, the grounds of disallowance might more readily suggest themselves. The present case is not of that sort and there is nothing which displaces the agreement and the legal consequences which flow from it. Therefore, where there is nothing before the Court which enables it to see any ground or principle upon which the decision appealed from can be supported, but on the contrary where the evidence substantiates the deduction claimed and therefore the decision appears as a purely arbitrary one, which the Statute does not permit, the appellant, in my opinion, has met the onus resting upon it of showing that the exercise of discretion involved has been "manifestly against sound and fundamental principles" or based upon "wrong principles of law." I do not think the appellant is in the position where his appeal must fail because, not knowing the ground of decision, he is unable to point to its error. I further think it cannot be said that the Statute contemplates that an appeal under its provisions is to be rendered abortive by the mere silence of the decision itself as to the grounds upon which it proceeds. Sec-

tion 60 (2) to my mind indicates the contrary, as it calls upon an appellant to submit with his notice of dissatisfaction a statement containing the "further" reasons which he intends to urge before the Exchequer Court in support of his appeal; "further" in the sense of "additional" reasons to those urged before the Minister. No appellant is in a position to give reasons for an appeal against an unfavourable decision without knowing the ground of such decision. I think the Statute recognizes this and when by sec. 59 the Minister is required to notify the appellant of his "decision", by registered post, reasons are intended to be given. When they are not given, I think, in such a case as the present at least, the result is not that the Court must assume something quite contrary to the evidence submitted to it.

It may be that the report of the local inspector discloses ground for the decision arrived at, but at the moment there are no means of knowing this. I think, therefore, consistently with the authorities to which I have referred, it is the duty of the Court to refer the case back to the Minister under the provisions of sec. 65 (2).

I have not referred to the provisions of *The Excess Profits Tax Act, 1940,* other than sec. 8 (*b*). By sec. 14, sections 40 to 87 of the *Income War Tax Act* are made applicable to excess profits tax. By sec. 2 (*f*) of the former Act "profits" in the case of a corporation are defined as the amount of net taxable income as determined under the provisions of the latter Act.

As to the contention that section 75 (2) of the *Income War Tax Act* does not authorize the delegation to the Deputy Minister of the duty imposed upon the Minister by sec. 6 (2), I cannot agree. A power may well include a duty. See Murray's New English Dictionary, p. 1213. In the context of sec. 75 (2) I think it is so included.

I would allow the appeal and remit the case back as already stated.

ESTEY J.—This is an appeal from a judgment in the Exchequer Court confirming a decision of the Deputy Minister of National Revenue whereby he disallowed the greater part of three items claimed as deductible expenses.

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The appellant filed its income tax returns for the years 1940, 1941 and 1942, and included for the respective years as deductible expenses:

Commission on sales of wire rope manufactured.	$17,381.94
Commission on sales of wire rope manufactured.	29,325.85
Commission on sales of wire rope manufacturers	39,480.91

The Deputy Minister of National Revenue, delegated by the Minister, as provided by section 75 (2), disallowed all these items except $7,500 in each year. This he did by virtue of the authority vested in him under section 6 (2) of the Act. This section reads as follows:

6 (2).

The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

The section is restricted in its application to items of expense, and in the exercise of his discretion the Minister, or Deputy Minister, as in this case, is required to determine whether the amount claimed as a deductible expense is "in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income". It is not an amount which is reasonable or normal in respect of business generally, but in respect of the business of that particular taxpayer.

The discretion to be here exercised is a judicial discretion similar to that under the then section 5 (*b*) which Davis J. described as "an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles." (*Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1)). This statement was adopted by Lord Thankerton in the judgment of the Privy Council in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (2).

Once such a discretion is properly exercised there is no appeal, but the Courts have consistently exercised the right to determine in a given case whether the discretion has in fact been exercised within proper limits and upon

(1) [1939] S.C.R. 1, at 5. (2) [1940] A.C. 127, at 136.

proper grounds, or in other words, to determine if the discretion has been exercised as contemplated by the terms of the statute.

Lord Esher, in *The Queen* v. *The Vestry of St. Pancras* (1):

> If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

Lord Thankerton in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (2):

> But it is equally clear that the Court would not interfere with the decision unless—as Davis J. states—"it was manifestly against sound and fundamental principles."

In the latter case, in the exercise of a discretion irrelevant facts were accepted and acted upon; as a result the assessment was set aside.

Cockburn, C.J., in *The Queen* v. *Adamson* (3):

> If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the Court could not act upon the matter further, or send the case back to the magistrates; but the Solicitor General has called our attention to evidence of such a description that I cannot resist the conclusion that the magistrates must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and which, it seems to me, was the same as declining jurisdiction.

The appellant had its head office in the City of Vancouver. On the 13th of August, 1943, Mr. Norman Lee, Inspector of Income Tax at Vancouver, advised the appellant that:

> By virtue of the powers vested in the Minister under Subsection 2 of Section 6 and Subsection 2 of Section 75 of the Income War Tax Act, discretion is about to be exercised in the following matters, which appear to be in excess of what is reasonable for the business * * *

Under date of September 8th, 1943, the appellant replied, enclosing copies of the agreements dated May 19th, 1931, and September 12th, 1935, under the terms of which these payments had been made in each of the respective years to Wrights' Ropes Limited, but did not otherwise attempt to justify the amounts. Under date of October 9th, 1943, Mr. Norman Lee advised the appellant that it was proposed to recommend to the Minister that all

(1) (1890) 24 Q.B.D. 371 at 375.
(2) [1940] A.C. 127, at 136.
(3) (1875) 1 Q.B.D. 201, at 205.

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the foregoing items except $7,500 for each year be disallowed. He again invited the appellant to submit representations either orally or in writing by the 15th October. On the 21st of October the appellant replied that they had nothing to add to their favour of September 8th.

The manager of the appellant company summarized the relevant provisions of these two agreements as follows:

> Wrights' Ropes, Birmingham, have agreed not to market any of their products in the district west of a line being the boundary between the provinces of Manitoba and Ontario * * * they place at our disposal their accumulated technical experience, extending over the past 170 years, in the design and manufacture of wire rope, the design, manufacture and installation of wire rope machinery, and such other information as is necessary and desirable in the successful conduct of the business.

The agreements provide:

> In consideration of the due performance by Wrights' of their obligations under this Agreement the Canadian Company will pay to Wrights' a commission at the rate of five per centum upon all cash received in respect of the net selling price of all wire ropes both manufactured and sold by the Canadian Company after the date of this Agreement.

In this paragraph Wrights' is Wrights' Ropes Limited of Birmingham, England, and the Canadian Company is the appellant.

The Deputy Minister, when exercising his discretion with respect to these three items, had only the income tax returns with the three items appearing as above set out, the copy of the agreements above mentioned, and the report from his Inspector of Taxation at Vancouver, Mr. Norman Lee. With this information he reduced each of the said three items to $7,500 by exercising the authority vested in him by section 6 (2) of the Act.

The Inspector's Report was not produced. Without a knowledge of its contents it is impossible to determine its validity as a basis for the exercise of the discretion here provided for. Apart from this report, which will be more particularly discussed hereafter, there would appear to be no facts contained either in the income tax returns or in the agreements which would provide a basis for the determination of what would be a reasonable or normal expense in the business carried on by the taxpayer, or that this expense was incurred in respect of any transaction or operation which would unduly or arti-

ficially reduce the income. Yet it is the determination of these questions which the statute specifically places upon the Minister. It is the relation of this item of expense to the business of the taxpayer, or the transaction or operation mentioned, that he is called upon to exercise his discretion. It is true that the income tax returns contain many figures with reference to the business of the appellant, and show with respect to the items on which the five per cent. was computed a very substantial increase during the three years. This latter the appellant pressed as an indication that the discretion had not here been exercised judicially. That would not of necessity follow. The greater difficulty is that the facts here disclosed in the returns filed and the agreements do not provide a basis upon which a discretionary determination can be made that the items are excessive within the terms of section 6 (2).

The Court, sitting in appeal, is not concerned with the amount as fixed but with the basis upon which the decision fixing that amount is determined. Upon principle it would seem that to act upon insufficient facts or information should in the result be the same as acting upon improper facts as in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1). The information contained in the income tax returns and the provisions of the agreements did not, in my opinion, place before the Minister or the Deputy Minister facts or information which enabled him to exercise the discretion contemplated by this section.

Then with respect to the report from Mr. Norman Lee, the Inspector of Income Tax at Vancouver, it is admitted that this included representations made to him by the appellant and that these were before the Deputy Minister when he exercised his discretion under section 6 (2). As to the contents of this report the Deputy Minister deposed as follows:

Mr. BRAY: I am not asking for production now of the representations to which you refer as having been made to you, but I think they should be here at the trial the day after to-morrow.

(1) [1940] A.C. 127.

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Mr. FORSYTH: Yes, the representation that you made to us.

Mr. BRAY: I know what they are, but I am asking that they be here.

By Mr. Forsyth:

26. Q. They were considered by you?—A. I think so.

By Mr. Bray:

27. Q. I notice you answered Mr. Forsyth's query with "I think so". Do you know, Mr. Elliott?—A. As I said before, all these facts are reported from the Vancouver offices; and to answer the question whether this or that document was considered I would have to thumb through the whole file. I do know that all the facts pertaining to this were transmitted from Vancouver to Ottawa, among which were representations from the taxpayer as expressed through the medium of Mr. Lee.

Mr. Bray's admission, as counsel for the appellant, is that he knows what the representations are and no doubt Mr. Lee reported the representations fairly and accurately as he understood them, but there is much to be said for Mr. Bray's contention that he should see them. It is well known that, however careful and conscientious one may be in recording statements, errors will creep in. Furthermore, one reading a report may place quite a different interpretation thereon from that which its author intended. It might well be, therefore, that after reading the report counsel for the appellant would have desired to make some explanation, supplement the facts or make submissions with respect thereto. It appears that without that report, which may have been important, it cannot be said that the appellant had the opportunity "to correct or to contradict any relevant statement prejudicial to its interests". Davis J. in *The King* v. *Noxzema Chemical Co. of Canada Ltd.* (1):

> If, on the other hand, the function of the Minister under the section may be said to be of a quasi-judicial nature, even then all that was necessary was that the taxpayer be given a fair opportunity to be heard in the controversy; and to correct or to contradict any relevant statement prejudicial to its interests.

Lord Loreburn in *Board of Education* v. *Rice* (2):

> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. * * * But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

(1) [1942] S.C.R. 178, at 180. (2) [1911] A.C. 179, at 182.

The respondent takes the position that this communication between the officials of the Department is privileged and that there is no obligation to produce it. In this regard reliance is had upon the established rule that such documents are in general privileged. They are so privileged under the rules and practice of Parliament, but in this particular instance Parliament has directed by section 63 (*g*) that this document when "relative to the assessment under appeal" shall be filed in the Exchequer Court. This report was before the Deputy Minister and it contained representations made by the appellant. What these were and whether material or proper to be taken into account cannot now be determined, but, as intimated above, apart from the document it would appear that no basis existed for the exercise of the discretion called for in section 6 (2). In any event, when the Deputy Minister admits that the report contained representations from the taxpayer and that it was considered, it then becomes "relative to the assessment" and should have been filed as required by section 63 (*g*).

The contention of the appellant that the Deputy Minister acted under section 6 (1) (*i*) and not under 6 (2) is not well founded. The correspondence and the decision of the Minister specifically stated that the disallowance was made under section 6 (2). There are possibly items under the terms of the agreements which might be included under some of the headings in section 6 (1) (*i*), but not all of them. One in particular, a payment in consideration of Wrights' Ropes Ltd. of Birmingham not marketing their products in Western Canada, is not included, and, as there is no information upon which the amounts may be allocated to the respective headings in the agreements, it is quite obvious why the Deputy Minister did not deal with this matter under section 6 (1) (*i*).

Moreover, under 6 (1) (*i*) the deduction shall not be allowed if "the company in Canada is controlled directly or indirectly by any company * * *" There was no evidence before the Minister upon which he could determine by whom this company is controlled "directly or indirectly". The question was not raised by the Minister, but because of a description in Mr. Norman Lee's letter of October 9th "Commissions paid to controlling Company", the Com-

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pany replied advising that Wrights' Ropes Ltd. held only 50 per cent. of the shares, and that Charles Hirst & Sons, Ltd., also an English company, held the other 50 per cent. Apart from this there was no information with respect to the question of control. It appears to me that had the Minister intended to act under section 6 (1) (*i*) he would have obtained further information. There was further evidence given at the trial before the learned judge of the Exchequer Court and upon that evidence I agree with the learned judge that it is impossible to determine the question of control.

It there appeared that the shares were held as follows:

	Shares
Wrights' Ropes Limited	748
Charles Hirst & Sons, Ltd	749
H. R. Bray	1
G. F. Gyles	1
J. G. Chutter	1

No evidence was given as to the basis upon which the three shares are held in Canada, and such evidence upon this allocation of shares is very important with reference to the matter of control. The consent filed at the trial does not in any way clear up this point. It merely states that Wrights' Ropes Limited hold 49·86 per cent. of the shares. Viscount Simon, L.C.:

> * * * I think the conception of "controlling interest" may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first-mentioned company * * * I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company. [*British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*] (1).

Upon the evidence it does not appear to me a case which could properly have been dealt with under section 6 (1) (*i*).

If I am correct in my analysis of this case, the report made by the Inspector of Income Tax at Vancouver, which included representations made by the appellant, may or

(1) [1943] 1 All E.R. 13, at 15.

may not have been the dominating factor in the exercise of the Deputy Minister's discretion. Inasmuch as apart from it the discretion could not be exercised as contemplated by the statute, its production as required by section 63 (*g*) becomes the more important in order to determine whether the discretion has been exercised as required by the statute.

I do not overlook that both under date of August 13th and October 9th the respondent invited the appellant to make representations, and on the latter date specifically indicated his probable decision, nor that the appellant replied under date of October 21st, "We have nothing further to add * * *" Such a general invitation asked for either facts or submissions or both. While such a request at that time is not provided for by the statute, it is not only unobjectionable but commendable; the appellant might well have complied therewith. What the statute does contemplate is that if additional information is required it will be requested under sections 41 and 43. Under the circumstances of this case further information relative to these items might well be requested. In view of this and the fact that the report was not filed under section 63 (*g*), I have concluded that the case should be referred back to the Deputy Minister as provided under section 65 (2).

I think the appeal should be allowed with costs.

Appeal allowed with costs and the matter referred back to the Minister to be dealt with by him according to the reasons of the majority of the Court.

Solicitor for the appellant: *H. R. Bray.*

Solicitor for the respondent: *H. H. Stikeman.*

1945
*Oct. 18, 19, 22
1946
*Jan. 24

INTERNATIONAL POWER COMPANY, LIMITED (RESPONDENT AND MISE-EN-CAUSE) ..... } APPELLANT;

AND

McMASTER UNIVERSITY AND OTHERS (RESPONDENTS) .....

AND

MONTREAL TRUST COMPANY ÈS QUAL. (PETITIONER) ..... } RESPONDENTS.

Company—Winding-up—Assets realized by liquidator—Preference and common stocks re-imbursed in full at par—Distribution of surplus assets—Rights of preferred shareholders—Interpretation of terms of preference—Extent of priority—Equal division of surplus assets among preferred and common shareholders—Preferred shareholders receiving per share dividend greater than those received by common shareholders—Whether "equality" to be made between them before division—Seven per cent cumulative preference as to dividends—Right to higher dividend than specified by by-law—Claim for equalization as between preferred and common shareholders of certain dividends paid to them—Companies Act, R.S.C. 1906, c. 79, ss. 47, 49.

The Porto Rico Power Company, incorporated in 1906 under the Dominion *Companies Act* with a capital of $3,000,000 divided into 30,000 common shares, increased its capital in 1909 and 1911 by creating each year preference stock for an amount of $500,000. The by-laws, dealing with the rights of the preference shareholders, provided that such shares shall be "entitled out of * * * net earnings * * * to cumulative dividends at the rate of seven per cent. per annum for each and every year in preference and priority to any payment of dividends on common stock and further entitled to priority on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid." The Company, in January 1944, then in voluntary liquidation under the *Winding-up Act*, had in its treasury more than $6,000,000. The liquidator, after having made a preliminary distribution by which the preference and common shareholders were reimbursed in full at par, still had surplus money amounting to $500,000. Up to the winding-up of the Company, the preference shareholders had received the stipulated dividends of 7 per cent., aggregating per share $239.75 and $200.11 for the first and second issues; while the holders of common stock had received in dividends a smaller aggregate of $188.50. The latter had received, until 1931, dividends lower than 7 per cent. per year; but, from 1931 to 1942, the annual dividend had been 8 per cent. and, in 1943, 49½ per cent. The liquidator, by way of petition, then sought the direction of the Bankruptcy Court as to the distribution of the surplus amount of $500,000, submitting that the holders of common shares were alone entitled to it. The preferred shareholders, represented by the respon-

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

dents, claimed, first, that there should be an equalization as between them and the common shareholders of certain dividends paid before liquidation, and, so, that they should be paid the amounts in excess of 7 per cent. received by the common shareholders from 1931 until liquidation, and, secondly, that they should then share equally with the common shareholders in the balance of $500,000. These claims were disallowed by the Bankruptcy Court, which made an order in accordance with the conclusions of the petition. On appeal, the dismissal of the first claim advanced by the preferred shareholders was affirmed, but it was held that the preferred and common shareholders were entitled to share equally in the distribution of the Company's surplus assets. The common shareholders appealed from that judgment before this Court and the preferred shareholders cross-appealed.

Held, affirming the judgment appealed from (26 C.B.R., 170), The Chief Justice dissenting in part, that, under the by-laws of the Company, the preference shareholders, subject to their rights with regard to dividends and priority to be repaid at par, have otherwise all the rights of the common shareholders; and, once the preference and the common stocks have been reimbursed in full at par, the preference shareholders are further entitled to share *pari passu* in the distribution of all surplus assets of the Company with the common shareholders.

Per The Chief Justice (dissenting in part):—But for the very reason that the common and preference shareholders should be put on the same footing for the purpose of such division, they should have received previously "equal treatment," outside of priorities to which the latter are entitled, the fundamental principle of "equality" being basically the essence of the Canadian *Companies Act*. In the present case, the preference shareholders did in fact receive per share dividends greater in the aggregate than those received by the holders of common shares; and, if the judgment appealed from is allowed to stand, there would be "inequality" between all shareholders. Therefore, before any division of surplus assets is made, the common shareholders should first be paid the sum representing the difference between the aggregate dividends paid to them and the aggregate dividends paid to the preferred shareholders; and, thereafter, the balance of the surplus assets should then be distributed equally between all shareholders.

Held, also, that the claim of the preference shareholders that they should be paid on a basis of equality of dividends with the common shareholders must be dismissed. The preference shareholders are not entitled to any greater amount than 7 per cent. on their shares *per annum,* nothwithstanding dividends at a higher rate having been paid on common shares in any year.

APPEAL and CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing in part the judgment of the Superior Court, Boyer J., sitting in Bankruptcy (2).

(1) (1945) 26 C.B.R. 170; [1945] 2 D.L.R. 93, 531.

(2) (1944) 26 C.B.R. 6; [1945] 1 D.L.R. 32.

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

Geo. A. Campbell K.C. for the appellant.

Aimé Geoffrion K.C. and *A. S. Bruneau K.C.* for the respondents McMaster University and others.

J. Senécal K.C. for the Liquidator respondent.

THE CHIEF JUSTICE (dissenting in part)—The cross-appeal should be dismissed, for the reasons given by my brother Kerwin with whom I am fully in accord in this respect.

On the main appeal however, I have to make the following observations: The by-laws providing for the issue of the preference shares as set out in the supplementary letters patent confirming them are as follows:

> The said increased capital stock of five hundred thousand dollars shall be preference stock entitled out of any and all surplus earnings whenever ascertained to cumulative dividends at the rate of seven per cent. per annum for each and every year in preference and priority to any payment of dividends on common stock, and further entitled to priority on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid.

The Porto Rico Power Co. Ltd., now in liquidation under the *Winding-up Act* and whose liquidator is the Montreal Trust Company, was incorporated under the Dominion *Companies' Act* of 1906; and by force of section 49 of that Act,

> holders of shares of such preference stock shall be shareholders within the meaning of this Part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part: Provided that in respect of dividends, and in any other respect declared by by-law as authorized by this Part, they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

That is the law of Canada and the law which must be applied in the premises, notwithstanding any ruling handed down by courts having to apply different laws or statutes.

For that reason, may I say with respect, most of the authorities, to which the Court has been referred, can have no application to the decision which we have to render.

That decision depends on the language of the by-laws under authority of which the preference shares were issued and the issue was set by Viscount Haldane in *Will* v. *United Lanket Plantations Co.* (1).

The point in dispute is one of construction, and construction must always depend on the terms of the particular instrument; it is only to a limited extent that other cases decided upon different documents afford any guidance. I make that observation because a good deal of authority has been cited in the course of the argument, and reference has been made to dicta of various learned judges. But in all those cases they were dealing with documents which were different from those we have to construe, and our primary guide must be the language of the documents we have before us.

To which the Earl Loreburn in the same case added at page 18:

My lords, I do not think that any light can be thrown upon the construction of this particular resolution by considering language that was used, whether by way of decision or of conjecture, in the construction of perfectly different contracts by other learned judges. There is nothing more unfortunate than the tendency which appears to influence some minds that you can attain to certainty in the interpretation of one set of sentences by considering the analogy of other different sentences.

Now, if we look at section 49 of the Dominion *Companies' Act* of 1909, we find that holders of preference stock are shareholders and

shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part.

It follows that, under our law, holders of preference stock are primarily shareholders on the same footing as ordinary shareholders. But section 49 adds the proviso that

in respect of dividends and in any other respect declared by by-law as authorized by this Part, they (the preference shareholders) shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

The preference shareholders and, in this particular case, the respondents have therefore all the rights of the ordinary shareholders (in this case the appellant); but in addition, they have the preferences and rights given by the by-laws under which the preferred shares were issued.

Moreover, if we will now refer to the by-laws which govern the case, we find that the preference stock is entitled (1) out of any and all surplus earnings whenever ascertained to cumulative dividends at the rate of 7 per cent. per annum for each and every year in preference and priority to any payment of dividends on common

(1) [1914] A.C. 11, at 15.

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stock; (2) and further entitled to priority in any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid.

The claim by the preference shareholders for additional dividends provided for in the first part of the by-law formed the subject of the cross-appeal and has now been finally disposed of.

The main appeal concerns the meaning of the second part of the by-law dealing with the division of the assets of the company, and on that point, I have this to say:

Like the Court of King's Bench, I think the second part of the by-law, having to do with the division of the assets of the Company, deals only with the priority to which the preference shareholders are entitled. In my view, it means that, "to the extent of its repayment in full at par" i.e. to the extent of the repayment in full at par of the preference stock, the holders of that stock are entitled to a priority as against the common shareholders. They will be reimbursed of the amount of their stock "in full at par" before the common shareholders are reimbursed of the amount of their stock.

But, should there be a surplus remaining after both the preference shareholders and the common shareholders have been so reimbursed, then, as the by-law is silent on the subject, the first part of section 49 of the *Companies' Act* comes into play and for the purpose of the division of those surplus assets, there are no longer preference shareholders and common shareholders, there are left only holders of shares in all respects possessing "the rights and subject to the liabilities of shareholders within the meaning of" the *Companies' Act*.

So far therefore, I agree with the proposition that after the preference stock has been reimbursed in full at par and the common stock has also been reimbursed, with regard to the surplus assets then remaining, both the preference and the common stock holders must be put on the same footing for the purpose of division; but, for that very reason, my view is that, in the present case, the judgment of the Court of King's Bench (appeal side) must be modified.

It is common ground in this case that the holders of preference stock, up to the winding-up of the Company,

have received dividends aggregating $239.75 or $200.11 per share while the holders of common stock have received in dividends only an aggregate of $188.50 per share.

Although the Court of King's Bench fully acknowledged that fact, which is undisputed, and although the judges of the Court insisted upon the fundamental principle, under our law, of the equality of shareholders, yet they took no account of the fact and they delivered a judgment which, if it should be allowed to stand, would do away with the principle of "equal treatment" between the preference and common shareholders, outside of the priorities to which the preference shareholders are entitled. For if all the shareholders are now to be allowed to divide share and share alike the surplus assets now in the hands of the liquidator, it will follow that, on the aggregate and outside of their priorities, the preference shareholders will have received or will receive in the end, a larger amount than the common shareholders, although there are in the hands of the liquidator ample funds both to cover the amounts to which the preference shareholders are entitled in priority and to meet the fundamental requirement of equality between all shareholders outside of the priority.

As stated in the judgment of Boyer J. "the principle of equality invoked by the contestants should work both ways".

From the incorporation of the company in liquidation up to the date of the winding-up order herein, the preference shareholders, as remarked by MacKinnon J. in the Court of King's Bench, did in fact receive per share dividends greater in the aggregate than those received by the holders of common shares.

As matters now stand, the preference shareholders have received in full the 7 per cent. per annum cumulative dividends to which they were entitled under the by-laws and the supplementary letters patent. They have also been reimbursed in full at par, of the whole of the payments they made in purchase of the preference stock. On the other hand, under the scheme proposed by the judgment appealed from, the common shareholders would receive payment in full at par of the stock paid for by them, but in respect of dividends, they stand in the proportion of

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$239.75 per share, paid in the aggregate to the holders of preference stock of the first issue, to approximately $200.11 per share to those of the second issue and to only $188.50 per share to the holders of common shares.

There would follow this inequality: that the common shareholders have therefore received as dividends per share less than the preference shareholders.

I cannot see how to reconcile such a result with the principle of equality which is basically the essence of the Canadian *Companies' Act,* which is the principle on which the Court of King's Bench pretends to proceed and which indeed is the very foundation of the claims made by the preference shareholders in the present case. In the absence of any provisions to the contrary, the rights of the shareholders are equal and they should participate in the distribution of profits and assets in proportion to their interest in the company of which they are shareholders.

In the Court of King's Bench, Stuart McDougall J. very well said:

> Under our system it seems to me that we should start with that equality as a basis and then endeavour to determine if it has been derogated from by the by-laws or charter.

Astbury J. in *In re Fraser and Chalmers Limited* (1) said at page 120:

> All shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares.

It is what, with respect, the judgment appealed from has disregarded. If the respondents were to be paid what the Court of King's Bench gave them, they would, in the aggregate, receive more than the appellant and there would be no equality as between the shareholders.

According to the ruling case of *Steel Company of Canada* v. *Ramsay* (2), dividends do not mean yearly dividends but dividends in the aggregate, and the holders of common shares should be entitled to be paid dividends equal in amount to those paid to the holders of preferred shares, before the latter become entitled to participate further.

Of course, it is objected in the present case that we are no longer dealing with profits as such, but rather with the division of the remaining assets. But I think the objec-

(1) [1919] 2 Ch. 114. (2) [1931] A.C. 270.

tion is answered by Lindley L.J., in *In Re Bridgewater Navigation Co.* (1). At page 329, Lord Justice Lindley says:

> The problem is no longer what is to be done in the way of dividing the profits of a going concern; the problem now is how much of the whole assets of the company belongs to one class of shareholders and how much to another; and if it appears that some of those assets consist of the undrawn profits of one of those classes, such undrawn profits ought to be distributed among the members of that class unless some sufficient reason to the contrary can be shown, and in this case there is no such reason.

Applying the words of Lindley L.J. to the case now before us, I must repeat: "In this case there is no such reason", i.e. there is no reason why before any division of the surplus assets, in fact, before the liquidator could consider that there are surplus assets, he should not first equalize the payments made to the preferred shareholders and those made to the common shareholders so that each class of shareholders shall receive equal treatment. In the premises, this cannot be done unless and until the common shareholders receive the amount of dividend per share, which so far the preferred shareholders have received over and above that paid to the common shareholders.

That is the only result consistent with the fundamental equality of rights in the matter of dividends as between the preference and common shareholders, taking into consideration the amounts paid in the aggregate on each class of shares down to the liquidation. This, to my mind, is the proper application of the decision of the Privy Council in the *Ramsay* case (2) and also appears to be the conclusion reached by MacKinnon J. in the present case.

The *Ramsay* case (2) was a Canadian case and the decision of the Judicial Committee in that respect constitutes an authoritative statement of the law applicable in this case.

If the rule of parity between shareholders must prevail and if all shareholders are entitled to equal treatment, unless and to the extent that their rights are modified by the contract under which they hold their shares, the rule would not be followed if the preferred shareholders, having received substantially more in dividends than the common shareholders and still holding that advantage, should

(1) L.R. [1891] 2 Ch. 317. (2) [1931] A. C. 270.

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be allowed to divide equally with the common shareholders the surplus assets now in the hands of the liquidator.

My conclusion is that, here, the proper advice to be given the liquidator is, that the common shareholders and that is to say, among others, the appellant, should first be paid the sum representing the difference between the aggregate dividends paid to the preferred shareholders and the aggregate dividends paid to the common shareholders, up to the date of the liquidation, and that the judgment of the Court of King's Bench (appeal side) should be modified accordingly.

Outside such modifications, the judgment of the Court of King's Bench in the main appeal should not be further disturbed. As agreed, the costs of all parties both in the main appeal and in the cross-appeal should be against the estate.

KERWIN J.—Porto Rico Power Company, Limited, is being wound-up under the provisions of the Dominion *Winding-up Act,* and the liquidator sought the direction of the Bankruptcy Court in Quebec by two petitions, with the second of which only are we concerned. The liquidator therein requested the Court to direct it to distribute a sum of $500,000, and any additional assets which might thereafter become available in its hands, among the holders of the common shares of the Company. The holders of those shares and of the preferred shares had been repaid in full the amount paid for them. Upon the hearing of the petition, the preferred shareholders, represented by the present respondents, claimed first that there should be what they termed an equalization as between the preferred and common shareholders of certain dividends which had been paid by the Company before liquidation, and second, that they should share equally with the common shareholders in the balance of the $500,000 and in the additional assets. These claims were disallowed and an order made in accordance with the conclusions of the petition. On appeal the Court of King's Bench agreed with the dismissal of the first claim advanced by the preferred shareholders but decided that the preferred and common shareholders were

entitled to share equally in the distribution of the Company's surplus assets. It is from that judgment that International Power Company, Limited, representing the common shareholders, appeals and that McMaster University and others, representing the preferred shareholders, cross-appeal.

Porto Rico Power Company, Limited, was incorporated by letters patent dated August 29th, 1906, under the provisions of the Dominion *Companies Act*, 1902, chapter 15. After some years of operation, the directors of the Company decided to increase its capital by creating and issuing $500,000 of preference stock. In 1909 this was done by by-law no. 10 and confirmed by supplementary letters patent in accordance with the provisions of the *Companies Act*, R.S.C. 1906, chapter 79. Clause 2 of by-law no. 10 provides:—

> 2. That the said increased capital stock of five hundred thousand dollars shall be preference stock entitled out of any and all surplus net earnings whenever ascertained to cumulative dividends at the rate of seven per cent. per annum for each and every year in preference and priority to any payment of dividends on common stock; and further entitled to priority on any division of the assets of the Company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid.

By-law no. 10 and the supplementary letters patent provided for further increases of capital stock by the issue of additional preference stock on the same terms, and to rank *pari passu* in all respects with the $500,000 of preference stock authorized by the by-law. In the exercise of the right so reserved, the capital stock of the Company was by by-law increased by the further sum of $500,000 by the creation of an additional 500,000 preference shares of $100 each. The relevant wording of this by-law and the confirming supplementary letters patent is substantially identical with the phraseology in by-law 10.

In due course all the preference stock was issued, and at liquidation amounted in the aggregate to $1,000,000 fully paid. For upwards of thirty years, without interruption, dividends at the stipulated rate of 7 per cent. were paid on all preference shares from time to time outstanding, and so continued down to the 31st of December, 1943, shortly before liquidation. Down to that date the holders of preference stock of the first issue were

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paid dividends amounting to $239.75 per share, and the holders of the second issue were paid dividends amounting to approximately $211 per share, whereas the common stock holders received only $188.50, paid at varying rates in some of the years and including a special dividend of 49·50 per cent. in 1942.

The respondents' contention is that the preferred shareholders were entitled to participate in dividends equally per share with the common shareholders after each class had received 7 per cent. dividends in each year. As to this claim and as to the claim to share in the surplus assets, the position of the respondents is that the *Companies Act* of 1909 did not permit any restriction upon what they term the rights of preferred shareholders in common with all other shareholders but that, on the contrary, the Act permitted merely the granting of a preference and priority. They also argue that the by-law on its true construction did nothing more. The trial judge disagreed with these contentions but the Court of King's Bench, while apparently holding the view that the Act did not authorize the suggested restriction, decided, on the wording of the by-law, that no such restriction was in fact imposed. However, on the first claim, that Court decided that the silence or acquiescence of the holders of preferred stock over a period of thirteen years was a bar to the holders of preference shares now seeking to be put on a footing of equality.

The applicable statutory provisions of the *Companies Act* of 1909 are sections 47 and 49, which read as follows:—

47. The directors of the company may make by-laws for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividends and in any other respect, over ordinary stock as is by such by-laws declared.

2. Such by-laws may provide that the holders of shares of such preference stock shall have the right to select a certain stated proportion of the board of directors, or may give them such other control over the affairs of the company as is considered expedient.

* * * *

49. Holders of shares of such preference stock shall be shareholders within the meaning of this Part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part: provided that in respect of dividends, and in any other respect declared by by-law as authorized by this Part, they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

Subsections 3 and 4 of section 57, which have been referred to, really have no application as they deal merely with the result of the increase or reduction of capital which might be effected only by supplementary letters patent.

Certain rights are common to the holders of all shares under Part I of the Act in which sections 47 and 49 are found but not all the rights of any shareholder are found in any part of the statute. While the judgment of the Privy Council in *Steel Company of Canada* v. *Ramsay* (1), does not refer to the provisions of the Act, it will be noticed from the report of this case in the Court of Appeal for Ontario (2) that counsel for the company argued:—

> Under secs. 47, 48 and 49, preference shareholders may be given priority when the fund shall be distributed; but apart from that, all shares, preference and common, must be placed on an equal basis when the distribution is made, i.e., at the time of the distribution it must be a "rateable distribution".

No reference is made in any of the judgments in any of the Courts to the statutory provisions, and the judgment of the Privy Council, therefore, cannot be taken as a pronouncement upon the point. However, it has arisen in *Holmsted* v. *Alberta Pacific Grain Co. Limited* (3), where the court of appeal of Alberta, affirming the decision of Ford J. decided that the powers given the directors of a company were not restricted to giving preferences. I agree with those judgments and particularly the statement of Chief Justice Harvey that preference shareholders

> have the rights and liabilities which are common to all shareholders and in addition they have the preferential rights conferred by the by-law. It (section 49) does not say nor can I see any reason to think it means, that they possess all the rights of any shareholder.

The fact that in 1924 Parliament amended section 47 does not alter my opinion in this respect as the amendment deals with deferred as well as preferred stock.

Having the power to provide that so far as dividends are concerned the holders of preference shares should be entitled to cumulative dividends at the rate of seven per cent. per annum, and to nothing more, is that what the by-law provides? I think it does because, as pointed

(1) [1931] A.C. 270.
(2) (1929) 65 O.L.R. 250.
(3) [1928] 1 D.L.R. 135.

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out by Viscount Dunedin in the *Ramsay* case (1), it has been decided by the House of Lords in *Will* v. *United Lanket Plantations Company Limited* (2), that, ordinarily speaking, when a preferred shareholder receives his preferred dividend, he can ask no more. So far as the claim now under consideration is concerned the remarks of Earl Loreburn in the *Will* case (2), at page 19, are, I think, apposite:—

> My lords, I have no doubt myself in regard to this particular resolution, that the people who took the preference shares under it knew perfectly well that they were taking shares with a preferential dividend of 10 per cent. I think they would have been rather surprised, although no doubt they would have been gratified, if they had been told that they were about to receive the almost boundless additional advantages which have been held out to them in the arguments we have been hearing.

While there are differences between companies in England and those incorporated under the Dominion *Companies Act,* the decision in the *Will* case (2) applies equally here as is indicated by Viscount Dunedin's reference to it in the *Ramsay* case (1).

The question remains as to whether, having similar powers with reference to surplus assets, the directors exercised it. The true nature of the fund in dispute is, I think, nowhere better expressed than in the reasons for judgment of Mr. Justice Eve in *In re William Metcalfe & Sons, Ld.* (3), where he says:—

> The expression "surplus assets" in this and similar cases signified something different from the expression "capital"; surplus assets are part and parcel of the property of the company not required for the discharge of its liabilities or for returning to the shareholders the capital they have paid up; they are part of the joint stock or common fund which, at the date of the winding-up, represented the capital of the company, but they are no part of the repayable capital. It has *ex hypothesi* been repaid before they came into existence.

His judgment was affirmed by the Court of Appeal and in the judgments in that court are found references to most, if not all, prior decisions.

While in *Birch* v. *Cropper* (4), the House of Lords was concerned with a company, the articles of which contained no provision as to the distribution of assets on its winding-up, the inclusion in the present case in the by-law of the words

(1) [1931] A.C. 270.
(2) [1914] A.C. 11.
(3) [1933] Ch. 142, at 148.
(4) (1889) 14 App. Cas. 525.

and further entitled to priority on any division of the assets of the Company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid

can I think make no difference. The remarks of Lord Macnaghten at page 543, referring, of course, to a company incorporated under the *British Companies Act* of 1862, apply as well to the Porto Rico Company,—that every person who becomes a shareholder becomes entitled to a proportionate part in the capital of the company and unless otherwise provided, entitled as a necessary consequence to the same proportionate share in all the property of the company, including its uncalled capital. In the present case the priority of repayment in full at par applies to the preference stock and has no application to the right of a holder of such stock to a share in the surplus assets as above defined. The reasoning in *Williams v. Renshaw* (1) to which we were referred, seems to overlook this distinction.

For these reasons, therefore, I am of opinion that the Court of King's Bench came to the right conclusion as to the surplus assets, and that both Courts came to the right conclusion with respect to the respondents' claim for equality of dividends. Upon this view of the matter, no question arises as to the propriety of the allowance of interest at five per centum per annum from February 2nd, 1944, upon the division of the sum of $500,000. If the conclusion now arrived at had been reached by the judge of first instance, that sum would have been distributed among the holders of preference shares at that time.

The appeal and cross-appeal should be dismissed and the costs of all parties paid by the liquidator out of the assets of the Company.

The judgment of Taschereau and Estey J.J. was delivered by

TASCHEREAU J.—The Porto Rico Power Co. Ltd. was incorporated under the Dominion *Companies Act* of 1902, by letters patent dated the 29th of August, 1906. Its original authorized capital was $3,000,000 divided into 30,000 common shares of $100 each, all of which were issued and

(1) (1927) 220 App. Div. [N.Y.] 39.

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fully paid. In 1909, the Company increased its capital by creating and issuing $500,000 of preference stock, divided into 5,000 shares of $100 each, and again in 1911, a further increase of $500,000 raised the amount of preference stock to $1,000,000 and, as a result of which, the total capitalization of the company was $4,000,000.

The provisions of both supplementary letters patent, dealing with the rights of the preference shares are the following:—

> The said increased capital stock of five hundred thousand dollars shall be preference stock entitled out of any and all surplus net earnings whenever ascertained to cumulative dividends at the rate of seven per cent. per annum for each and every year in preference and priority to any payment of dividends on common stock, and further entitled to priority on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid.

The main holdings, if not the only, of the Porto Rico Power Company, Limited were the shares of a certain Porto Rican subsidiary, the assets of which were expropriated by the Porto Rico Water Resources Authority, of the Porto Rican Government. As a result of this transaction, the Montreal Trust Company, in its quality of liquidator of Porto Rico Power Company, Limited, now in voluntary liquidation, had in its treasury more than $6,000,000 available for distribution amongst both classes of shareholders. The present appellant owns 29,357 of the 30,000 common shares of the Porto Rico Power Company, Limited, and the respondents are the holders of a substantial number of preference shares.

The Montreal Trust Company of Montreal was appointed liquidator on the 26th of January, 1944, and was authorized by the Court to make a preliminary distribution of $100 per share to the preference shareholders and $150 per share to the holders of common stock, and it also prayed the Court to determine how the surplus money amounting to $500,000 should be distributed. The Montreal Trust Company submitted that the holders of common shares are alone entitled to share in any surplus assets available for distribution after payment by priority of $100 per share to the preference shareholders, plus dividends thereon accrued due and remaining unpaid, and that the holders of preference shares are

entitled only to said payment by priority of $100 per preference share and dividends thereon accrued and remaining unpaid, and that they are not entitled to share *pro rata* with the holders of shares of common stock in any surplus assets. The contention is that the rights of the holders of the preference shares of stock of the Porto Rico Power Company Limited, in liquidation, are completely and exhaustively set out in the by-laws and supplementary letters patent and that, after having received cumulative dividends at the rate of 7 per cent. per annum, which in fact they have received, they are entitled to only $100 per share in the distribution of the assets of the company which is the repayment in full of their shares at par.

The respondents intervened to contest the petition of the liquidator claiming that the preference shareholders are entitled to equal treatment in all respect with the common shareholders, except to the extent to which the said preference shares are given a priority by the supplementary letters patent and the by-laws of the company. They further alleged that no limitation whatsoever is placed upon the rights of the preference shareholders, and all that the said by-laws and supplementary letters patent provide is the extent of the priority given to the preference shareholders.

The respondents further claimed that the company in liquidation has paid dividends to the common shareholders in excess of the 7 per cent. received by the preference shareholders, and that the said dividends paid to the common shareholders constitute an advance in respect of which the preference shareholders are entitled to be placed on an equal basis.

Mr. Justice Boyer dismissed the contention of the McMaster University and directed that the $500,000 and all further assets subject to distribution should be distributed to the common shareholders only, and to the exclusion of the preferred shareholders.

The Court of King's Bench allowed the appeal of the McMaster University, ordered that the judgment *a quo* be modified to the extent of ordering, and ordered, the liquidator to distribute amongst the holders of prefer-

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ence shares the sum of $500,000 in proportion to their holdings of said shares, with interest at the rate of 5 per cent. per annum from the 2nd day of February, 1944. The Court of King's Bench further ordered the liquidator to distribute amongst the holders of preference and common shares in proportion to their holdings of the said shares, without any distinction, any or all balance of surplus assets available for distribution, but dismissed the claim of preferred shareholders as regards dividends.

The decision of this case depends upon the true construction of the essential words of the supplementary letters patent and by-laws already cited. It is clear, I think, that under the Dominion *Companies Act*, a preferred shareholder has all the rights and liabilities of a common shareholder. This proposition is found in section 49 of the *Companies Act*, R.S.C. 1906, chap. 79, which reads as follows:—

> Holders of shares of such preference stock shall be shareholders within the meaning of this part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this part.

The preferred shareholders are however entitled to additional preferences and rights which are authorized by section 47 of the Act, which is to the effect that the directors of the company may make by-laws for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividend and in any other respect, over ordinary stock as is by such by-laws declared, and this is confirmed by subsection 49, which, after stating that holders of shares of preference stock are shareholders within the meaning of the Act, says that they are, as against the ordinary shareholders, entitled to the preferences and rights given by the by-laws.

Many judgments have been cited by both parties. As it will be seen the consensus of opinion appears to be that preference shareholders have all the rights and liabilities of common shareholders, and that the additional preferences and priorities, to which they may be entitled, must be found in the by-laws and supplementary letters patent of the company.

The oldest case is, I think, the case of *Birch v. Cropper* (1). In that case, the articles of association of an English company incorporated under the *Companies Act* of 1862 provided that the net profits for each year should be divided *pro rata* upon the whole paid-up share capital, and that the directors might declare a dividend thereout on the shares in proportion to the amount paid up thereon. The articles contained no provisions as to the distribution of assets on the winding-up of the company. The original capital consisted of ordinary shares partly paid up. Afterwards, preference shares were issued entitling the holders to a dividend at a fixed rate with priority over all dividends and claims of the ordinary shareholders. The preference shares were fully paid up. The undertaking having been sold under an Act which made no provision for the distribution of the purchase money amongst the shareholders, the company was voluntarily wound up and assets remained for distribution. It was held by the House of Lords, reversing the decision of the Court of Appeal, that in distributing the assets "amongst the members according to their rights and interests in the company" and in adjusting "the rights of the contributors amongst themselves", the liability of the ordinary shareholders for the unpaid balance of their shares must not be disregarded; and that, after discharging all debts and liabilities and repaying to the ordinary and preference holders the capital paid on their shares, the assets ought to be divided amongst all the shareholders, not in proportion to the amounts paid on the shares, but in proportion to the shares held.

At page 531, Lord Herschell said:—

> To treat them as partners receiving only interest on their capital and not entitled to participate in the profits of the concern, or to regard them as mere creditors whose only claim is discharged when they have received back their loan, appears to me out of the question. They are members of the Company, and as such shareholders in it as the ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits. I think, therefore, that the first contention of the appellant wholly fails.

At page 543, Lord Macnaghten says:—

> Every person who became a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations

(1) (1889) 14 App. Cas. 525.

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of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital.

And at page 546, Lord Macnaghten says also:—

The ordinary shareholders say that the preference shareholders are entitled to a return of their capital, with 5 per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture-holders, liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of 5 per cent, upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures. But they are not debenture-holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort— affecting their rights as shareholders in the capital of the Company.

In *In re Espuela Land and Cattle Company* (1), it was held:—

There is no general rule that where preference shareholders have a preference as to repayment of capital they can have no further share in surplus assets. The question depends on the construction of the memorandum and articles of association. But if these documents contain no provisions on the point, surplus assets must in a winding-up be divided amongst all the shareholders, ordinary and preference, in proportion to the nominal value of the shares.

In this case, Mr. Justice Swinfen Eady says at page 193:—

There remains the question how the assets which remain after paying preference capital, interest thereon, and ordinary capital are to be distributed.

Mr. Younger, who claimed the whole surplus on behalf of the ordinary shareholders, contended that where priority of repayment on a winding-up is secured to the preference capital the preference shareholder is entitled to that repayment, but not to any further interest in the capital of the company, in the same manner as where a right to a fixed preferential dividend is secured to preference shareholders they take that fixed amount and nothing more, however large the revenue of the company may be.

This, however, is merely a question of the construction of the memorandum and articles. There is not any rule of law that shareholders having a fixed preferential dividend take that only. It is quite open to a company to distribute its revenue first in paying a fixed preferential dividend, then in paying a dividend of like amount to the ordinary shareholders, and then dividing any surplus revenue of any year rateably between the preference and ordinary shareholders. An instance

(1) L.R. [1909] 2 Ch. 187.

of this is found in *Webb* v. *Earle* (1). The documents embodying the constitution of the company determine how its revenue shall be distributed; and in like manner they determine how any surplus assets are to be divided. An instance of a provision that preference shares shall confer certain rights, "but shall not confer any further right to participate in profits or surplus assets," occurred in *In re South African Supply and Cold Storage Co.* (2). In the absence, however, of any provision to the contrary, the rights of the shareholders are equal. Where the shares are of unequal amounts the surplus assets must be distributed rateably according to the nominal amount of the shares, unless some provision to the contrary is to be found in the memorandum or articles: *In re Wakefield Rolling Stock Co.* (3); *Birch* v. *Cropper* (4).

The judgment in the case of *Will* v. *United Lankel Plantations Co.* (5) did not deal with the distribution of the assets of the company but only with the right to dividends, and the House of Lords came to the conclusion that, on the construction of the by-law, a contract or a bargain for a 10 per cent. dividend was complete as to dividends, and that the preferred shareholders were not entitled to share in the dividends in excess of that amount. The only point in dispute was one of construction, and as Viscount Haldane said,

> construction must always depend on the terms of the particular instrument

and

> our primary guide must be the language of the documents we have before us.

Lord Atkinson said:

> It is said that the earlier part of the resolution by making him a shareholder gives him a right to some additional dividend on distribution. It does not appear to me to be at all capable of that construction.

In that same case, where only the right to dividends was discussed before the House of Lords, Lord Justice Farwell had said in the Court of Appeal (6):—

> To my mind the considerations affecting capital and dividend are entirely different. The preference given to capital is in the winding-up, and the preference claimed to be given to dividend here is in a going concern; and I do not think that you can reason from what will happen to capital in a winding-up to what ought to happen to dividend while the company is a going concern.

In *In re National Telephone Company* (7) much turned on the wording of some of the preferred share provisions.

(1) (1875) L.R. 20 Eq. 556.
(2) [1904] 2 Ch. 268, at 271.
(3) [1892] 3 Ch. 165.
(4) (1889) 14 App. Cas. 525.
(5) [1914] A.C. 11.
(6) [1912] 2 Ch. 571, at 580.
(7) [1914] 1 Ch. 755.

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The first preferred stock was entitled to a cumulative dividend of 6 per cent. per annum and no more, and to a preferential payment of the amount paid up out of the assets of the company in the event of the company being wound up in priority to any payment in respect of the ordinary shares of the company but to no other participation in profits.

The second preferred shares were given the right to participate rateably in the surplus profits with the common shareholders, and it was provided that in winding up the surplus assets shall be applied in the first place in repaying the holders of the original preference shares, the full amount paid up thereon, and subject thereto in repaying to the holders of the second preference shares the full amount paid up thereon in priority to any payment in respect of the ordinary shares of the company.

Next, the surplus assets were to be applied in repaying to the holders of the third preference non-cumulative shares the full amount paid up thereon, and the fourth preferred was in the event of winding up to

rank for repayment of the full amount paid up thereon, together with a bonus of 5 per cent. in priority to the common stock.

The appellants have relied upon this judgment and particularly upon the following passage of Mr. Justice Sargant:—

It appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding-up, the express gift or attachment of preferential rights to preference shares, on their creation, is *prima facie* a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights, they would have been entitled.

But this expression of opinion of Mr. Justice Sargant was later overruled in two cases.

In *In re Fraser & Chalmers Limited* (1) Mr. Justice Astbury, after considering the *Espuela* (2) and *National Telephone* (3) cases as well as the *Will* case (4), expressed his preference for the decision of Mr. Justice Swinfen Eady in favour of the preference shareholders.

At page 120, Mr. Justice Astbury says:—

All shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares.

(1) [1919] 2 Ch. 114.
(2) [1909] 2 Ch. 187.
(3) [1914] 1 Ch. 755.
(4) [1914] A.C. 11.

And at page 121, he further adds:—

It seems to me impossible to say that, because it is provided that certain debts of the company shall be paid in a winding-up in a particular order, a fund remaining after doing so which is not expressly, nor by implication, referred to at all, and which forms part of the general assets of the company, shall be divided between some, to the exclusion of other shareholders.

The ordinary shareholders contend that the express rights given to the preference shareholders by these resolutions contain the whole of their rights as such. It is clear however that they do not. They have voting and other rights as corporators, and I see no reason for construing this contract as depriving them of a right to share in an ultimate surplus that is not referred to, any more than as depriving them of voting and other rights of shareholders which are in the same position.

The other case which overruled the decision in the *National Telephone Company* case (1), is the case of *Anglo-French Music Company Limited* v. *Nicoll* (2). In that case the preferred shareholders were entitled to a fixed 7 per cent. cumulative dividend with right to repayment of capital before any dividend is paid or capital repaid to the holders of ordinary shares, with right to a further participation in dividends.

At page 391 Mr. Justice Eve says:—

The point I have to consider is this: does the provision in the bargain providing for what is to happen in the event of the assets being insufficient to repay all the capital operate to preclude the preference shareholders, in the event of the assets being more than sufficient to repay all the capital, from participating in the excess? I see no reason why it should do so * * * I do not think it is accurate to say that the whole bargain between the two classes of shareholders is to be found in the memorandum, except to this extent, that the rights of each class are thereby finally determined in respect of all matters expressly or by necessary implication therein dealt with.

In the present case the respective rights of the two classes to the profits of the company are expressly dealt with—so also are the rights in the event of an insufficiency of assets to repay all the capital in a winding-up—but I cannot see anything which deals either expressly or by necessary implication with the rights of either class in the event of the assets being more than sufficient to repay the capital.

Mr. Justice Eve who gave the judgment in the case of *Anglo-French Music Company Limited* v. *Nicoll* (2), made a further similar pronouncement in *In re Madame Tussaud & Sons, Limited* (3). In that case His Lordship held that, according to the constitution of the company, the *prima facie* presumption in favour of equality of distribution amongst all the shareholders ought to obtain, and the sur-

(1) [1914] 1 Ch. 755 (2) [1921] 1 Ch. D. 386.
(3) [1927] 1 Ch. D. 657.

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plus assets were distributed amongst all the shareholders *pro rata,* in proportion to the amount paid up on their shares.

The appellant relied on the *Collaroy Company, Limited* v. *Giffard* case (1). The company's memorandum after stating that the capital was 300,000 divided into 10,000 preference shares of 10 each and 20,000 ordinary shares of 10 each, declared that such preference shares should confer "the right" to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the capital paid up thereon, and "shall rank" both as regards dividends and capital in priority to the ordinary shares. It was held that the memorandum and article contained an exhaustive delimitation of "the right" of the preference shareholders, and that in the event of a winding-up they would be entitled to a return of their capital, but not to participate in surplus assets. This judgment was given by Mr. Justice Astbury who had previously given the judgment in the *Fraser & Chalmers* case (2). It would seem that both decisions are contradictory, but a careful reading of the judgment leads me to a different conclusion. The learned Justice stated in the first part of his judgment a proposition that cannot in his mind be questioned, and it is that:—

> The annexation to preference shares of a right to receive back their capital in a winding-up in priority to the ordinary shares does not *prima facie* exclude the preference shareholders from participation in the ultimate surplus assets if any.

In support of this proposition Mr. Justice Astbury cites the *Espuela* case (3), as well as *Fraser & Chalmers Limited* (2) *and Anglo-French Music* (4) cases. He further states that a provision may be expressed in such a manner and in such a context that according to its true construction, it does exclude preference shareholders from such a participation, and the question that he had to decide was as to whether the contract in the particular case he had to determine did exclude the preference shareholders. On the construction of the contract he reached the conclusion that the preference shareholders were excluded, and he seems to base his judgment on a very narrow ground, namely, that the preference shareholders were given "the right", to

(1) [1928] 1 Ch. 144.
(2) [1919] 2 Ch. 114.
(3) [1909] 2 Ch. 187.
(4) [1921] 1 Ch. 386.

repayment of capital, and that the use of the word "the" was limitative and produced a very different result from the use of such words as a "right".

In the *Metcalfe & Sons Limited* case (1) the Court of Appeal affirmed the decision of Mr. Justice Eve who disagreed with the conclusion arrived at by Mr. Justice Astbury in the *Collaroy Company, Limited* v. *Giffard* case (2), and Lord Hanworth says at page 158:

> Personally I find myself inclined to agree with Eve J. in not being able to follow the distinction between the *Fraser & Chalmers Limited* (3), and the *Collaroy* case (2).

And at the same page he also states:—

> Therefore, looking at the authorities as a whole, I come to the conclusion that there must be in respect of this balance of surplus assets a parity between all the shareholders. I cannot find anything in the present case which either expressly or impliedly is sufficient to displace the rights which belong to the preference shareholders equally with the ordinary shareholders, and the rule of parity among shareholders must therefore prevail.

In the *John Dry Steam Tugs Limited* case (4) the principle, that there being nothing in the articles to modify or exclude the normal right of the preference shareholders to share in the distribution of the surplus assets, was upheld and the preference shareholders were declared to be entitled to rank *pari passu* with the ordinary shareholders in the distribution of the assets of the company.

Another case reported in England is *Re W. Foster & Sons Limited* (5). It was there held that the question whether a liquidator ought to divide and distribute the surplus assets amongst the holders of the ordinary shares alone, or amongst the holders of the preference shares and the holders of the ordinary shares *pari passu,* was governed by the decision *In re William Metcalfe & Sons Limited* (1).

The English Weekly Notes of May 27th, 1944, at page 143 refers to a decision of Mr. Justice Cohen in *In re Wood, Skinner & Company Limited* (6), in which the preferred shareholders were entitled to rank as regards dividends and capital in priority to the ordinary shares. It was held that all shareholders are entitled to

(1) [1933] Ch. 142.
(2) [1928] 1 Ch. 144.
(3) [1919] 2 Ch. 114.
(4) [1932] 1 Ch. 594.
(5) [1942] 1 All E.R. 314.
(6) Full Report in [1944] Ch. 323.

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equal treatment unless and to the extent that their rights are modified by the contract under which they held their shares.

Two other cases were cited by the appellant, but nothing in the reasons for judgment can be found which is useful to help us in the determination of the case at bar.

The first one is the case of *Steel of Canada Limited* v. *Ramsay* (1). In that case the preferred shareholders were entitled to a fixed cumulative preferential 7 per cent. dividend, and were further entitled to share equally with the common stock in additional profits after the holders of the ordinary shares should have received dividends equal to those paid on the preferred shares. The question was whether under this special clause the common shareholders were entitled to be equalized with the preferred shareholders only in respect of the current year or as regards other years. The judgment of the Privy Council did not purport to deal with the division of surplus assets, but was only dealing with the right to additional dividends.

The other case is *Holmested et al.* v. *Alberta Pacific Grain Company Limited* (2). In the by-law of the company it was provided that the cumulative preferred shares would rank both as regards dividends and return of capital, in priority to all common shares in the capital stock of the company, but did not confer any further rights to participate in profits or assets. The preferred shareholders commenced an action for a declaration that they were entitled to rank equally with the holders of common shares on the distribution of the proceeds of the sale of the company's assets and business. It was argued that the by-law creating the said preferred shares, in so far as it purported to *limit or restrict* the right of the preferred shares to participate in the distribution of the profits or assets of the company was *ultra vires* of the Grain Company, because section 47, as it read at that time (now amended by 14-15 Geo. V, chap. 33, sec. 16), authorized *only priorities but not restrictions.* The Court came to the conclusion that the by-law was not invalid and that the restriction was *intra vires* of the powers of the

(1) (1931) A.C. 270; [1931] 1 D.L.R. 625.

(2) [1927] 3 D.L.R. 901; [1928] 1 D.L.R. 135.

company. The decision in that case does not apply to the case which has been submitted to this Court. In the *Alberta Pacific Grain* case (1) there was a restriction attached to the preference shares, but such restriction does not exist in the case which is submitted to this Court.

From all these numerous judicial pronouncements, and from a careful reading of the *Company's Act,* I believe that one may rightly gather that the rights of all classes of shareholders are on a basis of equality, unless they have been modified by the by-laws or the letters patent of the company, and, that the right to the return of invested capital, and the right to share in surplus assets are quite different and distinct matters.

Holders of preference stock are shareholders within the meaning of the Act, and they possess in all respects the rights, and are subject to the same liabilities as the other classes of shareholders. Section 49 on this point is quite clear and unambiguous. It is in virtue of this section that the ordinary rights of preference shareholders are created. These rights put them on an equal footing with the common shareholders as to the sharing in surplus assets.

It is in the letters patent and the by-laws of the company that have to be found the priorities that may be attached to preference shares, and which are clearly authorized by section 47. It may of course happen that these priorities are exhaustive of the rights of the preference shareholders., and therefore negative any additional rights, or it may be also that they create additional rights which coexist with the original rights inherent to all classes of shareholders. But in order to determine the true meaning and the legal effect of these preference and priority clauses, one must necessarily look at the creating clauses in order to find if there is or not an express or implied condition, which limits or adds to the ordinary rights of the shareholders. It is a mere question of construction of these clauses, which form part of the contract under which the shareholders hold their shares.

I entirely agree with the Court of King's Bench that the provisions of the by-laws of the company do not expressly or by necessary implication, limit the rights of the holders of preference shares. They do create priorities, but

(1) [1927] 3 D.L.R. 901; [1928] 1 D.L.R. 135.

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these priorities are in addition to the existing rights, and are not a declaration of all the rights of this class of shareholders. These priorities consist in a right for the preference shareholders to be repaid of the invested capital at par, together with any dividends accrued and remaining unpaid, but do not affect their right to share in the profits. For the sharing in the profits, which is the fundamental right to all shareholders, is a matter entirely different from the priority given to the preference shareholder which is the additional privilege given to him.

In the present case the priority to repayment

> on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued due and remaining unpaid

is a definition of the existing priority as to the sharing of assets, and cannot, I believe, be construed as a bar or a limitation to any further rights.

For these reasons, I come to the conclusion that the preference shareholders have a priority to be repaid at par, and that they are further entitled to share *pari passu* in the distribution of the assets of the company with the common shareholders, after the latter have received payment at par.

The main appeal should therefore be dismissed.

It is the contention of the cross-appellant that the stipulation for payment of cumulative dividends at the rate of 7 per cent. per annum for each and every year, in preference and priority to any payment of dividends on common stock, was not limitative in its terms and that in the event of the common shareholders receiving, in any year, a dividend exceeding the said rate of 7 per cent. per annum, then, the preferred shareholders were entitled to be paid on a basis of equality.

The preference shareholders have received each year the stipulated dividends of 7 per cent. until the winding-up of the company, and the common shareholders until 1931 have received dividends lower than 7 per cent per year. However, from 1931 to 1942, the directors have declared for the benefit of the common shareholders an annual dividend of 8 per cent. and in 1943 this dividend was 49½ per cent. The preference shareholders ask for equal treatment in

the matters of dividends. I cannot agree with this proposition, and it seems that the cases cited by the respondents on the main appeal defeat this very contention.

The question, I think, has been settled by the case of *Will* v. *United Lanket Plantations Company, Limited* (1). In that case the Court of Appeal (2) decided that, in the distribution of profits, holders of the preference shares were not entitled to anything more than a 10 per cent. dividend, and in the House of Lords (1) Viscount Haldane said:—

> Moreover, I think that when you find—as you do find here—the word "dividend" used in the way in which the expression is used in the resolution and defined to be a "cumulative preferential dividend" you have something so definitely pointed to as to suggest that it contains the whole of what the shareholder is to look to from the company.

The right to dividend, while the company is a going concern and the right to capital and surplus assets in the winding-up, are quite distinct. In the present case, the right of preference shareholders is to be paid an annual dividend of 7 per cent. and they have a priority for dividends accrued due and remaining unpaid. These dividends have been paid, and the preference shareholders, as to dividends, have therefore received all that they are legally entitled to.

The by-laws give priority to the preference shareholders to obtain reimbursement of their invested capital, in addition to their right to share in the division of assets, but a similar privilege as to dividends is not given. In the latter case, the privilege is only to assure the payment of a dividend of 7 per cent. which has been declared, and which at the time of the winding-up accrued and remained unpaid. I should dismiss the cross-appeal.

As agreed, all costs of the parties will be paid by the liquidator out of the mass of the estate.

RAND J.—This is a controversy between holders of common and preferred shares of the Porto Rico Power Company Limited in liquidation. Two claims are made, one by each group. During the company's business life, the preferred shareholders have received more than one-half of the total dividends declared: but they claim that where in any year a dividend equal to that received by

(1) [1914] A.C. 11. (2) [1912] 2 Ch. 571.

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them is paid to the common shareholders, any excess in that year must be shared equally by both classes. On the other hand, the common shareholders contend that when the total amount of subscribed capital has been repaid, the remaining or surplus assets belong exclusively to them.

The provision of the supplementary letters patent authorizing the issue of the preference stock was in these words:

> The said increased capital stock of $500,000 shall be preference stock entitled out of any and all surplus net earnings whenever ascertained to cumulative dividends at the rate of 7 per cent per annum for each and every year in preference and priority to any payment of dividends on common stock, and further entitled to priority on any division of the assets of the company to the extent of its repayment in full at par together with any dividends thereon then accrued, due and remaining unpaid.

This authority was exercised under the Dominion *Companies' Act,* R.S.C. 1906, chapter 79, sections 47 and 49 of which were at the time as follows:

> 47. The directors of the company may make by-laws for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividends and in any other respect, over ordinary stock as by such by-laws declared.
>
> 2. Such by-laws may provide that the holders of shares of such preference stock shall have the right to select a certain stated proportion of the board of directors, or may give them such other control over the affairs of the company as is considered expedient.
>
> * * *
>
> 49. Holders of shares of such preference stock shall be shareholders within the meaning of this Part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part: Provided that in respect of dividends, and in any other respect declared by by-laws as authorized by this Part, they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law.

I see no substance in the claim of the preferred shareholders that their equality in dividends must be referred to each year's distribution. On Mr. Geoffrion's basic assumption that all shareholders are equal with certain additional rights annexed to the preferred shares, his clients, having received substantially more in dividends than the common shareholders, are still holding an advantage. The reasoning in *Steel Company of Canada Limited* v. *Ramsay* (1), although there it was expressly pro-

(1) [1913] A.C. 270.

vided that participation of the preferred shareholders in addition to the fixed rate of 7 per cent should be only when the ordinary holders should have received "dividends equal to those paid on the preferred shares", applies even in the absence of such a stipulation. Certainly that would seem inescapable under the principle of section 49.

The language of the letters patent

> the said increased capital stock * * * shall be preference stock entitled out of any and all surplus net earnings whenever ascertained to cumulative dividends * * * in preference and priority to any payment of dividends on common stock

is claimed by the appellants to limit the preference holders so far as dividends go to the rate of 7 per cent provided. What is sometimes called a "preferential dividend" is simply a dividend with certain preferential incidents. The latter in this case are, the fixed rate, the accumulation and the priority. What the resolution deals with however is the entire right itself to dividend or to participation in profits, with those incidents. Whether this commutation of the right rather than merely declaring preferential additions is a violation of section 49 it is not, in view of the dividend inequality, necessary to consider, but the particular language used will be seen to be relevant to the second claim, that of the holders of ordinary shares in the distribution of assets.

The provision in relation to that is quite different in effect. Its subject does not purport to be the whole right to share in assets; it deals only with a preferential incident, the right of priority and priority only to the extent "of its repayment" meaning the repayment of the capital paid in. The funds which we are considering are surplus assets which were not paid in, and could not in any proper sense be said to be repaid.

It is argued that you cannot have a share in the abstract, that it is only to issued shares that incidents attach, and that these arise only at the moment of issue. But the determination of "preferential" rights involves an interpretation of qualifying language, and before that is possible we must make assumptions of the underlying

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substantive matter. The preference provision would be meaningless in isolation, and its interprteation depends upon what we attach to the concept of a share.

As declared by section 49, the holder of the preferred share is none the less a shareholder because he has certain advantages over ordinary shareholders: he places his property at the fundamental risk; but the interpretation of the constituting provision will depend upon whether we superimpose it upon the ordinary notion of share with its incidents of voting, participating in profits and in assets when the venture is over; or upon a skeleton of that concept such as a fractional interest in a fund to which the resolution adds all significant characteristics. Here again the essential fact obtrudes itself that all members are of a common group, and I think the rule unassailable that postulates the common and ordinary rights of shareholders as the underlying basis for the interpretation: *In re Wm. Metcalfe & Sons Ltd.* (1). The question then is simply one of construction: how far have those rights been clearly taken away? Here, in relation to surplus assets, the right is left intact and taking that view, I do not, again as in the other branch of the argument, find it necessary to consider whether section 49 would have prevented any restriction of that right.

I would therefore dismiss both the appeal and the cross-appeal with costs to be paid by the liquidator as agreed.

Appeal and cross-appeal dismissed, costs to be paid by liquidator as agreed.

Solicitors for the appellants: *Campbell, Weldon, Kerry & Rinfret.*

Solicitor for the respondents McMaster University et al. *A. S. Bruneau.*

Solicitors for the Liquidator respondent: *Stairs, Dixon, Claxton, Senécal & Lynch-Staunton.*

(1) [1933] 1 Ch. 142.

PERCY WALKER THOMSON... APPELLANT; 1945 *Oct. 16, 17

AND

THE MINISTER OF NATIONAL REVENUE..... RESPONDENT. 1946 *Jan. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Liability for—Income War Tax Act (R.S.C. 1927, c. 97, and amendments), s. 9 (1) (a) (b) (before its amendment in 1942)—"Residing or ordinarily resident" in Canada "during" year—"Sojourns".

Sec. 9 (1) of the Dominion *Income War Tax Act* (as it stood before amendment in 1942) required payment of a tax "upon the income during the preceding year of every person (*a*) residing or ordinarily resident in Canada during such year; or (*b*) who sojourns in Canada for a period or periods amounting to" 183 days "during such year".

Appellant was born in the province of New Brunswick. He had retired from business by 1923, and in that year, owing to a dispute over a village assessment, he sold his home in New Brunswick, declared Bermuda to be his domicile, went there and leased a house but didn't stay, and went to the United States and lived there, chiefly at Pinehurst, North Carolina, where in 1930 he built an expensive dwelling. From 1925 to 1931 he made some visits to Canada, mostly short. In 1932 he rented a house in New Brunswick where he spent a summer season in each of the years 1932, 1933 and 1934, of 134, 134 and 81 days, respectively; and in 1934, as his wife enjoyed being near her relatives and friends in New Brunswick, he built an expensive house there, and from 1935 to 1941 (inclusive) spent (in the warmer part of the year) an average of 150 days in each year (159 days in 1940, the year in question). The rest of the year the house was closed except quarters for his wife and house-keeper which were open the year round. In 1941 the Dominion authorities asked him to file an income tax return for the year 1940, and, on his not doing so, fixed a tax against him, under s. 47 of the Act. His liability to the Dominion of Canada for income tax was the question in dispute.

Held (Taschereau J. dissenting): Appellant was "residing or ordinarily resident" in Canada "during" the year 1940, within the meaning of said s. 9 (1) (*a*), and was liable for income tax in Canada.

The meaning of "residing", "ordinarily resident", "sojourns", "during", discussed. *Commissioners of Inland Revenue v. Lysaght,* [1928] A.C. 234; *Levene* v. *Commissioners of Inland Revenue,* [1928] A.C. 217, and other cases, discussed.

The word "during" in s. 9 (1) (*a*) meant "in the course of" rather than "throughout". (No ground against such construction was afforded by the fact that by subsequent amendment, in 1942, the words "at any time in" were substituted for "during").

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

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Per Kerwin J.: The frequency with which appellant came to Canada, his "routine of life" in that regard, the family ties of his wife, if not of himself, the erection and occupancy of his house, retention of servants, together with all the surrounding circumstances, make it clear that he was "residing" rather than merely staying temporarily in Canada. Assuming that he was a resident of the United States for the purposes of income tax there, a man may be a resident of more than one country for revenue purposes.

Per Rand J.: The mode or nature of appellant's living in Canada brought him within the language of s. 9 (1) (*a*). Apart from any question of domicile, which would appear to be still in New Brunswick, his living in Canada was substantially as deep rooted and settled as in the United States, though in terms of time his home in the United States might take precedence. He was at his place in Canada as at his "home", and the mere limitation of time did not qualify that fact. That brought him within the most exacting of any reasonable interpretation of "resides" or "ordinarily resident".

Per Kellock J.: There was no difference been appellant's use of his Canadian home and that of his United States home or homes. The establishments were essentially of the same nature and were equally regarded by him as "homes" in the same sense. His residence in each was in the ordinary and habitual course of his life and there was no difference in the quality of his occupation, though he occupied each at different periods of the year. He came within the terms "residing" and "ordinarily resident" in Canada.

Per Estey J.: Appellant selected the location for his residence in Canada, built and furnished it for his wife's enjoyment of her relatives and friends and his own enjoyment of golf nearby; his residence there was, in successive years, in the regular routine of his life; and, taking such facts into consideration, the conclusion must be that he was "ordinarily resident" there, within the meaning of s. 9 (1) (*a*). A person may have more than one residence, and the fact of his residence in the United States in no way affected the determination of the issue.

Per Taschereau J., dissenting: Appellant had in 1923 ceased to be a resident of Canada and his visits thereafter were of a temporary nature and did not justify a finding that he was "residing" or "ordinarily resident" in Canada; he was really a resident of the United States making occasional visits to Canada; and was not subject to income tax in Canada.

APPEAL from the judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing the present appellant's appeal from the decision of the Minister of National Revenue affirming an assessment levied upon him for the taxation year 1940 under the provisions of the *Income War Tax Act* (R.S.C. 1927, c. 97, with amendments, as it stood prior to amendment in 1942).

(1) [1945] Ex. C.R. 17; [1945] 3 D.L.R. 45; [1945] C.T.C. 63.

The Minister's affirmance of the assessment was on the ground that "the facts disclose that the taxpayer was resident or ordinarily resident in Canada during the year upon him for the taxation year 1940 under the provisions by paragraph (*a*) of section 9 of the Act". Thorson J. in his judgment put the question in the case as follows:

> The only question to be determined is whether the appellant in 1940 was "residing or ordinarily resident in Canada during such year", within the meaning of section 9 (*a*) of the Income War Tax Act, as it was in force in 1940, or whether he was merely sojourning there within the meaning of section 9 (*b*).

and came to the conclusion that, on the facts, and the proper construction of the said Act, the appellant was both "residing" and "ordinarily resident" in Canada "during" the said year 1940.

The facts are discussed at length in the reasons for judgment in this Court now reported, and also in the reasons for judgment of Thorson J. in the Exchequer Court (above cited).

C. F. Inches K.C. and *E. F. Newcombe K.C.* for the appellant.

R. Forsyth K.C. and *E. S. MacLatchy* for the respondent.

KERWIN J.—The sole point for determination in this appeal is whether, during the year 1940, the appellant was "residing or ordinarily resident in Canada" within the meaning of section 9 (1) (*a*) of the *Income War Tax Act* as it stood in 1940, or whether he was merely sojourning there within the meaning of section 9 (1) (*b*). No question is raised as to the amount of the assessment. The relevant parts of section 9 are as follows:—

> 9. There shall be assessed, levied and paid upon the income during the preceding year of every person
>
> (*a*) residing or ordinarily resident in Canada during such year; or
>
> (*b*) who sojourns in Canada for a period or periods amounting to one hundred and eighty-three days during such year;

There is no definition in the Act of "resident" or "ordinarily resident" but they should receive the meaning ascribed to them by common usage. When one is considering a Revenue Act, it is true to state, I think, as it is put in the Standard Dictionary, that the words "reside"

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and "residence" are somewhat stately and not to be used indiscriminately for "live", "house" or "home". The Shorter Oxford English Dictionary gives the meaning of "reside" as being "To dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place." By the same authority "ordinarily" means "1. In conformity with rule; as a matter of regular occurrence. 2. In most cases, usually, commonly. 3. To the usual extent. 4. As is normal or usual." On the other hand, the meaning of the word "sojourn" is given as "to make a temporary stay in a place; to remain or reside for a time."

The House of Lords has adopted the everyday meaning as a test in applying the terms "resident" and "ordinarily resident" in the British *Income Tax Act*. *Levene* v. *Commissioners of Inland Revenue* (1); *Commissioners of Inland Revenue* v. *Lysaght* (2). Under the British Act that is of particular importance where a finding of the Commissioners on a question of pure fact cannot be reviewed by the Courts except on the ground that there was no evidence on which they could have arrived at their conclusion. Under our Act no such question arises, but the remarks of the peers who took part in the two judgments mentioned are of assistance. Rule 3 of the General Rules applicable to all the Schedules of that *Income Tax Act* may have had an effect in the result arrived at in some of the cases. In the *Levene* case (1), Viscount Cave, at page 224, points out that if a man sought to be taxed is a British subject regard must be had to that rule

> which provides that every British subject whose ordinary residence has been in the United Kingdom shall be assessed and charged to tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad;

and as a matter of fact, at the foot of the same page the Lord Chancellor, after agreeing that it was plainly open to the Commissioners to find that Mr. Levene was resident in the United Kingdom, stated that it was probable that Rule 3 applied to him. Viscount Sumner refers, at p. 227, to the soundness of the Commissioners' conclusion on Rule 3.

(1) [1928] A.C. 217. (2) [1928] A.C. 234.

On the other hand, the decision of the First Division of the Court of Exchequer (Scotland) in *Cooper* v. *Cadwaladar* (1), was referred to with apparent approval by Viscount Cave at page 223 of the *Levene* case (2) and by Viscount Sumner at page 244 of the *Lysaght* case (3). There, the person held liable to tax was a citizen of the United States, where he resided and practiced his profession, but rented a house and shooting rights in Scotland where he spent about two months in each year. I refer to this decision because I find it difficult to imagine that it would be held in Canada that a citizen of the United States, residing in that country, but owning a summer home in Canada which he occupied for four or five months in each year, was, by reason of the latter facts, a resident of this country within the meaning of our Act.

However, that is not the case before us. No quarrel is found with the statement of facts contained in the reasons for judgment of the President of the Exchequer Court and I do not, therefore, repeat all of them. The appellant was born in Saint John, New Brunswick, and is still a citizen of Canada. Notwithstanding the absence of a provision corresponding to Rule 3 of the General Rules referred to above, that is a fact to be considered. I agree with the President that the appellant's motions in going to Bermuda, making an affidavit as to his intention, renting a house which he never used, and obtaining a passport, were a pure farce; that the appellant never became a resident of Bermuda; but that, whether that be so or not, he was certainly not a resident of Bermuda in the year 1940. The appellant had not been there since 1933 and his entry to Canada as a tourist from Bermuda was fictitious. The residence he built at Pinehurst in North Carolina, presumably with his other activities in the United States, convinced the tax authorities of that country that he was a resident there for the purposes of its Income Tax Act. Assuming that to be a fact, a man may be a resident of more than one country for revenue purposes. The frequency with which he comes to Canada and what the

(1) (1904) 5 Tax Cas. 101.
(2) [1928] A.C. 217.
(3) [1928] A.C. 234.

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President described as the routine of his life are important matters in coming to a conclusion, and I agree with that arrived at by the President.

The appellant seeks to make himself a sojourner as he carefully remained in Canada for a period or periods amounting to less than 183 days during each year. This attempt fails. The family ties of his wife, if not of himself, the erection of a substantial house, the retention of the servants, together with all the surrounding circumstances, make it clear to me that his occupancy of the house and his activities in Canada comprised more than a mere temporary stay therein.

The appellant developed an argument based upon the words "during such year" at the end of paragraph (*a*). These words were added by the commissioners charged with the duty of the 1927 revision of the statutes and were continued until the amendment of 1942. That amendment is in the following terms:—

9. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person, other than a corporation or joint stock company,

(*a*) residing or ordinarily resident in Canada at any time in such year; or

(*b*) who sojourns in Canada in such year for a period or periods amounting to one hundred and eighty-three days;

Attention was called to the change from "during" to "at any time in." This amendment does not, of course, govern, since it is the year 1940 in respect of which the appellant is assessed, but it is argued that the amendment shows that a change was intended to be made. That this is not the case appears by subsections 2 and 3 of section 21 of the *Interpretation Act*, R.S.C. 1927, chapter 1:—

2. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament to have been, different from the law as it has become under such Act as so amended.

3. The repeal or amendment of any Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

Reliance was placed upon the decisions in *The Queen* v. *Anderson* (1), and *Bowes* v. *Shand* (2), but these decisions were concerned with entirely different matters and

(1) (1846) 9 Q.B. 663. (2) (1877) 46 L.J.Q.B. 561.

do not affect what is to be determined here. "During such year" cannot certainly mean throughout the whole year, as the same phrase is used in (*b*). In each case it refers back to "the preceding year" in the body of section 9; that is, the year for which the assessment on income is to be made is the same as that in which the residing or sojourning occurs.

The appeal should be dismissed with costs.

TASCHEREAU J. (dissenting)—This is an appeal from a judgment rendered by the Honourable Mr. Justice Thorson, President of the Exchequer Court of Canada.

It raises the important and difficult question of determining the true meaning of the words "residing or ordinarily resident in Canada", that are found in the *Income War Tax Act*. The facts that brought about this litigation are the following:—

The appellant, Percy Walker Thomson, was born in Saint John, N.B., and lived there until he retired from business. He then became a resident of Rothesay, in the County of Kings, a short distance from Saint John, where he lived in 1923. During that year, he had a dispute with the tax assessors, and decided to leave Canada and establish his home in a different country.

The evidence reveals that, since moving from Canada, he spent most of his time in the United States, living in Pinehurst, originally in rented houses and later in a house that he built himself, at a cost of nearly $100,000. From 1925 to 1931, he paid very few visits to Canada, but from 1932 to 1941 inclusive, he spent the summers in Canada, first in St. Andrews, and from 1935, in a house that he built at Riverside, N.B. It was while he was occupying that house in 1941 that the Income Tax Department at Saint John, N.B., requested him to file a return for the year 1940. The appellant denied his liability, stating that as he understood the Canadian law, he was not compelled to file any income tax statement here, because he was visiting Canada only as a tourist. The Income Tax Department decided then to issue an arbitrary assessment against him for the year 1940, based on a yearly income of $50,000; with this letter was an official bill imposing a tax

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of $21,122, with interest amounting to $480.31, making a grand total of $21,602.31, the whole payable as of October 13th, 1941.

The appellant gave notice of appeal pursuant to section 58 of the *Income War Tax Act*, and on April 6th, 1942, the Minister of National Revenue issued his decision, affirming the said assessment, on the ground that the facts disclosed that the appellant was *"residing or ordinarily resident"* in Canada during the year 1940, and hence was subject to income tax as provided by paragraph (*a*) of section 9 of the *Income War Tax Act*. The appellant appealed to the Exchequer Court of Canada but his appeal was dismissed with costs.

Section 9 reads in part as follows:—

> There shall be assessed, levied and paid upon the income during the preceding year of every person
>
> (*a*) residing or ordinarily resident in Canada during such year; or
>
> (*b*) who sojourns in Canada for a period or periods amounting to one hundred and eighty-three days during such year.

The learned President reached the conclusion that the appellant had spent the following number of days in St. Andrews, N.B., since 1935: 1935—156 days, 1936—138 days, 1937—169 days, 1938—145 days, 1939—166 days, 1940—159 days, 1941—115 days. He also stated that the question of whether a person is ordinarily resident in one country or in another, cannot be determined solely by the number of days that he spends in each, but that he may be ordinarily resident in both, if his stay in each is substantial and habitual and in the normal and ordinary course of his routine of life.

According to his views the terms "residing" and "ordinarily resident" found in the *Income War Tax Act* have no technical or special meaning, and the question whether in any year a person was residing or ordinarily resident in Canada within the meaning of the section, is a question of fact. He finally came to the conclusion that in 1940 the appellant was "residing or ordinarily resident" in Canada. On this point he says:—

> There is no substance in the appellant's contention that when he was at East Riverside he was merely sojourning there. There was nothing of a transient character about his stay there. He lived there regularly with his wife and family and his staff of servants. The house at East Riverside was a permanent one. He kept a housekeeper and his wife there throughout the year and the house was always available

to him as his place of abode. The fact that he chose to stay there only while the weather made it pleasant to play golf is quite immaterial and does not affect the question. His liability to income tax assessment based upon residence cannot be determined by the fact that when it was too cold to play golf at East Riverside, he chose to go to Pinehurst to play golf there. Nor is the question of residence determined by the number of days spent at East Riverside. The regular and usual relationship implied in the term "residing" is present in this case. He stayed at East Riverside during a substantial part of each year, and his stay was habitual. Moreover he resided at East Riverside in the ordinary course of his life. There was nothing of an unusual or casual character about it. He lived and played there as long as it suited his pleasure to do so. His residence at East Riverside was in the course of the regular, normal and usual routine of his life. In my opinion the facts are conclusive that in 1940 the appellant was both residing and ordinarily resident in Canada within the meaning of section 9 (*a*) of the Act and I so find. Section 9 (*b*) has nothing to do with the matter.

Many cases have been cited by the respondent, but in examining these cases which are all British cases, it is very important to find out if the law applicable is the same as the one which governs us, and if the words that have been the subject of interpretation by the British courts have the same meaning as those used in our Statute.

The first distinction that must be taken note of is that in England the finding of the Commissioners on a question of fact is final, and not subject to review by the higher courts, the jurisdiction of which is limited to questions of law. It was held by the House of Lords that the question whether a person was a resident of England or not was a question of fact for the sole determination of the Commissioners. And in many of those cases their Lordships felt that, although they would have probably come to a different conclusion had they been the Commissioners, they could not possibly intervene. The situation before this Court is, of course, entirely different, and it is clearly open to us to hold that certain facts, not contested by the parties, satisfy or not the meaning of a particular word found in the provisions of an Act of Parliament.

Another distinction of paramount importance between the British and the Canadian Acts is that the words "residing" and "ordinarily resident" have not, in my judgment, a similar meaning. In the former case, they are singled out, and have been taken in their ordinary

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meaning, while in the Canadian Statute, being grouped together, they have a technical signification, which may not be ignored.

As it has already been said, these words are very flexible and elastic. They take colour in the context in which they are used, and may have a great variety of meanings according to the subject matter and the purposes of the Legislature, and the courts must consequently attribute to them a signification that will give effect to the legislative will.

In *Commissioners of Inland Revenue* v. *Lysaght* (1), Lord Buckmaster said at page 391:

> It may be true that the word "reside" or "residence" in other Acts may have special meanings, but in the Income Tax Acts it is, I think used in its common sense * * *

And in *Sifton* v. *Sifton* (2), Lord Romer said at page 675:—

> Their Lordships' attention was called during the arguments to numerous authorities in which the Court has been called upon to consider the meaning of the words "reside" and "residence", and the like. But these authorities give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least six weeks in a year can present no difficulty. In some contexts the word "reside" may clearly denote what is sometimes called "being in residence" at a particular house. In other contexts it may mean merely maintaining a house in a fit state for residence.

Moreover, in the majority of these cases, the taxpayer was held liable, not because his visits to England were of such a nature that they were considered sufficient to qualify him as a "resident", but for the reason that he had never ceased to be a resident of England, and that his occasional absences had never deprived him of his status of British resident.

For instance, in the case of *Lloyd v. Sulley* (3), it was held that the taxing provisions extended to a person who is not for a time actually residing in the United Kingdom, but who has constructively his residence there, because his ordinary place of abode and his home is there, although he is absent for a time from it, however

(1) (1928) 97 L.J.K.B. 385.
(2) [1938] A.C. 656.
(3) (1884) 2 Tax Cas. 37.

long continued that absence may be. It was found that Lloyd's ordinary residence was at Leghorn, England, and therefore he was chargeable under the Act.

A more striking example of the application of this principle may be found in the case of *Levene* v. *Inland Revenue Commissioners* (1). In that case Viscount Sumner said, speaking of Mr. Levene:—

> The evidence as a whole disclosed that Mr. Levene continued to go to and fro during the years in question, leaving at the beginning of winter and coming back in summer, his home thus remaining as before. *He changed his sky but not his home.* On this I see no error in law in saying of each year that his purpose in leaving the United Kingdom was occasional residence abroad only.

But in the case at bar, the facts are entirely different. The appellant left Canada in 1923, after having severed all his business connections, and after having made public his intention of ceasing to be a resident of Canada. Since moving from Canada, he lived with his family mostly in the United States, as indicated by the following figures: 201 days in 1925; 240 in 1926; 238 in 1927; 351 in 1928; 353 in 1929; 321 in 1930; 319 in 1931; 199 in 1932; 227 in 1933; 182 in 1934; 209 in 1935; 195 in 1936; 196 in 1937; 220 in 1938; 199 in 1939; 206 in 1940; 250 in 1941.

For some years he lived in rented houses in Pinehurst, North Carolina, building a house there in 1930, and for the years 1930 to 1942, he paid the United States income taxes as a resident of the United States. From 1925 to 1931 he spent the following number of days in Canada: 102 days in 1925; nil in 1926; nil in 1927; 2 in 1928; 12 in 1929; 44 in 1930; 2 in 1931.

It seems clear that since 1923 he had definitely left Canada and this fact was coupled with his avowed intentions of doing so permanently. In 1928, when he came back to Canada for a period of two days, it was for the purpose of settling with the proper authorities a balance of $180.40 which he owed for income tax. At that time, he was told that all his liability under the Act up to 1927 had been discharged, and that he would not become taxable until his status had changed. It was acknowledged that having left Canada, with a permanent purpose, with

(1) (1928) 97 L.J.K.B. 377.

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what has been called the *animus manendi* in his new settled abode, he had unquestionably ceased to be a resident of this country.

It is now claimed that because from 1932 to 1934, he spent the summers at St. Andrews, and from 1935 to 1941, at East Riverside, he falls within the provisions of the *Income War Tax Act,* having become a "resident or ordinarily resident" of Canada.

With this view I cannot agree. Of course, during that period of time, Thomson had a dwelling place in Canada, a temporary residence. But this is far from saying that he was "residing or ordinarily resident in Canada".

It is clear, I think, that in the charging section of the Act the words "ordinarily resident" mean "in most cases", "usually", "commonly", and is obviously stronger than "temporarily" which is the qualification that may be given to the occasional visits that Thomson made when he came to his country house to spend the summer in Canada.

The context further indicates that the words "ordinarily resident" are broader than the word "residing", and that the former were used to cover a field that the latter did not occupy. The aim of Parliament was to tax, not only the residents of Canada, those who have here their permanent home, their settled abode, but also those who live here most of the time, even if they are absent on temporary occasions. The first group comes under the classification of "residents", and the second under that of "ordinarily residents".

The fundamental error of the court below has been, I believe, to consider Thomson as a resident of Canada, making occasional visits to the United States, when he should have been classified as a resident of the United States, making occasional visits to Canada. The retaining of his Canadian citizenship has no bearing upon the matter. Nationality is not an ingredient for the purpose of the Act. Residents are taxed, not Canadians; but residents within the meaning of the Act, and not persons who have left this country since several years, and who, like many citizens of the United States and other countries, come here as tourists to enjoy the climate of our summer months. As Viscount Sumner said in the *Levene*

case (1) "they change their sky, but not their home". The status of "residents or ordinarily residents" is not acquired by these periodical visits to Canada.

I do not think that it has ever been the intention of Parliament to say so, and it would take much clearer words than those used in the Statute, to convince me that the present appellant and those who have residences or lodges in Canada, and who elect to occupy them at regular annual intervals, are subject to income tax.

There are two other cases with which I would like to deal before concluding. The first one is the case of *Inland Revenue Commissioners* v. *Lysaght* (2), decided by the House of Lords. I may say that I do not think that this case is binding. Lysaght was held liable, but their Lordships came to the conclusion that they could not review the finding of facts of the Commissioners, and some of them expressed the view that they would not have necessarily reached the same conclusion if their jurisdiction had not been limited to questions of law.

The case of *Cooper v. Cadwaladar* (3), decided by the First Division of the Court of Exchequer (Scotland), is the case of an American citizen living in the United States, who owned shooting rights in Scotland, where he spent a few months annually, and who was held liable in Scotland for income tax. I feel quite confident that no Canadian court, in similar circumstances, would hold that such a person, in view of the provisions of our Act, is a "resident" and therefore liable.

For the above mentioned reasons, I believe that the appellant is not liable, and that the appeal should be allowed with costs throughout.

RAND J.—The appeal raises a question of interpretation of the charging section of the *Income War Tax Act*. The appellant has been assessed on income received for the year 1940 and his liability depends on whether he is within the following provisions of section 9:

> 9. There shall be assessed, levied and paid upon the income during the preceding year of every person
> (*a*) residing or ordinarily resident in Canada during such year; or
> (*b*) who sojourns in Canada for a period or periods amounting to one hundred and eighty-three days during such year.

(1) [1928] 97 L.J.K.B. 377.
(2) (1928) 97 L.J.K.B. 385.
(3) (1904) 5 Tax Cas. 101.

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He claims that during 1940 he was neither residing nor ordinarily resident in Canada, nor did he sojourn here for the number of days specified.

The material facts may be shortly stated. Born in Saint John, New Brunswick, in 1872, the appellant lived in that city and later at the village of Rothesay, a short distance from it, until 1923 and in that time had become a man of means. As the result of a dispute over assessment by the village, he took up arms against what has become a sea of taxing troubles, sold his home, declared Bermuda to be his domicile, and proceeded to that island; and at the end of a week, armed with a British passport obtained there, returned to the mainland to set up residence in the United States. This continued until 1930, with his chief abode at Pinehurst, North Carolina. There in that year he built an expensive dwelling which ever since has been kept in readiness for occupancy. In 1932, marking his return to Canada, he rented a house at St. Andrews, New Brunswick, where he spent a summer season of 134 days. This was repeated during the next two years, with 134 days in 1933 and 81 days in 1934. In the latter year he built a house at East Riverside near Rothesay, costing, with furniture, close to $90,000. The reason given for this was his wife's desire to be near her relatives and friends in New Brunswick, but he protests against harbouring any like sentiment. Since then and up to 1942, between May and October he has spent there an average of 150 days each year. After the season at East Riverside, his life has centered around Pinehurst, with a stay of a month or two at Belleair, Florida. During that time, the New Brunswick house is closed except the quarters of a housekeeper and wife which are open the year around; but it could at any time become a winter or all year home if desired. With him in these mass movements are his wife and only child, motor cars and servants, and at all three places he indulges himself as an addict of golf, to which he devotes most of his time and a substantial part of his money. His passport was renewed in 1933 for a further period of ten years at a British Consulate in the United States, and on it his domicile was again stated to be in Bermuda. Apart from the brief visit in 1923, leasing a house for one or two

years which he never occupied, a stay of six days in 1926 and eight in 1938, that island was stranger to him for the twenty years after leaving Rothesay. From 1930 to 1941 he was taxed on income in the United States as a non-resident: but in 1942 he was classed as a resident and taxed accordingly.

The President of the Exchequer Court properly, I think, characterizing his motions in relation to Bermuda as "pure farce", found him to be ordinarily resident in Canada for the year in question and maintained the action; and from that judgment this appeal is brought.

The judgment treats as relevant a number of authoritative decisions on the *Income Tax Act* of the United Kingdom, including *Cooper v. Cadwalader* (1), *Levene* v. *Commissioners of Inland Revenue* (2), and *Lysaght* v. *Commissioners of Inland Revenue* (3), as they bear upon the interpretation of the words "residing" and "ordinarily resident". Mr. Inches, in an able argument, challenges the validity of that application on the ground that in the English Act these expressions, found in schedules, are in all cases used singly and in differing contexts and that there was raised no question of their effect upon one another in the collocation in which we have them in section 9, and their modification both by the phrase "during such year" and the word "sojourns" in paragraph (*b*). Before dealing with this contention, I think it desirable to refer briefly to the effect of those decisions upon the two expressions and, in the connotations so found, to consider them in the juxtaposition in which they appear in our own Act.

As interpreted, the English Act uses the word "residing" or the expression "ordinarily resident" in the sense of the general acceptation, without special or technical meaning; and the Tax Commissioners find first the actual circumstances of a case and then as fact whether they are within that acceptation. An appeal is allowed on a point of law, and where the person charged is appealing, the question invariably is whether there was any evidence to justify the finding. This strictly limited jurisdiction prevents us from assuming that a court sitting in appeal

(1) (1904) 5 Tax Cas. 101.
(2) (1928) 13 Tax Cas. 486.
(3) (1928) 13 Tax Cas. 511.

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generally would have come to the same view of liability; and there are frequent intimations by individual judges that their own finding might have been different. But notwithstanding this limited function, these decisions reveal many aspects of residence under modern conditions and the extreme scope of interpretation to which the courts have felt themselves driven by the generality of the terms used and from the wide administrative jurisdiction conferred upon the Commissioners.

In *Lysaght* v. *Commissioners, supra,* "residing" was examined by the House of Lords and it must, I think, be said that the language of "plain men" was stretched to the breaking point to encompass the facts that had been found by the Commissioners to be residence. The enquiry lies between the certainty of fixed and sole residence and the uncertain line that separates it from occasional or casual presence, the line of contrast with what is understood by the words "stay" or "visit" into which residence can become attenuated; and the difference may frequently be a matter of sensing than of a clear differentiation of factors.

The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.

The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the percon concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

For the purposes of income tax legislation, it must be assumed that every person has at all times a residence.

It is not necessary to this that he should have a home or a particular place of abode or even a shelter. He may sleep in the open. It is important only to ascertain the spatial bounds within which he spends his life or to which his ordered or customary living is related. Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviatory residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstance, but also accompanied by a sense of transitoriness and of return.

But in the different situations of so-called "permanent residence", "temporary residence", "ordinary residence", "principal residence" and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited. On the lower level, the expressions involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".

In that view, it is scarcely open to doubt that if the word "residing" or the expression "ordinarily resident" had been used as in the English statute, it would have been impossible not to hold the appellant in the year in question both residing and ordinarily resident at East Riverside for the full 160 days of living there. His life is a good example of what Viscount Sumner in the *Levene* case [*supra*] had in mind when he spoke of the "fluid and restless character of social habits" to which modern life has introduced us. His ordinary residence throughout the year 1940 was indisputably within a strip of North America bordering on the Atlantic and running from Florida to New Brunswick. In that area, enabling him to keep pace with a benign climate, he had at least two and possibly three dwelling places, each of which coupled with his presence for the time being constituted, so far as he had any, his home. When he moved to East Riverside, he moved not only himself but that home; ambu-

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latory over a considerable part of the Continent, it became residence where so set up. From each radiated his living and interests and from them in turn he might make occasional departures or visits or temporary stays amounting even to limited residence.

Giving to "residing" in paragraph (*a*) the fullest signification of which it is capable, "ordinarily resident" becomes superfluous. Mr. Inches contends for a construction of both and of "sojourns" purely in terms of time: that "residing * * * during such year" means a permanent residence throughout the year, without even temporary absence: "ordinarily resident * * * during such year" a predominant residence in Canada throughout the year but subject to temporary absences not amounting to residence elsewhere: and "sojourns" connoting temporary residence.

This view is based largely on the expression "during the year", the legal meaning of which is argued to be "throughout the year". The case cited for this, *The Queen* v. *Anderson* (1), was a decision on the Poor Law, but the statutes are not *in pari materia*. In general the language of a taxing statute is to be taken in its colloquial or popular sense, and "during the year" in that acceptation signifies rather "within the year" or "in the course of the year" than "throughout". Although consistency of language is no longer a jewel in such legislation, yet the adoption of that expression for the various paragraphs of the section by the amendment in 1927 would appear to intend the same sense in all of them. Obviously "throughout" is inappropriate to paragraphs (*b*) and (*e*), and the others would be unwarrantably restricted in application by such a construction. I think the suggested meanings are quite artificial and that nothing in the context of the section or in the Act requires us to give them to the expressions used. This makes it unnecessary to consider whether "ordinary residence" must be capable of being extended in a fictional sense over the entire taxing year.

I am not greatly concerned by overlapping or superfluous or even the virtual equivalence of terms. The language of the two paragraphs may not be a model of

(1) (1846) 9 Q.B. 663, 115 E.R. 1428.

precision or artistry, and if redundancy is of such a nature as might raise serious doubt of the intention of Parliament, some interpretative modification should be given; but when an intention to guard against omissions can fairly be drawn and there is no inconsistency or repugnancy, that would seem to make an end of the matter. If I may, I would adopt the language of Lord Selborne, L.C., in *Hough v. Windus* (1):

> I adhere to an opinion, expressed by myself in the House of Lords more than ten years ago in *Giles v. Melsom* (2) which, unless I am much deceived, I have also heard in substance expressed by great masters of the law, that "nothing can be more mischievous, than the attempt to wrest words from their proper and legal meaning, only because they are superfluous".

It is sufficient for the purposes of this case that the mode or nature of the appellant's living in Canada brought him within the language of paragraph (*a*) and strictly it is unnecessary to deal further with paragraph (*b*). But in justice to Mr. Inches' argument, I think I should say that I differentiate the circumstances of this case from those contemplated, say, by rule 2 of Miscellaneous Rules applicable to Schedule D under the English Act:

> 2. A person shall not be charged to tax under this Schedule as a person residing in the United Kingdom, in respect of profits or gains received in respect of possessions or securities out of the United Kingdom, who is in the United Kingdom for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment, but if any such person resides in the United Kingdom for the aforesaid period he shall be so chargeable for that year.

The Canadian Act taxes the person "residing" on the whole of his income, and provides only for a deduction of the amount of tax which the taxpayer may have been compelled to pay in a foreign country on the income arising from sources there. In the English Act, on the contrary, there is an elaborate classification of income with varying taxibilities and to hold a person liable for income from foreign possessions beyond what was received in the United Kingdom it is necessary under Schedule D to find not only that he resides in the United Kingdom but where he is a British subject, that he is both ordinarily resident and domiciled there. These taxes are, in theory, justified

(1) (1884) 12 Q.B.D. 224 at 229 (2) L.R. 6 H.L. 33, 34.

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by the protection to life and property which the laws of the country imposing them may give. They are conceived to be intended to apply fairly and equally to all persons and an apparent gross violation of that assumption is relevant to the enquiry into what Parliament by its general language has intended. That a person should be liable for tax upon the whole of his income even with the deduction mentioned merely because he has spent, say, two months in Canada as a temporary change of scene, whether or not part of his routine of life, is too unreasonable an intention to attribute to the language of Parliament unless it is beyond doubt. I would, therefore, treat the word "sojourns" as applying to presence in Canada where the nature of the stay is either outside the range of residence or is what is commonly understood as temporary residence or residence for a temporary purpose.

But that qualified stay is not the character of the appellant's. Apart from any question of domicile which would appear to be still in New Brunswick, his living in Canada is substantially as deep rooted and settled as in the United States. In terms of time, Pinehurst may take precedence but at best it is a case of *primus inter pares*. He is at East Riverside as at his "home"; and the mere limitation of time does not qualify that fact: *Attorney-General* v. *Coote* (1). That brings him within the most exacting of any reasonable interpretation of "resides" or "ordinarily resident".

For these reasons I would dismiss the appeal with costs.

KELLOCK J.—The facts have been sufficiently stated and it is not necessary to repeat them. The question for decision upon the facts is as to whether or not the appellant is, by reason of sec. 9(1) (*a*) of the statute, liable to be assessed for income tax. Clauses (*a*) and (*b*) of section 9, subs. (1), are as follows:

> There shall be assessed, levied and paid upon the income during the preceding year of every person
>
> (*a*) residing or ordinarily resident in Canada during such year; or
>
> (*b*) who sojourns in Canada for a period or periods amounting to one hundred and eighty-three days during such year;

(1) (1817) 4 Price 183.

To "sojourn" is defined in Murray's New English Dictionary as, to "make a temporary stay in a place," "to make stay," "to tarry," "to delay," while "reside" is defined as, "to take up one's abode or station," "to dwell permanently or for a considerable time," "to have one's settled or usual abode," "to live in or at a particular place."

"Ordinarily" is defined as "in conformity with rule or established custom or practice," "as a matter of regular practice or occurrence," "in the ordinary or usual course of events," "usually," "commonly," "as is normal or usual."

"Sojourn" in clause (*b*) is to be contrasted with "resident" in clause (*a*). A mere sojourn is not within the section unless the sojourn continues beyond the stated period. In my opinion, the appellant is not to be described as a sojourner in respect of the years in question but as a person residing in Canada within the meaning of clause (*a*). There is not the slightest difference between his use of his Canadian home and that of either of his two American homes. All three establishments are essentially of the same nature and are equally regarded by him as "homes" in the same sense. The appellant's residence in each is in the ordinary and habitual course of his life and there is no difference in the quality of his occupation in any one of them, although he may and does occupy each at different periods of the year.

With respect to the collocation of the word "residing" and the phrase "ordinarily resident" in clause (*a*), the phrase would seem to assume that a person may be resident in Canada without being "ordinarily resident." It is not necessary to consider just what the distinction may be in any particular circumstances. The appellant is residing and is ordinarily resident here in respect of the years in question. Even if in no case could any distinction be drawn between "residing," and "ordinarily resident" so that the phrase must be treated as superfluous, there is in law no objection to so doing, as has been pointed out by my brother Rand in the course of his judgment, citing *Hough* v. *Windus* (1), per Lord Selborne, L.C., at 229.

(1) (1884) 12 Q.B.D. 224.

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As to the appellant's argument that the phrase "during such year" is to be interpreted as meaning "throughout the whole year," I do not agree. It would not be possible to apply the appellant's interpretation to the phrase as it appears in clause (*e*), and there is no reason to suppose that it was intended it should not have the same meaning wherever it appears in the subsection. The phrase is used throughout with reference to the phrase "the preceding year" in the early part of the subsection and in my opinion means "in the course of."

I would dismiss the appeal with costs.

ESTEY J.—This is an appeal from a judgment rendered in the Exchequer Court. The learned President of that Court has embodied in his judgment an exhaustive statement of the facts, and as a consequence only a summary of the more relevant facts will be mentioned here.

The appellant resided at Saint John, New Brunswick, where he retired from business in 1921. Thereafter he resided in Rothesay, New Brunswick, until 1923 when, following a dispute with the taxing authorities, he left Canada, announcing that he intended to take up residence in Bermuda. He did not remain in Bermuda and during the next few years did a good deal of travelling. Eventually he selected Pinehurst, North Carolina, where in 1930 he built a residence which he still occupies.

In 1932 he spent the summer months at St. Andrews, New Brunswick, and again in 1933 and 1934. In the latter year he built and furnished another residence, at a cost of approximately $90,000, at East Riverside near Rothesay, New Brunswick. This residence at East Riverside was built in order that his wife might have the opportunity of visiting and enjoying the friendship of her relatives and friends in Saint John and Rothesay, and that he himself might enjoy the golf course near the residence. He employed a family who occupied the servants' quarters throughout the year, and though the rest of the house was closed during the appellant's absence, they looked after the premises. His practice was to move

into this residence in the Spring and remain until some time in the Fall of each year. From 1935 to 1941, inclusive, he spent the following number of days in Canada:

	days
1935	156
1936	138
1937	169
1938	145
1939	166
1940	159
1941	115

This residence at East Riverside was maintained in a manner that made it always at his disposal and available at any time. When there his activities of life were centred about that point. It was to and from there he made his visits to other places. He and his family were then living there. It would appear that the appellant was maintaining more than one residence to which he could and did come and go as he pleased.

In the light of these circumstances, the officials of the Department of National Revenue asked the appellant to file an income tax return for the year 1940, and when he did not do so the Minister, by virtue of section 47, fixed the tax at $21,122.

The appellant does not question the amount but takes the position that he is not liable for income tax in Canada. The relevant sections of the Act are:

> 9. There shall be assessed, levied and paid upon the income during the preceding year of every person
>
> (*a*) residing or ordinarily resident in Canada during such year; or
>
> (*b*) who sojourns in Canada for a period or periods amounting to one hundred and eighty-three days during such year; or

The appellant contends that he is not ordinarily resident in Canada under section 9 (*a*), but that he merely sojourns in Canada for a period less than 183 days in each year and is therefore not taxable under 9 (*b*).

A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually,

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casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question. Even in this statute under section 9 (*b*) the time of 183 days does not determine whether the party sojourns or not but merely determines whether the tax shall be payable or not by one who sojourns.

The words of Viscount Sumner in *Inland Revenue Commissioners* v. *Lysaght* (1), are indicative:

> I think the converse to "ordinarily" is "extraordinarily" and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not "extraordinary".

Lord Buckmaster, with whom Lord Atkinson concurred, in the same case, at p. 248:

> * * * if residence be once established ordinarily resident means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.

The appellant selected the location, built and furnished the residence for the purpose indicated, and has maintained it as one in his station of life is in a position to do. In successive years his residence there was in the regular routine of his life acting entirely upon his own choice, and when one takes into consideration these facts, particularly the purpose and object of his establishing that residence, the conclusion appears to be unavoidable that within the meaning of this statute he is one who is ordinarily resident at East Riverside, New Brunswick, and is therefore liable for income tax under section 9 (*a*).

It is well established that a person may have more than one residence, and therefore the fact of his residence in Pinehurst or Belleair does not assist or in any way affect the determination of this issue.

The appellant then contends that even if he be properly described as one ordinarily resident in Canada, he is not within the terms of section 9 (*a*) because he is not "ordin-

(1) [1928] A.C. 234 at 243.

arily resident in Canada during such year." He submits that the word "during" means throughout. As I understand his contention, it is that one must be a resident through the entire year and that when the appellant leaves Canada to go back to North Carolina or Florida he goes back to his residence in the United States, and is not then resident in Canada, and is therefore not resident in Canada throughout the year.

In the Oxford Dictionary "during" is defined as: "Throughout the whole continuance of; in the course of". In the Concise Oxford Dictionary it is defined as: "Throughout, at some point in, the continuance of". This term "during" appears several times throughout the Act and not only does it appear in subsections (*a*) and (*b*) of section 9, the clauses with which we are concerned, but also in other subsections of this same section. Apart from a specific provision or necessary implication, it would be assumed that Parliament intended these terms to have the same meaning throughout these subsections, and indeed throughout the Act.

I agree with the learned President of the Exchequer Court that the word "during" means, as used in this statute, "in the course of." Particularly in subsection (*b*) I do not know how any other meaning could be attributed thereto. If one sojourns in Canada 183 days or more he is taxable; if less than that time he is not taxable. If he were here for only 184 days it would not matter where he was throughout the rest of the year. He would be in Canada a taxable period of 184 days during that year. Moreover, that appears to be the clear meaning of the word in certain other subsections and is the natural meaning, it seems to me, throughout the statute.

The appellant submitted two cases in support of his contention. *Bowes* v. *Shand* (1), where the contract called for the shipment of rice "during the months of March and/or April". In fact the rice was shipped in February. The Lord Chancellor in the course of his judgment:

> Therefore, dwelling merely on the natural sense of the words, I must without hesitation conclude that the meaning of the contract must be one of these two things, either that the rice shall be put on board

(1) (1877) 46 L.J.Q.B. 561 (H.L.).

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during the two months, *i.e.* not before the 1st of March nor after the end of April, or (and this construction would require evidence of usage) the shipment must be made in a manner which has been described as continuous, and be completed during one of these months, and that the bill of lading should be given for the whole and complete shipment at that time.

The appellant particularly relied upon the remark of Lord Hatherly to the effect that "during those months" implied "a continuous act of shipping". It is obvious from reading the report that that did not mean continuous throughout the entire period of two months. It seems to me that a reading of the case supports the view that the word "during" should be interpreted as "in the course of".

The other case, *The Queen v. Anderson* (1), the words are found in a statute, and, having regard to the provision of that statute, Lord Denman, C.J., gave to the word "during" the meaning that the appellant here contends for, but that is a very different statute and one which does not assist in the construction of the word as it appears in the *Income War Tax Act*.

I agree with the conclusions arrived at by the learned President of the Exchequer Court and would therefore dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. F. Inches.*

Solicitor for the respondent: *H. H. Stikeman.*

(1) (1846) 9 Q.B. 663.

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HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA (PLAINTIFF)..... APPELLANT;

*Oct. 2, 3

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AND

*Feb. 11

THE BRITISH COLUMBIA ELECTRIC RAILWAY CO. LTD (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Companies—Income War Tax Act (R.S.C. 1927, c. 97, as amended), ss. 9B (2) (a), 9B (4), 84 (as the same were enacted by 1932-33, c. 41)—Tax on non-residents of Canada in respect of dividends received from "Canadian debtors"—Crown claiming from company for amount not withheld and remitted, from dividends paid to non-residents of Canada—Whether, in all the circumstances, the company (incorporated in England but carrying on its business in Canada) was a "Canadian debtor"—Whether legislation intra vires.

Subs. 2 (*a*) of s. 9B (as enacted by statutes of 1932-33, c. 41, s. 9) of the Dominion *Income War Tax Act* imposed an income tax of 5 per centum on all non-residents of Canada in respect of all dividends received from "Canadian debtors", and subs. 4 of said s. 9B required the debtor to collect such tax by withholding 5 per centum of the dividend and remitting the same to the Receiver General of Canada. S. 84 made any person, who failed to collect or withhold any sum as required by the Act, liable for the amount thereof.

Respondent was a company incorporated in England. Its registered office was in London, England. It was registered in British Columbia as an extra-provincial company. It carried on the business of supplying electric power and light and operating electric railways and motor buses in British Columbia. Its head office was at Vancouver, B.C. During the period in question its whole business, except such formal administrative business as was required by the statutes governing it or by its articles of association to be transacted at its registered office, was conducted and carried on in Canada. All its directors and officers were residents of Canada. All stockholders' and directors' meetings were held in Canada. All its assets, except for certain records and books of account kept in London, England, and certain cash remitted there from time to time, were situate in Canada. All the income from which the dividends in question were paid was earned in Canada. Its register of members in respect of the stock in question was kept at London, but, pursuant to an Imperial statute, a Dominion register of members in Canada was kept at Vancouver, and stock registered in the Dominion register could be transferred only upon that register, and all other stock could be transferred only upon the register in London; but there was provision for change of registry.

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

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The Attorney General of Canada claimed on behalf of the Crown against respondent for amounts not withheld and remitted by respondent in respect of dividends paid by respondent to holders not resident in Canada of its cumulative perpetual preference stock. Such dividends were paid by respondent's registrar and paying agent in London after funds had been remitted to London from Canada.

Held: Respondent was a "Canadian debtor" within the meaning of said subs. 2 (*a*) of s. 9B and came within the aforesaid requirements of the Act, and in respect of the dividends in question was liable for amounts not withheld and remitted by it in accordance with such requirements. (Judgment of Thorson J., [1945] Ex. C.R. 82, reversed). Said provisions of the Act, applied in accordance with such holding, were *intra vires (B.N.A. Act,* s. 91, head 3; *Statute of Westminster, 1931* (Imp.), particularly s. 3 thereof; its effect discussed) and must be given effect by Canadian courts.

APPEAL by the Attorney General of Canada from the judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing the action, which was brought by information of the Attorney General of Canada on behalf of His Majesty the King to recover from the defendant (a company incorporated in England, registered in British Columbia as an extra-provincial company, and carrying on its business in that province) the amount of 5 per cent. of the dividends paid or credited by the defendant during the period between April 1, 1933, and April 29, 1941, to non-residents of Canada on the defendant's fully registered 5 per cent. cumulative perpetual preference stock; and to recover interest on said amount claimed. The Attorney General alleged that in respect of such dividend payments the defendant was a "Canadian debtor" within the purview of s. 9B (2), paragraph *a,* of the *Income War Tax Act,* and that, having failed to deduct or withhold, from the amounts paid or credited to such non-residents of Canada, at the time of payment or crediting, the tax of 5 per cent. due under s. 9B (2) (and particularly said paragraph (*a*) thereof) of said Act (R.S.C. 1927, c. 97, as amended by c. 41 of the statutes of Canada, 1932-1933) and to remit the same to the Receiver General of Canada (as provided by s. 9B (4) of said Act as so amended), the defendant was liable (under s. 84 of said Act as so amended) for the amounts which should have been withheld out of said dividends.

(1) [1945] Ex. C.R. 82; [1945] 3 D.L.R. 613; [1945] C.T.C. 162.

The material facts of the case and the questions involved are sufficiently stated in the reasons for judgment in this Court now reported.

F. P. Varcoe K.C. and *W. R. Jackett* for the appellant.

Aimé Geoffrion K.C. and *A. B. Robertson* for the respondent.

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

KERWIN J.—The first question for determination in this appeal depends upon the construction of the expression "Canadian debtors" in subsection 2, paragraph (*a*), of section 9B of the *Income War Tax Act*, as enacted by section 9 of chapter 41 of the Statutes of 1932-33. Prior thereto, the main (but not the only) charging provision in the Act was section 9 wherein, speaking generally, Parliament dealt with incomes of persons who were resident, or ordinarily resident, or who sojourned in Canada, or who were employed or carrying on business therein, or who, not being resident in Canada, derived income from services rendered therein. In order to understand what Parliament was really doing by the particular enactment with which we are concerned, it is necessary to set forth subsections 1, 2, 3 and 4 of section 9B:—

9B. (1) In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons resident in Canada, except municipalities, or municipal or public bodies which in the opinion of the Minister perform a function of government, in respect of all interest and dividends paid by Canadian debtors, directly or indirectly to such persons, in a currency which is at a premium in terms of Canadian funds.

(2) In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of

(*a*) All dividends received from Canadian debtors irrespective of the currency in which the payment is made, and

(*b*) All interest received from Canadian debtors if payable solely in Canadian funds except the interest from all bonds of or guaranteed by the Dominion of Canada.

(3) In the case of bearer coupons or warrants, whether representing interest or dividends, the taxes imposed by this section shall be collected by the encashing agent or debtor who shall withhold five per centum of the obligation and remit the same to the Receiver General of Canada,

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provided that any encashing agent so withholding and remitting shall be entitled to recover one hundred per centum of the obligation from the debtor.

(4) In the case of interest or dividends in respect of fully registered shares, bonds, debentures, mortgages or any other obligations, the taxes imposed by this section shall be collected by the debtor who shall withhold five per centum of the interest or dividend on the obligation and remit the same to the Receiver General of Canada.

The remaining subsections are subsidiary.

At the same session, section 84 was also added to the principal Act and it provides:—

84. Any person who fails to collect or withhold any sum of money as required by this Act or regulations made thereunder, shall be liable for the amount which should have been collected or withheld together with interest at the rate of ten per centum per annum.

(2) Any person who fails to remit any sum of money collected or withheld as required by this Act, or at such time as the Minister may in special cases prescribe, shall in addition to being liable for such sum of money so collected or withheld, be liable to a penalty of ten per centum of the said sum together with interest at the rate of ten per centum per annum.

Section 21 of the 1932-33 enactment provides that sections 9B and 84 of the principal Act as therein enacted shall be deemed to have come into force April 1st, 1933.

It will be noticed that in section 9B the expression "Canadian debtors" is used thrice. By subsection 1 an additional income tax of five per centum is imposed on all persons resident in Canada (except as stated) in respect of all interest and dividends paid by Canadian debtors but only when so paid "in a currency which is at a premium in terms of Canadian funds." This subsection was amended in 1940 but the purpose for which I refer to it is not affected by the wording of the amendment.

When we come to subsection 2 we find that a tax is imposed on non-residents of Canada. While in subsection 1 dividends and interest are dealt with together, in subsection 2, paragraph (*a*), reference is made to dividends only, and paragraph (*b*) deals with interest only. As to dividends, it does not matter in what currency the payment is made, but as to interest, it is only payments in Canadian funds that are covered. In both cases, however, the payments or receipts are from "Canadian debtors." Paragraphs (*c*) and (*d*), which were added to sub-

section 2 of section 9B in 1934, do not concern us, but paragraph (*e*), enacted by chapter 40, section 9, of the Statutes of 1935, should be noted:—

> (*e*) All payments received directly or indirectly from Canadian debtors in respect of
>
> (i) any copyright, used in Canada, relating to books, music, articles in periodicals, newspaper syndicated articles, pictures, comics and other newspaper or periodical features, and
>
> (ii) any rights in and to the use of any copyrighted work subsequently produced or reproduced in Canada by way of the spoken word, print or mechanical sound on or from paper, composition, films or mechanical devices of any description.
>
> The tax payable by virtue of this paragraph shall be deducted by the Canadian debtor from the amount paid or credited to such non-resident at the time of payment or crediting and shall be remitted to the Receiver General of Canada.

Thus, for the fourth time, "Canadian debtors" are mentioned. One purpose of section 9B as first enacted and as amended from time to time was to ease the foreign exchange situation, and the expression in question should receive the same meaning throughout the section.

It could hardly be contended that in subsection 1 or in paragraph (*e*) of subsection 2 the expression meant anything except an individual who resided in Canada or an incorporated company which—in the sense in which that word is explained in well-known tax decisions—resided in Canada. It can surely have no reference to the nationality of the individual so as to exempt an alien resident in Canada nor, if the expression is applicable, to that of a company. The same meaning should be applied to it when it is found in subsection 2, paragraph (*a*).

It is under that paragraph that the Attorney General of Canada on behalf of His Majesty the King filed an information in the Exchequer Court against British Columbia Electric Railway Co. Ltd., alleging that an income tax of five per centum had been imposed on the non-resident holders of the Company's five per cent. cumulative perpetual preference stock in respect of the dividends received by them from the Company from April 1st, 1933, to April 29th, 1941; that by subsection 4 of section 9B this tax was to be collected by the Company and remitted to the Receiver General of Canada and that this was not done. Therefore, under section 84, the amount which should

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have been collected was claimed, together with interest at the rate of ten per cent. per annum from the respective dates upon which the dividends became payable.

The action came on for trial before the President of the Exchequer Court upon written admissions and certain exhibits. From these, it appears that the Company was incorporated in England in 1897 under the Companies Acts, 1862 to 1893. Since 1898 it has been registered in British Columbia as an extra-provincial company under the 1897 Companies Act of that province; it carries on the business of supplying electric power and light and operating electric railways and motor buses in British Columbia, and has its head-office at Vancouver. During the entire period under review, its whole business, except such formal administrative business as was required by the statutes governing it or by its articles of association to be transacted at its registered office, was conducted and carried on in Canada. All its directors and officers were residents of Canada; all such stockholders' meetings as were held and all directors' meetings were held in Canada; all its assets, except for certain records and books of account kept in London, England, and certain cash remitted there from time to time, were situate in Canada; and all the income from which its dividends were paid was earned in Canada. There is no question about these facts and the others mentioned in the President's judgment and the Company does not dispute his conclusion on those facts that it was resident in Canada for income tax purposes.

The President decided that because of the use of the word "dividends" in paragraph (*a*), the word "debtors" therein would apply only to companies, and with that I agree. He then proceeded, however, to take a further step and it is there that I find it necessary to part company with him. That was to construe "Canadian debtors" as "Canadian companies." This is substituting one phrase for another by applying the adjective "Canadian" to a noun that Parliament did not use and is, I think, an unjustifiable alteration of the language actually employed. Further difficulties in that connection would arise as to whether

"Canadian companies" would include the respondent, which was incorporated in England and not in Canada although doing business and earning all its income here.

The President stated that a reference to various other sections of the Act indicated that a clear distinction was throughout drawn between a resident in Canada and a non-resident, both with respect to individuals and companies, and from that he concluded that, if it had been the intention in paragraph (*a*) to denote as payors, companies resident in Canada, the same words indicating residence would have been used. This does not follow. In 1932-33 Parliament chose to use a certain expression to which some meaning must be attached but there is no rule whereby that expression may not mean the same as a different set of words in other provisions of the same Act. Particularly is this so when one bears in mind the foreign exchange position with which Parliament was concerned in enacting section 9B. The President also expressed the view that if it were the intention that "Canadian debtors" should mean debtors who are resident in Canada, it would follow that there would be no duty to collect the tax imposed upon a company incorporated in Canada and that was not resident therein. That is so but, in my view, Parliament has covered the former class and not the latter. For the reasons indicated, the expression means the same throughout 9B and the meaning in paragraph (*a*) is "Companies resident in Canada."

This being so, I should add that I do not understand that the Deputy Attorney General, either in the Exchequer Court or before this Court, argued alternatively that if the expression should not be interpreted as I have construed it and as he contended, it meant a person or company who owed a Canadian debt. I understood his position to be that if the Company's contention that Canadian debtors meant persons owing Canadian debts was right, then he would contend that the dividends constituted a Canadian debt. The Company did argue that and also that as it was incorporated in England the dividends, although declared here, were governed by English law and that, therefore, they were English and not Canadian debts.

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That argument also would alter and not construe "Canadian debtors" and fails for the same reason as the suggestion to read the phrase as if it were "Canadian companies."

As to the second question raised in the appeal, viz., that on the construction of "Canadian debtors" I have concluded is the correct one, subsection 2, paragraph (*a*), of section 9B is *ultra vires* Parliament on the ground that it is extra-territorial legislation, the *Statute of Westminster, 1931,* and particularly section 3, leaves no basis for the argument. By head 3 of section 91 of the *British North America Act,* Parliament was authorized to make laws with reference to "the raising of money by any mode or system of taxation." As long as Parliament legislates with reference to such matters, the permitted scope of the legislation is not restricted by any consideration not applicable to the legislation of a fully sovereign state. Such a state may tax persons outside its territory. Here it is clear that it has done so and the Canadian courts must obey the enactment. It is true that the Company might find itself in difficulties if holders of its preference stock chose to sue it in England for any taxes withheld by it under subsection 4 of section 9B but that is because the courts of one country will not enforce the fiscal legislation of another. The Company was under a duty to obey the injunction in subsection 4 and since it did not do so it is liable to the penalty prescribed by section 84.

In the admissions signed by the solicitors for the parties, it was admitted that between April 1st, 1933, and April 29th, 1941, the Company paid to holders of its five per cent. cumulative perpetual preference stock, whose addresses entered in its register of members as required by section 95 of the Imperial Companies Act of 1929 were elsewhere than in Canada, dividends upon the said stock amounting to $2,780,682.37, and that some, at least, of the said holders were non-residents of Canada. It was also agreed that should the Court decide that the Company should have deducted a tax of five per cent. from those dividends paid to any holders who were non-residents of Canada, a reference might be directed for the taking of an account to determine which of the said hold-

ers were non-residents of Canada within the meaning of section 9B of the Act. Such a reference should be directed, to be proceeded with before the Registrar of the Exchequer Court or, if the parties think it more convenient, before some one else to be agreed upon. The appellant is entitled to its costs of the action and appeal. The costs of the reference may be disposed of by a Judge of the Exchequer Court upon the confirmation of the report.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.—The respondent was incorporated in 1897 under the Companies Acts (Imperial), 1862-1893, and was registered as an extra-provincial company under the British Columbia Companies Act of 1897 on January 3rd, 1898. The head office is in Canada, all directors and officers are residents of Canada, and all meetings of shareholders and directors are held in Canada. The business of the Company is that of supplying electric power and light and operating electric railways and motor buses; and all of it, except such formal administrative matters as are required by statute or its articles of association to be transacted at its registry office in London, England, is carried on, all of its income earned and all of its assets, except certain records and books of account, are, in Canada. The Company's principal register is kept at London and in accordance with sec. 103 of the Companies Act (1929) (Imperial) a dominion register at Vancouver, on both of which holdings of its five per cent. cumulative perpetual preference stock are registered: a duplicate of the dominion register is kept in London and is deemed there to be part of the principal register. Stock registered in the dominion office can be transferred only upon that register and all other only upon the register in London, but there is provision for change of registry.

The controversy concerns dividends paid to the holders of the perpetual preference stock who reside in England. They were paid by the Company's registrar and paying agent in London after funds had been remitted to London from Canada. The Crown has assessed taxes under section 9B of the *Income War Tax Act* on these dividends, and the right to do so is the question presented for decision.

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Section 9B, subsections 2 and 4, are the charging provisions and are as follows:

2. In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of

(*a*) All dividends received from Canadian debtors irrespective of the currency in which such payment is made, and

* * *

4. In the case of interest or dividends in respect of fully registered shares, bonds, debentures, mortgages or any other obligations, the taxes imposed by this section shall be collected by the debtor who shall withhold five per centum of the interest or dividend on the obligation and remit the same to the Receiver General of Canada.

It is the contention of the Crown that under this language the Company is a Canadian debtor and that it is bound to deduct the tax imposed from the dividends. The President of the Exchequer Court construed the expression "Canadian debtors" in paragraph (*a*) to mean "Canadian company debtors" and "Canadian company" a company incorporated in Canada: and he dismissed the action.

The substitution of "Canadian company debtors" for "Canadian debtors" in paragraph (*a*) effects a subtle transfer of meaning which I think has escaped the President. Undoubtedly "Canadian company"—and the expression is used in a number of instances in the Act—imports a national characteristic, but that is due to the special and abstract nature of the concept "company" which is not present in the collocation "Canadian debtors." What is done by the importation is in fact to qualify the meaning of "Canadian debtors" by introducing a new and significant word.

The same expression is used in paragraph (*b*) of subs. 2:

All interest received from or credited by *Canadian debtors* if payable solely in Canadian funds, except the interest from all bonds of or guaranteed by the Dominion of Canada.

If the meaning so given to "Canadian" in (*a*) is applied to (*b*), it means that (*b*) in relation to natural persons is applicable only to Canadian nationals. It would exempt foreign citizen debtors who might have spent their lifetime in Canada and whose nationality would have no relevancy

to their being debtors in Canada. We would have also the apparent anomaly in (*a*) of Canadian companies carrying on their entire business outside of Canada being forced to pay over monies in respect of dividends which would never be in Canada and would move within or between foreign countries.

It was argued by Mr. Geoffrion that the expression, itself ambiguous, is in (*a*) limited to one of two interpretations, either Canadian company or foreign company, that in neither case was any further qualification to be attached, and that, construing the section in the light of the presumptions as to inherent limitations on jurisdiction and the rules of comity between states, the judicial choice must be the former. But I see nothing in the statutory matter to drive us to any such exclusive or limited alternatives, certainly not as the initial step in interpretation.

He argued also that "Canadian debtor" meant the debtor of a Canadian debt, *i.e.*, a debt arising by virtue of Canadian law; that the dividend as a debt arose from English law and that it was therefore outside the scope of the provision. But there is nothing in the context of the statute that gives significance to the place of origin of the debt or the law from which it arises, and where the creditor is admittedly a non-resident, it would be quite unwarranted and in fact invidious to do so.

"Canadian debtor" must, I think, be considered from the point of view of the Canadian Parliament. It can be said with some force that here we have a creditor in England who purchased his stock in England, who receives his dividend from the agent of the company at the registry office in England, and who looks only to the symbol of the company as that is present in England. But the creditor knows that the substance of the company is in Canada, that it "keeps house and does its business" there, a business completely within Canadian legislative power; and that he must look to Canada for the act of the company which declares the dividend and for the dividends themselves. The fact that the money is remitted in a lump sum to England and there distributed among the shareholders entitled is not significant.

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The cheques could have issued direct to the shareholders from the head office, as they were to shareholders shown as resident in Canada on the principal register and to all shareholders on the dominion register.

The imposition of the tax on the non-resident, subs. 2 (*a*), and the obligation of the debtor "to withhold" and to pay to the Receiver General, subs. 4, are express: and it is chiefly the latter provision by which, I think, are indicated the distinctive marks of the debtor intended to be charged: a person over whom there is actual power of compulsion; from whom in Canada payment of the debt is to proceed; on whom there is an obligation to pay the dividend *qua* dividend; and who, in the course of that act, is "to withhold". The expression, then, means a debtor resident in Canada by whom the act of paying the dividend as such is, under the obligation itself, to be initiated in and the payment to proceed from this country.

It may be and doubtless is the case that such an exercise of taxing power or, as it may be called, exacting power, is so extraordinary that the court should require a clear identification of any relation to which it is proposed to be applied. With the policy of legislation we have, of course, nothing to do, but I think the subject-matter with reference to which the non-resident is taxed is here clearly identified, and that it embraces the correlatives of the obligations of the respondent under consideration.

The legislative competence of Parliament to tax non-residents was challenged. It is argued that the power "to make laws having extra-territorial operation" as enacted by the *Statute of Westminster, 1931,* section 3, is subject to two conditions: that the legislation deal with matter assigned by the *British North America Act* to the federal legislature; and that it be of such a nature as under international public or private law would be accorded extra-territorial effect. It is then contended that the power of the Dominion under section 91 (3), "the raising of money by any Mode or System of Taxation," does not extend to taxation of non-citizens outside

the boundaries of Canada; and that international comity, apart from any rule against giving effect in one state to fiscal measures of another state, would not for any purpose recognize the validity of, much less enforce, what Parliament is said to purport by this legislation to do.

The power of the Dominion to tax is to be interpreted as being "as plenary and as ample within the limits prescribed by section 92 (91) as the Imperial Parliament in the plenitude of its power possessed or could bestow": *Hodge* v. *The Queen* (1). But there is obviously a distinction between the standing of legislative enactments by a sovereign state within its boundaries and beyond them. In an effective sense, a declaration by such a legislature that it imposes a tax upon a citizen of a foreign country toward whom there is no internationally recognized bond or relation, is, beyond the territories of that state, a futile act, and it is futile for the reason that beyond them it is incapable of enforcement. Within the state, however, it becomes an obligatory rule to be enforced whenever enforcement is feasible. The specific investment of extra-territorial power by section 3 of the Statute of 1931 was designed, no doubt, to remove the generally accepted limitation of colonial legislative jurisdiction, a limitation which the courts of the colony itself were bound to recognize: *Macleod* v. *Attorney General for New South Wales* (2), and any such jurisdictional inadequacy no longer hampers the legislative freedom of the Dominion. Within its field, there is now a legislative sovereignty. That the enactment of section 9B is an exercise of taxing power within that jurisdiction does not, I think, admit of doubt. It is an assessment uniformly imposed in respect of special items of a general class of defined subject-matter in an elaborated tax system; there is admitted jurisdiction over an act essential to the subject-matter, *i.e.*, the act of performance of an obligation; and these, taken with the language used, satisfy the taxation criteria. Legislation so enacted will be effective in, and must be enforced by the courts of, this country. To what extent, if at all, it will receive recognition in the

(1) (1883), 9 App. Cas. 117. (2) [1891] A.C. 455.

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tribunals of foreign countries depends upon different considerations: but that circumstance, apart from its function in interpretation, is not one in which the local tribunal is interested.

I would, therefore, allow the appeal and direct judgment against the respondent for such sum as may be found to be owing, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitors for the respondent: *Robertson, Douglas & Symes.*

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* Jan. 24, 25
* Feb. 20

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF ORDERS IN COUNCIL OF THE 15TH DAY OF DECEMBER, 1945 (P.C. 7355, 7356 AND 7357), IN RELATION TO PERSONS OF THE JAPANESE RACE.

Constitutional law—Deportation of persons of the Japanese race—Power of the Governor General in Council under the War Measures Act—Order in Council same as Act of Parliament—Governor General in Council sole judge of necessity or advisability of measures taken by Orders—Considerations, which led Governor General in Council to adopt Orders, not open to review by courts of law—Orders in Council dealing with deportation from Canada of Japanese nationals, naturalized British subjects of the Japanese race, natural born British subjects of the Japanese race and of wives and children under 16 of these persons—Request in repatriation—Order in Council enacting British subject by naturalization to cease to be either a British subject or a Canadian national—Order in Council appointing a commission to make inquiry concerning the activities and loyalty during the war of persons of the Japanese race—Whether Orders in Council ultra vires in whole or in part—Comments on meaning of the words "deportation", "exclusion", "exile", "repatriation"—Person detained pending deportation "deemed to be in legal custody"—Whether recourse to habeas corpus abolished by provision of Order in Council—War Measures Act, R.S.C., 1927, c. 206, s. 3—National Emergency Transitional Powers Act, 1945, 9-10 Geo. VI, c. 25—Naturalization Act, R.S.C. 1927, c. 138—British Nationality and Status of Aliens Act (Imp.) 4-5 Geo. V., c. 17.

On the 15th of December, 1945, three Orders, purported to be made pursuant to section 3 of the *War Measures Act*, were adopted by the Governor General in Council (nos. 7355, 7356 and 7357). The

*PRESENT:—Rinfret CJ. and Kerwin, Hudson, Taschereau, Rand, Kellock and Estey JJ.

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reasons for the adoption of Order 7355 are stated in the preamble: "Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise; And whereas other persons of the Japanese race have requested or may request that they be sent to Japan; And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above; And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly". Section 2 then provides that "(1) Every person of sixteen years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who, (*a*) has, since the date of declaration of war by the Government of Canada against Japan, on December 8, 1941, made a request for repatriation; or (*b*) has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946, * * * 1943, as amended by P.C. 5637, * * * 1945, and was so detained as at midnight of September 1, 1945; may be deported to Japan. (2) Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to midnight the first day of September, 1945. (3) Every natural born British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan; Provided that such person has not revoked in writing such request prior to the making by the Minister of an order for deportation. (4) The wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person." Section 3 provides that "Subject to the provisions of section 2 of this Order a request for repatriation shall be deemed final and irrevocable for the purpose of this Order or any action taken thereunder." Order 7356 refers to Order 7355 and further provides that "Any person who, being a British subject by naturalization * * * is deported from Canada under the provisions of Order * * * 7355 * * * shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national." By Order 7357 provision is made for the appointment of a Commission "to make inquiry concerning the activities, loyalty and the extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada * * * with a view to recommending whether in the circumstances of any such case such person should be deported," and, also, to "inquire into the case of any naturalized British subject of the Japanese race who has made a request for repatriation and which request is final under the said Order in Council and may make such recommendations with respect to such case as it deems advisable."(1)

Held that the Orders in Council, apart from the question as to the validity of their provisions upon which opinions are hereinafter reported, contain legislation that could have been adopted by

(1) Full text of the three Orders in Council are hereinafter printed.

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Parliament itself; that under the *War Measures Act* the Governor General in Council was empowered to adopt any legislation which Parliament could have adopted; that such legislation was, expressly and impliedly, adopted because it was deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of war; that the Governor General in Council was the sole judge of the necessity or advisability of these measures and it is not competent to any court to canvass the considerations which may have led the Governor General in Council to deem such Orders necessary or advisable for the objectives set forth.—*Re Gray* (57 Can. S.C.R. 150); *Fort Frances Pulp & Power Co. v. Manitoba Free Press* ([1923] A.C. 695) and *Reference re Chemicals* ([1943] S.C.R. 1).

Per Rand, Kellock and Estey JJ:—Although the Orders in Council ceased to derive any force from the provisions of the *War Measures Act* from and after January 1, 1946, after that date, they derive their force from the *National Emergency Transitional Powers Act, 1945* by reason of the existence of the emergency therein referred to.

Held that subsections (1) and (2) of section (2) of Order 7355 are *intra vires* of the Governor General in Council.

Per The Chief Justice and Kerwin, Hudson, Taschereau and Estey JJ.:—The provisions of the three Orders in Council are *intra vires,* Hudson and Estey JJ. excepting subsection (4) of section 2 of Order 7355.

Per Hudson, Rand, Kellock and Estey JJ:—Subsection (4) of section 2 of Order 7355 (deportation of wife and children under 16 of person ordered to be deported) is *ultra vires.*—*Per* Rand J.:—It is *ultra vires* in relation to wives and children under 16 who do not come within the first two classes ((1) and (2) of s. 2 of 7355).

Per Rand and Kellock JJ.:—Subsection (3) of section 2 of Order 7355 in relation to the compulsory deportation of natural born British subjects resident in Canada is *ultra vires.*

Per Kellock J.:—Section 3 of Order 7355 is *ultra vires* insofar as it prevents such persons from withdrawing consent at any time and in any manner.

Per Rand and Kellock JJ.:—Order 7356 is *intra vires* insofar as it takes away incidental rights and privileges of persons of the Japanese race as Canadian nationals; but it is *ultra vires* to the extent that it provides for loss of the status of a British subject by naturalization.

Per Rand J.:—Order 7357 is not *ultra vires,* subject to the observance of the requirements of the *Naturalization Act* as to grounds for the revocation of naturalization.

Per Kellock J.:—Order 7357 is *intra vires* save insofar as it may purport to authorize a departure from the provisions of the *British Nationality and Status of Aliens Act, 1914.*

Per The Chief Justice and Kerwin and Taschereau JJ.:—The powers of the Governor General in Council, under section 3 of the *War Measures Act,* are not strictly limited to such "deportation" as

means "the forcible removal of aliens." Such word, in subsection (b), has not that exclusive meaning, and, according to quotations from reputed dictionaries, could well include the word "exile" which admittedly means the banishment of a national from his country. However, subsection (b) also contains the word "exclusion" which would be apt to cover the measures adopted through Order 7355. Moreover, assuming that these measures are not strictly and specifically contemplated by the use of these two words, they are undoubtedly covered by the general terms of the *War Measures Act*, the enumeration contained in the last part of section 3 being stated not to restrict the generality of the terms of the first part of that section.

Per Rand J.:—The words "deport" and "repatriation" are appropriate to the return to his native country of an alien. The power of Parliament to deal with aliens is unquestioned, and that field is under delegation to the Governor General in Council. The obligation of his own state to receive him must be deemed correlated with the power of the foreign state to expel him.

Per Kellock J.:—The consideration of the word "deportation" as the equivalent of "to remove into exile" or "to banish" involves the idea of penal consequences. Such a meaning is not apt in the case of citizens who have committed no offence nor, in modern times, in application to a national born citizen of a country on the assumption that some other country is under some obligation to receive him by reason of some previous connection of the citizen with that country. No country is under any obligation to receive the natural born citizen of another country and any attempt to force such a citizen upon another country would involve an infringement of sovereignty—The consent of Japan through General MacArthur is a consent to "repatriation," *i.e.* to restore a person to his *own* country and, thus, is no consent to the reception of natural born Canadians who have no country but Canada.

Per Estey J.:—The word "deportation" has been restricted to aliens in one case and applied to native-born in another. The standard dictionaries do not agree as to its exact meaning. Upon this reference, it is not necessary to precisely define the word. It is enough to emphasize that, as it is applied in law, it is a compulsory sending out of, or, as stated in the Oxford Dictionary, "a forcible removal," and that, while it need not be restricted to aliens, it does apply to them.

Per Estey J.:—The terms of subsection (3) of section 2 of 7355 cannot be regarded as enacting compulsory deportation. The persons therein mentioned having expressed a desire to be repatriated to Japan, the Governor General in Council decided to facilitate their going by perfecting the necessary arrangements. This matter is more one of policy for the Government than a question of jurisdiction.

Section 9 of Order 7355 provides that "any person * * * who is detained pending deportation * * * shall * * * be deemed to be in legal custody," and section 5 of the *War Measures Act* enacts that "no person who is held for deportation under this Act * * * shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice."

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Held that there is no conflict between these two sections. The words "be deemed to be in legal custody" in section 9 do not rule out any remedy provided for in section 5, and, more particularly, the wording of section 9 does not indicate any intention of the Order that the recourse to *habeas corpus* was thereby abolished.

Per Kellock and Estey JJ.:—The provisions of section 6 of Order 7355, relating to the sale of real and personal property of deportees by the Custodian of Enemy Property are not invalid as being repugnant to section 7 of the *War Measures Act*.

REFERENCE by His Excellency the Governor General in Council 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: Are the Orders in Council dated the 15th day of December, 1945, being P.C. 7355, 7356 and 7357, *ultra vires* of the Governor in Council either 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 section 3 of the *War Measures Act*, chapter 206 of the Revised Statutes of Canada, 1927, provides as follows:—

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

(*a*) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
(*b*) Arrest, detention, exclusion and deportation;
(*c*) Control of the harbours, ports and territorial waters of Canada and the movement of vessels;
(d) Transportation by land, air, or water and the control of the transport of persons and things;
(*e*) Trading, exportation, importation, production and manufacture;
(*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof.

"2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the

Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

"And whereas on the fifteenth of December, 1945, Orders were made by the Governor in Council under the authority of the *War Measures Act* (P.C. 7355, P.C. 7356 and P.C. 7357, certified copies annexted hereto) which Orders provided, amongst other things, for the removal pursuant to the authority thereof of nationals of Japan and other persons of the Japanese race;

"And whereas these Orders were made only after a suitable arrangement had been made with General MacArthur as set out in the dispatches of which copies are annexed hereto;

"And whereas the Acting Minister of Justice reports that representations have been made to him, by and on behalf of a number of Canadian organizations and societies expressing the opinion based on advice of legal counsel that the Orders in Council are *ultra vires* and requesting a reference to the Supreme Court of Canada to test the question;

"That an action has been commenced by Utaka Shimoyama and Yae Nasu against the Attorney General of Canada for a declaration that the Orders in Council are *ultra vires,* illegal and void;

"That an Order was made by the Governor in Council on the 28th of December, 1945, (P.C. 7414, certified copy annexed hereto), pursuant to Section 4 of *The National Emergency Transitional Powers Act, 1945* ordering that all orders and regulations lawfully made under the *War Measures Act* in force immediately before the day *The National Emergency Transitional Powers Act, 1945* came into force (January 1st, 1946), shall, while that Act is in force, continue in full force and effect; and

"That in these circumstances it is urgently required in the public interest that the opinion of the Supreme Court of Canada upon the question of the validity of the Orders

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in Council aforesaid be obtained with the least possible delay which question is, in the opinion of the Acting Minister of Justice, an important question of law touching the interpretation of Dominion legislation;

"Therefore His Excellency the Governor General in Council, on the recommendation of the Acting Minister of Justice and under and by virtue of the authority conferred by section 55 of the *Supreme Court Act*, is pleased to refer and doth hereby refer the following question to the Supreme Court of Canada for hearing and consideration, namely:—

Are the Orders in Council, dated the 15th day of December, 1945, being P.C. 7355, 7356 and 7357, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

(Sgd.) A. M. HILL,
Asst. Clerk of the Privy Council."

The text of Order in Council 7355 is as follows:

"Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

"And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

"And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

"And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;

"Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Labour, concurred in by the Secretary of State for External Affairs, and under the authority of the *War Measures Act*, chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make and doth hereby make the following Order,—

Order

1. In this Order, unless the context otherwise requires:

(*a*) "deportation" means the removal pursuant to the authority of this Order of any person from any place in Canada to a place outside Canada:

(*b*) "deported" means removed or sent from Canada pursuant to the authority of this Order;

(*c*) "Minister" means the Minister of Labour;

(*d*) "request for repatriation" means a written request or statement of desire, to be repatriated or sent to Japan.

2. (1) Every person of sixteen years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who,

(*a*) has, since the date of declaration of war by the Government of Canada against Japan, on December 8, 1941, made a request for repatriation; or

(*b*) has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946, of the 5th day of February, 1943, as amended by P.C. 5637, of the 16th day of August, 1945, and was so detained as at midnight of September 1, 1945;

may be deported to Japan.

(2) Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to midnight the first day of September, 1945.

(3) Every natural born British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan; Provided that such person has not revoked in writing such request prior to the making by the Minister of an order for deportation.

(4) The wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person.

3. Subject to the provisions of section 2 of this Order a request for repatriation shall be deemed final and irrevocable for the purpose of this Order or any action taken thereunder.

4. The Minister may

(*a*) make orders for the deportation of any persons subject to deportation;

(*b*) take such measures as he deems advisable to provide or arrange for the deportation of such persons, and for their transportation, detention, discipline, feeding, shelter, health or welfare, pending their deportation;

(*c*) make such orders, rules or regulations as he deems necessary for the purpose of carrying out the provisions of this Order;

(*d*) subject to the approval of the Governor in Council, employ such officers and other employees as are necessary to assist him in carrying out this Order and fix their remuneration;

(*e*) authorize from time to time any person to exercise on his behalf any power vested in him under paragraph (*b*) of this section.

5 An order for deportation made by the Minister shall be in force and effect from the date of the order.

6. (1) Any person for whom an order for deportation is made or who, having made a request for repatriation, is proceeding to Japan without the issue of such an order, shall be entitled, in so far as circumstances at the time permit.

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(*a*) at or immediately prior to the time of his deportation from Canada, to purchase suitable foreign exchange to the extent of any money in his possession or standing to his credit in Canada or advanced to him by the Minister pursuant to section seven and to take such foreign exchange out of Canada with him;

(*b*) to deposit any money in his possession or standing to his credit in Canada with the Custodian of Enemy Property, who shall provide such person with a receipt therefor and purchase foreign exchange therewith, and transfer the same, less transfer charges, to such person whenever reasonably possible following upon his deportation;

(*c*) at the time of his deportation to take with him such other personal property belonging to him as may be authorized by the Minister;

and the foreign Exchange Control Board shall do such things and issue such permits as may be required to implement these provisions.

(2) Where real or personal property of a person who has been deported to Japan or who, having made a request for repatriation, has proceeded to Japan without the issue of an order for deportation, has not been sold or otherwise disposed of prior to departure such real and personal property shall, as of the date of deportation of such person, be vested in the Custodian of Enemy Property, who shall sell the same as soon as in his opinion it is reasonably practicable to do so, and in the meantime he may take such measures as he deems proper for the care, maintenance and safeguarding of such property, and the net proceeds realized from such sale, after the deduction of reasonable charges of handling shall be placed to the credit of such person and dealt with as provided in paragraph (*b*) of subsection (1) of this section.

7. (1) The Minister may at or immediately prior to the time of departure advance to or for a person who is being deported to Japan or who, having made a request for repatriation, is proceeding to Japan without the issue of an order for deportation,, an amount in suitable foreign exchange equivalent to the following:

(*a*) Where such person is sixteen years of age or over and does not possess at least two hundred dollars, the difference between the amount he possesses and two hundred dollars which shall be paid to such person;

(*b*) Where such person has one or more dependents under sixteen years of age and does not possess at least two hundred dollars together with a further amount computed on the basis of fifty dollars for each such dependent, the difference between the amount he possesses and the total of two hundred dollars and the amount so computed, to be paid to such person.

(2) Any amount advanced as provided for in subsection (1) of this section shall be recoverable from the person to whom it is paid, from any money to the credit of such person with the Custodian of Enemy Property.

8. (1) The Minister may make arrangements with any department or agency of the Government of Canada to assist him in carrying out the provisions of this Order.

(2) The Department of National Defence shall provide any military guard personnel which may be required in carrying out the provisions of this Order.

(3) The Commissioner of the Royal Canadian Mounted Police shall give all assistance which may be required of him by the Minister in the carrying out of the provisions of this Order.

9. Any person for whom an order for deportation is made and who is detained pending deportation or who is placed under restraint in the course of deportation by virtue of any order or measure made or taken under Section 4 of this Order shall, while so detained or restrained, be deemed to be in legal custody.

10. Any person who resists or obstructs or attempts to resist or obstruct any peace officer or other person from carrying out his duties with respect to any order made pursuant to the provisions of this Order shall be guilty of an offence against this Order.

11. Any person who contravenes or omits to comply with any of the provisions of this Order or any order made or given pursuant thereto is guilty of an offence and liable upon summary conviction to a fine not exceeding Five Hundred Dollars or to imprisonment for a term not exceeding twelve months or to both such fine and such imprisonment.

12. Every document purporting to be or to contain or to be a copy of an order, certificate or authority made or given by the Minister in pursuance of the provisions of this Order and purporting to be signed by the Minister shall be received as evidence of such order, certificate or authority without proof of the signature or of the official character of the person appearing to have signed the same and without further proof thereof.

General

13. The costs involved in the administration of this Order shall be paid from the amounts allotted from the war appropriation to the Department of Labour for Japanese administration.

(Sgd.) A. D. P. HEENEY,
Clerk of the Privy Council.

Order in Council 7356 is as follows:

"Whereas by Order in Council P.C. 7355 of the 15th December, 1945, provision is made for the deportation of persons who, during the course of the war, have requested to be removed or sent to an enemy country or otherwise manifested their sympathy with or support of the enemy powers and have by such actions shown themselves to be unfit for permanent residence in Canada;

"Therefore, His Excellency the Governor General in Council, on the recommendation of the Secretary of State (concurred in by the Secretary of State for External Affairs) and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to order and doth hereby order as follows:

1. Any person who, being a British subject by naturalization under the Naturalization Act, Chapter 138, R.S.C. 1927, is deported from Canada under the provisions of Order in Council P.C. 7355 of 15th

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December, 1945, shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national.

2. The Secretary of State shall publish in the *Canada Gazette* the names of all persons who have ceased to be British subjects or Canadian nationals by virtue of this Order.

(Sgd.) A. D. P. HEENEY,
Clerk of the Privy Council."

Order in Council 7357 is as follows:

"Whereas during the war particular measures with regard to persons of the Japanese race in Canada were made necessary by reason of their concentration along the Pacific coast of Canada;

"And whereas experience during the war in the administration of Order in Council P.C. 946 of February 5, 1943, providing for the control of persons of the Japanese race has indicated the desirability of determining whether the conduct of such Japanese persons in time of war was such as to make the deportation of any of them desirable in the national interest;

"And whereas it is deemed advisable to make provision for the appointment of a Commission to institute the investigation referred to above;

"Therefore His Excellency the Governor General in Council, on the recommendation of the Prime Minister, and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to order and doth hereby order as follows:

1. A Commission consisting of three persons shall be appointed to make inquiry concerning the activities, loyalty and the extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada in cases where their names are referred to the Commission by the Minister of Labour for investigation with a view to recommending whether in the circumstances of any such case such person should be deported.

2. Notwithstanding anything contained in the provisions of Order in Council P.C. 7355 of the 15th day of December, 1945, the Commission may, at the request of the Minister of Labour, inquire into the case of any naturalized British subject of the Japanese race who has made a request for repatriation and which request is final under the said Order in Council and may make such recommendations with respect to such case as it deems advisable.

3. The Commission shall report to the Governor in Council.

4. Any person of the Japanese race who is recommended by the Commission for deportation shall be deemed to be a person subject to deportation under the provisions of Order in Council P.C. 7355 of the 15th day of December, 1945, and the provisions thereof shall apply, mutatis mutandis, to such person.

5. Where any person is recommended for deportation pursuant to this Order he shall, as and from the date on which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national.

6. The Commission shall, for the purpose of all inquiries and investigations made pursuant to this Order, have all the powers and authority of Commissioners appointed under Part One of the Inquiries Act.

7. The Commission is authorized to engage the services of such clerks, reporters, assistants and counsel as they deem advisable to aid and assist in the performance of their duties.

8. The Commissioners shall be paid such remuneration, allowances and expenses as the Governor in Council may fix.

9. All expenses incurred in connection with the inquiries and investigation of the Commission pursuant to this Order, including the remuneration, allowances and expenses of the commissioners, shall be paid from amounts allowed from the War Appropriation to the Department of Labour for such purpose.

(Sgd.) 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 Saskatchewan were, pursuant to order of The Honourable The Chief Justice of Canada, notified of the hearing of the Reference.

Aimé Geoffrion K.C. and *D. W. Mundell* for the Attorney-General of Canada.

R. L. Maitland K.C. for the Attorney-General of British Columbia.

F. A. Brewin for the Attorney-General of Saskatchewan.

J. R. Cartwright K.C., F. A. Brewin and *J. A. MacLennan* for the Co-Operative Committee on Japanese Canadians.

The judgment of The Chief Justice and of Kerwin and Taschereau JJ. was delivered by:—

THE CHIEF JUSTICE: On the 15th day of December, 1945, His Excellency, the Governor General in Council, ordered as follows:—

2. (1) Every person of sixteen years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who,

(*a*) has, since the date of declaration of war by the Government of Canada against Japan, on December 8, 1941, made a request for repatriation; or

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(b) has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946, of the 5th day of February, 1943, as amended by P.C. 5637, of the 16th day of August, 1945, and was so detained as at midnight of September 1, 1945;

may be deported to Japan.

(2) Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to midnight the first day of September, 1945.

(3) Every natural born British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to the making by the Minister of an order for deportation.

(4) The wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person.

The Order further provided that a request for repatriation, made under the above provisions, would be deemed final and irrevocable for the purpose of the Order or any action taken thereunder after a fixed delay.

The Minister of Labour was thereby authorized to "make orders for the deportation of any persons subject to deportation"; to take such measures as he deemed advisable to arrange for the deportation and for the detention, transportation, etc., of the persons subject thereto, and generally to make such rules or regulations and employ such officers or adopt such measures as he would from time to time deem necessary for the purpose of carrying out the Order.

Certain ancillary provisions are added to the Order with regard to property and belongings of the person being deported, or subject to deportation, or for the purpose of enabling the Minister to carry out the provisions of the Order. Of these ancillary provisions, section (9) alone need be reproduced verbatim:—

(9) Any person for whom an order for deportation is made and who is detained pending deportation or who is placed under restraint in the course of deportation by virtue of any order or measure made or taken under section 4 of the Order shall, while so detained or restrained, be deemed to be in legal custody.

This Order in Council was given No. P.C. 7355 and the reasons for its adoption are stated in the preamble as follows:—

Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation and otherwise;

And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;

On the same day two other Orders in Council were adopted under numbers P.C. 7356 and P.C. 7357. The first of these (7356) refers to Order in Council 7355 whereby provision is made for the deportation of persons who, during the course of the war, have requested to be removed or sent to an enemy country

or otherwise manifested their sympathy with or support of the enemy powers and have by such actions shown themselves to be unfit for permanent residence in Canada.

It orders that any person who, being a British subject by naturalization under the *Naturalization Act,* chapter 138, R.S.C. 1927, is deported from Canada under the provisions of Order in Council P.C. 7355 of the 15th of December, 1945,

shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national.

Order in Council P.C. 7357 begins by stating that during the war particular measures with regard to persons of the Japanese race were made necessary by reason of their concentration along the Pacific Coast of Canada; that experience during the war in the Administration of Order in Council P.C. 946 of February 5th, 1943, providing for the control of persons of the Japanese race has indicated the desirability of determining whether the conduct of such Japanese persons in time of war was such as to make the deportation of any of them desirable in the national interest, and that it is deemed advisable to make provision for the appointment of a Commission to institute the investigation concerned. It is then ordered that a Commission consisting of three persons shall be appointed to make

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inquiry concerning the activities, loyalty and the extent of cooperation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada in cases where their names are referred to the Commission by the Minister of Labour for investigation with a view to recommending whether in the circumstances of any such case such person should be deported. The Commission is given power, at the request of the Minister of Labour, to inquire into the case of any naturalized British subject of the Japanese race who has made a request for repatriation and which request is final, and to make such recommendations with respect to such case as it deems advisable. The Commission is to report to the Governor in Council. Any person of the Japanese race who is recommended by the Commission for deportation shall be deemed to be a person subject to deportation under the provisions of Order in Council P.C. 7355, which order shall then apply, *mutatis mutandis,* to such person. As a result of the deportation, the person in question shall cease to be either a British subject or a Canadian national. And, further, the Commission is given, for the purpose of all inquiries and investigations made pursuant to this Order, all the powers and authority of Commissioners appointed under part one of the *Inquiries Act.*

As will be seen, the latter two Orders in Council (7356-7357) have no operation except by reason of the first Order in Council (7355); the three Orders constitute one scheme, the validity of which depends upon the first Order in Council.

I have outlined above the preamble of the first Order in Council. The Order contains certain definitions. "Deportation" is stated to mean the removal, pursuant to the authority of this Order (7355), of any person from any place in Canada to a place outside Canada. "Deported" is stated to mean removed or sent from Canada pursuant to the authority of this Order. "Minister" means the Minister of Labour. "Request for repatriation" means a written request or statement of desire to be repatriated or sent to Japan.

The Order establishes three categories of persons who may be deported to Japan. The first category includes

every national of Japan, who is not also a Canadian national, of sixteen years of age or over, resident in Canada who was detained pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946 of February 5th, 1943, as amended by Order in Council P.C. 5637 of August 16th, 1945, at midnight of September 1st, 1945, the day before the formal unconditional surrender of the military forces of Japan.

The second category includes certain persons of the Japanese race of sixteen years of age or over resident in Canada, who have made written requests for repatriation. It includes either a national of Japan, a person who is a naturalized British subject, or a natural-born British subject, provided their requests were made before certain dates and were not revoked prior to the making by the Minister of an order for deportation.

The third category of persons includes the wife and children under sixteen years of age of any person against whom an order for deportation is made. They may be included in the order.

These Orders in Council are expressed to have been made under the authority of the *War Measures Act*, chapter 206 of the Revised Statutes of Canada, 1927. It is stated and established that these Orders were made only after a suitable arrangement had been made with General MacArthur, Supreme Commander for the Allied Powers in Japan.

Following the adoption of the Orders, representations were made to the Acting Minister of Justice by and on behalf of a number of Canadian organizations and societies expressing the opinion based on advice of legal counsel that the Orders were *ultra vires* and requesting a reference to the Supreme Court of Canada to test the question. An action had even been commenced against the Attorney General of Canada for a declaration that the Orders in Council were *ultra vires*, illegal and void. It was, therefore, felt that, in the circumstances, in the public interest, the opinion of the Supreme Court of Canada should be obtained upon the question of the validity of the aforesaid Orders in Council, because, in the opinion of the Acting Minister of Justice, they raised an important question of law touching

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the interpretation of Dominion legislation. Therefore, His Excellency the Governor General in Council, on the recommendation of the Acting Minister of Justice and under and by virtue of the authority conferred by section 55 of the *Supreme Court Act* referred the following question to the Supreme Court of Canada for hearing and consideration:—

Are the Orders in Council, dated the 15th day of December, 1945, being P.C. 7355, 7356, and 7357, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

In The matter of a Reference as to the validity of the regulations in relation to Chemicals enacted by the Governor General of Canada on the 10th day of July, 1941, P.C. 4996, and of an Order of the Controller of Chemicals, dated the 16th day of January, 1942, made pursuant thereto, (1) this Court held that the authority vested in the Governor General in Council by the *War Measures Act* (its constitutional validity having been finally determined in *Re Gray,* (2) and the *Fort Frances* case (3), is legislative in its character; and an Order in Council passed in conformity with the conditions prescribed by, and the provisions of, that Act, i.e. a legislative enactment such as should be deemed necessary and advisable by reason of war, has the effect of an Act of Parliament, although the final responsibility for the acts of the Executive Government rests upon Parliament. Parliament has not abdicated its general legislative powers nor abandoned its control. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence. Parliament has not effaced itself, and has full power to amend or repeal the *War Measures Act,* or to make ineffective any of the Orders in Council passed in pursuance of its provisions; and if, at any time, Parliament considers that too great a power has been conferred upon the Governor General in Council, the remedy lies in its own hand.

On this occasion it was stated by Sir Lyman Duff, then Chief Justice, that (p. 9):—

The *War Measures Act* came before this Court for consideration in 1918 in *Re Gray* (2), and a point of capital importance touching its effect was settled by the decision in that case. It was decided there that the

(1) [1943] S.C.R. 1.
(2) (1918) 57 Can. S.R. 150.
(3) [1923] A.C. 695.

authority vested in the Governor General in Council is legislative in its character and an order in council which had the effect of radically amending the *Military Service Act, 1917*, was held to be valid. The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the *War Measures Act* may have the effect of an Act of Parliament.

* * *

The judgment of the Privy Council in *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* (1) laid down the principle that, in an emergency such as war, the authority of the Dominion in respect of legislation relating to the peace, order and good government of Canada may, in view of the necessities arising from the emergency, displace or overbear the authority of the provinces in relation to a vast field in which the provinces would otherwise have exclusive jurisdiction.

But any Order made under the *War Measures Act* is subject to two specific provisions: The Governor in Council is empowered to do and authorize such acts and things, and to make such orders and regulations, provided there exists a real or apprehended war, invasion, or insurrection; and also provided that the act or thing done, or the order or regulation made, are such that the Governor in Council, by reason of real or apprehended war, deems them necessary or advisable for the security, defence, peace, order and welfare of Canada.

And at p. 12 of the *Chemicals Reference* (2) Sir Lyman Duff states:—

> The duty rests upon the Executive Government to decide whether, in the conditions confronting it, it deems it necessary or advisable for the safety of the state to appoint such subordinate agencies and to determine what their powers shall be.
>
> There is always, of course, some risk of abuse when wide powers are committed in general terms to any body of men. Under the *War Measures Act* the final responsibility for the acts of the Executive rests upon Parliament. Parliament abandons none of its powers, none of its control over the Executive, legal or constitutional.
>
> The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above (and the specific provisions enumerated), when Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country—the Executive Government

(1) [1923] A.C. 695. (2) [1943] S.C.R. 1.

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itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor General in Council (not the courts) deems necessary or advisable.

The Co-operative Committee on Japanese Canadians appeared through Counsel in the matter and submitted that the question referred to the Court should be answered in the affirmative, that is to say, that the Orders in Council are wholly *ultra vires* of the Governor in Council.

First, they said that the word "deportation" means, and means exclusively, "the forcible removal of aliens"; and that it is not apt to describe the sending to Japan of Canadian citizens who were either born or naturalized in Canada and who have no connection with Japan other than that of "race". According to them, "deportation" is the return of an alien to the country from whence he came and not the exile or banishment of a citizen to an alien country.

In the second place, they said that the purpose of the enumeration in section 3 of the *War Measures Act* was to indicate that the powers of the Governor in Council "could go even thus far", or to indicate "marginal instances", or "cases in which there might be such doubt that it was better to mention them specifically". For that contention, certain dicta in the *Gray* case, (1) are referred to.

They added that the banishment of subjects by any court or body for any other reason than conviction of felony is expressly prohibited by heavy penalties by the *Habeas Corpus Act* 31, Charles II, chapter 2, section 60.

Moreover, they said that the banishment of nationals, particularly on racial grounds, is contrary to the accepted principles of International Law, such as may be gathered from *Attorney General of Canada* v. *Cain* (2).

They also contended that various provisions of the Orders in Council are repugnant to the *British Nationality and Status of Aliens Act*, 4-5 George V, chapter 17, and that the latter is an Act to which the *Colonial Laws Validity Act* applies.

(1) (1918) 57 Can. S.C.R. 150, at 158, 168, 177.

(2) [1906] A.C. 542, at 546.

Their conclusion is, of course, that if the Parliament of Canada did not have the power to make laws repugnant to the Imperial Statute, it could not delegate such power and could not be assumed to have attempted to do so.

Then they urged that section 9 of Order in Council P.C. 7355 does away with the right to the writ of *habeas corpus* and, moreover, conflicts with section 5 of the *War Measures Act;* and they contended that none of the sections, including said section 9, are severable from the three Orders in Council, so that it cannot be said that the Governor in Council would have passed the Orders at all if some of the sections thereof were being left out, all the provisions of the Orders in Council being interdependent. They argued that it is impossible to say that the Governor in Council would not have abandoned the whole scheme if parts of it had been known to have been *ultra vires.*

A further argument was put forward on the ground that the words "Japanese race" are so vague as to make the provision unenforceable and, for that reason also, the Orders in Council should be set aside.

In respect of the last argument, the Court indicated immediately that it would not be taken into consideration as the question referred to us is whether the Orders in Council are *ultra vires,* and the point whether some words or sentences therein are vague does not fall within that question. The Orders in Council would not be *ultra vires* even if some parts thereof were vague.

The attack upon the use of the word "deportation" is addressed, of course, to the word in the *War Measures Act,* for, in so far as the Orders in Council themselves are concerned, they contain a definition of the word which is said to mean, for the purposes of the Orders,

> the removal pursuant to the authority of this Order of any person from any place in Canada to a place outside Canada.

There can be no doubt that "deportation" so understood clearly covers the cases and categories of persons affected by the Orders.

But section 3 of the *War Measures Act,* after stating that the Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of

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real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada, adds:—

and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated;

and among the matters enumerated are (section (*b*)) "Arrest, detention, exclusion and deportation". The contention of the Co-operative Committee is that, as "deportation" is specifically mentioned in that sub-section of section 3, the powers of the Governor in Council, under the *War Measures Act,* are strictly limited to such "deportation" as means "the forcible removal of aliens."

But, to begin with, it is far from being sure that the word "deportation" is limited to what the Co-operative Committee contends. Counsel for the Attorney General of Canada was able to quote several definitions from standard dictionaries where the meaning of the word is stated to be more extensive. The New English Dictionary, edited by Sir James Murray, LL.D., and Henry Bradley, M.A., known as the Oxford English Dictionary, defines the word:—

The action of carrying away; forcible removal esp. into exile; transportation.

Webster's New International Dictionary gives:—

Act of deporting or state of being deported; banishment, transportation. In modern law, the removal from a country of an alien considered inimical to the public welfare; distinguished from transportation and extradition.

In Worcester's Dictionary:—

The act of carrying away; removal; transportation; exile; banishment.

It would follow from the above definitions that the word "exile" could well come under the word "deportation"; and, if it is submitted that "deportation" should, in ordinary language, be used for "the forcible removal of aliens", it should also, according to the above quotations from reputed dictionaries, include the word "exile" which admittedly means the banishment of a national from his country, or, in the words of the Interpretation Section of the Order itself (7355), "the removal of any person from any place in Canada to a place outside Canada".

However, I would not pause to further consider the objection raised upon that ground, because sub-section (*b*)

of section 3 of the *War Measures Act* also contains the word "exclusion", which would be apt to cover the measures that are being adopted through the Orders in Council under consideration; and, moreover, if the measures so adopted are not, as contended, strictly and specifically contemplated by the use of the words "exclusion and deportation" in sub-section (*b*), what is now being done pursuant to the Orders in Council is undoubtedly covered by the general terms of the *War Measures Act*. The enumeration therein contained is stated to be only "for greater certainty, but not so as to restrict the generality of the foregoing terms", and, in the first part of section 3, the Governor in Council is given the power

> to do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

So that the discussion as to the exact meaning of the words "exclusion and deportation" in sub-section (*b*) is really immaterial, for either the "acts and things" mentioned in Orders in Council 7355, 7356 and 7357 are covered by these two words or they are not. If they are, *cadit questio*; if they are not, they then come under the general powers conferred by the first part of section 3.

Order in Council P.C. 7355 expressly states:—

> It is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly.

The other two Orders in Council, as already pointed out, are merely ancillary to Order in Council 7355, and, although bearing separate numbers, would have no real existence but for Order in Council 7355. Indeed this is the very argument of the Co-operative Committee, that they are so completely interdependent that one cannot stand without the others. They are really the subordinate provisions and means for the purpose of carrying out the main Order contained in P.C. 7355. They must be read together and be taken to have been adopted because they were deemed necessary and advisable by reason of the war. This statement of fact made by the Governor in Council, so far as the Court is

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concerned, cannot be overruled in the circumstances of the matter before us. In the *Fort Frances* case (1), Viscount Haldane had this to say at page 706:—

> It may be that it has become clear that the crisis which arose is wholly at an end and 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. In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton* v. *Kentucky Distilleries Co.*, (2).

Later, in the *Chemicals Reference* (3), Sir Lyman Duff points out at page 13 that

> it is perhaps theoretically conceivable that the Court might be required to conclude from the plain terms of the Order in Council itself that the Governor General in Council had not deemed the measure to be necessary or advisable, or necessary or advisable by reason of the existence of war.

Such a situation must indeed be rare and certainly it does not arise in the present instance. I repeat the four recitals in P.C. 7355:—

> Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;
>
> And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;
>
> And whereas it is deemed desirable that provisions be made to deport the classes or persons referred to above;
>
> And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;

Then comes the following:—

> Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Labour, concurred in by the Secretary of State for External Affairs, and under the authority of the *War Measures Act*, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make and doth hereby make the following Order;

It is clear from this that the Order is made under the authority of the *War Measures Act*. The Japanese nationals referred to in the first recital are covered by the enacting provisions, paragraph 2, subparagraph 1; "other persons of the Japanese race" referred to in the second recital are

(1) [1923] A.C. 695. (2) (1919) 251 U.S. 146.
(3) [1943] S.C.R. 1.

dealt with by paragraph 2, subparagraph 2: "Naturalized British subject of the Japanese race", and by subparagraph 3: "natural born British subject of the Japanese race". The third recital states that it is deemed desirable that provision be made to deport these classes who have requested, or (in the case of naturalized or natural born British subjects) who may request that they be sent to Japan, and the fourth recital is surely a plain statement that the Governor General in Council has deemed it necessary by reason of the war to provide with reference to these various classes in the manner set forth in paragraph 2 of the Order and elsewhere.

It will be noticed that in the first recital dealing with Japanese nationals, the word "repatriation" is used, while in the second recital, dealing with other persons of the Japanese race, the reference is to requests "that they be sent to Japan". After these recitals surely the word "deport", in the third recital, is sufficient, notwithstanding any argument that might on other occasions be made that the word "deport" would not apply to the sending to Japan of natural born British subjects of the Japanese race.

Whatever might be said as to certain of the remarks made in *Re Price Bros. and Company and the Board of Commerce of Canada* (1), in view of the later decision in the *Fort Frances* case (2), it is quite clear from a perusal of all the opinions in the former that not only was there before the Court an opinion by the then Minister of Justice that there was no emergency, but also there was no definite statement such as we find in the fourth recital in P.C. 7355. In the *Price Bros.* case (1), Sir Lyman Duff referred to the recitals in the Order in Council of December 20th, 1919, as being

> in themselves sufficient to constrain any Court to the conclusion that the Order of 29th January was not preceded or accompanied by any such decision,

i.e., a decision

> that the particular measure in question is necessary or advisable for reasons which have some relation to the perils actual or possible of real or apprehended war.

(1) (1920) 60 Can. S.C.R. 265. (2) [1923] A.C. 695.

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At page 707 of the *Fort Frances* case (1) appears at least one statement in the Order of December 20th, 1919, to which Sir Lyman Duff must have been referring, i.e., that it must

> be realized that although no proclamation has been issued declaring that the war no longer exists, actual war conditions have in fact long ago ceased to exist, and consequently existence of war can no longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security of Canada.

Notwithstanding this reference in the *Fort Frances* case (1), their Lordships of the Judicial Committee had no difficulty in determining the validity of the Orders in Council there under review.

It is suggested that it cannot be said that the Governor General in Council really considered it necessary by reason of the war, for the security, defence, peace, order and welfare of Canada that natural born British subjects should be expelled. The argument is that while P.C. 7356 provides that any person who being a British subject by naturalization is deported from Canada under 7355

> shall as and from the date upon which he leaves Canada in the course of such deportation cease to be either a British subject or a Canadian national,

no provision is made anywhere that a natural born British subject of the Japanese race who is deported shall cease to be a British subject or a Canadian national; and that, therefore, theoretically there would be nothing to prevent such last mentioned person from immediately re-entering Canada. It is sufficient to point out that once such person is expelled from the country and sent to Japan under the arrangements made with General MacArthur, it is inconceivable that any practical difficulty can ever arise. In the history of England examples are not unknown of cases where natural born British subjects have been exiled without any provision being made that they should lose their British nationality.

It has also been suggested that since any natural born British subject of the Japanese race who has made a request to be sent to Japan may revoke in writing such request prior to the making by the Minister of Labour of an order for deportation, it could not be said that the Governor General in Council really deemed it necessary

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

to provide for the peace, order and good government of Canada to send them to Japan. As to this, and generally to all such arguments, it must be borne in mind that the Governor General in Council was dealing with people who had made requests to be sent to Japan or who might after the making of P.C. 7355 make such requests. Surely under the circumstances that existed during the actual hostilities with Japan or in the ensuing months, the Governor General in Council might well be justified in considering such people a menace to Canada and the mere fact that they were given an opportunity of retraction cannot alter the fact that the Governor General in Council did so decide. Even if it turned out that every natural born British subject of the Japanese race did withdraw his request, it would remain as expressed in the Order in Council that it was considered advisable to provide for the event of any number of such class not taking advantage of the opportunity of revocation.

Nor are we concerned with the policy of these measures. As was said by Lord Buckmaster in *Attorney General* v. *Wilts United Dairies* (1), in dealing with an Order of the Food Controller made in April, 1919:—"The only question here is: were such powers granted?"

That Canada possessed the power to expel an alien from its territory, or to deport him to the country whence he entered it, is a question that may now be regarded as settled since the judgment of the Privy Council in *Attorney General for Canada* v. *Cain* (2). It was also decided in that case that the power could be delegated to the Government, with the authority to impose such extra-territorial constraint as was necessary to execute the power.

As to the second point raised by the Co-operative Committee. I do not think it can be said that any provision of the Orders in Council now under discussion are repugnant to the *British Nationality and Status of Aliens Act*, 4-5 George V, chapter 17. It does not seem necessary for me to develop that statement, as, after all, the fact of no conflict can be ascertained only by comparison of the respective provisions of the latter Act and the text of the Orders in Council. Section 26 of the *British Nationality*

(1) (1922) 91 L.J. (K.B.) 897. (2) [1906] A.C. 542.

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Act, at the beginning, would seem to eliminate any possibility of conflict. The question which naturally comes to one's mind is: Why should Canada not be able to denaturalize the persons whom it had previously naturalized? The loss of the quality of British subject, resulting from the deportation and the denaturalization which takes place under the Orders, must be read, of course, to mean the cessation of the privileges of a British subject only in so far as Canada is concerned. Moreover, the attempt by the Co-operative Committee to apply here the provisions of the *Colonial Laws Validity Act* is, in my opinion, ineffective, because each of the Orders in Council are, by force of the *War Measures Act*, the equivalent of a statute; they have the force of law, and, to all intents and purposes, while they stand, they are exactly on the same footing as an Act of Parliament. It would follow, therefore, that they must be looked upon with regard to the Statute of Westminster, as bearing the date of the 15th of December, 1945, and consequently, much posterior to the coming into force of that statute. So that being posterior to it and getting the benefit of the Statute of Westminster itself, they are thus withdrawn from the application of the *Colonial Laws Validity Act*.

Moreover, the *British Nationality Act* cannot be said to have been adopted by Canada. The Canadian Act was an independent enactment, which was intended by the Canadian Parliament here as its own Act, with the consequence that it can be truly said that the *British Nationality Act* as such never applied to Canada.

Perhaps a special reference ought to be made to section 9 of Order in Council P.C. 7355, in respect of which counsel for the Co-operative Committee made a very insistent argument that it conflicted with section 5 of the *War Measures Act* and that it had the effect of abolishing the right to resort to *habeas corpus*. Section 5 in question enacts:—

> No person who is held for deportation under this Act or under any regulation made thereunder, or is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, or to prevent his departure from Canada, shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice.

Section 9 of P.C. 7355 enacts:—

> Any person for whom an order for deportation is made and who is detained pending deportation or who is placed under restraint in the course of deportation by virtue of any order or measure made or taken under section 4 of this Order shall, while so detained or restrained, be deemed to be in legal custody.

I do not see any conflict between the two sections. It is apparent that section 5 of the Act really deals with the situation anterior to the order for deportation, while section 9 of the Order deals with the situation after the order for deportation has been made. Even if the two sections dealt with the same situation, it does not follow that because the person detained or restrained is declared to be deemed to be in legal custody under section 9, it could not happen that the same person could be released upon bail, or otherwise discharged or tried, with the consent of the Minister of Justice.

But, above all, there is a good deal to be said for the contention that section 9 of the Order is really superfluous, because, if the order for deportation was made, or if the person detained pending deportation, or placed under restraint in the course of deportation, was so placed "by virtue of any order or measure made or taken under section 4 of this Order", such person is necessarily in legal custody. The whole of section 9 is predicated upon the assumption that the order for deportation, or detention, or restraint, was properly made or taken under section 4; and, if the provisions of section 4 are valid and followed, the necessary consequence is that the person detained, or restrained, is in legal custody. Section 9, therefore, appears to be superfluous, and to have been put there *ex abundanti cautela,* or, in other words, in order to avoid a doubt as to the legality of the detention or restraint. That very legality necessarily results from the fact that any order, or measure, taken under section 4, means precisely what it says, that is to say, an order or measure in conformity with section 4.

But I do not think that it can be concluded from the wording of section 9 that the intention of the Order in Council is that the recourse to *habeas corpus* is thereby

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abolished. At Bar, counsel for the Crown did not so contend; on the contrary, he stated that it was not. The language of section 9 refers to an order authorized by Order in Council P.C. 7355 and, therefore, a valid order resulting in legal custody.

In addition to any other argument in respect to section 9, it may be said that it is clearly severable; and, even if it was held to be *ultra vires*—which, in my opinion, it is not—it is quite evident that declaring it *ultra vires* would not in any way affect the remainder of the several Orders in Council now submitted.

The third recital in P.C. 7355,

> And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above,

in terms applies only to the classes referred to in the first two recitals, i.e., Japanese nationals who had manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise, and other persons of the Japanese race who had requested, or might request, that they be sent to Japan. Subparagraph 4 of paragraph 2 of the Order, however, provides:—

> (4) The wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person.

As to children, at what age under sixteen would a consent be of any value? As to both children and wives, it was apparently considered advisable that the Minister should have power to expend the sums mentioned in paragraph 7 in a desire to keep families together. Even though no request from wives or children under sixteen is required by subparagraph 4 of paragraph 2, it appears that the Governor in Council deemed it necessary for the security, defence, etc., of Canada to authorize the Minister of Labour to include this class in an Order covering a person of either of the first two classes. That the Governor in Council considered the matter necessary may appear without specific words being used, *Rex* v. *Controller General of Patents* (1), and in this case I am satisfied upon a consideration of all the terms of the Order that this occurred.

(1) [1941] 2 K.B. 306, at 314.

My conclusion is that Orders in Council 7355, 7356 and 7357 contain legislation that could have been adopted by Parliament itself; that, under the *War Measures Act,* the Governor in Council was empowered to adopt any legislation that Parliament could have adopted; that such legislation was, expressly and impliedly, adopted because it was deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of war; that the Governor in Council was the sole judge of the necessity or advisability of these measures and it is not competent to any Court to canvass the considerations which may have led the Governor in Council to deem such orders necessary or advisable for the objectives set forth.

The authority conferred on the Governor General in Council is a plenary legislative power, both to adopt the orders and to continue them in force, which is not subject to review in a Court of Justice.

My answer to the question submitted to the Court is, therefore, that the Orders in Council dated the 15th of December, 1945, being P.C. 7355, 7356 and 7357 are not *ultra vires* of the Governor General in Council either in whole or in part.

We hereby certify to His Excellency the Governor General in Council that the foregoing are our reasons for the answer to the question referred herein for hearing and consideration.

T. RINFRET
P. KERWIN
R. TASCHEREAU

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Hudson J.

Hudson J.—The question submitted for our opinion is the following:

Are the Orders in Council dated 15th December, 1945, being P.C. 7355, 7356 and 7357 *ultra vires* of the Governor in Council, either in whole or in part and, if so, in what particular or particulars?

These Orders in Council purport to be made under the authority of the *War Measures Act* and provide for the removal from Canada to Japan of a large number of persons of Japanese race, the revocation of naturalization of such of them as have been naturalized and the disposition of the properties of such persons in Canada.

The reasons given in Order P.C. 7355, which is basic, are stated as follows:

Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

The persons to whom this Order applies are of four classes. The first is:

Every person of sixteen years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who,

(*a*) has, since the date of declaration of war by the Government of Canada against Japan, on December 8, 1941, made a request for repatriation; or

(*b*) has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946, of the 5th day of February, 1943, as amended by P.C. 5637, of the 16th day of August, 1945, and was so detained as at midnight of September 1, 1945.

By section 91, heading 25, of the *British North America Act* the Dominion is given exclusive legislative authority in respect of naturalization and aliens, and it was held in the case of *Attorney-General* v. *Cain* (1), that the Crown undoubtedly possesses the power to expel an alien from the Dominion of Canada, or to deport him to the country from whence he entered it. In giving the judgment of the Committee, Lord Atkinson said at p. 546:

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport

(1) [1906] A C. 542.

from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.

It was also held that the Dominion has the power to exercise such extra-territorial constraint as is necessary to execute the power.

The second class provided for in the Order includes:

> Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to midnight the first day of September, 1945.

It is provided by section 9 of the *Naturalization Act*, R.S.C. 1927, chapter 138, that:

> Where the Governor in Council, upon the report of the Minister, is satisfied that a certificate of naturalization granted by the Minister under this Act or granted under any Naturalization Act heretofore in force in Canada has been obtained by false representation or fraud, or by concealment of material circumstances, or that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to His Majesty the Governor in Council shall by order revoke the certificate.

Here the request for repatriation by a Japanese has been treated by the Governor in Council as evidence of "disaffection or disloyalty to His Majesty" under the conditions subsisting in Canada at the time, that is, when this country was at war with Japan, or just emerging therefrom.

As the Canadian Parliament have power to grant naturalization, they have equally the power to revoke such naturalization and may delegate such power to the Governor in Council. Once the naturalization is revoked, the person concerned reverts to his original status of being an alien and thus becomes subject to deportation in the same way as any other alien.

It must also be remembered that in making the order for deportation, the Governor in Council is doing what the person involved himself had authorized.

The third class of persons included in Order in Council 7355 consists of:

> Every natural born British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to the making by the Minister of an order for deportation.

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The form of request for repatriation used by this class was supplied to us by counsel for the Co-operative Committee of Japanese Canadians and reads as follows:

"I, ...(.....), born.....
(M. or F.) (day, month, year)
registered as a Canadian-born British subject (J. R. No.....) under Order in Council P.C. No. 9760, dated December 16, 1941, hereby declare my desire to relinquish my British nationality and to assume the status of a National of Japan.

Further, I request the Government of Canada, under the conditions set out in the Statement of the Minister of Labour dated February 13, 1945, to arrange for and effect my repatriation to Japan.

I declare that I fully understand the contents of this document, and I voluntarily affix my signature hereto:

Date.....1945 .....
Signature

Place.....

....
Witness Interpreter

Note: All persons sixteen years of age and over are required to sign a separate Declaration.
Application Recommended:

....
R.C.M.P. Commissioner of Japanese Placement.

Date.....1945 Date.....1945

N.B.—This form in respect to Naturalized British Subjects was the same with the substitution of the words "Canadian naturalized" for "Canadian born" in the above form.

It will be observed that, by the terms of the Order in Council, persons in this class have a right to revoke the request at any time before a deportation order has actually been made, so that the order when made is no more than a compliance with such request.

The order as to this class does not impose a loss of citizenship. The form of request signed contains a declaration of a desire to relinquish British nationality and assume the status of a national of Japan. Any change of nationality, however, is left to action by the person himself. Section 16 of the *Naturalization Act* provides that:

A British subject who, when in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject.

I should say that no question could be raised as to the right of the Governor in Council to facilitate the departure of any member of the Japanese race who desires to make his home in Japan. A question of compulsion can arise only where a person seeks to withdraw his request after the Governor in Council has finally acted on it.

The relationship between a British subject and his sovereign is stated in Blackstone's Commentaries, vol. 1, p. 370, as follows:

> Natural allegiance is therefore perpetual, * * * allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent.

The mutual obligations there are spoken of as those arising from an implied contract.

It would seem to follow that such obligations could be modified or cancelled by mutual agreement expressed in any way not forbidden by law. The facts here establish a concurrence in some modifications leading to a final extinguishment of all.

The request of the subject states his desire to relinquish his British nationality and to assume the status of a national of Japan and asks the Government of Canada to arrange for and effect his repatriation to Japan. By this he must mean his naturalization in Japan. This is a plain indication that, with him, the ties of race are stronger than the obligations of nationality.

By the order the Governor in Council concurs in his proposal with no qualification, except that the subject is given an option to withdraw his request at any time before the final deportation order is actually made. If there is no withdrawal in time, it would seem that there was in the language of commerce "a firm contract", so that the deportation order when made and carried out will be in fulfilment of the promise made on behalf of the Government.

It remains to consider whether or not Parliament has power to authorize the Governor in Council to make these orders and, if so, whether such power has been delegated.

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As to the first two classes, for the reasons already given, I am satisfied that Parliament has that power and can delegate it to the Governor in Council.

As to the third class, there would be more difficulty in upholding the order, were it not for the terms of the request. Ample opportunity has been and still is given to the subject for reconsideration and withdrawal before the final order is made. It would be hard indeed if the Governor in Council, as soon as arrangements for transportation and reception are completed, is not permitted to carry out the arrangement. It has, in my opinion, adequate legislative sanction.

The British Parliament would undoubtedly have power to order the deportation from the realm of a British subject and the Canadian Parliament appears to have similar powers. Under the *British North America Act* it has a right to legislate in regard to the peace, order and good government of Canada and, in heading 25 of section 91, it is given exclusive power to legislate in regard to aliens and naturalization. Although deportation of a British citizen would not fall within this heading, yet it is of the same character and is a subject which could not be dealt with by a Provincial Legislature.

Under the *War Measures Act,* section 3, the Governor in Council is authorized to do all acts and things and make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war deem necessary or advisable for the security, defence, peace, order and welfare of Canada. This enables the Governor in Council to deal with any subject matter within the power of Parliament during the prescribed time, which does not conflict with any provision of the *War Measures Act* itself. This was conclusively established in *Re Gray* (1), and *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press* (2). As was said by Sir Lyman Duff in the *Chemicals Reference* (3):

> The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war.

(1) (1918) 57 Can. S.C.R. 150. (2) [1923] A.C. 695.
(3) [1943] S.C.R. 1, at p. 12

The Act also provides in section 2 that it shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has not ceased until by proclamation it is so declared. No such proclamation was made up to the time these Orders in Council were passed. Even if it were, it was held in the *Fort Frances* case (1) that Parliament still had power to conclude matters under way while the war was still going on.

The Orders with which we are here concerned plainly arose out of matters originating during the war, so that I think the Orders in Council can be taken to be an exercise of the powers vested in Parliament bearing on the subject matter under consideration.

The very able arguments presented by counsel for the Co-Operative Committee of Japanese Canadians have been dealt with by some of the other members of the Court and I shall make brief reference to only two or three.

It was argued that clause 9 of Order in Council P.C. No. 7355 might have the effect of depriving a person about to be deported from any right to a writ of *habeas corpus*. I agree with the other members of the Court that such is not a proper interpretation of this clause. I think that where any question of fact bearing on the jurisdiction of the Governor in Council is raised, the person concerned would have a right to put it forward: for example, whether or not he had signed any request or had been induced to sign by misrepresentation or coercion, or whether or not he was of the Japanese race. The validity of the Orders depends on the reality of the requests and any individual who wishes to raise a question of fact, so far as it affects him, should not be deprived of an opportunity of establishing his case.

I am in agreement with what Mr. Justice Estey has said in regard to the fourth class, that is, women and children.

The question submitted in this reference is as follows:

Are the Orders in Council dated 15th December, 1945, being P.C. 7355, 7356 and 7357 *ultra vires* of the Governor in Council, either in whole or in part and, if so, in what particular or particulars?

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

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In my opinion all the Orders in Council are *intra vires* of the Governor in Council with the exception of paragraph 2 (4) of P.C. 7355.

I HEREBY CERTIFY to His Excellency the Governor General in Council that the foregoing are my reasons for the answer to the question referred herein for hearing and consideration.

A. B. HUDSON.

RAND J.—His Excellency in Council has referred to this Court the following question arising out of certain Orders in Council which deal with the deportation of persons of the Japanese race:—

> Are the Orders in Council dated the 15th day of December, 1945, being P.C. 7355, 7356 and 7357, *ultra vires* of the Governor in Council either in whole or in part, and if so, in what particular or particulars and to what extent?

The Orders provide for the deportation in certain circumstances of:—

(*a*) Japanese nationals;

(*b*) Naturalized British subjects of the Japanese race resident in Canada;

(*c*) Natural born British subjects of the Japanese race resident in Canada; and

(*d*) The wives and children under 16 years of age of persons in classes (*a*), (*b*) and (*c*).

The power of the Governor in Council to enact legislation by Order is derived from section 3 of the *War Measures Act,* which, so far as it is pertinent here, is as follows:—

> 3. The Governor in Council may do and authorize such acts, and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—
>
> * * *
>
> (*b*) Arrest, detention, exclusion and deportation.

Apart from a consideration I shall deal with later, I am bound by decisions of this Court and of the Judicial Committee to attribute to Parliament the intention of clothing

the Governor in Council with authority to enact by Order, subject to the provisions of the Act, legislation in a field as wide as that possessed by Parliament itself subject only to any restriction of the power of Parliament under the *British North America Act* to delegate to the Governor in Council: Duff C. J., *Chemicals Reference* (1). The condition of the exercise of that power is that the Governor in Council should by reason of the existence of real or apprehended war, invasion or insurrection *deem necessary or advisable for the security, defence, peace, order and welfare of Canada the acts and things which by Order he purports to do.* It is not for the courts to substitute their view of any such necessity or advisability: but it must appear from the Order or be presumed that that decision has been made, or the condition laid down by Parliament is not fulfilled.

The preamble of Order P.C. 7355 contains the following recitals:—

> Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;
>
> And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;
>
> And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;
>
> And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;
>
> Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Labour, concurred in by the Secretary of State for External Affairs, and under the authority of the *War Measures Act,* chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make and doth hereby make the following Order:

A request for repatriation is defined as a written request or statement of desire to be repatriated or sent to Japan. Then follow specific provisions dealing with the different classes of persons affected.

Of these classes there is first that of Japanese nationals. The preamble quoted recites certain conclusions of the Governor in Council pertinent to jurisdiction, and we are to say whether from these and the operative provisions of the Order we find that the decision which the statute has prescribed as its condition has not been made: *in re Price Bros. and Company* (2), Duff J. (as he then was):

(1) [1943] S.C.R. 1, at p. 10. (2) (1920) 60 Can. S.C.R. 265.

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Rand J.

In this connection the sole point requiring examination is that which arises out of Mr. Biggar's contention in his admirable argument that orders in council made by the Governor General in Council professedly under the authority of section 6 of that Act are not judicially revisable. I think such orders are reviewable, in this sense that when in a proper proceeding the validity of them is called into question, it is the duty of a court of justice to consider and decide whether the conditions of jurisdiction are fulfilled and if they are not being fulfilled, to pronounce the sentence of the law upon the illegal order.

One of the conditions of jurisdiction is, in my judgment, that the Governor in Council shall decide that the particular measure in question is necessary or advisable for reasons which have some relation to the perils actual or possible of real or apprehended war—(I leave the case of insurrection out of view as having no relevancy) or as having some relation to the prosecution of the war or the objects of it.

Rex v. *Comptroller* (1). The language of the preamble is not precisely that employed by the statute, but in relation to this class of persons it appears, I should say, from the Order that the condition has been satisfied. The words "deport" and "repatriation" are appropriate to the return to his native country of an alien. The power of Parliament to deal with aliens is unquestioned, and that field is under delegation to the Governor in Council. The obligation of his own state to receive him must be deemed correlated with the power of the foreign state to expel him, and this has been implemented here by a direction of General MacArthur to which I shall refer later.

As is seen, the second recital of the preamble speaks of "other persons of the Japanese race", but from the operative paragraphs of the Order it is clear that this language refers to both naturalized persons of the Japanese race and natural born British subjects of Canada who have a Japanese racial origin. The Order in relation to naturalized subjects must be read with Order 7356 which deals only with that class and is as follows:

Whereas by Order in Council P.C. 7356 of 15th December, 1945, provision is made for the deportation of persons who, during the course of the war, have requested to be removed or sent to an enemy country or otherwise manifested their sympathy with or support of the enemy powers and have by such actions shown themselves to be unfit for permanent residence in Canada;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Secretary of State (concurred in by the Secretary of State for External Affairs) and under the authority of the *War Measures Act*, chapter 206 of the Revised Statutes of Canada, 1927, is pleased to order and doth hereby order as follows:

(1) [1941] 2 K.B. 306, at 316.

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1. Any person who, being a British subject by naturalization under the *Naturalization Act*, chapter 138, R.S.C. 1927, is deported from Canada under the provisions of Order in Council P.C. 7355 of 15th December, 1945, shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national.

2. The Secretary of State shall publish in the *Canada Gazette* the names of all persons who have ceased to be British subjects or Canadian nationals by virtue of this Order.

As in the case of Japanese nationals, these two Orders show the jurisdictional decision of the Governor in Council in respect of naturalized Japanese. But a question arises of the relation between revocation by Order 7356 and deportation under 7355. No doubt the expulsion was intended to be followed by alienage of the deported persons; but if no or only a partial effect has been brought about by Order 7356, does that modify the operation of Order 7355?

The *Naturalization Act* contains a number of grounds upon which the revocation of naturalization can be effected, but the only one of interest here is that set forth in section 9 of chapter 138, Revised Statutes of Canada, 1927, which is as follows:

> Where the Governor in Council, upon report of the Secretary of State of Canada, is satisfied * * * that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Governor in Council shall, by order, revoke the certificate.

Order 7356 does not refer to any naturalized person being "disaffected or disloyal"; it deals only with the deportation of a person under Order 7355, and this in turn puts the deportation on the fact of a request for repatriation which has not been revoked in writing prior to September 1st, 1945. Are we to imply from this language that the Governor in Council is satisfied in each case of the disaffection or disloyality of the naturalized person? Here is a penal provision of a drastic nature, and as it affects British subjects, I am unable to supply that conclusion by implication. The revocation for that cause seems to require the aid of the *War Measures Act* to enable the Governor in Council, as distinguished from the Secretary of State for Canada, to act under the *Naturalization Act*, but in either case, action must be strictly within the provisions of the latter as to grounds in order to bring about

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the revocation. It was argued that as Parliament could rescind the adoption, the Governor in Council could revoke on any ground he might see fit: but that view, I think, misconceives the foundation of the *Naturalization Act*. The legislative efficacy under which the naturalization arises is that of the *British Nationality Act*, part II of which has been "adopted" by the Canadian Parliament. That word would seem to mean simply that the Canadian Parliament has cleared the way for the extension to Canada of an Imperial Act providing an empire naturalization. That Act directly authorizes the Canadian Government to exercise the powers it creates. The form of the Canadian statute is not *ex facie* strictly in accordance with that conception, but if we look upon it as an exercise of Canadian legislative jurisdiction then that jurisdiction must be deemed to be by way of a specific investment additional to the *British North America Act*, but limited strictly to the precise language of the Imperial Act. No question of the *Colonial Laws Validity Act* arises because of the express power under the statute to rescind the adoption. But naturalization effecting an empire-wide status lies outside of the legislative power of Canada under section 91 of the Constitutional Act: and as the conditions of revocation have not been complied with, the status of British subject has not been destroyed.

Another view of these statutes might be that each member of the Commonwealth with concurrent action of the others itself enacts empire-wide legislation which in relation to grant or revocation of naturalization it would be at liberty to amend at its pleasure without affecting the recognition accorded by the other members. But that is not the legislative design of the *British Nationality Act*.

But Order 7356 declares a cesser also of being a Canadian national and in this goes beyond status. By the *Canadian Nationals Act*, chapter 21 of the Revised Statutes (1927) a Canadian national is a British subject who is a Canadian citizen within the definition of the *Immigration Act*. The latter for the purpose here requires a Canadian domicile: and the right to residence in Canada appears to be what the Order takes away from the

deported person. With the country of origin consenting to his return, the requirement for permanent exclusion is obtained. In these circumstances I am unable to say that the failure in revocation of naturalization is of such a nature as to affect the operation of Order 7355.

In relation to the third class, natural born British subjects resident in Canada, serious questions arise.

I observe first that the expulsion of persons in the other two classes is in conjunction with an order or the equivalent of an order made by General MacArthur for their reception as repatriates in Japan. The letters passing between the Governments of Canada and the United States make it clear that what was asked for and conceded was "repatriation". That word is defined in Order 7356 in effect as either a "return" to Japan or "being sent" to that country, but obviously that definition is irrelevant to the meaning of the word as it is used in the communications between the two countries. "Repatriation" means simply a return to the *patria* or fatherland, and it has no relation to the compulsory transfer of a natural born British subject to a foreign country. Whatever legal rights it may confer to enter or to remain in Japan do not apply to such a subject.

Banishment with or without the loss of citizenship status or rights, as an effective exile over a period of time, whatever its feasibility in the early political organization of the world is to-day, considering the tenacity with which every foot of land and water is now sought and held, a legislative and executive impossibility. Admittedly one sovereignty has no legal power to force its own citizen into the territory of another. It is quite the case that banishment and exile were known to the common law, but in each it was either a deportation to politically unorganized lands, a transportation to a British colony by way of punishment for a criminal offence, or a voluntary exile made either by way of abjuration of the realm or as fulfilment of a condition in a pardon or other remission or as an avoidance of punishment requiring self-exile. In none of these situations is there the slightest suggestion of compulsory invasion of another's territory.

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The process and effects of deportation of natural born British subjects under the Order seem to be these: a physical compulsion to leave Canadian shores; a *de facto* but not *de jure* entry upon Japanese territory: no citizenship rights in Japan and a retention of the rights of Canadian citizenship.

Now I must deal with this case as if, instead of a Canadian national of Japanese origin, I were dealing with that of a natural born Canadian national of English extraction who sympathized with Mosley or a French-Canadian national who supported Pétain or an Irish-Canadian national who thought deValera's course justified. I am asked to hold that, without a convention with those countries, the Government may, under the *War Measures Act*, and without affecting the national status or the citizenship rights of these persons, issue an order for their deportation, to those foreign shores. I am unable to agree with that contention.

In these days, we are familiar with exchanges or transfers of sections of population from one country to another by agreement or imposed, but they are carried out as changes of nationality as well as of country: a deprivation of citizenship rights by one state and an investment of them by the other. That is not what is done or intended to be done by the Order with which I am dealing.

I think that Parliament in enacting the *War Measures Act* must have contemplated, as a fundamental assumption underlying the statute, the delegation of legislative power of a strictly legal character only, and must have intended to restrict the Governor in Council to measures or actions in which full juridical quality would inhere: that power without recognized legal character would be excluded. What is proposed here is not juridical: it is an act envisaging the violation of the sovereign rights of another state by an invasion of its territory and an affront to its dignity as represented by the occupying power. This quality, of course, is not present in the case of an alien: there the authority of expulsion is a necessary corollary to that of the right to exclude: *Attorney General* v. *Cain* (1): but the fundamental distinction between the two cases is, I

(1) [1906] A.C. 542

think, unquestionable. As a further illustration of the principle invoked, I mention the presumption against the power to make retroactive orders, which I suggest would bind the Governor in Council, though there is no such restriction on Parliament.

On another ground I would come to the same conclusion. In Order 7355 the recital which, among others, relates to natural born British subjects, refers only to a request to be sent to Japan, implying, as I think, a continuing request: the general recital of "desirability" that provision be made to deport and the declaration of the necessity to make provision accordingly, apply to all three classes. The right to revoke the request by the natural born Canadian national is preserved up to the issue of the Order for deportation and this time limit is simply an administrative convenience. "Deportation" connotes only a single act and no period of time beyond the accomplishment of the expulsion. There is nothing in the Order to prevent such a Canadian from returning at once to the land of his birth. The contrast with the alien is obvious; once an alien leaves this country, he must establish a right given him by the legislature to return; at common law he has no right to enter which is recognized in our courts: *Musgrove* v. *Toy* (1). Considering, then, that the operation of the Order against the British subject by birth is placed solely upon a request which implies a continuing desire to leave this country, that the Order contemplates as well the withdrawal of persons voluntarily and enables the Minister to make financial arrangements to that end, in conjunction with the other circumstances I have detailed, I find in the Order clear evidence that that act of expulsion is not deemed by the Governor in Council either necessary or advisable for the peace, order or welfare of this country by reason of war; and the essential condition of the provision for compulsion is lacking.

The members of the family of a Canadian national may under Order 7355 be included in the deportation order. If revocation of naturalization takes place, the status of the wife and minor children may thereby be affected. But

(1) [1891] A.C. 272.

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where by the Order only incidents of the status of the husband and father are reached, the full citizenship rights of the wife and minor children continue. It was not seriously urged that the Governor in Council has deemed the expulsion of such persons advisable or necessary to the peace or welfare of Canada for any reason arising out of war; the most suggested was that it was advisable to the peace and welfare of indivdual families; but that purpose does not seem to be among the objects of Parliament's delegation of legislative power to the Governor in Council.

Mr. Cartwright argued that the war emergency must be deemed to have ended when the *War Measures Act* became inoperative on January 1st of this year. But that, I think, confuses the emergency with a particular period of it to which particular legislation is related. The emergency as a state of fact underlies both the *War Measures Act* and the *Transitional Powers Act* which came into force on January 1st, 1946.

Then it was argued that section 9 of Order 7355 is *ultra vires* because of conflict with section 5 of the *War Measures Act*. But an "order" for deportation under Order 7355 means one that carries with it the force of law. The "legal custody" which is declared relates only to the agents or instruments by which the restraint is effected: *Liverside* v. *Sir John Anderson* (1).

I would therefore answer the question as follows:—

1. Order 7355 is *intra vires* of the Governor in Council in relation to Japanese nationals and to persons of the Japanese race naturalized under the *Naturalization Act* of Canada as well as to persons voluntarily leaving Canada; but is *ultra vires* in relation to the compulsory deportation of natural born British subjects resident in Canada, and of wives and children under 16 who do not come within the first two classes.

2. Order 7356 is *ultra vires* of the Governor in Council to the extent that it purports to revoke the naturalization of persons of the Japanese race under the *Naturalization Act* but it is *intra vires* so far as it takes away incidential rights and privileges of such persons as Canadian nationals.

(1) [1942] A.C. 206, at 273.

3. Order 7357 is *intra vires* of the Governor in Council, subject to the observance of the requirements of the *Naturalization Act* as to grounds for the revocation of naturalization.

I HEREBY CERTIFY to His Excellency the Governor General in Council that the foregoing are my reasons for the answer to the question referred herein for hearing and consideration.

I. C. RAND

KELLOCK J.—By Order in Council of the 8th day of January, 1946, P.C. 45, His Excellency the Governor General in Council referred to this Court pursuant to the provisions of section 55 of the *Supreme Court Act* the following question, namely:—

Are the Orders in Council, dated the 15th day of December, 1945, being P.C. 7355, 7356 and 7357, *ultra vires* of the Governor in Council either in whole or in part, and, if so, in what particular or particulars and to what extent?

The first named order, P.C. 7355 contains the following recitals:—

Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;

Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Labour, concurred in by the Secretary of State for External Affairs, and under the authority of the *War Measures Act*, chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make and doth hereby make the following Order,—

By section 2 (1), it is provided that every person of sixteen years of age or over, other than a "Canadian national", who is a national of Japan resident in Canada and who (*a*) has, since the date of declaration of war by the Government of Canada against Japan on December 8, 1941, made a request for repatriation; or (*b*) has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or

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of Order in Council P.C. 946, of the 5th day of February, 1943, as amended by P.C. 5637, of the 16th day of August, 1943, and was so detained as at midnight of September 1, 1945, may be deported to Japan. By subsection 2, provision is made for the deportation to Japan of every naturalized British subject of the Japanese race of 16 years of age or over resident in Canada who has made a request for repatriation, provided that the same had not been revoked in writing prior to midnight of September 1st, 1945. Subsection 3 makes similar provision with respect to natural born British subjects of the Japanese race of 16 years of age or over, provided that requests in the case of these persons are not revoked in writing prior to the making by the Minister of Labour of a deportation order. By subsection 4, the Minister may include in any order for deportation the wife and children under 16 years of age of any deportee.

By section 3 a request for repatriation shall be deemed final and irrevocable for the purposes of the Order, subject only to the provisions for revocation already mentioned. By section 9, it is provided that any deportee detained pending deportation or placed under restraint in the course of deportation shall be deemed to be in legal custody.

By the second Order, P.C. 7356, it is provided, with respect to any person naturalized under the provisions of the *Naturalization Act,* R.S.C. 1927, cap. 138, and who is deported, that he shall, from the date upon which he leaves Canada, cease to be a British subject or a Canadian national. By R.S.C. cap. 21 it is provided:—

2. The following persons are Canadian Nationals, viz:—

(*a*) Any British subject who is a Canadian citizen within the meaning of the *Immigration Act;*

(*b*) The wife of any such citizen;

(*c*) Any person born out of Canada, whose father was a Canadian National at the time of that person's birth, or with regard to persons born before the third day of May, one thousand nine hundred and twenty-one, any person whose father at the time of such birth, possessed all the qualifications of a Canadian National, as defined in this Act.

3. (*a*) Any person who by reason of his having been born in Canada is a Canadian National, but who at his birth or during his minority became under the law of Great Britain or of any self-governing Dominion of the British Empire, a national also of that Kingdom or Dominion, and is still such a national; and

(*b*) Any person who though born out of Canada is a Canadian National;

may, if of full age and not under disability, make a declaration, renouncing his Canadian nationality.

2. Such declaration may be made before a notary public or other person authorized to administer oaths in the locality in which the declaration is made, and may be in the form set out in the Schedule to this Act.

3. The declarant shall transmit his declaration to the Secretary of State of Canada and upon the Secretary of State being satisfied of the sufficiency of the declaration and that it has been duly executed, it shall be filed on record, whereupon the declarant shall cease to be a Canadian National, and a certified copy of the declaration shall be forwarded to the declarant with an endorsement thereon that the original declaration has been filed of record.

By the third Order, P.C. 7357, provision is made for the appointment of a Commission to make inquiry concerning the activities, loyalty and the extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada in cases where their names are referred to the Commission by the Minister for investigation with a view to recommending whether, in the circumstances of any such case, such person should be deported. It is further provided that notwithstanding any provision of P.C. 7355, the Commission may, at the request of the Minister, inquire into the case of any naturalized British subject of the Japanese race who has made a request for repatriation which is final under the terms of the said Order in Council and may make such recommendations with respect to such case as the Commission deems advisable. It is further provided that any person of the Japanese race recommended by the Commission for deportation shall be subject to deportation under the provisions of Order in Council P.C. 7355, and where any person is so recommended for deportation he shall, from the date on which he leaves Canada in the course of such deportation, cease to be a British subject or a "Canadian national."

All of the above orders purport to be made pursuant to the provisions of the *War Measures Act,* R.S.C. 1927.

On the 28th of December, 1945, P.C. 7414 was passed. By this Order it is recited that the *National Emergency Transitional Powers Act,* 1945, is to come into force on the first of January, 1946, and by its terms provides that

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on and after that day the war, for the purposes of the *War Measures Act,* shall be deemed no longer to exist, that under section 4 of the first mentioned Act the Governor in Council may order that orders and regulations lawfully made under the *War Measures Act,* or pursuant to authority created thereunder in force immediately before the first of January, 1946, shall, while the *National Emergency Transitional Powers Act,* 1945, is in force, continue in full force and effect subject to amendment or revocation thereunder, and that all orders and regulations so made and in force immediately before the day the *National Emergency Transitional Powers Act,* 1945, comes into force, shall, while that Act is in force, continue in full force and effect subject to amendment or revocation under that Act.

In pursuance of the order of reference to this Court, we heard argument on behalf of the Attorney General of Canada, the Attorney General of British Columbia and the Cooperative Committee of Japanese Canadians. Counsel for the Attorney General of British Columbia supported the submissions of counsel for the Attorney General of Canada, while counsel for the Committee attacked the validity of the orders in question.

Mr. Cartwright argues that the Orders in Council here in question deal with a matter which, in the absence of the emergency of war, would fall within the competence of the provincial legislatures as being property and civil rights. He contends that to restrict the liberty of the subject where no crime has been committed is an interference with a civil right and he referred to the decision of the Court of Appeal of Ontario in *re MacKenzie* (1). The contention is that the Orders in Council are in their nature preventive and are not within the sphere of criminal law. It is conceded however, that, by reason of war, a new aspect of the business of government arises which justifies legislation by the Dominion Parliament in this aspect on matters normally exclusively within section 92 of the B.N.A. Act. It is also conceded that such legislation may continue to be justified after actual war has ceased but while conditions arising out of war continue, and reference is made to *Fort Frances Pulp and Paper Company* v. *Manitoba Free Press* (2).

(1) [1945] O.R. 787, at 796. (2) [1923] A.C. 695.

Counsel contends, however, that Parliament by the enactment of the *National Emergency Transitional Powers Act*, 1945 (9 and 10 George VI, cap. 24) has recognized that the emergency of war which justified or required the enactment of the *War Measures Act* ceased on the first of January, 1946. It is further contended that as the Act of 1945 does not include the provisions contained in clause (*b*) of subsection 1 of section 3 of the *War Measures Act*, this constitutes a declaration by Parliament that in respect to the matters included in such clause there is no continuing necessity for the exercise of extraordinary powers by the Governor in Council from the first of January, 1946, by reason of the emergency of war or of any continuing transitional post-war emergency.

Under the provisions of section 2 of the *War Measures Act*, the issue of a proclamation is to constitute conclusive evidence that war, real or apprehended, exists or has existed for any period of time therein stated and of its continuance until, which has not yet happened, by the issue of a further proclamation, it is declared that the war no longer exists.

The Act of 1945 recites among other things as follows:

> And whereas the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing; and whereas it is essential in the national interest that certain transitional powers continue to be exercisable by the Governor in Council during the continuance of the exceptional conditions brought about by the war and it is preferable that such transitional powers be exercised hereafter under special authority in that behalf conferred by Parliament instead of being exercised under the *War Measures Act;* and whereas in the existing circumstances it may be necessary that certain acts and things done and authorized and certain orders and regulations made under the *War Measures Act* be continued in force and that it is essential that the Governor in Council be authorized to and authorize such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance in an orderly manner as the emergency permits of measure adopted during and by reason of the emergency.

By section 2, the Governor in Council may do and authorize such acts and things and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of certain specified matters including, by clause (*e*),

> continuing or discontinuing in an orderly manner as the emergency permits measures adopted during and by reason of the war.

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Section 4 provides:

> Without prejudice to any other power conferred by this Act, the Governor in Council may order that the orders and regulations lawfully made under the *War Measures Act* or pursuant to authority created under the said Act in force immediately before the day this Act comes into force shall, while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act.

By section 5, provision is made for the Act to come into force on the first of January, 1946, and it is declared that

> On and after that day the war against Germany and Japan shall, for the purposes of the War Measures Act, be deemed no longer to exist.

It would appear that the effect of the declaration in section 5 just referred to is, so far as the *War Measures Act* is concerned, to render that statute no longer available as authority for orders or regulations thereunder. However, the statute of 1945 becomes the authority for the orders and regulations for which it provides, and an Order in Council of the 28th December, 1945, P.C. 7414, passed under its provisions and pursuant to section 12 of the *Interpretation Act,* provides that

> all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day the *National Emergency Transitional Powers Act,* 1945, comes into force shall, while that Act is in force, continue in full force and effect subject to amendment or revocation under that Act.

I think, therefore, that although the Orders in Council here in question cease to derive any force from the provisions of the *War Measures Act* from and after the first of January, 1946, after that date, they derive their force from the statute of 1945, by reason of the existence of the emergency therein referred to. I do not think, therefore, that effect can be given to the argument of Mr. Cartwright that Parliament has declared by the statute of 1945 that there is no continuing necessity for the exercise of such powers as were formerly contained in subsection 1 of section 3 of the *War Measures Act.*

With the exception of the above argument, no other attack (apart from the question of severability) was made upon the orders which affects their validity with respect to nationals of Japan. As I know of no other ground of invalidity in this respect, I would hold the orders valid with respect to this class of person.

It was next argued on behalf of the Committee that the Orders in Council in question in so far as they provide for the removal from Canada of persons other than aliens are not authorized by the provisions of the *War Measures Act*.

It will be convenient, in considering this submission, to quote section 3 of that Act:

> The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say;—

As will be observed, "deportation" is not defined in the Act but by section 1 (*a*) of P.C. 7355 it is defined as

> the removal pursuant to the authority of this order of any person from any place in Canada to a place outside Canada.

(It is also to be observed that the words used in subsections (1) (2) and (3) of section 2 of P.C. 7355 are "deported to Japan.") The contention on behalf of the Committee in effect is that these provisions are not authorized by the provisions of the *War Measures Act*.

Counsel for the Attorneys General contend that "deportation" as used in the statute is wide enough to include the meaning given to it by the definition in the order but that, in any event, the definition in the order is authorized by the earlier general language of subsection 1 of the Act.

In *In re Gray* (1), Fitzpatrick C.J.C. said with reference to the specified subjects in the subsection at p. 138,

> that the reason for introducing specifications was that those specified subjects were more or less remote from those which were connected with the war, and it was therefore thought expedient to declare explicitly that the legislative power of the Governor could go *even thus far*."

Duff J., as he then was, said at 168,

> there is in the second branch of the section an enumeration (an enumeration let it be said rather of groups of subjects which it appears to have been thought might possibly be regarded as "marginal instances" as to which there might conceivably arise some controversy whether or not they fell within the first branch of the section) * * *

(1) (1918) 57 Can. S.C.R. 150.

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At 177 Anglin J., as he then was, with whom Fitzpatrick C.J.C. also agreed, said

> the specification should be deemed to be of cases in which there might be such doubt as to whether they fell within the ambit of the general terms—wide as they are—that *ex abundanti cautela* it was safer to mention them specifically.

In Murray's New English Dictionary, "deportation" is defined as "to carry away," "carry off," "remove," "transport," "especially to remove into exile," "to banish." "Exile" by the same authority is defined as "enforced removal from one's native land according to an edict or sentence," "penal expatriation or banishment," "the state or condition of being penally banished," "enforced residence in some foreign land;" and "banish" is defined as "to put to the ban," "proclaim as an outlaw," "to outlaw," "to condemn a person by public edict or sentence, to leave the country," "to exile, expatriate."

Counsel for the Attorney General of Canada also called our attention to the definition of "deportation" in Webster's New International Dictionary, namely, the

> act of deporting or state of being deported; banishment; transportation; in modern law the removal from the country of an alien considered inimicable to the public welfare; distinguished from "transportation" and "extradition".

This last is evidently taken from the judgment of Gray, J. in *Fong Yue Ting* v. *United States* (1), as follows:—

> Strictly speaking, "transportation", "extradition", and "deportation", although each has the effect of removing a person from the country, are different things, and have different purposes. "Transportation" is by way of punishment of one convicted of an offence against the laws of the country. "Extradition" is the surrender to another country of one accused of an offence against is laws, there to be tried, and, if found guilty, punished. "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare and without any punishment being imposed or contemplated either under the laws of the country out of which he is sent or of those of the country to which he is taken.

Mr. Geoffrion points out that the Court in the case last cited was in fact dealing only with aliens and that the portion of the judgment quoted was obiter. He says in any event that the judgment is not binding on this court.

The importance or relevance of the above citation is, of course, not from any binding effect it may have, but as illustrating a meaning assigned to the word in question in

(1) [1893] 149 U.S. 697, at 709.

a modern statute dealing with a cognate subject. This use of the word in such a statute, although of another jurisdiction, leads naturally to the inquiry as to the meaning with which the word is used in statutes of Parliament and particularly in the *War Measures Act*.

To consider the word merely as the equivalent of "remove" or "carry away," as in fact it may be used, is to give effect to the contention of counsel for the Attorneys General. To consider it, however, as the equivalent of "to remove into exile" or "to banish" involves the idea of penal consequences, such as was involved in the old sentence of outlawry now abolished in criminal cases by the provisions of section 1031 of the Code. Such a meaning, in my opinion, is not apt in the case of citizens who have committed no offence, and as to whom there is no charge no trial and no conviction, nor is it apt in modern times in application to a natural born citizen of a country as it involves the idea that there is some other country to which the citizen may be sent, which is under some obligation to receive him by reason of some previous connection of the citizen with that country. No country is under any obligation to receive the natural born citizens of another country and any attempt to force such a citizen upon another country would involve an infringement of sovereignty.

In Bar on Private International Law, second ed., p. 135, the author says:—

> However far a State may go in hospitably receiving foreigners, still foreigners who are dangerous to the community, or in need of relief from the poor law, may be refused a right of residence, and in extraordinary cases at least that right may be limited by special legislation to some other effect. On the other hand, no State can in these days effectively refuse to receive back into its own territory subjects of its own, who have been rejected by a foreign country. The banishment of a State's own subjects, a power which is still sometimes exercised as an exceptional political measure, in truth can only be exercised with the knowledge that it is contrary to the rules of public law, and that it is impossible to carry it out in so far as other States refuse to receive the exiles.

It may be that the removal of citizens of one country to another country can be arranged with the consent of the latter, but it is to be observed in the present case that the consent of Japan through General MacArthur, the Supreme Commander for the Allied Powers, is a consent to "repa-

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triation" and nothing else. "Repatriation" is defined by Murray as "to return to one's country;" "to restore a person to his *own* country." Thus in the present case there is no consent to the reception of natural born Canadians who have no country but Canada. Japan is a sovereign power subject to the control of the powers represented by General MacArthur and no act such as is here in question can be legally done without his consent. The fact that the removal of a natural born Canadian to another country would involve an infringement of the sovereignty of the latter country apart from the consent of that country at a time when Canada has formally recognized the end of hostilities, and that the government of Japan is now as above stated, is, in my opinion, strong ground for construing the statute in question, in the absence of clear language, in a manner which does not involve such a result.

It is relevant here to refer to the official communication from the Government of Canada to General MacArthur to which the consent of the latter relates. That communication is contained in a letter of the 17th September, 1945, to the Canadian Ambassador at Washington and reads as follows:—

> There are approximately 24,000 people of Japanese origin now resident in Canada. About 10,000 (including dependents) have expressed a desire to be repatriated to Japan. There are also about 500 Japanese nationals now interned whom it will probably be desired to deport. At a later date it is probable that there will be some additional deportees and voluntary repatriates who will also have to be removed. The Canadian Government is anxious to proceed with repatriation and deportation as soon as this can be done without causing you embarrassment. It is difficult to proceed with redistribution and relaxation of control over Japanese remaining in Canada until repatriates and deportees are removed.
>
> It is proposed that repatriates and deportees from Canada should be given free transportation for themselves and their effects and provided with a maintenance grant upon repatriation sufficient to take care of their immediate needs, also that they be permitted to transfer remainder of their funds to Japan.
>
> You will appreciate the desire of the Canadian Government to proceed with these plans as soon as possible. The Canadian Government would be grateful for your advice as to the earliest date on which you would be prepared to have these people arrive in Japan.

It is to be observed that the word "deport" in the above communication is used only with respect to aliens. The word "repatriate" used with respect to the other persons is

properly usable only with respect to persons other than natural born Canadian citizens. In my opinion, this communication affords the best evidence as to the sense in which the word "deport" is understood in this country. As I have already indicated, nowhere in the communication is it used with reference to natural born Canadian citizens and even the word "repatriate" as applied to such persons is not appropriate. What is being done in the case of such persons is expatriation.

Counsel for the Committee further argues that where the personal liberty of the subject is in question, the view most favourable to the preservation of that liberty should be accepted. *In Rex* v. *Halliday* (1), Lord Atkinson said at 274,

> for myself, I must say that I never could appreciate the contention that statutes invading the liberty of the subject should be construed after one manner, and statutes not invading it after another, that certain words should in the first class have a meaning put upon them different from what the same words would have put upon them when used in the second. I think the tribunal whose duty it is to interpret the statute of one class or the other should endeavour to find out what, according to the wellknown rules and principles of construction, the statute means, and if the meaning be clear to apply it in that sense. Should the statute be ambiguous, equally susceptible of two meanings, one leading to an invasion of the liberty of the subject and the other not, it may well be that the latter should be preferred on the ground of the presumed intention of the legislature not to interfere with it.

Pollock, C.B. in *Bowditch* v. *Balchin* (2), cited with approval by Lord Wright in *Barnard* v. *Gorman* (3) said, at p. 381,

> In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.

I turn to statutes in force in 1927 when the statutory revision of that year was made. The *Immigration Act*, R.S.C. cap. 93 section 2 (*c*) contains a definition of the word "deportation" for the purposes of that Act. It is defined as

> the removal under authority of this Act of any rejected immigrant or other person, or of any immigrant or other person who has already been landed in Canada, or who has entered or who remains in Canada contrary to any provision of this Act, from any place in Canada at which such immigrant or other person is rejected or detained to the place whence he came to Canada, or to the country of his birth or citizenship.

(1) [1917] A.C. 260.
(2) (1850) 5 Exch. 378.
(3) [1941] 3 All. Eng. R. 45 at 55

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"Immigrant" is defined in clause (*g*) of the same section as

> a person who enters Canada with the intention of acquiring Canadian domicile, and for the purposes of this Act every person entering Canada shall be presumed to be an immigrant unless belonging to one of the following classes of persons hereinafter called "non-immigrant classes".

Here follows a long list of classes, the first of which is "Canadian citizens and persons who have Canadian domicile." "Canadian citizen" in turn is defined by clause (*f*) of the section as "(1) a person born in Canada who has not become an alien," "(2) a British subject who has Canadian domicile," or "(3) a person naturalized under the laws of Canada who has not subsequently become an alien or lost Canadian domicile." By section 3 the classes of persons who may be denied entry to Canada, or who, having entered Canada, may be removed, do not include Canadian citizens or persons with Canadian domicile. "Deportation" does not apply to them. The same situation exists under the provisions of the *Chinese Immigration Act* R.S.C. cap. 95; *Shin Shim* v. *The King* (1).

Again by *The Opium and Narcotic Drug Act* R.S.C., cap. 144, section 24, any *alien* convicted of certain enumerated offences may be deported under the provisions of the *Immigration Act* "relating to enquiry, detention and deportation."

We have not been referred to and I have not been able to find any other statute of Parliament where the word "deportation" is used. In *Eshugbayi Eleko* v. *Government of Nigeria* (2), the legislation there in question used the word "deported" with reference to the removal of a citizen from one part of Nigeria to another. I have not been able to find, however, any instance in which the word has been used in any statute in modern times with the connotion for which counsel for the Attorneys-General contend.

Apart from its now suggested meaning in the *War Measures Act*, therefore, the word has not been used previously in Parliament in any statute with regard to natural born citizens. This being so and the word itself having, in varying contexts, as set out above, a wider or a narrower meaning, I think it is the duty of the Court

(1) [1938] S.C.R. 378. (2) [1931] A.C. 662.

in such circumstances to adopt the canon of construction expressed in the passages from the judgments already cited and by Lord Hewart, L.C.J. in *Rex* v. *Chapman* (1) where referring to Maxwell on Statutes 7th Ed. p. 244, he said:

> where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.

When one looks at the enumerated powers in clause (*b*), "arrest, detention, exclusion and deportation," it is not unreasonable to conclude that in the case of citizens the powers of arrest, and detention added to the existing sanctions of the criminal law might well have been regarded by Parliament as ample, with the additional powers of exclusion and deportation in the case of other persons. All the powers given to the executive by the statute are emergency powers and in the scheme of things laid down in the statute it is not easy to see how Parliament either did or would contemplate the extension to natural born citizens, at least, of the power of removal from the state. These considerations, therefore, lead also to the conclusion which I have already expressed.

When once it is determined that the specified power of "deportation" is not as wide as the definition in P.C. 7355, I do not think that what is lacking can be made up, in a case like the present, by the general words with which the subsection begins. These words, or indeed, the particular word "deportation" itself, are not to be interpreted as authorizing what is really an illegal act, namely the infringement of the sovereignty of another country, unless that intention is clearly expressed. In my opinion, therefore, in so far as the Orders in Council provide for the removal of natural-born Canadian citizens against their will, they are invalid. Consequently, the provisions which purport to prevent such persons withdrawing their requests at any time and in any manner cannot be supported.

Mr. Geoffrion also founded himself upon the word "exclusion," but admitted that, as commonly used at least, it means "to prevent entry": In Murray's New English Dictionary it is defined as "to bar or keep out (what is already outside);" "to shut out (persons, living things);"

(1) [1931] 2 K.B. 606, at 609.

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"to hinder from entering." It is by the same authority also defined as "to put out," "to banish," "expel." As used in section 3 of the *War Measures Act* in the context of clause (*b*) of section 3 (1) I think it is used as the equivalent of expulsion. In *Attorney General for Canada* v. *Cain* (1), Lord Atkinson, dealing with validity of section 6 of the then *Alien Labour Act* of Canada, 60 and 61 Victoria, cap. 11 as amended by 1 Edward VII Cap. 13, section 13, said at 547,

> the power of expulsion is in truth but the complement of the power of exclusion. If entry be prohibited, it would seem to follow that the Government which has the power of exclusion should have the power to expel the alien who enters in opposition to its laws.

I cite this passage only as an illustration of the use of the word "exclude" in relation to a subject matter allied to the subject matter here under consideration. The power of "deportation" is used in the statute in my opinion as the complement of the power of "exclusion."

Mr. Cartwright further argued that at the time that the *War Measures Act* was passed in 1914 and also at the time of the revision of 1927, Parliament could not have authorized the Governor in Council to make orders or regulations repugnant to Part II of the British *Nationality and Status of Aliens Act,* 1914, as Parliament, apart from a rescission of the adoption of that Act had not that power itself. He contends that the orders here in question, in so far as they affect naturalized British subjects of the Japanese race are repugnant to the provisions of the Imperial Act, and he contends that even had Parliament purported to legislate with respect to this class of person as in the Orders in Council, such legislation would be invalid by reason of the provisions of the *Colonial Laws Validity Act.* Mr. Cartwright further contends that although Parliament, since the passing of the Statute of Westminster in 1931 is not subject to such a limitation, nevertheless, Parliament was so subject in 1914 and 1927 and has not since 1931 re-enacted the *War Measures Act* so that there is no "law made after the commencement of this Act" (the Statute of Westminster) "by the Parliament of a dominion"; (section

(1) [1906] A.C. 542.

2 (1) of the Statute of Westminster). Mr. Geoffrion submits on the other hand that the Imperial Act of 1914 was never adopted by Canada.

In view of subsection 4 of section 9 of the Imperial Act which provides for rescission at any time by a dominion which has adopted the provisions of Part II of the Act, it does not seem necessary to consider the bearing, if any, of the *Colonial Laws Validity Act*. It is first necessary to consider the question as to whether or not there was an adoption of Part II by Canada.

While it would doubtless have been sufficient and perhaps preferable for Parliament to have adopted the provisions of Part II merely by legislating in express terms to that effect, I think that Parliament has done the same thing in another way. By 10-11 George V, cap. 59, passed in 1920, the provisions of the former *Naturalization Acts* of 1914 were revived. Mr. Geoffrion points out that the first Act of 1914 was in fact passed by Parliament before the date of the passing of the Imperial Act and that the latter when passed differed from the Canadian Act. In the second Act of 1914 the differences between the Canadian and the Imperial legislation were enacted by Parliament and this Act contains a recital that Parliament had "adopted" the Imperial Act by the first Act of 1914. Mr. Geoffrion contends that in fact that was not so. However that may be, I think the Act of 1920 by reviving the Acts of 1914, both of which had been repealed in 1919, which would include the declaration in the second Act as to the adoption of the Imperial Act, is a declaration by Parliament in 1920 that the Imperial legislation was adopted. In Foote's Private International Law, 5th ed. p. 35 the author states that Canada, Australia and Newfoundland did adopt the Act and I think that as to Canada that is a correct statement.

There has been no rescission of this adoption by Parliament and there is no attempt at rescission in the Orders in Council in question and it is provided, in any event, by section 9 subsection 4 of the Imperial Act that rescission is not to affect legal rights previously acquired. Section 26 subsection 1, however, provides that nothing in the Act shall prevent any legislature or Government of any British

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possession from treating differently different classes of British subjects. As to persons whose Certificates of Naturalization have been granted under the Act elsewhere than in Canada, it is provided by subsection 5 of section 7 of the Imperial legislation of 1918, 8 and 9 George V, cap. 38, that such a Certificate may be revoked in accordance with the section

> with the concurrence of the Government of that part of His Majesty's Dominions in which the Certificate was granted.

As to naturalized persons, therefore, whose certificates were granted outside of Canada their status, by virtue of the Imperial Act, may not be affected by unilateral action on the part of Canada, but by reason of the provisions of section 26 subsection 1 the rights and liabilities incidental to status are left to Canada. This provision was the law existing before the statute as applied in the case *Re Henry Adam* (1). No one would suggest that the provisions of the *Immigration Act* R.S.C. cap. 93 which excluded from Canada British subjects coming within the classes mentioned in section 3 of that Act are in any way in conflict with the provisions of Part II of the Imperial statute and the same may be said of the provisions of the *Chinese Immigration Act* R.S.C. cap. 95. It follows, therefore, that it is competent for Parliament to deny to British subjects naturalized outside of Canada the right of residence in Canada, but not to interfere with their status except upon the terms set forth in the Imperial Act, including the concurrence of whatever other government is concerned, nor in the case of persons naturalized in Canada to revoke naturalization except upon the terms of the Imperial Act, but again in the case of such persons it is competent to interfere with the rights and liabilities growing from such status.

Order P.C. 7355 recites in the case of Japanese nationals that they have manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise, but there is no similar recital in the case of naturalized or natural born subjects. The recital with which P.C. 7356 begins is not to be interpreted, in my opinion, as broadening the scope of the recital in P.C. 7355.

(1) (1837) 1 Moore P.C. 459.

The loss of naturalization declared by Order 7356 is merely consequent upon physical removal of the persons concerned from Canada. It is not put upon any ground of disaffection upon which it might have been put under the provisions of section 7 of the Imperial Act as amended in 1918. The omission so to place it must, in my opinion, be taken to be deliberate, and as the ground upon which it is in fact put is not available under the terms of the Act in question, Order 7356 is invalid in so far as it purports to revoke naturalization but valid otherwise, and the provisions of Order 7355 which deny to naturalized persons the right of continued residence in Canada are valid.

As to the fourth class of persons dealt with by the orders in question, namely, the wives and children under 16 years of age "of any person for whom the Minister makes an order for deportation to Japan" my opinion is that the Orders in Council are invalid. It may be that some of the persons within this class are also within some one or other of the other classes and their position to that extent has already been dealt with. As to those who are not, however, there is nothing in any of the Orders to show that the Governor in Council considers their removal necessary or advisable within the ambit of the *War Measures Act*. The only attempt made in argument to support the Orders in the case of this class of person was the contention that the provision for their enforced removal was a humanitarian measure to prevent separation of families. That is not sufficient however. In *Rex* v. *Comptroller of Patents* (1), Clauson L.J. said:—

> It has been said that there might be a case where, on the face of it, the regulation was bad * * * If that means that, if, on reading the Order in Council, it appeared that in fact it did not appear to His Majesty to be necessary or expedient for the relevant purposes to make the regulation, I quite agree that, on the face of the order, it would be inoperative under this section.

This was referred to by Duff C.J.C. in the *Chemicals* case (2). In my opinion, the Orders in Council here in question fall within the circumstances described by Clauson L.J. and are to the extent already indicated, invalid.

Mr. Cartwright further argued that section 9 of P.C. 7355 was invalid as contrary to section 5 of the *War Measures Act* itself, in which it is implicit that a person held for

(1) [1941] 2 K.B. 306, at 316. (2) [1943] S.C.R. 1, at 13.

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deportation may with the consent of the Minister of Justice have the ordinary remedy by way of *Habeas Corpus*. Mr. Cartwright argued that the words "be deemed to be in legal custody" in section 9 rules out this remedy.

I do not think this argument is well founded. The argument is that an order valid on its face would, by reason of the words quoted, preclude all *Habeas Corpus* proceedings, even although the person held on the basis of such order did not belong to any of the classes mentioned in the Order in Council.

The point arose in *R.* v. *Secretary of State for Home Affairs, ex parte Green* (1). In the Court of Appeal, at p. 121 Goddard L.J. said:—

> I am of opinion that, where on the return, an order or warrant which is valid on the face is produced, it is for the prisoner to prove the facts necessary to controvert.

A little lower down on the same page he said:—

> Before dealing with the subsidiary points raised by counsel for the appellant, I will deal with the question whether para. (8) of the regulation itself takes away the right to apply for a writ. It is said that, if it does not, the words "shall be deemed to be in lawful custody" are otiose, and it is claimed that, if the order purports to show that the prisoner is detained under the regulation, he must be deemed to be in lawful custody. I do not think that this is the meaning of, or the reason for, the clause. If the order has been irregularly made, the prisoner is not detained in pursuance of but despite the regulation. It is to be noted that the Aliens Restriction Order, 1916, contained a similar provision. It provided that an alien might be put on board a ship and detained in such manner as the Secretary of State directed and that, while so detained, should be deemed to be in lawful custody. In *R.* v. *Chiswick Police Station Superintendent, Ex. p. Sacksteder* (2), I think that Pickford L.J., at p. 584 took the same view as that which I have expressed of this provision. The object of the clause, in my opinion, is to provide that, once an order of detention is made, the person named in the order may be kept in custody anywhere, and not only in a lawful prison, even if the Secretary of State has not specified in the order a particular place for his internment.

See also the judgment of MacKinnon L.J. at p. 116. In the House of Lords, I refer to the judgment of Viscount Maugham at 394; Lord Wright, at 402 and 403. In my opinion the principles enunciated in these judgments are applicable to the point raised by Mr. Cartwright and I do not think that the paragraph objected to is other than valid.

Mr. Cartwright further argued that the provisions of Order 7355 relating to the sale of real and personal prop-

(1) [1941] All. Eng. R. 104; in the House of Lords, at 388.
(2) [1918] 1 K.B. 578

erty of deportees by the Custodian of Enemy Property was invalid as repugnant to section 7 of the *War Measures Act*. "Appropriation" is defined by Murray among other definitions as "to take possession for one's own." I think it is in this sense that "appropriation" is used in the *War Measures Act* and I do not think that the provisions of P.C. 7355 amount to appropriation in that sense.

Mr. Cartwright next argued that the Orders in Council constitute one scheme and the invalid parts are not severable from those parts which are valid. In fact it is stated in the factum of the Attorney General of Canada that

> the latter two Orders in Council have no operation except by reason of the first Order in Council. The three Orders in Council constitute one scheme the validity of which depends on the first Order in Council P.C. 7355.

In my opinion, however, applying the proper principle to this question the orders are severable.

The question submitted on this reference is as follows:

> Are the Orders in Council dated the 15th day of December, 1945, being P.C. 7355, 7356 and 7357 *ultra vires* of the Governor in Council either in whole or in part and if so in what particular or particulars and to what extent.

I would answer the question as follows:

1. Order P.C. 7355 is valid except in the following particulars:

(*a*) Subsection 3 of section 2 and section 3 are invalid in so far as they authorize the deportation of natural born British subjects who do not wish to leave Canada, and in so far as it prevents such persons from withdrawing consents at any time and in any manner.

(*b*) Subsection 4 of section 2 is invalid in toto.

2. Section 1 of Order P.C. 7356 is invalid in so far as it provides for loss of the status of a British subject.

3. Order P.C. 7357 is valid save in so far as it may purport to authorize a departure from the provisions of the *British Nationality and Status of Aliens Act*, 1914.

I hereby certify to His Excellency the Governor General in Council that the foregoing are my reasons for the answer to the question referred herein for hearing and consideration.

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ESTEY J.:—The three Orders in Council numbered P.C. 7355, 7356 and 7357, with which we are here concerned, were passed under the authority of the *War Measures Act*, 1927, R.S.C., c. 206, on the 15th of December, 1945, and continued by Order in Council P.C. 7414 passed under the authority of section 4 of the *National Emergency Transitional Powers Act, 1945*, (Dom. 9-10 Geo. VI, c. 25).

Counsel for the Committee submits, apart from any other question respecting the validity of these Orders, they ceased to be effective when *The National Emergency Transitional Powers Act* came into force on January 1st, 1946. He points out that these Orders to be valid must be within the ambit of the *War Measures Act* and therefore passed as provided in the third section thereof "by reason of the existence of real or apprehended war." That Parliament in enacting the *National Emergency Transitional Powers Act* embodied in section 5 thereof a declaration that on and after the 1st day of January, 1946, the war against Germany and Japan, for the purposes of the *War Measures Act*, should be deemed no longer to exist, and that therefore these Orders, even if valid when made on the 15th day of December, 1945, ceased to be effective as of the 1st day of January, 1946. Section 5 of the *National Emergency Transitional Powers Act*, 1945, reads as follows:

> 5. This Act shall come into force on the first day of January, one thousand nine hundred and forty-six, and on and after that day the war against Germany and Japan shall, for the purposes of the *War Measures Act*, be deemed no longer to exist.

This provision that "the war against * * * Japan shall * * * be deemed no longer to exist" is specifically limited in its application to the provisions of the *War Measures Act* and in effect merely removes the basis on which Orders in Council may be passed under that Act. It is not and does not purport to be a proclamation under section 2 of the *War Measures Act* declaring "that the war, invasion or insurrection no longer exists." Section 2 of the *War Measures Act* provides:

> 2. The issue of a proclamation by His Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.

This section contemplates a period after the conclusion of actual combat during which the period of emergency caused by the war will continue. Parliament gave expression to the same view when it passed *The National Emergency Transitional Powers Act,* 1945, and embodied in the preamble thereof:

* * * the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing;

Parliament did recognize that the intensity and magnitude of the emergency had changed and diminished and under the provisions of this Act curtailed the extensive powers exercised by the Governor in Council under the *War Measures Act.*

The question whether an emergency exists or not is primarily a matter for Parliament, and through the *National Emergency Transitional Powers Act,* 1945, Parliament is doing in a general way what was done in special cases following the last war. One of these was considered in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press* (1), where at p. 310 of Cameron, vol. 2, Viscount Haldane, in delivering the judgment of the Privy Council, stated:

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.

And at p. 311:

At what date did the disturbed state of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became *ultra vires*? It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence at the dates on which the action in question was taken by the Paper Control Tribunal.

Apart from the provision embodied in section 5 of *The National Emergency Transitional Powers Act,* 1945, there was no suggestion that the emergency arising out of the war no longer existed.

Then it is provided in section 4 of the *National Emergency Transitional Powers Act,* 1945:

4. Without prejudice to any other power conferred by this Act, the Governor in Council may order that the orders and regulations lawfully made under the *War Measures Act* or pursuant to authority created under

(1) [1923] A.C. 695; 2 Cam. 302, at 310.

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the said Act in force immediately before the day this Act comes into force shall, while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act.

Parliament by this provision expressly authorized the Governor in Council to continue not some but any or all of the Orders in Council already passed and still in force under the *War Measures Act*. The Governor in Council, acting under this authority, on the 28th day of December, 1945, passed Order in Council P.C. 7414 whereby it was ordered that:

* * * all orders and regulations lawfully made under the *War Measures Act* or pursuant to authority created under the said Act in force immediately before the day *The National Emergency Transitional Powers Act*, 1945, comes into force shall, while that Act is in force, continue in full force and effect subject to amendment or revocation under that Act.

This Order in Council, passed under said section 4, continues as effective the Orders in Council here in question, namely P.C. 7355, 7356 and 7357.

The fact that Order in Council P.C. 7414 was made and dated the 28th day of December, 1945, and therefore prior to the coming into force of *The National Emergency Transitional Powers Act*, 1945, on January 1, 1946, does not affect its validity as such a procedure is provided for in section 12 of the *Interpretation Act*, 1927, R.S.C., c. 1.

Counsel for the Committee submitted that if these Orders were still effective as above indicated that the provisions thereof, at least in part, exceeded the powers delegated by Parliament under the *War Measures Act* to the Governor in Council. That the Governor in Council can only legislate by Order in Council within the powers so delegated is stated by my Lord The Chief Justice in *Re Chemicals* (1),

> The powers conferred upon the Governor in Council by the *War Measures Act* constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself (Lord Selborne in *The Queen* v. *Burah* (2)). Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power.

That it is an enactment to enable the government to deal effectively in time of emergency with matters of security,

(1) [1943] S.C.R. 1, at 17. (2) (1878) 3 App. Cas. 889.

defence, peace, order and welfare of Canada, and that its language should be so construed has been emphasized in this Court. Fitzpatrick C.J.:

> It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers. *In re Gray* (1).

Kerwin J.:

> The provisions of subsection 1 of section 3 are in as wide terms as may be imagined. As Mr. Justice Anglin stated in *In re Gray*, (2), "more comprehensive language it would be difficult to find". In *Re Chemicals* (3).

It is under the *War Measures Act* that these three Orders in Council have been passed. There is much to be said for the view that they should be read and construed as a code or a unit designed in the main to carry out the express desires of those of the Japanese race who have requested the government to arrange for their going to Japan. It is true that in addition to those who have made requests, these Orders provide for the return to Japan of those Japanese nationals who were interned during the war and remained so on September 1st, 1945. They also provide for a Commission to inquire and recommend with respect to certain Japanese nationals and naturalized persons of the Japanese race in Canada. They also provide that the wives and the children under sixteen of any one with respect to whom an order for deportation has been made "may be included." These provisions will be more particularly discussed hereafter, but they do not detract from the main intent and purpose underlying the passage of these Orders in Council.

That these Orders do not apply to all of the Japanese race in Canada but in the main to those only who have requested that they be sent to Japan is made plain in the recitals to P.C. 7355:

> Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;
>
> And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

(1) (1918) 57 Can. S.C.R. 150, at 158.
(2) [1918] 57 Can. S.C.R. 150. (3) [1943] S.C.R. 1, at 29.

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And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;

This Order includes provisions for revocation of the request on the part of those of the Japanese race who were naturalized or born in Canada. It seems appropriate that this purpose and intent be kept in mind throughout an examination of the provisions and construction of these Orders in Council. Such was the position taken in England as evidenced by the statement of Lord Maugham:

> My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention.

Liversidge v. *Sir John Anderson* (1)

Counsel for the Committee submitted that the word "deportation" as used in section 3 of the *War Measures Act* is restricted to the deportation of aliens, and as these Orders made under that Act deal with other than aliens, the Governor in Council has exceeded his authority. The standard dictionaries do not agree as to the precise meaning of this word. It is restricted to aliens in *Fong Yue Ting* v. *U.S.A.* (2). It is applied to native-born in *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*, (3). As defined in the *Immigration Act*, 1927, R.S.C., c. 93, it is not restricted to aliens. Upon this reference it is not necessary to precisely define the word. It is enough to emphasize that as it is applied in law it is a compulsory sending out of, or as stated in the Oxford Dictionary "a forcible removal," and that, while it need not be restricted to aliens, it does apply to them.

The first of these Orders in Council, P.C. 7355, deals with four groups. Para. 2(1) provides for those Japanese nationals who either have made a request for repatriation since December 8th, 1941, or were detained under the Defence of Canada Regulations and so detained on Sep-

(1) [1942] A.C. 206, at 219.
(2) (1892) 149 U.S. R. 698 at 709.
(3) [1931] A.C. 662.

tember 1st, 1945. These Japanese nationals are aliens and as such are subject to deportation. The provision of the Order in Council for their deportation is valid. *Attorney-General for Canada* v. *Cain* (1), where Lord Atkinson at p. 634 states as follows:

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interest.

The second group is dealt with under para. 2 (2) of P.C. 7355. It provides for the deportation of those of the Japanese race who have become naturalized, who have requested repatriation since the declaration of war and who have not revoked that request prior to midnight of the first day of September, 1945. It is contended that the Parliament of Canada has no power to revoke this naturalization except by virtue of the provisions of the *Naturalization Act,* 1927, R.S.C., c. 138. More particularly because it adopts, as Part II of the *Naturalization Act,* Part II of the British *Nationality and Status of Aliens Act,* 1914, being c. 17, 4 & 5 Geo. V, and amendments thereto as contemplated by the latter Act; the purpose and intent being to make for greater uniformity in the procedure and requirements of British nationality and the granting of naturalization certificates throughout specified parts of the British Commonwealth of Nations. It also provides for the revocation of these certificates. Section 9 in part reads as follows:

> 9. (1) Where the Governor in Council, upon the report of the Minister, is satisfied * * * that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Governor in Council shall by order revoke the certificate.

This provision was enacted by the Parliament of Great Britain in 1918, being an Act to amend the British *Nationality and Status of Aliens Act,* 1914 (8 & 9 Geo. V, c. 38), and was enacted in Canada by an Act to revise and amend the *Naturalization Act,* 1914 (1920, R.S.C., c. 59). These amendments were made as a result of the experiences arising out of the last war and deal specifically with and

(1) [1906] A.C. 542; 1 Cam. 631.

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greatly enlarge the provisions for revocation of naturalization. Westlake's Private International Law, 7th ed. at p. 371, referring to this particular legislation:

> The powers of revocation are large and somewhat vague; and the idea of a nationality conditional on good behaviour and on keeping in close touch with the British dominions is one new in English law. Experience alone will show whether it will be desirable to keep it as a permanent variety of citizenship.

And again, referring to the same legislation, at p. 372:

> The legislature or government of any British possession has the same power to grant a certificate of naturalization as the secretary of state has under the Act; and the provisions of the Act as to the grant and revocation of the certificate of naturalization apply.

This section 9 provides authority for the revocation of a certificate of naturalization when the recipient thereof shows "himself by act or speech to be disaffected or disloyal to His Majesty." A revocation at least by that government which has granted same and issued the certificate therefor. This appears from the entire section, but is made abundantly clear by subsection (6) hereafter quoted, which goes further and envisages the cancellation by one government of a naturalization granted by another government in some other part of His Majesty's dominions. It was contended by Mr. Geoffrion that Canada had not adopted Part II but had enacted a new Act modelled after the British Act. In either view, in my opinion the legislation provides for revocation by the government granting the naturalization.

It seems to me that if during a state of war and the emergency resulting therefrom one so naturalized makes a request in writing for repatriation, he does so because of the war and matters associated therewith. The making of such a request and the persistence therein, as in this case to September 1st, 1945, a date after the cessation of hostilities, provides evidence that with respect to such a person his affections are not with Canada, the land of his adoption, but rather with the country from which he originally came. The effect of such conduct is a matter for the consideration of the responsible authorities of the State.

The only question with which we are here concerned is whether the Governor in Council had authority under the *War Measures Act* to provide for the deportation and the

revocation of certificates of naturalization by Order in Council P.C. 7355. In my opinion the authority here exercised could in peacetime be exercised under the *Naturalization Act*. In time of emergency this can be accomplished under the *War Measures Act* through the medium of the Governor in Council passing an Order in Council and therefore in my opinion this paragraph in Order in Council P.C. 7355 is valid. *In Re Gray*. (1)

The same section 9 contains a sub-paragraph (6) reading as follows:

6. Where a person to whom a certificate of naturalization has been granted in some other part of His Majesty's dominions is resident in Canada, the certificate may be revoked in accordance with this section by the Governor in Council, with the concurrence of the Government of that part of His Majesty's dominions in which the certificate was granted.

A paragraph to the same effect is in the *Imperial Act* (Sec. 7 (5), c. 38, 8 & 9 Geo. V). It expressly contemplates the revocation of naturalization certificates granted by some other government in His Majesty's dominions, but that this right will not be exercised without the concurrence of that government which granted it. This may conceivably affect some parties, although we were supplied with no information upon the point. If there be some, we can rely upon the government in the exercise of these powers to respect any statutory obligations which it has assumed toward other component parts of the British Commonwealth of Nations. I do not think the existence of such an undertaking invalidates this paragraph.

The third group is dealt with under para 2(3) of P.C. 7355. It is the natural-born British subject of the Japanese race who has "made a request for repatriation," and who has not "revoked in writing such request prior to the making by the Minister of an order for deportation." It is not only the request but the persistence in that request that is emphasized by paras. 2(2) and 2(3). The naturalized citizen of the Japanese race might have revoked up to midnight of the 1st day of September, 1945. The natural-born British subject of the Japanese race may revoke at any time up to the moment of the Minister making his order. At the hearing counsel stated no order had been made and would not be made until after this decision is handed down. With respect to this group the right to

(1) (1918) Can. S.C.R. 150.

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revoke still remains, but unless that right to revoke is exercised as above indicated the Governor in Council concluded that with respect to such a person it was "necessary by reason of the war for the security * * * " he should go to Japan.

It is contended that these people are being compelled to go, are being deported. In reality they are going because they made the request to go and have persisted in that request as evidenced by their not revoking same. The government, in compliance with their request, has arranged for their transportation, the cost thereof, the disposition of their property and the dispatch of the proceeds therefrom to them in Japan, and has arranged for their own reception in Japan. In making these arrangements pursuant to the requests of the parties, it was only reasonable, if not necessary, that some date be fixed when revocation could not be made. It appears that this Order in Council fixes the last practical date upon which revocation ought to be permitted.

In no real sense can this be regarded as deportation. It is the procedure of deportation founded upon the request of the respective individuals to go to Japan and to become a citizen of Japan. It is not a "forcible removal." There is no element of compulsion, a going against the will that is present in deportation. For reasons of their own these British subjects, entitled to the benefits and privileges and obligated to discharge the duties and responsibilities of British subjects at a critical time in the history of this country, intimate a desire to return to the country of their racial origin and to remain and become citizens of that country.

If these same parties went to Japan and acquired a citizenship there, the *Naturalization Act*, 1927, R.S.C., c. 138, s. 16, provides for their being deprived of British citizenship. A similar provision is contained in the *Imperial Act*, 4 & 5 Geo. V, c. 13, s. 17. This cancellation of citizenship is recognized by the comity of nations. The basis, therefore, is disaffection as evidenced by the voluntary acquisition of nationality in the country of their now residence. The people with whom we are here concerned have expressed their disaffection for Canada and set forth

their affection for Japan. They have coupled therewith a desire to go to Japan. The Governor in Council under the circumstances decided to facilitate their going by perfecting the arrangements therefor as above indicated. This is more a matter of policy for the government than a question of jurisdiction for the courts.

It should be observed that their British citizenship is not cancelled by these Orders in Council. It is therefore suggested that at some future date they may return to Canada. That is a matter for the authorities and one which they have no doubt considered. In any event, it does not affect the validity of the Order and is not a matter to be considered upon this reference.

In my opinion the Parliament of Canada could so legislate and this paragraph is valid.

The fourth group is dealt with in para. 2(4). It affects the wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan and provides that they "may be included in such order and deported with such person." It is possible that some of the wives may be classed under para. 2(1), 2(2) or 2(3), but apart from those it will be observed that they may be sent away notwithstanding they have not signed a request, nor is there any recital or statement on the part of the Governor in Council that "such is necessary or advisable for the security * * *" as required by the *War Measures Act*. Moreover, under the *Naturalization Act*, and particularly the amendments thereto in 1931, it may be that many of the wives were born in Canada, still retain their British citizenship and desire to remain here. There is, therefore, involved with respect to them an element of compulsion which under this Order in Council cannot be justified.

It was suggested that this paragraph was included that families might not be separated. That is desirable, and that may be all that was contemplated. As passed the paragraph goes much further. It may be amended under the provisions of section 4 of the *National Emergency Transitional Powers Act* to take care of such cases and not involve the possibility of a British subject who has not signed a request, and therefore entitled to remain in

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Canada, being compelled to go to Japan because her husband has requested that he go. It is difficult to phrase a rule that should apply to all of the children, but generally speaking the children ought not to be sent unless both parents are going. In my opinion, as drafted this paragraph cannot be supported as valid.

Counsel for the Committee submits that para. 6 of P.C. 7355 is beyond the powers of the Governor in Council because it is in conflict with section 7 of the *War Measures Act*. I do not think that contention is tenable. Section 7 of the *War Measures Act* is dealing with the appropriation of property by His Majesty for which compensation is to be made, and in the event of no agreement as to the compensation it will be determined by the Exchequer or other designated Court. In para. 6 of P.C. 7355 His Majesty is not appropriating property in that sense, but is taking possession of the property, disposing of same and transmitting the proceeds, less expenses incurred therewith, to the owner who has gone to Japan under one of these Orders. No question of compensation is involved. The sections deal with entirely different matters with respect to which there is no conflict.

Counsel for the Committee also submits that para. 9 of P.C. 7355 is *ultra vires* in that it is contrary to the provisions of section 5 of the *War Measures Act*. Para. 9 reads as follows:

> 9. Any person for whom an order for deportation is made and who is detained pending deportation or who is placed under restraint in the course of deportation by virtue of any order or measure made or taken under section 4 of this Order shall, while so detained or restrained, be deemed to be in legal custody.

Section 5 of the *War Measures Act* reads as follows:

> 5. No person who is held for deportation under this Act or under any regulation made thereunder, or is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, or to prevent his departure from Canada, shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice.

In particular Counsel contends that para. 9 deprives a person detained under Order in Council P.C. 7355 of the right to have the legality of his detention inquired into under *habeas corpus* proceedings because by its express provisions the legality of the custody is finally determined in the words "deemed to be in legal custody," and therefore

a return to the writ that the person was so detained would preclude further inquiry. While section 5 of the *War Measures Act* specifically contemplates such proceedings with the consent of the Minister of Justice, this para. 9 purports to take away the right thereto and is therefore beyond the powers of the Governor in Council.

It should be observed that there are no express words in para. 9 which deny the party detained the right to apply for a writ of *habeas corpus* nor provide that a return as above indicated would preclude further inquiry. This writ and its availability to the subject is jealously guarded by the courts. It is one of the methods by which the subject may question the legality of his detention and is regarded as an assurance to the subject that he will not be illegally held under arrest or detention. Therefore, it has become an established rule that only express language or language so definite as to point directly and imperatively to such a conclusion that will be sufficient to deprive the subject of the benefit of this writ. In *Shin Shim v. The King,* (1) notwithstanding the strong language of the *Chinese Immigration Act,* 1927, R.S.C., c. 95, a procedure by way of a writ of *habeas corpus* was held to be open to a party detained under that Act who desired to raise the question that she was a British subject, notwithstanding the decision of the Controller of Chinese Immigration to the contrary.

The Defence (General) Regulations, 1939, as adopted by the Government of Great Britain, include as section 8:

> 8. Any person detained in pursuance of this regulation shall be deemed to be in lawful custody and shall be detained in such place as may be authorized by the Secretary of State and in accordance with instructions issued by him.

The words "deemed to be in lawful custody" are identical in meaning and effect to those used in section 9 of P.C. 7355, and yet an application for writ of *habeas corpus* was heard notwithstanding the provisions of section 8. *The King* v. *Secretary of State for Home Affairs,* (2) *Green* v. *Secretary of State for Home Affairs,* (3). In the former case section 8 was not referred to, or if so not seriously pressed. In the latter is was specifically raised as a bar to the writ of *habeas corpus* both in the Court of Appeal and

(1) [1938] S.C.R. 378
(2) [1941] 1 K.B. 72.
(3) [1942] A.C. 284.

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before the House of Lords. In the Court of Appeal (1) Lord Justice Goddard at p. 116 specifically deals with this provision as follows:

> I will deal with the question whether para. (8) of the regulation itself takes away the right to apply for a writ. It is said that, if it does not, the words "shall be deemed to be in lawful custody" are otiose, and it is claimed that, if the order purports to show that the prisoner is detained under the regulation, he must be deemed to be in lawful custody. I do not think that this is the meaning or the reason for the paragraph. If the order has been irregularly made the prisoner is not detained in pursuance of, but despite, the regulation. It is to be noted that the Aliens Restriction Order, 1916, contained a similar provision. It provided that an alien might be put on board a ship and detained in such a manner as the Secretary of State directed, and while so detained should be deemed to be in lawful custody. In *ex parte Sacksteder,* (2) I think that Pickford L. J. took the same view that I have expressed of this provision. The object of the paragraph, in my opinion, is to provide that once an order of detention is made, the person named in the order may be kept in custody anywhere, and not only in a lawful prison, even if the Secretary of State has not specified in the order a particular place for his internment, which he can do later.

In the House of Lords Lord Wright speaks as follows:

> In the first place, para. 8 of the regulation does not, in my opinion, render lawful a detention which is, apart from para. 8, unlawful and unwarranted by the Secretary's powers. It is inserted to settle possible doubts as to prison law and practice. *Liversidge* v. *Sir John Anderson* (3)

A perusal of this section 9 will indicate how apt are the words of Lord Goddard in ascertaining its effect. It reads in part:

> Any person * * * who is detained * * * or who is placed under restraint in the course of deportation * * * shall * * * while so detained or restrained, be deemed to be in legal custody.

It is his detention or restraint, wherever that may be, that will "be deemed to be in legal custody." It does not preclude an inquiry as to whether that legal custody is justified or legal within the terms of the Order in Council. It does not therefore deprive the party so detained or restrained of his right to apply for a writ of *habeas corpus.* This suggested conflict between section 9 and section 5 in my opinion does not exist.

It is contended that the right of a British subject to reside and to remain in Canada is a civil right and further that para. 6 of Order in Council P.C. 7355 providing for the protection, sale and dispatch of the proceeds to Japan

(1) [1942] 1 K.B. 87.
(2) [1918] 1 K.B. 578, at 584.
(3) [1942] A.C. 206, at 273.

realized from the sale of property belonging to a party who has been deported, is also a matter of property and civil rights; that under the B.N.A. Act by section 92(13) such matters are of provincial jurisdiction and in so far as the Parliament of Canada may purport to legislate with respect thereto, that legislation will be ultra vires and therefore in so far as these Orders in Council being legislation purporting to deal with these matters they are ultra vires.

The validity and effect of these contentions under normal conditions need not be here examined. These Orders in Council constitute legislation passed under circumstances of an emergency when the relationship between the dominion and the provinces is for the time being somewhat changed. Similar questions were raised in *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press,* (1) and the answer there given is applicable to this case. Viscount Haldane (2 Cam. at p. 309):

> It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within s. 91, because in their fullness they extend beyond what s. 92 can really cover. The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole. For it is not one that can be reliably provided for by depending on collective action of the Legislatures of the individual Provinces agreeing for the purpose. That the basic instrument on which the character of the entire constitution depends should be construed as providing for such centralised power in an emergency situation follows from the manifestation in the language of the Act of the principle that the instrument has among its purposes to provide for the State regarded as a whole, and for the expression and influence of its public opinion as such. * * * Their Lordships, therefore, entertain no doubt that however the wording of ss. 91 and 92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the Provinces of Canada, yet in a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole. The enumeration in s. 92 is not in any way repealed in the event of such an occurrence, but a new aspect of the business of Government is recognized as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the Legislatures of the Provinces as individual units. Where an exact line of demarcation will lie in such cases it may not be easy to lay down *a priori,* nor is it necessary.

(1) [1923] A.C. 695; 2 Cam. 302.

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In view of the foregoing authority, the contentions that the provisions of these Orders in Council are in these regards *ultra vires* the Governor in Council under the *War Measures Act* are not tenable.

The second of these Orders in Council, P.C. 7356, provides that:

> Any person who, being a British subject by naturalization * * * is deported from Canada under the provisions of Order in Council P.C. 7355 * * * shall * * * cease to be either a British subject or a Canadian national.

It concerns only those of the Japanese race who have been naturalized in Canada and have been dealt with under para. 2(2) of Order in Council 7355, and for the reasons there discussed, in my opinion this Order in Council is valid.

The third Order in Council, P.C. 7357, sets up a Commission of three persons:

> * * * To make inquiry concerning the activities, loyalty and the extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada in cases where their names are referred to the Commission by the Minister of Labour for investigation with a view to recommending whether in the circumstances of any such case such person should be deported.

The authority of the government to order such an inquiry cannot be questioned. The power of Parliament to legislate with respect to Japanese nationals and naturalized persons of the Japanese race has already been discussed when dealing with para. 2(1) and 2(2) of P.C. 7355. In any event, this Commission is but a fact-finding body with power to recommend to the Minister. Any order for deportation as a consequence thereof is upon the recommendation of the Minister, and the Governor in Council may pass such under para. 2(1) or 2(2) of P.C. 7355.

In the second paragraph thereof the Commission has power to review the case of any person of the Japanese race who was naturalized in Canada and who made a request for repatriation notwithstanding the provisions of Order in Council P.C. 7355. This is obviously but providing an opportunity for the reviewing of the case of one who has been ordered to be deported as a consequence of his request, and notwithstanding that he did not withdraw same before the 1st day of September, 1945.

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In my opinion these Orders in Council, except with respect to one group dealt with in para. 2(4) of P.C. 7355, are as passed within the competency of the Governor in Council under the *War Measures Act;* that para. 2(4) of P.C. 7355, being as passed invalid, does not affect the validity of the other provisions of the Orders in Council. In my opinion with respect to the different groups the provisions of these Orders in Council are severable. *Brooks-Bidlake and Whittall, Ltd.* v. *Attorney-General for British Columbia* (1).

The question submitted on this reference is as follows:

Are the Orders in Council dated the 15th day of December, 1945, being P.C. 7355, 7356 and 7357, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

In my opinion all of the Orders in Council are *intra vires* of the Governor in Council, with the exception of para. 2(4) of P.C. 7355.

I hereby certify to His Excellency the Governor General in Council that the foregoing are my reasons for the answer to the question referred herein for hearing and consideration.

J. W. ESTEY.

LOUIS MARIE KEABLE (PLAINTIFF).... APPELLANT;

AND

J. ERNEST LAFORCE (DEFENDANT).... RESPONDENT.

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*Mar. 6

* " 29

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

Appeal—Jurisdiction—Petition for leave to appeal—Appointment of respondent as civil service commissioner—Whether irregular and illegal—Respondent being over age limit of 65 and appointed as sole commissioner—Alleged to be in violation of Civil Service Act—Petition asking for writ of Quo Warranto and for payment of fine to the Crown by respondent—Leave to appeal refused—Sub-sections (b), (c) and (f) of section 41 of the Supreme Court Act not applicable.

The appellant, a registrar in charge of a lands registry office, was dismissed by orders in council. The respondent, sole member of the Civil Service Commission, had previously recommended, as required by

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

(1) [1923] A.C. 450; 2 Cam. 318.

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the *Civil Service Act,* such dismissal to the Executive Council. The appellant then took proceedings *(Quo Warranto),* asking *inter alia* that it be declared that the respondent was usurping the office of commissioner, that he be expelled therefrom and that he be condemned to pay to the Crown a penalty not exceeding $400, with rights to damages reserved. The main grounds of the petition were that the respondent, when appointed, was beyond the age limit of 65 years prescribed by the Act as the retiring age limit (s. 6) and that the order-in-council appointing him as sole commissioner was passed in violation of section 4 of the Act. The respondent contended that he was lawfully exercising the functions of his office under the authority of an order-in-council, and that the matter of such functions and of the Civil Service Commission belong to the executive, and not to the judicial authority, especially under the circumstances of the case. The Superior Court dealt with the merits of the appellant's petition and dismissed it. The appellate court held, by a majority, that the appellant had not shown that he had the special interest required by article 987 C.C.P. to bring his proceedings, which were not, moreover, appropriate to the allegations and conclusions of his petition. Upon a motion for leave to appeal to this Court made by the appellant under sub-sections (b), (c) and (f) of section 41 of the *Supreme Court Act.*

Held that this Court has no jurisdiction to grant leave to appeal.

The sole fact that the respondent may be condemned to pay a fine to the Crown does not meet the requirements of sub-section (b), which applies to a claim filed by the Crown itself. Such fine is not part "of the matter in controversy on the appeal," as the appellant's action could be maintained without any fine being imposed.

The "rights in future" of the appellant are in no way affected. Any rights he may have would be decisively determined by any decision rendered upon the proceedings taken by him. The provisions of sub-section (c), therefore, are not applicable.

The salary of which the appellant may be deprived and the damages he may be entitled to, even if exceeding $1,000, cannot be taken into account in order to make up "the amount or value of the matter in controversy in the appeal" within the provisions of sub-section (f).

MOTION for leave to appeal to this Court from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming by a majority the judgment of the Superior Court, Gibsone J. and dismissing the appellant's action.

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

F. Choquette K.C. for the motion.

L. E. Beaulieu K.C. contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE: L'appelant, qui a succombé tant devant la Cour Supérieure que devant la Cour du Banc du Roi (siégeant en appel), a fait à cette dernière cour une requête pour permission d'appeler à la Cour Suprême du Canada. Cette requête a été rejetée (les honorables juges Gagné et Pratte dissidents) et il s'adresse maintenant à notre Cour pour obtenir cette permission, en vertu de l'article 41 de la *Loi de la Cour Suprême.*

La procédure dont il s'agit est une requête de la part de l'appelant présentée à la Cour Supérieure du district de Québec et concluant à ce qu'il émane un bref ordonnant à l'intimé de comparaître pour répondre à la demande contenue dans cette requête et prouver l'autorité en vertu de laquelle l'intimé s'est permis d'occuper, de détenir et d'exercer la charge de président et membre unique de la Commission du Service Civil de la province de Québec; à ce que par le jugement à intervenir, il soit dit et déclaré que l'intimé exerce illégalement cette charge sous toutes les peines que de droit; et que l'intimé soit dépossédé et exclu de cette charge; qu'au surplus il soit déclaré qu'il n'a pas le droit d'assumer lui seul les pouvoirs de la Commission; qu'il lui soit fait défense d'assumer ainsi et d'usurper ces pouvoirs; à ce que tous les actes que l'intimé a pu poser pour et au nom de la Commission et en sa qualité de président et de membre unique de cette Commission, en tant que ces actes concernent l'appelant et sa fonction de Régistrateur, ou son remplacement comme tel, soient déclarés *ultra vires,* nuls et annulés à toutes fins que de droit; et à ce que l'intimé soit condamné à une amende n'excédant pas la somme de $400.00 payable à la Couronne, suivant les formalités prévues par la loi.

Dans cette requête, l'appelant se réserve le droit de prendre telles conclusions ultérieures qu'il sera nécessaire de prendre, et il se réserve particuliérement tout recours contre l'intimé pour le salaire dont il pourra être privé, ainsi que les dommages qu'il a subis et qu'il pourra subir par suite des actes prétendus illégaux de l'intimé. Le tout avec dépens.

A cette requête, l'intimé a produit une contestation où il nie chacun des paragraphes de la requête et où il ajoute

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que les procédures de l'appelant sont mal fondées en fait et en droit; qu'il a été nommé membre de la Commission du Service Civil de la province de Québec, à compter du premier novembre 1944, par arrêté-en-conseil du gouvernement de la province (dont il produit copie) et que depuis il exerce ses fonctions légalement.

Il allègue que l'exercice des fonctions de membre de la Commission du Service Civil de la province de Québec est de la compétence du pouvoir exécutif et qu'elles ne relèvent pas du pouvoir judiciaire, spécialement et sans restrictions dans les circonstances alléguées par l'appelant et de la façon qu'il a adoptée pour amener l'appelant devant les tribunaux.

Dans une première réponse, l'appelant avait rétorqué que l'arrêté-en-conseil invoqué par l'intimé violait la *Loi du Service Civil* et qu'il était nul, illégal, inexistant et sans effet, et il en a demandé l'annulation. Mais, quoique cela n'apparaisse pas au dossier qui a été mis devant nous à l'occasion de la requête pour permission d'appeler, l'avocat de l'intimé nous a dit que cette partie de la réponse avait été rejetée du dossier; avec la conséquence que la réponse telle qu'elle y subsiste n'est devenue qu'une simple dénégation générale.

La Cour Supérieure a rejeté la requête de l'appelant et la majorité des juges de la Cour du Banc du Roi (en appel) a confirmé ce jugement, bien que pour des motifs absolument différents.

Le jugement de la Cour Supérieure se prononce sur le mérite de la requête. Le jugement de la Cour du Banc du Roi, en appel, se base sur les articles 77, 87a, 987 et suivants du code de procédure civile.

L'article 87a est celui qui prescrit que nulle procédure par voie d'injonction, de *mandamus*, ou toute autre mesure spéciale ou provisionnelle, n'est recevable contre le gouvernement de la province ou contre l'un de ses ministres ou contre un officier agissant en vertu d'instructions de l'un de ses ministres, pour toute chose faite ou omise ou projetée dans l'exercice de ses fonctions, y compris l'exercice de toute autorité conférée par un Acte de la législature.

Les articles 987 et suivants sont ceux qui traitent de l'usurpation de charges publiques ou corporatives ou de franchises, soit: la procédure communément connue sous la dénomination de *quo warranto*.

Les motifs du jugement formel de la Cour du Banc du Roi, siégeant en appel, sont d'abord que la loi exige que toute demande en justice ne puisse être portée que par celui qui y a un intérêt, et que cette prescription de la loi est spécifiquement réitérée dans l'article 987 qui stipule que nulle autre qu'une

personne intéressée peut porter plainte lorsqu'un individu usurpe, prend sans permission, tient ou exerce illégalement: (1) une charge publique, une franchise ou une prérogative dans la province;

Le jugement poursuit en disant qu'il est nécessaire qu'un tel intérêt soit personnel et qu'il ne peut être l'intérêt d'une autre personne ou l'intérêt général d'une collectivité, où le demandeur prétendrait poursuivre pour tous ceux qui font partie de ladite collectivité; et que le requérant n'a pas réussi à établir l'existence de cet intéret personnel, vu que, même en accordant les conclusions de sa requête, le jugement n'aurait pas pour effet de rendre vacante la charge de Régistrateur qu'il occupait auparavant, et ne serait pas un moyen de parvenir à créer une vacance de cette charge permettant d'y réinstaller ou d'y réintégrer l'appelant;

que, quant aux autres conclusions de l'appelant, celles en annulation " des actes faits par l'intimé le concernant et concernant sa charge de Régistrateur " ne sont pas autorisées par les articles 989 et 990 du code de procédure civile et ne peuvent lui être accordées; sans compter qu'elles ne pourraient valois contre le titulaire actuel de la charge de Régistrateur qui n'a pas été mis en cause; qu'il y a donc défaut de la part du requérant d'établir l'intérêt personnel essentiellement requis.

M. le juge Walsh a été, en plus, d'avis que la prohibition édictée par l'article 87a du code de procédure civile est indiscutablement fatale à la requête du requérant.

Et la Cour conclut que le jugement de première instance est donc bien fondé dans son dispositif.

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Rinfret C.J.

L'honorable judge Errol McDougal, de son côté, declare concourir dans l'arrêt qui rejette l'appel et il dit:

> Whatever may be the recourse of the appellant, I am firmly convinced that it is not to be exercised by proceedings in *quo warranto* directed to the Respondent.

L'honorable juge Gagné a été dissident et était d'avis que la requête en *quo warranto* eût dû être maintenue; mais, pour les fins de la discussion au sujet de la requête pour permission d'appeler qui nous est actuellement soumise, nous ne devons nous occuper que de l'effet du jugement de la majorité de la Cour du Banc du Roi.

Il suit de tout ce qui précède que le jugement qui subsiste en l'espèce, n'est pas celui de la Cour Supérieure, où le mérite de la question a été discuté, mais celui de la Cour du Banc du Roi (en appel) qui ne décide absolument rien sur les propositions au mérite de l'appelant et qui a rejeté sa requête simplement parce que, de l'avis de la majorité des juges de cette Cour, le requérant n'avait pas démontré qu'il avait l'intérêt requis pour intenter sa procédure, et que, au surplus, la procédure qu'il avait adoptée n'était pas appropriée aux allégations et aux conclusions de sa requête.

La Cour du Banc du Roi n'a nullement adopté les motifs donnés par la Cour Supérieure pour rejeter la requête de l'appelant. Cela est déclaré en toutes lettres dans les notes du jugement.

Il reste donc que le seul jugement qui se soit prononcé dans la cause sur l'interprétation de la loi instituant une Commission du Service Civil, sanctionnée le 23 juin 1943, ne subsiste plus, et qu'il ne pourrait être invoqué comme précédent dans une autre cause, vu que le jugement de la Cour du Banc du Roi que nous avons maintenant devant nous a refusé de l'accepter.

Ce qui reste est exclusivement le jugement qui rejette la requête de l'appelant parce que, de l'avis de la Cour du Banc du Roi, l'appelant n'a pas réussi à établir son intérêt pour intenter la procédure qu'il a adoptée, et que d'ailleurs, cette procédure n'était pas celle qui était appropriée aux circonstances.

Bien entendu, en vertu de l'article 41 de la *Loi de la Cour Suprême,* celui qui demande à cette Cour la permission d'appeler doit d'abord démontrer que l'affaire tombe parmi l'un des cas énumérés aux sous-sections "a", "b", "c", "d", "e" et "f" de cet article.

L'appelant a invoqué alternativement les sous-sections "b", "c", et "f" de cet article.

La sous-section "b" ne s'applique pas. Le seul fait que la requête en cours contient une demande incidente à l'effet que l'intimé soit condamné à payer à la Couronne une amende n'excédant pas $400.00 ne rencontre pas les exigences de cette sous-section. Celle-ci s'applique à une demande faite par la Couronne elle-même et non pas à un cas, comme celui-ci, où il n'y a pas de réclamation de sa part, mais où il s'agit seulement d'une condamnation facultative qui résulterait du maintien de la requête en *quo warranto,* et où la Couronne n'est pas partie à la cause. (Voir sur ce point, le dictum dans le jugement de cette Cour *re O'Dell* v. *Gregory* (1).

L'on ne saurait dire qu'en pareil cas, l'amende fait partie "of the matter in controversy on the appeal". L'appel n'est pas porté pour décider si oui ou non cette amende doit être imposée. La requête en *quo warranto* pourrait parfaitement être accordée sans l'amende. Cette dernière ne serait qu'une conséquence secondaire du maintien de la requête.

Quant à la sous-section "f", qui exige pour notre juridiction que le montant ou la valeur en jeu dans l'appel excède la somme de $1,000.00, l'on ne saurait à cette fin tenir compte de ce que peut représenter pour l'appelant le "salaire dont il pourra être privé" ou "les dommages qu'il a subis ou qu'il pourra subir". Cette question ne fait pas, pour le moment, partie du litige. Au contraire, le requérant dans ses conclusions déclare spécialement se réserver d'adopter plus tard des procédures pour recouvrer le salaire ou les dommages en question. Ils ne sont donc pas en jeu dans l'appel actuel.

(1) (1895) 24 Can. S.C.R. 661, at 663.

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Comme il était dit dans l'arrêt de cette Cour *re*: *Lachance* v. *La Société de Prêts et de Placements de Québec* (1), "our jurisdiction does not depend on the possible consequence of a possible judgment". (Voir aussi *Gatineau Power Company* v. *Cross* (2).

Il pourrait y avoir plus de doute sur l'application de la sous-section "c" de l'article 41: "other matters by which future rights of the parties may be affected."

Sur cette question, l'on ne saurait invoquer des précédents, car il est évident que les droits futurs des parties diffèrent suivant chaque cas.

Ici, il est important de faire observer que l'article exige qu'il s'agisse des droits futurs des parties en cause. (*Campbell Auto Finance Company* v. *Bonin,* (3)). Même si les électeurs de la province de Québec peuvent avoir un intérêt futur dans la question de savoir si l'intimé usurpe la position qu'il occupe actuellement, en ce qui concerne l'appelant, il ne s'agit pas de droits futurs dans le sens de la sous-section "c". Cette question, par rapport à lui-même, devait être réglée une fois pour toutes sur la procédure qu'il a intentée. Ses droits à l'encontre de l'intimé étaient soumis à la Cour pour être tranchés *nunc et tunc.* La question de savoir si plus tard il pourrait recouvrer la position de Régistrateur n'est pas impliquée dans l'appel qu'il nous demande de porter ici; elle pourrait seulement faire l'objet d'une autre cause.

Nous sommes donc d'avis que cette permission d'appeler ne peut s'appuyer sur aucune des sous-sections de l'article 41 et que nous n'avons pas juridiction pour l'accorder.

La demande de permission d'appeler doit donc être rejetée avec dépens.

Leave to appeal refused.

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(1) (1896) 26 Can. S.C.R. 200, at 202.

(2) [1929] S.C.R. 35.

(3) [1945] S.C.R. 175.

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*Feb. 20
*Mar. 29

DAVID GUILLOT (PETITIONER) ..... APPELLANT;

AND

R. ERNEST LEFAIVRE AND OTHER (DEFENDANTS) ..... } RESPONDENTS;

AND

ÉLÉODORE ROUSSEAU (BANKRUPT)

Bankruptcy—Agreement between contractor and mason—Brick-work for houses under construction—Contractor supplying bricks, mortar and nails and mason furnishing labour and scaffolding—Mason hiring several helpers to perform work—Contractor becoming bankrupt—Claim by mason to be paid in priority for amount representing his own labour and wages paid to helpers—Whether claim is "compensation of workman in respect of services rendered to the bankrupt", within the provisions of section 121 of the Bankruptcy Act, R.S.C., 1927, c. 11.

The bankrupt, a general contractor, entered into an agreement with the appellant who, described as master-mason on his business letter-head, was also known as a working mason. The work to be done was the labour, including the scaffolding, for the brick-work (*lambrissage*) of four houses under construction by the bankrupt, the latter to furnish the bricks and nails. The mortar was in fact supplied by the bankrupt, though the appellant was to furnish it under the agreement. The work was actually performed by the appellant and by his son and some other workmen who were hired and paid by him. The appellant filed with the trustees in bankruptcy a claim for $1,018.20, being the amount due for his own work and the wages paid to his helpers, in order that the same be paid in priority under section 121 of the *Bankruptcy Act*, out of the distribution of the bankrupt's property. The trustees disallowed the claim for priority, the Superior Court sitting in bankruptcy affirmed such disallowance and the appellate court maintained that judgment.

Held, affirming the judgment appealed from, that the appellant's claim was not for "compensation of * * * workman in respect of services rendered to the bankrupt" within the meaning of paragraph 3 of section 121 of the *Bankruptcy Act*. The word "compensation" may include personal work or labour performed by the claimant personally, but does not include wages earned on the work by his son and the other helpers employed and paid by the appellant.—Upon the facts of the case, the appellant should be considered as a sub-contractor and not as a "workman."

APPEAL (1) from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court sitting in bankruptcy,

(1) Leave to appeal to this Court was granted by The Chief Justice in Chambers.

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

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Savard J. and disallowing the petitioner's claim filed with the trustees in bankruptcy that the same be paid in priority.

Guy Hudon K.C. for the appellant.

Jacques Dumoulin K.C. and *Jean Turgeon* for the respondents.

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

The CHIEF JUSTICE: Je ne vois aucune raison d'infirmer le jugement de première instance confirmé par celui de la Cour du Banc Roi (en appel).

Tout le litige dépend de l'interprétation de l'article 121 de la *Loi de Faillite.*

Cet article a trait à la priorité des réclamations de certains ouvriers et il stipule au troisième paragraphe que:

toutes les dettes du failli ou du cédant autorisé en vertu de toute loi de compensation ouvrière et tous les gages, salaires, commissions ou rémunérations des commis, domestiques, voyageurs de commerce, journaliers ou ouvriers, pour services rendus au failli ou cédant durant trois mois avant la date de l'ordonnance de séquestre ou de la cession * * * doivent être payés suivant l'ordre de priorité.

Pour déterminer le sort de cet appel, il s'agit d'interpréter dans le paragraphe que l'on vient de citer, les mots " rémunérations ", " ouvriers " et " services ".

En effet, ce que l'appelant réclame ne peut être classé dans la catégorie des "gages", "salaires" ou "commissions "; non plus dans celle des " commis ", " domestiques ", " voyageurs de commerce " ou " journaliers ".

Pour réussir, il fallait qu'il démontre que sa réclamation est pour " rémunération " à titre d'ouvrier " pour services rendus au failli ".

Or, les syndics intimés ont, à mon avis, justement représenté que l'appelant n'avait jamais été à l'emploi du failli à titre de salarié, que les travaux qu'il avait faits pour le failli lui-même étaient accordés par contrat à forfait et que sa réclamation, par conséquent, ne pouvait être acceptée autrement que comme créance chirographaire par opposition avec une créance privilégiée.

La réclamation de l'appelant représente: l'ouvrage en brique à la maison de Yvon Lepage, située dans la paroisse de St-Sacrement à Québec, et à deux autres maisons situées sur la rue Vitré; la construction d'une cheminée à une maison vendue à un monsieur Marcoux.

Ces ouvrages ont été confiés à l'appelant au moyen d'un contrat sur lequel ce dernier s'est donné comme entrepreneur-maçon. Il s'y est engagé à faire le lambrissage des maisons ci-haut mentionnées pour le compte du failli, à raison de $180.00 pour les petites maisons et $205.00 pour les plus grandes; la brique et les clous devaient être fournis par le contracteur général (le failli), le mortier et les échafaudages devant être fournis par le briquetier (l'appelant). Le failli s'y engageait à payer un estimé de 90% à toutes les semaines.

Le montant total, auquel l'appelant a droit pour ces ouvrages, s'élève à la somme de $1,018.20.

Le mot "rémunération" est sans doute très large et, pour les fins de cet appel, je serais certainement disposé à prendre pour acquis qu'il peut comprendre les montants stipulés au contrat en faveur de l'appelant et qui font l'objet de sa réclamation.

Mais, d'autre part, il est admis que dans cette somme sont inclus les salaires qui ont été payés par l'appelant à quelques ouvriers qui lui ont aidé à accomplir les travaux qu'il avait entrepris.

Il ne s'agit donc pas ici exclusivement de sa rémunération personnelle, mais également de la rémunération de ceux qui lui ont aidé dans ses ouvrages.

Déjà, par conséquent, nous nous éloignons des "services rendus au failli". Il ne réclame pas seulement pour ses services mais pour ceux de ses employés; et précisément où je ne puis me rendre à l'argumentation de son procureur, c'est lorsqu'il s'agit de le faire entrer sous la désignation d'ouvrier.

Je crois que le savant juge de première instance a eu raison de dire que nous sommes en présence d'un contrat dont les termes laissent voir qu'il s'agit d'un contrat à forfait

et que l'appelant

doit être considéré comme un entrepreneur et non pas comme un ouvrier.

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Ce n'est pas nécessairement parce que l'appelant devait fournir lui-même ses échafaudages et le mortier que cette stipulation du contrat l'exclut de la catégorie des ouvriers; mais c'est parce que dans l'exécution du contrat, il a engagé des ouvriers qu'il a choisis, dont il devait le temps et qu'il a payés.

C'est bien ainsi que le contrat devait être exécuté de la part de l'appelant, et c'est ainsi que les deux parties contractantes l'ont compris.

A raison de cela, l'appelant agissait comme entrepreneur indépendant; il ne réclame pas le loyer de son ouvrage, il réclame le prix fixe de son contrat. Il ne peut être considéré comme un ouvrier au sens de l'article 121 de la *Loi de Faillite*. Il n'a donc pas droit à la priorité qui y est mentionnée, et je crois que les jugements dans cet appel doivent être confirmés.

L'appel doit être rejeté avec dépens.

KERWIN J.:—The appellant David Guillot filed with the trustees in bankruptcy of Eléodore Rousseau a claim to be paid $1,018.20 "thirdly" in priority in the distribution of the bankrupt's property under section 121 of the *Bankruptcy Act*. No question arises as to the amount or that the appellant is entitled to rank as an ordinary creditor but the trustees disallowed the claim for priority, a judge of the Superior Court in Quebec sitting in bankruptcy affirmed such disallowance, and the Court of King's Bench (Appeal Side), by a majority, dismissed an appeal from the order of the Superior Court. By leave granted under section 174 of the *Bankruptcy Act*, Guillot now appeals to this Court.

The judge of first instance and the majority of the Court of King's Bench proceeded, in part at least, upon a reference to the provisions of the Quebec Civil Code, articles 1684 et seq., and particularly 1696. This is not a correct approach to section 121 of the *Bankruptcy Act*, which is a law of general application throughout the Dominion. The relevant part thereof reads:—

> Subject to the provisions of section one hundred and twenty-six as to rent, in the distribution of the property of the bankrupt or authorized assignor, there shall be paid, in the following order of priority:—
>
> * * *

Thirdly, all indebtedness of the bankrupt or authorized assignor under any Workmen's Compensation Act and all wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman, in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment:

Once a person falls within the enumeration "clerk, servant, travelling salesman, labourer or workman," it would be difficult to exclude the remuneration to which he was entitled from the preceding words "wages, salaries, commissions or compensation."

But there is an additional feature to be considered,—that is as to whether such remuneration was "in respect of services rendered to the bankrupt or assignor." Now it appears to have been generally assumed in the cases in the provincial courts to which our attention was drawn that it was not necessary that the workman should have rendered services exclusively to the bankrupt, and with that view I agree. Cases may be envisaged where he would be an independent contractor and still fall within the section and I am, therefore, unable to agree with certain expressions used in some of the decisions indicating that it was considered that the element of control must be present. In contracts for certain jobs to be done by workmen, the employer might, or might not, have the right of supervision over the manner of execution and for this reason it should not weigh against the appellant that the sheet of note-paper on which the first contract was written had a letter-head indicating that he was an "entrepreneur-maçon".

However, the services must, in the main, consist of personal work or labour on the part of the claimant but they will not lose that character merely because a claimant, in order to perform the labour, requires the use of the tools of his trade or the assistance of a helper. Just what would be included in tools may be a question of some nicety in particular circumstances. In the present case the use by Guillot of his own scaffolding and the ordinary bricklayers' tools could properly be included but the fact that he had the assistance of his son and several other workmen, all of whom were hired and paid by him, is fatal to his claim.

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Kerwin J.

Mr. Hudon relied upon two decisions, one of Chief Judge Bacon in *Ex parte Allsop* (1) and the other of Cave J. in *Ex parte Hollyoak, Re Field* (2). While the first may fall within the rules mentioned above, it is difficult to say the same of the latter although the short report of the case that appears in the Weekly Reporter and in Morrell, may omit something of importance. In any event, if these decisions are at variance with what has been stated, they should not be considered as authoritative in Canada.

Although a question was raised from the bench as to whether the appellant's claim could be divided so as to show the amount paid by Guillot to his helpers, leaving, presumably the balance of the claim to represent his own labour, no endeavour was made by counsel for either party to do this. Upon an examination of the record, I gather it was felt that this would be impossible since the appellant had contributed to the Workmen's Compensation Commission and to the Joint Committee of Construction in relation to the work done for the bankrupt.

The appeal should be dismissed with costs.

The judgment of Hudson and Rand JJ. was delivered by

RAND J.:—The question in this appeal is whether the appellant is a workman within section 121 of the *Bankruptcy Act,* and entitled to be preferred as for compensation for services rendered to the bankrupt. The material part of the section reads as follows:

121. (1) Subject to the provisions of section one hundred and twenty-six as to rent, in the distribution of the property of the bankrupt or authorized assignor, there shall be paid, in the following order of priority:—

First, * * *

Secondly, * * *

Thirdly, all indebtedness of the bankrupt or authorized assignor under any Workman's Compensation Act and all wages, salaries, commission or *compensation* of any clerk, servant, travelling salesman, labourer *or workman,* in respect of services *rendered to the bankrupt* or assignor during three months before the date of the receiving order or assignment: Provided that any commissions earned more than three months before the date of a receiving order or assignment, but not payable (by the terms of the creditor's agreement) until the shipment, delivery or payment of the good sold, shall be deemed to have been

(1) (1875) 32 L.T. 433.

(2) (1886) 35 W.R. 396; 4 Morre 63.

earned within three months of the date of the receiving order or assignment, when the said good have been shipped, delivered or paid for within three months of the receiving order or assignment; and provided, moreover, that any advances made on account of such commissions shall be deemed to have been legally paid on account thereof.

The bankrupt was a general contractor who entered into an engagement with the appellant in the following terms:

> Le soussigné s'engage à faire le lambrissage de la série de maisons de St-Pascal pour le compte de monsieur Rousseau.
>
> La brique sera fournie par le contracteur général, monsieur Rousseau, ainsi que les clous.
>
> La brique devra être déposée près des maisons.
>
> Le papier devra être posé d'avance pour ne pas retarder les briquetiers.
>
> Le mortier, les échafaudages seront fournis par le briquetier pour la somme de (cent quatre-vingt dollars) $180.00 pour les petites et deux cent cinq dollars) $205.00 pour les plus grandes.

(This is in error as to the mortar: it was supplied by Rousseau.)

> Le contracteur monsieur Rousseau devra donner un estimé de 90% à toutes les semaines.

Greater details of the work to be done were set forth in an exhibit to the proof of claim:

> (*a*) L'ouvrage en brique à la maison de Yvon Lepage, située près du Chemin Ste-Foye, à Québec, où j'ai posé de la brique à raison de $22.00 du mille, pour une somme globale de $607.20;
>
> (*b*) L'ouvrage en brique à une maison située sur la rue Vitré, et construite sur le lot 114, pour lequel il m'est dû une somme de $182.00;
>
> (*c*) L'ouvrage en brique à une maison située sur la rue Vitré, lot 115, pour lequel il m'est dû un montant de $207.00;
>
> (*d*) La construction d'une cheminée à une maison vendue à un monsieur Marcoux, pour laquelle il m'est dû un montant de $22.00, soit une somme globale de $1,018.20;
>
> Cette somme de $1,018.20 représentant la rémunération comme briqueteur-maçon, le failli m'ayant garanti un montant de $200.00 pour la première maison de la rue Vitré et $207.00 pour la seconde.

The appellant holds himself out, as his business letterhead indicates, as an entrepreneur, although he is also a working mason. The work done is seen to have been the labour for the brick work including the scaffolding for four houses under construction by the bankrupt. It was actually performed by the appellant assisted by three or four helpers. They were his employees exclusively and were paid in full by him; his claim includes their wages earned on the work and the balance represents the work done by him personally and the overall profit. There is

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Rand J.

nothing to indicate that his personal labour was at all bargained for: the entire work could have been done by others.

Mr. Hudon assimilated the case to that of a mechanic's lien with subrogation to the appellant of claims which his employees might have asserted; but this conception disregards the plain language of the statute. The claim, in order to obtain a priority, must be by "a workman" in respect of "services rendered to the bankrupt." "Services rendered" must be distinguished from work or labour furnished; and the enumeration of the persons shows the class and the nature of the service intended to be benefited.

The appellant in form and substance is a sub-contractor, and the logical conclusion of the contention made for him is that for the purposes of section 121 there cannot be a sub-contract for labour only. With that I am unable to agree.

Mr. Hudon relied on *Ex. parte Hollyoak; In re. Field*, (1). But that was a case of group production by persons dismissible by the bankrupt who divided total earnings between them, but who chose one of their number to represent them for all purposes vis à vis the employer. The representative was, in effect, treated as a trustee for the others. But the direct relations between the individual members of the group and the employer and between them and their representative distinguish the facts from those here.

I think the judgment below is sound, and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Guy Hudon* and *Ives Prévost.*

Solicitors for the respondents: *Power, Bienvenue, Lesage & Turgeon* and *Dumoulin & Rémillard*

(1) (1886) 35 W.R. 396.

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MAURICE POLLACK LIMITÉE (DEFENDANT) ..... APPELLANT; *Feb. 19 *Mar. 29

AND

LE COMITÉ PARITAIRE DU COMMERCE DE DÉTAIL À QUÉBEC (PLAINTIFF) ..... RESPONDENT.

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

Employer and employees—Collective Agreement Act—Decree relating to retail trade—Employees to receive regular wages if store closed on certain days—Employees working voluntarily on such days to be paid double wages—Store closed to the public by owner "to respect his religion"—Whether working employees entitled to double time—Collective Agreement Act, R.S.Q., 1941, c.163.

A decree relating to the retail trade in the city of Quebec, made under the authority of the *Collective Agreement Act*, provides that "Any regular employee shall be paid for the days when stores are closed: New Year's Day, the day after New Year's Day, Epiphany, Good Friday till 12.00 (noon), Ascension Day, St. John the Baptist's Day, Labour Day, All Saints Day, Immaculate Conception Day, Christmas Day and any other day the employer keeps his establishment closed to respect his religion" (section 3, par. 2(e)); and that "no employer shall compel his employees to work on Sundays and on the days mentioned in subsection "e" of the present section and all work performed on these days shall be paid double time with respect to the regular wages of the said employee." (section 3, par. 2 (m)). The appellant corporation, carrying on business as a retail merchant, closed its doors to the public on three days by way of observance of the Jewish New Year and Day of Atonement. Notice was also given that any employee desiring to work voluntarily would be at liberty to do so. All employees, whether working or not, were paid the regular daily rates. On behalf of those who did work, the respondent Comité Paritaire claimed payment of double wages in addition to the regular wages already paid, together with certain percentages provided by the Act. The trial judge allowed one-half the amount claimed for wages, as the regular wages had already been paid; and that judgment was affirmed by a majority of the appellate court.

Held, reversing the judgment appealed from, that the obligation of the appellant company to pay double time must be confined to work performed on Sundays and on the days specifically set out in clause (e). Employees will receive their regular wages on days "that employer keeps his establishment closed to respect his religion," but clause (m) does not then apply.

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

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MAURICE POLLACK LTD. v. COMITÉ PARITAIRE DU COMMERCE DE DÉTAIL À QUÉBEC

Rinfret C.J.

Per The Chief Justice and Taschereau J.:—The appellant corporation was at full liberty to open or close its premises on these three days. They were working days which were converted into holidays by the sole decision of the appellant, and that makes them distinct from the days mentioned in (e), which are holidays binding upon all employers without question of race or religion.—*Quœre* whether a commercial corporation can have a religion.

Per Hudson and Rand JJ.:—Clause (e) is limited in its application to a shop that is closed generally as to employees on the days specified. The decree does not purport to require a closure either towards the public or the employees; but, once the shop is closed, the right to wages arises. The day of optional closing, which becomes a day mentioned in (e) only if it becomes generally a closed day, is by its nature excluded from (m) except in respect of special employees. In this case, the shop was admittedly open generally to the employees. As an open shop, it was not mentioned or enumerated in (e) which, in the optional case, means, to come under its operative effect. Clause (m) has, therefore, no application to it and the ordinary terms of employment must apply.

APPEAL by leave of appeal granted by this Court, from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Sévigny C.J. and maintaining the respondent's action.

L.-P. Pigeon K.C. and *Sydney Lazarovitz* for the appellant.

W. Bhérer K.C. for the respondent.

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

THE CHIEF JUSTICE: En vertu du décret relatif au commerce en détail dans la cité de Québec, (n° 3265) édicté par Arrêté-en-Conseil le 5 septembre 1940 et approuvé par le Lieutenant-Gouverneur le 6 septembre 1940, il a été stipulé (article III) que la durée de la semaine de travail, dans les établissements régis par le décret, est de quarante-neuf heures et quinze minutes, réparties sur les lundi, mardi, mercredi, jeudi et vendredi, de huit heures a.m. à six heures p.m., et les samedis et veilles de fêtes, de huit heures a.m. à dix heures p.m., sauf le droit pour tout employé à une heure et quinze minutes pour prendre son repas.

Suivant le sous-paragraphe "e" du paragraphe 2 de cet article (III),

tout employé régulier sera rémunéré pour les jours suivants où les magasins seront fermés; le premier de l'An, le lendemain du premier de l'An, l'Epiphanie, le Vendredi-Saint jusqu'à midi, le jour de l'Ascension, la Saint-Jean-Baptiste, la fête du Travail, la Toussaint, l'Immaculée-Conception, le jour de Noël et tout autre jour où l'employeur tient son établissement fermé pour respecter sa religion.

Puis, en vertu du sous-paragraphe "m" de ce même paragraphe 2:

l'employeur ne pourra obliger ses employés à travailler les dimanches et durant les jours énumérés au paragraphe "e" du présent article et tout travail exécuté pendant ces jours sera rémunéré au taux double du salaire régulier de tel employé.

Il y a certaines exceptions à cette prescription, mais elles ne concernent pas la cause et il n'est pas nécessaire de les mentionner ici.

Le Comité Paritaire du Commerce de Détail à Québec, l'intimé, invoquant ce décret n° 3265 et ses amendements, ainsi que son devoir de surveiller l'application de ce décret, a poursuivi l'appelante et a conclu à ce qu'elle soit condamnée à lui payer la somme de $842.73, en alléguant que l'appelante exploitait dans la cité de Québec un commerce assujetti à ce décret, et que les 30 septembre, 1er et 9 octobre 1943, elle avait fermé son établissement au public pour respecter la religion hébraïque à l'occasion des fêtes de la nouvelle année hébraïque.

A raison de cette fermeture, suivant les prétentions de l'intimé, l'appelante était tenue de payer à ses employés leur salaire régulier pour les trois jours où son établissement a été ainsi fermé, aux termes du paragraphe "e" ci-haut reproduit et elle ne pouvait obliger ses employés à travailler ces jours-là à son établissement sans leur payer, en plus de leur salaire régulier, une rémunération additionnelle, conformément aux prescriptions du paragraphe "m".

L'appelante aurait requis certains de ses employés de travailler ces jours-là et elle ne leur aurait pas payé la rémunération additionnelle en question; c'est pourquoi, d'après l'intimé, elle devrait les montants mentionnés à une liste annexée à la déclaration, et qui forment un total de $669.36.

Cette somme, ajoutée à celle que l'intimé a le droit d'exiger aux termes du décret 2296 publié dans la Gazette Officielle du 28 août 1943, soit $139.87, à titre de dommages

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liquidés, conformément au paragraphe "c" de l'article 20 de la *Loi de la Convention Collective,* forme un total de $842.73, maintenant réclamé de l'appelante.

La Cour Supérieure a maintenu les prétentions de l'intimé, sauf qu'elle a fait remarquer que sa réclamation comportait une rémunération double pour les employés qui ont travaillé ces jours-là, en plus de leur salaire régulier qui leur avait déjà été payé. La Cour a donc accordé seulement la moitié du montant réclamé. Cette moitié, plus les dommages liquidés par le décret, ne s'élève qu'à un total de $421.37, et jugement est intervenu pour cette somme contre l'appelante.

La Cour du Banc du Roi, en appel, a confirmé ce jugement par une majorité de trois contre deux, les honorables juges Saint-Germain et Prévost se déclarant dissidents.

La cause est maintenant devant nous par suite d'une permission spéciale d'appeler, qui était nécessaire, vu que le montant en jeu n'atteignait pas la somme requise pour l'exercice de la juridiction de la Cour Suprême du Canada.

Comme elle l'avait fait devant les tribunaux dont l'appel est porté devant cette Cour l'appelante a proposé, entre autres, trois moyens qui, d'aprés elle, devaient justifier cette Cour d'infirmer les jugements qui ont été rendus par la Cour Supérieure et la Cour du Banc du Roi.

1er moyen: Le jour en question, l'appelante n'était pas tenue de fermer son établissement et, par conséquent, rien ne l'empêchait de fermer au public seulement et non à ses employés.

2ième moyen: Le texte du décret ne concerne qu'un employeur tenant son établissement fermé pour respecter sa religion. L'appelante, étant une corporation, n'a pas de religion.

3ième moyen: L'obligation de payer temps double ne s'applique qu'aux jours énumérés au sous-paragraphe "e", c'est-à-dire à ceux-là seuls qui sont nommés un à un.

Le premier moyen de l'appelante me paraît justifié. Elle n'était pas tenue de "respecter sa religion", si toutefois l'on peut dire qu'une corporation peut en avoir une. La fermeture de son établissement, pour ce motif, était indiscutablement facultative.

Or, il est admis que les 30 septembre, 1er et 9 octobre 1943 étaient des jours ouvrables.

Comme l'a fait remarquer M. le juge Prévost:

ils ne sont devenus des jours de chômage que par la volonté de l'appelante, ce qui les distingue de façon manifeste des jours énumérés au paragraphe "e" de l'article (III) du décret, qui eux sont des jours de congé obligatoires pour tous les patrons, sans distinction de race ou de religion.

L'appelante avait donc pleine liberté de laisser son établissement ouvert ce jour-là ou de le fermer. Pour M. le juge Prévost, ce motif seul suffisait au maintien de l'appel. Le même juge était également d'avis que, par suite du deuxième moyen, l'action aurait dû être rejetée parce que la condition fondamentale et essentielle à l'application de ce texte, c'est que l'employeur tienne son établissement fermé " pour respecter sa religion ".

L'appelante étant une corporation commerciale, ne peut professer une religion ni lui appartenir. Il fut décidé dans ce sens, dans un jugement de l'honorable juge Robidoux dans la cause des *Syndics de la Paroisse St-Paul de Montréal* v. *La Compagnie des Terrains de la Banlieue de Montréal* (1), qui fut unanimement confirmé par la Cour du Banc du Roi le 14 juin, 1905. Voir aussi l'arrêt de la Cour du Banc du Roi re: *Riverside Mfg. Co. Ltd.*, v. *La Fabrique de St-François d'Assise* (2).

Mais ce qui est décisif, c'est que, en vertu du sous-paragraphe "e", l'obligation de payer temps double ne s'applique qu'aux dimanches et aux jours désignés que nous avons déjà mentionnés plus haut.

C'est là le troisième moyen de l'appelante et celui sur lequel les deux juges dissidents en Cour du Banc du Roi se sont accordés.

A mon humble avis, c'est là la seule interprétation dont le sous-paragraphe "e" soit susceptible. Il y a dans ce sous-paragraphe, d'abord, l'énumération de certains jours de l'année. Ces jours-là " les magasins seront fermés ". Les jours où l'employeur tient son établissement fermé pour respecter sa religion ne sont pas énumérés. Ces jours-là, les patrons ne sont pas tenus de fermer leurs magasins et, en plus, ce sont des jours inconnus du décret, parce qu'il

(1) (1905) Q.R. 28 S.C. 493. (2) Q.R. [1944] K.B. 153.

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était impossible de prévoir à l'avance quels jours l'employeur jugerait à propos de fermer son établissement " pour respecter sa religion ".

Ces jours-là, les ouvriers de la même profession sont tous au travail dans les établissements des concurrents de l'employeur. Ce n'est pas le décret qui dicte à l'employeur de fermer ces jours-là. C'est sa religion et cela ne relève que de sa conscience. Ses employés ne peuvent compter sur un chômage ces jours-là, parce qu'il est facultatif à l'employeur de décider de fermer son établissement ou de le laisser ouvert. Tels jours ne pouvaient donc être énumérés dans le sous-paragraphe "e" et ils ne le sont pas.

N'étant pas " énumérés " dans le sous-paragraphe "e", ils ne tombent pas sous le coup des prescriptions du sous-paragraphe "m", qui seul stipule que

tout travail exécuté durant ces jours sera rémunéré au taux double du salaire régulier de tel employé.

Pour ces raisons, qui sont celles des juges dissidents dans la Cour du Banc du Roi, en appel, l'action de l'intimé aurait dû être rejetée, et je suis donc d'avis que l'appel doit être maintenu avec dépens dans toutes les Cours.

KERWIN J.: The appellant, Maurice Pollack Limitée, is a corporation carrying on business as a retail merchant in the city of Quebec and as an employer is subject to the provisions of the decree relating to the retail trade in that city made by the Lieutenant-Governor in Council of the province pursuant to the provisions of the *Collective Agreement Act,* now chapter 163 of the Revised Statutes of Quebec, 1941. By section 3, paragraph (*e*) of the decree:—

Any regular employee shall be paid or the days when stores are closed: New Year's Day, the day after New Year's Day Epiphany, Good-Friday till 12.00 (noon), Ascension Day, St. John the Baptist's Day, Labour Day, All Saints Day, Immaculate Conception Day, Christmas Day and any other day the employer keeps his establishment closed to respect his religion.

By paragraph (*m*):—

No employer shall compel his employees to work on Sundays and on the days mentioned in subsection (e) of the present section and all work performed on these days shall be paid double time with respect to the regular wages of the said employee.

So far as relevant, the French version of this paragraph states:—

> L'employeur ne pourra obliger ses employés à travailler les dimanches et durant les jours énumérés au paragraphe "e" du présent article * * *

On September 30th, October 1st and October 9th, 1943, the appellant published notices in various newspapers to the effect that its store would be closed to the public because those days were, as to the first two, the Hebrew New Year, and as to the latter, the Hebrew Day of Atonement. Notices to its employees were also posted in its establishment stating that the store would be closed to the public, that all employees would be paid as usual but that a specified entrance would be open to such employees who might have work to do and who would be willing to perform it voluntarily. All employees were paid their regular wages for those days whether they worked or not. On behalf of those who did work, the respondent Comité claimed payment of double wages in addition to the regular wages already paid, together with certain percentages provided for by the *Collective Agreement Act*. The Superior Court allowed one-half the amount claimed on the basis of the appellant's employees who worked on September 30th, October 1st and October 9th being entitled to double wages, —but not in addition to the ordinary wages already paid. This judgment was affirmed by the Court of King's Bench (Appeal Side).

I find it unnecessary to canvass all the grounds of appeal urged by the appellant because I am satisfied that on one which is relied upon by the two dissenting judges in the Court of King's Bench the appeal should be allowed. In paragraph (*e*) certain days are enumerated "when stores are closed" and it is provided that for them "and any other day the employer keeps his establishment closed to respect his religion" any regular employee shall be paid. The English version of paragraph (*m*) provides that no employer shall compel his employees to work on Sundays and on the days "mentioned" in (*e*) and that "all work performed on those days shall be paid double time." Whatever one might think of the use of the word "mentioned", the English version must, of course, be read in conjunction with the French version where the corresponding word is

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"énumérés". So read the obligation to pay double time must be confined to work performed on Sundays and on the days specifically set out in paragraph (*e*).

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

HUDSON J.: I am of the opinion that this appeal should be allowed and the action dismissed with costs throughout, for the reasons given by my brothers Kerwin and Rand.

RAND J.: By a decree relating to the retail trade in the city of Quebec, made under the authority of the *Collective Agreement Act,* R.S.Q. (1941) chap. 163, it is provided:—

> (*e*) Any regular employee shall be paid for the days when stores are closed: New Year's Day, the day after New Year's Day, Epiphany, Good-Friday till 12.00 (noon), Ascension Day, St. John the Baptist's Day, Labour Day, All Saints Day, Immaculate Conception Day, Christmas Day and any other day the employer keeps his establishment closed to respect his religion
>
> * * *
>
> (*m*) No employer shall compel his employees to work on Sundays and on the days mentioned in subsection (*e*) of the present section and all work performed on these days shall be paid double time with respect to the regular wages of the said employee * * *

The appellant is a corporation, and on three days, September 30, October 1 and October 9, 1943 its store was closed to the public by way of observance of the Jewish New Year and Day of Atonement. A notice was given that any employee desiring to work voluntarily on those days would be at liberty to do so. All of the employees, whether working or not, were paid the regular daily rates, but certain of them who did work have been awarded double wages, and the question is whether that is required by the clauses quoted.

Clause (*e*) is limited in its application to a shop that is closed on the days specified. Closed in what respect? Having regard to the object of the decree, which is to prescribe regulations to govern the relations between employers and employees, I should say it means closed gene-

rally as to employees. The decree does not purport to require a closure either towards the public or the employees: and its provision for double wages is the only pressure laid upon an employer to induce him to close. Once, however, that condition is present the right to wages arises. The day in that event becomes a holiday with pay.

On the other hand, clause (*m*) assumes a shop that is open generally or specially to employees. If generally, then the case cannot be within (*e*) because a shop cannot be generally closed and open at the same time. If specially, then the case remains in (*e*) and comes under the requirement of (*m*). In the latter case, there can be no compulsion to work, but double wages is the reward to the willing employee. In the former no compulsion is available to the employer in relation to the days mentioned in (*e*), but it is free to all employees to insist on working and at double rates.

But the day of optional closing, which becomes a day mentioned in (*e*) only if it becomes generally a closed day, is by its nature excluded from (*m*) except in respect of special employees. Here, the shop was admittedly open generally to the employees. As an open shop, it was not mentioned or enumerated in (*e*) which, in the optional case, means, to come under its operative effect. Clause (*m*) has, therefore, no application to it and the ordinary terms of employment must apply.

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

Appeal allowed and action dismissed, with costs throughout.

Solicitors for the appellant:
Lazarovitz & Chaloult.

Solicitors for the respondent:
Bhérer, Beaudet & Fortier.

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CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

JOSEPH HARRIS (PLAINTIFF) ..... RESPONDENT.

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

Railway—Carrier—Contract—Negligence—Shipment of horses—Shorn of their tails when delivered at destination—Claim for damages by shipper—Live Stock Special Contract—Construction of its terms—Liability of railway company—Negligence of railway company or shipper—Exemption of railway company from liability—"Carrier's risk" or "Owner's risk"—Clause in contract that shipper should provide attendant—Whether failure to do so caused or contributed to damage—Burden of proof as to when, how and by whom mutilation took place—Whether onus is on the railway company or the shipper—Articles 1672, 1675 and 1681 C.C.—Railway Act, R.S.C., 1927, c. 170, ss. 312, 348.

The respondent, a horse dealer doing business in Montreal, shipped eighteen horses over the appellant railway from points in Saskatchewan, the shipment being consigned to the Bodnoff Horse Exchange at Montreal, under a contract with the appellant company, known as a "Live Stock Special Contract", approved by the Board of Transport Commissioners for Canada under section 348 of the *Railway Act*. At the time of shipment, the horses were in good condition, but when they reached their destination and were delivered to the respondent, sixteen of them were mutilated and disfigured by being shorn of their tails. The respondent claimed that delivery in such a condition did not constitute valid delivery under the terms of the contract and that the disfiguration had caused damages amounting to $886.79. The appellant railway contended that the shipment was carried in conformity with the conditions of the contract signed by the respondent both as shipper and as attendant in charge of the horses, that the loss did not arise directly from the performance by the appellant of its contract of carriage and that whatever damage was caused resulted from the respondent's failure to provide an attendant to accompany and care for the horses en route as required by section 5 of the contract. The trial judge maintained the respondent's action and assessed the damages at $200; the judgment was affirmed by the appellate court and the appellant railway appealed to this Court. Leave to appeal was granted by the appellate court.

Held, The Chief Justice and Taschereau J. dissenting, that this appeal should be dismissed and the respondent's action maintained.—It was not the intention of the contract that the shipper or his representative should at all times be present with the horses to act as a guard, but only at such times as it might be expected that the horses would require care and attention. It was common ground that neither the

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

respondent, nor anyone on his behalf, accompanied the shipment. There is no liability, however, upon the respondent on that account, as there has been no evidence that failure to provide an attendant caused or contributed to the loss or damage suffered by the horses.—As a result of the terms of the contract and upon a proper construction of the relevant provisions of the freight classification referred to in the contract and of the tariff applicable to the shipment, the onus of establishing the cause of the loss or damage was upon the appellant railway and the latter has failed to adduce sufficient evidence to satisfy such onus.

Per The Chief Justice and Taschereau J. (dissenting)—The appellant railway should not be held responsible for the loss or damage suffered by the respondent. The Special Contract is valid and binding and its terms and conditions are determinative of the issue. One of its relevant provisions is that the live stock to be carried thereunder was received subject to the Classification and Tariffs in effect on the date of its issue, under which the rates and weights may be either at "carrier's risk", subject to the terms and conditions of the bill of lading issued by the originating carrier or at "owner's risk" subject to the terms and conditions of the Special Contract signed by the shipper or his agent. The shipper of live stock may thus choose how and to what extent he wishes to be protected by the carrier against loss or damage which may occur to his shipment in transit. In the present case, the respondent could have had the carriage performed at carrier's risk, through the terms and conditions of a standard bill of lading and by paying double the rate he paid, but he executed the Special Contract, whereby he agreed to ship at his own risk, upon whose terms and conditions the carrier's obligations and its liability were restricted and under which the rate applicable was lower. The shipment was thus carried at owner's risk and the carrier was relieved from liability for damage even if resulting from its negligence and that of its servants, such conclusion not being inconsistent with the terms and conditions of the Special Contract. Therefore, the respondent agreed to assume the risk of loss or damage to his horses during the journey, unless he could establish that such loss or damage was due to the non-fulfilment of the appellant's obligations under the contract. The respondent has failed to do so or to prove any negligence of the appellant railway, which was not even alleged. Moreover, the damage, in any event, was attributable to the respondent's failure to accompany, attend to and care for his shipment during the journey, as he was bound to do under the contract.—By force of article 1681 C.C., the special regulations made in accordance with the *Railway Act* must be recognized and applied in preference to article 1675 C.C., which is thereby superseded, and, therefore, the Special Contract in this case and the "owner's risk" clause forming part of it clearly eliminated the presumption created by article 1675 C.C.

Per Hudson J.:—The Special Contract itself does not contain any direct reference to the shipment being made at "owner's risk", as contended by the railway appellant; but it is expressed to be subject to the classification and tariff in effect on the date of the issue of the bill of lading. Upon a proper analysis of the provisions of the contract, the classification and the tariff, the shipper accepted the terms of

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the special live stock contract and nothing else. None of the causes of loss, other than failure to provide attendant, from which the carrier may be relieved from liability under section 6 of the contract, apply to the facts of this case, and the *Railway Act* does not give the appellant railway any immunity beyond that expressed in the contract, which was in a form approved of by the Board of Transport Commissioners.

Per Kellock J.:—The result of the various provisions of the contract, the classification and the tariff is that the shipment was carried "at owner's risk subject to the terms and conditions of the special live stock contract", under which the appellant railway agreed to carry the shipment to destination. The terms "owner's risk" cannot be construed here, as contended by the appellant railway, as throwing upon the respondent all risks including risk of loss or damage from negligence of the carrier, except wilful neglect or misconduct of the carrier. More particularly, section 6 of the contract presupposes that the appellant is liable as common carrier with some additional exceptions to that liability. Delivery of the horses in their mutilated condition was not a compliance with this underlying obligation resting upon the appellant, and it lay upon the latter, who contended that the loss fell within either one of two of those exceptions, namely "the act or default of the shipper" or "causes beyond the carrier's control", to adduce evidence bringing the case within the one or other of those exceptions. The appellant adduced no evidence to enable a finding to be made as to how the loss occurred, and it is insufficient to prove something equally consistent with the loss having been due to the respondent's default or to the default of the appellant railway.

Per Estey J.:—The provisions of the Special Contract were approved by the Board of Transport Commissioners pursuant to section 348 of the *Railway Act*. The phrase "its liability" as used in that section refers to the liability of the carrier at common law and under the Act, and, except as this liability may be impaired, restricted or limited under a contract, the liability of the carrier remains as determined by the common and statute law. In the determination of the rights of the parties under the present contract, the meaning to be ascribed to the phrase "owner's risk" is not that the entire risk is assumed by the shipper except only as that risk may be by the contract imposed upon the carrier. Such meaning would appear contrary to the plain intent of section 348 of the statute, and moreover, contrary to the form and phraseology of the subsequent sections of the contract itself. Sections 1, 4, 5, 6 and 9 of the contract deal with limitation of liability and liability for negligence on the part of the carrier, assumption of risk by the shipper and a list of specific causes from which if loss or damage result the carrier is liable. The "terms and conditions" of these sections are somewhat "impairing, restricting or limiting its (carrier's) liability" as contemplated by section 348, but they are not written on the basis that, if these conditions were not here, all the risk would be upon the shipper nor that the carrier is liable for only "wilful neglect or misconduct or unreasonable delay". A study of the contract, classification and the statute indicates that the Board of Transport Commissioners intended that the phrase "owner's risk" as used in the contract was, as

expressed in rule 25 of the classification, "intended to cover risks necessarily incidental to transportation, but no such limitation * * * shall relieve the carrier from liability * * * from any negligence or omissions of the company, its agents or employees". The injury suffered in this case in no sense can be regarded as a risk "necessarily incidental to transportation." Such loss or damage was caused by the deliberate act of a third person and no evidence has been adduced on the part of the carrier to indicate that it was covered by the provisions of the contract nor to establish on behalf of the appellant that it comes within any of the exceptions from liability at common law.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Tyndale J. and maintaining the respondent's action.—Damages awarded were for an amount of $200, but leave to appeal to this Court was granted by the appellate court.

Lionel Côté K.C. and *C. Perrault* for the appellant.

J. A. Mann K.C. and *K. H. Brown* for the respondent.

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

THE CHIEF JUSTICE:—The respondent is a horse dealer at Montreal. On March 18, 1941, he shipped by rail from North Battleford and Maymont, Saskatchewan, 13 and 5 horses from each point respectively, the shipment being consigned to the Bodnoff Horse Exchange at Montreal under a contract with the appellant, approved by the Board of Transport Commissioners for Canada and known as a "Live Stock Special Contract".

At the time of shipment the horses were in good condition and of normal appearance, but when they reached their destination 16 of the 18 horses were mutilated and disfigured on account of the loss of their tails in transit. The respondent claimed that delivery in such a condition did not constitute valid delivery under the terms and conditions of the Special Contract and that the disfiguration had caused them damages amounting to $886.79.

To this action the appellant pleaded that the shipment was carried in conformity with the terms and conditions of the Live Stock Contract signed by the respondent, both

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as shipper and as attendant in charge of the horses, and that whatever damage was caused resulted from the respondent's failure and neglect to properly attend to and care for the horses en route and that the loss did not arise directly from the performance by the appellant of its contract of carriage.

The judgment of the Superior Court rejected the appellant's contention that the juridical basis of the relationship between the parties was to be found exclusively in the express terms of the Live Stock Contract as supplemented by the "Owner's risk" provision of both the Tariff and Classification incorporated therein by reference, and that this provision had the effect of placing the burden of proof upon the respondent who could not succeed without allegation and proof of negligence on the appellant's part.

Briefly the learned trial judge held that the respondent apparently had based his action upon article 1675 of the Civil Code, because he had not alleged negligence, but that he had invoked the Live Stock Contract and all the conditions therein contained and implied; that the terms of the Live Stock Contract alone governed the issue and nothing else, and that the "Owner's risk" clause of the Classification and Tariff was without effect. From some indirect evidence that was made and on the balance of probabilities, the learned trial judge inferred that the missing tails were removed from the horses while they were in the car and while the car was stationary at some undetermined point. He further inferred, as the most reasonably probable conclusion, that the removal of the tails was performed by some unauthorized person or persons who gained access to the car while the latter was in the appellant's care, and this because the slats of the car were sufficiently wide apart to allow the operation in question to be performed presumably from outside the car. Moreover, the learned judge exonerated the respondent from any liability for his failure to accompany and care for the shipment in transit and, having referred to the appellant's obligation to provide suitable equipment under sec. 4 (2) of the Live Stock Contract, he concluded from the above inferences that the loss was attributable

to the appellant's failure to provide suitable equipment and to prevent the access of unauthorized persons to the car, which failure, he held, constituted a breach of the contract as invoked by the respondent.

The damages were assessed at $200.00 at the rate of $12.50 per horse for the 16 horses affected. The appellant does not dispute the quantum of the damages as fixed, its appeal being restricted to the question of liability.

On appeal to the Court of King's Bench (appeal side) the judgment of the Superior Court was affirmed with costs. Walsh and St. Jacques JJ. agreed with the finding of the learned trial judge that there was a breach of the contract as alleged by the respondent. Francoeur J. thought the presumption of article 1675 of the Civil Code governed and that the Live Stock Contract only restricted the liability as to the damages to be paid and he found that there was a breach of the contract. Marchand J. concurred with Bissonnette J. who rendered the judgment for the Court and gave very elaborate reasons on the case. Bissonnette J. disagreed with the inference made by the learned trial judge that the trimming of the tails was done while the horses were in the car by someone operating from outside the car, through the slats, because he thought the presumptions which would lead to that conclusion were not sufficiently weighty, precise and consistent to permit such an inference. He expressed the view that, under the provisions of the *Railway Act*, the appellant could restrict its liability contrary to article 1675 of the Civil Code, but he found that the provisions of the Live Stock Contract, as supplemented by the terms and conditions of the Classification and Tariff, have not destroyed the presumption created by that article of the Code and that the appellant had the burden of proof. He agreed that under the contract the shipper would have to bear the damage to his live stock resulting from his neglect to care for the shipment, but that, as to any other damage not related to the duties of the attendant on board the train, the carrier is presumed liable and he has the burden of showing that such damage did not result from his fault or that of his employees. Further, he said that the evidence was

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such that he could not draw any conclusion as to how and under what circumstances the damage to the respondent's horses was caused and that, in order to invoke its non-liability clause and destroy the presumption of liability created by article 1675 of the Civil Code, the appellant had to adduce sufficient evidence on that point, which it had failed to do, and, therefore, it had to bear the loss.

The appellant is subject, for the carriage of traffic, to the provisions of the Dominion *Railway Act*. Moreover, the Civil Code of the province of Quebec provides that:—

> Art. 1681. The conveyance of persons and things by railway is subject to certain special rules provided in the Federal and Provincial Acts respecting railways.

In my view, to determine the liability in the present instance, consideration must be given to the special rules provided in the Federal Acts with respect to railways.

Under section 348 of the *Railway Act*, a contract impairing, restricting or limiting the liability of the railway company in respect of the carriage of any traffic must be authorized or approved by order or regulation of the Board of Transport. In this case the appellant had such authorization, or approval, for its Live Stock Special Contract. Under the circumstances, this contract was valid and binding in conformity with the decision of the Privy Council in the case of *Grand Trunk Railway Co.* v. *Robinson* (1). (See also the decision of this Court in *Ludditt* v. *Ginger Coote Airways, Ltd.* (2).

I think that the terms and conditions of the Live Stock Special Contract executed by the parties are determinative of the issue. I may add, moreover, that under the *Railway Act* (sections 52 and 348) the Board is the sole and exclusive judge of the reasonableness of the terms and conditions contained in that contract. One of the relevant provisions of the contract is that the live stock to be carried thereunder is received subject to the Classification and Tariffs in effect on the date of its issue, except where inconsistent therewith.

Freight classification no. 19 in effect on the date of shipment of this carload of horses, March 18th, 1941, received the approval of the Board and the tariff applicable was Eastbound Tariff No. 116-A, which was then in full

(1) [1915] A.C. 740. (2) [1942] S.C.R. 406.

force and effect. By force of article 1681 of the Civil Code, the special regulations made in accordance with the *Railway Act* must be recognized and applied in preference to article 1675 of the Civil Code, which is thereby superseded.

In classification no. 19 the rating and regulations applicable are items 4 to 9 inclusive and, as we are dealing with a carload shipment in the present case, the rates and weights may be either at "carrier's risk", subject to the terms and conditions of the bill of lading issued by the originating carrier, or at "owner's risk", subject to the terms and conditions of the Live Stock Special Contract signed by the shipper or his agent.

The general rules (p. 163, item 3 (b)) provide that when the distance to be travelled by the shipment is in excess of 150 miles, the owner or his agent must accompany the shipment and, 3 (d), that the owner or his agent in such cases shall be carried free of charge.

The shipper of live stock may choose how and to what extent he wishes to be protected by the carrier against loss or damage which may occur to his shipment in transit.

In the present instance, if the respondent had wanted the protection afforded by the terms and conditions of a standard Bill of Lading under which the carriage is performed at Carrier's Risk, he could have had that protection by executing the straight Bill of Lading and paying double the rate he paid. Moreover, if he had wanted the additional protection of the carrier assuming liability for an amount in excess of $200.00 per horse, he could also have protected himself in that respect by paying the premium applicable in such a case, as determined by the provisions of item (1) (9), which deals with the transportation of high-priced animals. But in the present case the respondent executed the Live Stock Special Contract, as a result of which he agreed to ship at his own risk under the terms and conditions of that contract and the classification therein referred to, which restrict the carrier's obligations and its liability in many respects, apart from the limitation resulting from the agreed value. He agreed, on signing the contract, that the horses had a maximum

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value of $200.00 each and that they were to be carried at Owner's Risk, subject to the terms and conditions of the Live Stock Contract.

The difference as between a shipment at Carrier's Risk, under the straight Bill of Lading, and that at Owner's Risk, under the Live Stock Special Contract, are that the conditions of carriage vary according to the contract authorized in each case and that under the Live Stock Contract the rate applicable is lower.

As a result, the shipment in the present case was being carried at Owner's Risk, according to the acceptation of the term; the carrier was relieved from liability for damage resulting from its negligence and that of its servants, provided this was consistent with the terms and conditions of the Live Stock Special Contract. (See Rules and Conditions (2) and (3), at p. 21 of the Tariff.)

We may now turn to the Live Stock Contract and see whether there is in it any restriction limiting the "Owner's Risk" condition and which would, notwithstanding that condition, make the appellant liable in the case of loss or damage resulting from its negligence or that of its servants or employees.

The contract begins by stating that the appellant agreed to carry the carload of horses to its usual place of delivery at destination, and that it was mutually agreed that every service to be performed thereunder should be subject to all conditions therein contained; this was accepted for himself by the shipper, the respondent herein. The shipper agreed to pay all charges at a stated rate which is the

lower published tariff rate, and is based on the express condition that the carrier shall in no case be liable for loss or damage or injury to said live stock, in excess of the agreed valuation, upon which valuation the rate charged is based, and beyond which valuation neither the carrier nor any connecting carrier shall be liable in any event, whether the loss, injury or damage occurs through the negligence of the carrier or any connecting carrier, or their or either of their employees, or otherwise. (Sec. 1)

The shipper agreed to load, unload or reload the live stock at his own expense and risk; feed, water and attend the same at his own expense and risk, while in transit. Moreover, in case any of the employees of the carrier should

load, unload, reload, feed, water or otherwise care for the said live stock, or assist in doing so, it was agreed that they should be treated as agents of the shipper for that purpose and not as the agents of the carrier. There is an exception to that stipulation—when these things are occasioned by some act or default of the carrier itself.

The carrier agreed to provide proper loading, unloading or reloading facilities and suitable equipment with secure car door fastenings for the transportation of said live stock.

The shipper agreed to properly and securely place all said stock in cars, and, except in case where the shipper or some person on his behalf accompanies the live stock, the carrier shall keep the doors securely locked or fastened until placed for unloading. (Sec. 4)

If the destination of the shipment of live stock is more than 150 miles from the point of shipment, the shipper or some person on his behalf (not an employee of the carrier) must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey. (Sec. 5)

The carrier shall not be liable for loss, damage, or delay to any of the live stock herein described caused by the Act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the live stock, heat, cold, the authority of law, quarantine, the act or default of the shipper, or causes beyond the carrier's control, etc.

Except in case of the negligence of the carrier, (and the burden of proving freedom from such negligence shall be on the carrier) the carrier shall not be liable for loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request. (Sec. 6)

In the contract the shipper acknowledged that he had the option of shipping the live stock at a higher rate of freight than that payable under the Live Stock Special Contract, and according to the classification and tariffs of the carrier, or connecting carriers, the effect of which the shipper stated he understood, would be to remove the limitation on the amount of damages for which the carrier or the connecting carriers might be liable,

and the shipper has voluntarily elected to accept the limitation of liability herein contained to enable him to obtain the reduced freight rate above mentioned.

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Then on the reverse side of the contract form we find a special contract for the attendant in charge of the live stock, which is also signed by the respondent:—

I agree to give the live stock included in this shipment all care and attention needed en route. If anything goes wrong in connection with the shipment, or if it needs any care or attention that requires the help or co-operation of the train crew, I will promptly notify the conductor in charge.

It is common ground that the destination between the shipping point and destination in the premises much exceeded 150 miles, the actual distance by rail being 1,926 miles.

Therefore, by accepting and signing the special contract, the respondent consented to the appellant's limitation of liability, but more particularly he agreed to assume the risk of loss or damage to his horses during the journey unless he could establish that such loss or damage was due to the non-fulfilment of the appellant's obligation under the contract.

This special contract, and the Owner's Risk clause forming part of it, clearly eliminated the presumption created by article 1675 of the Civil Code. The fact that under sections (1) and (9) of the Contract the liability of the carrier in no case was to exceed $200.00 per horse, whatever may have been the cause of the loss, carrier's negligence or otherwise, does not affect or destroy the special stipulations of the contract, the effect of which was to place the burden of proof upon the shipper. If the latter wished the carrier to be liable, he had the option of asking for a standard Bill of Lading and paying a higher rate. The fact that a shipment under the Live Stock Special Contract is declared to be at the Owner's Risk clearly establishes that there was no intention that the carrier should be presumed liable and that the burden of proof should be on it. Indeed the contract itself contains specific provisions to that effect whenever it was intended that the carrier should assume that burden.

Canadian jurisprudence has fairly well settled the meaning of the words "Owner's Risk" when used in a

Carrier's Contract. (See *Brown* v. *Dominion Express Co.*, Court of Appeal in Ontario, where, at p. 332, Maclaren J.A., refers to a decision in the case of *Dixon* v. *Richelieu Navigation Co.* (2), which decision was affirmed by this Court (3) and the following cases: *Mason & Risch Piano Co.* v. *Can. Pac. Ry. Co.* (4), *Hotte* v. *Grand Trunk Railway* (5), *Turner* v. *Can. Pac. Ry. Co.* (6), (Alberta court of appeal); *Bayne* v. *Canadian National Ry.* (7) (Saskatchewan Court of Appeal); *Benoit* v. *Can. Pac. Ry.* (8) and *McCawley* v. *Furness Rly. Co.* (9).

In Elliott on Railroads, 3rd edit., vol. IV, no. 2338, at p. 837, the governing rule is stated as follows:—

> The correct rule in such cases, therefore, is that the burden of proof is upon the plaintiff to show that a breach of duty upon the part of the carrier caused the injury or loss, and if the carrier is liable only for negligence, the burden is upon the plaintiff to show such negligence.

Now the first consideration, I repeat, is that the respondent here has failed to prove negligence and has not even alleged it. On that score, therefore, I fail to see how the exception contained in section 6 of the Special Contract can be taken into consideration for the decision of the present case and the question of negligence of the carrier does not come up for discussion at all. (*Canadian National Steamships Co. Ltd.* v. *Watson* (10))

But in addition to the above reason, it seems to me inescapable that the damage in any event was attributable to the respondent's failure to accompany, attend to and care for his shipment during the journey. Had the respondent accompanied the shipment, as he was bound to do under the contract, and guarded and protected against intrusions of "unauthorized persons", surely the damage would have been avoided.

Section (5) of the Special Contract provided specifically that, as the destination of the shipment was more than 150 miles from the point of shipping,

> the shipper or some person on his behalf (not an employee of the carrier), must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey.

(1) (1921) 67 D.L.R. 325.
(2) (1888) 15 Ont. A.R. 647.
(3) (1890) 18 Can. S.C.R. 704.
(4) (1908) 8 Can. Ry. C. 369.
(5) (1912) 18 R. de J. 320.
(6) (1922) 66 D.L.R. 31.
(7) (1933) 42 Can. Ry. Cas. 340
(8) (1937) Q.R. 75 S.C. 334.
(9) (1872) L.R. 8 Q.B. 57.
(10) [1939] S.C.R. 11.

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There were no special arrangements in writing or otherwise and, therefore, the shipper completely failed to carry out his obligations under section (5) "to accompany and care for the shipment throughout the journey". It is not, as can be seen and as appears to have been assumed in the courts below, the mere obligation of accompanying the shipment, but the obligation to attend to and to "care for" it. It is evident that what happened to the horses is due to the lack of attention and of care and, as such care was the obligation of the shipper, the loss or damage is attributable to him. There is clearly a relation of cause and effect between the respondent's neglect and the loss he has suffered. (*Chemin de fer du Midi* v. *Delcros Frères,* Cour de Cassation in France, (1).)

The respondent's contention that the appellant waived that condition of the contract, by accepting the live stock while the respondent failed to accompany it or to put some of his employees in charge of it, cannot be accepted in view of the stipulations of the contract itself. The contract made it compulsory upon the respondent to load, unload or reload the live stock at his own expense and risk and to feed, water and attend the same, also at his own expense and risk, while in transit; and it also provided for the case where the respondent failed to carry out that obligation and it stated that if he failed to do so the employees of the carrier would do it and otherwise care for the live stock and under such circumstances

> they shall be treated as agents of the shipper for that purpose and not as agents of the carrier.

It followed that there was no waiver on the part of the appellant since the contract itself provided for whatever had to be done in case the shipper elected not to accompany and care for the horses during the journey.

Then section (6) of the contract expressly stipulated that the carrier was not to be liable for the loss or damage caused by "the act or default of the shipper".

The consequence is that, on the whole, the appellant cannot be held responsible for the loss or damage suffered by the respondent in the present case.

(1) Gazette du Palais, 1938, vol. 2, p. 683, at 684.

The appeal should, therefore, be allowed and the action dismissed with costs in the Superior Court and in the Court of King's Bench (appeal side). However, the appeal only came to this Court from that Court on the ground that the question to be decided was of general importance, and there is no question that it is so. On the other hand, it would not be just for the respondent personally to bear the costs incurred by reason of the fact that this important question was carried to this Court, and, for that special reason, I would think the respondent should not be called upon to pay the appellant his costs in this Court.

HUDSON J.:—The respondent shipped eighteen horses over the defendant's railway from points in Saskatchewan, consigned to Montreal. In due course these horses arrived at Montreal but when delivered to the plaintiff sixteen of them had been shorn of their tails. Just when, how or by whom this mutilation took place was not clearly established in evidence by either party.

The plaintiff brought this action to recover for the loss sustained and at the trial before Mr. Justice Tyndale was awarded a verdict of $200.00. This was affirmed on appeal and the appellant now comes to this court by special leave.

The pleadings of both parties referred to the contract of shipment which is in a form approved of by the Board of Transport Commissioners and governs the case in so far as it applies.

The appellant seeks to avoid liability on two grounds:

In the first place, it is said that the respondent's loss was due to his failure to provide an attendant to accompany and care for the horses, as required by the contract of which section 5 provides:

> If the destination of the shipment of said live stock is more than one hundred and fifty (150) miles from the point of shipment, the shipper or some person on his behalf (not an employee of the carrier), must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey.

Section 4 (1) provides:

> The shipper agrees to load, unload or reload said live stock at his own expense and risk; feed, water and attend same at his own expense and risk while in transit, except as provided in subsection 5 of this Section. In case any of the employees of the carrier load, unload, reload, feed, water or otherwise care for the said live stock, or assist in doing so,

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they shall be treated as agents of the shipper for that purpose and not as the agents of the carrier; except when such loading, unloading, reloading, feeding or watering is occasioned by some act or default of the carrier.

It is admitted that the destination of the shipment was more than 150 miles from the point of shipment and that neither the respondent himself nor anyone on his behalf accompanied the shipment. Whatever care and attention the horses received on the journey was provided by the appellant's employees.

The contract does not contemplate the continuous presence of an attendant, but only at such times as it might be expected that the horses would require care and attention, that is, loading, unloading, feeding, illness, etc.

The attendant was not required to be a watchman; in fact his movements were considerably restricted by a special collateral contract relieving the company from liability in case of personal injuries. It is certain that there were long periods of time on the journey when the train was stationary, other than those during which the horses would be expected to receive personal attention.

No explanation is given on behalf of the appellant of how and when the horses' tails were removed. It is possible that this was done at a time when the respondent or his agent should have been in attendance, but there is no evidence to justify a presumption that such was the case. What is certain is that it was brought about by the wilful and deliberate act of some human agency while the animals were in the sole possession of the appellant and its employees. It seems very strange indeed that an operation of this sort could be carried on without the knowledge of some of them.

The second contention of the appellant is that the shipment was made at "owner's risk". The contract itself does not contain any direct reference to the term "owner's risk", but it is expressed to be subject to the classification and tariffs in effect on the date of the issue of the bill of lading "(*except when inconsistent herewith*)."

The Canadian Freight Classification approved of by the Board of Transport Commissioners, rule 25, sec. 1, provides:

Articles specified in this Classification to be carried under Owner's Risk conditions, shall, unless otherwise required by the shipper, be carried at Owner's Risk as so specified and defined, and special notation to that

effect is not necessary on the bill of lading. These conditions are intended to cover risks necessarily incidental to transportation; but no such limitation, expressed or otherwise, shall relieve the carrier from liability for any loss or damage which may result from any negligence or omission of the company, its agents or employees.

But by section 4 of this rule it is provided:

This rule will not apply to live stock which will be carried only on the terms and conditions specified in the Classification.

In the detailed Classification under the heading "Live Stock" it is provided that live stock will be carried either (*a*) at carrier's risk, or (*b*) at owner's risk, as shipper may elect * * *

In carloads, at the undermentioned rates and weights:

(*a*) At carrier's risk:

Subject to terms and conditions of the bill of lading issued by the originating carrier.

(*b*) At owner's risk:

Subject to the terms and conditions of the special live stock contract signed by the shipper or his agent.

The tariff setting forth rates from different points applicable to this particular shipment is preceded by a number of rules and conditions, rule 2 being:

Rates named herein only apply when live stock is shipped at owner's risk, subject to the terms and conditions of the special live stock contract signed by the shipper or his agent.

The learned trial judge, after a careful analysis of the provisions of the contract and of the classification and tariff, came to the conclusion that the shipper accepted the terms of the special live stock contract and nothing else.

With this view I agree. Apart from statute, there is no generally accepted definition of the term "owner's risk". In the present case the only consideration for a limitation of the carrier's liability is a reduced freight rate and that consideration is exhausted by the limitations incorporated in the contract itself. This is made clear by the language used in sections 1 and 9. Section 1 provides that:

The shipper agrees to pay, if required, before delivery, all lawful and proper charges as well as freight thereon to the carrier at the rate of . . . . . per one hundred pounds, which is the lower published tariff rate, *and is based on the express condition that the carrier shall in no case be liable for loss of or damage or injury to said live stock, in excess of the following agreed valuation,* or a proportionate sum in any one case, *upon which valuation the rate charged for the transportation of the said live stock is based,* and beyond which valuation neither the carrier

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nor any connecting carrier shall be liable in any event, whether the loss, injury or damage occurs through the negligence of the carrier or any connecting carrier, or their or either of their employees, or otherwise, viz.—

Horses or mules * * * not exceeding $200.00 each.

Section 9:

The shipper hereby acknowledges that he has the option of shipping the above described live stock at a higher rate of freight than that payable hereunder, and according to the classifications and tariffs of the carrier, or connecting carriers, the effect of which the shipper understands would be to remove the limitation on the amount of damages for which the carrier or the connecting carriers might be liable as herein provided, *and the shipper has voluntarily elected to accept the limitation of liability herein contained to enable him to obtain the reduced freight rate above mentioned.*

The general limitation of liability is contained in section 6 as follows:

The carrier shall not be liable for loss, damage or delay to any of the live stock herein described caused by the Act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the live stock, heat, cold, the authority of law, quarantine, the act or default of the shipper, or causes beyond the carrier's control; nor when caused by changes in weather or delay resultng therefrom, except such delay is due to the carrier's negligence, and the burden of proving freedom from such negligence shall be on the carrier; nor for loss or damage caused by fire occurring after cars have been placed for unloading at point of destination.

Except in case of the negligence of the carrier, (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occuring while the live stock is stopped and held in transit upon the request of the party entitled to make such request.

The only "act or default of the shipper" alleged is his failure to provide an attendant for the horses and, as already stated, there is no evidence here to afford any presumption that this caused the loss. None of the other causes of loss from which the carrier is relieved from liability by this section apply to the facts in this case.

The appellant, as a common carrier, is subject to the liabilities attached to anyone carrying on that occupation, unless otherwise provided by the *Railway Act* or a valid contract between the parties.

Section 312 of the *Railway Act* provides that the company shall

without delay and with due care and diligence, receive, carry and deliver all * * * traffic,

and subsection 7 of that section provides that:

Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant.

Section 348 prohibits contracts restricting or limiting the company's liability in respect of the carriage of any traffic unless said contract is first authorized or approved by order or regulation of the Board.

The contract between the parties here was in a form approved of by the Board. The statute then does not give the appellant any immunity beyond that expressed in the contract.

The action was brought in Quebec and it has been recognized by both parties that the laws of Quebec should apply, subject to the provisions of the *Railway Act* and any valid contract subsisting between the parties.

The Civil Code of Quebec provides by articles 1672, 1675 and 1681:

1672. Carriers by land and by water are subject, with respect to the safekeeping of things entrusted to them, to the same obligations and duties as innkeepers, declared under the title Of Deposit.

1675. They are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.

1681. The conveyance of persons and things by railway is subject to certain special rules, provided in the Federal and Provincial Acts respecting railways.

In Mignault, vol. 7, p. 383, it is stated:

Notre article consacre la règle du droit commun qui met à la charge de la personne qui l'invoque la preuve du cas fortuit ou de la force majeure (Art. 1200). Donc dès que la chose confiée au voiturier est avariée ou perdue, la faute du voiturier est présumée, et il lui incombe de repousser cette présomption, en prouvant que la perte ou avarie a été causée par cas fortuit ou force majeure ou provient des vices de la chose. C'est l'application au voiturier du principe de la faute contractuelle.

The common law liability of a common carrier is, I think, authoritatively stated in 4 Halsbury, at p. 12 and following pages:

A common carrier is responsible for the safety of the goods intrusted to him in all events, except when loss or injury arises solely from act of God or the King's enemies. He is therefore liable even

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where he is overwhelmed and robbed by an irresistible number of persons. He is an insurer of the safety of the goods against everything extraneous which may cause loss or injury except the act of God or the King's enemies.

It is noteworthy that this article in Halsbury is contributed by Lord Wright.

A case which has been cited on numerous occasions and the decision accepted as good law by all courts is that of *Curran* v. *Midland Great Western Co.* (1). In that case the plaintiff shipped some pigs from Sligo to Manchester. The special conditions of contract were as follows:

> The Company undertakes the conveyance of animals at the reduced rate stated above solely on the condition that they shall be free from all liability (including liability for loss, injury or delay) whether in the loading, unloading, transit, or conveyance of animals, or while in the vehicles of the Company, or on their premises, unless such injury or delay shall be occasioned by the intentional and wilful neglect or misconduct of their servants acting within the scope of their authority.

When the shipment arrived at Manchester the number of pigs was short and the plaintiff claimed for the value. Palles C.B. gave the judgment of the court and stated the principle at p. 188:

> I have considered the question according to the strict principles of the law of evidence; and, applying one well-known doctrine, that is, that a state of facts once proved to have existed is presumed, in the absence of evidence to the contrary, to continue, I have arrived at a clear opinion that the above question must be answered in the negative. I view the matter in this way; the pigs, notwithstanding their delivery to the defendants, remained the property of the plaintiff, and continued to be his, unless and until some event happened, such as their absolute destruction by fire or otherwise, or the sale of them in market overt, or some other act which would have divested the property. All these events are such as are not to be presumed without evidence; and the evidence of any of them, if any such be relied upon, ought to come from the defendants.
>
> I say, therefore, that we have evidence here from which we may presume that at the time at which the defendants refused to deliver the pigs, they were in existence in rerum naturâ, and were the property of the plaintiff.
>
> Next, the pigs having been received into the possession of the defendants, there is a prima facie presumption that they continued to be in their possession until the contrary is shown, or until a different presumption arises from the nature of the subject—neither of which states of fact exists here.
>
> Lastly, the defendants failed to deliver some of the pigs, and allege no excuse.
>
> These circumstances, in my opinion, are evidence from which a jury would be warranted in holding as matter of fact that the defendants had the pigs in their possession. If that inference in fact were drawn,

(1) [1896] 2 Ir. Rep. 183.

then I hold as matter of law that their unaccounted-for refusal to deliver them, so continuing in their possession, upon the plaintiff's demand for them at the place and time at which they ought to have been delivered—of which there is ample evidence—amounted to wilful misconduct, for which this action will lie.

Upon this short ground, I am of opinion that there is evidence of the defendants' liability in respect of the non-delivered pigs.

It is to be understood that I do not express any opinion as to the extent of the explanation which, in such cases as the present, it is incumbent on the Company to give.

The present case is not a case of injury or loss through direct negligence, or accident, or fortuitous event. There was here not merely an injury to the horses but an abstraction and non-delivery of part of the property shipped, i.e. the horses' tails. It was in evidence that the hair had a commercial value.

In essentials the reasoning of Chief Baron Palles in the *Curran case* (1) applies here. The onus is on the appellant and, for this reason, I would dismiss the appeal with costs.

KELLOCK J.:—This is an appeal from a judgment of the Court of King's Bench, appeal side, province of Quebec, pronounced the 29th day of December, 1944, dismissing an appeal by the present appellant, the defendant in the action, from a judgment of the Superior Court, dated the 6th day of April, 1943, in favour of the respondent for damages with respect to certain horses shipped by the respondent from Saskatchewan to Montreal.

Eighteen horses had been shipped by the respondent on the terms of what is known as a Special Live Stock Contract, dated the 18th of March, 1941, thirteen of the horses having been loaded at North Battleford, and the remaining six at Maymont, both in the province of Saskatchewan. On arrival, sixteen of these horses had had their tails cut off in a rather ragged manner close to the tail bone, and it was established that this loss had occurred after shipment. The learned trial judge was of the opinion and so found that the loss had been occasioned by the act of some unauthorized person and that on the

(1) [1896] 2 Ir. Rep. 183.

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balance of probabilities the loss had happened while the horses were in the car and when the car itself was stationary.

The Special Contract, which was in a form approved by the Board of Transport Commissioners, provided that where a transit involved a journey in excess of 150 miles, the shipper, or some person on his behalf must, unless special arrangements were made in writing to the contrary, accompany and care for the shipment throughout the journey. In fact, no one on behalf of the respondent did accompany the horses which were unloaded for rest and feeding at three stations en route; namely, Saskatoon, Saskatchewan; St. Boniface, Manitoba, and Hornepayne, Ontario.

The car in question was an ordinary live stock car with open spaces between the boards or slats and it appears from the evidence that some of these spaces were capable of being enlarged, by movement of the slats over the original spacing at the time of the construction of the car, and the learned trial judge's view was that the damage had been done by a person outside the car working through the space between the slats. He also held the appellant guilty of a breach of contract in failing to provide proper equipment as he considered the spaces between the slats constituted the car an improper one. The learned trial judge was also of opinion that the failure of the respondent to have any one accompany the horses on his behalf as required by the contract had not been shown to have in any way been a contributing factor in connection with the loss and that the onus of showing this was upon the appellant.

On appeal to the Court of King's Bench, appeal side, the majority concurred in the view of the learned trial judge as to there being a breach of contract but all the members of the Court disagreed with the inference drawn by the learned trial judge that the trimming of the tails was done while the horses were in the car by someone operating from outside the car through the slats for the reason that the evidence was not sufficient. The Court held that the onus was upon the appellant to show that

the loss arose from circumstances for which it was not responsible under the contract, which included the onus of showing that it arose from failure on the part of the respondent to have someone accompany the shipment. As the appellant had failed to adduce sufficient evidence to satisfy this onus, it was held that it must bear the loss.

Under the provisions of the contract itself, the appellant acknowledged receipt,

subject to the classification and tariffs in effect on the date of issue of this original live stock Bill of Lading (except when inconsistent herewith).

of the live stock described in the contract

which the said company agrees to carry to its usual place of delivery at said destination.

The document then proceeds as follows:

the live stock of the kind and number, and consigned and destined as indicated below, which the said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed as to each carrier of all or any of said live stock, over all or any portion of said route to destination, and as to each party at any time interested in all or any of said live stock, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are agreed to by the shipper and accepted for himself and his assigns.

The contract then sets out particulars of the car number, the consignee, the destination, the number of animals and the instructions for feeding and watering and completion of loading.

The document then continues:

1. The shipper agrees to pay, if required, before delivery, all lawful and proper charges as well as freight thereon to the carrier at the rate of ————per one hundred pounds, which is the lower published tariff rate, and is based on the express condition that the carrier shall in no case be liable for loss of or damage or injury to said live stock, in excess of the following agreed valuation, or a proportionate sum in any one case, upon which valuation the rate charged for the transportation of the said live stock is based, and beyond which valuation neither the carrier nor any connecting carrier shall be liable in any event, whether the loss, injury or damage occurs through the negligence of the carrier or any connecting carrier, or their or either of their employees, or otherwise, viz.—

Horses or mules .....not exceeding $200.00 each
Colts, under one year of age.....not exceeding $100.00 each
Cattle (except calves).....not exceeding $150.00 each
Hogs .....not exceeding $ 40.00 each
Other Domestic Animals
(including calves 6 months old and younger) not exceeding $ 20.00 each

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If, upon inspection, it is ascertained that the live stock shipped is not as described in this Live Stock Bill of Lading, the freight charges must be paid on the live stock actually shipped, with any additional charges lawfully payable thereon.

2. No carrier is bound to transport said live stock by any particular train, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon. Every carrier, in case of physical necessity, shall have the right to forward said live stock by any railway or route between the point of shipment and point of destination.

3. By this contract the carrier agrees to transport only over its own line, and acts only as agent with respect to the portion of the route beyond its own line, except as otherwise provided by law; no carrier shall be liable for damage or injury not occurring on its portion of the through route, nor after the stock has been delivered to the next carrier, except as such liability is or may be imposed by law. Unless a different agreement is made with connecting carriers, in respect to transportation on their respective lines, the terms and conditions hereof shall apply to the transportation by each carrier on any portion of the route to destination.

4. (1) The shipper agrees to load, unload or reload said live stock at his own expense and risk; feed, water and attend same at his own expense and risk while in transit, except as provided in sub-section (5) of this Section. In case any of the employees of the carrier load, unload, reload, feed, water or otherwise care for the said live stock, or assist in doing so, they shall be treated as agents of the shipper for that purpose and not as agents of the carrier; except when such loading, unloading, reloading, feeding or watering is occasioned by some act or default of the carrier.

(2) The carrier agrees to provide proper loading, unloading or reloading facilities and suitable equipment with secure car door fastenings for the transportation of said live stock.

(3) The shipper agrees to properly and securely place all said stock in cars, and the carrier shall, except in cases where the shipper or some person on his behalf accompanies the live stock keep said doors securely locked or fastened until placed for unloading.

(4) If temporary partitions or decks are put in the cars by the shipper, the carrier shall not be responsible for the sufficiency thereof, or for any loss or damage caused by defects therein.

(5) In the event of delay to said live stock caused by the negligence of the carrier, any consequent unloading, reloading, feeding or watering en route shall be at the carrier's expense and risk; and any expense incurred by the shipper in connection therewith shall be repaid to him by the carrier.

5. If the destination of the shipment of said live stock is more than one hundred and fifty (150) miles from the point of shipment, the shipper or some person on his behalf (not an employee of the carrier), must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey.

6. The carrier shall not be liable for loss, damage or delay to any of the live stock herein described caused by the act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the live stock,

heat, cold, the authority of law, quarantine, the act or default of the shipper, or causes beyond the carrier's control; nor when caused by changes in weather or delay resulting therefrom, except such delay is due to the carrier's negligence, and the burden of proving freedom from such negligence shall be on the carrier; nor for loss or damage caused by fire occurring after cars have been placed for unloading at point of destination.

Except in case of the negligence of the carrier (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request.

7. Notice of claim on account of loss, damage or delay must be made in writing to the Agent of the carrier at the point of shipment, or to the Agent of the carrier at the point of delivery; or to a Divisional Superintendent, a District Freight Agent, a Claims Agent, or the General Counsel of the carrier, within thirty (30) days after the delivery of the live stock, or in case of failure to make delivery, then within thirty (30) days after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable.

8. No person accompanying the said live stock shall have the right to ride free or at a rate less than full fare in connection with this shipment, unless and until he has signed the special form of contract for such attendants, printed on the back hereof.

The carrier shall not be liable either for loss of life or personal injury to such persons accompanying said live stock, whether such person is being carried free or at a rate less than full fare, unless such loss of life or personal injury is caused by negligence on the part of the carrier, its servants or employees while the said persons are in the caboose or other car provided for their transportation, or while in the car provided for their transportation, or while in the car provided for the transportation of the live stock.

9. The shipper hereby acknowledges that he has the option of shipping the above described live stock at a higher rate of freight than that payable hereunder, and according to the classifications and tariffs of the carrier, or connecting carriers, the effect of which the shipper understands would be to remove the limitation on the amount of damages for which the carrier or the connecting carriers, might be liable as herein provided, and the shipper has voluntarily elected to accept the limitation of liability herein contained to enable him to obtain the reduced freight rate above mentioned.

10. Any alteration, addition or erasure in this Live Stock Bill of Lading shall be signed or initialled in the margin by an agent of the carrier issuing the same, and if not so signed or initialled shall be without effect, and this Bill of Lading shall be enforceable according to its original tenor.

It is the contention of counsel for the appellant that as the result of these terms and of the relevant provisions of the classification and tariffs referred to in the contract, the onus of establishing the cause of the loss was upon the

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respondent and not upon the appellant and that as the cause of the loss was not established, the action should have been dismissed.

It has been held under the provisions of the respective *Railway Acts* then in force that the liability of a railway is that of a common carrier; *Grand Trunk Railway Company of Canada* v. *Vogel* (1) per Strong J. *Grand Trunk Railway Company* v. *McMillan* (2) and *The Queen* v. *Grenier* (3). It has not been argued that there is anything in the provisions of the present statute R. S. C. ch. 170 which produces a different result. Such liability may be affected in accordance with the provisions of section 348 of the Act, which is the provision referred to in the phrase "subject to this Act" in subsection 7 of section 312, *Grand Trunk Railway Company* v. *Robinson* (4). The question in the case at bar is as to the effect of the classification, the tariff and the provisions of the special Live Stock Contract.

Coming to the provisions of the classification incorporated by reference into the contract, this classification begins with a number of "Rules and Conditions of Carriage."

Rule 25 reads in part as follows:

Sec. 1. Articles specified in this Classification to be carried under Owner's Risk Conditions, shall, unless otherwise required by the shipper, be carried at Owner's Risk as so specified and defined, and special notation to that effect is not necessary on the bill of lading. These conditions are intended to cover risks necessarily incidental to transportation; but no such limitation, expressed or otherwise, shall relieve the carrier from liability for any loss or damage which may result from any negligence or omission of the company, its agents or employees.

Sec. 2. Should the shipper decline to ship at "Owner's Risk" as specified and defined in this Classification any article shown as to be so carried, the articles will be carried subject to the terms and conditions of the bill of lading approved by the Board of Railway Commissioners for Canada, in which case twenty-five per cent. over and above the rates which would be payable if such articles were shipped at "Owner's Risk" will be charged.

Sec. 4. *This rule will not apply to live stock which will be carried only on the terms and conditions specified in the classification.*

(1) (1886) 11 Can. S.C.R. 612, at 625.
(2) (1889) 16 Can. S.C.R. 543, at 551.
(3) (1899) 30 Can. S.C.R. 42.
(4) [1915] A.C. 740, at 744.

Under the heading, "Live Stock," it is provided in the Classification itself that

live stock will be carried either (*a*) at Carrier's Risk or (*b*) at Owner's Risk, as the shipper may elect, but in each case the value of the animals must be declared by the shipper or his agent.

Where, as in the case at bar, the value of each animal is declared not to exceed $200.00, the shipment is to be charged for

at the rates and weights and be carried upon the terms and conditions following, that is to say:

In carloads at the undermentioned rates and weights

(*a*) At Carrier's Risk

Subject to the terms and conditions of the Bill of Lading issued by the originating carrier.

(*b*) At Owner's Risk

Subject to the terms and conditions of the Special Live Stock Contract signed by the shipper or his agent.

And where, as in the present case, the shipper elected to ship at "Owner's Risk," the freight rate provided in "9th class" whereas the rate applicable to a shipment at "Carrier's Risk" is double the 9th class rate.

The tariff incorporated by the terms of the contract is "East-bound Tariff No. 116 (a)." Rule 2 of this tariff provides that the

rates named herein only apply when live stock is shipped at Owner's Risk subject to the terms and conditions of the Special Live Stock Contract signed by the shipper or his Agent.

The result of these various provisions is that the shipment here in question was carried "at Owner's Risk subject to the terms and conditions of the special live stock contract." It is the contention of the appellant that the words "owner's risk" are to be construed as throwing upon the respondent all risks including risk of loss or damage arising from negligence of the carrier, the only exception being wilful neglect or misconduct of the carrier and *Dixon* v. *Richelieu Navigation Company* (1) is cited. Counsel argues that the terms of the written contract are to be considered against this background, and when so considered, there is nothing which throws upon the appellant any responsibility or any burden of proof.

It is of interest at this point to refer to a form of contract formerly in use with regard to the shipment of

(1) (1888) 15 Ont. A.R. 647; (1890) 18 Can. S.C.R. 704.

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live stock under which such cases as *Booth* v. *Canadian Pacific Railway* (1) and others were decided. That form of contract provided that the carrier should not be liable for any loss or damage in respect of the said live stock by reason of * * * any other injuries happening to said stock while in any railway car, except such as may arise from a collision of the train, or the throwing of the cars from the track during transportation * * * said stock is to be loaded, unloaded, fed, watered, and while in the cars cared for *in all respects* by the shipper or owner at his expense and risk.

At the end of what is now section 5 there followed:

and unless the shipment is so accompanied the company shall be relieved from all obligation to carry the same. If the company carry such live stock without it being so accompanied, it shall not be liable for any loss or damage due to the live stock not being so accompanied and cared for.

Whatever may have been the situation under such a form of contract in circumstances such as are here present, the provisions of the contract which have now to be construed are quite different. In view of these provisions, very little of the content contended for with respect to the words "owner's risk," apart from the limitation in the amount of damages, would seem to be left in a case such as the present. The contract, in my opinion, proceeds on the assumption that there is the underlying responsibility of a common carrier to which I have already referred, resting upon the carrier which it restricts and modifies. Section 1 of itself does not impose any liability upon the carrier even up to the amount which it sets. The section assumes that, apart from its provisions, a liability does rest upon the carrier for loss or damage occurring through the negligence of the carrier "or otherwise." That liability the section limits to $200.00.

Section 6 would be largely meaningless apart from such a construction. It presupposes that the carrier is liable as a common carrier with some additional exceptions to that liability. To take the last sentence of section 6 by itself further illustrates the above view. The carrier is to be free from loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request, except in the case of its own negligence. If the shipper, as the appellant now contends, assumed all the risk of carriage, there would be

(1) (1906) 5 Can. Ry. Cas. 389.

no reason for the inclusion of this provision in the contract at all, and the inference from it is that if a stoppage occurs which is not due to a request of the shipper, the risk of loss is upon the carrier. In the case at bar, there was a delay of some twenty-five hours in the transit which is not accounted for.

Delivery of the horses in their mutilated condition was not a compliance with the obligation resting upon the appellant and if, as I think, the terms of the special contract recognize this underlying obligation and provide certain exceptions from it, it lay upon the appellant, (on whose behalf the argument is in essence that the loss fell within either one of two of those exceptions, namely, "the act or default of the shipper" or "causes beyond the carrier's control,") to adduce evidence bringing the case within the one or other of those exceptions; *London and North Western Railway* v. *Ashton* (1). The appellant adduced no evidence to enable a finding to be made as to how the loss occurred. Merely to prove, if it can be said that that has been done in the case at bar, something equally consistent with the loss having been due to the respondent's default or to the default of the appellant is insufficient; *Taylor* v. *Liverpool and Great Western Steam Company* (2)

In my opinion, it was not the intention of the contract that the shipper or his representative should at all times be present with the horses to act as a guard. In fact, the Special Contract required to be signed by the person accompanying the shipment contemplates the contrary. Sections 1 and 5 of that contract read as follows:

1. I will remain in a safe place in the caboose or other car provided for my transportation, or in the car provided for the transportation of the stock, at all times while the train is in motion.

5. I will always bear in mind that freight trains do not stop at stations or places especially prepared for passengers to alight; that freight trains frequently stop on bridges and places along the line where it is not safe to alight; I will therefore not attempt to alight from the caboose or other car, when a train may stop for any purpose, without first making a careful examination, (with a lighted lantern if at night time), and thus ascertaining that it is safe to alight at that point; and I will not omit taking these precautions because of anything said or done by employees of the carrier.

(1) [1918] 2 K.B. 488; [1920] A.C. 84.

(2) (1874) L.R. 9 Q.B. 546.

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It was not shown, therefore, that this default of the respondent was related in any way to the loss and I think the contention of the appellant with regard to this point fails. The contract provisions, as already pointed out, are substantially different in form from the contract under consideration in the cases relied upon by the appellant.

Counsel for the appellant also pointed to the provisions of the ordinary Bill of Lading which would have applied had the respondent shipped at "Carrier's Risk," and paid the higher rate. This Bill of Lading begins:

> The carrier of any of the goods herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided.

Appellant argues that there is no corresponding provision in the Special Live Stock Contract here in question and that therefore the onus is not thrown upon the Railway Company. For the reasons already given, I do not think this argument entitled to prevail. Much clearer language than is found in the contract here under consideration would be required to effect such a result.

I would therefore dismiss the appeal with costs.

ESTEY J.:—On the 18th of March, 1941, the respondent shipped from North Battleford and Maymont, Saskatchewan, eighteen horses via the appellant railway company for delivery at Montreal. En route sixteen of the horses had their tails cut off at the end of the tail bone, and to recover damages thereby occasioned the respondent (plaintiff) brought this action. He pleaded delivery of the horses to the appellant under the provisions of the Live Stock Special Contract, executed by the parties covering this shipment, and the failure of the appellant to make a valid delivery of the horses at Montreal.

The appellant denied the allegations of the plaintiff; alleged the provisions of the same Live Stock Special Contract; and further that the loss or damage

> did not take place while the horses were on the car and the loss alleged to result therefrom is solely due to plaintiff's neglect and failure to properly attend to and care for said horses, as he was obliged to do.

This is the only allegation of negligence throughout the pleadings.

The car in question left North Battleford on March 18th, and arrived at Montreal on March 24th, a distance of about 1,926 miles. En route the horses were taken from the car at three feeding points: Saskatoon for 7 hrs. and 50 mins., St. Boniface for 24 hrs. and 40 mins., and at Hornepayne for 3 hrs. and 50 mins., a total of 36 hours. There is a further period of 25 hours en route which could not be explained nor accounted for.

That the loss was suffered en route is established, but no evidence is tendered to prove where, when or by what means it was inflicted. The nature of the injury makes it clear that it was the deliberate effort of some person or persons.

The provisions of this Live Stock Special Contract were approved by the Board of Transport Commissioners on the 2nd of June, 1920, pursuant to the provisions of section 348 of the *Railway Act,* 1927 R.S.C., c. 170:

> 348. No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice has been first authorized or approved by order or regulation of the Board.

The phrase "its liability" as used in this section refers to the liability of the carrier at common law and under the *Railway Act.* Except, therefore, as this liability may be impaired, restricted or limited under a contract, such as we are here concerned with, the liability of the carrier remains as determined by the common and statute law.

The first sentence of this contract reads in part as follows:

> Received, subject to the classification and tariffs in effect on the date of issue of this original Live Stock Bill of Lading.

Canadian Freight Classification no. 19, also approved by the Board of Transport Commissioners, was in effect on the date of this contract and a reference thereto will indicate the different basis upon which live stock may be

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shipped. These horses were shipped upon the basis found in the classification under the general heading "Live Stock":

5. In carloads, at the undermentioned rates and weights.

* * *

(*b*) At Owner's Risk:

Subject to the terms and conditions of the special live stock contract signed by the shipper or his agent.

In the determination of the rights of the parties under this contract the meaning to be ascribed to the phrase "Owner's Risk" is of first importance. The appellant carrier contends that:

* * * the shipment in the present case was carried at "Owner's Risk" taken in the ordinary, broad acceptation of the term, even relieving the carrier from liability for damage resulting from its negligence and that of its servants, provided such wider meaning is consistent with the terms and conditions of the Live Stock Contract.

In other words, that the entire risk is assumed by the shipper except only as that risk may be by the contract imposed upon the carrier. This appears contrary to the plain intent of section 348 of the statute, and, moreover, contrary to the form and phraseology of the subsequent sections of the contract itself.

This phrase "Owner's Risk" is familiar to those engaged in the carriage of goods and has been the subject of judicial decision.

It seems conceded that the words "Owner's Risk" alone would protect the carriers against all but wilful neglect or misconduct or unreasonable delay. *Dixon* v. *Richelieu Navigation Co.*, (1)

See also *B. C. Canning Co.* v. *McGregor*, (2); *Brown* v. *Dominion Express Co.*, (3); *H. C. Smith Ltd.* v. *Great Western Ry. Co.*, (4).

A study of the subsequent sections of the Live Stock Special Contract will indicate that the Board of Transport Commissioners have not used the phrase "Owner's Risk" under the heading "Live Stock" in this classification in

(1) (1888) 15 Ont. A.R. 647; (1890) 18 Can. S.C.R. 704.
(2) (1913) 14 D.L.R. 555.
(3) (1921) 67 D.L.R. 325.
(4) [1922] 1 A.C. 178.

the sense or meaning contained in the appellant's submission nor the definition under the above quoted authorities. Section 1 of the contract provides in part:

> Sec. 1. * * * that the carrier shall in no case be liable for loss of or damage or injury to * * * in excess of the following agreed valuation * * * whether the loss, injury or damage occurs through the negligence of the carrier * * * or otherwise.

Section 4 specifically provides that the loading, unloading, feeding and caring for the live stock shall be done at the risk of the shipper unless it is occasioned by some delay caused by some negligence on the part of the carrier.

Section 5 provides that if the destination of the shipment is a distance of more than 150 miles from the shipping point the shipper or some person on his behalf must accompany and care for the shipment throughout the journey.

Section 6 provides as follows:

> Sec. 6. The carrier shall not be liable for loss, damage, or delay to any of the live stock herein described caused by the act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the live stock, heat, cold, the authority of law, quarantine, the act or default of the shipper, or causes beyond the carrier's control; nor when caused by changes in weather or delay resulting therefrom, except such delay is due to the carrier's negligence, and the burden of proving freedom from such negligence shall be on the carrier; nor for loss or damage caused by fire occurring after cars have been placed for unloading at point of destination.
>
> Except in case of the negligence of the carrier (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request.

Section 9 provides:

> Sec. 9. The shipper hereby acknowledges that he has the option of shipping the above described live stock at a higher rate of freight * * * the effect of which the shipper understands would be to remove the limitation on the amount of damages for which the carrier * * * might be liable * * * and the shipper has voluntarily elected to accept the limitation * * *

These sections deal with limitation of liability and liability for negligence on the part of the carrier; assumption of risk by the shipper; and a list of specific causes from which if loss or damage result the carrier is not liable. It is obvious that the "terms and conditions" of these sections are "impairing, restricting or limiting its liability"

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as contemplated by section 348, and they are not written on the basis that if these conditions were not here all the risk would be upon the shipper as the appellant contends, nor that the carrier is liable for only "wilful neglect or misconduct or unreasonable delay" as the phrase "Owner's Risk" is construed under the foregoing decisions.

All of which makes it clear that the Board of Transport Commissioners did not intend to adopt in this classification either the definition of "Owner's Risk" suggested by the appellant or that which obtains under the authorities. If they had so intended these provisions with respect to negligence, and many, if not all, of the others would have been omitted because they would have been entirely unnecessary. The contract would have been written differently both as to form and substance.

A study of the statute, the classification and the contract leads to the conclusion that the Board of Transport Commissioners have used this phrase "Owner's Risk" throughout in the same sense, and that the intention with respect to "Owner's Risk" conditions as expressed in rule 25 of the classification applies, including Live Stock. This rule 25 reads as follows:

Sec. 1. Articles specified in this Classification to be carried under "Owner's Risk" conditions, shall, unless otherwise required by the shipper, be carried at "Owner's Risk" as so specified and defined, and special notation to that effect is not necessary on the bill of lading. These conditions are intended to cover risks necessarily incidental to transportation; but no such limitation, expressed or otherwise, shall relieve the carrier from liability for any loss or damage which may result from any negligence or omission of the company, its agents or employees.

Sec. 2. Where "Owner's Risk" conditions are specified for articles in less than carloads, such conditions will also apply on the same articles in Carloads.

Sec. 3. Should the shipper decline to ship at "Owner's Risk" as specified and defined in this Classification any article shown as to be so carried, the articles will be carried subject to the terms and conditions of the bill of lading approved by the Board of Railway Commissioners for Canada, in which case twenty-five per cent. over and above the rates which would be payable if such articles were shipped at "Owner's Risk" will be charged.

Sec. 4. This rule will not apply to live stock which will be carried only on the terms and conditions specified in the Classification.

It will be observed that rule 25 refers to "Owner's Risk conditions * * * so specified and defined", and then provides that "these conditions are intended to cover

risks necessarily incidental to transportation; * * *"
It includes certain general provisions with respect to less than carload lots and the rates to be charged when the shipper refuses to ship at "Owner's Risk". These latter apply generally throughout the classification but under the heading "Live Stock" they are specifically dealt with. It was prudent, therefore, to include in rule 25 that such should not apply to live stock. Subsection 4 is intended to so provide and avoid any conflict between that rule and the provisions under the heading of "Live Stock". It would appear that it should be so read and construed.

It is significant that this important phrase "Owner's Risk" does not appear in the body of this Live Stock Special Contract and in the classification under the heading "Live Stock" it appears only as above quoted. The foregoing construction of rule 25 explains why it is not used in the contract as it provides "special notation to that effect is not necessary on the bill of lading". If either the meaning contended for by the appellant or that under the above authorities had been intended, one would have expected a special notation to that effect would have been required in the contract. Moreover, if the Transport Commissioners had intended to use "Owner's Risk" in rule 25 in the restricted sense and then in the Live Stock Classification, (and by virtue thereof in the contract),

in the ordinary, broad acceptation of the term, even relieving the carrier from liability for damage resulting from its negligence * * *

they would have provided for this substantial difference by language clear and specific.

In any event, it appears clear from a study of the contract, classification and the statute that the Board of Transport Commissioners intended that the phrase "Owner's Risk" as used in this contract is, as expressed in rule 25,

intended to cover risks necessarily incidental to transportation; but no such limitation * * * shall relieve the carrier from liability * * * from any negligence or omission of the company, its agents or employees.

Certainly no other intention is expressed, and apart from the general words in subsection 4, "this rule will not apply to live stock", there is nothing which even suggests this expressed intention should not apply to live stock. On the

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contrary, the statute and the terms and conditions throughout both the classification and the Live Stock Special Contract support this construction.

The injury suffered in this case was obviously the deliberate effort of some person who committed an act in the nature of a theft or of malicious mischief and in no sense can this be regarded as a risk "necessarily incidental to transportation". That which is incidental is something which is usually or naturally associated with or arising out of the work of transportation. It is as the Oxford Dictionary states: "something occurring or liable to occur in fortuitous or subordinate conjunction with something else". The word "necessarily" further limits the word "incidental". It would appear that this general limitation is intended to cover those incidents and that other eventualities should be dealt with under the terms and conditions of the contract or left subject to the statute or common law.

Then when we examine the terms and conditions of the contract itself, this loss or damage is not specifically covered. There are two provisions that should be mentioned and both are in section 6 quoted above. First, "the act or default of the shipper". This shipment was for a distance of over 150 miles and the contract provides that an attendant will "accompany and care for the shipment throughout the journey". The respondent shipper in this case signed another contract entitled "Special Contract with Attendants in Charge of Stock" which requires the attendant to provide "all care and attention needed en route". These contracts must be read and construed together. Section 4 of the Live Stock Special Contract provides specifically the duties of the shipper in this regard:

> Sec. 4. The shipper agrees to load, unload or reload said live stock at his own expense and risk; feed, water and attend same at his own expense and risk while in transit, except * * * in the event of delay * * * caused by the negligence of the carrier.

It is the care and attention of this nature that is involved in the expressions "accompany and care for the shipment throughout the journey" and "all care and attention needed en route". This conclusion is emphasized by those provisions of the Attendant's contract which provide that the attendant

will remain in a safe place in the caboose or other car provided for my transportation, or in the car provided for the transportation of the stock, at all times while the train is in motion.

This does not contemplate that the attendant shall remain in the car with the stock, particularly on a long journey such as this. Furthermore, this contract specifically requires the attendant to use caution in moving about the "track, station or other premises", and specifically provides

I hereby release the said carrier * * * from all liability for any injury or damage suffered by me while violating any of the terms of this agreement.

It would be quite impracticable for the attendant to be at all times with the stock, nor in fact does the contract require that he do so. Moreover, its provisions do not relieve the carrier of its obligations to supervise and care for this freight as it is required to care for freight generally while in transit. It does not relieve the carrier of its responsibilities to carry freight qua freight safely.

There is no question but that the respondent shipper did not carry out the terms of his Attendant's Contract. His default in that regard is relevant in this action only in so far as it caused or contributed to the loss or damage suffered by these horses. Both of the parties hereto had obligations and responsibilities with regard to these horses while en route. The evidence makes it plain that the loss or damage was not a result or consequence of any default or failure to perform the obligations and duties devolving by virtue of the contracts upon the respondent. If it did so other important considerations would arise.

The appellant pleaded that this loss or damage

did not take place while the horses were on the car and the loss alleged to result therefrom is solely due to plaintiff's neglect and failure to properly attend to and care for said horses, as he was obliged to do.

This plea suggests that the appellant was liable while the horses were in the car but when outside thereof they were in the care of the attendant, but the evidence does not establish that the damage took place while the horses were outside the car. In fact one of the appellant's witnesses, when asked as to the possibility of this loss or damage being inflicted while the horses were in the car by one operating outside of the car, replied: "It might

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be done". Another witness for the appellant admitted: "Yes, it was a bum job. It was done by someone who did not know the business". This also suggests the possibility that it might have been done by some person operating under difficulties such as might exist when the horses were within the car. In my opinion, as above stated, the evidence does not establish whether the damage was done while the horses were within or without the car.

Then in the same section 6 there is the phrase "causes beyond the carrier's control". This phrase, as will be observed in the above quoted section 6, follows a rather lengthy list of causes. If this phrase be regarded as a general phrase to be construed according to the well-known ejusdem generis rule, it is obvious that such a loss or damage cannot be included as coming under this heading. If, on the other hand, this phrase be regarded as a separate and distinct category and therefore not subject to the ejusdem generis rule, then the question arises, was this act beyond the control of the carrier?

Whether such an act as that here in question was one beyond the control of the carrier cannot be determined apart from evidence directed to that issue. It has apparently been recognized throughout that the facts of this case do not warrant such a finding. The onus of adducing such evidence rests upon the appellant carrier who invokes the provisions of the contract to relieve it from liability. *London and North Western Rly. Co.* v. *Ashton,* (1); *London and North Western Rly. Co.* v. *Neilson,* (2); *The Canadian Northern Quebec Rly. Co.* v. *Pleet,* (3).

The appellant, while recognizing this general rule and that no specific provision in the contract places the burden of proof upon the shipper, contended

> that *indirectly* with the Owner's Risk clause as part of the contract, it follows that the burden of proof is on the shipper;

and further that the difference in the language used in the "Carrier's Risk" contract and the "Owner's Risk" contract for the shipment of live stock was such that "the risk and

(1) [1920] A.C. 84.
(2) [1922] 2 A.C. 263.
(3) (1921) 26 Can. Ry. Cas. 238

the burden of proof" were placed upon the shipper. The meaning and effect of the words "Owner's Risk" have already been dealt with. These two contracts:

At Carrier's Risk: Subject to the terms and conditions of the bill of lading issued by the originating carrier;

and

At Owner's Risk: Subject to the terms and conditions of the special live stock contract signed by the shipper or his agent,

clearly indicate that these terms "Carrier's Risk" and "Owner's Risk" are in this Freight Classification not used in their literal or precise dictionary meaning but rather as in the classification defined. The law has always placed upon the carrier the burden of proof and if this contract, prepared and approved as above indicated, was intended to shift the burden of proof it would have contained a provision to that effect or used such language as to point directly to that conclusion.

The appellant submitted that the phraseology of the contract did point directly to that conclusion and referred to two provisions in section 6 to support his contention. The first:

The carrier shall not be liable for loss, damage, or delay * * * when caused by changes in weather or delay resulting therefrom, except such delay is due to the carrier's negligence, and the burden of proving freedom from such negligence shall be on the carrier * * *

The second:

Except in case of the negligence of the carrier, (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occurring while the live stock is stopped and held in transit upon the request of the party entitled to make such request.

This section 6 includes the act of God, the King's enemies and inherent vice; the carrier has always been relieved of liability by establishing one or other of these as the cause of the loss or damage. In effect, this section 6 enlarges the number of such causes that may be so established by the carrier but even with regard to the first three mentioned, and the others under this section would be so treated, the carrier was under an obligation to take reasonable care to avoid loss or damage being suffered therefrom.

With regard to the excepted perils, the carrier must use all reasonable care, skill, and diligence to avoid their consequences; and if damage occurs which is attributable to a breach of this duty, he is liable. 4 Halsbury, p. 13, para. 17.

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If the carrier established one of these causes it would succeed. On the other hand, it is clear that if the evidence indicated that even this consequence could have been avoided by the exercise of due care on the part of the carrier, the carrier would not succeed. In dealing with the provision that the carrier would not be responsible for loss or damage occasioned by the kicking, plunging, or restiveness of the animal, Lush J. stated:

> It cannot, I think, be contended that this condition dispenses with the use of reasonable care on the part of the company in the receiving, carrying, and delivering cattle, any more than the exception of perils of the sea, in a bill of lading, relieves a ship-owner from the obligation to navigate with ordinary skill and care. The exception goes to limit the liability, not the duty. It is the duty of the carrier to do what he can, by reasonable skill and care, to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, he is released from liability; but if his negligence has brought on the peril, the damage is attributable to his breach of duty, and the exception does not aid him. *Gill* v. *Manchester etc. Rly. Co.*, (1).

See also *The Canadian Northern Quebec Rly. Co.* v. *Pleet*, (2). In the two foregoing provisions the appellant must not only establish in one the delay and in the other the loss, damage or delay occurring, etc., but in order to succeed must go further and establish that it was without negligence on his part. This does not have the effect of placing the onus of proof generally, as contended for by the appellant, upon the respondent.

This particular loss or damage not being covered by the provisions of the contract, it follows "its liability", as that term is used in section 348 of the *Railway Act*, has not been impaired, restricted or limited by the terms of the Live Stock Special Contract. The provisions of the *Railway Act* do not otherwise than under section 348 provide for the alteration of the liability of the carrier with respect to this type of damage and the carrier's liability therefore must be determined at common law.

The doubt expressed in *Grand Trunk Rly. Co.* v. *Vogel* (3) as to whether under the common law animals were included within the definition of goods to be handled by the common carrier has been settled in the affirmative in *Prior* v. *The London & South-Western Rly. Co.* (4); see also

(1) (1873) L.R. 8 Q.B. 186, at 196.
(2) (1921) 26 Can. Ry. Cas. 238.
(3) (1886) 11 Can. S.C.R. 612.
(4) (1885) 2 T.L.R. 89.

Leslie in Law of Transport by Railway, 2nd ed. p. 46. In Canada the matter is determined by section 2 (10) of the *Railway Act* where the definition of goods is sufficiently broad to include horses.

At common law the carrier is liable for all loss or damage to goods in transit, or as it is often stated, the carrier is an insurer of the safe delivery of the goods, except where the loss or damage is caused by acts of God, the King's enemies or the inherent vice of the goods. This deliberate act of some third party does not come within any of these exceptions but is included within the statement:

> The common carrier of goods is an insurer against harm occurring from outside which no care on his part can avert. 4 Halsbury, 2nd ed., p. 16, para. 22.

The appellant is therefore liable at common law for the loss or damage suffered by the respondent.

This action was brought in the province of Quebec and no question of jurisdiction has been raised. In any event, the liability of the appellant as a common carrier appears to be the same in both the provinces of Quebec and Saskatchewan. *The Boston & Maine Railroad* v. *Ratzkowski,* (1); *Bayne* v. *Can. Nat. Ry.* (2).

The loss or damage here inflicted was caused by the deliberate act of a third person and no evidence has been adduced on the part of the carrier to indicate that it is a loss or damage covered by the provisions of the Live Stock Special Contract nor to establish on behalf of the appellant that it comes within any of the exceptions from liability at common law, and therefore the appellant must be held liable.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Côté & Perrault.*

Solicitors for the respondent: *Mann, Lafleur & Brown.*

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(1) (1919) Q.R. 30 K.B. 445.

(2) [1933] 3 W.W.R. 616; 42 Can. Ry. Cas. 340.

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*Feb. 18, 19
*Apr. 11.

BENJAMIN BODNOFF (PLAINTIFF) .... APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

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

Railway—Carrier—Live Stock Special Contract—Negligence—Shipment of horses—Mare found lying sick during trip—Shipper's attendant not there—Railway or stock yard's employees erecting gate partition —Mare and another horse found dead later on—Claim for damages by shipper—Clause in contract that shipper should provide attendant —Carrier not liable—Failure of attendant, to "care for" and "attend" the mare, cause of the accident—Railway's or stockyard's employees to be treated as agents of the shipper and not of the carrier— "Owner's Risk"—Articles 1675 and 1681 C.C.

The appellant shipped eighteen horses from three points in Saskatchewan to be delivered at Montreal under a contract with the respondent railway, known as Live Stock Special Contract, approved by the Board of Transport Commissioners of Canada. The shipper, as he agreed to do under the contract, sent a person to accompany and care for the shipment on his behalf, but the evidence is not clear at what exact point the attendant boarded the train. When the horses were unloaded for feeding and watering at Saskatoon, it was found that a bay mare was lying on the floor, bruised and unable to rise to its feet. The appellant's attendant was not there at that time. After examination by a veterinary surgeon, a special gate partition was erected either by the railway's or by the stock yard's employees for the purpose of separating the bay mare from the rest of the horses. On arrival at Wynyard, Saskatchewan, a gelding which had travelled with the other horses in the main body of the car was found over the partition, and both it and the mare had died from suffocation. The appellant claimed from the respondent $227.98 for damages through non-delivery and loss of the two animals. The trial judge maintained the action, but the appellate court, by a majority, reversed that judgment.

Held, that, under the circumstances, the respondent railway should be relieved of any responsibility and, therefore, the appeal should be dismissed.—If the appellant's attendant, while performing his duty as he was bound to do under the provisions of the Special Contract, had been there at the relevant time when the mare was found lying sick, it would have been his responsibility to "care for" and to "attend it", and he would have done what was necessary in the circumstances. As the attendant was not there, either the railway's or stock yard's employees had to "care" for the live stock, but, in erecting the gate partition, they should be treated as agents of the shipper for that purpose and not as agents of the carrier. Such

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Kellock JJ.

employees may have been negligent in "otherwise" caring for the horses or the partition may be found to have been insufficient, but, in the events that happened, the real cause of the accident was the failure of the shipper to carry out his obligation.

Per The Chief Justice and Taschereau J.:—The shipper had the option of asking for a straight bill of lading whereby the shipment would have been at carrier's risk or for a special contract under which the shipment is made at owner's risk. In this case, the horses were carried at owner's risk according to the usual acceptation of the term and the carrier was relieved from liability for damages even resulting from its negligence or that of its employees, provided it was consistent with the terms and conditions of the Special Contract. No restriction is found in that contract limiting the "owner's risk" condition, and the respondent therefore should not be held responsible for the accident complained of by the appellant.—Under article 1681 C.C. the provisions of article 1675 C.C. are superseded by the rules provided by the *Railway Act.—Canadian National Ry.* v. *Harris,* reported *ante* p. 352.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing by a majority the judgment of the Superior Court, Duclos J. and dismissing the appellant's action for $277.98 damages. Leave to appeal to this Court was granted by the appellate court.

J. A. Mann K.C. and *K. H. Brown* for the appellant.

L. G. Prévost K.C. and *J. E. Paradis* for the respondent.

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

THE CHIEF JUSTICE:—In this case the appellant claimed $277.98 for damages suffered through non-delivery and loss of two horses out of a shipment of eighteen from three points in Saskatchewan to be delivered at Montreal.

The appellant alleged that the horses were shipped under a contract with the respondent, known as "Live Stock Special Contract" approved by the Board of Transport Commissioners for Canada; and that the respondent agreed to deliver the two horses in question at the point of destination.

The respondent denied being responsible under the terms of the contract and the Freight Classifications and Tariffs.

No issue is raised as to the quantum of damages.

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The action was maintained by the judgment of the Superior Court, Duclos J.; but that judgment was reversed by the Court of King's Bench (appeal side), Mr. Justice Francœur dissenting.

The evidence discloses that when the horses were unloaded for feeding and watering at the Union Stockyards at Saskatoon, it was found that a bay mare was lying on the floor, bruised and unable to rise to its feet.

A veterinary surgeon was called to examine the horse and, after examination, a gate partition (4 ft. 7 ins. high) was erected with the intention of separating the bay mare from the rest of the horses.

On arrival at Wynyard, Sask., a gelding which had travelled with the others in the main body of the car was found over the partition, and both it and the mare had died from suffocation.

The learned trial judge held that the burden was on the respondent to establish that the loss of the horses was in no way due to its fault, negligence or want of proper precaution and that it failed to do so; that the partition used was insufficient to properly separate the horses; that in virtue of the Live Stock Special Contract, the shipper consented only to limit the carrier's liability in case of loss to $200.00 per horse; and that, even if in erecting the partition the employees of the respondent acted as agents for the shipper, they were bound to execute such duty in a proper and safe manner and their failure to do so would bind the respondent company.

According to the learned trial judge, the probable explanation of the accident was that the united weight of the sixteen other horses, pushing against the partition, might well have forced the gelding over it during shunting of the car or starting or stopping of the train, and that a higher partition would have prevented the accident.

In the Court of King's Bench, it was found *inter alia* that the partition used to separate the horses was standard equipment; that the respondent's employees in the handling of the car-load and the erection of the partition had acted "en bons pères de famille" and that, moreover, in erecting the partition, the respondent's employees were acting as the agents of the appellant.

In this Court, the substance of the appellant's argument was briefly that the responsibility of the respondent as a carrier, so far at least as the present case is concerned, is the agreed responsibility imposed by the Civil Code subject only to such modification thereof as may be expressly stated in the contract between the parties; and that, by force of article 1675 of the Civil Code, the respondent could only escape liability by proving affirmatively that the damage occurred by "fortuitous event or irresistible force or * * * a defect in the thing itself" or by one of the exculpatory causes set out in section 6 of the contract, which are similar in character; that the respondent has failed to prove that the cause fell within one of these exculpatory provisions; and that therefore, the appellant's action must succeed.

I have already given out, in my reasons for judgment in the case of *The Canadian National Railways* v. *Harris,* (1) where judgment is to be rendered at the same time as the present one, my views on the question of the responsibility of a railway company towards the shipper under the Live Stock Special Contract; and, for that reason, I do not feel that I need repeat here, except in substance, an elaborate opinion in the matter.

Under article 1681 of the Civil Code,

> the conveyance of persons and things by railway is subject to certain special rules provided in the Federal and Provincial Acts respecting railways.

To my mind, that means that article 1675 of the Civil Code is superseded in the present case by the rules provided in the Federal Act respecting railways.

The Live Stock Special Contract, in this case, is in standard form approved by the Board of Transport Commissioners for Canada, by Order No. 298, dated the 2nd day of June, 1920; and by force of section 348 of the Dominion *Railway Act,* the contract in question is valid; it is not only the agreement whereby the parties are bound, but, in a certain sense, it is really the law governing the relationship of all shippers and railway carriers to such an extent that it would not be open in the premises, for either the appellant or the respondent, to relieve themselves of the stipulations of such a contract.

(1) Reported *ante,* p. 352.

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Moreover, under section 9 of the contract, the shipper acknowledged that he had the option of shipping his live stock at a higher rate of freight than that payable under the special contract, and according to the classifications and tariffs of the carrier, the effect of which the shipper understood, would be to remove the limitation on the amount of damages for which the carrier might be liable as thereunder provided,

and the shipper had voluntarily elected to accept the limitation of liability therein contained, to enable him to obtain the reduced freight rate mentioned in the contract.

(See the judgment of this Court in *Ludditt* v. *Ginger Coote Airways Ltd.* (1))

The special contract governing the parties starts by stating that it is made subject to the classifications and tariffs in effect on the date of its issue (except when inconsistent with the contract itself); and it follows that the live stock to be carried thereunder was subject to these classifications and tariffs.

Under these classifications and tariffs, we are dealing with a carload shipment; therefore, the rates and weights were at "owner's risk". I repeat that the shipper had the option of asking for a straight bill of lading whereby the shipment would have been made at carrier's risk and the special contract under which the shipment was made is at owner's risk.

In the present case, the horses were being carried at "owner's risk" according to the usual acceptation of the term, and the carrier was relieved from liability for damage even resulting from its negligence and that of its servants, provided it was consistent with the terms and conditions of the Live Stock Special Contract. (Refer to Rules and Conditions 2 and 3 at page 21 of the Tariff).

It follows that unless we find in the special contract a restriction limiting the owner's risk condition, the respondent in the present case cannot be held responsible for the accident complained of by the appellant.

The contract states that the respondent agreed to carry the carload of horses to its place of delivery at destination

(1) [1942] S.C.R. 406.

and that it was mutually agreed that every service to be performed thereunder should be subject to all the conditions therein mentioned.

This was accepted for himself by the shipper, the appellant herein.

The appellant agreed to load, unload, reload the live stock at his own risk;

feed, water and attend same at his own expense and risk while in transit, except as provided in sub-section 5,

in the event of delay, which does not arise in the present case.

Section 4 of the contract further stipulates that

in case any of the employees of the carrier load, unload, reload, feed, water, or otherwise care for the said live stock, or assist in doing so, they will be treated as agents of the shipper for that purpose and not as agents of the carrier; except when such loading, unloading, reloading, feeding or watering is occasioned by some act or default of the carrier.

Under sub-section 3 of section 4 of the contract, the

shipper agrees to properly and securely place all said stock in cars, and the carrier shall, except in cases where the shipper or some person on his behalf accompanies the live stock, keep said doors securely locked or fastened until placed for unloading.

Under sub-section 4,

if temporary partitions or decks are put in the cars by the shipper, the carrier shall not be responsible for the sufficiency thereof or any loss or damage caused by defects therein.

Under section 6,

the carrier is not to be liable for loss or damage to any of the live stock caused by the act of God, the King's or public enemies, riots, strikes, defects or inherent vice in the live stock, heat, cold, the authority of law, quarantine, the act or default of the shipper, or causes beyond the carrier's control * * * and the burden of proving freedom from such negligence shall be on the carrier.

In the present instance, the shipper, or the appellant, did send a person to accompany and care for the shipment throughout the journey on his behalf. It is not clear at what exact point this person boarded the train. It would seem that he was not there when the horse was found lying in the car at Saskatoon.

The special partition appears to have been put up by the employees of the shipyards, and not those of the respondent at Saskatoon.

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At all events, it is not necessary to ascertain the exact situation in that respect, for it was the undeniable obligation of the appellant to accompany and care for the shipment throughout the journey, either by himself or by some person on his behalf. If the attendant was there when the horse was found lying sick, it was his responsibility to "care for" and to "attend" it at the shipper's "risk while in transit". If the attendant was not there, the employees of the respondent were to "care" for the live stock, but then they would be "treated as agents of the shipper for that purpose and not as agents of the carrier".

Attending the live stock, caring for it, or "properly and securely place" it in the car would all be part of the obligations of the appellant under section 4, sub-sections 1 and 3, and under section 5 of the contract. And it is particularly stipulated in sub-section 4 of section 4, that if temporary partitions or decks are put in the cars by the shipper, the carrier shall not be responsible for the sufficiency thereof or for any loss or damage caused by defects therein.

So that whether the accident was caused through the lack of attendance or care of the live stock, or through the insufficiency of temporary partitions or decks, in either case it was caused by the failure of the shipper to carry on his obligations under the special contract.

It seems evident that when the horse was found sick in Saskatoon, it became the duty of the person who was to "attend" it or to "care for" it to do what was necessary in the circumstances. And when the partition was put up, it was for the purpose of protecting it and therefore included in the carrying out of the obligations to "attend" or to "care for".

On the other hand, if we limit the question to the fact of having erected a temporary partition in the car, that was also part of the obligations of the shipper "to properly and securely place" the stock in the cars; it was indeed, under sub-section 4 of section 4, a temporary partition put up by the shipper, since in doing so, the employees were to be "treated as agents of the shipper for that purpose and not as agents of the carrier."

In either case, what was done cannot be traced back to the responsibility of the respondent who, in such a case, (under sub-section 4),

shall not be responsible for the sufficiency thereof or for any loss or damage caused by defects therein.

No partition was necessary for the other horses. It was put there only because the mare was sick in order to protect it; it was part of the care due to the mare and entirely part of the obligations of the shipper under the contract.

It was also the conclusion arrived at by St.-Jacques J. in the Court of King's Bench with whom Prévost J. and Stuart McDougall J. agreed, and with whom MacKinnon J., writing separately, agreed.

I find myself fully in accord with these conclusions and for these reasons, I would dismiss the appeal with costs.

KERWIN J.:—The Live Stock Special Contract upon which this action is based was in a form approved by the Board of Transport Commissioners under section 348 of the *Railway Act*. The contract states that there was

Received, subject to the classification and tariffs in effect on the date of issue of this original Live Stock Bill of Lading, except when inconsistent herewith.

a number of horses from different places in Saskatchewan for delivery to the appellant in Montreal. The particulars as to what occurred to a bay mare and a gelding appear elsewhere. Suffice it is to say that the action is brought to recover the agreed valuation of each animal, which action was contested by the respondent on several grounds.

In my view it is not necessary to consider more than one such ground. By section 5 of the Special Contract:—

If the destination of the shipment of said live stock is more than one hundred and fifty (150) miles from the point of shipment, the shipper or some person on his behalf (not an employee of the carrier), must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey.

It is uncertain when any attendant joined the train.

By sub-section 1, section 4:—

The shipper agrees to load, unload or reload said live stock at his own expense and risk: feed, water and attend same at his own expense and risk while in transit, except as provided in sub-section (5) of this

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Kerwin J.

Section. In case any of the employees of the carrier load, unload, reload, feed, water or otherwise care for the said live stock, or assist in doing so, they will be treated as agents of the shipper for that purpose and not as the agents of the carrier, except when such loading, unloading, reloading, feeding or watering is occasioned by some act or default of the carrier.

It seems to me unquestionable that the appellant did not "attend" the horses at the relevant times and that in the events that happened, even if the employees of the respondent were negligent in "otherwise" caring for them, they must, under sub-section 1 of section 4 of the Special Contract, be treated as agents of the appellant. Therefore, assuming that the trial judge was right in finding such negligence, this sub-section serves to relieve the respondent from any liability. I say nothing as to the effect of anything in the classification and tariffs except to point out that, by the opening words of the Special Contract, nothing therein contained could apply where it was inconsistent with the terms of the Special Contract.

The appeal should be dismissed with costs.

HUDSON J.:—The facts giving rise to this controversy are set forth in the judgment of my Lord the Chief Justice, which I have had an opportunity of reading.

The condition of the plaintiff's mare when the car arrived at Saskatoon was such as demanded the care and attention of those in charge. The occasion called for a decision as to what should be done. Neither the plaintiff nor any attendant representing him was there to act. As a consequence, after the mare had been examined by a veterinary, it was decided by the employees of the company and two employees of the stock yard that a partition should be erected separating the mare from the other horses in the car and that she should then be allowed to proceed on the journey. A partition was erected and the car proceeded on the journey.

The only fault attributed to the defendant is that the partition was insufficient for the purpose and the subsequent death of the animal arose therefrom. The learned trial judge so found but a different view prevailed in the court of appeal.

It appears from a perusal of the evidence that there were different opinions on the question of the sufficiency of this partition among men engaged in the shipping of live stock. It does appear, however, that none of them had known of a case where an injury had occurred under circumstances at all similar to those of the present case.

The contract of shipment provides:

4. (1) The shipper agrees to load, unload or reload said live stock at his own expense and risk, feed, water and attend same at his own expense and risk while in transit, except as provided in sub-section 5 of this section. In case any of the employees of the carrier load, unload, reload feed, water or otherwise care for the said live stock or assist in doing so, they will be treated as agents of the shipper for the purpose, and not as the agents of the carrier, except when such loading, unloading, reloading, feeding or watering is occasioned by some act or default of the carrier.

* * *

(4) If temporary partitions or decks are put in the cars by the shipper, the carrier shall not be responsible for the sufficiency thereof, nor for any loss or damage caused by defects therein.

5. If the destination of the shipment of said live stock is more than one hundred and fifty miles from the point of shipment, the shipper or some person on his behalf (not an employee of the carrier), must, unless special arrangements are otherwise made in writing, accompany and care for the shipment throughout the journey.

It appears that an attendant of the plaintiff was on the train but never gave any attention to the animal in question until after her death. Under these circumstances, I do not think that it lies in the mouth of the plaintiff to complain of any provision that was made for the care of his animal.

In my opinion, the employees of the defendant could not have been guilty of more than a lack of judgment and it is peculiarly a case for application of the provision that defendant's employees should be treated as the agents of the shipper himself. For this reason, I would dismiss the appeal with costs.

KELLOCK J.:—Under the terms of section 5 of the Live Stock Special Contract here in question, the shipper, or some person on his behalf, was obliged to accompany and care for the horses throughout the journey. It is apparent from the evidence that although the Special Contract between the Railway Company and the attendant in

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Kellock, J.

charge was not signed, nonetheless an attendant did in fact accompany the shipment, although he did not board the train at Rutland, the original shipping point. After the train had left Wynyard, the attendant was found asleep in the car provided for shippers' attendants.

Again under the provisions of sub-section 1 of section 4, the obligation to load, unload and reload the horses, to feed, water and attend the same while in transit, was placed upon the appellant. In the attendant's contract there is the following provision:

> I agree to give the live stock included in this shipment all care and attention needed en route. If anything goes wrong in connection with the shipment, or if it needs any care or attention that requires the help or co-operation of the train crew, I will promptly notify the conductor in charge.

Accordingly, when the horses arrived in Saskatoon, had the appellant's attendant performed his duty, he would have seen the condition of the horse which was there found to be down, and he would have been under obligation to take the proper steps to see that this horse was protected from the other animals for the remainder of the journey if its condition required this. When the stock yard employees put in the partition, which in their judgment was called for in the circumstances, I think they were acting as the appellant's agents in accordance with the provisions of the contract and the appellant, having failed in the obligation which lay upon him, cannot be heard to say that what was done was not done on his behalf. In my opinion the provisions of sub-section 4 of section 4 contemplate the very situation that arose. I think that the temporary partition was put in on behalf of the appellant and its insufficiency is not something for which the respondent is responsible.

The appellant's own witness, Arnold, gave the following evidence:

> Q.—Have you ever shipped horses on the Canadian Pacific Railway?
>
> A.—I ship them all the time.
>
> Q.—Have you ever seen any other type of gate used than this one which is shown as exhibit D-3?
>
> A.—No. Not provided by the C.P.R. But generally two gates are used or the gate is raised up. It is raised up two or three feet, and it is cleated. You put cleats on the side or you supplement it with a plank on top.

Q.—Have you ever done it yourself?
A.—Yes, often. Practically every week. Continually.
Q.—But it has not been done by railway employees?
A.—Well, sometimes it is, *if we ask them to.* It has been done.

I think, therefore, that the loss complained of in this action was a loss for which the appellant himself was responsible.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mann, Lafleur & Brown.*

Solicitor for the respondent: *L. G. Prévost.*

THE SECRETARY OF STATE FOR CANADA, IN HIS CAPACITY AS THE CUSTODIAN OF ENEMY PROPERTY (DEFENDANT) ..... APPELLANT;

1946
*Mar. 6, 7.
*May 3

AND

BARON EDOUARD DE ROTHSCHILD AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Enemy property—Bearer share warrants—Owned by a citizen of France—Deposited with a bank situated in Holland—Sent to Canada in 1939 prior to war—Held by a bank in Montreal—Holland, when invaded by Germans, declared to be proscribed territory—Custodian of Enemy Property vested with the securities—Owners asking to get possession—Custodian asserting right to investigate before releasing control—Upon evidence, release allowed by Custodian subject to payment of commission on total value of assets—Whether Dutch bank an "enemy"—Whether Custodian entitled to commission—Consolidated Regulations Respecting Trading with the Enemy (1939), s.s. 28 (1) and 44 (1).

The respondents' action was brought for a declaration as to whether bearer share warrants, most of them owned by the respondent Baron de Rothschild, a citizen of France, have been at any time on or since the 2nd day of September 1939 subject to the Consolidated Regulations Respecting Trading with the Enemy (1939). These shares, being of the Royal Dutch Company, had been deposited with a bank named N. V. Commissie-en-Handelsbank, incorporated under the laws of Holland at Amsterdam; and they had been sent by that bank early in 1939 to Canada to be held for it by the Royal Bank of Canada.

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

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On May 10th, 1940, Holland was invaded by the German army; on the following day, by order-in-council, the Netherlands was declared proscribed territory and the above Regulations became applicable to it. Section 28 (1) deals with the reporting, to the Custodian, of enemy property in Canada by any person who holds or manages it. Section 44 (1) provides that "the Custodian shall have power to charge against all property investigated, controlled or administered by him but which is subsequently released * * * an amount not exceeding two per centum of the value of all such property * * *". On August 1st, 1940, the respondents claimed ownership and wanted to get possession of the shares, but the Custodian insisted on getting adequate proof of the respondents' claim and that they were not enemies. Later, the Custodian, on the basis of evidence adduced, agreed to release control over these shares, subject to the payment of a commission of two per cent. on their total value. The respondents contended that they were never enemies within the meaning of the Regulations, that the shares always belonged to them and were never subject to the Regulations and that the Custodian had no right to charge any commission against them. The President of the Exchequer Court of Canada agreed with the respondents' contentions and maintained their action. On appeal to this Court.

Held, reversing the judgment of the Court below, that the respondents' property was within the time mentioned subject to both sections 28 (1) and 44 (1) of the Regulations and that, therefore, their action should be dismissed.

Held that the Custodian had power, under section 44 (1), to charge against the respondents' property "investigated, controlled or administered by him but * * * subsequently released" the amount of two per cent. of the value of such property. The language is precise to apply to the situation in this case: the property was held for an enemy; it became subject to the direction of the Custodian, and where other persons were claiming through that enemy, it must necessarily be investigated and either released or applied to the purposes contemplated by the Regulations.

Per The Chief Justice and Kerwin, Rand and Estey JJ.:—The Dutch bank was an enemy within the meaning of the Regulations and the property held by the Royal Bank of Canada was reportable to the Custodian under section 28. The residence of the bank on the 11th of May, 1940, must be deemed still to be in Amsterdam, in the absence of proof that, on the 10th, the central management and control and the seat of the bank's business had been transferred to a place outside of Holland. There was evidence that, early in 1939, the original books (duplicate remaining in Holland), securities and records had been sent to London, England, but there was still property in Amsterdam, including the premises occupied by the bank and some amount of cash; and to attribute sole residence to a corporation elsewhere than at the place of incorporation requires a more complete and collective migration of its faculties and activities.

Per Hudson J.:—The respondents' argument, that the securities, having been their property at all times, never did vest in the Custodian and as a consequence, the investigation was not done under the authority of the Regulations, is adversely answered by the fact that when

Holland was occupied the securities were in Canada held here for a bank in Amsterdam which, by reason of the order-in-council of the 11th of May and the definition of "enemy" in the Regulations, became an enemy.

APPEAL from the judgment of the President of the Exchequer Court of Canada, declaring that certain bearer share warrants belonging to the respondents were never subject to the Consolidated Regulations Respecting Trading with the Enemy (1939) and that the Custodian of Enemy Property was not justified in levying any charge against the property under the provisions of section 44 (1) of the Regulations.

D. L. McCarthy K.C. and *W. G. C. Howland* for the appellant.

Gustave Monette K.C. and *Kenneth Archibald K.C.* for the respondents.

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

RAND J:—The question in these proceedings is whether or not certain property consisting of bearer share warrants, in part owned by the respondent, Baron de Rothschild, a citizen of France, (whose status and rights may be taken as representing those of the other respondents) has been at any time on or since the 2nd day of September, 1939 subject to the Consolidated Regulations Respecting Trading with the Enemy (1939).

The shares were of the Royal Dutch Company. The warrants had been deposited with a bank named N. V. Commissie-en-Handelsbank, incorporated under the laws of Holland at Amsterdam. By that bank they, with others, had been sent early in 1939 to Canada to be held for it by the Royal Bank of Canada at Montreal. An account was opened, and from time to time dividend coupons were sent to the Dutch Bank and service charges entered against cash remitted. Letters had been signed and given to the respondents as early as August, 1939, directing the Royal Bank to hold certain of the warrants for each, but these letters were retained until some time in July, 1940 when they were presented to the London branch of the

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Royal Bank and copies forwarded to Montreal. The respondent was unknown to the Canadian bank.

On May 10th, 1940 Holland was invaded by the German army. On the following day, by Order-in-Council P.C. 1936 the Netherlands was declared proscribed territory, and the Regulations made applicable to it in these terms:

> Whereas the Secretary of State of Canada, with the concurrence of the Minister of Finance, reports that, in consequence of the invasion of the Netherlands, Belgium and Luxembourg by enemy forces, it is necessary and expedient, with the view of preventing any of the resources in Canada of residents of the Netherlands, Belgium and Luxembourg from falling under the control of the invading enemy or agents of the invading enemy, to place, temporarily, under protective custody all property, rights and interests in Canada of persons residing in the Netherlands, Belgium and Luxembourg and to regulate trading with such persons; and
>
> That the most expedient measure which can be adopted to ensure such custody and regulation is to use the machinery of the Custodian's Office established under the Regulations respecting Trading with the Enemy (1939) and to confer on the Secretary of State the powers of regulation and control in respect to such property, rights and interests in Canada of persons residing in the Netherlands, Belgium and Luxembourg which are exercisable by him as Secretary of State and as Custodian under the Trading with the Enemy Regulations in respect to proscribed territory;
>
> Now, therefore His Excellency The Administrator In Council, on the recommendation of the Secretary of State of Canada, with the concurrence of the Minister of Finance, and under and by virtue of the *War Measures Act* (R.S.C. 1927, chapter 206) is pleased to order as follows:
>
> From and including the tenth day of May, 1940, the provisions of the Regulations respecting Trading with the Enemy (1939) are hereby extended to and deemed to apply to the territories of the Netherlands, Belgium and Luxembourg as proscribed territory;
>
> Provided that any transaction or act permitted by the Secretary of State of Canada, with the concurrence of the Minister of Finance, shall not be deemed to come within the provisions of this Order.

Section 28 (1) of the Regulations deals with the reporting of enemy property in Canada, and is as follows:—

> Any person who holds or manages any property for or on behalf of an enemy shall within thirty days after the commencement of the present war, or if the property comes into his possession or custody or under his control after the commencement of the present war, then within thirty days after the time when it comes into his possession or custody or under his control, by notice in writing communicate the fact to the Custodian, and shall furnish the Custodian with such particulars in relation thereto as the Custodian may prescribe and require and shall, on the Custodian's written request, deliver to him all documents or other evidence of title relating to such property.

The word "enemy" is defined as:—

(ii) any person who resides or carries on business within territory of a State or Sovereign for the time being at war with His Majesty, or who resides or carries on business within territory occupied by a State or Sovereign for the time being at war with His Majesty, and as well a person wherever resident or carrying on business who is an enemy or treated as an enemy and with whom dealing is for the time being prohibited by these Regulations or by statute or proclamation of His Majesty by and with the advice of His Majesty's Privy Council for Canada or by the common law.

Whether or not Holland was on May 11th, 1940 a territory occupied by a State or Sovereign for the time being at war with His Majesty, it must, I think, be taken that that was the situation some time before July, 1940. From this it follows that the Regulations of their own force became applicable before the disclosure of ownership of the property to the Royal Bank in London. If P.C. 1936 modifies that application, then so far it controls. But its preamble seems to me simply to express in relation to the property of persons residing or doing business in proscribed territory what otherwise would be the effect of the Regulations; and I take the question then to be, what is that effect on the facts before us?

Was the Dutch bank residing or carrying on business in Holland on May 11th, 1940? Its issued shares were owned solely by the respondent and his brothers. There was carried on a general banking as well as brokerage business, including the deposit and management of securities. Many months before, early in 1939, steps had been taken to meet the eventuality of invasion. Duplicate books had been set up and the originals sent to London, and new pages were sent over from week to week as transactions took place: these with securities were kept in a strong room. Instructions had been given to burn all records in Amsterdam on the outbreak of hostilities. On May 10th, powers of attorney to Polock and Jansen to sign on behalf of the bank were revoked and notice by cable given to correspondents in America and elsewhere. Of the members of the Managing Board and the Board of Directors, one, Geyer, had gone to London in 1939, another, Gans, managing director, to Paris in March, 1940, and Messrs. Van Straaten, managing director for Holland, and Esser, director, had remained in Amsterdam. We have no evidence of what

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took place in that city after the invasion, but under these officers holding some degree of managing powers there was a staff of nine or ten employees.

No doubt every effort was made to bring the active business of the bank in Holland to an end. I will assume that those efforts were successful and also the termination as between the bank and the respondent, of its agency in respect of the share warrants; but there remains the question of residence. That term is to be interpreted according to the law of this country. So long as a corporation continues with assets and organization, residence must be attributed to it; and in the absence of proof that on the 10th day of May the central management and control and the seat of the company's business had been transferred to a place outside of Holland, the residence of the bank on the 11th must, I think, be deemed still to be in Amsterdam. Such a transfer was, in fact, never intended; the cessation of business and the scattering of corporate authority were the objects of the steps taken. The preservation of records and property must continue, but there was property in Amsterdam, including the premises occupied by the bank and some amount of cash. To attribute sole residence to a corporation elsewhere than at the place of incorporation requires, in my opinion, a more complete and collective migration of its faculties and activities than that; and I cannot agree that a residence did not continue in Holland.

The bank was, therefore, an enemy within the meaning of the Regulations, and the property held by the Royal Bank of Canada was reportable to the Custodian under section 28.

There is next section 44, which is in these words:—

(1) The Custodian shall have power to charge against all property investigated, controlled or administered by him but which is subsequently released, in addition to any other charges authorized under these Regulations, an amount not exceeding two per centum of the value of all such property, including the income if any.

It is argued that the word "investigated" harks back to section 7.

7. If the Secretary of State is satisfied that there is reasonable ground for suspecting that an offence under any of Regulations 2 to 5 inclusive has been or is about to be committed by any person he may, by written order, authorize a specified person to inspect all books or documents

belonging to or under the control of the person named in the order, and to require any person able to give any information with respect to the business or trade of the suspected person, to give that information and if accompanied by a police officer to enter and search any premises used in connection with the business or trade and to seize any such books or documents as aforesaid.

But there what is investigated is a person suspected of an offence; here the investigation is of property. The language is precise to apply to the situation before us: the property was held for an enemy; it became subject to the direction of the Custodian; and where other persons were claiming through that enemy, it must necessarily be investigated and either released or applied to the purposes contemplated by the Regulations. Here it was found to belong to a citizen of France and its release is in order.

As we are not concerned with the quantum of charge made or to be made by the Custodian, the answer to the question submitted must be that the property was within the time mentioned subject to both sections 28 and 44 of the Regulations.

I would, therefore, allow the appeal and dismiss the petition with costs in both Courts.

HUDSON J.:—The matter here in controversy is a claim by the Custodian of Enemy Property to a commission of two per cent. on the value of certain securities which were finally released by the Custodian to the respondents.

The claim was made under the authority of section 44 of the Consolidated Regulations respecting Trading with the Enemy which is as follows:

44. (1) The Custodian shall have power to charge against all property investigated, controlled or administered by him but which is subsequently released, in addition to any other charges authorized under these Regulations, an amount not exceeding two per centum of the value of all such property, including the income if any.

(2) The Custodian shall have power to retain out of the proceeds of all property vested in him under these Regulations sufficient moneys to pay the expenses incurred in the administration of such Regulations.

The facts giving rise to the controversy are fully stated in the judgment of the President in the court below.

It appears that early in 1939 a Netherlands bank known as N. V. Commissie-en-Handelsbank, and hereafter for convenience called "Coha", deposited with the Royal Bank of Canada in Montreal securities in the form of share war-

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rants payable to bearer. There was nothing said or done at the time of such deposit to indicate any ownership or interest in such securities other than that of the bank itself.

These securities remained in the possession of the Royal Bank who collected and paid the income therefrom to, or to the order of, "Coha" until the Netherlands was occupied by German forces on the 10th of May 1940. Meanwhile, Canada had declared war on Germany and Regulations respecting Trading with the Enemy had been made by Order-in-Council under the authority of the *War Measures Act*. On the 11th of May 1940, these Regulations were made applicable to the Netherlands, Belgium and Luxembourg.

No question arises as to the validity of these Regulations but their application to the securities claimed by the plaintiffs is denied.

The purpose of the Trading with the Enemy Regulations was to supplement, strengthen and regulate the common law restraint on commercial dealings with alien enemies and the inhabitants of the enemy countries as well as to secure and control property in Canada belonging to enemies.

By the first section of the Regulations, clause (*b*), it is provided that:

"Enemy" shall extend to and include—

* * *

(ii) Any person who resides or carries on business within enemy territory or proscribed territory and, as well, a person wherever resident or carrying on business who is an enemy or treated as an enemy and with whom trading is, for the time being, prohibited by these Regulations or by statute or proclamation by His Majesty or by the common law.

* * *

(*d*) "Enemy territory" means any area which is under the sovereignty of, or in the occupation of, a State or Sovereign for the time being at war with His Majesty.

(*e*) "Proscribed territory" means any area in respect of which the Governor in Council by reason of real or apprehended hostilities or otherwise, may order the protective custody of property of persons residing in that area and the regulating of trade with such persons.

(*h*) "Property" as used in these Regulations shall extend to and include all real and personal property of every description, and all rights and interests therein, whether legal or equitable, and without restricting the generality of the foregoing, including securities, debts, credits, accounts and choses in action.

Section 28 (1) reads as follows:

Any person who holds or manages any property for or on behalf of an enemy shall within thirty days after the commencement of the present war, or if the property comes into his possession or custody or under his control after the commencement of the present war, then within thirty days after the time when it comes into his possession or custody or under his control, by notice in writing communicate the fact to the Custodian, and shall furnish the Custodian with such particulars in relation thereto as the Custodian may prescribe and require and shall, on the Custodian's written request, deliver to him all documents or other evidence of title relating to such property.

By the Order-in-Council of the 11th of May resources in Canada of the Netherlands, Belgium and Luxembourg were placed under protective custody and it was further provided:

From and including the 10th May, 1940, the provisions of the Regulations respecting Trading with the Enemy, 1939, are hereby extended to and deemed to apply to the territories of the Netherlands, Belgium and Luxembourg as proscribed territory.

On the 31st of July, 1940, an order to the same effect was passed, extending the Regulations to French territory in Europe and Africa.

The Royal Bank did not formally notify the Custodian of the securities held by them in "Coha" until the 20th of August, when a return was made in Form B, as prescribed by section 28 of the Regulations. It showed that the securities were held for "N. V. Commissie-en-Handelsbank, Amsterdam, Holland." But meanwhile, on or about the 31st of July, the manager of the Royal Bank had advised the Custodian that Baron and Baroness Edouard Rothschild claimed ownership and wished to get possession of the securities in question.

The Custodian then insisted on getting adequate proof of the claims of the plaintiffs and that they were not enemies.

After a prolonged interchange of correspondence, verification of statements and many personal interviews the Custodian wrote a letter to the Royal Bank as follows:

I have to advise you that on the basis of the evidence submitted the Custodian would not now appear to be interested in the shares of the Royal Dutch Company claimed by these parties. He is accordingly releasing control over them. However, since the shares become vested in the Custodian on the 10th of May, 1940, the date fixed in Order-in-Council No. 1936 proscribing the Netherlands, the release is subject to a commission of 2% on the total value of the assets released.

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The plaintiffs refused to pay the 2% claimed. Their position was fully stated in a memorandum submitted to the Custodian by their solicitor on the 13th of September, 1941, and summed up as follows:

> The question at issue therefore is, whether the Custodian has a right, under the law, to investigate, control or administer the property of persons in general, and after proof of non-enemy status, to charge of percentage for doing so.
>
> The scope of the regulations covers only enemies or persons dealing with the enemy. In order to prove who is an enemy or a person dealing with the enemy, it is naturally necessary to make an investigation. The general law permits this in all cases, but when a person is proved not to have merited suspicion, he resumes his place as an unsuspected person, and is in no case required to pay the cost of the investigation.

The Custodian replied to this memorandum stating that

> the Custodian has not and does not now consider these applicants as having been enemies under The Consolidated Regulations respecting Trading with the Enemy.

He also stated:

> The Custodian's claim to commission in this case is not based upon whether the property in question vested in him under section 21 of the Regulations, but upon the fact that on the 10th May, 1940, the property claimed was held in Canada for the account of a person whose address was in Holland.
>
> * * *
>
> It is admitted by you and cannot be gainsaid that the property claimed was in the name of a bank in a country which was under the provisions of these Regulations "proscribed territory". Once these facts were brought to the attention of the Custodian by the Royal Bank of Canada, it was his obvious duty to place himself in control of that property as Custodian. Further, it is the Custodian's conclusion that the Regulations were established to cover such cases as the one now under discussion. The Royal Bank of Canada having reported the account to the Custodian, as it was bound to do, the Custodian was required under the Regulations to administer and control the property, and consequently, he is entitled to charge against this property when released by him, the commission already levied.
>
> To sum up the Custodian's position, I would point out that it is not dependent in any sense upon the position of the applicants themselves under the Regulations, but entirely upon the status of the property under the Regulations on the 10th May, 1940.

No agreement having been reached the Custodian gave his consent to an action to decide this issue. The learned President who tried the case agreed with the plaintiff's contention and judgment was entered declaring that the property in dispute was never subject to the Consolidated Regulations respecting Trading with the Enemy 1939, and that the Custodian was not entitled to charge any amount against the said property.

After much consideration, I have come to the conclusion that the Custodian has taken the right view. Section 44 (1) gives the Custodian a right to make a charge "against all property investigated, controlled or administered by him." The fact that the property was investigated by him is not open to serious question.

The real argument on behalf of the plaintiffs is that, once it was established that the securities belonged to them at all relevant times, it must be held that such property never did vest in the Custodian and that, as a consequence, what was done in the interim was not done under the authority of the Regulations. This argument is answered, I think, by the fact that when Holland was occupied the securities were in Canada held here for a bank in Amsterdam which, by reason of the Order-in-Council of the 11th of May and the definition of "enemy" in the Regulations, became an enemy.

Under section 21 (1) and (2) of the Regulations it is provided:

> 21. (1) All property in Canada belonging to enemies at or subsequent to the commencement of the present war, and whether or not such property has been disclosed to the Custodian as required by these Regulations, is hereby vested in and subject to the control of the Custodian.
>
> (2) This regulation shall be a vesting order and shall confer upon the Custodian all the rights of such enemies, including the power of dealing with such property in such manner, as he may in his sole discretion decide.

By reason of this section nobody could effectually deal with the property without the authority of the Custodian. When, as here, a claim was made by a third person, the onus was on such person to prove his title under section 58 (1):

> 58. (1) The onus of proof in every instance shall rest upon the person who asserts that he or any property claimed or held by him is not within the provisions of these Regulations.

This, of course, was recognized by the Royal Bank. As a consequence, the plaintiffs themselves applied to the Custodian for a release and he rightly insisted on proof of their title beyond their mere assertion of ownership. This proof was furnished only after many inquiries and much delay.

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It may be that there was not such a complete vesting as would entitle the Custodian, after notice of plaintiffs' claim, to deal with the property without getting an order from the Exchequer Court of Canada under section 25 which reads as follows:

> 25. (1) The Exchequer Court of Canada or any judge thereof, on the application of the Custodian, or any one acting on his behalf, may by order vest in the Custodian any property suspected of belonging to or of being held or managed for or on behalf of an enemy, and may by such order confer on the Custodian such powers of dealing with the property vested as to the court or judge may seem proper.
>
> (2) It shall not be necessary to give any notices of such application to the suspected enemy unless notice or notices shall be ordered by the court or judge before whom the application is made.

But here there was no immediate need to deal with the securities. They were held by the Royal Bank and could be left there with assurance of safety until the claim of the plaintiff could be investigated and determined. The primary object of section 25 is to give the Custodian an opportunity to prevent disposal of property which may be so placed as to create a risk of its transfer or loss.

Section 27 under which the present action is taken was always available to the plaintiffs but they did not seek to take advantage of it until after the investigation had been carried on, and had an acknowledgment from the Custodian of their ownership of the property. It seems to me that the securities here fell well within the ambit of the Regulations and that the investigation made by the Custodian was such an investigation as falls within section 44 (1). It will be noted that section 44 (1) does not deal exclusively with the property *vested in the Custodian* as is mentioned in subsection 2.

I am, therefore, of the opinion that the Custodian is entitled to charge such fee as he deems proper within the limits prescribed by section 44 and would allow the appeal and dismiss the action with costs here and below.

Appeal allowed and petition dismissed with costs.

Solicitor for the appellant: *D. L. McCarthy.*

Solicitors for the respondents: *Archibald & Cain.*

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

AND

ALFRED LAPERRIÈRE, ÈS-QUAL. (SUPPLIANT) ..... } RESPONDENT.

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*Feb. 25, 26.
*May 3.

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

AND

OMER DUBEAU, ÈS-QUAL. (SUPPLIANT) .. RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Negligence—Petition of right—Injury to minor children through explosion of thunderflash—Alleged negligence of army officers in leaving live explosive in a field after manoeuvres—Small children later finding it, playing with and lighting it—Liability of the Crown—Negligence or fault of the children—Division of negligence—Whether doctrine of contributory negligence applicable to the Crown, when cause of action arises in Quebec province—Exchequer Court Act, R. 5 C., 1927, c. 34, section 19 (c), amended by 2 Geo. VI (Dom.), c. 28, s. 1.

During the evening of October 10, 1942, a detachment of soldiers belonging to a Canadian regiment carried on military exercises on the course of the old Kent Golf Club, near the city of Quebec. During these manoeuvres some seventy five thunderflashes were used. On October 31st one unexploded thunderflash was found on the adjoining farm of one Giroux by two boys who had been looking for golf balls, one of them being Marcel, minor son of the respondent Dubeau. The boys opened the thunderflash and extracted bits of powder from it, which they ignited with matches and caused small explosions. Marcel took home with him the thunderflash containing the remaining of the powder. On the same evening, these two boys, with several others including Gaston, minor son of the other respondent Laperrière, gathered on the street. After burning a small bit of the powder on the sidewalk, Gaston and the other boy who had found the explosive decided to ignite the remainder of the powder in the thunderflash all at once. After two attempts had been made with no result, Gaston and Marcel, respectively 11 and 12 years of age, thinking that the explosive had not been properly lighted, were about to pick it up, when it exploded causing severe injuries to the two boys. The respondents, in their qualities of tutors to their minor sons, by petitions of right, claimed damages from the Crown, alleging its liability for the negligence of its officers or servants in the exercise of their duties or employment. The Crown contended that there was nothing in the case which was of a nature to involve its liability, that the military exercises had taken place on private properties, that young Dubeau was illegally on such lands when he found

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

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the explosive and that there had been no negligence on the part of any of its officers or servants while acting within the scope of their duties or employment. The Exchequer Court of Canada maintained the respondents' petitions of right, fixed the amount of the damages to a sum of about $15,371.00 in each case and then reduced such amount by one third on the ground that the two boys were at fault to that extent. The Crown appealed to this Court, and the suppliants cross-appealed, claiming that the Crown should be held liable for the full amount of the damages.

Held, affirming the judgments of the Exchequer Court of Canada ([1945] Ex. C.R. 53), The Chief Justice dissenting, that the appeals by the Crown should be dismissed and that the petitions of right of the respondents be maintained for the amount of damages awarded by that Court.

Held also that the cross-appeals by the respondents should be dismissed.—Rand J., dissenting, was of the opinion that the full amount of the damages should be granted.

Per The Chief Justice (dissenting)—A child, who is of sufficient age (at least over 7 years) and who also possesses requisite intellectual capacity and rational judgment, is legally liable to account for his acts: such doctrine is adopted by noted French authors and by a jurisprudence derived from many decisions rendered by the Quebec courts. Thus, when a child is found to be guilty of contributory negligence, he is evidently guilty of negligence and answerable for the full liability attached to his illegal act, unless there is evidence that another person has contributed with him to cause the damages: he is solely responsible, being the *causa causans*. In the present case, the military men cannot be charged with gross negligence for having willingly and knowingly left on the ground a dangerous explosive, as, upon the evidence, they were ignorant of the fact that a thunderflash had remained unexploded. Assuming that, because the military men did not ascertain before leaving that no thunderflash was left unexploded, it would constitute negligence on their part, there is no evidence that they were aware, or should have been aware, that children would enter the ground after the manœuvres had taken place; on the contrary, the evidence shows that there could not be such possibility Moreover, in view of the opinion expressed by the trial judge that the two boys possessed sufficient intelligence to have foreseen the possible consequences of their acts, they should be treated the same as if they had been adults; and the Crown would not have been held liable if adults had committed these acts. On the whole, the minor sons of the respondents have conducted themselves with the full knowledge of the possible consequences of their acts and they have suffered injury through their own want of prudence. In any event, there has been, from the time the explosive has been found to the time when the accident occurred, a sequence of intervening events which makes of the alleged negligence of the military men a most remote cause *(causa sine qua non)* of the accident and of the damages resulting from it, but not a *causa causans*.

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Per Kerwin J.:—On the facts of the case, there was negligence on the part of the officers in charge of the military exercises, their acting within the scope of their duties or employment, in leaving, without making a search, the unexploded thunderflash, a dangerous article, on Giroux's farm, where the two boys on the day in question went with at least the implied permission of the owner. Under all circumstances, steps should have been taken to see that all the thunderflashes used had been exploded; and, in the absence of such steps, it should have been anticipated that an unexploded one would be found by children on Giroux's farm and that such children might so play with it as to cause injuries to themselves. While the two boys were normal and intelligent enough to understand to a certain extent the imprudence of their acts, they were, nevertheless, of such an age as not fully to comprehend the dangerousness of their actions: such was the finding of the trial judge and it should not be disturbed.

Per Hudson and Estey JJ.:—The Crown appellant has failed to prove that after the manoeuvres all the thunderflashes were accounted for and had, in fact, exploded. Notwithstanding that no permission had been obtained to use Giroux's land in any way, and in spite of the fact that these thunderflashes were thrown from a point adjoining it and in its direction, no effort was made to see that these thunderflashes did not reach it, nor to warn Giroux of the possibility that some of them might have reached his farm, upon which the boys who found the explosive were not trespassers. Under the circumstances, these facts constituted negligence. The conduct of the two boys, having regard to their capacity, knowledge and experience, constituted also negligence, but that the boys were negligent, however, does not necessarily relieve the first party negligent of liability. Nevertheless, in spite of their partial knowledge of the possibility of injury with which they were confronted, they cannot be entirely excused because in part their negligent conduct has contributed to their own injuries.

Per Rand J. (dissenting on the cross-appeal):—A highly dangerous explosive has been unlawfully placed and left on land where two boys who shortly thereafter found it had permission to be. The high degree of care required of those who control such articles means the anticipation of a greater range of probable mischief and, in this case, reaching to the children injured. The natural consequences of that initial *culpa* extend then to the injuries suffered unless it can be said that at some point a new and independent actor has intervened. The intervening act in this case, if an adult had been concerned rather than a boy of 12, would be held to be new and independent; it was not a situation in which contributory negligence could operate; it would have been an intermeddling by a responsible person with what he would know could be dangerous. There are degrees of liability for consequences between two or more participants in a negligent cause, but there is no binding authority which attributes fractional liability or deprivation of right to an infant in proportion to his appreciation of a particular situation; in relation to a specific act, he must be either responsible or not responsible, there is no halfway culpability and these boys of 11 and 12 cannot be held to conduct that in the

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circumstances would have avoided the results which happened. The act of both boys, moving to pick up the explosive after the fuse had been lighted, not only negatives intelligence and general capacity which would have placed them in an older age or adult category, but demonstrates their inadequate appreciation of the danger they were courting. Their conduct then was normal, likely and, just as prudent behaviour in an adult, innocent: that excludes any qualification or limitation of the right to recover full damages from the Crown.

The Crown contended that its liability under section 19 (c) of the *Exchequer Court Act* is confined to cases where the injuries to person or property are exclusively "resulting from the negligence of any officer or servant of the Crown", i.e. that there is no right of action against the Crown in a case of contributory negligence on the part of the Crown and the subject.

Held, per Kerwin, Hudson and Estey JJ. that the Crown's contention is not well founded when the cause of action arose in the province of Quebec. The Chief Justice and Rand J. expressing no opinion.

Per The Chief Justice:—There is no necessity to decide such question in view of the conclusion arrived at, that the Crown was in no way liable for the accident.

Per Kerwin J.:—In cases between subject and subject in Quebec, damages must be mitigated in the case of common fault. This being the general law in that province, it is the law to be applied to the Crown under section 19 (c): it has been so settled by decisions in this Court.

Per Hudson and Estey JJ.:—In many decisions of this Court as well as of the Exchequer Court of Canada, where action was brought under section 19 (c) and the cause of action arose in Quebec, damages were apportioned between the Crown and the subject, when the negligence on the part of servants of the Crown contributed to the loss, thus indicating a long accepted construction of that section.

Per Rand J.:—It is unnecessary to consider this ground of appeal, in view of the opinion above reported.—*Semble* that there is nothing whatever anomalous in the view that what Parliament intended in creating liability of the Crown was to adopt the law then existing in each province, except as it might thereafter be amended or changed by Parliament, but that in any event the interpretation placed on section (19 (c) since its enactment has established a jurisprudence which would now be too late to modify.

APPEALS by the Crown and CROSS-APPEALS by the suppliants from the judgments of the Exchequer Court of Canada, Angers J. (1), maintaining the suppliants' claims made by way of petitions of right, for damages amounting to about $15,371.00 in each case and then reducing such amount by one third owing to the suppliants' minor sons being at fault to that extent.—The Crown appealed to this

(1) [1945] Ex. C.R. 53.

court, praying for the dismissal of the petitions of right, and the suppliants cross-appealed, claiming that the Crown should be held liable for the total amount of damages found by the trial judge.

Aimé Geoffrion K.C. and *Gérard Lacroix K.C.* for the appellant.

Frédéric Dorion K.C. and *Camil Noël* for the respondents.

The CHIEF JUSTICE (dissenting): Ces deux causes nous viennent par voie d'appel de la Cour d'Echiquier du Canada qui a accordé à l'intimé Dubeau une somme de $10,247.23 pour dommages, étant les deux tiers d'une réclamation de $15,370.84, (la différence représentant la somme que cette Cour a cru devoir retrancher parce qu'elle est arrivée à la conclusion que Dubeau s'était rendu lui-même coupable de négligence contributoire), et accordant à Laperrière $10,-248.39, étant les deux tiers de sa réclamation de $15,372.59, la différence ayant été retranchée pour la même raison que celle qui a été adoptée dans le cas de Dubeau.

Les deux causes ont été entendues ensemble, sur la même preuve, et nous pouvons en disposer pour des raisons à peu près identiques. La nature des faits est très importante pour la décision que nous avons à rendre.

Le ou vers le 10 octobre 1942, un détachement de militaires de la cité de Québec, sous les ordres du Ministre de la Défense Nationale, s'est rendu sur un terrain appartenant à la compagnie Quebec Power, situé dans la ville de Courville, et de là sur un autre terrain appartenant à François-Xavier Giroux, cultivateur du même endroit.

Les militaires y firent des exercices dans le but de se préparer à un raid simulé qui devait avoir lieu à Québec quelques jours plus tard et qui, de fait, eut lieu après ces exercices.

Au cours de ces manœuvres, le détachement s'était servi d'explosifs et il aurait apparemment lancé sur le terrain de Giroux un explosif communément appelé "thunderflash".

Le samedi, 31 octobre, le fils du pétitionnaire, âgé de 12 ans et accompagné d'un autre garçon du même âge, trouva ce "thunderflash" en jouant sur le terrain de Giroux, et il

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s'amusa à en retirer de la poudre en petites quantités et à y mettre le feu. Cela produisit une explosion minime au cours de laquelle son compagnon se brûla le pouce.

Tous deux eurent alors l'idée d'apporter le "thunderflash" au village de Courville et, le soir du même jour, accompagnés d'autres garçons du même âge, parmi lesquels se trouvait cette fois le fils du pétitionnaire Laperrière, ils commencèrent à s'adonner au même jeu après avoir de nouveau retiré du "thunderflash" une petite quantité de poudre; puis ils décidèrent de mettre le feu au "thunderflash" lui-même afin de produire ce qu'ils ont appelé un feu d'artifice.

Le "thunderflash" ne s'alluma pas immédiatement; ils crurent que le feu s'était éteint et alors le jeune Dubeau et le jeune Laperrière voulurent prendre le "thunderflash" dans leurs mains dans le but d'en rallumer le feu lorsqu'une explosion violente se produisit, enlevant au jeune Dubeau et au jeune Laperrière une partie de leur main droite, ce qui nécessita plus tard, pour chacun d'eux, l'amputation complète de la main droite.

Les deux pétitionnaires sont respectivement les pères de ces deux jeunes gens et, par voie de pétition de droit, ils réclamèrent de la Couronne les sommes ci-haut mentionnées, en alléguant que l'accident était dû à la négligence, à l'incurie et à la faute des militaires qui, dans les circonstances, agissaient sous les ordres de Sa Majesté le Roi par l'intermédiaire de son Ministre de la Défense Nationale.

Le Procureur-Général du Canada, au nom de Sa Majesté, plaida que les exercices des militaires avaient eu lieu sur des terrains privés, que le jeune Dubeau, au moment où il trouva l'explosif, était illégalement sur ce terrain, que d'ailleurs il n'y avait eu aucune négligence de la part ou des officiers en charge des exercices ou des militaires eux-mêmes, et que rien de ce qui s'était passé n'engageait la responsabilité de la Couronne.

L'honorable juge de première instance a apprécié la preuve de la façon suivante:

Il a été d'avis que le "thunderflash" trouvé sur le terrain de Giroux avait été laissé là, non explosé, par les militaires; que tout s'était bien passé ainsi qu'il est rapporté plus haut quant à la manière dont l'accident s'était produit; que le

jeune Dubeau, lorsqu'il trouva l'explosif, traversait la propriété de Giroux qui est voisine d'un terrain de golf, pour chercher des balles de golf; que cependant le terrain de golf était hors d'usage depuis trois ou quatre ans; et, de l'aveu du jeune Dubeau, en passant sur le terrain de Giroux, il se trouvait sur la propriété d'un étranger, où personne ne lui avait donné la permission de passer bien que c'était son habitude de passer sur cette propriété pour se rendre au golf.

Quant à Laperrière, il n'a vu l'explosif pour la première fois qu'après le souper lorsque les jeunes garçons se réunirent et qu'ils décidèrent, au lieu de se contenter de faire brûler un peu du contenu de l'explosif, de le brûler tout ensemble pour produire ce qu'ils appelèrent un feu d'artifice.

Le jeune Laperrière, au cours de l'appel au procès, a admis qu'il savait que, quand on met le feu à la poudre, cela explose et "c'est dangereux".

Tous deux avaient déjà joué avec des pétards ordinaires, mais ils ont avoué que l'explosif en question n'était pas un pétard comme ils avaient l'habitude d'en voir.

Le jeune Dubeau, au cours de son témoignage, déclara d'abord qu'au souper il avait informé son père de sa découverte et que ce dernier lui avait dit de ne pas jouer avec l'explosif qu'il avait trouvé parce que c'était dangereux.

Son père et sa mère lui auraient alors "défendu de jouer avec ça;" ils lui ont dit que c'était dangereux et "malgré cela il a joué avec". Il avoua que pour produire un feu d'artifice il lui fallait faire quelque chose que son père lui avait recommandé de ne pas faire, en lui disant que c'était dangereux.

Mais plus tard, dans sa déposition, il se contredit d'une façon flagrante et affirma qu'il n'en avait parlé ni à son père ni à sa mère.

Comme cette dernière affirmation du jeune Dubeau est corroborée par son père et par sa mère, l'honorable juge de première instance a cru devoir l'accepter.

Giroux, le propriétaire du terrain, fut entendu comme témoin et déclara que le jeune Dubeau avait passé une partie de l'été chez-lui à l'époque des foins; également que Dubeau et d'autres petits compagnons venaient jouer au

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golf, surtout à l'automne, tant sur le terrain de golf que sur son propre terrain, et il ajouta qu'il ne les empêchait pas parce qu'il "n'y avait pas grand tort à faire".

D'autre part, les officiers et les militaires qui ont rendu témoignage ont affirmé que

> en autant qu'ils savaient, le public n'avait pas accès à l'endroit où les manœuvres se faisaient, et qu'il n'était pas à leur connaissance que ces manœuvres s'étaient faites sur la propriété de Giroux.

On aurait employé au cours de ces manœuvres 75 "thunderflashes" contenus dans une boîte, et les instructions étaient d'être prudents dans la distribution de ces explosifs et la façon de les allumer, vu qu'il était admis qu'ils étaient dangereux; mais, d'après les affirmations des militaires, ces instructions avaient été suivies.

Personne n'a eu connaissance qu'un explosif aurait été laissé sans qu'il eût subséquemment explosé.

Le constable en chef de la compagnie Quebec Power, en septembre et octobre 1942, s'occupait des terrains du club de golf Kent et du "power house", et il a témoigné que durant l'été et l'automne de 1942 les terrains étaient fermés et que seules les personnes ayant un permis avaient le droit d'y aller.

Il a déclaré qu'il a lui-même renvoyé des gens qui étaient venus sur le terrain sans permis et qu'il avait donné ordre à ses hommes d'en faire autant.

L'honorable juge de première instance a été d'avis qu'il était possible que le "thunderflash" en question ait été lancé du terrain de golf sur la propriété de Giroux. Il a cru qu'il n'y avait pas d'autre conclusion à tirer du fait que l'explosif avait été trouvé sur cette propriété.

De là il a conclu que le fait d'avoir laissé dans un champ utilisé pour des manœuvres militaires un explosif constitue une négligence de la part des officiers qui avaient la direction de ces manœuvres; que des officiers prudents auraient dû faire ou faire faire des recherches sur le terrain des manœuvres pour vérifier s'il y restait des explosifs non explosés; or, comme rien de tout cela n'a été fait, d'après le juge, ces omissions de la part des officiers et du quartier-maître, tous serviteurs de la Couronne aux termes de l'article 50A de la *Loi de la Cour d'Echiquier du Canada,* entraînent, à son avis, la responsabilité de la Couronne.

Mais, par ailleurs, le juge de première instance fut d'avis que le jeune Dubeau et le jeune Laperrière avaient été chacun d'eux partiellement responsables de l'accident.

Il dit de Dubeau:

C'est un enfant intelligent qui savait que la poudre est une matière inflammable, explosive et dangereuse, qui était au courant du fait que Guy Bouchard s'était brûlé un doigt en en faisant brûler une petite quantité provenant du "thunderflash" et qui, désireux de faire un feu d'artifice, a, avec son ami Gaston Laperrière, décidé de mettre le feu à ce qui restait du "thunderflash" et de le faire éclater.

Il cite Savatier dans son Traité de la Responsabilité Civile, et H. et L. Mazeau dans leur Traité Théorique et Pratique de la Responsabilité Civile, Délictuelle et Contractuelle.

C'est d'ailleurs l'essence de la doctrine

que les tribunaux ont à rechercher si l'enfant avait l'intelligence assez développée pour comprendre, sinon la malice, au moins l'imprudence de son acte. (Savatier, tome 1er, nº 199); (Mazeaud, tome 2, nº 1468 et la note sous ce paragraphe.)

Il cite également Sourdat, Traité Général de la Responsabilité, (tome 1, nº 17); Demolombe, Cours de Droit Civil, (tome 31, nºs 494 et 495); Baudry-Lacantinerie et Barde, Traité de Droit Civil, (tome 15, nº 2864); Planiol et Ripert, Traité Pratique de Droit Civil, (tome 6, nº 497).

Tous ces auteurs sont d'avis que

le mineur, nonobstant son âge, est pécuniairement responsable s'il a pu se rendre compte de la portée de son acte.

En ce sens, ces auteurs adoptent la doctrine de Pothier qui, dans son Traité des Obligations, nº 118, al. 3, édit. Dupin, 1, p. 63, écrivait:

On ne peut précisément définir l'âge auquel les hommes ont l'usage de la raison, et sont, par conséquent, capables de malignité, les uns l'ayant plus tôt que les autres; cela doit s'estimer par les circonstances.

L'honorable juge passa ensuite à la jurisprudence de la province de Québec et il référa à la cause de *Rowland* v. *La Corporation de la paroisse de Rawdon et autres* (1).

En toute déférence, cette cause fait bien voir la distinction qui existe avec celle qui nous est soumise.

Dans la cause de *Rowland* (1), la corporation défenderesse avait entrepris la réfection d'un chemin et, dans ce but, employait de la dynamite. Le contracteur procédait

(1) (1939) Q.R. 77 S.C. 477.

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de cette façon à trois ou quatre endroits simultanément. Pendant cette opération personne n'avertissait le public ni ne l'empêchait de circuler, personne n'était chargé de surveiller les détonateurs et le public circulait librement.

Le jeune Rowland trouva le bout d'une mèche, la prit, la mit dans sa poche, l'en sortit à plusieurs reprises même devant son père, l'apporta chez lui, tenta de l'allumer avec une allumette mais sans succès, alla alors ensuite derrière la maison, l'alluma avec un feu de papier croyant que cela ferait l'effet d'une pièce pyrotechnique. L'explosion se produisit et lui causa des blessures aux mains et à l'œil.

La décision de la Cour fut que le contracteur, préposé de la corporation défenderesse, aurait dû savoir qu'il était dangereux de laisser sans surveillance des explosifs à un endroit où le public et surtout des enfants circulaient librement.

La négligence attribuée au contracteur, et, par son intermédiaire, à la corporation défenderesse, fut déclarée une faute résultant d'avoir permis au public de circuler sans l'avertir du danger.

Une autre cause citée par l'honorable juge de première instance, *Cutnam* v. *Léveillé* (1), est susceptible de la même distinction car la faute sur laquelle s'appuie cet arrêt est que le défendeur qui avait la garde d'explosifs, négligea "de les tenir hors d'atteinte de personnes étrangères et irresponsables".

L'honorable juge Archambault y réfère également à la cause de *Plante* v. *La Cité de Montréal,* (portant le numéro 75, 238 des dossiers de la Cour Supérieure de Montréal, lequel n'a pas été rapporté) qui est le cas d'opérations de minage faites par la cité de Montréal, où l'enfant avait ramassé un détonateur à l'endroit des travaux et

it has been shown that the spot where they were found is a public place, opened to pedestrians and where children are accustomed to play without hindrance.

Encore, *Makins* v. *Piggott & Inglis* (2) couvre le cas d'un bâton de dynamite trouvé par un enfant de quinze ans qui l'avait ramassé et fait éclater en le frottant.

Le propriétaire du bâton de dynamite fut trouvé responsable; mais il s'agissait d'un procès par jury où, par consé-

(1) (1931) 37 R.L. n.s. 84. (2) (1898) 29 Can. S.C.R. 188.

quent, les jurés étaient maîtres des faits, et la Cour Suprême du Canada, en accordant jugement aux demandeurs, jugea que, en ce qui concernait l'enfant,

if his negligence contributed to the accident, the jury should have so found; and that whether or not he was a trespasser, was also a question for the jury, who did not pass upon it.

Dans la cause de *Lambert* v. *Canadian Pacific Railway Co.* (1), un enfant de huit ans fut trouvé coupable de négligence contributoire. Dans la cause de *Morin* v. *Lacasse* (2), le père d'un enfant de sept ans fut trouvé coupable de faute commune pour "n'avoir pas exercé une surveillance convenable sur cet enfant".

Dans *Burke* v. *Provencher* (3), un enfant de huit ans fut trouvé en faute

lorsqu'il traversa une rue en faisant irruption derrière un tramway sans s'assurer qu'il pouvait le faire sans danger.

Dans la cause de *Desroches* v. *St-Jean* (4), la Cour du Banc du Roi (en appel) a jugé que

quoiqu'on ne puisse attendre d'un enfant de neuf ans le discernement et la prudence d'un adulte, au cas de faute de sa part, il sera responsable de l'accident dont il est victime mais dans une proportion moindre que celle d'un adulte.

Dans *Normand* v. *The Hull Electric Company* (5), où il s'agissait d'un accident survenu au fils du demandeur, âgé de dix ans et demi, résultant du fait qu'il avait voulu monter sur un tramway en mouvement, la Cour de Révision modifia le jugement de la Cour Supérieure et diminua le montant des dommages accordé par cette dernière Cour "vu son opinion qu'il y avait eu négligence de la part de l'enfant du demandeur".

Dans *Figiel* v. *Hoolahan et al* (6), un enfant de dix ans avait été blessé par une automobile en traversant une ruelle à l'arrière de la résidence de ses parents. Il fut jugé:

There was fault on the part of the victim of the accident in that he stepped from the vacant lot into a paved lane practically in front of the automobile, without looking to his left to see whether any traffic was coming, and as he was ten years old, he had obtained a sufficient degree of intelligence so that he could have some appreciation of the danger to which he was exposing himself.

(1) (1932) 38 R. de J. 196.
(2) (1931) Q.R. 69 S.C. 280.
(3) (1929) Q.R. 67 S.C. 500
(4) (1928) Q.R. 44 K.B. 562.
(5) (1909) Q.R. 35 S.C. 329.
(6) (1939) Q.R. 78 S.C. 179.

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De même encore dans la cause de *Marquis* v. *Prévost* (1) où un enfant de neuf ans s'était engagé à la course dans l'intersection de deux ruelles, sans se soucier de la circulation; et aussi dans la cause de *Légaré* v. *Quebec Power Company* (2), où un enfant de treize ans blessé par un courant électrique provenant de fils appartenant à la défenderesse, rompus et tombés sur la voie publique et que l'enfant a touchés, bien qu'il eût été conseillé de ne pas le faire, il fut décidé qu'il y avait faute commune et 75% de la responsabilité fut imputé à l'enfant.

Dans la cause de *Lauzon* v. *Lehouiller* (3), il fut décidé que

il y a lieu de tenir compte de l'âge de l'enfant et de faire supporter à un enfant de huit ans une part de responsabilité moindre que celle qui devrait être imputée à un enfant plus âgé.

Tout récemment, dans la cause de *The Oliver Blais Company Ltd.* v. *Yachuk* (4), qui présentait de grandes similitudes avec celle-ci, cette Cour a confirmé le jugement de la High Court d'Ontario qui avait imputé 75% de la responsabilité d'un accident à deux jeunes enfants, âgés respectivement de neuf et de sept ans.

Dans cette cause, l'honorable juge Urquhart, qui présidait alors la Cour, déclara entre autres choses:

I have little hesitation in finding that he (the infant plaintiff) was so negligent. The first point that should be considered is whether a boy of 9 years and one month, as this boy was at the time, could be guilty at all of contributory negligence. I have examined a great many cases on this subject and my conclusion is that where the boy is an ordinary bright, alert lad as this boy appears to be, and was shown to be at the time, there has been a short dividing line fixed at seven years. Under seven years, unless there is extraordinary brightness, in scarcely any case has a child been held guilty of contributory negligence.

Et l'honorable juge Urquhart passe en revue un certain nombre de causes pour appuyer son jugement.

Le résultat de l'examen très élaboré que fait dans le jugement *a quo* l'honorable juge de première instance est que: un enfant qui a atteint l'âge de discernement, généralement fixé à 7 ans, doit être tenu responsable de son acte de négligence et appelé à en supporter seul, ou conjointement avec d'autres, selon le cas, les conséquences.

Comme le dit Savatier, (Responsabilité Civile, tome 1, n° 199)

la minorité n'est pas, en soi, une impossibilité de prévoir et d'éviter l'acte illicite, donc une cause d'irresponsabilité.

(1) (1939) 45 R. de J. 494.
(2) (1939) Q.R. 77 S.C. 552.
(3) [1944] R.L. 449.
(4) [1946] S.C.R. 1.

En somme, cette doctrine et cette jurisprudence impliquent que l'enfant qui a l'âge, l'intelligence et le discernement voulus, est légalement responsable de ses actes. En effet, il suffit d'y réfléchir: Etre tenu coupable de négligence contributoire équivaut à dire: être tenu coupable de négligence et entraîne la pleine responsabilité de l'acte. L'atténuation ne provient que du fait qu'une autre personne a elle aussi été responsable. Et si l'on arrive à la conclusion que les deux responsabilités ont contribué aux dommages, alors on en fait supporter une partie par chacun de ceux qui y ont contribué. Mais la négligence de l'un n'est appelée négligence contributoire, cela est évident, que si une autre personne a, pour sa part, contribué aux dommages.

Si les circonstances ne permettent pas de relier à ces dommages la contribution de cette autre personne, il s'en suit nécessairement que la première est uniquement responsable et est seule la *causa causans*. D'où il résulte que dire d'un enfant qui remplit les conditions voulues qu'il a été coupable de négligence contributoire, cela équivaut à dire qu'il a été coupable de négligence, qu'il en supportera seul les conséquences, si nulle autre personne n'y a contribué avec lui.

Et voici maintenant l'appréciation que fait le juge des deux jeunes victimes de l'accident qui a donné lieu à la présente cause:

> Marcel Dubeau est un enfant normal, sain d'esprit, d'une intelligence suffisamment développée et capable de comprendre, dans une certaine mesure, l'imprudence de son acte.
>
> Gaston Laperrière est un enfant normal, sain d'esprit, d'une intelligence suffisamment développée et capable de comprendre, dans une certaine mesure, l'imprudence de son acte.

L'honorable juge a été d'avis que

> le fait d'avoir laissé des explosifs sur les terrains de manœuvres constituait une négligence grossière, d'autant plus grossière qu'elle était facilement évitable.

Mais, dans les circonstances, il a cru qu'il y avait lieu de tenir chaque enfant, respectivement, partiellement responsable de l'accident, conjointement avec la Couronne. Il a attribué la responsabilité dans les proportions de $33\frac{1}{3}\%$ à chacun des jeunes gens, et $66\frac{2}{3}\%$ à la Couronne.

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A l'argumentation devant cette Cour, la Couronne a soulevé la question de savoir si la doctrine de la faute commune pouvait s'appliquer à elle, et c'est là un point d'une grande importance qui est susceptible de se poser de plus en plus à l'avenir.

La prétention du savant procureur de la Couronne, en l'espèce, est que l'article 19 (*c*) de la *Loi de la Cour d'Echiquier du Canada,* suivant sa véritable interprétation, stipule que la Couronne ne peut être responsable en dommages vis-à-vis d'une personne ou à l'égard d'une propriété que si les dommages résultent exclusivement de la négligence d'un officier ou d'un serviteur de l'Etat dans l'exercice de ses devoirs ou de ses fonctions;

("resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment").

Il a ajouté que l'accident qui résulte de la faute commune est un accident qui est la suite de la combinaison des négligences de chaque participant, et non pas un accident qui résulte uniquement de la négligence de l'officier ou du serviteur de l'Etat.

Je n'ignore pas l'arrêt de cette Cour dans *Canadian National Railway Company* v. *Saint John Motor Line Limited* (1), où l'honorable juge Newcombe avait exprimé l'opinion unanime des juges qui avaient alors siégé dans cette affaire; mais je n'ai pas à me prononcer sur la question soulevée ici par l'appelante (et où il aurait fallu examiner minutieusement le jugement dont je viens de parler), car je suis d'avis que, en l'occurrence, l'appelante ne peut pas être tenue légalement responsable de l'accident dont les fils des deux intimés ont été les victimes.

Si je pouvais être d'accord avec le juge qui a décidé ce procès en qualifiant de négligence grossière des militaires qui auraient volontairement et sciemment laissé sur le terrain un explosif du genre du "thunderflash" dont il s'agit, je ne puis le suivre lorsqu'il se prononce ainsi dans un cas où, de toute évidence, il n'y a eu de la part des militaires, aucun acte volontaire et conscient.

Il est manifeste que les militaires ne savaient pas que ce "thunderflash" était resté sur le terrain sans avoir explosé. Le fait est que le juge de première instance a été amené à

(1) [1930] S.C.R. 482.

faire consister la négligence dans le fait que les officiers n'auraient pas, avant de quitter le terrain des manœuvres, fait un examen minutieux des terrains de golf et de celui de Giroux pour vérifier si, par hasard, un "thunderflash" était resté sur les terrains sans exploser. Mais, à supposer que ce défaut de vérification eût pu être considéré comme une négligence—ce qui ne me paraît pas certain—je crois que ce qui manque à l'appréciation des faits dans le jugement dont est appel, c'est qu'il n'y a aucune preuve que les officiers ou les militaires savaient ou auraient dû savoir que des enfants se rendraient sur le terrain où les manœuvres ont eu lieu.

Je ne pense pas me tromper en disant que tous les jugements où des adultes ont été trouvés responsables d'accidents survenus à des enfants et causés par l'abandon d'objets dangereux dans un certain endroit, ou le défaut de surveillance d'appareils dangereux, ont toujours été rendus dans ce sens, parce que le juge saisi de la cause avait d'abord considéré comme prouvé le fait que ces adultes savaient ou auraient dû savoir que le public ou des enfants avaient accès à l'endroit où se trouvait l'objet dangereux; comme par exemple: des objets laissés sur une rue ou une voie publique, ou des objets abandonnés ou non surveillés dans quelque région où le public ou des enfants avaient l'habitude de se rendre ou de jouer. Telle fut la base du jugement de la Cour du Banc du Roi dans la cause de *Canadian Pacific Railway* v. *Coley* (1).

Mais ici il n'y a aucune preuve que les militaires savaient ou auraient dû savoir que des enfants pourraient venir sur le terrain des manœuvres. Au contraire, tout indiquait qu'il n'y avait aucune possibilité de ce genre. Le terrain de golf était fermé depuis trois ou quatre ans; le terrain de Giroux était un terrain privé, et le constable de la compagnie Quebec Power a déclaré que lui et ses subordonnés s'employaient à empêcher tout le monde de se rendre sur l'un ou l'autre de ces terrains; les enfants, au moment où ils ont trouvé l'explosif, n'étaient même pas sur le sentier où Giroux tolérait le passage, mais ils se trouvaient à un tout autre endroit. Rien ne pouvait faire prévoir aux militaires que des enfants se rendraient à cet endroit, et il ne fut certaine-

(1) (1907) Q.R. 16 K.B. 404.

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ment pas établi, au cours de l'enquête, que les militaires ou leurs officiers savaient ou avaient vu, ou auraient dû voir ou savoir que des enfants circuleraient autour de cet endroit. Dans les circonstances, il manque donc un élément essentiel pour que l'on puisse attribuer de la négligence aux militaires qui avaient employé des explosifs de ce genre dans l'exercice légitime et même obligatoire de leurs manœuvres.

Il me faut donc écarter toute attribution de faute aux militaires et, par le fait même, à la Couronne.

Mais, en plus, vu la décision du juge de première instance sur l'intelligence des jeunes Dubeau et Laperrière, je ne vois pas bien comment l'on pourrait les traiter, pour le cas qui nous occupe, autrement que comme des adultes.

Des adultes qui auraient fait ce que le jeune Dubeau et le jeune Laperrière ont fait auraient pu difficilement convaincre une cour de justice que la Couronne pourrait être tenue responsable de ce qui était arrivé.

Il ne m'est pas possible de voir en quoi, dans les circonstances, le cas des deux jeunes gens peut être distingué de celui d'un adulte.

Ils avaient, dit le juge de première instance, toute l'intelligence nécessaire pour comprendre ce qu'ils faisaient. Ils avaient déjà eu un avertissement lorsque le jeune compagnon de Dubeau s'était brûlé le pouce sur le terrain de Giroux, après avoir mis le feu à une petite quantité de poudre retirée du "thunderflash". Et d'ailleurs, ce n'est pas au moment où ils ont trouvé l'explosif que les dommages ont été causés. Il aurait pu y avoir une nuance si le "thunderflash" avait fait explosion au moment où ils le trouvèrent et s'en emparèrent. Mais le jeune Dubeau l'a emporté avec lui, et ce ne fut que plus tard, plusieurs heures après, dans la rue, alors qu'ils jouaient avec d'autres petits compagnons que l'accident s'est produit. D'après leur propre témoignage, ils savaient bien alors et appréciaient toute la portée de leur acte. Ils ont encore commencé par extraire de la poudre et à y mettre le feu. Puis lorsqu'ils décidèrent de mettre le feu au "thunderflash" lui-même, ils ont eux-mêmes déclaré qu'ils voulaient faire un feu d'artifice. C'est bien à cela qu'ils s'employèrent et c'est bien cela qu'ils espéraient. Et même là encore, l'accident ne s'est pas produit. Le moment fatal est venu lorsqu'ils ont cru que

le feu s'était éteint; ils ont même mis le pied sur le "thunder-flash" pour s'en assurer davantage; puis tous deux, le jeune Laperrière et le jeune Dubeau, ont pris l'explosif dans leurs mains et c'est alors qu'ils ont subi des dommages dont ils se plaignent maintenant.

Il ne m'est pas possible de dire qu'ils n'ont pas agi en toute connaissance de cause et qu'ils n'ont pas été les victimes de leur propre imprudence.

A tout événement, il y a eu entre le moment où Dubeau a trouvé l'explosif sur le terrain de Giroux et le moment où l'accident s'est produit, toute une série d'événements intermédiaires qui rendent la prétendue négligence des militaires une cause certainement très éloignée (*causa sine qua non*) de l'accident et des dommages en résultant, mais non pas une *causa causans*.

Tout particulièrement pour le jeune Laperrière, il s'agit simplement d'un *novus actus interveniens*; ce qui, après tout, n'est qu'une façon de dire que la prétendue négligence des militaires n'a pas contribué à l'accident qui s'est produit. (*Potvin* v. *Gatineau Electric Light Co.*, (1) C.P.).

Comme le dit le juge de première instance lui-même:

> Il me semble évident que l'explosif qui a blessé le fils du pétitionnaire n'aurait pas explosé s'il n'avait pas été manié par lui.

Il ne pouvait être vraisemblablement prévu par les militaires ou leurs officiers que ce qui est arrivé se produirait.

A mon avis, les deux jeunes gens, avec l'intelligence les caractérisant, les connaissances qui leur ont été trouvées par le juge de première instance, sont uniquement responsables du malheureux accident dont ils ont été les victimes; et, toute participation des militaires—si l'on peut dire qu'il y en a eu—a certainement été trop éloignée pour que l'on puisse en tirer des conséquences de responsabilité légale contre eux.

Je suis d'avis de maintenir l'appel dans chacun des jugements *a quo*, et de rejeter chacune des actions avec dépens dans les deux cours.

KERWIN J:—These appeals from two judgments of the Exchequer Court of Canada were argued together. In one case the petition of right was presented by Omer Dubeau as tutor of his son Marcel Dubeau and in the

(1) [1935] 4 D.L.R. 1.

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other by Alfred Laperrière as tutor of his son Gaston Laperrière. Each boy was injured under circumstances which, in the opinion of the trial judge, Mr. Justice Angers, made the Crown liable as for the negligence of its officers or servants in the exercise of their duties or employment under the provisions of section 19 (c) of the *Exchequer Court Act* as enacted by chapter 28 of the 1938 statutes, taken in conjunction with section 50 (a) of the *Exchequer Court Act* as enacted by chapter 25 of the statutes of 1943-1944. The trial judge found the boys at fault to the extent of one-third and, therefore, reduced the sums which he otherwise would have allowed the suppliants. No question arises as to the amounts involved but the appellant argues that the suppliants are not entitled to succeed to any extent.

On October 10, 1942, a detachment of soldiers belonging to the 57th Quebec Field Battery engaged in a scheme on the old Kent Golf Club course at Courville, Quebec, and, in the course of this operation, seventy-five explosives known as thunderflashes were employed. The evidence accounts for their distribution and, on the whole, that every one who received a thunderflash was under the bona fide impression that each one used had actually exploded. The golf course had been closed to the public for some time but, whether the fact be that the men engaged in the scheme did not go outside the limits of the course, an unexploded thunderflash was found on or about October 31, 1942, on the adjoining Giroux farm. The evidence shows that at or about the spot where the thunderflash was found, the ground was disturbed in such a fashion that it might be proper to draw the inference that some of the men had actually used part of the Giroux farm but, whether that be so or not, it is undoubted that this particular thunderflash had been used during the course of the scheme.

It was found by Marcel Dubeau and another boy, Guy Bouchard. These two boys were playing on the farm without the knowledge of the owner but they had on various occasions worked there and had also looked for golf balls. It seems clear that on the day in question they were there with at least the implied permission of the owner. They extracted bits of powder from the thunderflash, which

they ignited with matches and caused small explosions. Marcel Dubeau took home with him the thunderflash containing the remainder of the powder. At the trial, Marcel, at one stage, testified that he told his father about what he had found and that he was warned to be careful but, on re-examination he denied this, and in this he was confirmed by his father. The trial judge chose to believe the boy's latter story thus confirmed, and I can see no reason to interfere with that finding. That same evening Marcel was playing with a number of friends, including Gaston Laperrière, and had burned a small bit of the powder on the sidewalk when Gaston and Guy Bouchard decided to ignite the remainder of the powder in the thunderflash all at once. After two attempts had been made to ignite it and it did not seem to be burning, Marcel and Gaston were about to pick it up when it exploded causing severe injuries to the two boys.

On these facts the appellant contends that there was no negligence on the part of any officer or servant of the Crown while acting within the scope of his duties or employment. The trial judge found that there was negligence on the part of the officers in charge of the scheme in leaving the unexploded thunderflash on Giroux's farm without making a search, and with that I agree. It is evident that whether any of the men actually traversed part of Giroux's farm or not, the latter was in fact used as part of the area for the scheme and although in time of war considerable latitude must be allowed the armed services in their training operations in Canada, under all the circumstances in the present case, steps should have been taken to see that all the thunderflashes used had been exploded. Thunderflashes are dangerous articles and in the absence of any such steps it should have been anticipated that an unexploded one would be found by children on Giroux's farm and that such children might so play with it as to cause injuries to themselves. The fact that this particular one, while found on the farm, caused the injuries complained of at another spot, including those to one who is not the finder, can make no difference.

The appellant argues that the injuries did not *result* from such negligence but that it was caused by a *novus*

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actus interveniens, namely, the action of the two boys. Subject to the question discussed later, this, however, was the thing that the officers or servants should have anticipated, and the doctrine contended for has no application.

The suppliants cross-appeal and claim that the Crown should be held liable for the total amount of damages found by the trial judge. At the time of the accident, the boys were respectively eleven and twelve years of age. The trial judge saw them and came to the conclusion that while they were normal and intelligent enough to understand to a certain extent the imprudence of their acts, they were, nevertheless, of such an age as not fully to comprehend the dangerousness of their actions. This finding should not be disturbed. *Bouvier* v. *Fee* (1).

It is clear, I think, that in the words of Lord Sumner in *Glasgow Corporation* v. *Taylor* (2), infancy as such is not a status conferring right and that a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations. Lord Denman's statement in *Lynch* v. *Nurdin* (3) that "ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation" has always been accepted as an authoritative statement of the law relating to the contributory negligence of children; see, for instance, the statement of Duff J., as he then was, in *Winnipeg Electric Railway Co.* v. *Wald* (4) where he stated that the trial judge in that case might perhaps have told the jury that

> if they accepted the appellant's account, it would be a question for them whether the plaintiff's conduct had fallen below the standard of reasonable care to be expected from a child of her years;

This is as applicable in Quebec as in the common law provinces: *Bouvier* v. *Fee* (1).

To revert to the negligence found against the Crown,—it should be held to extend to the foreseeability that the thunderflash might be found by children but the extent of

(1) [1932] S.C.R. 118.
(2) [1922] 1 A.C. 44, at 67.
(3) (1841) 1 Q.B. 29.
(4) (1909) 41 Can. S.C.R. 431, at 444.

the liability must depend upon the age of the children playing with it. It was definitely settled in this Court in *Price* v. *Roy* (1), that in cases between subject and subject in Quebec, damages must be mitigated in the case of common fault; and see the decision of the Privy Council in *The Montreal Tramways Company* v. *McAllister* (2). This being the general law in Quebec, it is settled by decisions in this Court that it is the law to be applied to the Crown under section 19 (c) of the *Exchequer Court Act*. In view of this, I am unable to agree with Mr. Geoffrion's argument that the Crown's liability under that section is confined to cases where the negligent act of the Crown's officer or servant is the sole cause of the injury.

I would dismiss the appeals with costs and the cross-appeals without costs.

The judgment of Hudson and Estey JJ. was delivered by

ESTEY J.:—These appeals are from judgments rendered in the Exchequer Court of Canada apportioning damages suffered by the boys in the loss of their right hands when on the evening of October 31, 1942, a thunderflash exploded. The boys reside at Courville, Quebec, and at that time were respectively 12 years and 8 months and 11 years and 7 months of age.

The military authorities, having obtained permission to so use the premises, on the evening of October 10, 1942, conducted military manoeuvres at the Kent Golf Club. About 30 men were so engaged and in the course of these manoeuvres 75 thunderflashes were used. These were dangerous missiles about 10″ long and 1″ in diameter, manufactured for the purpose of representing "gunfire and shellfire in training". That they were dangerous is not disputed. The instructions for using them required that the cap be removed, the fuse ignited, and then, lest "somebody could get hurt", thrown some distance as they exploded in a few seconds.

These thunderflashes were thrown at distances varying from 25 to 100 feet. The learned trial judge finds that manoeuvres were not conducted on the farm of Mr. F. X. Giroux adjoining that of the Kent Golf Club, but it is clear that one group of the men was during the manoeuvres

(1) (1899) 29 Can. S.C.R. 494. (2) (1916) 26 R.L. n.s. 301.

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stationed near Giroux's farm and that this and other thunderflashes were thrown upon the farm of Giroux. The learned trial judge states:

> Au cas où j'admettrais, ce que je ne suis pas disposé à faire, qu'aucun militaire n'est entré sur la propriété de Giroux durant les manœuvres, je ne verrais pas d'autre conclusion à tirer qu'un "thunderflash" a été jeté sur sa propriété

It is apparent that the officers in charge cautioned the men as to the dangerous character of these thunderflashes and at the trial the appellant sought to prove that after the manoeuvres all the thunderflashes were accounted for and had, in fact, exploded. The evidence indicates they were not able to do so. Notwithstanding that no permission had been obtained to use Giroux's land in any way, and in spite of the fact that these thunderflashes were thrown from a point near the Giroux farm and in the direction thereof, no effort was made to see that these thunderflashes did not reach the farm, nor to warn Mr. Giroux of the possibility that some of these thunderflashes might have reached his farm.

> The law of England in its care for human life requires consummate caution in the person who deals with dangerous weapons.

Erle C. J., *Potter* v. *Faulkner* (1); Beven 4th Ed. p. 201. Again:

> The duty of the defendants on bringing this foreign and dangerous material on the ground and exploding it there was to keep all the results of the explosion on their own lands, and it escaped from their own lands at their peril.

Swinfen Eady M. R. in *Miles* v. *Forest Rock Granite Co. (Leicestershire) (Limited)*, (2).

> This amounts to saying that in dealing with a dangerous instrument of this kind the only caution that will be held adequate in point of law is to abolish its dangerous character altogether.

Pollock, 14th Ed., p. 402.

Under the circumstances, the throwing of these thunderflashes upon the farm of Giroux, the failure to ascertain if any so thrown had not exploded, or to notify Giroux of their possible presence and dangerous character, constituted negligence.

Later in the same month, on Saturday afternoon, October 31, Marcel Dubeau and Guy Bouchard (about 11 years of age) went out to play upon the premises of the Kent

(1) (1861) 1 B. & S. 800.

(2) (1918) 34 T.L.R. 500, at 501.

Golf Club where they had at times acted as caddies. It was their habit to look for golf balls, apparently both on the premises of the golf club and upon the farm of Giroux. At the time in question they were looking for golf balls on the farm of Giroux and there came upon the unexploded thunderflash (sometimes referred to in the evidence as "bâton"). It looked to them like a large firecracker and they proceeded to examine it.

Marcel Dubeau deposed as follows:

Q. Quand vous avez vu ce bâton, qu'est-ce qui est arrivé?

R. On l'a ouvert.

Q. Qui l'a ouvert?

R. Guy, on voyait qu'il y avait de quoi dedans. On a mis ça à terre, on en a vidé un peu sur ce carton-là, (No. 5), et là, on a mis une allumette dedans, ça fait toute une boucane; il s'est brûlé un peu le pouce; on a laissé tout ça là, on est descendu avec ce qui restait dedans.

Q. Vous avez laissé tous ces papiers (nos. 4 et 5).

R. Oui, monsieur. On a descendu le bâton, on a vu un tas de planches chez monsieur Giroux; c'était l'heure du souper; je l'avais dans mes poches; on l'a fait prendre un peu; je l'ai mis dans ma poche, et j'ai dit: on va aller souper, on se rencontrera à soir dans la rue St-Joseph.

Q. Et là?

R. On s'est rencontré, on était plusieurs, il y en avait une gang, là on en a fait brûler là aussi; on mettait ça sur le trottoir; ça faisait une fumée; il en restait pas beaucoup dans la boîte; on a dit: on va faire tout brûler, ça va être beau. Là, Gaston Laperrière, il a pris une allumette et il l'a mis sur le bout, il voyait que ça allumait pas, et il l'a éteint avec son pied; et il est allé une deuxième fois pour l'allumer; il voyait pas de feu, il a été pour voir, il a été pour le prendre avec sa main, et là il s'est fait une explosion.

Both Marcel Dubeau and Gaston Laperrière gave evidence at the trial and the learned trial judge had an opportunity to hear and to observe with respect to their knowledge and capacity. He finds with respect to Marcel Dubeau:

Je suis d'opinion par ailleurs que Marcel Dubeau, le fils du pétitionnaire, a lui-même été partiellement responsable de l'accident. C'est un enfant intelligent qui savait que la poudre est une matière inflammable, explosive et dangereuse, qui était au courant du fait que Guy Bouchard s'était brûlé un doigt en en faisant brûler une petite quantité provenant du "thunderflash" et qui, désireux de faire un feu d'artifice, a, avec son ami Gaston Laperrière, décidé de mettre le feu à ce qui restait du "thunderflash" et de le faire éclater. Le pauvre enfant ne savait pas évidemment qu'il y avait dans le "thunderflash" une quantité de poudre aussi considérable que celle qui s'y trouvait encore et il ne prévoyait pas qu'une explosion si violente se produirait.

His finding with respect to Gaston Laperrière is to the same effect.

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Marcel Dubeau and Guy Bouchard thought they had found a firecracker. They had neither seen nor heard of a thunderflash, and having regard to its size, the fact that the cap would have been removed before it was thrown, and its general appearance, one can understand how boys might well think they had found a firecracker. As Marcel Dubeau stated:

> Je pensais que c'était des petits pétards qu'on achetait.

The boys knew that firecrackers contained powder and "ça faisait seulement qu'un petit paff".

In the evening on St. Joseph street one of them lighted the thunderflash and Gaston Laperrière, not satisfied with the way it was burning, put it out with his foot and lighted it again, and when this time it did not appear to burn, the two boys, Marcel Dubeau and Gaston Laperrière, picked it up with their right hands when it exploded.

They admitted they appreciated danger. Marcel Dubeau admitted: "Je pensais que c'était pas dangereux".

Gaston Laperrière: "Q. Quand ça explose, c'est dangereux? R. Oui, monsieur."
but then explains:

> R. Je le savais, mais je ne savais pas . . . je ne pensais pas que ça allait faire tant de dommage que ça.

These boys were not trespassers upon the Giroux farm. They and other boys were in the habit of going there and for the purpose they were pursuing when they found this thunderflash. Giroux knew of their doing so over a period of time and never made objection thereto. Indeed, Marcel Dubeau often worked on the Giroux farm, had in fact worked there that day and finished about 2.30 in the afternoon.

Mr. Geoffrion pressed that even if the military authorities were negligent, the conduct of the boys plainly indicated they were aware of the danger and therefore their conduct in these circumstances constituted an intervening act of a third person of such a character as to relieve the appellant of responsibility. He points out that the first time the powder was lighted Guy Bouchard's fingers were burned and that Marcel Dubeau, one of the injured boys, was

present and witnessed that incident, and thereafter stood further back from the danger. That after supper when a group of about 25 boys gathered on St. Joseph street they lighted the powder on the sidewalk and it burned with a puff. They wanted a bigger puff and decided to burn all of the remaining powder at once. That when it was lighted and it did not burn as they anticipated from their experience with firecrackers, Gaston Laperrière put it out with his foot. Then when he re-lighted it and it did not appear to burn, he and Marcel Dubeau both took it in their hands when it exploded. He submits this constituted conduct so absurd and foolish in the light of their capacity, knowledge and experience and of what had taken place as to be quite beyond the field of reasonable foreseeability and the appellant ought not to be held liable therefor.

The conduct of these boys was in relation to what they believed to be a large firecracker. Upon their own admissions they knew it contained powder and was dangerous.

> Where a child is of such an age as to be *naturally ignorant of danger* or to be unable to fend for itself at all, he cannot be said to be guilty of contributory negligence with regard to a *matter beyond his appreciation,* but quite young children are held responsible for not exercising that standard of care which may reasonably be expected of them.
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> 23 Halsbury, p. 688, para. 972.

In view of their admissions and the finding of the learned trial judge, it is impossible to say, at least with respect to a firecracker, that these boys were "naturally ignorant of danger", or that it was "a matter beyond his (their) appreciation". In my opinion, having regard to their capacity, knowledge and experience, their conduct constituted negligence. That the boys were negligent, however, does not necessarily relieve the first party negligent of liability.

That a thunderflash left unexploded in a field adjoining a golf course would be picked up and meddled with in a manner that might cause injury or damage is a consequence that in my opinion would be anticipated by a reasonably careful person. If within the field of that reasonable anticipation injury results, the fact that the party finding the dangerous missile is negligent does not relieve the first party from liability.

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A boy 17 years old found a gun and without realizing it was loaded he pointed it at and shot another boy. In an action against the party who had so left the gun, Holmes L. J., stated:

> There is no evidence of how the path was used, but the jury were at liberty to infer that it was used to some extent; and their knowledge of the world would tell them that a gun casually laid aside has a great fascination for some people, who seem to have a natural impulse to handle and examine it, and who often do so in so careless and unskilful a way as that it is discharged without intention on their part. I do not attach much importance to the age of the defendant's son. He was old enough to know that it was dangerous to handle the gun on full cock, which had evidently been placed where he found it for some temporary purpose by a person who had been using it; and in my own reading and experience negligence in connection with firearms is as common in the case of men as of boys. Quite irrespective of the age of the persons who might use the path, I think that there was evidence from which the jury were at liberty to find that the defendant, when placing the gun against the fence, ought to have contemplated that it might fall into negligent hands. *Sullivan* v. *Creed,* (1).

Then again, in Pollock on Torts:

> A wrongful or negligent voluntary act of Peter may create a state of things giving an opportunity for another wrongful or negligent act of John, as well as for pure accidents. If harm is then caused by John's act, which act is of a kind that Peter might have reasonably foreseen, Peter and John may both be liable; and this whether John's act be wilful or not, for many kinds of negligent and wilfully wrongful acts are unhappily common, and a prudent man cannot shut his eyes to the probability that somebody will commit them if temptation is put in the way. One is not entitled to make obvious occasions for negligence.

Pollock on Torts, 14th ed. at p. 376.

Lord Dunedin in another case:

> It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives and other things *ejusdem generis,* there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity; the duty being to take precaution; it is no excuse to say the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter.

Dominion Natural Gas Co. v. *Collins,* (2).

Gloster v. *Toronto Electric Light Co.,* (3); *Makins* v. *Piggott & Inglis,* (4); *Whitby* v. *Brock,* (5).

(1) [1904] 2 I. R. 317, at 355.
(2) [1909] A.C. 640, at 646.
(3) (1906) 39 Can. S.C.R. 27.
(4) (1898) 29 Can. S.C.R. 188.
(5) (1888) 4 T. L. R. 241.

Conduct that will relieve the first party negligent of liability is described by Lord Wright:

> It must always be shown that there is something which I will call ultroneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic.

The Oropesa, (1).

The negligent conduct of the boys, Dubeau and Laperrière, cannot be so described. It falls far short of that of the 14 year old boy who, while employed at his work, decided to quit. To do so he crawled over or under a barricade in front of an open door, jumped onto a smoke flue and when it gave way fell and lost his life. His death was due to his *"own rash act"*: *Dominion Glass Co.* v. *Despins* (2).

Another illustration, a boy of 12 years walked on a trestle across a ravine 17 to 19 feet deep and 300 feet wide in the face of conspicuous danger signs. Recovery could not be had. It was just as if some person was saying to the boy: "It is dangerous to go there". As Anglin J. states:

> It shocks my common sense to think that a boy or a person who had been warned in that way and does go there and is injured by something he did not anticipate to find, should be entitled to recover.

Shilson v. *Northern Ontario Light and Power Co.* (3).

That the boys believed they were playing with powder which they knew to be dangerous, that they were playing with a firecracker larger than they were familiar with, distinguishes this case and its facts from the case of *Makins* v. *Piggott & Inglis,* (4) where a boy scratched a detonator of which he was "unaware of its character" and did so "in ignorance of its dangerous character" and thereby caused an explosion that

> could not be said to be his voluntary act in the sense that would incapacitate him from recovery.

The conduct of Marcel Dubeau and Gaston Laperrière indicated that they appreciated the possibility of injury, not the possibility of an injury so great as that which they suffered, but an injury similar in character. The difference is one of degree rather than of kind. Therefore, in spite of their partial knowledge of that with which they were

(1) [1943] 1 A.E.R. 211, or 214
(2) (1922) 63 Can. S.C.R. 544.
(3) (1919) 59 Can. S.C.R. 443, a 446.
(4) (1898) 29 Can. S.C.R. 188.

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confronted, they cannot be entirely excused because in part their negligent conduct has contributed to their own injuries. In the language of *Makins* v. *Piggott & Inglis* (1) their conduct was voluntary with respect to a dangerous substance. In *Clarke* v. *Army & Navy Co-Operative Society,* (2), the defendants when they sold the tin of chlorinated lime appreciated the possibility of danger. No negligence was found on the part of the purchaser who recovered damages. Collins, M. R., stated at p. 161:

> I do not think it is very material whether he (the manager) attributed their being dangerous to the right reason or not. He clearly knew that the tins were potentially dangerous, for he instructed his assistants not to sell them without giving a warning to purchasers.

It would appear that when due consideration is given to the capacity, knowledge and experience and age of the boys in relation to all the facts and circumstances in this case, the law applicable is that set forth in the well-known case of *Lynch* v. *Nurdin* (3) and quoted with approval by Anglin J. (later Chief Justice) in *Geall* v. *Dominion Creosoting Co.,* (4).

> If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.

The appellant contends that if this be a case in which both parties contribute, and therefore a case of contributory negligence, the action on behalf of the boys must fail because section 19 (c), under which this action is brought, gives a right of action against the Crown only where the injuries are those "resulting *exclusively* from the negligence of any officer or servant of the Crown". Section 19 (c) of the *Exchequer Court Act,* being 1927 R.S.C., c. 34:

> 19. (*c*) Every claim against the Crown arising out of any death or injury to the person or to property *resulting* from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The phrase "resulting from the negligence of any officer or servant of the Crown" has been in this section since it

(1) (1898) 29 Can. S.C.R. 188.
(2) [1903] 1 K.B. 155.
(3) (1841) 1 Q.B. 29, at 35.
(4) (1917) 55 Can. S.C.R. 587, at 610.

was enacted in 1887, and though twice amended, this phrase has remained unchanged. Referring to this enactment Mr. Justice Gwynne stated:

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals.

The City of Quebec v. *The Queen,* (1).

Sir Charles Fitzpatrick C. J., referring to the same section stated:

> Since the judgment in *The King* v. *Armstrong* (2), it must be considered as settled law that the *Exchequer Court Act* not only creates a remedy, but imposes a liability upon the Crown in such a case as the present and that such liability is to be determined by the laws of the province where the cause of action arose.

The King v. *Desrosiers,* (3).

The law varies in the respective provinces and the Crown has in the past quite properly availed itself of any defence provided by the law of the province in which the cause of action arose. This is illustrated by decisions in which the fellow servant rule was pleaded. When the cause of action arose in the province of Manitoba where the fellow servant rule obtained the suppliant's action failed: *Ryder* v. *The King,* (4). When the cause of action arose in the province of Quebec, where the fellow servant rule did not obtain, the suppliant recovered: *The Queen* v. *Fillion,* (5). See also *The King* v. *Armstrong,* (2).

In this Court the damages were apportioned where the negligence on the part of servants of the Crown contributed to the loss. The cause of action arose in the province of Quebec and action was brought under the present section 19 (c) (then sec. 20 (c)). Anglin C.J.:

> It seems to follow that we have here a case of "common offence or quasi-offence" of the respondent company and of the appellant resulting in a joint and several obligation on their part to persons who have sustained consequential injury (art. 1106 C. C.), with the result that there must be an apportionment of responsibility between these co-debtors
> * * *

(1) (1894) 24 Can. S.C.R. 420, at 449.
(2) (1908) 40 Can. S.C.R. 229.
(3) (1908) 41 Can. S.C.R. 71, at 78.
(4) (1905) 36 Can. S.C.R. 462.
(5) (1895) 24 Can. S.C.R. 482.

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The King v. *Canada Steamship Lines Ltd.* (1).

In the Exchequer Court damages have been apportioned between the Crown and the subject where the cause of action arose in the province of Quebec: *Lapointe* v. *The King,* (2); *Rochon* v. *The King,* (3); *Thiboutot* v. *The King,* (4); also two as yet unreported cases, *Martial St. Jacques* v. *The King,* and *Joseph Bouchard* v. *The King.*

The foregoing indicates the long accepted construction of section 19 (c). The insertion of the word "exclusively" in this section as suggested would make a substantial difference and at variance with the construction already established. It would therefore appear that the addition of any such word is a matter for the consideration of parliament rather than for the Court.

In my opinion the appeals should be dismissed with costs and the cross-appeals without costs.

RAND J.:—The essential fact of these cases is that what is known as a "thunderflash", a tube between 10 and 12 inches long and $1\frac{1}{2}$ inches or so in diameter, loaded with powder, highly dangerous, and used in military field exercises, was unlawfully placed and left on land where two boys who shortly thereafter found it had permission to be. Apart from the continuing trespass, the high degree of care required of those who control such articles means the anticipation of a greater range of probable mischief and that it must reach to children in their position I do not doubt. The natural consequences of that initial culpa extend then to the injuries suffered unless it can be said that at some point a new and independent actor has intervened.

The conception of "cause" in article 1053 of the Civil Code does not differ, in a case of this nature, from that of the Common Law: and as put by Lord Sumner in *S.S. "Singleton Aubry"* v. *S.S. "Paludina"* (5) in language approved by Lord Wright in *The Oropesa* (6).

> Cause and consequence in such a matter do not depend on the question, whether the first action which intervenes, is excusable or not, but on the question whether it is new and independent or not.

(1) [1927] S.C.R. 68, at 79.
(2) (1913) 14 Ex. C.R. 219.
(3) [1932] Ex. C.R. 161.
(4) [1932] Ex. C.R. 189.
(5) [1927] A.C. 16.
(6) [1943] 1 A.E.R. 211 at 216.

But where we are dealing with persons in their normal state of mind and body acting deliberately, in the absence of special circumstances, the innocence or culpability of the intervening act, certainly as we have it here, must, as to the actor himself, fix it either as a consequence of the initial cause or a new and originating cause. The chain of events was such that if an adult had been concerned rather than a boy of 12, the intervening act would be held to be new and independent; it was not a situation in which contributory negligence could operate; it would have been an intermeddling by a responsible person with what he would know could be dangerous.

As I understand the judgment below, it holds there can be partial culpability, in the case of children, for a given act. We do admit degrees of liability for consequences between two or more participants in a negligent cause, but I know of no binding authority which attributes fractional liability or deprivation of right to an infant in proportion to his appreciation of a particular situation. In relation to a specific act he must be either responsible or not responsible for its consequences; there is no halfway culpability; and the question is whether or not these boys of 11 and 12 are to be held to conduct that in the circumstances would have avoided the results which happened.

What is the standard by reference to which that question is to be answered? It has been declared by Baron Parke, in his customary terseness and clarity of language:

> The decision of *Lynch* v. *Nurdin* (1) proceeded wholly upon the ground that the Plaintiff had taken as much care as could be expected from a child of tender years—in short, that the Plaintiff was blameless and consequently that the act of the Plaintiff did not affect the question;

Lygo v. *Newbold* (2) (in argument).

The same rule is laid down by Duff, J. (as he then was) in *Winnipeg Electric Railways* v. *Wald,* (3).

> * * * it would be a question for them whether the Plaintiff's conduct had fallen below the standard of reasonable care expected from a child of her years.

That sets up an objective criterion: the prudent child of given years. But age is not to be taken too literally: understanding and care appear in rough categories. It is

(1) (1841) 1 Q.B. 29.
(2) (1854) 156 E.R. 130.
(3) (1909) 41 Can. S.C.R. 431, a

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not, however, the actual capacity of the child whose conduct is being examined; on this basis, the standard would be that of the tribunal itself; and the inconvenience and uncertainty of that, long ago pointed out by Chief Justice Tindal in *Vaughan* v. *Menlove* (1) in relation to adults, increase as we take into account the instincts and impulses of the child, in certain circumstances so susceptible to excitement. But that mode of stating the standard does not affect the substantial identity of the conduct so defined with that from which, in the particular situation, there would be only the exceptional departure by persons of the same age class.

As with the adult, the standard would take into account any clearly shown special knowledge, and, probably, the fact that the child's intelligence and general capacity had indubitably placed him in an older age category. But there is nothing of the unusual here. The act of both boys moving to pick up the explosive after the fuse had been lighted not only negatives such a capacity but demonstrates their inadequate appreciation of the danger they were courting.

If, then, the child in all the circumstances has used as much care as the ordinary child of his years would have used or if he has acted as all save the exceptional child of his age would have acted, his act is innocent; if not, as regards his own injury it is culpable: and whether his responsibility is exclusive or contributory depends on the nature of the events into which he has projected himself.

To determine if he has met the standard, I ask myself what is the general opinion of prudent persons—"the common sense of the community" as Holmes has put it—as to the likely and expectable conduct of an ordinary boy of 11 or 12 who gets hold of such an explosive; and the answer is, I think, that it would be just what happened here. It follows that he should not be allowed to handle by himself and alone such a menace as a thunderflash; and the universal care and apprehension attending holiday celebrations in fireworks attests this. In the common understanding, the natural and probable consequence of the conjunction of a normal boy of that age and such a compact danger will be that he will pry and meddle to his own injury. There is the virtually inevitable external behaviour which adults

(1) (1837) 4 Scott's Rep. 244, at 252.

must foresee in relation to acts which may, without justification or excuse, bring about that conjunction. The conduct of the boys here, then, was normal, likely, and, just as prudent behaviour in an adult, innocent. That excludes any qualification or limitation of the right to recover from the appellants.

This makes it unnecessary for me to consider Mr. Geoffrion's argument that the liability of the Crown under section 19 (c) of the *Exchequer Court Act* is limited to cases in which the act of the Crown's servant is the sole cause of the injury. I should perhaps say that I see nothing whatever anomalous in the view that what Parliament intended in creating liability of the Crown was to adopt the law then existing in each province except as it might thereafter be amended or changed by Parliament, such as for instance in the field of navigation and shipping; but in any event the interpretation placed on this section since its enactment has established a jurisprudence which I think it is now too late to modify.

As no question of quantum of damages has been raised, in each case I would dismiss the appeal with costs and allow the cross-appeal with costs both here and in the Court below.

Appeals dismissed with costs.

Cross-appeals dismissed without costs.

Solicitor for the appellant: *Gérard Lacroix.*

Solicitors for the respondents: *Dorion, Dorion & Robitaille.*

1946
*May 21, 22.
*June 3

LÉON TREMBLAY (PLAINTIFF) APPELLANT;

AND

ANTOINE BEAUMONT (DEFENDANT) RESPONDENT.

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

Appeal—Jurisdiction—Amount in controversy—Inclusion of interest on judgment in computing amount—Principle applies whether judgment of first instance is affirmed or reversed by appellate court.

The interest running on the judgment of the court of first instance up to the date of the judgment of the appellate court must be included in computing "the amount or value of the matter in controversy in the appeal" to this Court.—*Supreme Court Act*, s.s. 39, 40.

Such principle does apply, not only when the judgment of a court of first instance, allowing less than $2,000, has been affirmed by an appellate court, but also where such a judgment has been reversed by that court.

Bridge v. *Eggett* ([1928] S.C.R. 154) and *Dominion Cartage Company* v. *Cloutier* ([1928] S.C.R. 396) ref.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing by a majority the judgment of the Superior Court, Boulanger J. and dismissing the appellant's action. The judgment of the trial judge condemned the respondent to pay to the appellant an amount of $1,942.50 for damages.

Louis A. Pouliot K.C. and *F. Dorion K.C.* for the appellant.

Pierre de Varennes for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—Le savant procureur de l'intimé, au cours de sa plaidoirie, a soulevé pour la première fois une objection à la juridiction de la Cour pour entendre cette cause.

Il n'a pas nié que le montant total en capital et intérêt, qui est en question dans l'appel, excède $2,000.00, suivant les exigences de l'article 39 de la *Loi de la Cour Suprême* du

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

Canada, si l'on tient compte du jugement rendu par la Cour Supérieure. Mais il a prétendu que, comme la Cour du Banc du Roi (en Appel) avait infirmé le jugement de la Cour Supérieure et avait rejeté l'action, il n'existait plus de condamnation pécuniaire et, par conséquent, l'appel devant cette Cour n'était plus justifié par les prescriptions de cet article 39.

A l'appui de sa prétention, il a cité trois jugements de cette Cour: *Hamilton* v. *Evans,* (1); *Bridge* v. *Eggett,* (2); *Dominion Cartage Co.* v. *Cloutier,* (3). Mais nous n'avons vraiment à tenir compte que de ces deux derniers arrêts car ils sont postérieurs au premier; et, comme la Cour l'a fait remarquer dans l'affaire de *Dominion Cartage Company* (3), la décision re *Bridge* v. *Eggett* (2) a mis de côté l'opinion qui avait été exprimée dams *Hamilton* v. *Evans* (1).

L'article 40 de la *Loi de la Cour Suprême* spécifie que la computation du montant ou l'estimation de la valeur en litige ne doit pas comprendre l'intérêt subséquent à la date du jugement dont l'appel est porté devant cette Cour.

En vertu du principe *inclusio unius fit exclusio alterius,* cela veut dire que, par conséquent, l'intérêt pour la période qui s'étend depuis le jugement de la cour de première instance jusqu'à la date du jugement de la cour d'appel, doit être compris pour calculer le montant ou la valeur en litige dans l'appel à cette Cour. C'est toujours ainsi que depuis un grand nombre d'années cette section a été interprétée pour définir la juridiction de la Cour Suprême, et c'est ainsi que doivent être compris les arrêts de *Bridge* v. *Eggett* (2) et de *Dominion Cartage Co.* v. *Cloutier* (3).

Si, dans le "jugé" qui figure en tête de ces deux causes dans les rapports de 1928, l'on a employé les expressions where the judgment of a court of first instance for recovery of a sum of money is affirmed by an appellate court.

c'est uniquement parce que, dans chacune de ces causes, la cour d'appel avait confirmé le jugement de première instance. Il n'y avait nulle intention de déclarer que le principe invoqué dans ces deux causes ne s'appliquait qu'aux cas où la cour d'appel avait confirmé le jugement de première instance.

(1) [1923] S.C.R. 1.
(2) [1928] S.C.R. 154.
(3) [1928] S.C.R. 396.

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Le principe s'applique également lorsque la cour d'appel a infirmé le premier jugement.

En effet, s'il fallait en décider autrement, il faudrait dire que lorsqu'une action de plus de $2,000.00 a été rejetée par la Cour de première instance, il n'y aurait plus moyen de porter cette cause en appel devant la Cour Suprême. D'ailleurs, les termes dont s'est servi le juge en chef rejetant, au nom de la Cour, les deux motions dans ces causes invoquant le défaut de juridiction, montrent clairement that interest in the judgment of the trial court up to the date of the judgment of the appellate court, must be included in computing the amount in controversy in the appeal.

Nous devons donc maintenir que cette Cour a juridiction en l'espèce.

Reporter's note:—On the merits this Court held that the appellate court was not justified, upon the facts and circumstances of the case, in setting aside the judgment of the trial court. Consequently, the appeal to this Court was allowed and the judgment of the Superior Court was restored, with costs in all courts to be paid by the respondent.

Solicitors for the appellant: *Dorion, Dorion & Robitaille.*

Solicitor for the respondent: *Pierre de Varennes.*

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*May 6, 7.
*June 3

JAMES C. MAHAFFY ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income—Expenses incurred by a member of a legislative assembly.—While attending sessions of the legislature or travelling from seat of legislature to residence—Whether member entitled to deduct such expenses when making his annual income tax return—Income War Tax Act, R.S.C. 1927, c. 97, s. 5(1) (f) and s. 6(1) (a).

The appellant, a resident of Calgary, was in 1941 a member of the Legislature of the province of Alberta which meets at the capital city of Edmonton and received as such the sum of $2,000 as an allowance. In his income tax return for the year 1941, he deducted

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certain expenses and disbursements incurred for living expenses in the provincial capital while in attendance at legislative sessions and for travelling expenses from Calgary to Edmonton and return for week-ends during the time of such session. All of these deductions were disallowed by the Minister of National Revenue; and an appeal to the Exchequer Court of Canada was dismissed. Upon appeal to this Court,

Held that the expenses above mentioned are not such as the appellant is entitled to deduct under the provisions of the *Income War Tax Act*.

2. Such expenses are "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the terms of section 6 (1) (*a*) of the Act.

3. Travelling expenses incurred by the appellant are not "travelling expenses * * * in the pursuit of a trade or business "within the meaning of the words used in section 5 (1) (*f*) of the Act.

Judgment of the Exchequer Court of Canada ([1946]) Ex. C.R. 18) affirmed.

APPEAL from the judgment of the Honourable Mr. Justice Cameron, Deputy Judge of the Exchequer Court of Canada (1), dismissing an appeal from the decision of the Minister of National Revenue confirming the appellant's assessment under the *Income War Tax Act* for the year 1941.

Leave to appeal to the Supreme Court of Canada was granted by the Chief Justice in Chambers.

Redmond Quain K.C. for the appellant.

F. P. Varcoe K.C., W. R. Jackett and *J. G. McEntyre* for the respondent.

The judgment of The Chief Justice and of Kerwin, Hudson and Estey JJ. was delivered by

THE CHIEF JUSTICE:—The appellant was, in 1941, a Member of the Legislature of the province of Alberta representing the constituency of Calgary.

He included his allowance of $2,000.00 (as a Member of the Legislature) as part of his income; but he deducted certain expenses, which deduction was disallowed by the Minister of National Revenue.

(1) [1946] Ex. C.R. 18.

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Rinfret C.J.

These expenses as set out in the agreed facts consisted of:

(*a*) The bill of the McDonald Hotel in Edmonton being the place at which the Provincial Legislature sits and in respect to which the appellant paid for a room at a monthly rate of $80.00 per month, making a total of $144.35

(*b*) Expenses for berths and other conveyances to and from Calgary to Edmonton for 14 single trips which the appellant took over each week end so as to be in Calgary on Saturdays and Sundays in order to be available to confer with his constituents who might wish to see him about various matters, making a total of 43.40

As to the above it is to be noted that the actual railroad fare, apart from berths, was provided by a pass issued to the appellant and in respect to which he has made no claim.

(*c*) Additional expenses for meals and other incidentals while away from Calgary and in Edmonton over and above the cost of the same to the appellant while he is at home, which the appellant has calculated at $2.00 per day for 38 days, making a total of .. 76.00

$263.75

Less an item which had been reimbursed from the Provincial Government as against these expenses 27.40

$236.35

His appeal to the Exchequer Court of Canada was dismissed and the question is whether there was error in the judgment of that Court in not holding that:

(1) The said expenses were wholly, exclusively and necessarily expended for earning the income as stipulated in section 6 (1) (*a*) of the *Income War Tax Act*; or,

(2) The said expenses consisted of travelling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a business; and therefore should be deducted from income as provided by section 5 (1) (*f*) of the Act.

Taxable income is defined in section 3 (*d*) (ii) of the Act and is said to include the

salaries, indemnities or other remuneration of * * * members of Provincial Legislative Councils and Assemblies.

The sole problem therefore is whether the expenses above mentioned are such as the appellant is entitled to deduct under the provisions of the *Income War Tax Act*.

We do not think the words used in subsection 5 (1) (*f*) are apt to include the expenses now in question.

The provisions of that subsection are as follows:

(1) (*f*) Travelling expenses, including the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business.

The occupation of Members of Provincial Legislative Councils and Assemblies is neither a trade nor a business. The travelling expenses there mentioned are in the nature, for example, of expenses of commercial travellers. *Bahamas General Trust Company et al.* v. *Provincial Treasurer of Alberta* (1); *Ricketts* v. *Colquhoun* (2) approved in the judgment of Lord Blanesburgh in the House of Lords in the same case (3).

In our view, this is sufficient to eliminate subsection (*f*) of paragraph (1) of section (5) of the Act as supporting the appellant's contention.

Alternatively the appellant claims the benefit of the provisions of section 6 (1) (*a*) of the Act which is as follows:

In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

This clause was considered in the case of *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (4) where the then Chief Justice of this Court, at page 22, said:

In order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income", expenses must be working expenses; that is to say, expenses incurred in the process of earning the income.

In that judgment, the Court followed the decision in *Lothian Chemical Co. Ltd.* v. *Rogers* (5); *Robert Addie & Sons Ltd.* v. *Inland Revenue Commissioners* (6). In the *Addie* case (6) it was held that in order to be allowed, such expenditure must be laid out as part of the process of profit earning. Reference may be also made to the case of

(1) [1942] 1 W.W.R. 46, at 53.
(2) [1925] 1 K.B. 725, at 731.
(3) [1926] A.C. 8.
(4) [1941] S.C.R. 19.
(5) (1926) 11 Tax Cases 508.
(6) (1942) S.C. 231, at 235.

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Montreal Coke and Manufacturing Company v. *Minister of National Revenue* (1) where it was held that expenditure to be deductible must be directly related to the earning of income from the trade or business conducted.

It cannot be said here that the expenses of the appellant had been incurred in the process of earning the income and more particularly such expenses cannot be considered as having been incurred "wholly, exclusively and necessarily" for that purpose. Moreover, section 6 of the Act, subsection (*f*) excludes "personal and living expenses" from the deduction which may be allowed "in computing the amount of the profits or gains to be assessed".

For these reasons, the appeal is dismissed with costs.

RAND J.:—The appellant is a member of the Provincial Legislature of Alberta, representing the constituency of Calgary. The Assembly sits in Edmonton, some 200 miles from that city. He receives from the province an allowance of $2,000.00 under *The Legislative Assembly Act*, R. S. A. (1942) c. 4, sections 54 and 57 of which are as follows:

54. (1) In respect of each session of the Legislature which is first held in any year, there shall be allowed and payable to each member of the Legislative Assembly attending such session an allowance of $2,000.00 and no more;

* * *

57. There shall be allowed to each member five cents for each mile of the distance between the nearest railway station to the place of residence of the member and the place at which the session is held, reckoning the distance going and coming, according to the shortest railway route together with his actual travelling expenses between his place of residence and the railway station when the distance is greater than five miles.

In making his return of income to the respondent, he deducted from the sessional allowance the expenses of (*a*) lodging in a hotel at Edmonton in the sum of $144.35; (*b*) expenses for berths and incidental transportation between Calgary and Edmonton exclusive of regular fares incurred in seven round trips taken at weekends to enable the appellant to be in his constituency to confer with constituents on various matters in the sum of $43.40; (*c*) additional expenses for meals and other incidentals while in Edmonton over and above their cost to the appellant at home figured

(1) [1944] A.C. 126.

at $2.00 a day for 38 days, making a total of $76.00 less the sum of $27.40 representing the mileage allowance for one trip to Edmonton and return under section 57.

The deductions were disallowed by the respondent; an appeal to the Exchequer Court of Canada was dismissed, and the case is now brought to this Court.

The *Income War Tax Act* defines "income" as follows:

3. (1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity * * * and shall include the interest, dividends or profits * * * and also the annual profit or gain from any other source including

* * *

(*d*) The salaries, indemnities or other remunerations of

(1) members of the Senate and House of Commons of Canada and officers thereof;

(2) members of Provincial Legislative Councils and Assemblies.

Exemptions and deductions are covered by sections 5 and 6 as follows:

5. (1) "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

* * *

(*f*) Travelling expenses, including the entire amount expended for meals and lodging, while away from home in the pursuit of a trade or business;

* * *

6. (1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

* * *

(*f*) Personal and living expenses;

The question is whether the items deducted are travelling expenses "in the pursuit of a trade or business"; or disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

and in my opinion they are neither. Whether or not attending a session of a Legislative Assembly can be deemed "business" which I think extremely doubtful, certainly making the extra trips and lodging in a hotel in Edmonton cannot be looked upon as "in the pursuit" of it. That expression had been judicially interpreted to mean "in the process of earning" the income: *Minister of National Revenue* v. *Dominion Natural Gas Co.* (1). The sessional allowance is specifically for attendance by members at the

(1) [1941] S.C.R. 19.

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MAHAFFY v. THE MINISTER OF NATIONAL REVENUE

Rand J.

legislative proceedings: it has no relation to any time or place or activity outside of that. The "pursuit" of a business contemplates only the time and place which embrace the range of those activities for which the allowance is made: the "process of earning" consists of engaging in those activities. To treat the travelling expenses here as within that range would enable employees generally who must, in a practical sense, take a street car or bus or train to reach their work to claim these daily expenses as deductions. Employees are paid for what they do while "at work"; and the legislators receive the allowance for their participation in the sessional deliberations: up to those boundaries, each class is on its own. For the same reason it cannot seriously be urged that the expenses are "wholly, exclusively and necessarily" laid out for the purpose of earning the allowance: they are for acts or requirements of the member as an individual and not as a participant in the remunerated field.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *S. J. Helman.*

Solicitor for the respondent: *S. H. Adams.*

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*May 7, 8.
*May 20.

UNION PACKING COMPANY LIMITED (SUPPLIANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Petition of right—Contract—Negligence—Bacon Agreement between Canada and the United Kingdom, 1940—Bacon Regulations, Order in Council December 13 and 27, 1939—Bacon Board booking shipment for pork products to be furnished by suppliant—Products delivered at seaboard but no ship available for loading—Products deteriorated from being unattended—Whether Board bound to notify suppliant

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

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or put products in cold storage—Whether Bacon Board a servant of the Crown—Validity of claim by Suppliant under section 19 (c) of the Exchequer Court Act, R.S.C., 1927, c. 34.

Suppliant, carrying on business as meat packers and provisioners, alleged that, on February 28th, 1941, it was notified by the Bacon Board that the latter had booked shipment for pork products on a steamship scheduled to load at Saint John from March 12th to 15th, 1941; that the suppliant proceeded to make arrangements accordingly and so notified the Board; that the products arrived at Saint John on March 11th, 1941 and were delivered at seaboard but no ship was available on which to load them; that the Board did not inspect the products until March 29th, 1941 when it advised the suppliant that some of them were rejected for slime, odour and mould; that the Board, knowing that no ship was available, failed to notify the suppliant and failed to put the products into cold storage until shipping space would be made available; and that on the resale of the rejected products the suppliant suffered loss to an amount of $4,508.86. Suppliant claimed that the Crown, through the Board, had purchased or requisitioned its property and, alternatively, that it had suffered damages resulting from negligence of the Board. A question of law was set down for disposition before trial of the action as to whether a petition of right lies, assuming the acts or omissions alleged in it to be established. The President of the Exchequer Court of Canada held that the suppliant was not entitled to any of the relief sought in its petition. On appeal to this Court,

Held, reversing the judgment appealed from, that the appellant's claim under section 19 (c) of the *Exchequer Court Act,* "arising out of * * * injury to * * * property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment" might still be valid, even if the Board has no power to purchase or to appropriate. Therefore, the suppliant is entitled to proceed to trial on its petition of right.

APPEAL from the judgment of the President of the Exchequer Court of Canada (1) adjudging that the suppliant is not entitled to any of the relief sought in its petition of right.

Redmond Quain K.C. for the appellant.

F. P. Varcoe K.C. and *D. W. Mundell* for the respondent.

The judgment of the Court was delivered by

KERWIN J.:—This is an appeal by the suppliant, Union Packing Company Limited, from a judgment of the Exchequer Court of Canada declaring that the suppliant is not entitled to any of the relief sought in its petition of right.

(1) [1946] Ex. C.R. 49.

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Kerwin J.

This judgment was delivered upon a question of law set down for argument pursuant to an order made on the application of the suppliant. The question as set forth in that order is as follows:—

In view of the agreement dated the 30th day of October, 1940, between the Governments of the United Kingdom and of Canada for the purchase of Canadian bacon and hams, and in view of Order-in-Council P.C. 4076, dated the 13th day of December, 1939, as amended by P.C. 4353, dated 27th day of December, 1939, and assuming the acts or omissions alleged in the Petition of Right herein to be established, does a Petition of Right lie.

The first argument advanced by the respondent why a negative answer should be given to that question was that a petition of right does not lie against the Crown in this case because the Bacon Board, created by P.C. 4076, (referred to in the question) is not a servant or agent of the Crown but an independent body. The President of the Exchequer Court of Canada decided adversely to the Crown on that argument and on the opening of the appeal before us, Mr. Varcoe announced that he accepted that conclusion and would not seek to support the judgment appealed from on that ground. After disposing of that argument, the President proceeded to discuss the question whether a petition of right lies under the circumstances, and he held it did not. The circumstances, of course, mean the acts or omissions alleged in the petition, and according to the terms of the order granting leave to set down the question of law, these acts or omissions must, for the purpose of the motion, be taken as admitted. The first inquiry must therefore be as to what is so alleged.

The suppliant carries on business as meat packers and provisioners. By a letter of February 5th, 1941, the Bacon Board, set up and acting as a servant and agent of the Crown, notified the suppliant that with respect to the week commencing February 10th, 1941, a put-down to the extent of 160,000 pounds of bacon and other pork products was authorized, and accordingly the suppliant placed into cure bacon and other pork products of the required weight and notified the Board accordingly. Contained in the said products so put into cure were seventy-three boxes of rib backs weighing 42,785 pounds. On February 28th, 1941, the suppliant was notified by the Board that it had booked

shipment for this pork on a steamship scheduled to load at the Port of Saint John from the 12th to 15th March, 1941, and the suppliant proceeded to make arrangements accordingly, and so notified the Board. The product arrived at Saint John on March 11th, 1941, and was delivered at seaboard but no ship was available at that time for the purpose of having the product loaded thereon. The Board did not inspect the product until March 29th, 1941, when it advised the suppliant that the seventy-three boxes of rib backs were rejected for slime, odour and mould. The petition of right then proceeds to allege:—

The Bacon Board on the arrival of the said pork, knowing that no ship was available, failed to notify the suppliant to take care of the said product and failed to take any steps to have the same put into cold storage. The suppliant says that the Bacon Board as the agent and servant of the Crown was negligent in its handling of the said lot of pork products and failed to use reasonable care in that—

(*a*) When it found that no ship was available as booked it should have taken steps to have the said pork products put into cold storage so that the same would not be damaged or permitted to deteriorate until shipping space was made available, or

(*b*) It should have immediately notified the suppliant that the shipping space was not available and so have permitted the suppliant to have itself made arrangements for the care of the said pork products.

(*c*) It permitted the said pork products to remain on hand at Calgary too long a period without arranging for the shipping thereof.

Paragraph 6 alleges that by reason of the said negligence and lack of care, the rib backs became slimy and developed mould, and were rejected, and the suppliant suffered damage in the amount thereinafter set out.

Paragraphs 7 and 8 set up alternative claims in the following language:—

7. In the alternative the suppliant says that the Crown took over the complete handling, care and shipping of the said pork products from the time it authorized the same to be put into cure until the said boxes of rib backs were rejected and that the suppliant acted at all times in accordance with the instructions received from the Crown relative thereto and that if any of the said pork deteriorated or was damaged such deterioration or damage was due entirely to the fault of the Crown and that the suppliant is entitled to be paid by the Crown the agreed price or value of such rib backs less any moneys it has received on account thereof from the resale of such rib backs.

8. In the further alternative the suppliant says that the said 73 boxes of rib backs were delivered at seaboard in good condition as agreed and that the suppliant is entitled to be paid therefor at the agreed price from the moneys in the hands of the Crown paid by the United Kingdom Ministry of Food in respect thereof and that the suppliant has sustained

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loss as hereinafter set out by reason of the wrongful return of the said boxes of rib backs. The suppliant says that as against the agreed price owing to it the Crown is entitled to have credited the amount realized from the resale of the said products.

Particulars of the damage and loss sustained by the suppliant are then given, showing a total amount claimed, $4,508.86. There is another claim for another shipment in which the same allegations are made, the total amount of that claim being $4,085.89.

Leaving aside for the moment the claim for negligence under section 19 (c) of the *Exchequer Court Act*, the respondent contends that the only claim made by the suppliant is in contract and that no allegation is made that the Board, acting for the Crown, appropriated the rib backs. I am unable to agree with that view as I consider the petition of right alleges facts in paragraphs 7 and 8 and I take it that the President construed the petition of right in the same way. However, he held that the Board has no power to appropriate for the use of the Crown and, therefore, that no claim on that basis could succeed. In that connection he referred to the decision of this Court in the *Chemicals Reference* (1), where it was held that a certain paragraph of the Order in Council there in question was in conflict with section 7 of the *War Measures Act*. As to that, it might be pointed out that, if the Board has power to appropriate the boxes of rib backs or the use thereof, and does so appropriate, section 7 of the *War Measures Act* merely provides that the claim for compensation therefor shall be referred by the Minister of Justice to one of certain courts named therein, or a judge thereof, if "Compensation is to be made therefor and has not been agreed upon." It might appear from the evidence, and in fact is a fair assumption from the petition of right, that the suppliant and the Board had agreed upon the price. In view of the disposition proposed to be made of this appeal, nothing further need be said at this time in connection with the matter and no opinion is expressed as to the correctness of the President's view.

As to the claim in contract, the President held that the Board has no power to purchase and that as a matter of fact any purchase from the suppliant was made by the

(1) [1943] S.C.R. 1.

United Kingdom Minister of Food and that the sale was made by the suppliant to it. He therefore held that there was no duty owing by the Board to the suppliant to arrange for the care of the rib backs but, on the contrary, that it was the duty of the suppliant to attend to such matters.

No opinion is expressed on this point because it seems to be clear that the claim under section 19 (c) of the *Exchequer Court Act*, arising out of injury to property, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, might still be valid even if the Board has no power to purchase or to appropriate. At present we do not know what was contained in the instructions from the Board to the suppliant, how the boxes of rib backs were shipped, and what communications passed between the suppliant and the Board.

The appeal should be allowed and in lieu of the judgment a quo there should be an adjudication that the Bacon Board is a servant of the Crown and that the suppliant is entitled to proceed to trial on its petition of right. It should, however, be pointed out that the

> arrangements for the delivery at Canadian seaboard ports to the United Kingdom Ministry of Food, of bacon and hams during the period November 17th, 1939, to October 31st, 1940,

referred to in the first recital in P.C. 4076, would not be found in the later agreement between the Ministry of Food and the Canadian Government, dated October 30th, 1940, unless they happen to be the same as in an earlier agreement, nor are they the arrangements referred to in paragraph 2 of the petition of right since they are there stated to have been entered into in the year 1939. The disposition to be made of the costs of the argument on the question of law and this appeal causes some concern. It has been shown that some questions of law were raised by the statement of defence; that an *ex parte* order was made giving leave to have those points of law set down for argument at the sittings to be held in Calgary; that Mr. Justice Robson, sitting as an *ad hoc judge*, struck the case off the list to allow for further consideration since counsel for the Crown took the position that he thought the questions were not merely ones of law but of mixed fact and

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law. The suppliant then served a notice of motion for an order that the following question of law should be set down and disposed of before the trial:—

Whether a cause of action against His Majesty is disclosed in the Petition of Right herein or such other or additional preliminary question of law as is raised by the statement by defence herein.

Upon that motion it was suggested that the agreement of October 30th, 1940, and P.C. 4076 as amended by P.C. 4553, should be considered, and the order was made accordingly. Under all the circumstances, the costs of that application and of the argument on the question of law and of this appeal should be costs in the cause.

Appeal allowed, costs in the cause.

Solicitors for the appellant: *Helman, Mahaffy & Barron.*

Solicitor for the respondent: *F. P. Varcoe.*

1946

*May 13
*May 20

LEO KINCAID GREENLEES (PLAINTIFF) ..... APPELLANT;

AND

ATTORNEY-GENERAL OF CANADA (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Jurisdiction—Liability to military service—Exemption of "a minister of a religious denomination"—Action by member of Jehovah's Witnesses to be declared within exemption—Dismissal of action—Petition for leave to appeal—"Rights in future"—Supreme Court Act, Section 41(c).

The appellant brought an action against the Attorney-General of Canada, claiming a declaration that he was "a minister of a religious denomination," to wit. Jehovah's Witnesses, within the meaning of section 3, subs. 2 (c), of the *National Selective Service Mobilization Regulations, 1944*, and that, therefore, the Regulations did not apply to him. The trial judge held that, even assuming that the Jehovah's Witnesses were "a religious denomination", the appellant was not "a minister" thereof; and that judgment was affirmed by the appellate court. The appellant moved for special leave to appeal to this Court, under the provisions of section 41 (c) of the *Supreme Court Act.*

*PRESENT:—Kerwin, Hudson, Taschereau, Rand and Estey JJ.

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Held that this Court has no jurisdiction to grant leave, and the application must be refused, on the ground that the appellant's present or future pecuniary or economic rights are not in controversy in this appeal. The decision appealed from is confined to the point that the appellant is not "a minister of a religious denomination", and the mere possibility that a lower Court might inappropriately use it against the appellant in connection with any rights he may have under other statutory enactments cannot alter the fact that, in the present appeal, his future rights are not involved.

MOTION for leave to appeal to the Supreme Court of Canada from a judgment of the Court of Appeal for Ontario (1), affirming the judgment of the trial judge, Hogg J. (2) and dismissing an action for a declaration that the appellant is exempt from the application of the *National Selective Service Mobilization Regulations.*

W. G. How for the motion.

W. R. Jackett contra.

The judgment of the Court was delivered by

KERWIN J.:—L. K. Greenless brought an action against the Attorney-General for Canada, claiming a declaration that he is a minister of a religious denomination within the meaning of section 3, subsection 2, of the *National Selective Service Mobilization Regulations, 1944.* By subsection 1, the Regulations are stated to apply to such age classes, or parts of age classes, of men as the Governor in Council may, from time to time, by proclamation in the Canada Gazette, designate for the purpose. Then comes subsection 2, which so far as material provides:

(2) Notwithstanding subsection 1, these regulations shall not apply to the following:—

* * *

(c) a regular clergyman or a minister of a religious denomination.

A preliminary objection was raised that the appellant was not entitled to bring the action but the trial judge, Mr. Justice Hogg (2), concluded that he had jurisdiction and that it came within such cases as *Dyson* v. *Attorney-General* (3). However, while inclining to the view that

(1) [1946] 1 D.L.R. 550.
(2) [1945] 2 D.L.R. 641, 808.
(3) [1911] 1 K.B. 410.

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Kerwin J.

there is a religious denomination known as Jehovah's Witnesses, he held that the plaintiff was not a "minister" of that denomination, and dismissed the action.

Upon appeal to the Court of Appeal for Ontario (1), the Chief Justice of the province, writing the judgment of the Court, expressed no opinion upon the preliminary objection. He concluded that notwithstanding the stand taken by Jehovah's Witnesses as to "religion", it would be proper to say that the word "religious" in Regulation 3(2(*c*)) might be applied to them. He had more difficulty with the question whether they constituted a denomination, and he concluded that he was far from satisfied that, the onus being upon the plaintiff to bring himself within an exception, the evidence warranted a finding that those calling themselves "Jehovah's Witnesses" constituted a "religious denomination" within the meaning of the Regulation. That was sufficient for the dismissal of the appeal but he agreed with the conclusion arrived at by Mr. Justice Hogg that, even assuming they were a religious denomination, the appellant was not a minister thereof.

The plaintiff sought leave from the Court of Appeal for leave to appeal from its decision but that leave was refused. He then applied to this Court for special leave and admitted that the only provision giving this Court power to grant leave must be found in clause (*c*) of section 41, *Supreme Court Act*, reading as follows:

> (*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

Mr. How endeavoured to distinguish the decision of this Court in *Bland* v. *Agnew* (2), where it was held that section 41, when enacted substantially in its present form in 1920 by chapter 32, section 2, did not profess in terms to introduce any change in the well-settled practice that no appeal would lie unless the matter in controversy involved or affected something in the nature of a pecuniary or economic interest, present or future. It was there held that there was no jurisdiction in this Court to grant special leave to appeal from the Court of Appeal for British Columbia dismissing the applicant's appeal from an order allowing the adoption by respondents of the applicant's daughter.

(1) [1946] 1 D.L.R. 550. (2) [1933] S.C.R. 345.

Mr. How argued that this rule had been broadened by this Court since that decision, and he referred to *Forcier* v. *Coderre* (1), *Christie* v. *The York Corporation* (2) and *Le Comité Paritaire* v. *Dominion Blank Book Company Limited* (3). In the first of these cases the application was actually refused and the statement of the present Chief Justice, at page 551:—

> si la règle nisi avait été maintenue, la liberté du sujet serait en jeu, et nous serions probablement d'avis que le litige soulève une question suffisamment importante,

must be read in the light of what was involved, viz., the title to real estate under clause (*d*) of section 41. In the *Christie* case (2) there was an economic interest involved as the plaintiff claimed, among other things, damages, while in the third case, the judgment at the trial was finally restored, as would appear by a reference to the report of that decision (4), wherein, besides other relief, damages in the sum of $33.80 had been ordered to be paid. None of these decisions has made any inroads upon the principle set forth in *Bland* v. *Agnew* (5).

Mr. How then sought what would really amount to a reversal of the jurisprudence of this Court in connection with applications for special leave to appeal under section 41 (*c*) by emphasizing the fact that the paragraph speaks of matters by which rights in future of the parties "may" be affected; and he suggested that the plaintiff's right to exemption as a minister or clergyman in charge of a diocese, parish or congregation under Rule A to the First Schedule to the *Income War Tax Act,* or his claim to a railway pass under the provisions of the *Railway Act,* or his standing under various other enactments might be affected. That overlooks that *Bland* v. *Agnew* (5) merely reiterates the well-settled jurisprudence set forth in a line of decisions, some of which are there referred to, that it is the matter in controversy in the appeal that must be looked at, 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.

(1) [1936] S.C.R. 550.
(2) [1939] S.C.R. 50.
(3) [1943] S.C.R. 566.
(4) [1944] S.C.R. 213.
(5) [1933] S.C.R. 345.

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Furthermore, the decision of the Court of Appeal in the present case is that within section 3, subsection 2 (*c*) of the *National Selective Service Mobilization Regulations, 1944,* Jehovah's Witnesses is not a religious denomination and the plaintiff is not a minister. It is confined to that point and the mere possibility that notwithstanding the explicit words of the Chief Justice of Ontario, a lower Court might inappropriately use it against the plaintiff in connection with one of the other matters referred to cannot alter the fact that the plaintiff's present or future economic rights are not in controversy in this appeal.

On the ground that we have no jurisdiction to grant leave, the application must be refused.

Leave to appeal refused.

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*Mar. 11
*May 3

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

AND

SAINT JOHN TUG BOAT COMPANY, LTD. (SUPPLIANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision in harbour during fog—Petition of right—Claim for damages to tug and for loss of earnings—Both vessels at fault and fault in equal degree—Crown held liable for one-half the damage and loss sustained by suppliant—Crown also ordered to pay costs of action—Whether Crown liable for costs—

The tug *Ocean Hawk I* and its tow and H.M.C.S. *Beaver,* belonging to His Majesty in the right of Canada, collided in the harbour of Saint John, N.B. during a fog. On a petition of right presented by the respondent, O'Connor J. in the Exchequer Court of Canada found that the injury to the Crown's vessel was insignificant, but that the damage to the tug boat amounted to $2,367 and that there was loss of earnings to the extent of $1,400. The trial judge, holding that such damage and loss were caused by the fault of both vessels and that the fault was in equal degree, directed that the Crown should bear half the damage and loss sustained by the suppliant, and pay the costs of the action. The Crown appealed to this Court from that judgment and further contended that it should not be made liable for costs, following a rule of the Admiralty Court.

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

Held that the finding of the trial judge, that the damage and loss to the *Ocean Hawk I* was caused by the fault, in equal degree, of both vessels, and the direction that they should be apportioned equally between them, should not be disturbed; but

Held The Chief Justice and Kerwin J. dissenting, that the evidence as to loss of earnings was not sufficient to enable the Court to make any allowance and that the sum of $700 should be deducted from the amount of damages awarded to the respondent.

Held, also that the Crown could be made liable for costs of the action.

Per The Chief Justice and Kerwin, Hudson and Estey JJ.—If the proceedings in this case, originated in a petition of right, are taken to be in the Exchequer Court of Canada in its general jurisdiction, the right to adjudge that the suppliant is entitled to recover its costs from the Crown is unquestionable, and, if the proceedings are treated as being on the Admiralty side of that Court, then section 12 of the *Petition of Right Act* would confer upon the Court power to award costs against the Crown.

Per Rand J.—The proceedings are in the Exchequer Court of Canada proper and not in its Admiralty jurisdiction and, therefore, the costs are at the discretion of the Court unhampered by the rule of the Admiralty Court.

Judgment of the Exchequer Court of Canada ([1945] Ex. C.R. 214) affirmed in part.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J. (1), maintaining a petition of right by the respondent to recover from the Crown damages for loss resulting from a collision, between the respondent's tug *Ocean Hawk I* and H.M.C.S. *Beaver* owned by the Crown, alleged to be due to the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

H. A. Porter K.C. and *C. Stein* for the appellant.

C. F. Inches K.C. for the respondent.

The judgment of the Chief Justice and of Kerwin J. (dissenting in part) was delivered by

KERWIN J.:This is an appeal by His Majesty from a judgment of the Exchequer Court of Canada on a petition of right presented by the respondent, Saint John Tugboat Company, Limited, the owner of the tug *Ocean Hawk I.* On September 17th, 1942, a collision occurred between that tug and its tow, on the one hand, and H.M.C.S. *Beaver,*

(1) [1945] Ex. C.R. 214.

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belonging to His Majesty in the right of Canada, on the other. Mr. Justice O'Connor in the Exchequer Court of Canada found that the damage and loss to the *Ocean Hawk I* was caused by the fault of both vessels and that the fault was in equal degree. I am not prepared to disagree with this finding.

The trial was fought on the basis of the applicability of the rules of the International Regulations for Preventing Collisions at Sea as they appear in Annex II to the *Canada Shipping Act,* 1934, chapter 44, where it is stated that

> These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels.

While Mr. Porter contended that these rules did not apply to the Crown, he admitted that the relevant ones provided a reasonable course of conduct to be followed by the Commander of the *Beaver.* In assessing one-half of the damages against the Crown, the trial judge referred to section 640 of the *Canada Shipping Act* but, as appears by section 712, this does not apply to His Majesty. That it applied to the suppliant was not controverted by Mr. Inches. No question was raised as to the power of the Exchequer Court of Canada to order that the Crown pay one-half the damages and loss sustained by the suppliant if it be held that both ships were equally to blame but it was argued that the Crown could not be made liable for costs.

These proceedings originated in a petition of right pursuant to the *Petition of Right Act,* R.S.C. 1927, chapter 158. By virtue of section 5 thereof, the Exchequer Court of Canada had exclusive original cognizance of the petition and by section 12 the suppliant is entitled to costs against His Majesty in like manner and subject to the same rules, regulations and provisions, restrictions and discretion, so far as they are applicable, as are or may be usually adopted or in force in respect to the right to recover costs in proceedings between subject and subject. Section 87 of the *Exchequer Court Act* empowers the President to make general rules and orders "(*e*) for awarding and regulating costs in such Court in favour of or against the Crown as well as the subject" and Rule 260 passed in pursuance thereof provides that costs may be awarded against the

Crown. If these proceedings be in the Exchequer Court of Canada in its general jurisdiction and not on its Admiralty Side, the right to adjudge that the suppliant is entitled to recover its costs from His Majesty is unquestionable.

By virtue of the *Admiralty Act,* 1934, chapter 31, the jurisdiction of the Exchequer Court of Canada on its Admiralty Side extends to and may be exercised in respect of all navigable waters. If it be taken that the direction in section 5 of the *Petition of Right Act* to file the petition and fiat in the Exchequer Court of Canada means in such a case as this to file it in that Court on its Admiralty Side, Rule 131 of the General Rules and Orders Regulating the Practice and Procedure in Admiralty must be considered. That rule provides:—

> In general costs shall follow the event; but the Judge may in any case make such order as to costs as to him shall seem fit.

It was pointed out that this is a reproduction of an order formerly in force in Britain under which it was held that the "event" referred to was that each party there succeeded and failed in equal degree since at that time the law did not inquire into degrees of fault. This is referred to by Mr. Justice Hill in *The Modica* (1) where that experienced judge also stated that it seemed to him that the old rule as to there being no costs in cases between subjects should not be treated as governing the changed conditions since the *Maritime Conventions Act* of 1911, which contains the provision found in section 640 of the *Canada Shipping Act* that

> the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.

In the *Robert Koeppen,* noted at page 81 of the same report, Mr. Justice Hill, while finding the plaintiff's ship one-fourth to blame, ordered the defendants to pay one-half of the plaintiff's costs. I quite agree that in view of section 640 of the *Canada Shipping Act,* Rule 131 confers a discretion upon the trial judge in cases between subject and subject and, even if these proceedings be treated as being on the Admiralty Side of the Exchequer Court, section 12 of the *Petition of Right Act* confers upon the Court power to award costs against His Majesty.

(1) [1926] P. 72, at 78.

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Kerwin J.

The item of $1400 for loss of earnings, included by the trial judge in the loss sustained by the suppliant, was attacked on the ground of the absence of any evidence to justify it. While the evidence on the point is meagre, I think it is sufficient to warrant the allowance of the items. At the argument we declined to permit the appellant to raise the question as to whether the locus of the collision was in a narrow channel within the meaning of Article 25 of the Rules as the pleadings do not refer to the point and no evidence directed to it was introduced.

The appeal should be dismissed with costs.

The judgment of Hudson and Estey JJ. was delivered by

HUDSON J.—This is an action for damages arising from the collision in Saint John Harbour of a tug boat belonging to the suppliant and a naval vessel belonging to His Majesty.

At the trial Mr. Justice O'Connor found the vessels to be equally at fault and directed that damages should be apportioned equally between them.

Consideration of the evidence does not to my mind justify any interference with this finding and direction of the learned judge.

The injury to the naval vessel was of an insignificant character and nothing was allowed in respect of same. The injury to the tug boat was more serious and the trial judge found it to amount to $2,367. He also found that there was loss of her earnings to the extent of $1,400. The amount of the damage to the boat is not seriously questioned but it is contended that no loss of earnings was established. On this point the evidence is very meagre indeed.

The onus is on the respondent to establish the actual loss and reasonable proof of the amount. It appears from the evidence that the respondent had a number of boats used in their business, some of which were idle from time to time.

The Superintendent of the respondents in cross-examination was asked very specifically if he could name any business that had been offering or available to the Tug

Boat Company, during the time that the boat in question was being repaired, which the Tug Boat Company were unable to handle through the loss of the service of the *Ocean Hawk*. He was unable to state any.

In the case of *The City of Peking* (1) it was stated by Sir Barnes Peacock at p. 442:

> There is no doubt as to the rule of law according to which compensation is to be assessed in cases of this nature, where a partial loss is sustained by collision. The rule is *restitutio in integrum*: citing *The Black Prince*, (2). The party injured is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered. It does not follow as a matter of necessity that anything is due for detention of a vessel whilst under repair. In order to entitle a party to be indemnified for what is termed in the Admiralty Court a consequential loss resulting from the detention of his vessel, two things are absolutely necessary—actual loss and reasonable proof of the amount (citing *The Clarence*, (3) and *The Argentino* (4).

See also 30 Halsbury, p. 861.

For this reason, I would allow the appeal and reduce the verdict by $700, with no costs in this Court.

It was pressed strongly on behalf of the appellant that no costs should be allowed at the trial but, for the reasons mentioned in the judgment of my brother Kerwin, I do not think that this point can be sustained.

RAND J.—I see no reason to interfere with the finding of the Court below of negligence in the navigation of both vessels and of equal responsibility.

On that basis, it is argued that there should be no costs following the old rule of the Admiralty Court. But the proceeding here is in the Exchequer Court of Canada proper and not in its Admiralty jurisdiction. The costs are, therefore, in the discretion of the Court unhampered by the rule in question.

The point also is taken that there was no proof of damages through loss of profits. The vessel was one of four tugs operated by the respondent in Saint John harbour. The business was an entirety, and damages of this nature would appear in the lessened earnings over the 16 days

(1) (1890) 15 A.C. 438.
(2) (1862) 1 Lush 568, at 573.
(3) (1850) 3 Wm. Rob. 283.
(4) (1883) 13 P.D. 61, 191.

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Rand J.

during which repairs were being made. The following questions and answers of the respondent's Superintendent give the only evidence on the point:

Q. And during the days that followed this collision was there any time that you were unable to do the business offering?

A. No, I don't think so.

Q. You had three boats with which to work and when anything was to be done you had a boat to send?

A. We did use the whole four of them.

Q. I am asking you whether in the days immediately after that—it was a slack time in the harbour just then, wasn't it—there was no time you were embarrassed for lack of the fourth boat?

A. I can't say for sure now.

We cannot then infer an actual loss even in gross receipts during that time, and with no running expenses including wages of the crew, there was possibly a higher net return than if the tug had been kept in service. At any rate, there is no material before us from which a conclusion one way or the other can be drawn. In these circumstances, I think it impossible to make any allowance. A claimant must not only present facts which show that damage of this nature has been suffered, but they must be of a nature from which an amount can fairly be deduced: *St. John Motor Line Ltd.* v. *Canadian National Railway Co.* (1). There is nothing of that sort here, and the sum allowed must be struck out.

I would, therefore, allow the appeal and reduce the judgment by $700. In view of divided success, there should be no costs in this Court.

Appeal allowed in part; no costs.

Solicitors for the appellant: *Porter & Ritchie.*

Solicitors for the respondent: *Inches & Hazen.*

(1) (1929) 2 M.P.R. 55.

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*May 27, 28
*June 19

BETWEEN:

LA COMPAGNIE DU PONT PLESSIS-BÉLAIR ..... (PETITIONER) } APPELLANT;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC ET AL ..... (RESPONDENTS) } RESPONDENTS.

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

Franchise—Act of provincial legislature authorizing erection and exploitation of toll-bridge—Exclusive right to cross river and charge tolls—Crown to have right, after fifty years, to take possession of bridge and dependencies upon payment of their value—Crown then to have right to charge and collect tolls—Construction of the Act—Taking of possession by Crown not constituting expropriation in its strict sense—Crown solely exercising rights conferred to it by Act—Mere execution of clauses of contract between Crown and grantee—Franchise not perpetual, but ceasing to exist from date of taking of possession by Crown—Provision in Act of 1830 and subsequent enactment in 1940 as to taking of possession upon payment of value of properties—Taking of possession allowed without making immediate payment—Interest payable on amount of indemnity from date of taking of possession—Statute of Lower Canada (1830) 10-11 Geo. IV, c. 56—(Que.) (1940) 4 Geo. VI. c. 33 and c. 71—Arts 1066 (a) and seq. C.C.P.

The appellant company was vested with all the rights, prerogatives and privileges conferred to one J.P.. in 1830 by a provincial statute of Lower Canada (10-11 Geo. IV, c. 56). Under that Act, J.P. was authorized to erect and exploit a toll-bridge with its dependencies, for a league round, in the upper and lower part of the river Jésus, opposite the village of Sainte-Rose and was granted the exclusive right to cross the river and to charge tolls in accordance with the tariff established by the Act. But it was also provided that, after the expiration of a period of fifty years, the Crown would have the right at any time "to assume the possession and property" of the bridge and dependencies, upon paying to the grantee the "full and entire value", and it was further stipulated that, from the moment of that taking of possession, the Crown would be substituted to all the rights of the grantee to charge and collect the tolls. The Crown took such possession on July 1st, 1940. Proceedings were taken by the appellant under the expropriation law (Arts. 1066 (*b*) and (*c*) C.C.P.) and the record was referred to the Public Service Board for the purpose of fixing the indemnity. Subsequently the Crown made an offer of $109,398 which was refused. The appellant then filed its claim for $2,387,093, $1,848,000 being the alleged value of the franchise

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

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and $539,093 as value of the physical assets, damages, interest and other items. The Public Service Board fixed the amount of the indemnity at $109,899. The Superior Court homologated that decision and the appellate court affirmed that judgment.

Held that the appeal should be dismissed. Upon a proper construction of the Acts of 1830 and 1940, under whose provisions the appellant's claim must exclusively be decided, the appellant company has been granted by the courts below the full amount of compensation to which it was entitled.

Held that, under the enactments of the Act of 1830, the taking of possession by the Crown, whenever effected, did not constitute an expropriation in its strict legal sense. The Crown, by taking possession, did not do more than exercising the rights which had been conferred to it by the Act and to which the grantee had acquiesced in advance. It is purely and simply the execution of the clauses of a contract passed between the Crown and the grantee.

Held, also, that, upon a proper construction of the Act of 1930, the franchise, which the grantee has acquired through that statute, ceased to exist from the moment of the taking of possession by the Crown and the grantee or his successors or assigns cannot lay any claim to the tolls collected thereafter.

The Act of 1930 stipulated that "it shall and may be lawful for His Majesty * * * to assume the possession and property of the said bridge * * * upon payment to the said J.P. * * * the full and entire value which the same shall, at the time of such assumption, bear and be worth". But by a subsequent Act, in 1940 (Que. 4 Geo. VI, c. 33), "The Minister of Public Works (was) authorized to take possession, in the name of His Majesty, of the toll-bridge * * * and dependencies * * * and the Provincial Treasurer (was) authorized to pay * * * to the * * * assigns of the grantee J.P. the full and entire value of the whole at the time when the Minister of Public Works shall so take possession thereof."

Held that the stipulation in the Act of 1830 is susceptible of being so construed that the Crown could not have efficient possession, and become definitively owner, of the toll-bridge and dependencies, unless payment of their full and entire value had been made; but such preliminary condition, if it existed, has been set aside by the Act of 1940 and the Crown was granted the right, under that Act, to take possession and assume the ownership of those properties *ipso facto* without any previous obligation to pay the indemnity due the grantee or his assigns. The only consequence resulting from the taking of possession thus made by the Crown is that, at the time of the payment of the indemnity ultimately determined and granted, the Crown will be bound to pay interest on the capital of that indemnity from the date of the taking of possession.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming a judgment of the Superior Court, McKinnon J. The latter judgment had homologated an order of the Public Service

Board fixing at the sum of $109,899 the indemnity payable to the appellant company for the taking over by the Crown respondent of a toll-bridge crossing the river Jésus, opposite the village of Sainte-Rose, in the province of Quebec, with other dependencies.

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

L. E. Beaulieu K.C. and *Elie Beauregard K.C.* for the appellant.

Joseph Gingras K.C. and *Guy Hudon K.C.* for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—La compagnie du Pont Plessis-Bélair est aux droits de James Porteous, conférés à ce dernier en 1830 par la Loi du Bas-Canada, 10-11 George IV, chapitre 56.

En vertu de cette Loi, James Porteous était autorisé à construire et à exploiter un pont de péage et ses dépendances traversant la rivière Jésus, à un endroit approximativement situé près du village de Sainte-Rose, tel qu'il était alors.

La section (3) de cette Loi se lit comme suit:

And be it further enacted by the authority aforesaid, that the said Bridge and the said Toll-house, Turnpike, and other dependencies to be erected thereon, or nearthereto, and also the ascents or approaches to the said Bridge, and all materials which shall be from time to time found or provided, for erecting, building, or maintaining and repairing the same, shall be vested in the said James Porteous, his heirs and assigns for ever. Provided that after the expiration of fifty years from the passing of this Act, it shall and may be lawful for His Majesty's, his heirs and successors, to assume the possession and property of the said Bridge, Toll-House, turnpike and dependencies and the ascents and the approaches thereto, upon paying to the said James Porteous, his heirs, executors, curators, or assigns, the full and entire value which the same shall, at the time of such assumption, bear and be worth.

La section (5) de la Loi pourvoit au tarif des taux que James Porteous aura le droit d'exiger de ceux qui feront usage du pont.

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Mais pour l'intelligence de la cause, il est opportun de reproduire ici la section (7):

And be it further enacted by the authority aforesaid, that the said tolls shall be, and the same are hereby vested in the said James Porteous, his heirs and assigns, for ever. Provided that if His Majesty shall, in the manner hereinbefore mentioned, after the expiration of fifty years from the passing of this Act, assume the possession and property of the said bridge, toll-house, turnpike, and dependencies, and the ascents and approaches thereto, then the said tolls shall, from the time of such assumption, appertain and belong to His Majesty, His Heirs and Successors, who shall from thence-forward be substituted in the place and stead of the said James Porteous, his heirs, and assigns, for all and every the purposes of this Act.

En vertu de la section (9), les droits ainsi conférés à James Porteous étaient déclarés exclusifs en sa faveur dans un rayon de trois milles en amont et en aval du village de Sainte-Rose.

Enfin, par la section XI, il fut stipulé que le pont serait confisqué au bénéfice de Sa Majesté, sans indemnité, si James Porteous ou ses successeurs et ayants droit faisaient défaut de compléter la construction du pont dans un délai de cinq ans ou, par la suite, de le tenir en bon ordre.

Le pont fut construit dans le délai prescrit, et il fut entretenu conformément aux engagements pris.

En 1857, le pont fut vendu par Walter Millar (qui s'en était rendu acquéreur) à Adolphe Plessis dit Bélair. Cette vente comprenait les terrains, îles et chemins décrits dans l'Acte. Le pont est depuis resté la propriété de la famille Plessis-Bélair jusqu'à ce que le Gouvernement de la province de Québec se l'appropriât en 1940.

Cette année-là, par la Loi 4 George VI, chapitre 33, le Ministre des Travaux publics du Gouvernement de la province de Québec fut

autorisé à prendre, au nom de Sa Majesté, possession du pont de péage construit sur la rivière Jésus vis-à-vis le village Ste-Rose, sous l'autorité de la Loi de la province du Bas-Canada, 10-11 George IV, chapitre 56, y compris la maison de péage, le chemin à barrière et les dépendances ainsi que les abords et montées dudit pont, et le trésorier de la province est autorisé à payer, à même le fonds consolidé du revenu, aux héritiers ou ayants droit du concessionnaire James Porteous, la pleine et entière valeur du tout à l'époque où le Ministre des Travaux Publics en prendra ainsi possession.

Le Ministre des Travaux Publics était autorisé à effectuer à cette fin telles ententes qu'il croirait justes avec les héritiers ou ayants droit dudit concessionnaire et, à défaut d'entente,

la prise de possession, la fixation et le paiement de la valeur dudit pont, avec ses accessoires ci-dessus énumérés, seront effectués conformément à la loi générale d'expropriation alors en vigueur.

Cette Loi vint en force le 22 juin 1940, et la Loi générale d'expropriation alors en vigueur était la loi 4 George VI, chapitre 71, reproduite depuis dans le chapitre XLVI-A du code de procédure civile de la province de Québec (articles 1066 (*a*) et suivants).

Le Gouvernement prit possession du pont le 1er juillet 1940. Les procédures pour la fixation et le paiement de la valeur du pont et de ses accessoires ne furent commencées que le 4 septembre 1942, au moyen d'une requête concluant à ce que l'intimé soit tenu, conformément aux articles 1066 (*b*) et 1066 (*c*) du code de procédure civile, de signifier, sous 15 jours du jugement à intervenir, un avis contenant:

(*a*) l'indication des immeubles que l'intimé entend acquérir de l'appelante;

(*b*) un énoncé des motifs justifiant l'expropriation;

(*c*) la mention de l'indemnité offerte;

(*d*) un plan et une description des immeubles qu'il s'agissait d'acquérir;

et à ce que le dossier, ainsi constitué, soit référé à la Régie des Services Publics, pour la fixation de l'indemnité à laquelle avait droit le réclamant.

Il n'est pas nécessaire de référer aux avis, à l'offre et au refus qui furent d'abord échangés entre les parties, parce que l'instance était à peine engagée devant la Régie, que l'intimé produisit un avis d'expropriation amendé avec nouvelle description de la propriété requise par le Ministre des Travaux Publics et offre d'un montant différent.

Cet avis amendé déclare que le Gouvernement a pris possession du pont le 1er juillet 1940,

y compris la maison de péage, le chemin à barrière et les dépendances, ainsi que les abords et montées dudit pont, tel que le tout est indiqué et montré dans une description technique et sur un plan signés par un arpenteur-géomètre, annexés au présent avis pour en faire partie.

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L'offre de l'indemnité "comme pleine et entière valeur de tout ce que ci-dessus mentionné à la date de la prise de possession" est d'une somme de $109,398.00.

La description technique des immeubles dont le Gouvernement déclare avoir pris possession comprend le pont sur la rivière des Mille Iles, érigé sur les lots 425 du cadastre officiel de la paroisse de Ste-Rose, comté de Laval, et 951 du cadastre officiel de la paroisse de Ste-Thérèse, comté de Terrebonne; et il est ajouté que "cette dite description comprend les abords dudit pont".

La description technique ajoute:

> Sont aussi requises la barrière ou porte cochère actuellement érigée sur l'extrémité Nord dudit lot 951 ou dans ses environs immédiats, et la bâtisse en bois servant de bureau à la compagnie du Pont Plessis-Bélair et située sur * * * le lot (118) de la subdivision officielle du lot (928).

D'après le plan qui accompagnait la description technique, le lot décrit comme étant le lot n° (425) est cette partie du fond de la rivière des Mille Iles qui s'étend depuis le village de Ste-Rose jusqu'à la ligne de séparation entre la paroisse de Ste-Rose, comté de Laval, et la paroisse de Ste-Thérèse de Blainville, comté de Terrebonne. Cette ligne se trouve au milieu de la rivière, et la partie du lot (425) qui nous intéresse est cette lisière sur laquelle le pont est construit.

De même, le lot décrit comme étant le lot n° (951) est cette autre partie du fond de la rivière des Mille Iles sur laquelle se trouve construite la continuation du pont sur la rivière des Milles Iles, depuis la ligne de séparation entre Ste-Rose et Ste-Thérèse, jusqu'à ce que la description technique appelle

> la barrière ou porte cochère * * * et la bâtisse en bois servant de bureau à la compagnie du Pont Plessis-Bélair * * *

Les détails de l'offre faite par l'intimé ont été fournis à l'appelante comme suit:

Pour valeur actuelle du Pont Plessis-Bélair, y compris les culées	$ 106,414 00
Pour maison de péage et barrière	2,000 00
Pour ameublement	983 00
Pour terrain situé dans le lit de la rivière Jésus, sur lequel repose le pont	1 00
	$ 109,398 00

L'offre fut alors référée à la Régie des Servcies Publics à la suite d'une motion des intimés; et l'appelante amenda sa réclamation comme suit:

Réclamation amendée de la Réclamante		
Valeur de concession ("franchise") en exploitation		
Revenu net de $92,400.00 à 5%.....		$1,848,000 00
La valeur de concession ci-haut comprend les valeurs physiques suivantes:		
Pont	$ 136,803 00	
Loge, etc.	3,329 00	
Ameublement, etc.	983 00	
Route en exploitation.....	67,210 00	
Terrain de l'exploitation.....	18,459 00	
Arbres	3,375 00	
	230,159 00	
Route future, terrain et travaux.....		34,842 00
Valeur des plans du nouveau pont—$400,000.00 à 2½%..		10,000 00
		1,892,842 00
Plus 10% pour dépossession forcée.....		189,284 00
		2,082,126 00
Dommages intérêts sur $2,082,126.00 à 5% du 1er juillet 1940 au 1er mai 1943 (à ajouter).....		294,967 00
Frais des experts.....		10,000 00
		2,387,093 00
A raison de l'amendement de l'avis d'expropriation des intimés, les items suivants sont réclamés à titre de dommages:		
Route en exploitation non expropriée....$	67,210 00	
Terrain de l'exploitation.....	18,459 00	
Arbres	3,375 00	
Route future, terrain et travaux.....	34,842 00	
Valeur des plans du nouveau pont, $400,000.00 à 2½%.....	10,000 00	
	$ 136,886 00	

C'est dans ces conditions que la Régie des Services Publics fut appelée à fixer le montant que les intimés devaient payer à l'appelante. Il a été alors procédé à l'enquête et à l'audition des parties, de leurs témoins et de leurs procureurs, en séances publiques tenues à Montréal. Au cours de cette enquête, la Régie a visité le pont Plessis-Bélair et les terrains avoisinants.

Puis, le 18 juin 1943, la Régie a rendu son Ordonnance qui est signée par son Président, monsieur Lucien Dugas.

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Cette Ordonnance, comme base fondamentale, commence par faire remarquer qu'il ne s'agit pas ici d'une expropriation au sens de la Loi, c'est-à-dire d'une dépossession forcée faite contre le gré du propriétaire pour fins d'utilité publique, mais simplement, de la part du Gouvernement, de l'exercice du droit qu'il s'est réservé et que Porteous lui a librement consenti lorsqu'il s'est adressé au Parlement du Bas-Canada pour faire adopter la Loi de 1830.

Elle discute le sens des mots "entière et pleine valeur" mentionnés dans les deux Lois qui régissent cette affaire, et arrive à la conclusion que le mot "valeur" n'inclue pas les dommages de toutes sortes qui peuvent résulter à l'appelante de la perte de sa propriété. Elle fait remarquer la différence qu'il y a à cet égard entre le texte des deux Lois spéciales et celui de la Loi générale d'expropriation. Dans cette dernière,

l'indemnité est fixée d'après la valeur de l'immeuble * * * et les dommages causés à l'exproprié.

Ici, il s'agit simplement de "la pleine et entière valeur" des immeubles dont le Ministre des Travaux Publics est autorisé à prendre possession. Il n'est pas question des "dommages". Et, poursuit l'Ordonnance,

ceci suffirait à écarter toute réclamation pour autre chose que ce dont le Ministre s'est emparé, notamment pour perte de profits, dommages au résidu, travaux exécutés en vue de la construction d'un nouveau pont, etc.

Pour ce qui est de $1,800,000.00 pour valeur de la franchise, l'Ordonnance fait remarquer que

la même Loi qui faisait une concession à Porteous, déclarait que la concession prendrait fin lorsque Sa Majesté le jugerait à propos.

Il s'en suit que l'on ne saurait sérieusement prétendre que la franchise Porteous se prolonge et se continue après l'exercice par Sa Majesté du droit de prise de possession du pont. Et encore:

Dans le cas présent, la valeur actuelle du pont ne peut être augmentée à cause de cet espoir de profits futurs, parce que dans l'Acte de 1830 il est décrété et convenu que les profits n'appartiendront plus au concessionnaire à compter du temps où Sa Majesté reprendra le pont.

En conclusion, l'Ordonnance déclare:

que le rôle de la Régie est de fixer la valeur des biens décrits dans la description technique annexée à l'avis d'expropriation, sans ajouter à cette valeur quoi que ce soit pour les dommages au résidu de la propriété de l'appelante qui n'est pas expropriée ou pour perte qui serait la conséquence de la dépossession dont elle est l'objet et à laquelle ses auteurs ont consenti d'avance pour elle.

Elle accorde donc l'indemnité suivante:

(a) Valeur du pont	$ 106,414 00
(b) Pour les lots nos 425 et 951 pris à même le lit de la rivière Jésus "qui est une rivière navigable" et qui n'ont aucune valeur spéciale puisqu'ils sont entièrement recouverts par le pont et ses culées ou approches..	2 00
(c) Ameublement	983 00
(d) Pour la barrière ou porte cochère actuellement érigée sur l'extrémité nord du lot n° 951, et la bâtisse en bois servant de bureau à la compagnie	2,500 00
Total	$ 109,899 00

Quant à la route, avec les arbres qui la bordent et le terrain qu'elle recouvre, conduisant de la route N° 29 au pont, sur et à travers l'Ile Bélair qui a été déclarée chemin municipal en 1909, (l'Ordonnance déclare qu')il n'y a pas lieu de l'évaluer parce qu'elle ne semble pas être la propriété de l'appelante, ce sur quoi la Régie ne se prononce pas, mais surtout parce qu'elle n'est pas comprise dans la description technique amendée. * * * Elle n'a évalué que ce qu'il lui était enjoint d'évaluer.

L'Ordonnance stipule en outre que cette somme de $109,899.00 serait payable par les intimés, avec intérêts, à la Compagnie, à compter du 1er juillet 1940, date de la prise de possession, et les frais d'une action au montant de $109,899.00 en Cour Supérieure.

Elle accorde en outre une somme de $2,500.00 pour frais d'experts.

C'est l'appelante elle-même qui a fait la requête à la Cour Supérieure pour homologation de ce jugement;
sous la réserve expresse du droit d'appeler à la Cour du Banc du Roi du jugement de la Cour Supérieure homologuant ladite sentence, et de faire fixer par ladite Cour du Banc du Roi une indemnité conforme au droit et à la preuve.

Le jugement de la Cour Supérieure, intervenu à la suite de cette requête de l'appelante, constitue une homologation pure et simple de la sentence rendue par la Régie des Services Publics.

Le jugement de la Cour du Banc du Roi (en appel) est une confirmation de la sentence de la Régie.

L'Honorable juge Galipeault, qui présidait la Cour, considère que, étant donné les termes du statut en vertu duquel la franchise a été accordée à Porteous, la Couronne ne fai-

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sait que reprendre le bien dont elle n'avait fait concession que pour une période de temps depuis longtemps écoulée. Il se rend donc au raisonnement de son collègue, monsieur le juge Prévost.

Monsieur le juge St-Germain, après avoir fait l'analyse minutieuse des deux Lois spéciales, en conclut que les conditions stipulées se trouvent à pourvoir à une indemnité à Porteous ou à ses ayants cause de

l'entière et pleine valeur dudit pont, maison de péage, barrière, etc., et que telle indemnité est prévue par la franchise, du fait que les dits péages, par suite de la prise de possession du pont, appartiendront à Sa Majesté, Ses Héritiers et Successeurs qui seront dès lors substitués au lieu et place du dit James Porteous, ses hoirs et ayants droit pour toutes et chacune des fins de cet Acte.

Lui aussi déclare adhérer entièrement aux notes de son collègue, monsieur le juge Prévost.

Monsieur le juge Barclay, dans une courte note, dit simplement:

I think it is clear from the terms of the Statute in question that what was originally given to Porteous was not a perpetual franchise but a limited franchise. It was given for a minimum of fifty years and would continue so long as the Crown did not take up the option. When the Crown took up the option, its only obligation was to pay the value of the bridge and its approaches.

We are not concerned here with whether the extent of the expropriation was in conformity with the Statute. The extent of the expropriation had to be fixed by the Superior Court and it was fixed, and neither party appealed from that decision, so that question is no longer open.

Au surplus, il déclare être d'accord avec monsieur le juge Stuart McDougall.

Monsieur le juge Prévost, qui a mis au dossier les notes les plus élaborées, se demande d'abord si l'appelante a droit à une indemnité pour la perte des revenus que lui procurait l'exploitation du pont; et il est d'avis que cette prétention serait fort plausible, s'il s'agissait, en l'espèce, d'une expropriation; mais encore faudrait-il que l'appelante fût propriétaire incommutable du pont, et que sa franchise fût vraiment perpétuelle. "Or", ajoute-t-il,

il ne s'agit pas dans la présente cause d'une expropriation; et, au 1er juillet 1940, lorsque la Couronne a pris possession du pont, le droit de propriété de l'appelante était depuis longtemps précaire, et son droit de percevoir des taux de péage était limité à la durée de son exploitation du pont comme propriétaire.

Ce n'est pas, d'après lui, dans l'exercice d'un droit d'expropriation que la Couronne a pris possession du pont, mais en usant d'un droit formellement stipulé et convenu entre elle et le concessionnaire Porteous, dans le statut même qui lui a conféré le droit de construire le pont. Quand elle a exercé son droit de reprendre la possession et propriété dudit pont, la Couronne a tout simplement procédé à l'exécution d'un contrat. Et ce n'est donc pas dans la Loi d'expropriation qu'il faut chercher les conditions auxquelles est soumis le droit exercé par la Couronne, mais dans les termes mêmes de la convention.

Quant au statut de 1940, il n'ordonnait pas une expropriation. Son seul objet est de désigner le tribunal qui fixera la valeur du pont et de ses dépendances, et d'indiquer la procédure qui sera suivie à cette fin, sans altérer les droits respectifs des intéressés.

Porteous et ses ayants droit étaient les propriétaires du pont pendant cinquante ans. Après cette période de temps, leur droit de propriété était révocable en tout temps au bon plaisir de la Couronne. Le droit de l'appelante de percevoir des taux de péage était subordonné à la durée de son exploitation du pont comme propriétaire. Il leur était conservé à toujours si la Couronne ne se prévalait pas de la faculté qu'elle s'était réservée de reprendre la propriété du pont; mais les conditions de révocation se sont réalisées le 1er juillet 1940, et, à cette date, la franchise de l'appelante a pris fin. Il ne peut être question pour elle d'en établir la valeur ni de solliciter une indemnité pour la perte d'un droit qui s'est éteint du consentement de son auteur.

Quant au statut de 1940, il n'ordonnait pas une expropria- et travaux qui ne font pas l'objet de l'évaluation soumise à la Régie, si l'appelante prétendait que ces chemins et travaux faisaient partie des accessoires du pont, comme en étant des dépendances ou des abords ou montées, prévus à l'article 3 du statut de 1830, elle aurait dû le faire déclarer par la Cour Supérieure, en contestant l'amendement apporté par la Couronne à son avis d'expropriation. Le rôle de la Régie devait nécessairement se borner à déterminer la valeur des biens désignés dans l'avis. L'appelante

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a acquiescé à l'amendement de la Couronne, et elle ne s'est pas opposée à la motion demandant que le dossier, tel qu'amendé, soit référé *de novo* à la Régie.

Cette dernière a arbitré la valeur du pont et des accessoires décrits dans l'avis amendé. C'est tout ce que la Loi 4 George VI, chapitre 33, l'autorisait de faire. Elle n'avait pas juridiction pour accorder des dommages-intérêts à l'appelante. Et le savant juge conclut au rejet de l'appel avec dépens.

Enfin, pour monsieur le juge Stuart McDougall, il paraît très clair que le texte du statut de 1830 est à l'effet que, du moment où la Couronne a pris possession du pont, l'appelante a cessé d'avoir aucun droit au péage. La section (7) le dit très expressément. Le droit au péage dépend naturellement de l'existence de la franchise, et la franchise a cessé d'exister dès la prise de possession du pont par la Couronne.

Il est également d'avis, comme la Régie et comme ses collègues à la Cour du Banc du Roi, qu'il ne s'agit pas ici d'une expropriation en vertu de la Loi générale d'expropriation et à laquelle les règles ordinaires de l'indemnité s'appliqueraient, mais tout simplement de la reprise de la propriété par la Couronne, en vertu d'un contrat spécial qui pourvoit à une méthode définie d'évaluation des biens repris. La franchise est terminée et ne peut plus à l'avenir avoir de valeur pour l'appelante. Il a été explicitement convenu qu'en reprenant la franchise, les taux de péage appartiendraient à la Couronne, et décider autrement serait enlever tout sens au statut qu'il s'agit d'interpréter.

C'est le statut de 1830 qui fixe la base de l'évaluation et de l'indemnité que la Couronne a à payer. Le statut de 1940 ne fait que pourvoir à la procédure qui devrait être suivie pour fixer cette indemnité. Il s'accorde avec ses collègues pour rejeter l'appel.

Devant la Cour Suprême du Canada, les parties, représentées par leurs procureurs, ont déclaré ne pas contester le chiffre de l'évaluation fixée par la Régie des Services Publics à la somme de $106,414.00, pour la valeur physique ou intrinsèque du pont dont il s'agit; et l'appelante s'est attaquée à la sentence arbitrale en prétendant que l'in-

demnité aurait dû être fixée d'après la Loi générale et aurait dû comprendre non seulement la valeur physique des biens repris par la Couronne, mais également tous les avantages présents et futurs que possédaient ces biens pour son propriétaire.

Par conséquent, les dommages causés au résidu de la propriété de l'appelante auraient dû être pris en considération pour fixer l'indemnité. A tout événement, d'après l'appelante, le droit au péage ne se terminait que sur paiement de la pleine et entière valeur des biens repris, et l'appelante a le droit d'en demander compte aux intimés depuis la date de la prise de possession jusqu'au moment où l'indemnité sera payée.

Nous sommes d'accord avec l'Ordonnance de la Régie et les opinions exprimées par chacun des juges de la Cour du Banc du Roi, pour dire qu'il ne s'agit pas ici d'une expropriation ordinaire.

La Loi de 1830 qui constitue le contrat qui doit servir de base à la décision que nous avons à rendre, pourvoyait d'avance au droit de la Couronne de reprendre possession du pont et de ses accessoires énumérés dans cette Loi.

En plus, cette Loi déclare expressément ce qui devait se produire dès que la Couronne déciderait d'exercer son droit de reprise.

La Couronne avait le droit

to assume the possession and property of the said bridge, toll-house, turnpike and dependencies, and the ascents and the approaches thereto, upon paying to the said James Porteous, his heirs, executors, curators or assigns, the full and entire value which the same shall, at the time of such assumption, bear and be worth. (Section 3)

Puis, comme conséquence de cette reprise de possession et de propriété par la Couronne,

the tolls shall, from the time of such assumption, appertain and belong to His Majesty, His Heirs and Successors, who shall from thence-forward be substituted in the place and stead of the said James Porteous, his heirs and assigns, for all and every the purposes of this Act. (Section 7)

Déjà ces deux textes nous semblent justifier l'attitude prise par la Régie des Services Publics et par les honorables juges de la Cour du Banc du Roi. Tout au plus l'appelante pouvait-elle encore prétendre que la prise de possession ne devenait efficace en définitive que lorsque

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l'indemnité lui aurait été entièrement payée, bien que le texte de la section (7) serait certainement susceptible de l'interprétation que, à tout événement, dès la prise de possession physique, les taux de péage devaient appartenir immédiatement et de ce moment à la Couronne,

who shall from thence-forward be substituted in the place and stead of the said James Porteous * * * for all and every the purposes of this Act.

Mais il nous paraît superflu d'entrer dans cette discussion parce que, à notre avis, la Loi de 1940 aurait alors modifié cette interprétation possible.

Cette Loi, (chapitre 33 du statut de Québec, 4 George VI) commençait par faire allusion aux privilèges octroyés sous la condition qu'après 50 ans à compter de la sanction de la Loi antérieure de 1930, Sa Majesté aurait droit de prendre possession dudit pont et de ses dépendances en en payant la valeur actuelle, et après avoir ajouté

que l'intérêt public exige que le gouvernement de cette province exerce ces pouvoirs,

autorisa le Ministre des Travaux Publics à prendre possession du pont au nom de Sa Majesté,

y compris la maison de péage, le chemin à barrière et les dépendances, ainsi que les abords et montées dudit pont.

Il n'est plus question là d'une prise de possession subordonnée à l'obligation de payer l'indemnité préalablement. Le statut ajoute spécialement que le trésorier de la province est autorisé à payer la pleine et entière valeur des biens ainsi appropriés, telle que cette valeur existait

à l'époque où le Ministre des Travaux Publics en prendra ainsi possession.

Puis, le Ministre des Travaux Publics est autorisé à effectuer à cette fin telles ententes qu'il croira justes avec les héritiers ou ayants droit du concessionnaire et, à défaut d'entente, la prise de possession, la fixation et le paiement de la valeur du pont et de ses accessoires ci-dessus mentionnés devront être effectués conformément à la Loi générale d'expropriation en vigueur.

Il n'a pas été nécessaire, en l'espèce, d'avoir recours à la Loi d'expropriation pour la prise de possession parce que l'appelante y a consenti. Elle l'a fait, il est vrai,

pour accommoder et coopérer avec les autorités et éviter les procédures prévues par la Loi pour la possession préalable en matière d'expropriation,

en ajoutant que

d'autre part, la compagnie réserve tous ses droits, prétention pour le transfert définitif de la propriété, soit de gré à gré ou par expropriation, tel que prévu au Bill nº 66

(i.e. la Loi de 1940).

Cette réserve équivaut à dire que l'appelante a réservé tous ses droits, mais elle ne pouvait évidemment lui en conférer de nouveaux. Or, nous sommes d'avis que, en vertu de la Loi de 1940, toutes conditions préalables au droit de la Couronne de prendre possession, si l'on peut dire qu'il en existait en vertu de la Loi de 1830, ont été mises de côté par la Loi de 1940. En vertu de cette dernière, la Couronne possédait le droit de prendre possession immédiatement, sans conditions préalables et avec la seule obligation de payer l'indemnité pour la valeur actuelle des biens au moment de la prise de possession, et qui serait bien

établi et fixé au moyen de la procédure prévue à la Loi générale d'expropriation alors en vigueur.

Il ne s'agit pas d'établir l'indemnité suivant les bases adoptées et courantes en matière d'expropriation. Cette indemnité continuait d'être régie par les termes de la Loi de 1830. Seule la procédure prévue à la Loi générale d'expropriation devait être adoptée pour arriver à déterminer la "pleine et entière valeur" stipulée à la Loi de 1830.

Nous croyons donc que la Régie et la Cour du Banc du Roi (en appel) n'ont pas commis d'erreur dans leur interprétation des deux Lois spéciales qui régissent l'affaire et que, en vertu de ces Lois auxquelles nous devons avoir recours exclusivement, l'appelante a obtenu tout ce à quoi elle avait droit.

Nous sommes d'accord avec la Cour du Banc du Roi pour dire que ce litige, et en particulier l'appel dont cette Cour est saisie, doivent nécessairement se borner à l'avis d'expropriation tel qu'il a été défini par la Cour Supérieure lorsqu'elle a remis l'affaire entre les mains de la Régie des Services Publics.

L'indemnité se limite aux objets et aux biens qui ont fait le sujet de l'arbitrage de la Régie. S'il est exact—ce que nous ne pourrions déceler au dossier qui nous est

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soumis—que la Couronne a pris possession et s'est emparée de biens autres que ce qui faisait l'objet de l'avis tel qu'amendé, il va sans dire que l'appelante n'a pas reçu d'indemnité pour ces biens additionnels et que tout recours à cet égard doit lui être conservé.

Mais nous croyons qu'elle n'a pas droit à une indemnité pour ce qu'elle a appelé la valeur de la franchise, vu que cette franchise s'est trouvée éteinte le jour de la prise de possession du pont par la Couronne.

Il s'en suit également qu'elle ne peut réclamer de la Couronne les taux qui ont pu être perçus à partir du moment de la prise de possession du pont par cette dernière. La Loi de 1830 est très claire sur ce point; ces taux sont devenus la propriété de la Couronne du moment de la prise de possession et, à partir de ce moment, la Couronne a été substituée à l'appelante à cet égard.

Le présent jugement ne doit, en aucune façon, être interprété comme éliminant le droit de l'appelante à toute réclamation qu'elle pourrait avoir pour l'empiétement de la Couronne sur des biens qui n'étaient pas décrits dans l'avis d'expropriation.

Nous croyons qu'en effet cette question ne peut être soulevée dans le présent appel; et l'appelante conserve tous ses recours à raison des empiétements, s'ils existent.

Mais sur l'appel tel qu'il est venu devant nous, nous sommes d'avis qu'il doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *L. E. Beaulieu, Elie Beauregard.*

Solicitor for the respondent: *Edouard Asselin.*

ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

LESLIE C. JACKSON (DEFENDANT) ..... RESPONDENT.

1945
*May 3, 4.
*Nov. 8.

1946
*Feb. 5, 6.
*Mar. 29.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Crown—Master and servant—Automobile—Collision—Member of Armed Services injured while riding as gratuitous passenger—Crown's disbursements for wages and medical and hospital services—Action by Crown to recover same from owner and driver of motor car—Civil wrong, actionable by servant, prerequisite to right of master to recover expenses—Application of section 50 A Exchequer Court Act to proceedings in provincial courts—Its constitutionality—Exchequer Court Act, section 50 A, enacted Dom. 1943-44, c. 25, s. 1—Motor Vehicle Act (N.B.) 1934, c. 20, s. 52.

One D., a soldier on active service in the Canadian Army, being on leave of absence, was travelling to his home as a guest passenger with the respondent in the latter's motor car. A collision occurred and D. was severely injured. The Crown (Dominion) disbursed a sum of $1,855.24 for wages paid and medical and hospital services furnished through its Army organization during the period of incapacitation. The Attorney-General of Canada brought suit in the Supreme Court of New Brunswick to recover that amount from the respondent. Section 50 A of the *Exchequer Court Act* (enacted 1943-44, c. 25, s. 1) establishes a master-servant relationship between the Crown (Dominion) and a Canadian serviceman. Section 52 of the *Motor Vehicle Act* (N.B. 1934, c. 20) negatives any right of action against the owner or driver of a motor car for loss or damage resulting from injury to, or death of, a gratuitous passenger. The action was dismissed by the trial judge, and that judgment was affirmed by the appellate court.

Held that the appeal to this Court should be dismissed. The Crown, while bearing under section 50 A the relation of master towards a serviceman, has no direct or specific right of recovery against a third person for expenses incurred through injury caused by the latter to the serviceman: such right depends on whether the serviceman himself has any right of action arising from the act of the third person. Hence, where D., being a gratuitous passenger in the respondent's automobile at the time of his injury, could bring no action against the respondent, neither can the Crown.

Held also that the provisions of section 50 A applied not only to actions brought in the Exchequer Court of Canada, but also to proceedings brought in any provincial court.

Per Kellock J.:—The constitutional validity of section 50 A may be supported under section 91 (7) of the B.N.A. Act.

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

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APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division (1), affirming the judgment of the trial judge, Le Blanc J. and dismissing an action by the Crown (Dominion) to recover from the respondent, on the ground that he was a negligent driver of a motor car, amount of moneys paid to and on account of a Canadian serviceman injured while riding as a passenger.

F. P. Varcoe K.C. and *W. R. Jackett* for the appellant.

R. H. Allen, for the respondent at the hearing of the appeal.

A. B. Gilbert K.C. for the respondent at the re-hearing ordered by the Court.

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

RAND J.:—This action arises out of injuries to a member of the Canadian Army in New Brunswick. The soldier, named Dunham, was on leave and was travelling to his home as a guest passenger with the respondent in the latter's auto. A collision occurred and the injuries resulted.

The claim is for wages paid and medical and hospital services furnished by the Crown through its Army organization during the period of incapacitation. It is based on negligence in the respondent, the relation of master and servant between the Crown and the serviceman, and the rule enabling a master to recover damages against one who negligently or wilfully injures his servant. This relation is put first as actual and alternatively as constructive by virtue of s. 50A of the *Exchequer Court Act,* enacted by c. 25, s. 1, of the statute of Canada 1943-44, as follows:

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

The *Motor Vehicle Act* of New Brunswick, c. 20 of the statutes of 1934, has negatived any right of action of the serviceman against the respondent by s. 52, in the following language:

(1) (1945) 18 M.P.R. 138; [1945] 2 D.L.R. 438.

52(1) Notwithstanding anything contained in Section 48, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for hire or gain, shall not be liable for any loss or damage resulting from bodily injury to or death of any person being carried in or upon or entering or getting on or alighting from such motor vehicle.

The Supreme Court of that province has held that the relation was not that of master and servant in fact and that s. 50A of the *Exchequer Court Act,* being included—as was assumed—in a group of sections headed "Rules for Adjudicating upon Claims," applied only to actions brought in that court.

I do not find it necessary to decide the first of these questions. As to the second, it may be remarked that the amendment is embodied in an Act which contains nothing to indicate inclusion within the fasciculus mentioned; one could just as easily place it under the heading which immediately precedes s. 51 of the *Exchequer Court Act,* "Effect of payment on judgment". Its matter is foreign to rules for computing damages and its terms and purposes are clear. It might have been enacted as a separate statute and in that case it could hardly be contended that its wide provision did not apply to such a proceeding as the present: and I see no difference in the form which has been given to it.

But while the Crown, under the amendment, bears the relation of master toward the serviceman, the fact that the latter has no right of action arising from the act of the respondent puts, I think, an end to the controversy. The rule by which the master claims against a third person is an exception to the broad principle that one party to a contract cannot complain of negligence toward a co-contractor that interferes with the latter's performance of the contract: *Cattle* v. *Stockton Waterworks Co.* (1). It applies whether the servant is at the time acting for the master or is engaged in his own affairs. There is no suggestion in the early cases that damages in loss of wages and medical and hospital expenses where those were actually suffered or incurred could not be recovered by the servant, and such claims are a commonplace today. Nor is it suggested that the master's right is independent of conduct or action by the servant which defeats the claim on his own part. What English

(1) (1875) L.R. 10 Q.B. 453.

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authority there is tends to the contrary: *Williams* v. *Holland* (1); *Chaplin* v. *Hawes* (2). In *Alton* v. *Midland R. Co.* (3), Willes J. uses this language which is not within the criticism that has been made of the judgment in that case:

> It must be admitted by the defendants that a long series of authorities has established that a master may sue for loss of services caused by a pure wrong, a trespass, to his servant, as by beating him. *On the other hand, it is indisputable that no such action has ever been sustained in a case in which the injury to the servant was not actionable in respect of the civil wrong,* but only in respect of a duty arising out of and founded upon a contract with the servant.

Although it is the contrast between a civil wrong and the breach of a contractual duty that is being pointed here, nevertheless a civil wrong actionable by the servant seems to be indicated as a prerequisite to the right of the master. In *Admiralty Commissioners* v. *S.S. Amerika* (4) Lord Sumner says:

> They are two separate causes of action in two different persons in respect of the same act.

The act here, in relation to the servant, is not in law culpable and unless we import into the right given to the master the conception of an independent duty running to him in addition to the duty to the servant—an introduction which, in view of our ignorance of the principle underlying the rule and the comparative modernity of the concept of duty in negligence, I think wholly unwarranted—we must conclude that it is the quality of the act vis-à-vis the servant which determines its significance for purpose of liability to the master. The notion of an act at once innocent and culpable would here be an innovation whatever the theory behind the liability; and I should say that if there is no wrong to the servant the act is innocuous toward the master.

This qualification of the rule has been applied in Ontario where the claim was asserted by a parent for injury to his child, a right based on the same theory of deprivation of service: *McKittrick* v. *Byers* (5). The United States authorities are uniform in the same view: Beach on Contributory Negligence, 3rd ed., p. 189. In these cases

(1) (1833) 172 E.R. 1129.
(2) (1828) 172 E.R. 543.
(3) (1865) 19 C.B. (N.S.) 213.
(4) [1917] A.C. 38, at 55.
(5) [1926] 1 D.L.R. 342.

the cause of action of the master was held to be dependent upon a right in the servant and to be defeated by the contributory negligence of the latter.

The case of *Norton* v. *Jason* (1), cited by Mr. Varcoe, decides only that the bar of the *Statute of Limitations* against the servant cannot be raised against the master. The case was of parent and child and there was no question of the existence of a cause of action in the daughter; but the fact that the point is raised would seem rather to assume the necessity of a right in the servant to support that of the master.

The *injuria* to the master is, then, a loss of service arising from an act which is an actionable wrong against the servant: and its effect is to permit the master to recover damages to a large extent the same as those in a proper case recoverable by the servant.

This view is indirectly supported by the reasoning in *Attorney-General* v. *Valle-Jones* (2), where it is said that if the wages and expenses had not been paid by the Crown they could have been recovered from the defendant by the injured serviceman. Conversely, if not recoverable directly by the servant, the law should not be circumvented through indirect but substantial recovery by the master.

As Dunham, then, could bring no action against the respondent, neither can the Crown. The amendment, s. 50A, does not purport to create a direct and specific right in the Crown: it places the Crown in a recognized common law relation only, and its rights are those arising from that relation under the rules of that law. The fact that jurisdiction over the civil right of the servant affects what might otherwise be a right in the Dominion Crown is immaterial. The Crown's right is of the same nature as that of a private person: it can arise here only from a wrong to the servant over which the jurisdiction of the province is exclusive.

Mr. Varcoe advanced the further contention that in any event the act of Jackson was a wrong against the Crown within the principle of *Donoghue* v. *Stevenson* (3). There it was held by the House of Lords that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by the members

(1) (1651) 82 E.R. 809.
(2) [1935] 2 K.B. 209.
(3) [1932] A.C. 562.

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of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. Obviously the act of the manufacturer is specifically directed towards the consumer. If there were no consumer there would be no act, and it was not difficult to hold that, since a failure to observe care in that act might reasonably result in injury to the consumer, a duty toward the consumer to use care arose. But in the act with which we are dealing, only Dunham was in contemplation of the respondent. Conveying him to his home was a matter of fact to which the Crown was a stranger. Duty is annexed to prudent foresight of consequences in matter of fact and although we perhaps cannot say that a legal circumstance can never be a link in that fact, to apply the principle here would be to charge a person with a prevision of contractual relations with third parties, which *Cattle* v. *Stockton Waterworks* (1) decided cannot be done.

The claim thus failing because of a fatal defect in the cause of action, I do not find it necessary to consider the interesting constitutional questions bearing upon the legislative fields of the Dominion and the Province that were so thoroughly canvassed on the re-argument.

I would dismiss the appeal with costs.

KELLOCK J.:—This is an appeal by the plaintiff in an action brought in the Supreme Court of New Brunswick, King's Bench Division, for damages alleged to have been sustained by the Crown arising out of an injury to one Dunham, a member of the Veterans' Guard of Canada, on the 31st of October, 1940, the damages claimed being payments made by the Crown while Dunham was incapacitated. This soldier, a passenger in a motor vehicle owned and driven by the respondent, was injured when it came into collision with another motor vehicle occasioned, as it was alleged, by the negligence of the respondent. The trial judge found the respondent guilty of negligence, and this finding has not been interfered with by the Appeal Division. The trial judge, however, dismissed the action on the ground that the order in council under which payments had been made by the Crown had not been proven. The Appeal Division (2) did not proceed upon this ground but on the

(1) (1875) L.R. 10 Q.B. 453. (2) [1945] 2 D.L.R. 438.

ground that the action did not lie. Baxter C.J., who delivered the judgment of the Court, held that the relationship of master and servant, essential for the maintenance of such an action, did not obtain as between Dunham and the Crown. It was held also that s. 50A of the *Exchequer Court Act,* enacted by c. 25 of the statutes of Canada 1943-44, is not applicable to an action in a provincial court, and that in any event the claim was barred by virtue of s. 52 of the New Brunswick *Motor Vehicle Act,* c. 20 of the 1934 statutes, Dunham being a gratuitous passenger in the respondent's car at the time of the accident.

On this appeal the Crown contends that:

(1) the relationship of master and servant as between Dunham and the Crown did subsist at common law and that the point is now, in any event, concluded by s. 50A of the *Exchequer Court Act;*

(2) that section is not limited to proceedings in the Exchequer Court of Canada;

(3) section 52 of the *Motor Vehicle Act* does not affect the right of action of the appellant;

(4) the damages were properly proven.

It will be convenient to examine the second ground of appeal.

Sections 47 to 50A, inclusive, of R.S.C. 1927, c. 34, entitled "An Act Respecting the Exchequer Court of Canada", constitute a fasciculus of sections under the heading "Rules for Adjudicating upon Claims". Section 50A was no doubt passed, partly at least, as a result of the decision of the Exchequer Court of Canada in *McArthur* v. *The King* (1). That was the case of an action against the Crown under s. 19 (*c*) of the Act but the new section is made to apply to an action by, as well as against, His Majesty. The judgment below proceeds upon the footing that this group of sections is governed by the above heading and is confined to claims in the Exchequer Court of Canada.

Where the language of a section is ambiguous, the title and the headings of the statute in which it is found may be resorted to to restrain or extend its meaning as best suits the intention of the statute, but neither the title nor the

(1) [1943] Ex. C.R. 77.

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headings may be used to control the meaning of enacting words in themselves clear and unambiguous: *The "Cairnbahn"* (1); *Fletcher* v. *Birkenhead Corporation* (2).

Section 50A taken by itself is not ambiguous. I think it is not to be applied only to proceedings in the Exchequer Court of Canada. It is not expressly limited as are ss. 47, 48 and 50. Section 49 is not limited in terms and there appears to be no reason why its terms should not apply to the subject-matter of proceedings taken by the Crown in a provincial court.

Section 50A does not depend for its constitutional validity, in my opinion, upon s. 101 of the *British North America Act*. It may be supported under s. 91(7). In *Grand Trunk Railway Co.* v. *Attorney General of Canada* (3), Lord Dunedin at p. 68 said:

> It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation.

This principle applies equally to the present question, namely, the relationship between a soldier and the Crown. I assume that there is no other question which would render the provisions of the section inapplicable at the time of the occurrence here in question to the relations between Dunham and the Crown.

Coming to the third question, s. 52 of the *Motor Vehicle Act* reads as follows:

> 52(1) Notwithstanding anything contained in Section 48, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for hire or gain, shall not be liable for any loss or damage resulting from bodily injury to or death of any person being carried in or upon or entering or getting on or alighting from such motor vehicle.

Mr. Varcoe contends that the cause of action arising in favour of a master who loses the services of his servant through injury to the servant caused by the wrongful act of a third person is independent of any cause of action which may enure to the servant himself. He argues that an act, causing loss to the master through injury to the servant, may be wrongful *quo ad* the master and therefore actionable, even although, by reason of the existence of a

(1) [1914] P. 25, at 30 and 38.
(2) [1907] 1 K.B. 205, at 214 and 218.
(3) [1907] A.C. 65.

statutory provision which disentitles the servant to sue but which does not affect the quality of the act, the servant himself has no remedy. Put another way, he says that if the injury to the servant is "justifiable", neither the master nor the servant has any cause of action but a provision which merely bars proceedings by the servant does not affect the cause of action vested in the master. He submits that the statutory provision here in question is of the latter character and does not purport to affect the quality of the act.

Mr. Varcoe referred to the judgment of Lord Blackburn in *Darley Main Colliery Co.* v. *Mitchell* (1) where in referring to the action "per quod" he said at p. 142:

* * * but no amount of damage would give the master an action if the beating were justifiable.

Mr. Varcoe argues that "justifiable" is to be interpreted as "innocent" (*Machado* v. *Fontes* (2)) and as by reason of s. 37 of the *Motor Vehicle Act* negligence in the operation of a motor vehicle on a highway is made the subject of a penalty, the conduct of the respondent is not innocent.

It is important to keep in mind that the cause of action here in question is an anomalous one, having arisen at a time when the relationship of master and servant was based on status and that it is illogical in a society based on contractual obligation: *per* Lord Parker in *The "Amerika"*, (3) at p. 45 and *per* Lord Sumner in the same case at pp. 54 and 60. In the words of Lord Sumner at p. 60:

Indeed, what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status.

The cause of action, therefore, is not to be extended beyond limits already marked out, however logical it might be to do so.

A convenient statement of the action *per quod* is to be found in Blackburn and George on Torts, 1944 ed., p. 181, namely:

If A deprives B of his servant's services by a *tort* committed against the servant, B may sue A. In such a case B must prove (i) that A's actions are a tort against the servant; (ii) that B has thereby lost his servant's services.

(1) (1886) 11 App. Cas. 127.
(2) [1897] 2 Q.B. 231.
(3) [1917] A.C. 38.

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Accordingly, if the defendant's conduct does not constitute a *tort against the servant*, the master has no cause of action.

The provisions of sub-section (1) of section 52 of the Act eliminate any duty to take care civilly as between persons in the relative positions of the respondent and Dunham. That being so there is no negligence on the part of the respondent. There is therefore no *tort* which Dunham can rely on and there is no authority to which we have been referred or which I have been able to find establishing a right on the part of a master to sue in such circumstances. The fact that the respondent's conduct may render him liable to a penalty is not enough.

The action for seduction referred to by Lord Sumner in the case last cited (3) as the most artificial aspect of the action *per quod* is again itself anomalous in that the woman has no right of action: Salmond on Torts, 10th ed., pp. 356 and 361. In the case of a parent and child however, the parent's right to sue for damages for injury to the child was always affected at common law by contributory negligence on the part of the child: *Blais* v. *Yachuk* (1); *Hall* v. *Hollander* (2); *Williams* v. *Holland* (3); *McKittrick* v. *Byers* (4). I can find no authority showing that in the case of a true master and servant relation, the result was not the same. Unless therefore there be a wrong of which the servant can complain, with the single exception of seduction, referred to above, the master has no cause of action and in the case at bar there is no such wrong.

It is not necessary to deal with the other points argued. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitors for the respondent: *Allen & Allen.*

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(1) [1946] S.C.R. 1, at 18.
(2) (1825) 4 B. & C. 660.
(3) (1833) 6 Car. & P. 23.
(4) (1926) 58 O.L.R. 158.

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WEDDEL LIMITED (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... RESPONDENT.

*Feb. 27
*May 20

WATT & SCOTT (TORONTO) LTD. (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... RESPONDENT.

TEES & PERSSE LIMITED (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Customs duty—Goods imported and duty paid according to value fixed at port of entry—Minister's (National Revenue) power to re-determine value of goods for duty—Imposition of additional duty—Applicability of such power to goods already imported—Construction of section 41 of the Customs Act—Whether Minister's power is referable to past as well as to future importations—Alleged re-appraisal by Customs appraiser under section 48—Whether Crown can claim, in the present cases, additional duty under such re-valuation—Customs Act, R.S.C. 1927, c. 42 and amendments, sects. 4, 19, 20, 35, 38, 39, 40, 41, 42, 43, 48, 52, 111, 112.

Section 41 of the *Customs Act* provides that "whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because" of several enumerated causes or reasons, as to the existence of which the Minister of National Revenue shall be the sole judge, "the Minister may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied."

The appellants during 1940, 1941 and 1942 imported into Canada large quantities of canned corned beef from Argentine, Uruguay and Brazil and paid customs duty based on the values at which the goods were entered for customs. In December 1942, it being considered that

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

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the goods had been undervalued, the Crown alleged that the Chief Dominion Customs appraiser, purporting to act under section 48, made fresh appraisals and sent the appellants a statement showing such appraised values and the amount of underpaid duty and taxes. Protests were made by the appellants and the matter was referred to the Minister of National Revenue, who, in August 1943, acting under the provisions of section 41, re-determined the value for duty of the goods imported by each of the appellants, and additional customs duty and taxes were demanded from them. Actions were brought to recover in each case such additional amount, or, in the alternative, the additional amount resulting (as contended) from the re-appraisal by the Chief Dominion Customs appraiser. The appellants submitted that the Minister had no jurisdiction under section 41 to determine increased values for duty purposes in respect of individual past importations on which duty had been assessed by the proper officer and paid and the goods released; and they also contended that the power vested in the Customs appraiser by section 48 was not and could not be exercised in these cases.

Held, The Chief Justice and Rand J. dissenting, affirming the judgments of the Exchequer Court of Canada ([1945] Ex. C.R. 97 and 111), that the appellants were liable for the additional duty claimed by the Crown in accordance with the re-valuation determined by the Minister of National Revenue—Section 41 is not solely prospective in its application. Parliament, when dealing in that section with cases where it was difficult to determine the value, was still dealing with goods that have actually been imported and appraised, upon which duty may also have already been paid; and the Minister was given power to determine the value for duty of such goods. *Per* Estey J.:—Moreover, section 41 does not impose any time limit within which the Minister may act after importation.

Per The Chief Justice and Rand J. (dissenting):—The Minister's power, under section 41, to determine the value for duty of imported goods, is not referable to past importations, which have already been legally appraised. Such power is restricted to future importations: it must be exercised at the time the importation takes place and the Minister's ruling must be antecedent to a valid allowance of the entry.

Held that the Crown cannot succeed on its alternative claim. There is no satisfactory evidence that a fresh appraisement under section 48 has been made by a Dominion appraiser and that there was any direction by him for an amended entry and payment of the additonal duty. If that had been done, the appellants might have exercised their right to a re-valuation by a board selected under section 52.—*Per* The Chief Justice:—The alternative argument suggested by the Crown shows by itself that it has no basis in fact: both the Minister under section 41 and the Dominion appraiser under section 48 could not act at the same time, and the evidence establishes that what was done here was a determination by the Minister.

APPEALS from the judgments of the President of the Exchequer Court of Canada (1), maintaining actions by the Crown, on informations of the Attorney General of

(1) [1945] Ex. C.R. 97 and 111.

Canada, to recover from each of the appellants the additional amount of customs duty and taxes resulting from the determination by the Minister of National Revenue of the values for duty of certain goods imported into Canada in excess of those at which they had been entered for duty.

Aimé Geoffrion K.C. for the appellants.

J. Singer K.C. and *W. R. Jackett* for the 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.

THE CHIEF JUSTICE (dissenting): These three cases were heard together and I intend to dispose of them by the same reasons.

The facts, as stated in the judgments of the learned President of the Exchequer Court (1), are as follows:

During the years 1940, 1941 and 1942, the appellants imported into Canada large quantities of canned corn beef from Argentine, Uruguay and Brazil and paid custom duties based on the value at which the goods were entered for customs.

On December 16, 1942, the Commissioner of Customs of the Department of National Revenue notified the appellants that the importations appeared to have been undervalued and that he proposed to instruct the collectors at the various ports where their entries had been passed, to call for amending entries, accounting for additional duty on appraised values on all entries passed by them since January 1, 1940.

After correspondence between the department and the appellants, or their representatives, the Department of National Revenue made an appraisal of the value of the imported goods, in excess of those at which they had been entered for duty, and directed the appellants to make amended entries and to pay additional customs duty and taxes; and, on April 6, 1943, it sent the appellants statements showing such appraised values and the amount of underpaid duties and taxes.

(1) [1945] Ex. C.R. 97 and 111.

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No appeal from the appraisals was taken, but representations protesting against this were made to the Department by the appellants and their representatives.

Subsequently, the matter was referred to the Minister of National Revenue, and, on June 29, 1943, the Minister advised the appellants' representatives, by letter, that it appeared that this might be a proper case in which to determine the value for duty under section 41 of the *Customs Act*, but that, before he decided what determination should be made, he would be glad to arrange an appointment to hear any further representations or to receive any further statement in writing.

An appointment was then arranged with the Minister on July 14, 1943, at which time he heard oral representations both by the appellants' representatives and by their counsel. Further written representations were also made. Finally, on August 19, 1943, the Minister made his determination to the effect that, on reviewing the circumstances and conditions of importation, it appeared to him and he found that such circumstances and conditions rendered it difficult to determine the value of the goods in question for duty, because:

(1) Such goods are not sold for use or consumption in the country of production.

(2) Such goods, by reason of the fact that the circumstances of the trade render it necessary or desirable, are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption.

The Minister accordingly determined

that the value for duty of the canned beef imported into Canada from Brazil, Argentine and Uruguay, during the calendar years 1940, 1941 and 1942 by Messrs. Weddel Limited (and the other appellants), shall be as set forth in the statement attached as Schedule "A" hereto.

In the case of Weddel Limited, the schedule showed that the amount of additional customs duty and taxes payable by them amounted to $49,312.03.

The Deputy Minister of National Revenue (Customs and Excise) notified the appellant of the Minister's determination, sent a copy of the schedule and required the entries to be amended not later than September 2, 1943.

On the appellant's refusal to pay any additional duty or taxes, this action was brought, claiming the additional

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amount of customs duty and taxes resulting from the determination of the Minister, under section 41 of the *Customs Act*, (R.S.C. 1927, c. 42) and, in the alternative, the additional amount resulting (as contended) from the appraisal by the Chief Dominion Customs appraiser purporting to act under section 48.

In the Watt and Scott (Toronto) Limited case, the facts are the same except that the judgment is for $158,215.18; and the appellant suggests that there are two differences: no details were asked in this case, and the appellant is not a principal but only the agent of the owner.

In the Tees and Persse Limited case, the judgment is for $68,825.30, and it is subject to the same two differences as in the Watt and Scott case.

As already stated, the Minister purported to have acted under sections 41 and 48 of the *Customs Act*.

These two sections read as follows:

Section 41. Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because:

(*a*) such goods are not sold for use or consumption in the country of production; or

(*b*) a lease of such goods or the right of using the same but not the right of property therein is sold or given; or

(*c*) such goods having a royalty imposed thereon, the royalty is uncertain, or is not from other causes a reliable means of estimating the value of the goods; or

(*d*) such goods are usually or exclusively sold by or to agents or by subscription; or

(*e*) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions;

the Minister may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

(2) the Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

* * *

Section 48. If, upon any entry or in connection with any entry, it appears to any Dominion appraiser or to the Board of Customs that any goods have been erroneously appraised, or allowed entry at an erroneous valuation by any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with, such Dominion appraiser or such Board may make a fresh appraisement or valuation, and may

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direct, under the valuation or appraisement so made, an amended entry and payment of the additional duty, if any, on such goods or a refund of a part of the duty paid, as the case requires, subject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as in such case hereinafter provided for.

The learned President gave judgment against each of the appellants for the amounts claimed by the respondent. On behalf of the appellants, it is contended that the Chief Dominion Customs appraiser did not make any appraisal of the value of the imported goods in excess of those at which they had been entered for duty, and did not direct the appellants to make amended entries and pay additional duty and taxes, as it is suggested in the judgment appealed from.

According to the appellants, this was done by the Commissioner of Customs; and the point may be one of importance in connection with the alternative ground in the Minister's decision and in the action of the respondent.

The appellants submitted that these judgments were erroneous because, under section 41 of the *Customs Act,* the Minister had no jurisdiction to determine increased values for duty purposes in respect of individual past importations on which the duty had been assessed by the proper officer and paid, and the goods released. The appellants also claimed that the power vested in the Dominion Customs appraiser by section 48 of the *Customs Act* was not and could not be exercised in this case.

Under section 112 of the *Customs Act,* the true amount of Customs duty payable to His Majesty with respect to any goods imported into Canada shall, from and after the time when such duty should have been paid or accounted for, constitute a debt due and payable to His Majesty, jointly and severally, from the owner of the goods at the time of the importation thereof, and from the importer, as the case may be.

Under section 111, the importation is deemed to have been completed from the time the goods are brought within the limits of Canada.

Under section 35, whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold

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for home consumption in the principal markets of the country whence and at the time when they were exported directly to Canada; and the Minister may determine the value of such goods and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied, under regulations prescribed by the Minister.

But if the goods imported into Canada are under such circumstances or conditions as render it difficult to determine the value thereof for duty because of some of the reasons stated in section 41, the Minister may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

If one compares section 35 and section 41, it would seem, at first glance, that in the case of section 35 what is contemplated is a ruling ("under regulations prescribed by the Minister") which applies whenever the goods do not come under one of the conditions inserted in section 41.

There are some exceptions covered by sections 42 and 43 in respect of medicinal or toilet preparations or the valuation of imports considered as prejudicially or injuriously affecting Canadian producers.

We are not concerned with the latter.

Under ordinary circumstances, the Dominion Customs appraisers and every one of them, and every person who acts as such appraiser, or the collector, as the case may be, shall, by all reasonable ways and means in his or their power, ascertain, estimate and appraise the true and fair market value of the goods at the time of exportation and in the principal markets of the country whence the same have been imported into Canada, and the importer pays duties then and there upon taking possession of the goods.

The decision of any appraiser or collector as to the principal markets of the country, or as to the fair market value of goods for duty purposes, is subject to review by the Board of Customs; and, in that respect, the decision of the Board of Customs, when approved by the Minister, is final and conclusive, except as otherwise provided in the Act.

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Then, under section 52, if the importer is dissatisfied with the appraisement made of any such goods by the appraiser, he may within six days give notice in writing to the collector of such dissatisfaction. Upon receipt of such notice, the collector shall at once notify the importer to select one disinterested and experienced person familiar with the character and value of the goods in question, and the collector shall select a second person of similar knowledge and notify the importer of such appointment.

Then, the persons so selected, together with a third selected by the Minister from among the Dominion appraisers, shall examine and appraise the goods in accordance with the provisions of the Act, and the decision arrived at either unanimously or by a majority of them, shall be reported to the collector and shall be final and conclusive, and the duty shall be levied and collected accordingly.

It should be stated that all customs officers are local appraisers under the Act; and that, therefore, when the goods of the appellants in the present cases were imported into Canada and were appraised by the Customs' officers acting as local appraisers and, the duties having been paid as assessed and asked for, the appellants took possession of their goods, everything required by the *Customs Act* had been complied with.

I think the several sections to which I have just referred indicate correctly the whole scheme of the collection of duties for customs purposes provided for by the Act.

Such scheme therefore appears to be as follows:

Upon arrival of the goods in Canada, the value thereof is ascertained by the local customs officer acting as appraiser; and, in the ordinary course of events, the duties are paid and the goods handed over to the importer. It may be that the value of the goods imported was already determined and has to be computed and levied under regulations prescribed by the Minister in conformity with section 35 of the Act.

The appraisal of the Customs officer is subject to review by the Board of Customs in accordance with subsection 4

of section 38, or may be made the subject of another appraisement by three disinterested and experienced persons, under the provisions of section 52.

The decision of the Board of Customs in the first case, when approved by the Minister, is final and conclusive; and so is the decision of the three appraisers under section 52.

But, if it should happen that the goods imported into Canada are under one or more of the circumstances or conditions mentioned in section 41, then the local Customs officers are not to act as appraisers; sections 35, 38 and 52 do not apply, and section 41 alone states what should be done:

> The Minister may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

In those cases, the Minister is the sole judge as to the existence of all or any of the causes or reasons enumerated in section 41.

In the present case, the local appraisers, when the goods were imported, acted under sections 35 and 38 of the Act. There was no review of the decision made by the Board of Customs, under section 38, subsection 4, nor was there any notice of dissatisfaction and consequential appraisement under section 52.

In my view, therefore, there the whole matter lies. The several provisions of the Act covering the situation had been fully satisfied and there was no coming back against the importers, subject to what may be said about section 48.

It was only if, at the time of the importation (n.b. section 41: "*whenever* goods are imported into Canada" etc.,) on account of one or more of the reasons enumerated in section 41, the Customs officers acting as local appraisers found themselves unable to ascertain the fair market value, that the Minister was called upon to determine the value of the goods, upon which duty on such goods shall be computed and levied.

But it is only at that time and that is to say: at the time when the importation took place that the Minister could act under section 41.

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There is nothing in that section which authorizes the Minister and gives him jurisdiction to determine increased value for duty purposes in respect of individual past importations on which the duty has already been assessed by the proper officer, paid, and the goods released.

The alternative contemplated by the *Customs Act* is that either the appraisal takes place by the local Customs officers or it must be then and there made by the Minister, provided one of the conditions enumerated in section 41 applies.

The first alternative took place; the goods were appraised by the officer entitled to make the appraisal; the duty was paid; the goods were released; and that was complete compliance with the provisions of the *Customs Act*. The Minister had no jurisdiction to interfere and more particularly several years after the goods had been released.

If there was cause for dissatisfaction, the matter came under the jurisdiction of the Board of Customs or is covered by section 52 of the Act.

The Minister now says in his decision that these were not cases for the local appraisers, but rather cases coming under section 41 and where he alone could act.

I could not find anything in section 41 giving him that power and authority, more particularly three years after the whole scheme of the Customs appraisal had been gone through in accordance with the Act.

There remains the new point very forcibly raised by Mr. Singer at the argument before this Court.

He said that even if the Minister, in the premises, was lacking of authority to act under section 41, in the alternative the Dominion appraiser could reopen the question by force of section 48; and he endeavoured to show that a re-appraisal had really been made by the Dominion appraiser in such a way that the determination of the value for duty of the goods in question was thereby made and supports the claims of the respondent in these several cases.

Section 48 of the *Customs Act* may be again quoted here:

> If, upon any entry or in connection with any entry, it appears to any Dominion appraiser or to the Board of Customs that any goods have been erroneously appraised or allowed entry at an erroneous valuation by

any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with, such Dominion appraiser or such Board may make a fresh appraisement or valuation and may direct, under the valuation or appraisement so made, an amended entry and payment of the additional duty, if any on such goods, or a refund of a part of the duty paid, as the case requires, subject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as in such case hereinafter provided for.

Under section 4 of the *Customs Act*,

there may be appointed * * * appraisers to be called Dominion Customs appraisers and assistant Dominion Customs appraisers, with jurisdiction at all ports and places in Canada; and Customs appraisers and assistant Customs appraisers with jurisdiction at such ports and places in Canada as are designated in an Order-in-Council in that behalf.

They shall, before acting as such, take a prescribed oath of office. If no appraiser is appointed in any port of entry, the collector there acts as appraiser, but without taking any special oath of office as such; and every appraiser is deemed an officer of Customs.

The Dominion appraiser is independent of the Department and, when he acts under section 48, he does so as a special officer with, as may be seen, the same powers as the Board of Customs.

For the purposes of section 48, they are both put on exactly the same footing.

It so happens that when the appellants were negotiating with the Department in connection with the announced intention that their goods were to be re-appraised and that the entries were to be amended, some of the correspondence exchanged between the Department and the appellants was signed by the then Dominion appraiser. But I could not interpret that correspondence to mean that the Dominion appraiser was at the time acting as such, and surely that intention was nowhere conveyed to the appellants.

The Department and the Minister were then purporting to act under section 41; the Dominion appraiser, who apparently was then also an employee of the Department, appears to have been carrying on some of the correspondence on behalf of the Department, and nowhere was it specifically mentioned that he was undertaking to act as a Dominion appraiser under section 48.

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It is not satisfactorily established that he made a re-appraisal under that section, and that, under it, he directed an amended entry and payment of the additional duty.

The appellants were certainly not advised that he pretended to act under section 48; and one of the results to their prejudice, if it were to be so decided now, would be that they were deprived of the right to a re-valuation by a Board selected under section 52.

I do not find in the record any satisfactory evidence that proceedings were ever gone through in conformity with section 48; and moreover, I am of opinion that, in the circumstances, that could not have been done, since the whole matter was then before the Minister, avowedly acting under section 41.

By force of that section, it is for the Minister to determine the value for duty of such goods, and it is upon the value so determined by him that the duty on the goods shall be computed and levied.

Moreover, the Minister is the sole judge as to the existence of all or any of the causes or reasons enumerated in section 41.

It can not be contended that after the Minister has given his decision under section 41, the Dominion appraiser or the Board of Customs could yet review the case under section 48.

The Minister's determination is final for all purposes and the Dominion appraiser or the Board of Customs are ousted of any jurisdiction in the matter.

Likewise, when the case stands to be decided by the Minister under section 41, the Dominion appraiser or the Board of Customs could not step in and proceed to make a re-appraisal so to say *pendente lite.*

I simply look upon the suggestion that section 48 could be relied on to support the case of the respondent as a clever after-thought, upon the assumption that the assessments made in the present cases could not be otherwise supported.

The very fact that it is suggested as an alternative argument would in itself show that it has no basis in fact. Both the Minister, under section 41, and the Dominion appraiser, under section 48, could not act at the same time.

It had to be one or the other; and the evidence is clearly to the effect that what was done here was a determination and a decision by the Minister under section 41.

I am therefore of the opinion that, for the purposes of these cases, section 48 must be eliminated.

We have before us the decision of the Minister made under section 41, and I have already indicated that the Minister had no power to make those decisions under that section, in the circumstances.

For these reasons, I would allow the appeals and dismiss the Informations with costs in both Courts.

The judgment of Kerwin and Hudson JJ. was delivered by

KERWIN J.:—An information was filed in the Exchequer Court of Canada by the Attorney General of Canada on behalf of His Majesty the King, claiming from Weddel Limited the sum of $49,312.03 as being the additional amount of customs duty and taxes resulting from a determination of the Minister of National Revenue, purporting to act under section 41 of the *Customs Act*, R.S.C. 1927, chapter 42 and amendments, and, in the alternative, the sum of $50,415.12 as being the additional amount of customs duty and taxes resulting from an alleged appraisal by the Chief Dominion Customs Appraiser, purporting to act under section 48. The President of the Exchequer Court of Canada, before whom the matter came, determined that the claim for $49,312.03 was well-founded, and he accordingly gave judgment for that amount and costs without dealing with the alternative claim. From that judgment Weddel Limited now appeals.

In its factum, the appellant agrees with the following statement of facts appearing in the judgment of the learned President, subject only to what it describes as an important inaccuracy:—

> During 1940, 1941 and 1942 the defendant imported into Canada large quantities of canned corned beef from the Argentine, Uruguay and Brazil and paid customs duties based on the values at which the goods were entered for customs. On December 16, 1942, the Commissioner of Customs of the Department of National Revenue notified the defendant that the importations appeared to have been undervalued and that he proposed to instruct the collectors at the various ports where its entries had been

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passed to call for amending entries accounting for additional duty on appraised values on all entries passed by it since January 1, 1940. After correspondence between the Department and the defendant or its Ottawa representative, the Chief Dominion Customs appraiser made appraisals of the values of the imported goods at $104,031.00 in excess of those at which they had been entered for duty and directed the defendant to make amended entries and pay additional customs duty and taxes amounting to $50,415.12, and, on April 6, 1943, sent the defendant a statement showing such appraised values and the amount of underpaid duty and taxes. No appeal from the appraisals was taken, but representations protesting against them were made to the Department by the defendant and its Ottawa representative. Subsequently the matter was referred to the Minister of National Revenue, and, on June 29, 1943, the Minister advised the defendant's Ottawa representative by letter that it appeared that this might be a proper case in which to determine the value for duty under section 41 of the *Customs Act*, but that, before he decided what determination should be made, he would be glad to arrange an appointment to hear any further representations or to receive any further statement in writing. An appointment was then arranged with the Minister on July 14, 1943, at which time he heard oral representations both by the defendant's Ottawa representative and by its counsel. Further written representations were also made. Finally, on August 19, 1943, the Minister made his determination as follows:

Memorandum for: "19th August, 1943,
David Sim, Esq.,
Deputy Minister of National Revenue,
Customs Excise.

Whereas Messrs. Weddel Limited, Montreal, imported into Canada a quantity of canned beef duing the calendar years 1940, 1941 and 1942,

And whereas, on reviewing the circumstances and conditions of importation, it appears to me and I find that such circumstances and conditions render it difficult to determine the value of the goods in question for duty, because—

(1) Such goods are not sold for use or consumption in the country of production:

(2) Such goods, by reason of the fact that the circumstances of the trade render it necessary or desirable, are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption.

Acting under the provisions of the *Customs Act*, I determine that the value for duty of the canned beef imported into Canada from Brazil, Argentine and Uruguay during the calendar years 1940, 1941 and 1942 by Messrs. Weddel Limited shall be as set forth in the statement attached as schedule "A" hereto.

Encl.

Colin Gibson
Minister of National Revenue."

The schedule showed that the amount of additional customs duty and taxes payable by the defendant amounted to $49,312.03. On August 21, 1943, the Deputy Minister of National Revenue (Customs and Excise) notified the defendant's Ottawa representative of the Minister's determination, sent him a copy of the schedule and required the entries to be amended not later than September 2, 1943.

The appellant claims that the Chief Dominion Customs Appraiser did not make any appraisement of the values of the imported goods at $104,031.00 in excess of those at which they had been entered for duty, and did not direct it to make amended entries and pay additional customs and taxes amounting to $50,415.12. I may say at once that, in my opinion, the respondent is unable to succeed on its alternative claim. The correspondence and evidence make it clear that even if the Chief Dominion Customs Appraiser made a fresh appraisement under section 48, there was no direction by him for an amended entry and payment of the additional duty. If that had been done, the appellant, under section 52 of the Act, might have given notice in writing, within the prescribed six days, of its dissatisfaction and proceedings would thereupon have ensued for the selection of three persons to examine and appraise the goods, in accordance with the provisions of the Act. Any direction given was by the Commissioner of Customs.

However, on the respondent's main claim, I have come to the same conclusion as the President although not for precisely the same reasons. The determination of this question involves a consideration of various sections of the *Customs Act*. Speaking generally, section 19 requires every importer of goods to make "due entry" of such goods, and by section 20, the person entering such goods is to deliver to the Collector of Customs, or other proper officer, an invoice and bill of entry in a prescribed form. This bill of entry, according to an exhibit filed, shows the importer's description of the goods imported, the quantity, the rate of duty, the value for duty in dollars, the total customs duty, the duty paid value, the war exchange tax, and the sales tax. In the present case the appellant paid, as it was obliged under section 22 to do, all duties and taxes so shown by it upon the canned corned beef it imported.

By subsection (1) of section 35:—

> Whenever any duty ad valorem is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

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By subsection (1) of section 38:—

The Dominion Customs appraisers and every one of them and every person who acts as such appraiser, or the collector, as the case may be, shall, by all reasonable ways and means in his or their power, ascertain, estimate and appraise the true and fair market value, any invoice or affidavit thereto to the contrary notwithstanding, of the goods at the time of exportation and in the principal markets of the country whence the same have been imported into Canada, and the proper weights, measures or other quantities, and the fair market value thereof, as the case requires.

It will be necessary later to revert to some of the other subsections of these sections but, in the meantime, section 41, under which the Minister purported to act, should be read in its entirety:—

41. Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because

(*a*) such goods are not sold for use or consumption in the country of production; or

(b) a lease of such goods or the right of using the same but not the right of property therein is sold or given; or

(*c*) such goods having a royalty imposed thereon, the royalty is uncertain, or is not from other causes a reliable means of estimating the value of the goods; or

(*d*) such goods are usually or exclusively sold by or to agents or by subscription; or

(*e*) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions;

the Minister may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

2. The Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

While other questions were apparently argued at the trial, the appellant's sole point in this appeal upon the Attorney General's main claim is on the construction of this section. Its contention is that the power given the Minister is either one to make a general ruling as to a class of importations for the future or, to quote its factum, a power to choose individual past importations on which the duty has been assessed by the proper officer and paid and the goods released no matter how many years before, and determine a higher valuation and consequently, a higher duty whenever he thinks fit without there being any remedy.

It may be conceded that if the section gives the Minister power to determine the value for duty of goods that have been imported and upon which duty has been paid, it may work a hardship in particular cases, depending, among other things, upon the length of time that has elapsed. However, it must be borne in mind that the Court does not know what information the Minister had before him and, as the appellant's counsel admits, this appeal is not, and could not be, on the merits of the decision of the Minister but is as to his jurisdiction.

Along with the relevant provisions of the *Customs Act* must be read subsection (1) of section 3 of the *Customs Tariff Act*, R.S.C. 1927, chapter 44 as amended, which, so far as pertinent, enacts:—

3. (1) Subject to the provisions of this Act and of the *Customs Act*, there shall be levied, collected and paid upon all goods enumerated, or referred to as not enumerated, in Schedule A to this Act, when such goods are imported into Canada or taken out of warehouse for consumption therein, the several rates of duties of Customs, if any, set opposite to each item respectively or charged on goods as not enumerated, in the column of the tariff applicable to the goods.

Provision having thus been made for the levying, collecting and paying certain rates of customs duty upon goods imported into Canada, the value for duty of such goods, whenever any duty *ad valorem* is imposed, is taken care of by the general rule set forth in subsection (1) of section 35 of the *Customs Act*. That provision has been in the Act for some years and appeared as R.S.C. 1906, chapter 48, section 40. In 1922, by chapter 18, section 2, subject to an immaterial change, what are now subsections (2) and (3) of section 35 appeared as one paragraph, while what is now subsection (4) appeared as an unnumbered paragraph. The 1922 amendment reads as follows:—

2. Section forty of the *Customs Act*, chapter forty-eight of the Revised Statutes, 1906, is amended by adding thereto the following subsection:—

(2) In the case of importations of goods the manufacture or produce of a foreign country, the currency of which is substantially depreciated, the value for duty shall not be less than the value that would be placed on similar goods manufactured or produced in the United Kingdom and imported from that country, if such similar goods are made or produced there. If similar goods are not made or produced in the United Kingdom, the value for duty shall not be less than the value of similar goods made or produced in any European country the currency of which is not substantially depreciated.

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The Minister may determine the value of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied under regulations prescribed by the Minister.

The mere fact that in the revision of 1927 this enactment was divided into subsections (2), (3) and (4) cannot alter its proper construction.

I pay some attention to this enactment because Mr. Geoffrion seeks to obtain some comfort from it. He points out that subsection (4) is the same as the last leg of subsection (1) of section 41 except for the words "under regulations prescribed by the Minister". Now, looking at subsection (1) of section 35, it seems to me that Parliament is there dealing with the fair market value of goods upon which an *ad valorem* duty is imposed by the *Customs Tariff Act* and saying in very plain terms that when such goods have been imported into Canada, the value for duty shall be as therein specified. Parliament is surely still dealing with goods that have been imported when in what are now subsections (2), (3) and (4) it takes care of the cases of the importations of goods, the manufacture or produce of a foreign country, the currency of which is substantially depreciated. In such cases the Minister is given power to determine the value of such goods, that is goods that have been imported from such a foreign country. In order to make the Act work, the last part of subsection (4)

> and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied under regulations prescribed by the Minister.

must mean that once the Minister has determined the value of such imported goods, such value, until otherwise provided, is to be the value upon which the duty, not only on the particular goods already imported, but also on goods of that class to be imported in the future, shall be computed and levied.

When Parliament, in section 41, came to deal with cases where it was difficult to determine the value, it was still dealing, first of all, with goods that have actually been imported. Such, I think, is the fair and proper meaning of the opening words of subsection (1) "Whenever goods are imported into Canada", and the Minister was given power

to determine the value for duty of such goods that had been imported. I would construe the last part of subsection (1) of section 41 in the same way as the last part of subsection (4) of section 35.

This is confirmed by the provisions of section 42:—

The Minister shall in like manner and with the like effect determine the value for duty of all material imported to form medicinal or toilet preparations either alone or with other articles or compounds, and intended to be put up, labelled or sold under any proprietary or special name or trade mark: Provided that the Minister may refer to the appraising officers for valuation such of the materials as have a fair market value in the ordinary course of trade.

When the Minister is empowered "in like manner and with the like effect" to "determine the value for duty of all material imported" Parliament was surely conferring upon him a power to be exercised with reference to material that had been imported. And finally, subsection (1) of section 43 demonstrates how Parliament proceeded when it intended to deal only with the fixing of the value for duty of any class or kind of goods for the future.

43. (1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind not entitled to entry under the British Preferential tariff or any lower tariff are being imported into Canada either on sale or on consignment, under such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value so fixed shall be deemed to be the fair market value of such goods.

Mr. Geoffrion relied upon the words "in any case or class of cases" in subsection (4) of section 39:—

4. The Board of Customs may review the decision of any appraiser or collector as to the principal markets of the country, or as to the fair market value of goods for duty purposes; and the decision of the Board of Customs in regard to such principal markets, and value of goods for duty purposes in any case or class of cases, shall, when approved by the Minister, be final and conclusive, except as otherwise provided in this Act.

The Board of Customs is now the Tariff Board and some difficulties arose as to its power, which were considered in this Court (1). I am unable to perceive how the proper construction of this subsection really assists in the question before us.

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Even without relying upon section 2 of the *Customs Act*:—

> 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.

(1) Reference concerning the Jurisdiction of the Tariff Board of Canada [1934] S.C.R. 538.

I am of opinion that section 41 should be construed in the manner above indicated.

In the Weddel case the appellant is the owner but in each of the two other cases argued at the same time, the appellant is the importer, and by section 112 of the Act, the true amount of Customs duties payable with respect to any goods imported into Canada constitutes a debt due and payable to His Majesty jointly and severally from the owner of the goods at the time of the importation thereof and from the importer thereof. In all three cases this provision was referred to as indicating the severity with which the construction adopted might bear upon an importer who was acting merely as agent for the owner. This is quite true and the point has not been overlooked in arriving at a conclusion but as has already been stated, the Court is not seized of all the considerations that moved the Minister in proceeding as he did under section 41.

The appeals should be dismissed with costs.

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RAND J.:—(dissenting): This appeal raises a question of the interpretation of section 41 of the *Customs Act*, which so far as it is material here is as follows:

> Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because
>
> (*a*) such goods are not sold for use or consumption in the country of production;
>
> * * *
>
> (*e*) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions;

the Minister may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

2. The Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

Mr. Geoffrion argues that the determination by the Minister under this section is prospective only and is inapplicable to an entry of goods made before the Minister's decision. The point is narrow, but some light is thrown on it by other sections of the Act.

The value for duty is prescribed by section 35, and in certain exceptional circumstances special provisions are made as follows:

35. Whenever any duty ad valorem is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

2. In the case of importations of goods the manufacture or produce of a foreign country, the currency of which is substantially depreciated, the value for duty shall not be less than the value that would be placed on similar goods manufactured or produced in Great Britain and imported from that country, if such similar goods are made or produced there.

3. If similar goods are not made or produced in Great Britain, the value for duty shall not be less than the value of similar goods made or produced in any European country the currency of which is not substantially depreciated.

4. The Minister may determine the value of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied under regulations prescribed by the Minister.

Section 48 empowers a Dominion Appraiser or the Tariff Board to re-appraise and to direct amended entries and payment of additional duty. Dissatisfaction with a re-appraisal is dealt with in section 52, which enables the importer to obtain the finding of a board of three valuators, one chosen by himself, one by the collector and the third by the Minister from among the Dominion appraisers. The decision of a majority of these valuators is final.

I do not think it at all doubtful that the value determined by the Minister under section 41 does have a prospective application. The language

and the value so determined shall, *until otherwise provided,* be the value upon which the duty on such goods shall be computed and levied

is conclusive on that. The phrase "until otherwise provided" occurs likewise in subsection (4) of section 35 and there, beyond any doubt, it is restricted to future entries.

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But the question is whether section 41 is so limited. The language "the value for duty of such goods" is followed in the admittedly prospective sense by "the value upon which the duty on such goods" shall be computed. Now, what is the meaning, first, of the word "value" and then of "such goods" as they appear in both cases? Certainly in the second use, "value" must mean "unit value" and "such goods" must mean "such class of goods" for only in those senses could they have a future application. Can we fairly say that in their first use they mean something different? In the close context presented, I do not think so. If "value for duty of such goods" was intended to mean the fair market value of the goods of a specific entry, then the transfer of meaning would, ordinarily, have been accompanied by a corresponding verbal change. It is "the value so determined" that is prescribed for the future. If intended to be retroactive as well, surely there would have been some such word as "also" after the word "shall" rather than a precise repetition. It is not immaterial that the finding of the Minister is final and in a real sense arbitrary. This may be of no individual consequence for future importations, but it might be of utmost consequence for those of the past. I, therefore, treat the words in both cases as signifying "unit value" and "such class of goods"; and in that sense, the text does not permit us to relate the Minister's ruling to past entries that have been appraised.

Section 42 is as follows:

42. The Minister shall in like manner and with the like effect determine the value for duty of all material imported to form medicinal or toilet preparations, either alone or with other articles or compounds, and intended to be put up, labelled or sold under any proprietary or special name or trade mark: Provided that the Minister may refer to the appraising officers for valuation such of the materials as have a fair market value in the ordinary course of trade.

But by this language, the ascertainment of value is taken away from the appraisers except as it may be referred to them by the Minister. No appraisal can be made and no entry allowed until the Minister acts. His action is not retroactive in the sense of changing a valuation already made and used under the authority of the statute: it is precedent to valuation.

But no one suggests that in this case initially value was not legally ascertained, the appraisal made, the entry allowed and the goods properly released; the Dominion appraiser and the Deputy Minister were acting, though in terms of unit value, in revision of the appraisal; and the contention really is that the Minister under section 41 may, in respect of an entry passed and allowed, supersede an appraisal validly made and make a new appraisal. If the entry here had been held for the Minister's decision whether the situation was one in which he should act, there would, in the proper sense, be no retroactivity; dealing with or passing the entry would be suspended, and the appraisal would be originally made on the basis of unit value laid down by the Minister. So interpreted, the two sections are identical in effect, and neither provides for action by the Minister affecting an entry of goods completed by payment of duty in accordance with an appraisal made under the authority of the statute: there is no *ex post facto* application of the Minister's arbitrary finding and the importer has preserved to him his rights of appeal under section 52.

This brings out clearly the distinction between fixing value and appraisal: the Minister does not appraise; he determines unit value in accordance with which the collectors and appraisers are to carry out their duty. But in such a case as the present, they have already legally appraised, and the entry has been made and allowed. Section 41 does not provide for a re-appraisal or an amendment to the entry, and section 48 does not apply. What the Crown sues for does not appear on the records of the collector at the port of entry, and the proceeding is based on the Minister's letter. Surely nothing could be more conclusive that the Minister's ruling must be antecedent to a valid allowance of the entry, and that when that is done there remains only revision by the Dominion appraisers or the Tariff Board under section 48.

But Mr. Singer raises a further point. He says that a re-appraisal by a Dominion appraiser had been made before the Minister entered the controversy, which the invalidity or inapplicability of the Minister's ruling leaves untouched. This necessitates a consideration of the communications

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which have passed between the Department and the importers. The first letter is from the Commissioner of Customs to the appellant, dated December 16, 1942, the whole of which I quote:

On reviewing past importations of canned corned beef, a wide discrepancy has been found between the values upon which your firm has paid duty and those declared by exporters of other Canadian suppliers. This discrepancy is so marked that I cannot conceive that it would be accounted for by market fluctuations or difference in quality and I can only conclude that your importations have been undervalued.. In the circumstances, therefore, I propose to instruct our Collectors at the various Ports where your entries have been passed to call for amending entries accounting for additional duty on appraised values on all enttries passed by your firm since 1st January, 1940. Before issuing these instructions, however, I am prepared to discuss the matter with you in order to arrive at a fair valuation for the purpose of these amendments and future importations.

The next was under date of March 29, 1943 from the Commissioner, and the material paragraphs are:

A careful study of importations during the period under review shows that, based on values information now before the Department, the canned corned beef imported by your Company has been undervalued to the extent of $92,229.00, resulting in duty and taxes short-paid amounting to $45,425.74.

You are requested to forward a certified cheque for the above amount direct to the Department to cover the amendment of the entries in question.

The period under review was the years 1940, 1941 and 1942.

The appellant answered on March 31, 1943, and the Commissioner was asked for details of the additional value and duty; the reply was under date of April 6, 1943 by the Chief Dominion Customs Appraiser, which included a statement on the importations during the years mentioned and added

Upon further review the undervaluation was found to be greater than as stated in the Department's letter addressed to you on the 29th ultimo.

There followed under dates of the 16th and 17th of April, communications from P. F. Jackson, a customs broker of Ottawa on behalf of the appellant, addressed to the Commissioner, asking an extension of time until the end of April to enable the appellant to obtain additional information from Argentina. A reply was sent by the Chief Appraiser under date of the 19th of April:

As advised verbally on the 17th instant, this matter has been discussed with the Acting Commissioner of Customs, Mr. Sim, and, in view of all the circumstances, he has agreed to an extension of time to

the 5th May, 1943, on the distinct understanding that arrangements for the amendment of the entries, satisfactory to the Department, will be made by that time.

On May 4, Jackson addressed a further letter to the Acting Commissioner, in which a request was made to the Department "to vacate their ruling in this matter, and to withdraw the assessment." On May 10, the Acting Commissioner wrote Jackson:

> This is an interim acknowledgment of brief of the 4th May in the above regard which you left with me at our conference on the 4th May, and also of your letters of the 5th and 7th May dealing with the same case.
>
> There are one or two points on which I feel I should have the benefit of advice from the law officers of the Crown, and when I have had an opportunity of consulting them I shall communicate with you again.

The next letter from the Department was dated June 29, 1943 addressed by the Acting Commissioner to Jackson:

> With further reference to my letter of the 10th May in regard to the appraisal of Canned Corned Beef imported from South America by your clients, Messrs. Weddell Ltd., Watt & Scott, and Teese & Persse, following consultation with our legal advisers I have referred this matter to the Honourable, the Minister, and I understand that he is writing to you today.

Such a letter from the Minister followed, in which he stated that it appeared to him the matter was a proper case for him to proceed to determine the value for duty under the provisions of section 41 on the statutory grounds I have quoted. He then intimated that he would arrange an appointment to hear further representations. These apparently were made, but subsequently on August 19, 1943, a formal ruling was made by him on the alternative basis of which these proceedings have been brought.

This correspondence makes it clear to me that although a tentative re-appraisal appears to have been made by the Department, and although the correspondence does raise the matter of amendment of the entries, there was neither a specific re-appraisal by a Dominion appraiser nor a definitive requirement to amend; and the revised statement was withdrawn by the official who first submitted it to the appellant on his reference of the matter to the Minister.

Now under a re-appraisal, the importer is entitled to a board of valuators; but to enable him to follow the procedure laid down, it is necessary that the steps taken by

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the Dominion appraiser be in accordance with that procedure, and carry some degree of formality and finality. These conditions not only were not present here, but the steps, attributing them to an appraiser, even in their provisional form, were abandoned. To hold the appellant to the inconclusive departmental negotiation and deprive it of its rights under section 48 would be a denial of elementary fairness.

I would allow the appeal and dismiss the information with costs in both Courts.

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RAND J. (dissenting): The facts of this case raise the same questions as are considered in the appeal of Weddel Limited, and as I see no material difference between the correspondence with the Department there considered and that here, I would hold the Department to have taken the same action in relation to the tentative re-appraisal.

The appeal should therefore be allowed, and the information dismissed with costs in both Courts.

Tees & Persse Limited v. *The King*

RAND J. (dissenting): The facts of this case raise the same questions as are considered in the appeal of Weddel Limited, and as I see no material difference between the correspondence which the Department there considered and that here, I would hold the Department to have taken the same action in relation to the tentative re-appraisal.

The appeal should therefore be allowed, and the information dismissed with costs in both Courts.

ESTEY J.:—The appellants imported into Canada goods from Brazil, Uruguay and Argentine throughout the years 1940, 1941 and 1942. The duty was paid and the goods released when on December 16, 1942, the Commissioner of Customs intimated that there had been an undervaluation. This was followed by correspondence, conferences and submissions until June 29, 1943, when the Minister of National Revenue advised that these goods would be valued for duty purposes under section 41 of the *Customs Act*, (1927 R.S.C., c. 42). The values so determined by the

Minister were greater than those disclosed in the invoices, and these actions were brought to recover the consequent increase in duty. The issues in each case are identical and were so presented upon the hearing of these appeals.

The appellants contend that in determining these valuations the Minister exceeded the authority vested in him by section 41. That under that section he had no authority to determine increased values for duty purposes in respect of individual past importations on which the duty had been assessed by the proper officer and paid and the goods released.

Section 41 is included in a group of sections numbered 35-53, inclusive, under a heading "Valuation For Duty". The first of these sections, (sec. 35), provides "the value for duty shall be the fair market value" as determined by reference to the domestic market in the country of export. If that value could always be accepted or ascertained some of the following sections would be unnecessary.

The provisions of section 35 indicate how that market value will be determined where the currency in the exporting country is depreciated.

Section 36 fixes a minimum value for duty purposes on new or unused goods and section 36A empowers the Governor in Council, whenever it is deemed expedient, to authorize the disregarding of import, excise and other duties and taxes in estimating the value for duty purposes. Section 38 deals with the methods of appraisers and collectors of customs duties in the determination of fair market value; and subsection (4) thereof provides as follows:

38. (4) The Board of Customs may review the decision of any appraiser or collector as to the principal markets of the country, or as to the fair market value of goods for duty purposes; and the decision of the Board of Customs in regard to such principal markets, and value of goods for duty purposes in any case or class of cases, shall, when approved by the Minister, be final and conclusive, except as otherwise provided in this Act.

Sections 39 and 40 deal with drawbacks and deductions.

The intent and purpose of these sections is the determination of value for duty purposes in the more routine or usual conditions that obtain in the importation of goods into Canada. They indicate the basis for valuation, provide

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for certain special facts in appropriate cases, a review of the valuation as determined by the Customs Board and an appeal under section 52 by the importer if he be dissatisfied with the appraisement.

We then come to section 41 which deals with the more unusual cases where, for reasons therein set out, it is difficult to determine the value for duty purposes. This section places upon the Minister the responsibility of deciding whether these difficulties exist and if so, he may determine "the value for duty of such goods". It then continues,

> and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

Section 41 reads as follows:

> 41. Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because
>
> (a) such goods are not sold for use or consumption in the country of production; or
>
> (*b*) a lease of such goods or the right of using the same but not the right of property therein is sold or given; or
>
> (c) such goods having a royalty imposed thereon, the royalty is uncertain, or is not from other causes a reliable means of estimating the value of the goods; or
>
> (*d*) such goods are usually or exclusively sold by or to agents or by subscription; or
>
> (*e*) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions; the Minister may determine the value for duty of such goods and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.
>
> 2. The Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

As already intimated, the sections preceding section 41 provide for the cases where the market value can be determined by the usual and routine commercial inquiries. Section 41 deals with the cases of goods where difficulties obtain in the determination of that value. These sections do not overlap. Both are necessary if the field of importation is to be adequately covered.

Section 35 contemplates the determination of value for duty purposes after the goods have been "imported into Canada" as that phrase is interpreted in section 111:

Sec. 111. For the purpose of the levying of any duty, * * *

(*a*) The importation of any goods * * * shall be deemed to have been completed from the time such goods were brought within the limits of Canada, * * *

Section 35 commences "whenever any duty *ad valorem* is imposed on any goods imported into Canada". Apart from the words "any duty *ad valorem* is imposed" the opening words of that section are almost identical with those of section 41:

Sec. 35. Whenever any duty *ad valorem* is imposed on any goods imported into Canada * * *

Sec. 41. Whenever goods are imported into Canada * * *

There can be no question but that section 35 applies as and when goods are imported. In adopting almost the identical words Parliament indicated its intention that the value under section 41 should likewise be determined as and when goods are imported into Canada. It is "whenever goods are imported", or at any time when goods are "brought within the limits of Canada" and the difficulty as to valuation arises that the Minister is authorized to act under the provisions of section 41.

Throughout section 41 the phrase "such goods" appears several times and each time relates back to the phrase "whenever goods are imported" as it appears in the first line of the section. It is the specific goods imported as distinguished from a class or kind of goods that may be imported, and it is the value of these specific goods which is determined by the Minister under section 41. In section 43 where Parliament uses the phrase "to fix the value for duty of any class or kind of such goods", it is dealing with future importations. The specific goods that "are being imported" have created a situation which Parliament authorizes the Minister to take steps to avoid in the future. In order to do so he deals not only with the specific goods that "are being imported" but with "any class or kind of such goods" that may make for a continuation of that condition. There is no such authority vested in the Minister under section 41; there he is restricted in the determination of value to the goods imported.

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It is obvious under section 41 that once the value is determined it will apply to future importations, but it would appear that had Parliament intended section 41 to apply only to future importations it would have used language that would have indicated that intention as it did in section 43.

It was the inadequacy of the preceding sections to deal with the difficulties specified in section 41 that prompted Parliament to pass that section, and it is only when such goods are imported that the Minister may determine their value under that section.

Moreover, Parliament has provided in section 42 "in like manner and with the like effect" (as in section 41) the Minister shall

> determine the value for duty of all material imported to form medicinal or toilet preparations, * * *

In other words, whenever the goods described in section 42 are imported then the Minister shall determine the value for duty and that value so determined shall, until otherwise provided, be the value. Such would appear to be the meaning of the phrase "in like manner and with the like effect". It is the importation of the goods that vests in the Minister the authority to determine the value, and as under section 42 he alone can do so, this section appears to cover both past and future importations. It could not be suggested that Parliament intended by this provision that if the collector in error accepted the invoice price as the value for duty that that would prevent the Minister from determining the value for duty purposes as Parliament has specifically directed. Then too, in section 42 there is a proviso that if the Minister decides the said goods have a fair market value in the ordinary course of trade he may refer the matter back to the appraising officers to deal with them in the ordinary routine way. In other words, section 42 appears to provide for a return of the goods to the ordinary routine procedure when the Minister so decides, just as in section 41 they are taken out of that procedure when the Minister so decides.

It is submitted, however, that the words "until otherwise provided" are inconsistent with this construction and consistent only with a construction that restricts the applica-

tion of section 41 to future importations. Such a construction would appear to be contrary to the opening words of the section and to what appears to be the intent and purpose of the section. It is the determination of the value of "such goods" and the value so determined that "until otherwise provided" shall be the value. The determination thereof by the Minister must involve considerable investigation and inquiry and in order to avoid the necessity of doing this work each time such goods are imported, it is provided that the "value so determined shall, until otherwise provided, be the value". The Minister is thereby enabled to avoid the time and trouble incident to inquiry and investigation in each case.

The same phrase "until otherwise provided" appears in section 35 (4). It is not at all clear that that subsection is necessarily restricted to future importations.

It was pointed out that such a construction may impose a hardship upon those called upon to pay additional duty some time after the importation and the payment of the duty as then determined. If so, it is the identical hardship that may at any time be imposed upon importers under sections 38 (4) and 48; indeed, had the Minister in this case seen fit to allow the matter to remain to be dealt with under the ordinary procedure the result would have been similar. In other words, such hardship as may from time to time occur must have been regarded by Parliament as unavoidable.

The contention of the appellants would raise the question that even if the Minister might determine the value of goods as and when imported, he cannot do so after "the duty has been assessed by the proper officer and paid and the goods released". Section 41 does not impose any time limit within which the Minister must act after importation. In this regard these provisions are identical with those providing for a "review * * * as to the fair market value" as in section 38 (4) and for "a fresh appraisement or valuation" as in section 48. The absence of any time limit is in keeping with the policy of the Act and was obviously not an oversight. Moreover, the difficulties of valuation contemplated by section 41 might appear at the port of entry but might not appear until the officials were

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considering the value of the goods and deciding whether any error or mistake existed and whether or not further proceedings should be taken. It is the presence and existence of the difficulty that Parliament is seeking to deal with whenever in the opinion of the Minister it may appear. If the usual methods of determination of value were inappropriate and unsuitable in the first instance, they are equally so upon proceedings taken under sections 38 (4) or 48. A construction of the section that restricts the intervention of the Minister as contended for would be to add words of limitation to the section which were not only not incorporated by Parliament but would appear to defeat the intent and policy of the Act in the determination of value for the purpose of duty.

The statute throughout contemplates the production at the port of entry of an invoice giving the quantity and value of each kind of goods so imported, the entry thereof and the payment of duty before the goods are passed through the customs and delivered to the consignee. That the value so declared and the duty there calculated are not final is made abundantly clear by the sections providing for a review and a fresh appraisal or valuation. The reason is obvious. It avoids delays at the port of entry and the loss and inconvenience necessarily incidental thereto to importers. It is after all this that the values may be checked and reviewed and adjustments made. If in the course of this checking and reviewing a proper case in the opinion of the Minister for his intervention under section 41 arises, it is his duty to so intervene.

The Act contemplates the intervention of the Minister to deal with an unusual situation, one that presents certain difficulties that cannot be dealt with under usual methods of procedure of the Act and therefore his decision is final. This Court has already ruled that the provisions of section 48 do not apply to determinations made by the Minister: *Reference Concerning the Jurisdiction of the Tariff Board of Canada,* (1) where my Lord the Chief Justice, at p. 549, states as follows:

> Perhaps it may be added that the jurisdiction of the Dominion appraiser or of the Board under s. 48 is only by way of appeal from a valuation or appraisal by an appraiser or collector as such. It would

(1) [1934] S.C.R. 538.

therefore appear that the exercise of the powers therein conferred presupposes a valuation or appraisement; and the consequence would be that when the value for duty is fixed by the Minister, and not by an appraisement, the section does not apply and the Dominion appraiser, or the Board, has no jurisdiction under it.

In view of the foregoing it is unnecessary to deal at length with the alternative claim made by the Crown on the basis that the appraiser under section 48 had fixed the valuation for duty purposes. After the intimation under date of December 16, 1942, by a letter signed by the Commissioner of Customs that there had been an undervaluation, further correspondence and interviews followed which were concluded by a letter dated June 29, 1943, signed by the Acting Commissioner of Customs intimating that the matter had been referred to the Minister of National Revenue. The Dominion appraiser, who was also a departmental official, signed a letter or two but not as Dominion appraiser. He did not sign the letter upon which the Crown relies nor is there any intimation that it contained his decision as Dominion appraiser. Moreover, there was no intimation that the provisions of section 48 were being or would be involved. It seems quite obvious that it never occurred to the appellants that action was being taken under section 48. There never was a direction for an amended entry or for payment of the additional duty under section 48. It would seem that after all the efforts to determine the valuation the officials in the department realized this was an importation of goods that should be referred to the Minister. After consideration the Minister concluded this was a proper case for the application of the provisions of section 41. In my opinion there was no appraisal made under section 48.

I would therefore dismiss the appeals with costs.

Appeals dismissed with costs.

Solicitors for the appellants: *Geoffrion & Prud'homme.*

Solicitor for the respondent: *Robert Forsyth.*

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IN RE FRED BROWN

*Jun. 26
*Jun. 28

Habeas Corpus—Criminal law—Accused sentenced to one year's imprisonment—Notice of appeal by Crown—Accused served sentence and released from gaol before hearing of appeal—Appellate court increasing sentence—Accused re-arrested and incarcerated—Whether illegally detained—Sections 1078 and 1079 Cr. C.

The petitioner was convicted on September 22, 1944, in respect of three separate charges under section 436 Cr. C. and was sentenced on each charge to be fined $5,000 or, in default of payment, to serve consecutively two years in gaol and, in addition, was further sentenced on each charge to serve one year in gaol, such sentence to run concurrently. The petitioner paid the fines and served the additional sentence of one year. On October 18, 1944, the Attorney General for Ontario gave notice of appeal against the additional sentence; but the appeal was not heard until May, 1946, at which time the petitioner, having served the sentence, had been released from gaol. The appellate court ordered that the sentence be increased on each of the charges for a further term of one year to run consecutively. The petitioner was re-arrested and incarcerated. He then moved for the issue of a writ of *habeas corpus,* claiming that he is detained illegally because there was no longer jurisdiction in the appellate court to increase the sentence imposed on him. The ground raised by the petition is that, under sections 1078 and 1079 Cr. C., the petitioner having undergone his sentence, this had "the like effect and consequences as a pardon under the great seal" and that, from that moment, he was "released from all further or other criminal proceedings for the same cause".

Held that the petition is not well founded and that the writ should not issue.

Held, further, that, as the same point has been submitted to the appellate court and that court had dismissed it, there would appear to be *res judicata* on the subject matter by a court competent to dispose of the objection; and the present petition, under the circumstances, might well be considered as an attempt to appeal indirectly from the judgment of the appellate court, where no direct right of appeal lies.

MOTION before The Chief Justice of Canada in Chambers, for the issue of a writ of *habeas corpus,* the petitioner claiming that he was illegally detained in gaol on the grounds stated in the head-note and in the judgment now reported.

S. A. Hayden K.C. for the motion.

John J. Robinette K.C. contra.

THE CHIEF JUSTICE:—The petitioner was convicted on a plea of guilty on the 22nd day of September, 1944, in respect of three separate charges, under section 436 of the

*PRESENT:—The Chief Justice in Chambers.

Criminal Code, as amended by 1939, chapter 30, section 8, and was sentenced on each charge to be fined $5,000 or, in default of payment, to serve two years in gaol, such sentence of two years to be served consecutively, and, in addition, was further sentenced on each charge to serve one year in gaol, such additional sentence to run concurrently.

The petitioner has paid the said fines and has served the said additional sentence of one year concurrently on each of the said charges.

On the 5th day of October, 1944, the Attorney-General for Canada gave notice of appeal against the sentence imposed, and, on the 18th day of October 1944, the Attorney-General for the province of Ontario gave similar notice. But through circumstances about which the petitioner does not complain, the appeal was not heard by the Appellate Division of the Supreme Court of Ontario, until the 3rd day of May, 1946, at which time the petitioner had served the sentence of one year imposed on him, and had been released from the gaol where he had served his term of imprisonment.

The Supreme Court of Ontario, Appellate Division, ordered that the additional sentence of one year in gaol on each of the above charges be varied by increasing the sentence on each of the said charges by a further term of one year, and the said increased sentence to run consecutively. The petitioner was re-arrested on the 6th day of June, 1946, and is presently confined at Kingston penitentiary, serving the increased sentence imposed on him as the result of the appeal.

It is now claimed that the petitioner is being detained illegally because there was no longer jurisdiction in the Supreme Court of Ontario, Appellate Division, to increase the sentence imposed on Brown as a result of which the arrest was made on the ground that, under sections 1078 and 1079 of the Criminal Code, the petitioner having undergone his sentence and having endured the punishment adjudged by the trial judge, this had "the like effect and consequences as a pardon under the great seal" and that,

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from that moment, he was "released from all further or other criminal proceedings for the same cause" and the court of appeal could no longer deal with the matter.

After having heard the very able argument on behalf of the petitioner pleading for the issue of a writ of *habeas corpus,* I am of opinion that the petition is not well founded and that the writ should not issue.

Under subsection (2) of section 1013 of the Criminal Code, the Attorney-General could, with leave of a court of appeal or a judge thereof, appeal to that court against the sentence passed by the trial court, unless that sentence was one which was fixed by law. This was done within the required delay.

Under section 1015, subsection (2), a judgment whereby the court of appeal increased the punishment of an offender, as happened in the premises,

shall have the same force and effect as if it were a sentence passed by the trial court.

Reading that section 1015 (2), together with sections 1078 and 1079, as they should be, my opinion is that the "punishment" referred to in section 1078 and the "imprisonment" referred to in section 1079 mean the punishment or the imprisonment as finally determined by the court of appeal, in cases where there has been an appeal, and which, by force of section 1015 (2),

shall have the same force and effect as if it were a sentence passed by the trial court.

Otherwise, to my mind, in very many cases, the recourse to the court of appeal would be rendered useless and inoperative.

Here, the notice of appeal was effectively served upon the petitioner, the Appellate Division of the Supreme Court of Ontario was regularly seized of the appeal, and that Court could either refuse to alter the sentence or diminish or increase the punishment imposed by that sentence. It increased that punishment and it had full jurisdiction to do so, under section 1015 of the Criminal Code.

The sentence or punishment so increased and imposed by the court of appeal had the same force and effect as if it were a sentence passed by a trial court; and the sentence,

punishment or the imprisonment to which sections 1078 and 1079 have reference, is the sentence, punishment or imprisonment which was substituted by the Appellate Division to the sentence, punishment or imprisonment awarded in the first instance. They, in fact, became the sentence, punishment or imprisonment awarded in the first instance, and it had the same force and effect as if it were passed by the trial court. It is only the enduring of that sentence as finally determined by the Appellate Division which, according to the true meaning of the two sections 1078-79 is stated to "have a like effect and consequences as a pardon under the great seal."

It cannot be held that there was any lack of jurisdiction in the Appellate Division to render the judgment it has rendered in the present case.

The above is really sufficient to dispose of the matter, because it contains a final answer to the petition for *habeas corpus* and it defines the limit to which I am entitled to go on such petition for the writ.

I have carefully read the authorities referred to by the learned counsel for the petitioner. (*Le Roi* v. *Levy* (1); *Rex* v. *Lee Park,* (2); *Rex* v. *Kirkham,* (3); *Rex* v. *Jarvis,* (4); *Rex* v. *Jarvis,* (5); and *Ex parte Boucher,* (6)) and either they support the opinion just expressed by me or, with respect, I feel bound to disagree with them.

I fully concur with the passage in Chief Justice Rowell's judgment in the second *Jarvis* case, (5) at page 197, that

> Sections 1078-79 should receive if possible a construction which would not deprive either the Crown or the accused of the right of appeal given by the Code. This would be achieved by construing them as being subject to the right of appeal.

As for the passage in Sir Lyman Duff's judgment re: *Royal Prerogative of Mercy upon Deportation Proceedings* (7), where the opinion is expressed

> that the phrase "punishment adjudged" in Section 1078 of the Criminal Code does not describe a punishment reduced by an act of the royal clemency, but is intended to designate the punishment nominated by the original sentence,

(1) (1923) Q.R. 35 K.B. 541.
(2) (1924) 43 Can. Cr. C. 66.
(3) (1935) 64 Can. Cr. C. 255.
(4) (1936) 66 Can. Cr. C. 20.
(5) (1937) 68 Can. Cr. C. 188.
(6) (1928) 50 Can. Cr. C. 161.
(7) [1933] S.C.R. 269, at 274; 59 Can. Cr. C. 301.

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I think it should be read in the way suggested by Chief Justice Rowell just mentioned, or suggested in the present reasons, that, when there is an appeal, the "punishment adjudged" is necessarily that finally determined by the court of appeal and which, under section 1015 (2), is substituted for the original sentence and thus becomes the original sentence.

Of course, I need not add that *habeas corpus* is not applicable to review the judgment whereby sentence was imposed, more particularly in this case where the appeal to the Appellate Division was limited to the sentence; and no appeal in respect of the sentence lies to the Supreme Court of Canada.

It should be pointed out that the point on which the application for *habeas corpus* is based was submitted to the Appellate Division and that Court passed upon it. I cannot see that it had no jurisdiction to dismiss the point and, now that it has done so, there would appear to be *res judicata* on the subject matter by a Court which was competent to dispose of that objection.

Indeed, the present proceedings, under the circumstances, might well be considered as an attempt to appeal indirectly from the judgment of the Appellate Division, where no direct right of appeal lies.

The latter objection would be fatal to the petitioner's present application, even if the point on which I am now deciding and which is based on the construction that, in my view, should be given to sections 1078-79, was not decisive. (See *In re Sproule,* (1)).

The petition will accordingly be dismissed (2).

Petition dismissed.

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(1) (1886) 12 Can. S.C.R. 140, at p.p. 190, 194 to 205, 211, and 245 to 248.

(2) REPORTER'S NOTE:—An appeal to the Full Court is now pending.

IN RE FRED BROWN

1946
*Jul. 17
Jul. 18

Bail—Jurisdiction—Petition for writ of habeas corpus.—Dismissal by a judge of this Court.—Application for bail before same judge, pending appeal to Full Court.—Whether judge has power to grant it or is functus officio—Section 58 Supreme Court Act.

A judge of the Supreme Court of Canada, who has rendered judgment refusing a petition for the issue of a writ of *habeas corpus,* ceases to have any jurisdiction to grant an application for bail by the petitioner, pending disposition of an appeal to the Court itself from the judgment in question. The judge, from the date of his judgment, is *functus officio* and the Court alone has jurisdiction to grant bail, provided the application for *habeas corpus* is brought before it by way of appeal.

APPLICATION made before The Chief Justice of Canada in Chambers, for bail pending disposition of an appeal to the Full Court from the judgment of The Chief Justice dismissing a petition for the issue of a writ of *habeas corpus* (1).

J. C. Osborne for motion.

John J. Robinette K.C. contra.

THE CHIEF JUSTICE:—My view is that I have no jurisdiction to grant the application for bail pending disposition of the appeal to the Supreme Court of Canada from my judgment dated the 29th day of June, 1946, whereby the petition for the issue of a writ of *habeas corpus* and the discharge from custody in the Kingston penitentiary of Fred Brown, alias Fred Bronstein, was refused.

The judgment was delivered by me, as stated, on the 29th of June, and since that date I consider that I am *functus officio.*

I construe section 58 of the *Supreme Court Act* to mean that while the *habeas corpus* matter is before a judge of the Supreme Court of Canada, that judge has the same power to bail, discharge or commit the prisoner or person, or to direct him to be detained in custody or otherwise to deal with him as any court, judge or justice of the peace having jurisdiction in any such matters in any province of Canada.

(1) See *ante* p. 532.

*PRESENT:—The Chief Justice in Chambers.

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But once the judge before whom the matter was brought has disposed of it by his judgment, he ceases to have any jurisdiction in the premises; and on appeal to the Court itself from the judgment in question, the Court alone then may exercise the power to bail, discharge or commit, etc.

It is sufficient to notice that throughout the *Supreme Court Act* wherever it was intended that the Court, or any judge of the Court, may exercise some jurisdiction the wording is invariably "the Court * * * or any judge thereof". In section 58, on the contrary, the language is: "the Court or judge". Taking into account the context in which this language is found, the "judge" there referred to is the judge before whom the application for *habeas corpus* was brought, and while such application is still before him,—and no other. After he has disposed by judgment of the *habeas corpus* petition, he becomes *functus officio*. The Court alone then has jurisdiction to grant bail, provided the application for *habeas corpus* is brought before it by way of appeal.

The application for bail is accordingly quashed.

Application dismissed.

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*Jun. 28
*Jun. 29

IN RE HAROLD SAMUEL GERSON
IN RE MATT SIMMONS NIGHTINGALE

Habeas corpus—Petitioners charged with criminal offence and committed for trial—Called as witnesses in another trial—Refused to be sworn and give evidence—Fear to incriminate themselves—Contempt of court—Sentence to term in jail "under common law"—Pronounced after trial terminated—Alleged illegalities of sentence and committal—Inability to prepare defence in their own trials—No conflict with section 165. Cr. C.—Section 5 Canada Evidence Act.

In March 1946, the accused were charged with violation of the *Official Secrets Act* and conspiracy to violate that Act. They were committed for trial and subsequently entered a plea of not guilty. Their trials were to take place in September, 1946. In June, 1946, they were called as witnesses by counsel for the Crown in a case of The King *v.* Rose. They refused to be sworn and give evidence on the ground that their testimony may tend to incriminate themselves, although

*PRESENT:— The Chief Justice in Chambers.

they were told by the trial judge that their refusal was in contradiction with the very wording of section 5 of the *Canada Evidence Act*. The petitioners were told to remain in attendance at the trial, and, being recalled later, still refused to give evidence. The trial judge then declared them in contempt of court and they were told to remain at the disposal of the Court. Some five days after the Rose trial terminated, the trial judge sentenced the petitioners "under the common law" to three months in jail, where they have been detained since. The petitioners moved for writs of *habeas corpus*, alleging that their detention was illegal and they were thus unable to prepare their full defence to the charges laid against them. The alleged illegalities are based on several grounds stated in the judgment now reported.

Held that the petitioners have not proved any illegality in the sentences and committals of the trial judge, who had full competence and jurisdiction to act as he did. There is no ground shown by the petitioners which would justify the ordering of the issue of the writs prayed for and the petitions, therefore, should be dismissed.—The refusal by the petitioners to be sworn was a direct defiance of a lawful order of the Court and an attempt to frustrate the course of justice: it was, moreover, a contempt in the face of the Court.—The explanation for their refusal cannot justify their conduct, because they could not then know that their answers might incriminate them and, moreover, they were acting in direct opposition to the very wording of section 5 of the *Canada Evidence Act*.—The power to punish for contempt is inherent in courts of superior original jurisdiction, quite independent of enactments in codes or statutes relating to their disciplinary powers.—The trial judge, when imposing the sentence, meant evidently to exercise that inherent power, when he stated he was proceeding "under the common law".—Section 165 Cr. C. does not conflict or interfere with such inherent power.—The trial judge was not compelled, either by the Criminal Code or the jurisprudence concerning contempt of court, to render his sentence immediately: he had the power of delaying it until the end of the Rose trial.

MOTION before The Chief Justice of Canada in Chambers, for the issue of a writ of *habeas corpus*, the petitioners alleging that they were illegally detained in gaol.

Marcel Marcus K.C. for the motion.

F. P. Varcoe K.C. and *Oscar Gagnon K.C. contra.*

THE CHIEF JUSTICE:—These are two petitions for the issue of a writ of *habeas corpus*, based on identical grounds and which therefore can be disposed of upon the same reasons.

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IN RE GERSON

IN RE NIGHTINGALE

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The petitioners allege that they are at present illegally detained in the common jail at Bordeaux, in the city and district of Montreal, under the following circumstances:

On or about the 15th of March, 1946, the petitioners were charged in the Ottawa Police Court with violation of the *Official Secrets Act* and conspiracy to violate the *Official Secrets Act* and they were committed for trial, after preliminary hearing.

They were subsequently arraigned before the Honourable the Chief Justice McRuer of the Supreme Court of Ontario, at Ottawa, and they entered a plea of not guilty. It is stated that their trial is to take place at Ottawa, on the 9th day of September, 1946.

On the 13th day of May, 1946, they were served with a subpoena to attend as witnesses and give evidence in the case of Rex *vs* Fred Rose. They attended the trial and remained in attendance from the 20th day of May, 1946, until they were called as witnesses by counsel for the Crown, the petitioner Gerson on the 8th of June and the petitioner Nightingale on the 12th of June, 1946.

The Honourable Mr. Justice Lazure was presiding in the trial by jury in the case of Rose.

The petitioners refused to be sworn and give evidence. In doing so, each of them explained to the learned trial judge that his refusal to answer questions was not because he wished to show any disrespect to the Court, nor did he desire to obstruct the course of justice in any way, but because he was afraid of incriminating himself.

The petitioners further explained that they had already been examined by the R.C.M.P. and the Royal Commissioners inquiring into certain matters of spies, when, as they alleged, they were refused the benefit of counsel, either before or during said examination. Further, they said, the report of the Royal Commissioners dealing with the petitioners' evidence, given before them, had been widely publicized and the petitioners had been prejudged as guilty even before they had their trial by jury, as they had elected.

The learned trial judge pointed out to the petitioners that, under section 5 of the *Canada Evidence Act,* no witness could be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

That section further adds that if, with respect to any question, a witness objects to answer upon the ground that his answer may tend to criminate him, and if, but for the *Canada Evidence Act,* the witness would therefore have been excused from answering such question, then although the witness is, by reason of this Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

The learned trial judge however denied Crown counsel's application to commit *instanter* the petitioners for contempt of court, but he required them to remain in attendance at the trial during its pendency.

On June 12, at the request of Crown counsel, the petitioners were recalled to the witness stand. The learned trial judge told them that, under section 5 of the *Canada Evidence Act,* they were compelled to answer the questions put to them.

The petitioners reiterated to the learned trial judge that they themselves were awaiting trial upon charges not dissimilar to those on which the accused Rose was being tried, and that they could not give evidence without serious danger of further criminating themselves and putting their liberty in jeopardy.

The learned trial judge then declared the petitioners in contempt of court and told them to remain at the disposal of the Court until the Rose trial terminated when he would tell them "what he would do with them". The petitioners were not detained.

The Rose trial terminated on the 15th day of June, 1946, and the petitioners were told to report to the Court on the 20th day of June, when the learned trial judge, without

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asking the petitioners whether they had anything to say or whether they had any lawful excuse or justification for refusing to obey the order of the Court to testify as required of them under section 5 of the *Canada Evidence Act,* sentenced the petitioners "under the common law" to three months in jail.

The petitioners were then taken to the Bordeaux jail and they have been detained there ever since.

They now allege in support of their petitions for the issue of a writ of *habeas corpus* that they are charged with the most serious offence of conspiracy, as well as the substantive offences under the *Official Secrets Act,* that their trial is set for September 9, 1946, and that while they are illegally detained at Bordeaux jail, they are unable to take the necessary steps to prepare their full defence to the charges laid against them and to make the necessary efforts to prove their innocence.

They claim that they are being detained illegally and without legal cause or justification and that the learned trial judge had no jurisdiction to sentence them to three months in jail, or at all, and that the sentence is illegal, irregular and invalid, and has no foundation in either law or in fact for the following reasons:—

A) In imposing the sentence of three months for contempt of court upon the petitioners, the learned trial judge stated that he was proceeding under the common law. Yet, under the common law, the petitioners were not compelled to give evidence which would criminate them.

B) If petitioners committed an offence at all, it was in refusing to obey an order of the Court to answer questions as required under section 5 of the *Canada Evidence Act.*

C) That such an offence is an indictable offence and is expressly covered by the Canadian Criminal Code.

D) That under the provisions of the Canadian Criminal Code, the petitioners were not committing an offence if they had a lawful excuse for not obeying such order.

E) That the petitioners should have been charged and tried under the provisions of the Canadian Criminal Code in that behalf, and on the hearing of such charge, the petitioners would have had the right to make a full defence

showing their justification or lawful excuse, which in fact they have, for refusing to obey such order of the Court.

F) That such justification and lawful excuse would be a complete defence as well under the Code as the common law.

G) That the learned trial judge never asked the petitioners before passing sentence upon them whether they had justification or a lawful excuse for refusing to obey the order of the Court to testify under section 5 of the *Canada Evidence Act.*

H) That inasmuch as the petitioners can be said to have committed an offence, it was in refusing to answer questions under the said section 5 of the *Canada Evidence Act,* and as the Canadian Criminal Code contains statutory provisions covering the offence of contempt of court, common law principles and practices did not apply in the premises.

I) That if the learned trial judge had jurisdiction to sentence the petitioners, by reason of their refusal to testify as aforesaid, upon the ground that there was urgency or expediency, to sentence them *instanter,* once the trial was over, and Rose had been convicted, such expediency and urgency had disappeared. The learned trial judge no longer had jurisdiction to summarily dispose of the contempt of court charge *instanter,* but should have proceeded in the manner prescribed by the provisions of the Canadian Criminal Code in that behalf.

I have no hesitation to say that the refusal of the petitioners to be sworn was a direct defiance of a lawful order of the Court and an attempt to frustrate the course of justice. Moreover, it was a contempt in the face of the Court.

The petitioners called as witnesses were not justified in refusing to be sworn or to be examined. The explanation of their refusal: that their testimony might tend to incriminate them, cannot be invoked in justification of their conduct for at least two reasons:—

(*a*) At that point in the case, the witnesses could not know that the answer to any question which might be put to them might incriminate them.

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(*b*) Section 5 of the *Canada Evidence Act* specifically enacts that no witness shall be excused from answering any question upon the grounds advanced by the petitioners as witnesses. Subsection 2 of section 5 of the *Canada Evidence Act* is clearly to the effect that, notwithstanding such circumstances, the witness is compelled to answer, but it adds that

> the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

The petitioners in refusing even to be sworn, notwithstanding the order of the Court, were in flagrant violation of the law and in designed contempt of the Court.

The power to punish for contempt is inherent in courts of superior original jurisdiction, quite independent of enactments in codes or statutes relating to their disciplinary powers.

As was said by Cross J. in *Fournier* v. *The Attorney-General* (1),

> It is to be observed that the power to punish for contempt by summary process is conceded on all hands to be a power inherent in every court of record.

(And see also what was said by Archambault J. in the same case, at page 459.)

It was, no doubt, to the existence of such inherent power, independent of enactments in codes or statutes, that Mr. Justice Lazure meant to refer by stating that he was proceeding "under the common law" and not under section 165 of the Criminal Code, which provides for the indictable offence of disobedience to the orders of a court. The imposition of the sentence was the exercise of the inherent power which exists independently of codes and statutes, but the contempt itself was the violation of section 5 of the *Canada Evidence Act,* which clearly state that the so-called explanation, put forward by the petitioners of their refusal to be sworn at all, constituted no lawful excuse.

Section 165 of the Criminal Code does not conflict or interfere with the inherent power to punish for contempt by summary process. That section provides for contempt in

(1) (1910) Q.R. 19 K.B. 431, at 436.

its criminal aspect and disobedience of orders of the court is thereby made an indictable offence if the procedure there referred to is resorted to, but section 165 itself contains the proviso

unless some penalty is imposed, or other mode or proceeding is expressly provided, by law.

Giving to section 165 the meaning suggested by counsel for the petitioners would do away with the inherent power.

In *Ex Parte Jose Luis Fernandez* (1), upon the trial at the assizes of an information against one C. for bribery alleged to have been committed by him at the election of a member of Parliament, a witness was called, on the part of the Crown, who had been examined before a Royal Commission about to inquire into alleged corrupt practices at that election, and who had received from the Commissioners a certificate indemnifying the witness from

all penal actions, forfeitures, punishments, disabilities and incapacities, and all criminal prosecutions to which he may become liable or subject at the suit of Her Majesty etc. for anything done by him in respect of such corrupt practice

—and being asked

Did you in the month of April 1859, receive any sum of money from Mr. C.?

declined to answer the question on the ground that his answer might tend to criminate himself; and, though told by the presiding judge that the certificate was a complete protection to him, and that he was bound to answer the question, he persisted in his refusal. The judge thereupon committed him to York Castle for six months

for having wilfully and in contempt of the Court refused to answer the said question

and further imposed upon him a fine of 55 pounds. It was held by the Court of Exchequer that, the Court of Assize being a superior court, the judge had jurisdiction to commit and was not bound to set out at length in his warrant the cause of his commitment, his decision not being subject to review by the Court above.

I find no substance in the contention of the petitioners that they were not, before sentence, asked whether they had any justification or lawful excuse for refusing to obey the

(1) (1861) 10 C.B. N.S. 3.

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order of the Court to be sworn and to testify. On the two occasions when the petitioners were called as witnesses, they had full opportunity to put forward any pretended excuse for their refusal and whatever justification they claimed was of no avail in view of section 5 of the *Canada Evidence Act*.

Nor was there anything wrong in delaying the sentence until the end of the Rose trial. There is nothing either in the Criminal Code itself or in the jurisprudence concerning contempt of court which compels the judge to render his sentence immediately.

In the case of *State* vs. *Morrill*, (1) referred to with approval by Mr. Justice Marshall in *Re Shepherd*, (2) at p.p. 261, 262, in the Supreme Court of Missouri, in 1903, it was stated, at p. 399 of *Morrill* case (1), in words which I wish to make my own:

> The cases above cited (and many more might be cited if deemed at all necessary), abundantly show that, by common law, courts possess the power to punish, as for contempt, libellous publications of the character of the one under consideration upon their proceedings, pending or past, upon the ground that they tend to degrade the tribunals, destroy public confidence and respect for their judgments and decrees, so essentially necessary to the good order and well being of society, and most effectually obstruct the free course of justice.

Before having cited the above passage, Mr. Justice Marshall said (3):

> The power to punish for contempt is as old as the law itself, and has been exercised so often that it would take a volume to refer to the cases. From the earliest dawn of civilization, the power has been conceded to exist. It has been exercised, or not, as a matter of public policy, but its existence has never been denied. * * * In fact, so well settled is the law of England in this regard that it is said in 3 Enc. of Laws of England, p. 313: "A Court of justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are instructed to its care, would be an anomaly which could not be permitted to exist in any civilized community . . . . without such protection, courts of justice would soon lose their hold upon public respect, and the maintenance of law and order would be rendered impossible."

I do not find therefore that the petitioners have proved any illegality in the sentences and committals by Mr. Justice Lazure. The learned trial judge had full competence

(1) (1855) 16 Ark. 384.
(2) (1903) 177 Mo. 205.
(3) (1903) 177 Mo. 205, at pp. 218 and 226.

and jurisdiction to act as he did and the petitioners show no ground upon which I would be justified in ordering the issue of the writs prayed for; and for the above reasons, their petitions should be dismissed.

Petition dismissed.

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IN RE

SAMUEL HAROLD GERSON

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*Sept. 4
*Sept. 5

Habeas corpus—Petitioner charged with criminal offence—Refused to be sworn as witness in another trial—Fear to criminate himself—Contempt of court—Sentence "under common law"—Legality of sentence or committal—Sections 165 and 180 Criminal Code.

The petitioner, charged with a criminal offence, being called as a witness in a criminal trial, refused to be sworn and give evidence. The trial judge declared him in contempt of court and sentenced him "under the common law" to a term of imprisonment. The petitoner applied for the issue of a writ of *habeas corpus* before The Chief Justice of this Court, and the application was dismissed. The petitioner then appealed to the Full Court from that order.

Held that the appeal should be dismissed.—The trial judge had the power and authority to make the committal order and, in proceeding to do so, had not infringed any rule of law.

APPEAL from an order of The Chief Justice of Canada, in Chambers, (1) refusing an application by the petitioner for the issue of a writ of *habeas corpus.*

Marcel Marcus K.C. for the appellant.

F. P. Varcoe K.C. and *Oscar Gagnon K.C. contra.*

The judgment of the Court was delivered by

KERWIN J.:—This is an appeal from an order of the Chief Justice of this Court refusing an application for the issue of a writ of *habeas corpus.* Apparently no question was raised before the Chief Justice and certainly it was not raised before us as to his power, or ours, to order the issue of such a writ under section 57 of the *Supreme Court Act* and nothing, therefore, is said upon the point.

(1) See *ante* p. 538.

*PRESENT:—Kerwin, Hudson, Rand and Estey JJ.

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The circumstances attending the committal of the applicant to three months in jail are set forth in the reasons for judgment of the Chief Justice and need not be repeated. It is sufficient to state that the applicant declined to be sworn as a witness for the Crown in a criminal trial against a third party although subpoenaed so to do, on the ground that the answer he might give to any question that might be put to him might tend to criminate him, and this notwithstanding the provisions of section 5 of the *Canada Evidence Act*:—

> 5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> 2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

It was argued that because Mr. Justice Lazure, before whom the trial was proceeding, stated that he sentenced the applicant under the common law the order for committal was void. The argument was, that since at common law the applicant would not have been compelled to answer any question that might tend to criminate him, and that it was only by the above section that this privilege was removed, the common law had no application. However, as the Chief Justice of this Court pointed out in effect, it was the common law as to contempt of court to which Mr. Justice Lazure referred.

Reference was then made to section 165 of the Criminal Code:—

> Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order other than for the payment of money made by any court of justice, or by any person or body of persons authorized by any statute to make or give such order, unless some penalty is imposed, or other mode or proceeding is expressly provided, by law.

And to section 180 (*d*):—

Every one is guilty of an indictable offence and liable to two years' imprisonment who

* * *

(*d*) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice.

The argument on this point was that the applicant could be prosecuted under either of these sections and that these proceedings being available the right of the Court to punish for a contempt of court had been abrogated. Without deciding whether either of these sections would apply in the circumstances, we are of opinion that even if that were so it is a necessary incident to every superior court of justice to imprison for a contempt of court committed in the face of it: *Ex Parte Jose Luis Fernandez* (1), a judgment of the Court of Common Pleas in which judgments were delivered by Chief Justice Erle, Willes J. and Byles J. That right persists and has not been abrogated by either of the sections of the Criminal Code referred to and the mere fact that the trial of the third party had been completed did not deprive the Court of the power to exercise its authority.

Mr. Marcus next argued that even if he admitted that a contempt of court had been committed by the applicant and that Mr. Justice Lazure had the power to punish the applicant for that contempt, no opportunity was given the applicant to make any representations as to what order should, under all the circumstances, be made. This is not like the case of *In Re Pollard* (2), because, undoubtedly, the present applicant took a position from the very commencement in direct conflict with the provisions of section 5 of the *Canada Evidence Act* and there was no doubt as to this being the basis of the order of committal made against him. Reliance, however, was placed upon another decision of the Privy Council in *Chang Hang Kiu* v. *Piggott* (3), but there what was in question was a section of an Ordinance and it was held that as it did not dispense with giving the appellants an opportunity before sentence of

(1) (1861) 10 C.B. n.s. 3.
(2) (1868) L.R. 2 P.C. 106.
(3) [1909] A.C. 312.

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explaining or correcting misapprehensions of their statements, it was essential that it should be accorded to them. It was also held that the judge who had committed for contempt should, before sentencing the appellants,

> have given them an opportunity of giving reasons against summary measures being taken.

That, however, must be read in connection with the Board's subsequent statement

> it would have given an opportunity of explanation and possibly the correction of misapprehension as to what had been in fact said or meant

and also in connection with the Board's reference to the *Pollard* case (1). Here, accepting what is stated in the petition for the writ of *habeas corpus* that the applicant in a polite manner expressed his respect for the Court and the presiding Justice and his desire not to obstruct the course of justice in any way, it is apparent from the petition itself that the applicant adhered to his original position that he would not answer any question because such answer might tend to criminate him. Mr. Justice Lazure had already been apprised that Gerson had been indicted and had pleaded not guilty; that he was at liberty on bail and that his trial would take place early in the following September; and it is not suggested that there was anything else that the applicant desired to say or in fact could say.

Reliance was placed upon the fact that in another prosecution in Ontario, Chief Justice McRuer had declined to make an order of committal against one Lunan for refusing to answer certain questions on the ground that they tended to criminate him. As Chief Justice McRuer stated, he was there dealing only with the cricumstances of that particular case. This decision was brought to the attention of Mr. Justice Lazure but it has no application to the circumstances of any other case, including this. In fact, in this connection and also in connection with the suggestion that the applicant, instead of being imprisoned, might have been dealt with in some other way, it should be pointed out that these circumstances have nothing to do with the original application before the Chief Justice of this Court for a writ of *habeas corpus* or the present appeal. Neither proceeding is an appeal from the order

(1) (1868) L.R. 2 P.C. 106.

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for committal. The Chief Justice was, and the Court is, restricted to an inquiry as to whether Mr. Justice Lazure had the power and authority to make the committal order and whether in proceeding so to do he infringed any rule of law. We are of opinion that he had the power and that he did not transgress any rule of law and the appeal must be dismissed.

Appeal dismissed.

1946

*May 13, 14
*Oct. 1

IRVING OIL COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Compensation—Value to owner—Gasoline service station—Allowable items—Expropriation Act, R.S.C. 1927, c. 64, sections 2 (d) 3, 23.

The appellant company, a distributor of gasoline and oil products, purchased a corner lot in the city of Saint John N.B., and erected a service station thereon. Some years later, the Crown expropriated the property and the present action is to determine its value. The Crown offered a sum of $4,750, while the Company claimed an amount over $21,000. The Exchequer Court of Canada awarded $6,000 in all to the Company, after having estimated at $4,000 the fair market value of the land and improvements. The Company appealed to this Court.

Held, varying the judgment of the Exchequer Court of Canada ([1945] Ex. C.R. 228), that the amount of compensation money to which the appellant company is entitled should be increased and that a sum of $8,697.88 should be awarded, consisting chiefly of the costs of the purchase of the land, of the making of a necessary fill-in and of the construction of the service station less fifteen per cent. for depreciation on the latter, plus expenses of removal and depreciation of equipment and compensation for compulsory taking.

Section 23 of the *Expropriation Act* provides that "The compensation money * * * adjudged for any land * * * acquired or taken * * * shall stand in the stead of such land * * *," and, by section 2 (*d*), "'land' includes * * * damages, and all other things done in pursuance of this Act * * *"

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

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Per The Chief Justice and Kerwin J.:—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.

Per Hudson J.:—The value to be fixed is the value to the owner, bearing in mind its acquisition of the property for special purposes and the net earnings which it might receive therefrom until it had established other profitable outlets for its products.

Per Rand J.:—The use of the word "damages" and the further language "and all other things done in pursuance of this Act" in section 2 (*d*) indicate the comprehensive sense in which the word is used and that it is intended to cover not merely the value of land itself, but the whole of the economic injury done which is related to the land taken as consequence to cause.

Per Estey J.:—It is the market value of the property expropriated, plus allowances equivalent to the present worth of those advantages which the property possessed to the owner, that constitutes the compensation to which he is entitled.

Cedar Rapids Manufacturing and Power Co. v. *Lacoste* ([1914] A.C. 569) and *Pastoral Finance Association Ltd.* v. *The Minister* ([1914] A.C. 1083) ref.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J. (1), awarding to the appellant company the sum of $6,000 in full compensation for the property expropriated by the Crown under the *Expropriation Act,* R.S.C. 1927, c. 64. The Crown had offered $4,750 and the appellant company had claimed $21,544.30. The appellant appealed to this Court for an increase of the award granted by the Court below.

C. F. Inches K.C. for the appellant.

R. D. Keirstead and *C. Stein* for the respondent.

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

KERWIN J.:—On July 8, 1943, under the provisions of the *Expropriation Act,* R.S.C. 1927, chapter 64, the Crown expropriated lands of the Irving Oil Company Limited, situate at the corner of Britain and Prince William Streets, in the city of Saint John, in the province of New Brunswick. It offered the Company for the property $4,750 and the

(1) [1945] Ex. C.R. 228.

proportionate share of the 1943 municipal taxes from July 8 to December 31, 1943, while the Company claimed some $21,000. The Exchequer Court of Canada awarded $6,000 and the Company now appeals.

The Company is a distributor of gasoline and other oil products, with its head-office at Saint John, and operates and maintains bulk stations and service stations throughout the Maritime provinces. It does not carry on business in the United States. In 1935, the Provincial Government announced plans for a system of paved roads, and the Company, expecting an influx of tourists, turned its attention to a consideration of the increased number that might be expected to travel by ship from Boston to Saint John. This ship made two trips each week during the summer, docking at Reed's Point, just across Prince William street from the land here in question. It did not run in the winter. The ship carried automobiles whose gas tanks, however, had to be emptied before being put on board.

A business competitor, Provincial Oil Company, purchased a lot on the north side of Britain street for $1,600 and erected a service station thereon. In December of that year the appellant company purchased its corner lot for $3,000 and erected a service station thereon with a large sign in front. It cost $666 to fill-in the land, and the cost of the service station appears to be $3,938. In accordance with its usual practice, it leased the property to various lessees to run the service station at a rental of one cent for every gallon of gasoline sold by the lessee. After allowing for taxes and maintenance, and taking into consideration losses from the renting of the property in certain years, the Company estimated that it had a net annual revenue from it and from the profit of five cents per gallon for every gallon furnished by it to its lessees during the years 1937 to 1941.

The Company's object in buying the property and erecting the service station was, as one of its officers stated, to have it as an advertising medium. Not relying solely upon the building and sign, it had its men approach the passengers from the Boston ship with literature and maps and, of course, endeavour to sell its own products. The Provincial Oil Company was doing the same thing and the

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competition became so keen that the ship's officials finally took steps to keep the contending parties off the dock. The appellant company's premises are nearer to the dock than those of Provincial Oil Company. The Boston ship ceased running in the fall of 1939 or 1940 but it is a reasonable probability that it will start again.

The appellant's service station is not located in a desirable district from the point of view of residence, and in fact most of the buildings in the neighbourhood are stated to be in a condition of non-repair; railway tracks run along Prince William street and part, at least, of the section is more suited for manufacturing than anything else. The Company made up its claim on the basis of the original cost, or upon the replacement value in 1943 of the building, and claimed for loss of goodwill and loss of profits besides several small items to be mentioned hereafter. The Crown's evidence was directed towards showing the assessed value of this property and adjoining property which had also been expropriated by the Crown but as to which it had been able to arrive at a settlement with the owners. Assessment, of course, is not a deciding factor but merely one of the things that may be looked at in arriving at a final conclusion. In this case I think it has no bearing whatever. The evidence as to what other owners in the immediate vicinity accepted in payment of their holdings is not of assistance because, as it has been pointed out more than once, these owners may for various reasons prefer to take lower sums rather than enter into a dispute; and, furthermore, none of the properties is really comparable when one considers what the Crown is taking from the appellant.

The trial judge stated:—

> While the fair market value to any one other than an oil company might be in the neighbourhood of $4,000. the competition between the companies still exists and for that reason another oil company would pay a higher price. It would gain an outlet for its own products and close the outlet of its competitor. This potentiality must be taken into account in arriving at a fair market value to the defendant. The price that another oil company would pay would certainly be based on the yearly gallonage of gasoline passing through the station and the evidence showed that over a five-year period this was small.

While making no allowance for loss of profits, he found that the compensation money to which the appellant was

entitled was $6,000. This is about the sum mentioned by the witness Lawton, called on behalf of the Crown. While the reading of his evidence does not impress me, if the trial judge had chosen to take his estimate in preference to others and had proceeded upon proper principles, I would, of course, not suggest any change. However, while expressions may be found in some of the cases that, where property expropriated is not ordinary agricultural or residential land, there should be added to the fair market value of land of that type an additional amount for the particular value to the owner, it is not meant by that, that two sets of figures should be set down and added together,—at least not in all cases. In another respect the trial judge erred where he said that while damages are included in the definition of "land" in section 2 (*d*) of the *Expropriation Act,* that was clearly damage for land injuriously affected. That statement would cover but a few items of the amounts claimed and I shall revert to the question later.

In this type of case, two decisions of the Privy Council are always referred to. The principles set forth in *Cedar Rapids Manufacturing and Power Company* v. *Lacoste* (1) are well-known and need not be repeated but it is important to refer particularly to a passage in the judgment of Lord Moulton in *Pastoral Finance Association Limited* v. *The Minister* (2). He pointed out that the owners in that case were not entitled to have the capitalized value of certain prospective savings and additional profits added to the market value of the land taken in estimating their compensation, and then continues:—

> They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they 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.

As pointed out by Mr. Justice Duff, as he then was, in *Manuel* v. *The King* (unreported), where this Court affirmed the judgment of the Exchequer Court of Canada (3), this statement is not a preferable way of putting it for the purpose of a case where a residence long occupied by the owner had been expropriated. In the present case, however, the appellant company was not imprudent, in

(1) [1914] A.C. 569.
(2) [1914] A.C. 1083.
(1) (1915) 15 Ex. C.R. 381.

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1935, in purchasing this corner lot and expending the money they did upon it, and, therefore, they should receive the cost of the land, the cost of the fill, and the cost of the service station, less an allowance for depreciation of fifteen per cent. on the latter. This would mean $3,000 plus $666 plus 85 per cent. of $3,938. I agree with the trial judge that notwithstanding the fact that by a by-law of the city of Saint John, the erection of any service station from a point 100 feet north of Britain street is prohibited, and that by a provincial enactment of 1935 no retailer's licence for a new service station shall be issued unless in the judgment of the appropriate Minister, public convenience and necessity so require, the appellant will not lose the sale of all its products that had previously gone through this particular service station. Under the circumstances of this case, the appellant is entitled to ten per cent. for compulsory taking on the total of the above items, $7,013.50 or $701.33.

Under section 23 of the *Expropriation Act*,

> The compensation money * * * adjudged for any land * * * acquired or taken * * * shall stand in the stead of such land,

and by section 2 (*d*) "land" includes "damages." It was argued in the Exchequer Court of Canada, before the late President Maclean, in *Federal District Commission* v. *Dagenais* (1), that no compensation could be allowed for certain items there claimed because they did not represent an estate or interest in the lands taken. While saying nothing as to the correctness of the list of things for which compensation has been allowed and enumerated by the late President, I agree with him that 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. Examples may certainly be found of cases where allowances have been made for such things as would correspond to the cost of moving the present appellant's equipment, and depreciation thereon. There is no dispute as to the amounts of these items, $120 and $275. There is also no good reason why, in these cases, the Crown should not pay the proportion of municipal taxes from the date of expropriation to the

(1) [1935] Ex. C.R. 25.

end of the current year, $88.25, and as a matter of fact, that was offered by the Crown in addition to the sum of $4,750.

The total of the above items is $8,197.88, which I considered sufficiently large to include any loss of profits. However, as some members of the Court consider $500 more should be allowed under that heading, I do not disagree. The appeal should, therefore, be allowed and in lieu of the sum of $6,000 mentioned in the judgment, there should be inserted the sum of $8,697.88. The appellant is entitled to interest thereon at the rate of five per centum per annum from July 8, 1943, the date of the expropriation, to the date of this judgment, and is also entitled to its costs of the appeal.

HUDSON J.:—The matter for decision in this appeal is the amount of compensation payable to the respondent for rights owned by it and taken by the Crown in the right of the Dominion for public purposes.

The land in question is near the harbour of Saint John, N.B. It was purchased by the respondent in December, 1935, for $3,000 and the defendant erected thereon a building for a service station at a cost of $3,947.58.

Thereafter the respondent leased the premises to various tenants who operated same on the basis that the tenant should there sell exclusively gasoline and oil products of the respondent and should pay as a rental one cent per gallon for all gasoline sold.

The evidence of value at the date of expropriation is not satisfactory.

The learned trial judge puts the matter thus:

> While the fair market value to any one other than an oil company might be in the neighbourhood of $4,000, the competition between the companies still exists and for that reason another oil company would pay a higher price. It would gain an outlet for its own products and close the outlet of its competitor. This potentiality must be taken into account in arriving at a fair market value to the defendant. The price that another oil company would pay would certainly be based on the yearly gallonage of gasoline passing through the station and the evidence showed that over a five-year period this was small.

I see no reason to question the finding of the learned trial judge as to the market value of the property, apart from its special usage. The purchase price is some

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evidence of the value but this depends on many circumstances. A purchaser may make a bad bargain or a good one. If he makes a bad bargain, he surely is not entitled to compensation, and if he makes a good one he should not be deprived of any advantage thereby gained. Moreover, conditions affecting value may change.

In the present case, the evidence makes it fairly clear that the value of the property to the respondents must be greatly affected by the revenue which they derived and might expect to receive from the sale of their products. It appears that on the basis of the rental the property did not carry itself but, on the other hand, the respondents did make profits from the sale to the tenant of its products. This should be taken into account.

The learned trial judge in the portion of his judgment above quoted refers to the amount another oil company might be expected to pay for the property. With respect, I do not think that this is the sole criterion of the value. It seems to me that here, where the owner had acquired the property for a specific purpose and had established a business thereon, there might well be a special value to him greater than to any other competitor. The statement put in evidence as to the net profits on the sale of products showed something in excess of $1,000 a year for a number of years preceding the expropriation.

I am not satisfied that a thorough examination of circumstances might not reduce this sum substantially but, on such evidence as there is, it would appear to be sufficient to provide a return which would justify a valuation of somewhat over $8,000, if there be included therewith the miscellaneous items such as costs of moving equipment, etc., and special allowance for compulsory taking included by the trial judge in his computation.

The principles upon which compensation for compulsory taking should be based are very well settled by decisions of Canadian courts and the Judicial Committee. I would just quote again the statement of Lord Dunedin in *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste* (1).

> The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. The value to the

(1) [1914] A.C. 569 at 576.

owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

In the present case I think that the value to be fixed is the value to the owner, bearing in mind its acquisition of the property for special purposes and the net earnings which it might receive therefrom until it had established other profitable outlets for its products.

For these reasons, although I think the amount rather generous, I will not dissent from the amount proposed by the other members of the Court, namely, $8,697.88 and concur in the order that the appeal should be allowed with costs, and the amount awarded to the appellant increased to that figure, with interest from 8th July, 1943.

RAND J.:—This is an appeal against the award of the Exchequer Court of Canada for land taken by the respondent under the *Expropriation Act*. The property consisted of a gasoline filling station with the ordinary facilities for persons and for washing and greasing cars. The land lay at the corner of Britain and Prince William streets in the city of Saint John, almost immediately opposite the wharf at which the steamships of the Eastern Steamship Company tied up. This service between Boston and Saint John has been in existence for many years.

The appellant in the course of establishing a system of gasoline distribution throughout the Maritime provinces came to the conclusion that the land in question would afford a desirable site from which to advertise its business to incoming tourists by boat to New Brunswick. In 1936 it purchased the land for $3,077, spent approximately $600 to make a necessary fill, and set up the building and gasoline service facilities at an expense of $3,938. From that time until the summer of 1942 the station was operated by several lessees. The arrangement tied the station to the purchase from the appellant of all gasoline, oil and other automobile supplies, and the rent was based upon 1c for each gallon so supplied. Some time in the late summer of 1942, the naval authorities at Saint John intimated to the lessee that the property was to be taken over for war purposes, and the lessee promptly gave up the station. The plan of expropriation was actually filed only in June, 1943.

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At that time there were three sets of restrictions upon opening gasoline stations. First, there was a zoning limitation in the city of Saint John which did not permit a filling station in this particular section of the city below a point 100 feet north of Britain street. There was, next, a provincial regulation which required that good ground be shown for a new facility before it would be authorized; and finally, the war regulations prohibiting absolutely new stations. From this it resulted that from the time of expropriation until the trial of the information, it was legally impossible for the appellant to have opened a substitute station for that taken over.

The appellant claimed:—

(*a*) For the value of the land and building;

(*b*) The expense of taking up and removing certain parts of the facilities, such as gasoline tanks and pumps; and

(*c*) Loss of profits.

The Court allowed the sum of $4,000 as the market price of the land and improvements, and estimated that for the special purposes of the business of the appellant, an additional value of $2,000 should be allowed; and from that award, the appeal is brought to this Court.

The provisions of the *Expropriation Act* dealing with compensation are in general language. Section 2 (*d*) defines "land" as follows:

> (*d*) "Land" includes all granted or ungranted, wild or cleared, public or private lands, and all real property, missuages, lands, tenements and hereditants 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.

The use of the word "damages" and the further language "and all other things done in pursuance of this Act", indicate the comprehensive sense in which the word is used and that it is intended to cover not merely the value of land itself, but the whole of the economic injury done which is related to the land taken as consequence to cause.

Then section 23 provides:

> 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;
> * * *

This language must be construed, within the limits mentioned, in the sense of compensation "by reason of" the acquisition or taking of land or property. 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.

There is nothing in the *Exchequer Court Act* which is in conflict with that view. Section 47 provides that

> the Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work * * * shall estimate or assess the value or amount thereof at the time when the land or property was taken, * * *

The word "for" taken with the language of section 50:—

> The Court shall, in determining the compensation to be paid to any person for land taken * * *

supports it.

This interpretation of the statute, in agreement with that given similar but not precisely the same statutory language in England, is assumed by this Court in the case of *The King* v. *MacArthur* (1), and the reference to that decision by Duff J. (as he then was) in *City of Toronto* v. *Brown* (2), does not challenge that interpretation in relation to the *Expropriation Act* or the *Railway Act*; and the long series of cases decided in the Exchequer Court of Canada since 1887 on the same assumption puts it beyond doubt that the effect of the Canadian Acts has been judicially determined to be the same as that of the *Railway Clauses Act* and the *Land Clauses Act* of England.

The statement of Lord Justice Moulton in *Pastoral Finance Association Ltd.* v. *The Minister* (3):

> Probably the most practical form in which the matter can be put is that they 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.

emphasizes the essential consideration to be regarded in determining compensation in a case of this kind. If the land is such as to have no special value to the owner, then

(1) (1904 34 Can. S.C.R. 570.
(2) (1917) 55 Can. S.C.R. 153.
(3) [1914] A.C. 1083, at 1088.

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the general market value, including the present worth of all possibilities, is the measurement of compensation. If a special value is actually realized by him, then the compensation must represent the sum which as a prudent man he would be prepared to pay rather than to fail to obtain or retain his property.

Admittedly here the property had a special value and a special adaptability to the appellant. It was purchased and developed in an unusual site for advertising the products of the appellant. For any other purpose suggested, the value of the land would be less than that which the appellant paid. There was a competing service station about 75 yards or so farther east on the north side of Britain street as well as the larger generalized competition prevailing in the whole of the gasoline supply field.

But the only evidence before the Court bearing upon the value to the owner is the amount which it cost the appellant to set the station up. As to this, there is no dispute, but it was not on that basis that the award was made. The Court considered rather the general market value of the property from evidence given of amounts paid for adjoining lots taken in conjunction with the improvement added. But for the $2,000 additional sum representing in effect the special value to the owner, there is nothing beyond what the appellant itself has presented. There is no suggestion in the case that the purchase was unprofitable or that the judgment of the company was poor or that the experience of six years showed that it was not when purchased or at that time worth what the appellant had laid out in it.

In this branch of the claim then I am forced to the view that the court below erred in the basis in fact of its computation; in the absence of any other evidence the actual outlay, with the prudence of judgment behind it unquestioned, should, in such a field, have been the support for the finding of the special value to the appellant. Under this heading I think the appellant is entitled to the amount which was actually expended, up to the time of expropriation, in the development of the property, less a depreciation of 15 per cent. on the building. To this should be

added the expense of taking up and removing to its stock yard the tanks and pumps and other apparatus of the station, the possibility of their re-installation in a substitute station, and some allowance for their depreciation.

The final item is expressed in terms of loss of profits. It is said that profits are never recoverable under the principles of compensation so laid down, and in the true sense, that is so: they are not recoverable as such: and they cannot be used for the purposes of capitalization to reach the sale value of the land. They represent in this aspect the productive capacity of the owner as contrasted with rents which may represent the productive capacity of the land. But where a business is temporarily disrupted, then loss of profits may furnish the proper basis to estimate the damage suffered by reason of the loss of possession. The causal connection must of course be shown: but if it is, then the settled rule takes them into account generally as disturbance to or interference with the business. This is well issustrated in *Jubb* v. *Dock Company* (1). In that case the language of the statute contained this clause:

and also the sum to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works.

The jury found a sum of £300 as compensation for the damage, loss and injury which the owner sustained by reason of having to give up his business as a brewer until he could obtain other suitable premises, and that allowance for damages was held by the Court to be within the language quoted.

There was a substantial gallonage of gasoline being sold at the station, the loss of which would be reflected both in the rent and in the company's general profits; but it is quite impossible to say how much if any went to other stations of the company. Obviously the cessation of sailings of the steamship company to Saint John during the war and the uncertainties of business after the war render estimates difficult. There can be little doubt, however, that between June, 1943, and the date of the trial or the end of the war, a measurable loss was suffered. For this damage, taking into account off-setting items, I think the appellant should be allowed the sum of $500.

(1) (1846) 9 Q.B. 443.

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A recapitulation of the allowable items would then be as follows:

Purchase of the lands and making of the fill	$3,666 00
Construction of the building	3,938 00
Expenses of removal and depreciation of equipment, etc.	395 00
	$7,999 00
Less estimated depreciation of building at 15%	590 70
	$7,408 30
Damages through disturbance of business, etc.	500 00
Forcible taking	701 33
Unearned taxes	88 25
Total	$8,697 88

I would, therefore, allow the appeal with costs and increase the amount of the award to the sum mentioned with interest to the date of this judgment.

ESTEY J.:—The Government of Canada on July 8, 1943, expropriated, under the provisions of the *Expropriation Act*, 1927 R.S.C., c. 64, a parcel of land in the city of Saint John. The only part of that land we are here concerned with was owned by the appellant and situated at the corner of Britain and Prince William streets. The government tendered the sum of $4,750, together with interest thereon of 5 per cent. from the date of expropriation, and $88.25 being the taxes paid by the appellant to the city of Saint John for the year 1943 from the date of expropriation to the 31st of December, 1943. The tender was refused by the appellant and consequent proceedings commenced in the Exchequer Court of Canada to determine the compensation the government should pay for the said lot. The appellant before the Exchequer Court of Canada asked $21,544.30.

The learned trial judge in the course of his judgment stated:

> While the fair market value to any one other than an oil company might be in the neighbourhood of $4,000, the competition between the companies still exists and for that reason another oil company would pay a higher price. It would gain an outlet for its own products and close the outlet of its competitor. This potentiality must be taken into account in arriving at a fair market value to the defendant.

He then fixed $6,000 as the amount of compensation to which the appellant was entitled.

The appellant is a distributor of gasoline and oil products and throughout the Maritime provinces maintains many service stations and bulk distributing centres. In 1935 the Provincial Government entered upon a policy of paved roads which it was anticipated would result in increased tourist traffic, particularly with automobiles. A regular boat service was maintained between Boston and Saint John in the summer months, and at Saint John this boat docked approximately opposite the lot in question. The automobiles of passengers were accommodated upon this boat and under the regulations the gas tank had to be emptied before the automobile could be placed on board. As anticipated, many tourists did come by boat and brought their automobiles. In fact the competition for this tourist business was so keen between the appellant and the Provincial Oil Company that those in charge of the unloading at the docks had to somewhat restrain their activities. There was, therefore, at this point an opportunity for doing business with the tourists, and particularly possibilities for advertising by distributing maps and information that would assist the tourists in their travel throughout the provinces. With these possibilities, particularly that of advertising, the appellant purchased the lot in question in December 1935 for $3,000 and after spending about $666 in levelling the lot and making it suitable for its purpose, erected a service station thereon at a cost of $3,938. It then installed its usual service station equipment. Apart from this latter equipment, which was removed by the appellant at the time of the expropriation, it had an investment of over $7,600.

In the same year, and with apparently much the same objects in view, the Provincial Oil Company purchased a lot nearby for $1,600 and erected thereon a filling station.

Section 23 of the *Expropriation Act* reads in part as follows:

> 23. The compensation * * * adjudged for any land or property acquired or taken for * * * any public work shall stand in the stead of such land or property; * * *

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Lord Dunedin in delivering the judgment of the Judicial Committee in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1), stated as follows:

The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board,* (2), where Vaughan Williams and Fletcher Moulton L.J.J. deal with the whole subject exhaustively and accurately.

Lord Justice Fletcher Moulton in that case of *In re Lucas and Chesterfield Gas and Water Board* (2), at p. 29, stated:

The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

Mr. Justice Taschereau, writing the judgment of the Court in *The King* v. *Elgin Realty Co. Ltd.* (3), stated:

* * * the value to the owner consists in all advantages which the land possesses, present and future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value.

Mr. Justice Idington, with whom Davies J. and Maclennan J. concurred, in *Dodge* v. *The King* (4), stated:

The market price of lands taken ought to be the *prima facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

* * *

The compensation must rest, not on what such a block may be worth to the Crown for the peculiar purpose involved in its acquisition, but upon the loss the owner suffers by the Crown taking it.

(1) [1914] A.C. 569, at 576.
(2) [1909] 1 K.B. 16.
(3) [1943] S.C.R. 49, at 52.
(4) (1906) 38 Can. S.C.R. 149, at 155 and 158.

These quotations emphasize that it is the market value of the property expropriated, plus allowances equivalent to the present worth of those advantages which the property possessed to the owner, that constitutes the compensation to which he is entitled. An application of the principles embodied in the foregoing quotations to the facts of this case results, with deference to the learned trial judge, in compensation to an amount quite in excess of $6,000. One witness valued the lot at $1,000 and another even a little less. The first condemned it as a suitable location for a service station and the latter based his conclusion upon figures supplied to him and admitted that, had he known that $3,000 had actually been paid for it, he might have so valued it.

The established facts are that in 1935 the appellant paid $3,000 for the lot in question, and the Provincial Oil Company in the same year paid $1,600 for a nearby lot which, for the purposes we are considering, was not so favourably located. Each company established a service station upon their respective lots and continued to carry on business there, until the appellant by these expropriation proceedings was compelled to discontinue. That though the officer of the appellant company who selected the lot deposed that in doing so its possibilities for advertising was "the chief motive in mind at that time", it has in fact been operated at a profit, even in the years after the Boston boats, because of the war, were discontinued. These lots were purchased in the open market and no evidence was adduced that indicated these lots had depreciated in value. The fact that they were operating at a profit and the value of the location for advertising purposes, particularly when the Boston boats resume their sailings, leads to the conclusion that the purchase price would be substantially the market value of these lots, particularly to oil companies, at the time of this expropriation.

In order to make the lot suitable for its purpose, the appellant expended $666 in filling and levelling the ground. This amount is accepted by both of the contractors who examined the plans and specifications. It then constructed a service station at a cost of $3,938, and there was evidence of replacement values by the two experienced

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contractors. After allowing depreciation of 15 per cent. they respectively estimated the replacement cost of the building in 1943 at $5,182 and $5,474.20. The only figure less than the cost deposed to was that of $3,000 by one who had neither inspected the building nor examined the plans and specifications. It would appear, particularly as the appellant was maintaining the business thereon at a profit, that under all the circumstances it is at least entitled as compensation to its original cost less the depreciation adopted by the contractors in the sum of 15 per cent.

The appellant had paid the taxes for the year 1943. The respondent has tendered the proportion thereof from July 8 to December 31, 1943, in the sum of $88.25.

The appellant, because of this expropriation, was required to remove its equipment, including two meter pumps and three 500 gallon storage tanks from this service station. The evidence indicated that this cost $120 and that in the moving this equipment depreciated in the sum of $275.

This expropriation not only involved the closing of this service station which was operating at a profit, but because of the Dominion Oil Control Regulations it could not open another service station. As Sir Louis Davies pointed out in *Lake Erie and Northern Rwy. Co.* v. *Schooley* (1):

> The true principle on which they should have proceeded is that laid down by the Judicial Committee in the *Pastoral Finance Association* v. *The Minister,* (2), namely, that this special suitability of the lands expropriated for the carrying on of an ice business and the additional profits which the owners will derive from so carrying it on, are proper elements in assessing the compensation, but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the lands.

This item, as well as an allowance for compulsory taking, ought to be taken into account in arriving at the compensation which is equal to, in the above quoted language of Lord Moulton (3):

> * * * the full price for his lands, and any and every element of value which they possess * * * in so far as they increase the value to him.

In my opinion, therefore, the compensation should include the purchase price of the land, cost of the fill, cost of construction less depreciation, expense of removal and

(1) (1916) 53 Can. S.C.R. 416, at 421.

(2) [1914] A.C. 1083.

(3) [1909] 1 K.B. 16 at 29.

depreciation of equipment, proportionate share of 1943 taxes, and an amount for compulsory taking and damage to its business.

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I have had the advantage of reading the computation of the foregoing items in the judgment of my brother Kerwin and agree therewith, and that the judgment appealed from should be varied as he directs.

This appeal should be allowed with costs.

Appeal allowed with costs and judgment varied.

Solicitors for the appellant: *Porter & Ritchie.*

Solicitor for the respondent: *R. D. Keirstead.*

HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT;

AND

WILLIAM O. ANTHONY (SUPPLIANT) . . . . RESPONDENT.

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*Mar. 13, 14
*Jun. 11

HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT;

AND

TEMAN T. THOMPSON (SUPPLIANT) . . . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Master and servant—Negligence of officer or servant of the Crown—Soldier wrongfully firing live ammunition—Alleged failure of officer in charge to stop firing—Destruction of barn and contents—Extent of Crown's liability—Whether breach of duty by officer to owner of barn—Neglect of duty in respect of military law—Use of reasonable care by officer in charge—Exchequer Court Act, 1927, c. 34—Section 19 (c) as amended by 1938 (Dom.) c. 28, s. 1—Section 50 A, 1943-44 (Dom.) c. 25.

M., a soldier, took wrongfully a quantity of live ammunition from the gun stores and had it in his possession, while being transported by truck as part of a draft which was moved to another building. The draft was in charge of two non-commissioned officers, sergeant major W. being in command and lance-corporal H. assisting him. During the trip some soldiers in M.'s truck fired blank ammunition, and M. fired live ammunition at least once before reaching Anthony's barn.

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

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The live ammunition was property of the Crown, the soldiers were not to fire except under orders of a superior officer and the orders were that the soldiers should turn in the ammunition at the close of military exercises. When M. passed in front of respondent Anthony's barn, he directed a tracer bullet at a window, and the barn, and its contents belonging to respondent Thompson, were destroyed by fire. In actions against the Crown under section 19 c of the *Exchequer Court Act*, the trial judge found that, while M. was not acting within the scope of his employment, there was liability on the Crown because of the negligence of the officers in charge of the draft in failing to stop the firing.

Held, reversing the judgment of the Exchequer Court of Canada ([1946] Ex. C.R. 30), Kerwin and Estey JJ. dissenting, that the Crown was not liable.

The act of M. in shooting the incendiary bullet into the barn cannot, in any way, be treated as an act of negligence committed while acting within the scope of his duties; it was a wilful act done for his own purpose, quite outside of the range of anything that might be called reasonably incidental to them.

The failure of the officers, in charge of the draft, was a neglect of duty only in respect of military law; it did not constitute also a breach of private duty toward the respondents; and the rule of *respondeat superior* has no application.

Paragraph (*c*) of section 19 of the *Exchequer Court Act* creates a liability against the Crown through negligence under the rule of *respondeat superior,* and it does not impose duties on the Crown in favour of subjects. The liability is vicarious, based as it is upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.—If the liability is placed merely on the negligent failure to carry out a duty to the Crown and not on a violation of a duty to the injured person, then there will be imposed on the Crown a greater responsibility in relation to a servant than rests on a private citizen. But the words "while acting" clearly exclude such an interpretation.

Per Kerwin and Estey JJ. (dissenting):—W., an officer in charge of the draft, was a servant of the Crown as provided by section 50 A. of the *Exchequer Court Act* and the damages claimed by the respondents resulted from his negligence while acting within the scope of his duties or employment within the meaning of section 19 (*c*) of that Act.

Per Kerwin J. (dissenting):—W. should have known that the men in M.'s truck were discharging rifles and should have detected the live ammunition fired by M. before the truck reached the barn.—W. owed to the respondents a duty to prevent M. from firing and should have foreseen that damage would occur as a result of his failure to stop him.

Per Estey J. (dissenting):—The failure of W. to use reasonable care to restrain M. was the cause of the destruction of the barn.—W. owed the duty to use care towards the respondents as residents along the highway, and his breach of that duty constituted negligence.

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APPEALS by the Crown from the judgment of the Exchequer Court of Canada, O'Connor J. (1), maintaining their claims, made by way of petitions of right, for damages caused by the alleged negligence of members of the military forces of His Majesty in the right of Canada.

F. P. Varcoe K.C., E. J. Henneberry K.C. and *W. R. Jackett* for the appellant.

C. F. Inches K.C. for the respondents.

The judgment of the Chief Justice and of Hudson and Rand JJ. was delivered by

RAND J.:—The question in this appeal is whether on the facts a claim arises against the Crown under section 19 (*c*) of the *Exchequer Court Act,* which reads:—

(*c*) Every claim against the Crown arising out of any death or injury to the person or property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

By section 50 (*a*) of the Act, a member of the Naval, Military or Air Forces of His Majesty is deemed a servant of the Crown for the purposes of that provision.

I think it must be taken that what paragraph (*c*) does is to create a liability against the Crown through negligence under the rule of *respondeat superior,* and not to impose duties on the Crown in favour of subjects: *The King* v. *Dubois* (2); *Salmo Investments Ltd.* v. *The King* (3). It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.

If the liability is placed merely on the negligent failure to carry out a duty to the Crown and not on a violation of a duty to the injured person, then there will be imposed on the Crown a greater responsibility in relation to a servant than rests on a private citizen. But the words "while

(1) [1946] Ex. C.R. 30.
(2) [1935] S.C.R. 378, at 394 and 398.
(3) [1940] S.C.R. 263, at 272 and 273.

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acting" which envisage positive conduct of the servant taken in conjunction with the consideration just mentioned clearly exclude, in my opinion, such an interpretation.

This raises the distinction between duties and between duty and liability. There may be a direct duty on the master toward the third person, with the servant the instrument for its performance. The failure on the part of the servant constitutes a breach of the master's duty for which he must answer as for his own wrong; but it may also raise a liability on the servant toward the third person by reason of which the master becomes responsible in a new aspect. The latter would result from the rule of *respondeat superior;* the former does not.

Now I think it quite impossible to say that the act of Morin in shooting the incendiary bullet into the barn can be treated as an act of negligence committed while acting within the scope of his duties; it was a wilful act done for his own purpose, quite outside of the range of anything that might be called reasonably incidental to them.

But it is argued by Mr. Inches that both the detachment and the particular truck were in charge of officers with responsibilities that link the Crown with what happened. Although in the case of the lance-corporal it seems doubtful, I will assume a degree of general authority and duty in both non-commissioned officers that would go to the extent of requiring Morin to hand over the live cartridges and on that footing examine this contention.

The evidence shows that at Fort Mispec, the military personnel on duty, because of the nature of their service, were normally furnished with live ammunition, but a careful check of it was kept, and each soldier was held to an accounting for what had been issued to him. Prior to military tests or exercises, it would be called in, as well as when transfers of men were made to another unit as here. On April 21st, a test had commenced, and accordingly all such ammunition had been given over; and when, on the 24th, the detachment started for Partridge Island none was supposed to be outstanding. But Morin had, by a trick, obtained some, which was in his possession when the trucks set out.

Now, this ammunition was property belonging to the Crown, and the soldiers were entitled to make use of it only as they were discharging their duties. The order to turn it in when military exercises were being carried out was primarily a safeguard against its accidental use, for those so engaged and presumably for civilians who might be within the range of the operations.

Morin then was guilty of a breach of discipline in possessing the bullets and in discharging them; and when that fact became evident, the officer's military duty arose. There is some dispute whether the sergeant should have been able to distinguish the firing of live from blank ammunition, but I will take that to be so, and that there was a time before the barn was set afire when either could have acted.

This brings me to the question of the nature of this duty and whether, for its failure, either officer could be held personally responsible for the damage caused by Morin. The conditions under which a duty toward A may give rise to a contemporaneous and independent duty toward B are not clearly settled; but here we have a special situation in which the primary duty arises. In the national organization, military and police agencies are necessary for the preservation of the national life and its order. For this purpose, men must, among other things, be entrusted with instruments of danger, and laws, rules and authority are set up to regulate their behaviour. But the duties so arising are essentially for the public interest. They are created within a structure of general law which postulates as a basic principle to which there are few exceptions, that a person is responsible only for his own act: *Moon* v. *Towers,* (1) * * * Failure in relation to a duty undertaken or assumed directly toward the injured person becomes affirmative action in the obverse of actual conduct modified by the failure, and the actual conduct may be mere persistence in inaction; but where the injured person is not the one with whom the undertaking is made, then it must appear at least that he is within the intended range of benefit: *Bélanger* v. *Montreal Water and Power Co.* (2). In other circumstances, reliance by him on the under-

(1) (1860) 141 E.R. 1306.
(2) (1914) 50 Can. S.C.R. 356.

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taken conduct may be necessary to establish the link of legal duty. I see nothing of those elements in the duty of an officer under military discipline in relation to acts of subordinates. The military law is a body of rules by which, among other objects, the possibilities of illegal and injurious action, whether by means of dangerous weapons entrusted to soldiers or otherwise, may be restricted; but it is a proposition which I am unable to accept that persons bearing that authority must have regard to private interests before they may safely abstain, in any situation, from exercising it. It would introduce fundamental questions of conflicting responsibilities, of excuses for failure to act and of legal causation; and so far as counsel have been able to discover, in generations of experience with military activities and personnel, it has never before been suggested. We enter here the field of executive action and the hierarchy of command. In this case, the sergeant's excuse was that he had to get on with the military movement in which he was engaged. It was in a time of war. Are the courts to sit in judgment on decisions of that sort in a conflict between public and private interests? Citizens have no guarantee that they and their property can or will be kept inviolate against occasional wilfulness. Officers are accountable to military law for failing to exercise authority when exercise is called for; but the penalties prescribed by it for such delinquencies must, I think, be looked upon as the only sanctions intended, and the duties raised as not intended to enure to the private benefit of the citizen. An officer may make an injurious act of a subordinate his own, but in that case he becomes a principal and directly liable: and his act would be no more significant to the liability of the Crown under section 19 (*c*) than that of the subordinate. It is clear that an officer is not within the rule of *respondeat superior* for the act of one within his command, and it would be extraordinary if liability could be raised indirectly through a responsibility based not on his act but on his authority.

The failure of the sergeant or lance-corporal to act towards Morin was then a neglect of duty only in respect of

military law; it did not constitute also a breach of private duty toward the respondents; and the rule of *respondeat superior* has no application.

I would therefore allow the appeal and dismiss the action and if the Crown insists upon them with costs here and in the court below.

KERWIN J. (dissenting):—His Majesty the King appeals from a judgment of the Exchequer Court of Canada awarding the suppliants damages for the destruction by fire of a barn and its contents. The fire was caused by one Gunner Arthur Morin, firing a tracer bullet at the barn under the following circumstances.

At Fort Mispec in the province of New Brunswick, about fifteen miles from the city of Saint John, was stationed the Fourth Coastal Battery, of which Morin was a member. Usually live ammunition was carried by all ranks of the battery but when a test operation or scheme was to take place, each man was obliged to account for the live ammunition issued to him, turn it in, and then receive blank ammunition. A careful record of the live ammunition was kept at all times but it was impossible to check the blank ammunition as the officers were forced to accept the men's statements as to the quantities used in test operations.

On April 23, 1944, the live ammunition on hand was checked and found correct. A scheme had been proceeding since April 21st and was not due to finish until the 26th. Morin, who had been in charge of the gun stores, was on sick leave during part of this period but returned to duty on the morning of the 24th, on which date a draft from the battery was to be transferred to Partridge Island. Morin procured the keys of the gun stores from the man then in charge in order to secure some personal possessions of his own but took the opportunity to purloin a quantity of live ammunition.

The draft left in three trucks, the foremost of which carried the baggage. Although a commissioned officer should have been in command of the draft, Sergeant-Major Williams was sent in charge. He left Fort Mispec in the third truck which, however, passed the second one prac-

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tically at the commencement of the trip when it stopped to permit an occupant to secure something from one of the huts. Morin was in this truck, which accordingly brought up the rear of the cavalcade. To go to Partridge Island, it was necessary, first, to traverse the fifteen miles to Saint John. A number of soldiers on Morin's truck fired blank ammunition and Morin fired live ammunition. He did this at least once before reaching a point opposite Anthony's farm when he fired at a window in the barn and it is that shot that caused the fire in question.

In the truck with Morin was Lance Bombardier Haynes and the trial judge found that both Williams and Haynes were negligent. Without evidence as to the authority of Haynes, I am unable to agree as to the relevancy of any negligence of his but that Williams was negligent I have no doubt. He was a servant of the Crown as provided by section 50 (*a*) of the *Exchequer Court Act* as enacted by chapter 25 of the statutes of 1943-1944, and the damages claimed by the petitions of right resulted from his negligence while acting within the scope of his duties or employment within the meaning of section 19 (*c*) of the *Exchequer Court Act* as enacted by chapter 28 of the 1938 statutes. He was in charge of the draft and knew, or should have known, that the men were not to fire except on an officer's order. He excused himself by stating that when the party left Fort Mispec they were passing through an area in which the scheme was being conducted and that while he heard shots, he assumed they were in connection with that operation. But Morin had fired at least one live shell before reaching Anthony's barn and Williams should have heard the shot and investigated immediately. He was in a hurry to arrive at the dock where the draft was to board a ship for Partridge Island and while he stated, "it sounded to me like blanks", he also said, "I wasn't sure at the time it was blank shots,—I couldn't swear to that,". Under these circumstances it must be held that he should have known that the men in Morin's truck were firing and he should certainly have detected the live ammunition fired by Morin before the trucks reached Anthony's farm.

I am unable to accede to Mr. Varcoe's argument that Williams owed no duty to the suppliants. On the contrary, I am of opinion that he did owe such a duty and that it should be expected that damage would occur as a result of his negligence. Mr. Varcoe also pointed out that the expression in section 19 (*c*) of the *Exchequer Court Act* is "while acting within the scope of his duties or employment" and not that used at common law in master and servant cases, "in the course of his employment." It has already been pointed out in *Lockhart* v. *Canadian Pacific Railway Company* (1), that this is the correct formula at common law and not "acting within the scope of his authority." While the latter and the wording used in section 19 (*c*) might appear linguistically similar, the statute should receive the same interpretation as the expression "in the course of his employment",—particularly when one takes into consideration the wording of the French text,

pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi.

So treated, the mere fact that Morin's act was deliberate cannot excuse the want of care on Williams' part, and on this ground and without expressing any opinion as to the other questions argued before us, I would dismiss the appeal with costs.

ESTEY J. (dissenting):—The respondent (suppliant) William Anthony's barn was destroyed by fire caused by a bullet discharged from the rifle of Gunner Arthur Morin, a member of the armed services. The respondent (suppliant) Teman T. Thompson had certain chattels stored therein which were also destroyed. The respondents recovered judgments against the Crown in the Exchequer Court of Canada for their respective damages and from these judgments the Crown now appeals.

On April 24, 1944, the military authorities were transporting about 30 men of the 4th Coastal Battery from Fort Mispec, N.B., along the highway to Saint John en route to Partridge Island. Q.M.S. Williams was in charge of the men who left Fort Mispec in three trucks, a baggage truck with seven men and the balance of the men in two

(1) [1941] S.C.R. 278.

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other trucks. When the trucks left Fort Mispec Williams and a number of men were in the third or last, and in the truck preceding Lance Bombardier Haynes and several men, including Gunner Morin. About a quarter of a mile from Fort Mispec the Haynes-Morin truck stopped to pick up a party and the Williams truck passed and remained ahead all the way to Saint John.

While it was customary at Fort Mispec for the men to have an issue of live ammunition, at this time, in preparation for certain manoeuvres, it had been turned in and all accounted for. There was also an order requiring the men to turn in their blank ammunition, but a number had failed to do so. It was therefore contrary to orders for any of the men to have either blank or live ammunition. Each man did, however, carry his rifle, but here again it was contrary to orders to fire it using either live or blank ammunition except under orders of a superior officer.

Immediately after starting from Fort Mispec the men began firing blank ammunition for amusement or pastime. Morin had no blank ammunition but the day before had taken from the gun stores 26 rounds of live ammunition which he began firing. He commenced near the B.O.P. station at Fort Mispec and continued to fire his live ammunition throughout the journey:

I fired all along the road into the air. I fired the last shot in Saint John—by the Marsh bridge. I fired to the sea.

At about six miles from Fort Mispec he aimed at the barn in question, fired a tracer bullet setting the fire that burned it to the ground.

The respondents pleaded negligence on the part of the servant of the Crown and gave in part as the particulars thereof that

the said Arthur Morin was not restrained from discharging live ammunition at or in the direction of the said barn.

In such an action the respondents can succeed only if there be upon the appellant a duty owing to the respondents to use due care, a breach of that duty, and consequent damage. The immediate issue is, did any person owe to the respondents a duty to restrain Morin? Williams, under orders from his superior officer, was in charge of the

transportation of the men into Saint John and for that purpose he was utilizing the highway. Lord Russell of Killowen and Lord Macmillan adopted the statement of Lord Jamieson:

> "No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway, or in premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care." *Hay or Bourhill* v. *Young*, (1). Charlesworth, Law of Negligence, p. 67.

This statement, applied here to a driver of an automobile, is equally applicable to persons generally who make use of our highways.

The duty of Williams may be placed upon another basis. The men began firing immediately they left Fort Mispec. This was contrary to orders in two respects. They were not supposed to have either live or blank ammunition in their possession, nor were they to discharge their rifles. Such orders exist for different reasons, one of which being that persons and property of both those in the services and of the public may not be injured or damaged.

Morin began firing near the B.O.P. at Fort Mispec; whether that was before Williams passed the Haynes-Morin truck is not clear. It is clear that the boys commenced firing at the very outset and that Williams was in the last car as they left Fort Mispec. After proceeding approximately a quarter of a mile this car passed the Haynes-Morin car. Williams, exercising reasonable care would have known, or should have known at the very outset that the men were discharging rifles and that at least one of them was discharging live ammunition, all of which was contrary to orders, and all this was upon a public highway where people travelled and along which people reside. One who is in a position where he ought to know is in the same position in law as one who knows: *White* v. *Steadman*, (2).

In my opinion a man placed in the position of Williams would have foreseen the possibility of damage. Indeed, quite apart from any order, under such circumstances a reasonable man in the position of Williams would have

(1) [1943] A.C. 92, at 102, 104. (2) [1913] 3 K.B. 340, at 348.

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foreseen the probability of damage and therefore in my opinion a duty rested upon Williams, acting in the place and stead of the master, to have exercised reasonable care. The respondents were residents along the highway and as such those toward whom Williams owed a duty to use due care that neither their person nor property be damaged. Lord Russell of Killowen:

> In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double rôle. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to compensation * * * In my opinion, such a duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach. *Hay or Bourhill* v. *Young*, (1).

Lord Atkin:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. *Donoghue* v. *Stevenson*, (2).

And the same learned judge in a later case:

> * * * every person * * * is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. *East Suffolk Rivers Catchment Board* v. *Kent* (3).

And Lord Dunedin:

> If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions. *Fardon* v. *Harcourt-Rivington*, (4).

The conduct of Morin was such as to make the possibility of danger emerging reasonably apparent to those in the position of the respondents who, in the language of Lord Russell of Killowen (above quoted), would be included among

> those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach.

(1) [1943] A.C. 92, at 101 and 102.
(2) [1932] A.C. 562, at 580.
(3) [1941] A.C. 74, at 89.
(4) (1932) 146 L.T.R. 391, at 392.

Williams not only owed a duty as the person in charge of this operation upon the highway to use due care, but under the circumstances of this case a reasonable man in his position would have known that live ammunition was being discharged and would have taken reasonable care to prevent a continuation thereof. In my opinion he owed this duty to the respondents.

Williams, however, did not exercise reasonable care. That he heard the firing is clear, but as to the reports he said:

I wasn't sure at the time it was blank shots,—I couldn't swear to that,—but it sounded to me like blanks.

He did not even know whether it was his men firing the shots but because he heard an alarm before leaving Fort Mispec he assumed that the infantry might be discharging rifles along the road or in the woods. This assumption might have some validity had the firing not started at the very outset when he was nearby and had he been sure only blank ammunition was being fired, as he knew that the men upon manoeuvres used only blank ammunition. He made this assumption without any investigation or any inquiry until he got into Saint John where he "questioned the men and received no response". This in itself indicates that Williams was not satisfied with his own assumption. Upon all the evidence it appears clear that he paid no attention whatever to what the men were doing en route and only sought to excuse himself on the ground that he was in a hurry and had but a limited time to catch the boat. Such excuse does not relieve him of any responsibility.

Reasonable care on the part of Williams would not have prevented Morin discharging the first or perhaps even the second bullet. This, however, is not the case of a servant taking a bullet, concealing it and suddenly and without warning firing it thereby causing damage. This is a case of a man taking live ammunition, using it and continuing to use it, contrary to orders, either in the immediate presence of the party in charge or where that party, in the discharge of his duty, would know that the man was firing live ammunition and yet who on his part made no objection or effort to stop him with the result that after

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at least four or five shots had been fired over a distance of about six miles damage resulted. The evidence clearly establishes that there was considerable firing but Morin alone was firing live ammunition. There is a difference in the report created by live as distinguished from blank ammunition, a difference known to and recognized by all the men, including Williams. All of the firing was contrary to orders. If Williams within the first five miles had discharged his duty he would have stopped the firing and avoided destruction of the barn.

That Morin's conduct was intentional and wrongful even to the point of constituting a criminal offence does not affect the duty or responsibility of Williams.

That the master may be liable for the failure of the servant responsible to use due care, when the immediate cause of the damage was the wrongful act of another employee, is illustrated by *Engelhart* v. *Farrant & Co.*, (1); *Ricketts* v. *Thos. Tilling, Ltd.*, (2). In the latter case the servant immediately responsible was convicted of a criminal offence, as was Morin for wilful damage to property. In the latter case Lord Justice Pickford at p. 650:

> It is admitted that the driver was sitting by the man who was driving and he could see all that was going on—he could control what was going on. It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven.

Counsel for the Crown contended that if Williams failed to perform any duty it constituted a mere breach of military regulations and not negligence within section 19 (*c*) of the *Exchequer Court Act*. It is not his duty under the military regulations that we are here concerned with but rather to determine whether the person in charge of this transportation of the men upon a public highway exercised reasonable care under the circumstances, and if not, did his failure to do so cause the damages here claimed? In determining what here constituted due care we may look at the military regulations, not in the sense of enforcing them, but to determine what standard of care would be reasonable under the circumstances. These army regulations do provide a standard of conduct and for this purpose

(1) [1897] 1 Q.B. 240. (2) [1915] 1 K.B. 644.

are in much the same position as the regulations of the Clyde Trustees in another case where Lord Dunedin spoke as follows:

> There are by-laws and regulations of the Clyde Trustees published to regulate the river traffic, which must be here set forth. The by-laws have not the force of statute, but like the rules of the road they form a rule of conduct, so that an infringement of them would be held to be in law a fault which, if it led to damage, would infer liability. *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.*, (1).

When one takes into account the requirements of these regulations which provide that the guns should not be discharged except under instructions of a superior officer, that there is a difference in the report made by live and blank ammunition, a difference known to all of them, and in any event the men were not to discharge their rifles using either live or blank ammunition, it would seem, measured by any standard required by the military regulations, that Williams was remiss in his duty. Quite apart from those regulations, any person in charge of a group of men passing along a public highway who permits the firing of live ammuntion at random or otherwise is endangering the public and disregarding his duty to those who are upon or near the highway and is in law negligent.

Under the circumstances of this case it was the failure of Williams, as the party in charge, to use reasonable care to restrain Morin from discharging live ammunition as he proceeded along the highway; that his failure in this regard was a cause of the destruction of the barn. He owed the duty to use care in this regard towards the respondents as residents along the highway and his breach of that duty constituted negligence.

In this case Williams, a member of the military services, as officer in charge was, under section 50A of the *Exchequer Court Act* (1943-44 Dom. c. 25), a servant of His Majesty and his conduct constituted negligence within section 19 (*c*) of the *Exchequer Court Act*, (1927 R.S.C., c. 34).

The learned trial judge found that Lance Bombardier Haynes was also negligent. With deference I cannot agree with that finding. Apart from the evidence that Williams was in charge of the men, there is no evidence as to the

(1) [1924] A.C. 406, at 413.

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duty, if any, that rested upon any other officers or men. If, therefore, any duties rested upon Lance Bombardier Haynes these are not disclosed in the evidence, and without evidence of his duties there can be no finding as to a breach thereof. This, however, does not affect the result.

In my opinion the judgment of the learned trial judge should be affirmed and this appeal dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitors for the respondents: *Inches & Hazen.*

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*May 14, 16.
*Oct. 1.

MUNICIPALITY OF QUEEN'S COUNTY AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

ARTHUR I. COOPER (DEFENDANT) ..... RESPONDENT.

Riparian owners—Tidal and navigable river—Alluvion—Accretion—Riparian owner's rights subject to changes effected by nature—Island and mainland gradually connected together—Deposits of alluvium over course of years—Rights of riparian owner and owner of island—To whom the accreted, or increased, land has accrued.

The appellant municipality is the owner of an island situate in the Saint John river, a tidal and navigable river, and the respondent is the owner of a tract of land bordering on the same river immediately above the head of the island. At the time of the grant to the appellant's predecessor in title, there was an access to the main river in front of the respondent's land and the island was separated from the eastern shore of the river by a narrow channel of water. But, in the course of a century, by gradual and imperceptible deposits of alluvium, the respondent's land has become extended upstream into a junction with the easterly bank of the island as it became extended by alluvium. The narrow channel was blocked up and the island connected with the respondent's land. At the time of the trial, the junction of these accreted lands was indicated by a narrow, wet, but apparent, depression. The appellant municipality claimed title to the extension of the island on the ground that through the years the island has been enlarged by the process of accretion up to the depression and brought the present action for damages

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

for trespass and for an injunction. The respondent contended that the entire increase is an accretion to the mainland, and, in the alternative, that as riparian owner he is entitled either to the accreted land itself by virtue of adverse possession or to rights over it sufficient to maintain his riparian privileges; and, by counter-claim, he asked damages for interference with his occupation and for an injunction. The trial judge upheld the appellant's claim. The Appeal Division reversed that judgment and held that the accreted land, at some stage in the process of its formation, have become the respondent's property and that, as riparian owner, the latter had a right of access to the river over the accretions physically connected with the island.

Held, reversing the judgment of the Appeal Division (18 M.P.R. 317), that the judgment of the trial judge should be restored, which judgment upheld the appellant municipality's claim for a title to the extension of the island up to the depression shown at the junction of the accreted lands.

Held also, and the trial judge so found, that the claim advanced by the respondent to title founded on adverse possession should, upon the evidence, be dismissed.

Per The Chief Justice and Hudson and Rand JJ.:—The right of access of the riparian owner to the river is not the consideration underlying accretion; but even if it were, to extend its application to land formed quite otherwise than by accretion vis a vis the riparian owner is, in the law as laid down for centuries, quite out of the question. If, in the circumstances, the most efficient use of the newly formed land would lie in its connection with the original ripa, the legislature must bring about that change; but that, on such a ground, a court should forcibly re-allocate ownership, with all its possibilities of areas and values, is a proposition supported neither by authority nor principle.—Upon the facts of the case, the Municipality has been in actual occupation of the accreted lands since their formation.

Per Kerwin and Hudson JJ.:—As a riparian owner, the respondent, or his predecessors, had certain rights at one time, among them being that of access to the river. "The rights of a riparian proprietor, * * *, exist *jure naturae,* because his land has, by nature, the advantage of being washed by the stream: * * *" (*Lyon* v. *Fishmonger's Company* [1875-76] 1 A.C. 662, at 682). But, once the advantage of being washed by the water is put an end to by an act of nature, this right of access disappears, as it has disappeared in this case. Then, no question of public policy can interfere with the title which, so far as the parties hereto are concerned, has been acquired by law by the appellant Municipality.

Per Hudson and Estey JJ.:—The riparian owner's rights are subject to the changes effected by nature. So long and to the extent that nature continues the riparian owner as such, he enjoys riparian rights, but nature or the act of any person in the exercise of his rights may from time to time alter or even destroy those of a riparian owner.—In the present case, the relative positions of the appellant municipality and the respondent have thus been determined by nature: the first has been fortunate, while the latter unfortunate.

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MUNICIPALITY OF QUEEN'S COUNTY v. COOPER

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), reversing the judgment of the trial judge, Richards J. and dismissing the appellant municipality's action for trespass and an injunction.

The trial judge also dismissed a counter-claim by the respondent, who, alleging his own title to the land, claimed damages for interference with his occupation and an injunction and that judgment was affirmed by the Appeal Division.

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

A. McF. Limerick for the appellant.

W. J. West K.C. for the respondent.

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

RAND J.:—The respondent is the owner of land bordering on the Saint John river below tidehead. It was formerly a portion of a large tract which in the original grant in 1787 was bounded on the west

along the easterly bank or shore of the said River following its several courses upstream to the bounds first mentioned.

This language, under the established presumption, carries the title to the ordinary high water mark; and it is not disputed that the property in the bed of the river, including the shore, remained in the Crown.

The appellant Municipality is the successor in title to what was an island in the river, granted in 1819, then lying wholly below the respondent's land, which in the course of a century by gradual and imperceptible deposits of alluvium has become extended upstream into a virtual junction with the easterly bank from a point about four rods below the upper boundary of the respondent's line to a point a somewhat greater distance above it. There has also been a slight accretion to the mainland and the junction of these accreted lands is indicated by a narrow, wet, but clearly defined depression. When the river is at its highest, the westerly

(1) (1945) 18 M.P.R. 317.

portion of the respondent's land near the river as well as the disputed lands opposite are flooded, and they are of little apparent use otherwise than for raising hay. Between the extended island and the mainland southerly of the junction is now a narrow backwater which is of no benefit for reaching the body of the river.

The appellants, Webb and Bridges, in 1942 under an agreement with the Municipality sowed barley on the disputed land, the crop from which was to be theirs. The respondent destroyed part of that crop, on various occasions pastured cattle on the land, and in many or most of the years between 1914 and 1942 cut hay from it.

The Municipality claims title to the extension of the island up to the depression and brought the action in trespass and for an injunction. The respondent contends that as riparian owner he is entitled either to the land itself or to rights over it sufficient to maintain his riparian privileges.

On these facts the Appeal Division (1), reversing Richards J., held the accreted land, at some stage in the process of its formation, to have become the property of the respondent as riparian owner, and dismissed the action.

The result of that judgment is that a body of land at one moment vested in the Crown or its grantee, in the next is found to have passed to the respondent without any act or consent of its proprietor. This extraordinary transfer is said to have been effected through the operation of law by way of fulfilment of implications of the original grant of the shore-bounded property and on the consideration in policy of the most efficient utilization of the dry soil won from the river bottom. More specifically it is said to be necessary to the proper and contemplated enjoyment of the right of access to the river to which the riparian owner, by his grant, became entitled.

I should observe at the outset that no question of accretion arises directly. That doctrine applies to the encroachment of dry land on water-covered land following the slow retreat of the fluid boundary between them. It is based on the physical process of the gradual deposit of alluvium at and immediately below the boundary line by which the latter becomes imperceptibly pushed back towards the

(1) (1945) 18 M.P.R. 317.

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river or sea. There is also the like recession of the waters. The converse process is the slow erosion of the dry land. Contrasted with these are the sudden upheavals of shore or water-bed, the abandonment of the course of a stream or the violent invasion and cutting off of land by waters. It is obvious then that only between the Crown and the Municipality could the question of accretion arise here. But the doctrine has been invoked in two aspects: it is said to be founded on the maintenance of the riparian right of access, and that consideration has been extended to what are considered the analogous physical conditions existing here: and as it is put in a dictum in *St. Louis* v. *Rutz,* (1).

> The right of accretion to an island in the river (Mississippi) cannot be so extended lengthwise as to exclude riparian owners above or below such island from access to the river as such riparian proprietor.

I will deal with the latter first. In the case cited, the land over which the deposit moved belonged to the riparian owner. It was a contest between a riparian owner of the river bed and the owner of an island: it does not appear what portion of the river bed was annexed to the latter: but it was an invasion beyond the boundary of the river bed belonging to the riparian proprietor that was in question; and the dictum must be interpreted in the light of that fact. If in this case, the Crown owned not only the bed but the bank, a similar though not the precise question might arise: not precise because the boundary of the riparian owner's portion of the river bed was not a fluid line; and I quite agree that in a situation where the river bottom is parcelled out between riparian and island proprietors, the interests affected do raise considerations of the sort suggested. So does the case of adjoining owners of the bed of sea or river, without more.

In his work De Jure Maris, Lord Hale uses this language:

> This jus alluvionis, as I have before said, is de jure communi by the law of England the King's, viz. if by any marks or measures it can be known what is so gained; for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, idem est non esse et non apparere, as well in maritime increases as in the increases by inland rivers. (6, II).

Now that view of the effect on accretion of "marks or measures" cannot be said to have been followed; but the

(1) (1890) 138 U.S. 226.

fact that it was held by such an authority is the strongest evidence that accretion is wholly involved in boundary and is inapplicable where that boundary is not a water line. In cases then where the stream bed is parcelled out in ownership by fixed or line limits, the essential condition of accretion is lacking: and the dictum in *St. Louis* v. *Rutz* (1) appears to be founded on that conception.

But here a third interest intervenes, the effect on which is precisely the same whether the emerged land is attributed to the Municipality or to the Crown and regardless of where it originated. The controversy must then be decided as if the emergence of the river bed had taken place through a process of deposit confined to the land of the Crown fronting that of the respondent.

Now is it a fact—and in the foregoing I have assumed it is not—that accretion is a consequence of the right to continued access to the boundary waters? I think the query is answered by the language of Smith, L.J. in *Hindson* v. *Ashby* (2):

> The whole doctrine of accretion is based upon the theory that from day to day, week to week and month to month, a man cannot see where his old line of boundary was by reason of the gradual and imperceptible accretion of alluvium to his land.

It is a matter of fluid and unstable boundary between his land and adjoining water-covered land: the title itself at that line becomes fluid and the soil passes to the one or other proprietor with the progress of the process. The identity of the ripa remains notwithstanding the accretion and the rights inhere in all of its modifications.

Baxter C.J. deduces from *Atty.-Gen. for Nigeria* v. *Holt* (3) the principle of preserving the right of access as fundamental to the original grant; but all the case decided was that the riparian owner, by constructing artificial works on the foreshore, did not, in the circumstances, abandon his riparian rights over it. The language of Lord Shaw, relied on by both the Chief Justice and Harrison J. was obviously directed to the conflicting interests of riparian and foreshore owners and the effect upon them of acts by either. It does not touch the effect of natural changes; and there is

(1) (1890) 138 U.S. 226.
(2) [1896] 2 Ch. 1, at 28.
(3) (1914) 84 L.J. P.C. 98.

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nothing in it that remotely countenances the divesting of Crown or other ownership following a natural change other than accretion.

I have already observed that the case must be treated as if the accreted land had imperceptibly emerged wholly on the river bed opposite the respondent's land and unconnected with the island. But from the point of view of the principle invoked, the process that brings about the obstruction is irrelevant. If that portion of the stream bed had been thrown up by a natural convulsion, the effect on the respondent would have been precisely the same; but in that case what change in property rights would have followed? None whatever. It is conceded that the owner of the river bottom would remain owner of the disgorged land; and in my opinion that settles the controversy. Admittedly, also, the same result would follow from a sudden reliction. And on principle what distinction could be made between natural changes where the legal result follows not from the mode of change but from the physical consequence?

What in fact is the position of a grantee of land along a river whose banks and shores and bed are, to a degree, in a state of slow flux? Is he, in effect, entitled to an implied grant or natural right to perpetual access regardless of natural changes? Or does he become the owner of land with horizontal dimensions, one boundary of which is fluid, which so long as the water contact remains carries certain rights related to the continuous waters, but which, if in the course of nature, it ceases to be riparian, *ipso facto* no longer supports those rights? The answer is furnished by the rule of law applicable to avulsion or sudden reliction; the fluid boundary becomes fixed and the land ceases to be riparian.

I am then unable to accept the view that the right of access is the consideration underlying accretion: but even if it were, to extend its application to land formed quite otherwise than by accretion vis a vis the riparian owner is, in the law as laid down for centuries, quite out of the question. If, in the circumstances, the most efficient use of the newly formed land would lie in its connection with the original ripa, the legislature must bring about that desirable change; but that, on such a ground, a court should

forcibly re-allocate ownership, with all its possibilities of areas and values, is a proposition supported neither by authority nor principle.

The case of *Waring* v. *Stinchcomb* (1), is treated as virtually identical with the facts here; but there the contest was between adjoining riparian owners, each of whom, by statute, had a right to build out in the water in front of his lands. This raises questions of the sort suggested between adjoining owners of submerged soil; and however they may be dealt with, the interests here are quite different and the considerations raised by them likewise.

On appeal the respondent was permitted to add a count to the counter-claim for an injunction against the continuance of a causeway across the lower end of the so-called creek between the island and the mainland. I find it impossible to say that we have all the evidence that might be brought forward for or against that claim; and I agree that, on the record before us, no judgment can be given on that question.

I had thought that as the Crown is the owner of the river bed, the Attorney-General should have been made a party to the action. No finding of title here can, of course, affect the interest of the Crown; but in the absence of the Attorney-General, I think it inadvisable to place a judgment in favour of the appellant on the ground that as against the Crown, the Municipality has acquired title to the lands by accretion. The facts are clear that the Municipality has been in actual occupation of the accreted lands since their formation; in fact the claim of adverse possession was asserted as against the Municipality: and on that possession by the Municipality, the claim is sufficiently founded.

The trial court found against the respondent on the claim of adverse possession, a finding which the evidence, in my opinion, requires us to make.

As I have intimated, the disputed land is of very slight value and we were told that this was in the nature of a test case for a number of similar situations along the river. In those circumstances, I think the costs should be dealt with specially.

(1) (1922) 32 A.L.R. 453.

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I would allow the appeal and dismiss the cross-appeal, and restore the judgment at the trial. There will be no costs in this Court or in the Court of Appeal. This judgment will be without prejudice to the claim of the respondent in relation to the causeway.

KERWIN J.:—The pecuniary value of the matter in controversy in this appeal is slight but important questions of law present themselves for determination. The Appeal Division of the Supreme Court of New Brunswick (1) came to a conclusion opposed to that of Richards J., the trial judge, and gave leave to the plaintiffs to appeal to this Court.

The plaintiffs are the Municipality of Queen's County and Maurice Webb and Holland B. Bridges, and the defendant is Arthur I. Cooper. In 1787 a Crown grant was made to the defendant's predecessors in title of a tract of land, the westerly boundary of which is described as being

> along the easterly bank or shore of the said river (Saint John) following its several courses upstream to the boundaries first mentioned.

The Saint John river, it is admitted, was at all material times, and is, a tidal and navigable river. In 1819, the predecessors in title of the County obtained a Crown grant of Thatch Island in the river. At that time the island had a length from south to north of 71 chains and 50 links and its head was about 15 chains below or south of the continuation of the southern boundary of the land now owned and in possession of the defendant. Since then mud and silt have been deposited in the area of the river at the head of the island and between that and the mainland, with the result that the island has been extended up-river northerly for a distance of about 40 chains and has become attached to the mainland along the upper portion of this extension for a distance of about 8 chains. The juncture with the mainland begins at a point about 4 rods below the defendant's upper line, and the remaining 7 chains of juncture of the island with the mainland is with the land of the next adjoining mainland owner, north of the defendant's land. The claim by the County is for damages for trespass to that part of the land so formed in front of the defendant's intervale lots and for an injunction,

(1) (1945) 18 M.P.R. 317.

and by the individual plaintiffs for damages for cutting down barley sown thereon by them with the County's permission. By counter-claim the defendant set up his own title to and possession of the lands and claimed damages for interference with his occupation and an injunction.

The Crown is not before the Court but, as between the parties to this litigation, the findings of fact made by the trial judge must stand, that the alluvium, except for a small portion, formed an accretion to the head of the island, producing the latter's present extension; that the remaining portion of the alluvium formed a small accretion to the mainland; and that the boundary line between the accretion to the island and that to the mainland is a certain depression referred to in the evidence and in the judgment. On these findings of fact, Richards J. determined that in law the County was the owner of the land in question and directed judgment to be entered, with costs, for the County for $5.00 and for an injunction, and for the individuals, for $100 and dismissed the counter-claim with costs.

The Chief Justice of New Brunswick concluded that the County had no claim to the new made land as he considered that while, as between the island on the west and the bank owners on the east of the small channel between the island and the mainland, and also on the western side of the island, *ex adverso* of the western bank of the river, the owners of the island as originally formed were riparian proprietors, they were not so with respect to the head of the island, and he referred to a statement of Sir Louis Davies in *Francis Kerr Co.* v. *Seely* (1). In that case, however, it should be noted that what Sir Louis Davies was dealing with was a water-lot and it was in that connection that he stated that the lessee thereof was not a riparian proprietor in any sense of the word.

On principle, the owner of an island is a riparian proprietor as to every part thereof; the fact that this island has always been ovoid in shape is merely an accident and can make no difference in the application of the principle. Their Lordships of the Privy Council were dealing with an island in *Secretary of State for India in Council* v. *Foucar and Company, Limited* (2), where, at page 24, appears the following:—

(1) (1911) 44 Can. S.C.R. 629. (2) (1933) 61 Ind. App. 18.

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The conclusions which their Lordships draw from these facts are that in each case the grant was of land forming part of the foreshore of tidal water, of which the south boundary and, in the material cases, the east boundary also, was the river.

The important holding was that the principle of accretion applied to Burma but it is significant that the point mentioned by the Chief Justice was never raised. It was also pointed out, at page 25, that the basis of the rule that gradual accretion enures to the land which attracts it has been differently stated at different times:—

* * * but their Lordships think it must be regarded as a rule of "general convenience and security": per Lord Shaw in *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (1); and as necessary for the "mutual adjustment and protection of property": per Lord Abinger *In re Hull and Selby Railway* (2).

A single sentence in the decision of the Supreme Court of the United States in *St. Louis* v. *Rutz* (3) is relied upon:—

The right to accretions to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below the island from access to the river.

That must be read in connection with the fact that there the riparian proprietor was the owner of the bed of the Mississippi river and with the prior holding of the Court that the law of title by accretion had no application since its progress was not imperceptible in the legal sense. *Mulry* v. *Norton* (4) also needs careful examination in order to ascertain exactly what the Court was dealing with. It is merely a decision that however accretions may be commenced or continued, the right of the one owner of uplands to follow and appropriate them ceases when the formation passes laterally the line of a coterminous neighbour. A number of other American cases have been referred to but in reading them care must be observed to differentiate between the decisions in States which have followed the English common law as to the title of an owner of lands bounded by water extending to the middle thread of a stream and those in which a different rule has been formulated. It will also be found that a number of these cases are concerned with the title to submerged land on its reappearance.

(1) [1915] A.C. 599, at 612.
(2) (1839) 5 M. & W. 327, at 33
(3) (1890) 138 U.S. 226, at 250.
(4) (1885) 100 N.Y. 424.

Mr. Justice Harrison considered that:—

> Public policy is served by providing for the most efficient utilization of land formed by accretion and the most efficient utilization is obtained by giving accreted land lying in front of a shore lot to the riparian owner, where such accreted land blocks access to the navigable water.

Undoubtedly, as a riparian owner, the defendant, or his predecessors, had certain rights at one time, among them being that of access to the river.

> But the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturae,* because his land has, by nature, the advantage of being washed by the stream: * * *

per Lord Selbourne in *Lyon* v. *Fishmongers' Company* (1) at 682, and again at 683:—

> It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream.

Once the advantage of being washed by the water is put an end to by an act of nature, the right of access disappears. Countenance is lent this conclusion upon a question of a private right by the decision in *The King* v. *Montague* (2) where it was held that a public right of navigation in a river or creek may be extinguished by natural causes such as the recess of the sea or an accumulation of silt and mud. The right of access having in this case disappeared, no question of public policy can interfere with the title which so far as the parties hereto are concerned has been acquired by law by the County.

The claim advanced by the defendant to title founded on adverse possession was quite rightly dismissed by the trial judge. At the hearing of the appeal before the Appeal Division, the defendant was allowed to amend his counterclaim by alleging that the plaintiff County built a bridge or causeway across the lower end of the creek or channel between the mainland and Thatch Island, which interfered with the rights of the defendant. No such question was raised at the trial and there being no evidence directed to the point, the matter should not be dealt with.

The appeal should be allowed and the cross-appeal dismissed and the judgment at the trial restored. Since this is in the nature of a test case, under all the circumstances, there might very well be no costs in this Court or in the Appeal Division.

(1) [1875-76] 1 A.C. 662. (2) (1825) 4 B. & C. 598.

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HUDSON J.:—For the reasons given by my brothers Kerwin, Rand and Estey, I agree that in this action, on the facts as found by the learned trial judge, the appeal should be allowed and the cross-appeal dismissed and the judgment at the trial restored, with no costs here or in the Appeal Division.

ESTEY J.:—This is an appeal in an action for trespass, the real purpose of which is to determine which of the parties has title to the accreted part of Thatch Island in the Saint John river. The parties are in agreement that by the process of accretion the original island has been extended for some distance up the river and joined to the mainland. The judgment of the learned trial judge in favour of the appellant county was reversed by the appellate court of New Brunswick.

In 1819, when Thatch Island was granted to the Justices of the Peace of Queens County (subsequently taken over by the county), it consisted of a parcel of land 71·50 chains in length, lying along the easterly shore of the river and separated therefrom by a channel of water in width about 1·20 chains which varied only slightly throughout its length. The respondent's parcel then fronted upon the river a distance of 16·42 chains. The head of the island was then 20 chains below or down the river from the respondent's lower or southerly boundary. By 1900 the head of the island had by the process of accretion reached a point about opposite the respondent's upper or northerly boundary. By 1935 the head of the island was about 7 chains above that boundary and at some date between 1900 and 1935 it joined to the mainland at a point about 4 rods below the upper or northerly boundary of respondent's land, and now from that point adheres to the mainland some distance beyond the respondent's upper or northerly boundary.

The dispute between the parties hereto commenced, so far as the records are concerned, with a resolution passed by the Municipal Council of Queen's on January 19, 1932, requesting the respondent to discontinue cutting hay on the end of Thatch Island, and authorizing the placing of stakes to indicate the boundary of its property. The respondent does not remember receiving notice of such a

resolution and there is no evidence that these stakes were placed. Later a fence was erected by the county and by some person destroyed. The respondent, although admitting having seen the fence, denied having any part in the removal or destruction thereof. In 1942 the appellants, Webb and Bridges, under an agreement with the appellant county, planted a portion of the land in question with barley and timothy seed. The defendant, in August, entered upon the premises and cut and destroyed a portion of the barley. It is this alleged trespass upon the part of the defendant that provides the basis for this litigation.

The parties agreed to the following statement of facts:

1. That the Saint John river at the material times and places was and is a tidal and navigable river.

2. That the plaintiff, the Municipality of Queens County, was at all material times and still is the owner and possessor of as much of that certain island lot situate in the Saint John river, known as Thatch Island as is bounded and described in the grant of the said island to the Justice of the Peace of Queens County by the Crown, the said grant being numbered 1145 and being dated on the 1st day of September, 1819.

3. That the defendant was at all material times and still is the owner and possessor of certain intervale lands, situate in the parish of Canning in the county of Queens, known as lot no. 15 and the upper or northern one half of lot no. 16 as bounded and described in the grant to William Spry and others, the said grant being number 105 and being dated the 30th day of January, 1787, the said lots having been conveyed to the said defendant by one William S. Cooper by deed bearing date the 17th day of April, 1916, registered in Queen's County records in book P-4 at pages 312-3 as no. 31583.

4. That the westerly boundary of the said lots 15 and 16 was at the date of the said grant in 1787, described as being "along the easterly bank or shore of the said river (Saint John) following its several courses upstream to the bounds first mentioned."

The appellant county, as owner of the original island, submits that through the years this island has been enlarged by the process of accretion, and therefore it has at all times been the owner of the entire island.

The respondent submits that the entire increase is an accretion to the mainland. In the alternative that as the riparian owner he is entitled to all the island contained in the area bound by an extension of his upper and lower mainland boundary lines across the accreted area, and in the further alternative that he is entitled to that portion of the accreted land by virtue of the principles underlying adverse possession.

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The learned trial judge found as a fact

> that the alluvion, except for a relatively small portion, formed as an accretion on the head of the island, producing the present extension to the island; that the remaining portion of the alluvion formed a small accretion to the mainland; that the boundary line between the accretion to the island and that to the mainland is the line of depression above referred to, as shown in the survey of C. R. Starkey of 1942, and as marked by him on the ground by stakes "A", "B", "C" and "D" during that survey.

This finding of fact is supported by the evidence and provides an answer to the respondent's first contention.

The respondent's alternative constitutes the principal issue in this appeal. He submits that under the circumstances this case cannot be decided solely upon the basis of the law of accretion. That his rights as riparian owner must be maintained and to do so it is necessary that he be declared owner of that part of the accreted island land lying in front of his mainland. His submission on this point is as follows:

> In other words where there are competing rights the right of the riparian owner of access will prevail over that of another owner, particularly where the latter suffers no detriment. This is because of benefit and convenience and of the necessity for the permanent protection and adjustment of property and not because of physical attachment. Otherwise the land of the riparian owner would become a hinterland.

At common law as and when land was increased by the process of accretion the newly formed land became the property of the owner of the land to which it attached. The accumulation under that process is so slow and imperceptible that for practical and convenient purposes in the "mutual adjustment and protection of property" it is regarded as never having taken place and the owner of the land affected by the accretion as having always owned both the original and the accreted portion. *In re Hull and Selby Rly. Co.* (1); *Secretary of State for India in Council* v. *Foucar* (2).

The riparian owner acquires his rights not by grant or prescription but "as a natural incident to the right of the soil itself": *Chasemore* v. *Richards,* (3). His soil as it abuts upon a body of water gives to him his position and rights as a riparian owner. As Lord Selborne stated:—

(1) (1839) 5 M. & W. 327.
(2) (1933) 61 Ind. App. 18; 50 T.L.R., 241.
(3) (1859) 7 H.L.C. 349, at 382.

It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; * * * *Lyon* v. *Fishmongers' Company,* (1).

Any infringement of his rights by a party or the Crown will give to him a right of action for damages and often a basis for an injunction. His rights, however, are subject to the rights of other riparian owners and indeed of those who in the proper exercise of their own rights may cause him damage. He must exercise his rights in a manner that will not interfere with the rights of other riparian owners.

In *Chasemore* v. *Richards* (2), the defendant dug a well upon his land and thereby utilized water upon his own premises which, while having no defined course, had prior thereto found its way to the river in question. The construction of this well adversely affected the flow of the river, but although the plaintiff's rights as riparian owner were interfered with, he had no claim against the defendant. See also *Mayor, etc., of Bradford* v. *Pickles* (3).

In *Foster* v. *Wright* (4), the river originally flowed through the plaintiff's land. Gradually and imperceptibly the river on one side wore away the plaintiff's land to the point that it was extinguished and continued to encroach upon and wear away the defendant's land until at the time of the action what was formerly defendant's upland was a portion of the river bed. The plaintiff had the exclusive right of fishing in this part of the river but the defendant contended that this right did not extend over that part of the river bed which could be identified as previously his land. The defendant had by virtue of the process of erosion become a riparian owner but his rights were subject to the fishing right of the plaintiff though the river had changed its position. The Court said:

The river has never lost its identity nor its bed the legal owner.

In the course of his judgment Lindley J. stated as follows at p. 446:

Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex* v. *Yarborough,* (5); and, conversely, land gradually incroached upon by water, ceases to belong to the former owner: *In re Hull and Selby Ry. Co.* (6). The law on this subject is based upon

(1) [1875-76] 1 A.C. 662, at 683.
(2) (1859) 7 H.L.C. 349.
(3) [1895] A.C. 587.
(4) (1878) 4 C.P.D. 438.
(5) (1824) 3 B. & C. 91; 5 Bing. 163.
(6) (1839) 5 M. & W. 327.

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the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water.

In *Withers* v. *Purchase* (1), the defendant sought by dredging and cleansing the river to increase its flow "to restore the current to its former course". This work on the part of the defendant would have reduced the flow into Fish Lake Cut where the plaintiff had a mill. An injunction was granted restraining the defendant on the basis that while he was endeavouring to restore a former flow he was in fact interfering with the natural course of the river as it now obtained. Mr. Justice Kekewich, in the course of his judgment at p. 821, stated:

> The wonted or accustomed course of a stream which riparian owners are entitled to say must not be disturbed is not, in my judgment to be found by historical research, but is that which has its natural and apparently permanent course at the time when the right is asserted or called in question.

And again at p. 822:

> I can discover no sound argument against extending to the bed the principle applicable to the banks—that where a stream changes its course by slow steps the riparian proprietors are obliged to accept the consequent alteration in their boundaries.

The position of a riparian owner is set forth in an oft quoted and approved passage in a judgment of Lord Wensleydale:

> It has been now settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour. *Chasemore* v. *Richards,* (2).

Lyon v. *Fishmongers' Company* (3), *Hindson* v. *Ashby* (4), *North Shore Ry. Co.* v. *Pion* (5).

That the same rules with respect to accretion and erosion apply to islands as to the mainland would appear to be established: *Secretary of State for India in Council* v. *Foucar* (6); *Great Torrington Commons Conservators* v. *Moore Stevens* (7); 33 Halsbury, 2nd Ed. 534.

(1) (1889) 60 T.L.R. 819.
(2) (1859) 7 H.L.C. 349, at 382.
(3) [1875-76] 1 A.C. 662.
(4) [1896] 2 Ch. 1.
(5) (1889) 14 A.C. 612.
(6) (1933) 61 Ind. App. 18; T.L.R. 241.
(7) [1904] 1 Ch. 347.

The foregoing and the authorities generally indicate that the riparian owner's rights are subject to the changes effected by nature. So long and to the extent that nature continues the riparian owner as such, he enjoys riparian rights, but nature or the act of any person in the exercise of his rights may from time to time alter or even destroy those of a riparian owner.

The relative positions of the appellant and the respondent have been determined by nature. The appellant here has been fortunate, the respondent unfortunate. Sometimes nature favours one and sometimes another, but such are changes incidental to the soil abutting upon a body of water. The law recognizes such changes as inevitable and adjusts the rights of the parties as and when and to the extent that nature alters their positions. It is the natural process of accretion that has altered the areas in holdings of the appellant county and the respondent, and on that basis the learned trial judge has found their boundary to be that line along which the accretion to the island and the mainland met.

Under this view there appears to be no conflict such as the respondent suggests.

> The right to accretions is one of the riparian rights incident to all land bordering on the water. Lamont J., *Clarke* v. *City of Edmonton,* (1).

His position as a riparian owner is affected by the natural process of accretion or erosion as the case may be, and to his position as so determined the law attributes his rights as riparian owner. The common law has been developed to avoid just such conflicts as respondent suggests and does so by adjusting the rights of the parties according to changes effected by nature.

The respondent submitted a number of United States authorities in which discussions and statements will be found favourable to his contention. While these statements are entitled to the greatest respect, they were made in cases that are distinguishable upon their facts. *Mulry* v. *Norton* (2) and *St. Louis* v. *Rutz* (3), are not cases of accretion. Both of these decisions are reached upon

(1) [1930] S.C.R. 137, at 151.
(2) (1885) 100 N.Y. 424.
(3) (1890) 138 U.S. 226.

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principles well established in the common law. The discussions upon which the respondent relies were not necessary to the decisions and really dictum. The case of *Waring* v. *Stinchcomb* (1) does not involve an island and was decided largely upon a statement found in *Lamprey* v. *State* (2). In the latter case the basis of the law of accretion was stated as follows:

> * * * to preserve the fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land—of *access to the water.*

Such a basis is quite different from that which, as already indicated, has been accepted in our law. It is also to be noted that *Fillmore* v. *Jennings* (3), and *Van Dusen Inv. Co.* v. *Western Fishing Co.* (4) were cases in which islands were involved and in which the island owner was entitled to the accretion to the island regardless of what part of the island it attached itself. It will therefore be observed that in the United States there is not uniformity of decision. Moreover, in some jurisdictions where a rule approaching that for which the respondent contends, it is found necessary to make exceptions thereto. Farnham, Waters & Water Rights, p. 2489. It would appear that in a country such as Canada, where we have large rivers and many islands large and small, the common law rule should be adhered to and if in a given locality the circumstances are such to make some other rule desirable the matter should be dealt with by legislation.

The respondent in the further alternative claims the land in question by virtue of his possession thereof. He and his brother bought the mainland parcel in 1912 and his brother sold out to him in 1916. He asserts his possession upon the fact that in each year from 1913 inclusive he cut the hay on the land in question in the month of August, except in the last three years when he rented it to another party. I am in agreement with the disposition made by the learned trial judge against this contention of the defendant. In my opinion his possession could not be described otherwise than "occasional, or for a special or temporary purpose", and therefore his occupation was not

(1) (1922) 32 A.L.R. 453.
(2) (1892) 52 Min. 181.
(3) (1889) 78 Cal. 634.
(4) (1912) 63 Or. 7.

"exclusive, continuous, open or visible and notorious" as required by the authorities. *Sherren* v. *Pearson* (1); *Wood* v. *LeBlanc* (2).

Before the Appeal Division the respondent amended his counter-claim by asking for damages and a mandatory injunction ordering the appellant municipality to remove a bridge or causeway constructed between the mainland and Thatch Island, and for a further injunction to restrain the appellant from building any other such bridge. The learned judges in the court of appeal, because of the conclusions at which they arrived, were not called upon to deal with this particular issue. It was not an issue at the trial and while there is some evidence with regard to it, one cannot but feel that there might well be additional evidence, particularly as it is built out from the mainland of another owner not a party to these proceedings. Furthermore, the act of the Municipal Council, as evidenced by its resolution of January 1936 giving to the respondent a right to cross the head of Thatch Island, may well be a factor in dealing with certain phases of such issues. In any event, I do not think there is sufficient evidence to justify a final disposition of the matter, and I therefore think that this decision should be without prejudice to the rights of the parties with respect to that bridge or causeway.

This appeal should be allowed, the cross-appeal dismissed and the judgment of the learned trial judge restored. I agree with the disposition of costs as directed by my brothers Kerwin and Rand.

Appeal allowed, cross-appeal dismissed, judgment of the trial judge restored, no costs.

Solicitors for the appellant: *Limerick & Limerick.*

Solicitors for the respondent: *Hanson, Dougherty & West.*

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(1) (1886) 14 Can. S.C.R. 581. (2) (1904) 34 Can. S.C.R. 627.

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*May 16, 17.
*Oct. 1.

SPRINGFIELD FIRE AND MARINE INSURANCE CO. (DEFENDANT).....APPELLANT;

AND

MILLIE MAXIM (PLAINTIFF).....RESPONDENT.

EAGLE FIRE COMPANY OF NEW YORK (DEFENDANT).....APPELLANT;

AND

MILLIE MAXIM (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Insurance (Fire)—False representation by applicant for policy—Non-disclosure or denial of previous fires—Transfer of property—Request by transferor to place insurance in name of transferee—Insurance company endorsing policy to cover transferee—Whether assignment or new contract—Right of transferee to recover on policy—Whether misrepresentation by transferor a defence to action.

The appellant companies issued two insurance policies to the respondent's husband on property owned by him consisting of a flour mill and equipment. During their currency, the property was conveyed to the respondent, and it is admitted that she is a *bona fide* purchaser for value. The policies were then taken to the local agent of the appellant companies by the husband, with the request that, as the property had been transferred, the insurance be placed in the name of his wife. An endorsement was then affixed to the policies by the two companies in nearly the same terms, reading "* * * this policy is held to cover in her name only * * *. All other terms and conditions remaining unchanged." A material misrepresentation was made by the husband in his application for insurance, when he stated that he never had a fire previously. The trial judge found that the statement was knowingly false and such finding was not disturbed by the appellate court. The property insured was totally destroyed by fire, and the respondent brought two actions against the appellant companies for the amount of the policies. The trial judge held that the misrepresentation by the husband could be set up as a defence against the respondent's claim and no waiver of statutory condition No. 1 of *The Alberta Insurance Act* could be inferred from the language of the assent by the companies; and the actions were dismissed. The Appellate Division, reversing that judgment, found that the effect of the request made by the husband on behalf of his wife and the endorsements on the policies by the companies was to create new contracts of insurance running direct to the wife as then owner of the property, and that the misrepresentation had no application to them; the respondent's actions were maintained.

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

Held, affirming the judgment appealed from ([1945] 3 W.W.R. 705), The Chief Justice and Hudson J. dissenting, that, upon the facts and circumstances of the case, non-disclosure or denial of previous fires by the husband in his application for fire insurance cannot be set as a defence to the actions on the policies brought by the respondent against the appellant companies.

Per The Chief Justice and Hudson J. (dissenting):—The insurance policies, as between the original insured and the appellant companies, were void and unenforcible; but the effect of the assignment remains to be decided.—Though the misrepresentation was made by the husband and not by his wife, the husband was representing her in getting the approval of the companies to the transfer. The respondent must be held responsible for his acts as her agent, the respondent herself in her evidence proving such agency. "Concealment or misrepresentation (by the agent) is to be imputed to his principal and any policy effected through him will be void." Moreover, there was no change in the moral risk as the husband remained in control of the insured property after the transfer to his wife. Under the circumstances, the respondent acquired no rights under the policies.

Per Kerwin and Estey JJ.:—The respondent was not a mere assignee, who thus would take nothing from policies avoided for misrepresentation. —In view of the manner in which the companies' local agent was apprised of the respondent's wish to have the insurance in her name, and of the evidence of representatives of the companies that they had no objection to the respondent as an insured, it follows that new contracts were entered into between the companies and the respondent. The respondent was a purchaser for value; and, in the ordinary course of business, it should be possible for a purchaser of insured property to enter into a new contract of insurance without being bound by all representations that had been made to the insurer by his predecessor in title.—The wording "all other terms and conditions remaining unchanged" must be taken to refer to such terms as are applicable to the new contracts and the answers to the questions as to previous fires, by the husband, do not constitute an applicable term.

Per Rand J.:—Assignment of a contract of fire insurance is essentially different from an ordinary assignment. The latter is a matter between assignor and assignee solely; but admittedly, and here by express terms, in such insurance it is a condition that there be assent by the company. The insured cannot by his own act substitute a new party to the contract and thereby change the moral risk and the interest in the subject matter insured. The effect of the company's assent is to substitute the assignee as the person insured, the transaction involves also a reapplication of terms, the entire group of relations undergoes a readjustment and what emerges is a completely new contract. In this case, therefore, a new contract based on the existing policies was entered into with the respondent. But its terms and conditions must be determined; and, in particular, was it made on the basis of the original application so as to constitute the misrepresentation a fundamental defect? The simple procedure of assignment furnishes the answer to that question. The request for approval of an assignment is in effect an application for a new

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contract of insurance; the company may require any information before giving consent and could insist upon an application *de novo*. But, if it does not see fit to do so, the company must be deemed to have been content to deal with the assignee on the footing of his own representations alone and should not be able to raise against the assignee any misrepresentation made by the assignor.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ewing J. A. (2) and maintaining two actions by the respondent to enforce a claim for loss occasioned by fire in respect of property insured under policies issued by each of the appellant companies.

G. H. Steer K.C. and *R. Martland K.C.* for the appellants.

J. N. McDonald K.C. for the respondent.

The judgment of the Chief Justice and of Hudson J. (dissenting) was delivered by

HUDSON J.:—These actions were brought to enforce claims under insurance policies which the defendant companies had issued to the plaintiff's husband, and which policies were subsequently assigned to the plaintiff to whom, meanwhile, the property had been transferred.

The facts are fully set forth in the judgment of Mr. Justice Ewing at the trial (2). He found (*a*) that the plaintiff's husband, in each application to the defendant companies for the insurance, had represented that he never had a fire previous to the date of the applications; (*b*) that such representation was false to the knowledge of the applicant; (*c*) that such misrepresentation was of facts material to be made known to the defendants, to enable them to judge of the risks they were undertaking.

On these findings the learned judge held that the policies were void. He referred to section 1 of the Statutory Conditions in Schedule B of the *Insurance Act*, R.S.A. 1942, chapter 201, as follows:

1. If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known

(1) [1945] 3 W.W.R. 705. (2) [1945] 3 W.W.R. 209.

to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.

He also held that this defence was valid as against the plaintiff as assignee and dismissed the action.

In the Appellate Division (1) this decision was reversed and judgment given for the plaintiff for the amounts claimed. Chief Justice Harvey arrived at his decision on two grounds: first, that it is only a misrepresentation or omission in respect of the insured property that comes within the terms of the condition, and in the present case it was other properties of the insured where the previous fires had occurred; secondly, that the assignment to the plaintiff when approved of resulted in a new contract between her and the company to which the condition in question here did not apply.

Mr. Justice Ford and Mr. Justice Macdonald agreed with the Chief Justice on the second ground but did not express any opinion on the first.

In respect of the first ground relied on by the Chief Justice, counsel for the appellant contended that the question simply is whether the occurrence of previous fires with respect to other properties is a material circumstance to be considered by an insurer, to enable him to judge of the risk he undertakes. This view is supported by a decision of the Judicial Committee in *Condogianis* v. *Guardian Assurance Company Ltd.* (2). In regard to what was a misleading answer to a similar question, Lord Shaw said at p. 131:

> It is not to be wondered at that this was made the basis of the contract, because insurance companies might hesitate long before entering into a contract with an insurer who had been formerly a claimant upon companies, and they would have been put upon their inquiry as to what these claims were and how they had been settled and what were the circumstances of these former transactions. The importance of the question might be increased by the number of times in which such transactions had taken place.

The question goes to the "moral" risk which, after all, is much the most important in a case of fire insurance. The danger is not merely that of incendiarism but of carelessness. The careless man in control of property is no doubt responsible for a very large percentage of destructive fires.

(1) [1945] 3 W.W.R. 705. (2) [1921] 2 A.C. 125.

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At the expiration of the term provided for in the original insurance policies, new policies were issued by each of the companies. These were in the nature of renewal policies and upon the same terms and conditions as the earlier policies and on the faith of the original applications. For that reason this condition continued to apply.

I, therefore, agree with the learned trial judge that as between the original insured and the defendant companies the policies were void and unenforcible.

There remains the question of the effect of the assignment to the plaintiff. It appears that in July, 1943, Efrim Maxim, the husband, transferred the title of the flour mill insured to his wife, the plaintiff, and a certificate of title was issued in her name. Several weeks later he told the local agent of each of the insurance companies about this transfer and, at his request, this agent wrote a letter to each of them as follows:

August 12, 1943.

I am informed by the assured that *he has transferred the property in the name of his wife,* Mrs. Millie Maxim. Please issue the endorsement and send same over to me for attachment to the above policy.

As requested, the companies issued and forwarded to their agent, to be delivered to the plaintiff, endorsements to be attached to the policies in the following language:

The Springfield endorsement:

Notice received and accepted that the title to the within described property now stands in the name of Mrs. Millie Maxim and this policy is held to cover in her name only. All other terms and conditions remaining unchanged.

The Eagle endorsement:

Notice is hereby received and accepted that the property insured under the within policy now stands in the name of Mrs. Millie Maxim, and this policy shall, in future, read and cover in the name of Mrs. Millie Maxim, with loss, if any, payable to the Assured and not as heretofore written. All other terms and conditions remaining unchanged.

Some months later the insured property was totally destroyed and the plaintiff claimed the full amount insured for from each company.

The general rule as to the position of an assignee of a fire insurance policy is stated in Welford and Otter Barry's Fire Insurance, 3rd ed. at p. 223:

On the other hand, as the assignee merely takes the place of the original assured, he necessarily succeeds to the consequences of any act

or omission by which the validity of the policy may have been affected before the assignment, and he may, therefore, through no fault of his own fail to recover in the event of a loss.

See also Couch's Cyclopedia of Insurance, vol. 6.

The contention on behalf of the respondent here is that the misrepresentation of the husband in the original applications became irrelevant when the property passed to a new owner, that in such case the rights of the purchasers of properties who were entirely innocent of the misrepresentations and who were not parties to same would be put in a most unfair and improper position.

It is true that the misrepresentation was made by Efrim Maxim, not by his wife, but Efrim Maxim represented his wife in getting the approval of the company to the transfer. She was responsible for his acts as her agent. Welford and Otter Barry's Fire Insurance, p. 152:

> Where the policy is effected through the medium of an agent of the assured, such as, for example, an insurance broker, the duty as to disclosure applies as fully as in the case where the assured effects the policy himself. If, therefore, the agent fails to perform this duty, and is guilty of concealing or misrepresenting a material fact, his concealment or misrepresentation is to be imputed to his principal, and any policy effected through him will be void.

Moreover, the moral risk involved remained. The husband always carried on the business of operating the mill in question, not only before but after the transfer to the wife. It was a flour mill and not the sort of business which a woman would be likely to operate. The position was stated by her as follows:

Q. Have you ever carried on business as a flourmiller yourself?

A. Myself?

Q. Yes, have you ever done that business? Did you ever learn to mill flour?

A. I didn't learn. How could a woman learn to mill flour?

Q. Since you went to Smoky Lake in 1936 Mr. Maxim has always looked after the flour milling business?

A. Yes.

Q. But he was the man who really ran the business?

A. Yes.

Q. And he still ran the business after he transferred the property to you?

A. Yes.

And again:

Q. After you got the transfer of the flour mill, did you keep the books or did Mr. Maxim?

A. Well, the books, it was his work.

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Q. That was his work?
A. Yes.
Q. And he would receive the money from the farmers when they paid it?
A. Yes.
Q. He would be the one who really ran the business there?
A. Yes.

Again:

Q. The truth is you were worried about this money that Mr. Maxim had in the Prairie Rose Company, isn't that right?
A. I guess so; I think so.
Q. And you wanted to have the flour mill in your name so that it would be safe, in case anybody made claims against Mr. Maxim, isn't that right?
A. Yes it was part of it.
Q. Did you ever go and see Mr. Romaniuk yourself?
A. No.
Q. You did not have any talk with him about insurance?
A. No.

Chief Justice Harvey expressed his views in the following language:

The important words of these endorsements are in the last clause: "All other terms and conditions remaining the same." Condition 1 is one of the conditions which still applies but it must be adapted to the new contract which is one between Mrs. Millie Maxim and the company instead of one between Efrim Maxim and the company and condition 1 is concerned only with representation made by the "person applying for insurance." Certainly Efrim Maxim did not apply for this insurance which is for the benefit and protection of his wife, other than as agent for her. She was the principal making the application. She acquires her rights under this policy not by assignment but as the terms of a new contract as disclosed in the words of the endorsement. All she received from Efrim Maxim is the benefit of the consideration already paid to the company for which presumably, as in the usual case, she has given him consideration, it then becomes a consideration from her to the company.

Mr. Justice Ford stated his reason as follows:

There has been no formal assignment of the policy, and the plaintiff is not relying upon a legal or equitable assignment thereof. She is the insured, and in my opinion her rights are to be determined as those of any applicant who has obtained insurance without a formal application therefor. Whatever duty she had to disclose or not to conceal such a circumstance material to the risk as is relied upon by the respondents, such disclosure is relative only to a new contract made with her.

There was no consideration for the change in the name of the insured. It was made at the request of her agent who was the person guilty of the original misrepresentation by which the insurance was secured. This agent was then and remained in control of the insured property. There was no change in the moral risk.

In Welford on Fire Insurance, 3rd ed. at p. 223, it is stated:

> On the other hand, as the assignee merely takes the place of the original assured, he necessarily succeeds to the consequences of any act or omission by which the validity of the policy may have been affected before the assignment, and he may, therefore, through no fault of his own, fail to recover in the event of a loss.
>
> The insurers do not, by the mere fact of giving their consent to the assignment, preclude themselves from afterwards asserting that the policy had already been avoided at the date of the assignment. The form of their consent and the circumstances in which it was given may, however, amount to a new contract, and therefore place the assignee in a better position than the original assured.

This statement in Welford is amply borne out by the authorities.

The contract of fire insurance required throughout its existence the utmost good faith on the part of both the insurer and the insured.

The defendants in their several defences set up that the plaintiff acquired no rights under the policy because it was null and void *ab initio,* by reason of the misrepresentations and non disclosures of the husband. It was the plaintiff in her evidence who proved the agency of her husband in securing the consent to the transfer to her name. The consequence of such agency, in my opinion, follows as a matter of law. Under these circumstances the plaintiff acquired no rights under the policy.

I would, therefore, allow the appeal and restore the judgment at the trial with costs.

The judgment of Kerwin and Estey J.J. was delivered by

KERWIN J.:—The respondent, Millie Maxim, brought an action against Springfield Fire and Marine Insurance Company on a policy of fire insurance for loss suffered by the destruction by fire of a flour mill and equipment in the village of Smoky Lake, in the province of Alberta. She also brought an action against the Eagle Fire Company of New York on a policy of fire insurance for the same loss. An order was made consolidating the trials of the two actions, which came on before Mr. Justice Ewing who dismissed the actions (1). Upon appeal, the Appellate

(1) [1945] 3 W.W.R. 209.

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Division of the Supreme Court of Alberta (1) gave judgment for the respondent, and the two insurance companies now appeal.

The flour mill and equipment were at one time owned by Efrim Maxim, the husband of the respondent, and on May 18, 1942, he applied in writing for $2,500 insurance. The application was directed to a different company but nothing turns on this as it was accepted, and policy no. 12872 issued, by the appellant, Springfield Fire and Marine Insurance Company. On June 11, 1942, Maxim applied in writing for $2,000 insurance on the same property and again, while the application was directed to a different company, it was accepted, and policy no. 15741 issued, by the Eagle Fire Company of New York. In each application was a question: "Have you ever had a fire?", to which the applicant answered "No". Each policy was for the term of one year and in 1943, on May 18 and June 11 respectively, each of the companies issued to Efrim Maxim a new policy for the corresponding amount covering the mill and equipment.

In July, 1943, Efrim Maxim transferred and conveyed all his estate and interest in the property to his wife, the present respondent, and a certificate of title was issued to her on July 21. In August of the same year, Efrim Maxim notified the local agent of the appellants of the transfer and that his wife wanted the insurance in her name, and on the 16th of that month, each appellant issued and delivered to the respondent an endorsement to the policy issued by it. The Springfield endorsement reads as follows:—

> Notice received and accepted that the title to the within described property now stands in the name of Mrs. Millie Maxim and this policy is held to cover in her name only.
>
> All other terms and conditions remaining unchanged.

The Eagle endorsement is in the following words:—

> Notice is hereby received and accepted that the property insured under the within policy now stands in the name of Mrs. Millie Maxim, and this, policy, shall, in future, read and cover in the name of Mrs. Millie Maxim, with loss, if any, payable to the assured and not as heretofore written.
>
> All other terms and conditions remaining unchanged.

On February 24, 1944, the property insured was totally destroyed by fire.

(1) [1945] 3 W.W.R. 705.

Mr. Justice Ewing found that the answers to the questions in the original applications quoted above were false to Efrim Maxim's knowledge because, while carrying on business at Bellis, Alberta, he had sustained two fire losses prior to the applications, one in 1931 and the other in 1936, and that these were material circumstances to be made known to the insurers in order to enable them to judge the risk to be undertaken within the meaning of Alberta Statutory Condition No. 1:—

> Misrepresentation. 1. If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstances which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.

It was only after the fire in February, 1944, that the companies learned of the previous fire losses.

The trial judge treated the policies issued in 1943 as mere renewals of the 1942 originals and held that it was settled law that a renewal is made on the faith of the truth of the original representations. As to the endorsements, he held they constituted new contracts entered into between the respondent and the insurers but that they were based upon the terms of the then existing policies.

The Appellate Division did not disturb the finding that the answers of Efrim Maxim were false and that the prior fire losses were material circumstances to be made known to the companies. No attack was, or very well could be, made upon it. The Appellate Division did not deal with the contention that the new policies of May and June, 1943, must be taken to be issued on the strength of the original representations but, while counsel for the respondent raised the point before us, there is no doubt that the trial judge was correct; *Sun Insurance Office* v. *Roy* (1). The Appellate Division, however, held that the respondent was not an assignee but that, in the circumstances, she had entered into a new contract with each company. Under *The Alberta Insurance Act,* an application for such policies as are before us need not be in writing.

The Chief Justice of Alberta held that, even assuming Statutory Condition I avoided the contracts with Efrim Maxim, there was a new and valid contract effected with

(1) [1927] S.C.R. 8.

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his wife, under which she has a valid claim. Ford J. stated that there had been no formal assignment of the policy and that the respondent's rights were to be determined as those of any other applicant who had obtained insurance without a formal application therefor. The new contracts, he continued, were based upon the terms of the existing policies in accordance with the terms of the companies' consents, "All other terms and conditions remaining unchanged," but with the limitation that only those terms thereof were continued as were applicable to the new contracts. "I think", he says,

> it entirely repugnant to the concept of the new contract which arises to say that it is to be avoided by reason of a misrepresentation the materiality of which can have relation only to the moral risk relative to someone other than the person who has been accepted by the insurer as the person assured. The question of whether an applicant for fire insurance has had other fires is so personal to the individual applicant that its materiality is relevant only to him.

Mr. Justice Macdonald agreed with the Chief Justice and Ford J.

Mr. Steer argued that the respondent was a mere assignee who took nothing because by Statutory Condition I the policies were avoided. If I could agree with his premise, the result predicated would, I think, follow but, bearing in mind the manner in which the companies' local agent was apprised of the respondent's wish, and that the evidence of representatives of the companies makes it abundantly clear that they had no objection to the respondent as an insured, I agree with the view of the members of the Appellate Division that new contracts were entered into between the companies and the respondent. It is admitted she is a purchaser for value, and the results in the commercial world would be serious indeed if, in the ordinary course of business, it were not possible for a purchaser of insured property to enter into a new contract without being bound by all representations that had been made to the insurer by his predecessor in title.

In *North British and Mercantile Insurance Company* v. *Tourville* (1), relied upon by the appellants, it appears from the printed case filed on the appeal that no question of a new contract could arise as the assignment to Tourville was made after the fire which would give rise to a claim

(1) (1896) 25 Can. S.C.R. 177.

had occurred. Even as to assignments of policies as distinguished from assignments of the proceeds, the latter part of the discussion in Welford and Otter-Barry on the Law Relating to Fire Insurance, 3rd edition, also relied upon by the appellants and quoted by the trial judge, shows (pp. 223-4) that while an assignee merely takes the place of the original assured,—

> The form of their (the insurers') consent and the circumstances in which it was given may, however, amount to a new contract and therefore place the assignee in a better position than the original assured.

An example of a new contract between the original assured and his insurer may be found in the decision of the Ontario Court of Appeal in *Mechanic* v. *General Accident Assurance Co. Ltd.* (1).

It is argued that in the present case there was no consideration moving from the respondent to the appellants but, as stated by Ford J., that may be found in the retention by the appellants of the unexpired portion of the premiums paid by Elfrim Maxim and the obligations imposed upon the respondent by virtue of the applicable statutory conditions,—such, for instance, as under Statutory Condition No. 11:—

> Salvage
>
> 11. After any loss or damage to insured property, it shall be the duty of the insured, when and as soon as practicable, to secure the insured property from further damage, and to separate as far as reasonably may be the damaged from the undamaged property, and to notify the insurer of the separation.

It was then contended that even if there were new contracts, one of the terms on which the companies entered into them was, as expressed in each endorsement of August 16, 1943, "all other terms and conditions remaining unchanged." I agree with Ford J. that that must be taken to refer to such terms as are applicable to the new contracts and that, for the reasons given by him in the extract from his judgment previously quoted, the answers to the questions as to previous fires, by her husband, do not constitute an applicable term.

An additional reason for allowing the appeal was given by Chief Justice Harvey, namely, that Statutory Condition I did not avoid the policy even if Efrim Maxim had

(1) (1924) 26 O.W.N. 185.

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remained the insured because of the words "as to the property in respect of which the misrepresentation or omission is made" and the representations had been made with reference to other property. Like Mr. Justice Ford and Mr. Justice Macdonald I am not prepared to agree with that interpretation but what has been said is sufficient to dispose of the appeal which should be dismissed with costs.

RAND J.:—This appeal raised a question of importance in the law of fire insurance. The respondent claims under two policies which were originally issued to her husband. During their currency, the property consisting of a mill, was conveyed to her, and the case is before us on the basis that she is the bona fide owner of it. There was no formal assignment executed, but the policies were taken to the local agent with the request that, as the property had been transferred, the insurance be placed in the name of the wife. Thereafter an endorsement was affixed to the policies, in the one case in this form:

> Notice is hereby received and accepted that the property insured under the within policy now stands in the name of Mrs. Millie Maxim and this policy shall in future read and cover in the name of Mrs. Millie Maxim with loss, if any, payable to the assured and not as heretofore written.
>
> All other terms and conditions remaining unchanged.

And in the other:

> Notice received and accepted that the title to the within described property now stands in the name of Mrs. Millie Maxim and this policy is held to cover in her name only.
>
> All other terms and conditions remaining unchanged.

The policies had been issued following the expiration of preceding policies to which they referred, and in the application for which there had been a material misrepresentation. In the reply to the question

> Have you ever had a fire? If so, give particulars and name of company which insured the property destroyed at the time

the husband had in each case answered "No". The applications were made in May, 1942, but in 1931 and in 1936 he had had two fires on both of which he had recovered insurance. The trial judge, on conflicting evidence, found that the answer was knowingly false.

The first statutory condition of the *Insurance Act* of Alberta deals with misrepresentation in these words:

1. If any person applying for insurance falsely describes the property to the prejudice of the insurer or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.

The answers made come clearly within this condition, and as against the husband there can be no question that they furnish a complete defence to an action.

The Appellate Division, reversing the judgment at trial, has found, however, that the effect of the request made by the wife and the endorsements on the policies was to create two new contracts of insurance running direct to the wife as then owner of the property, and that the misrepresentation had no applicatoin to them.

Mr. Steer, in his admirable argument, contended that the transaction was an assignment within the terms of statutory condition 5 (*c*) which reads as follows:

5. Unless permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring,—

Change of Interest

(*c*) after the interest of the insured in the subject matter of the insurance is assigned, but this condition is not to apply to an authorized assignment under *The Bankruptcy Act* or to change of title by succession, by operation of law or by death.

Because of the misrepresentation, the policy was in fact void and as an assignee whether his interest is equitable or legal simply steps into the shoes of his assignor, there was effected no contract of indemnity with the wife.

I think it necessary to have clearly in mind just what is entailed in the so-called "assignment" of such a contract. An assignment from the earliest times has related to the transfer of an interest in property, corporeal or incorporeal. In the latter case, it has been used with reference to debts in which there existed in substance only an absolute obligation to pay money: the personality of the creditor was not a material element. Admittedly in such cases there was a transfer of beneficial interest but the only legal creation was an irrevocable power of attorney to the assignee to bring action in the name of the assignor: the legal structure of the chose was not changed. In equity the

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assignee was looked upon as the owner of it and was entitled to enforce his right there by bringing both the debtor and the assignor before the court. Later the *Judicature Act*, in the case of an assignment in writing followed by notice in writing to the debtor, substituted the assignee for the assignor as the legal party to the chose and so enabled the assignee to bring action at law in his own name, but subject to all the defences that might then have been raised against the assignor.

In the contract of fire insurance we have an entirely different relation. It is now beyond controversy that it is a personal contract of indemnity against loss or damage to the interest of the insured in specified property. It is insurance against certain risks, and among them, what is called the moral risk of the insured. It is limited also to the interest of the insured in the subject matter. To say of such a reciprocal relationship, that the insured could by his own act substitute a new party to the contract, and thereby change the moral risk and the interest in the subject matter insured is to misconceive the nature of the contract. It is perhaps unnecessary to remark that this form of transfer is wholly different from that of a mere right to receive moneys that may become payable: there the contract in its insurance aspects remains untouched.

The essential difference between the two is indicated by the fact that ordinary assignment is a matter between assignor and assignee solely; but admittedly, and here by express terms, in such insurance it is a condition that there be assent by the company. And the reason is obvious; after a transfer of interest in the subject matter, the insured cannot recover because he suffers no loss, and the assignee, because he is not insured. The effect of that assent is, in some form, to substitute the assignee as the person insured in relation to his newly created interest in the subject matter. The transaction involves also a reapplication of terms. For instance, the provisions relating to the "insured" necessarily apply to the substituted party. In this case, assuming the policies to have been valid, the husband, as the insured, although barred by his own act of incendiarism, could have recovered on a fire set by his wife; but after assignment could it be seriously questioned that the wife,

although barred by her own act, would not be barred by that of her husband? The entire group of relations undergoes a readjustment, and what emerges is a completely new contract.

Now it is possible that A should agree to indemnify B as trustee for C in respect of the interest of C in the subject matter. As in marine insurance C might be a series of transferees of property and of the right to indemnify: but B remains always the party to the contract, and it is contemplated both that the property may be so transferred and the insurance pass without reference to the insurer. In such case obviously the terms made with B not only should but are intended to be the basis of the indemnity to the successive *cestuis que* trust. But here there is no such form or contemplation; such a transfer would render the policies inoperative; and by the terms of the consent to the transfer and on the evidence, it is unquestionable that there was a complete substitution of insured party, interest and risk under the policies, which terminated the relation of the husband to them.

It was argued that there was in fact no assignment but a wholly original contract with the respondent; but that view appears untenable. The existing contract, including the consideration, the premium, was the basis for the substituted arrangement; and from that as well as the mode in which the transfer was made, I think it impossible to treat the transaction as being other than the ordinary "assignment" which follows a change in ownership of the subject matter.

Mr. Steer contended that there was no consideration for such a contract, and that all that was changed was in effect the party to whom the loss might become payable. But apart from the necessary modifications in person and risk mentioned, this view overlooks the fact that, in the circumstances, the wife became the equitable owner of whatever rights or powers under the policies might be available in a renegotiation of insurance. When she presented the policies to the agent, it was on the terms that the obligation to her husband be released and a

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novation made to herself. This release given by her was sufficient to satisfy any requirement that consideration move from the promisee.

The termination of insurance and the refunding of unearned premium are covered by condition 10 (1) which is as follows:

> 10. (1) The insurance may be terminated,—
>
> (*a*) subject to the provisions of condition 9, by the insurer giving to the insured at any time fifteen days' notice of cancellation by registered mail, or five days' notice of cancellation personally delivered, and, if the insurance is on the cash plan, refunding the excess of premium actually paid by the insured beyond the pro rata premium for the expired time;
>
> (*b*) if on the cash plan, by the insured giving notice of termination to the insurer, in which case the insurer shall, upon surrender of this policy, refund the excess of premium actually paid by the insured beyond the customary short rate for the expired time.

Notwithstanding the misrepresentation, at the time of the assignment the assignee and the company in fact assumed the policies to be in force, and that a notice under this condition (b) could be given. The discharge of that apparent right to a refund by the superseding agreement would likewise furnish a sufficient consideration from the wife for the new promise.

But although a new contract based on the assumption in fact that the existing policies were in force was entered into with the assignee, the question still remains: what were its terms and conditions? In particular, was it made on the basis of the original application and did the first statutory condition apply so as to constitute the misrepresentation a fundamental defect? The argument is that that application is the foundation for not only the assignment, but any and every policy of insurance issued thereafter by way of renewal. The consequence of that view would be, as Mr. Steer frankly conceded, that an innocent purchaser could continue the payment of insurance premiums for any number of years, and in the event of fire find himself at the mercy of a misrepresentation by his predecessor in title about which he knew nothing and which might be irrelevant to the actual risk of the new contract. I think the simple procedure of assignment furnishes the answer to that contention. The request for approval of an

assignment is in effect an application for a new contract of insurance. The company may require any information considered necessary or desirable before giving consent. It could insist upon an application *de novo*. But if it does not see fit to do that, apart from the question of estoppel on the fact that, in reliance on the approval, the assignee ordinarily can be said to have abstained from taking out new insurance, the company must be deemed to have been content to deal with the assignee on the footing of his own representations alone.

The interpretation of the precise language of the condition leads really to the same result. "If any person applying for insurance" must refer to the assignee, because it is insurance of the assignee that is constituted by the new contract. The assignee becomes the insured, and the terms and conditions become applicable to him accordingly. The only real difference between the taking of a new policy and that of following the procedure of assignment is that the contract with the unearned premium runs for the balance of the old term rather than with a new premium for a new term. With such an alternative at hand, it would be intolerable that the company should be able to raise such a misrepresentation against the assignee.

On the basis of the foregoing grounds, the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Milner, Steer, Dyde, Poirier, Martland & Bowker.*

Solicitors for the respondent: *Jackson & McDonald.*

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*Apr. 25, 26, 29.
*Oct. 1.

KATHLEEN O'NEIL AND OTHERS (DEFENDANTS) ..... } APPELLANTS,

AND

THE ROYAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF E. AMELIA BROWN (PLAINTIFF)..... } RESPONDENT;

AND

ELLEN McCLURE AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Will—Testamentary capacity—Partial unsoundness of mind—Mental delusions or hallucinations—Effect on disposition of property.

At a trial as to the validity of a will, it appeared that the husband of the testatrix had predeceased her in 1919, leaving him surviving his widow and a sister who in turn died in 1927. By the terms of his will the husband left the testatrix a legacy of $2,000, plus an annuity of $150 per month, with a general power of appointment by will over the residue of his estate. The husband's will contained also a request that his wife should make a will leaving the entire estate to his sister for her life and after her death to his grand nieces (the respondents McClure). In 1920, the testatrix made a will giving substantial effect to her husband's wishes. She later became dissatisfied with the terms of her husband's will and in 1927 executed a new will, leaving, by the exercise of her power of appointment, the estate of her late husband to her own niece and nephew (the appellants Sutcliffe). In July, 1929, the testatrix was admitted as a voluntary patient into a sanitarium and remained in the institution until her death in 1943. In November, 1929, the testatrix executed a third will leaving her own estate and the estate of her husband to the latter's nieces (McClure); and it is the validity of this last will which is in question. The testatrix was subject to hallucinations and delusions which "at times" disturbed her, but "were never very fixed at any time," and, amongst them, that she was hearing voices from the grave (presumably her husband's), that she was smelling either gas or dusting powder in her room and that she was tasting poison in her food. But her general rationality was conceded: she was able to converse rationally, had a good memory and was conversant with her husband's estate, her own assets and the contents of the two first wills. The trial judge refused to grant probate basing his conclusions very largely upon the evidence of a medical expert that the testatrix was not capable of managing her own affairs and did not possess testamentary capacity at the time the will was made. The appellate court, reversing that judgment, held that the testimony of experts should not outweigh the testimony of eye-witnesses who had opportunities for observation and knowledge of the testatrix and that the instrument propounded was the last will of a free and capable testator.

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

Held, affirming the judgment appealed from ([1945] 3 W.W.R. 641), that the evidence showed the testatrix to have been competent to make the impugned will and that it must be regarded as valid.

Delusions and hallucinations may, or may not, have influenced the will of a testator in disposing of his property: it is a question of fact to be determined by the jury or the court after the contents of the will and all the surrounding circumstances have been considered.

The proved hallucinations and delusions in this case did not, upon the evidence, influence or direct the motives and reasons that led the testatrix to the making of her will, when she gave instructions and executed it; and it does not appear that in her mind there was any connection between those delusions and the disposition of her property.

Banks v. *Goodfellow* (L.R. 5 Q.B. 549) ref.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) reversing the judgment of the trial judge, Wilson J., and maintaining the Administrator's action to prove in solemn form the will of E. Amelia Brown, deceased.

J. W. de B. Farris K.C. for the appellants.

A. Bruce Robertson for the defendant respondents.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.:—This appeal arises out of an action to prove in solemn form a will, dated November 28, 1929, of the late Elizabeth Amelia Brown. At the trial it was adjudged she did not possess testamentary capacity at the time she made the will. Upon appeal that judgment was reversed and probate directed. This appeal is from the latter judgment.

Mrs. Brown's husband, John Brown, died June 18, 1919, leaving a will, the material parts of which provided a bequest to his wife of the furniture; the sum of $2,000; a monthly payment of $150 during her life; and a power of appointment over the residue of his estate. It contained requests that his wife take care of his sister, Miss Esther Brown, and that by her will she should leave his

entire estate to my said sister Esther Jane Brown for her life and after her death to my said grand-nieces Ellen and Eva McClure.

Mrs. Brown and the Royal Trust Company were named executors and trustees of his estate.

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In 1920 Mrs. Brown made a will giving substantial effect to her husband's wishes. About 1925 Miss Brown contracted arthritis and thereafter until her death in June 1927 she required a good deal of care and attention. Much of that time she was confined to her bed and at times a nurse was employed, but in the main Mrs. Brown looked after and cared for her in a manner that was described as "excellent".

Mrs. Brown paid the expenses incurred because of the illness of Miss Brown as well as the funeral expenses. She felt that the Trust Company should have paid the latter item but this it refused to do. On one occasion she asked the company for an additional allowance of $25 at Christmas, and this it also refused. She became "very indignant about" the Trust Company. Then with respect to her late husband's will, she thought the payment of $150 per month was not enough and that she should have been left the entire estate. In fact, she described her husband's will as a "terrible will". In this frame of mind she decided in 1927 to exercise her right under the power of appointment and leave the estate of her late husband, not as he had expressly requested, but to her own niece Susie Sutcliffe and her nephew George Sutcliffe.

Mr. O'Brian, a barrister of Vancouver, had not only been Mr. Brown's solicitor, but had been a personal friend and after Mr. Brown's death he and Mrs. O'Brian continued to visit Mrs. Brown. Mr. O'Brian had drawn Mrs. Brown's will in 1920 and she now consulted him. As to that interview, he deposed as follows:

> She came in in September or October of 1927 and got the 1920 will. She told me she had a right to leave Mr. Brown's property to whom she liked and that if she so desired she could leave it to her own grand-nieces the Sutcliffe's. I told her that I considered the directions contained in Mr. Brown's will to be binding on her conscience and that if she didn't carry out the directions contained in his will she was doing something very wrong. She remarked to me that that was her own particular business. She took the will and we didn't leave on the ordinary cordial terms.

Mrs. Brown had made up her mind. She refused the advice of her friend and solicitor and consulted another solicitor, Mr. Burnett. Under her instructions Mr. Burnett prepared a will in which she revoked her will of 1920 and exercised the power of appointment under her husband's will in favour of her niece Susie Sutcliffe and her nephew

George Sutcliffe. She also left her own property to these relatives. This will is dated October 4, 1927, and no question is raised as to her competency at that time.

Two years later Mrs. Brown sent for Mr. O'Brian and executed a third will dated November 28, 1929, under which she revoked the will of 1927 and left all of her own estate and the estate of her late husband, over which she had power of appointment, to Ellen and Eva McClure, nieces of her late husband. In so leaving the property to his nieces she complied with the request contained in the will of her late husband.

It is the validity of this last will dated November 28, 1929, that is the subject matter of this litigation. Mrs. Brown, except for one week in 1929, remained at Hollywood Sanitarium from July 12, 1929, until she died on June 24, 1943.

The learned trial judge refused to grant probate basing his conclusions very largely upon the evidence of Dr. McKay that the testatrix was not capable of managing her own affairs and did not possess testamentary capacity. In the Court of Appeal Mr. Justice Bird, who wrote the judgment of the Court, was concerned about the weight that ought to be given Dr. McKay's evidence and concluded that the evidence of the other witnesses who had "opportunities for observation and knowledge of the testatrix" was sufficient

> to satisfy the conscience of the Court that the document propounded is the last will of a free and capable testator.

Then referring particularly to her mental difficulties Mr. Justice Bird concluded:

> I think that the mental difficulties so described were "of a degree or form of unsoundness which neither disturbed the exercise of the faculties necessary for the making of a will nor were capable of influencing the result."

The contention of the appellants may be summarized as follows: That the learned judges in the Court of Appeal failed to appreciate that Mrs. Brown's proved delusions or hallucinations were such as were likely to directly influence her in making a will, particularly the fact that she was hearing voices from the grave (presumably her husband's), coupled with the fact of her distress that she had not in her previous will carried out his requests as to the beneficiaries in her will.

Associated with this were other contentions that the learned judges had not given due consideration to the heavy burden

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of proof that rested upon the party propounding the will of a testatrix who is admittedly of unsound mind in at least some particulars, and that undue weight was given to lay witnesses as compared with expert opinion.

On its face it is a rational will and carries out the express wish of her late husband. Where, however, the question of testamentary capacity is an issue,

> it is not sufficient that the will upon the face of it should be what might be considered a rational will. We have to go below the surface and consider whether the testator was in such a state of mind that he could rationally take into consideration not merely the amount and nature of his property, but the claims of those who, by personal relationship or otherwise, had claims upon him;

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Mr. O'Brian deposed that on the day he received her instructions and prepared the will:

> I thought she was very clear mentally and with full capacity to appreciate the nature and extent of her estate,

and Mr. Watson, who was present with Mr. O'Brian when Mrs. Brown gave her instructions, and who signed the will as a witness:

> In my opinion she was highly nervous and unstrung but knew what she was about, and was quite competent to make a will.

She was conversant with the details of her husband's estate, her own assets and the contents of her wills of 1920 and 1927. That in the latter she had left the property to the Sutcliffes contrary to her husband's request. She also stated that she had deceived her husband in that she had accumulated a sum out of her housekeeping allowance and that she had not used this money to give Miss Brown proper nursing attention. It was not contended that anything said upon that occasion would justify a conclusion that she did not possess testamentary capacity.

It is, however, submitted that the statements made upon that occasion must be read in association with the other facts and circumstances disclosed in the evidence, and when so read support the appellants' contentions.

Mr. O'Brian first suspected something irrational about Mrs. Brown in the spring of 1928. In July 1929 she voluntarily entered Hollywood Sanitarium, a privately owned and operated institution for the treatment of mental and functional nervous diseases. She then gave her age

(1) (1879) 5 Pro. D. 84; L.J. 49 P.D. & A. 8, at 13.

as 64. In February 1930 an application for the appointment of a committee was heard by the Court in British Columbia, and on March 17, 1930, judgment rendered that

Elizabeth Amelia Brown is, by reason of mental infirmity, arising from age or otherwise, incapable of managing her affairs.

Dr. McKay, who had specialized in psychiatry and functional neurological conditions since 1907, and who since 1919 had been managing director and medical superintendent of the Hollywood Sanitarium, stated that when Mrs. Brown entered the sanitarium "she had certain peculiarities" and that

she used to have an idea that there was gas in her room. It was either gas in her room or she was afraid of powder, that is such as dusting powder, it was either one of those two.

She had hallucinations and delusions which "were never very fixed at any time."

When questioned if Mrs. Brown worried, he replied:

The only worries I can recall her possessing, was worrying regarding things she had done to her husband. That is the only thing that I can recall. There may have been others, but I do recall that because it came up innumerable times. I mean many times. She used to talk about that she hadn't treated her husband well, and she hadn't lived up to his requests.

Mrs. Brown possessed a good memory and often talked with Dr. McKay

about her life in Vancouver here, her life in Montreal, and even prior to coming to Canada,

but never mentioned to him anything about a will.

He concluded his direct examination with a statement:

I personally believe that she was competent (to make a will) for this reason * * * that she did not possess any delusions or hallucinations or illusions that would govern her one way or the other in constructing a will.

In cross-examination he was referred to his affidavit dated January 6, 1930, filed in support of the application for the appointment of a committee to manage her affairs. This affidavit read in part as follows:

At the time of her admission she was restless, delusional and hallucinatory, her delusions being of the persecutory character.

She possessed hallucinations of taste, believing she could taste poison in her food.

She also had hallucinations of smell, claiming that she could smell gas which was being forced into her room with the idea of doing her bodily harm.

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At times she is very disturbed which is altogether due to these false ideas that she possesses.

Owing to the delusions and hallucinations that were present, the said Mrs. Elizabeth Amelia Brown is incompetent to look after herself or her affairs.

Throughout his cross-examination there was much disagreement between counsel and Dr. McKay, and finally the following appears:

Q. Well, what you said on the 7th of January, 1930, was, in your opinion—you said, owing to delusions, and hallucinations that are present, the said Elizabeth Amelia Brown is incompetent to look after herself or her affairs. That was your truthful opinion at that time?

A. Probably it was.

Q. If it was your truthful opinion at that time, then it means that, in your opinion, at that time she was not competent to make a will, does it not?

A. We would only be starting another argument, so I will admit it.

This admission does not purport to embody the considered opinion of Dr. McKay but rather an opinion expressed to avoid another argument. Another argument upon the question whether because she could not manage her own affairs it followed she was not competent to make a will. Just before this admission Dr. McKay stated: "I don't think * * * you have the right to combine those two features". Such an admission as a matter of testing credibility would have weight, but as evidence in support of an essential factor in a cause of action it is for practical purposes of no value. When read in association with the whole of his evidence it falls far short of establishing that because a person is unable to manage her affairs she is incompetent to make a will. Nor does it in this case provide evidence in support of the contention that her hallucinations and delusions were influencing or directing her thinking as she gave instructions and executed this will.

Dr. McKay referred to hallucinations and delusions of a persecutory character and mentioned only those of taste and smell. He described them as

of a minor character not fixed on any person or persons—never fixed at any time—

and

there wasn't any category from the standpoint of medical diseases that I think I could conscientiously at all place her in.

It is significant that in referring to matters respecting her husband he classifies them as worries on her part. Throughout his evidence these hallucinations and delusions are not associated with her worries.

Apart from Dr. McKay's evidence there are the statements made to Mr. O'Brian and Mr. Watson on November 28, 1929, the day the will was made, and those to Mr. O'Brian and Dr. Gillies on January 23, 1930. Upon these dates she was concerned about changing the beneficiaries in her will that she might comply with the wish of her late husband, and throughout these conversations she made no mention of taste or smell, of poison or of bodily harm.

Mr. O'Brian in October or November of 1927 had told her that the request of her late husband was binding on her conscience. In consequence of the illness of Miss Brown and the funeral expenses, which she paid but thought the Trust Company should at least have paid the funeral expenses, Mrs. Brown had become annoyed at the Trust Company and felt her husband's will should have left everything to her. In that state of mind she had made the will of 1927. Now after a period of two years she viewed the matter differently. "Her husband's will was a proper one, although at one time she did not think so". She now felt she should respect the request of her late husband. Her conscience dictated that course. It was always upon her mind; she was concerned about the legality of the will. It was written in the handwriting of Mr. O'Brian, was that sufficient, and then was it properly witnessed?

She was sure she would feel much better if she could satisfy her mind that the McClure children would get the estate.

In speaking of her feelings to Mr. O'Brian, Mr. Watson and Dr. Gillies, she used various phrases, but her strongest language appears in her conversation of January 23, 1930:

She said she got very depressed at times; had a pain in the top of her head; that the day seemed to be the night sometimes, and the night the day; felt sometimes she was going out of her mind; that voices spoke to her at night, as if from the grave; and she was at times in great torment. She felt she would never see Mr. Brown or Miss Brown; that she had done wrong; that she hadn't been fair to them; that there was no hope for her in the next world; that if she could only be sure the McClure's would get the whole estate, she might feel better.

This is a portion of the conversation when Mr. O'Brian and Dr. Gillies visited Mrs. Brown on January 23, 1930,

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in order that Dr. Gillies might converse with Mrs. Brown and express his opinion as to her competency to make a will. Dr. Gillies made notes of the conversation but unfortunately upon changing his offices in 1933 these notes were lost. He had, however, a very definite recollection that as he left the sanitarium he was of the opinion that Mrs. Brown was competent to make a will. As to the details of that conversation he said his memory was "extremely vague". He did think she mentioned "she heard voices" but could not remember her making any mention of poison. He did not recall any hallucinations or delusions. Dr. Gillies therefore heard the foregoing statement as part of her conversation and was of the opinion that she was competent to make a will.

Mrs. Kane was in charge of the office of the sanitarium from July 1931, and apart from a year and a half in 1940 and 1942, she was there as long as Mrs. Brown lived. She saw Mrs. Brown practically every day and found her

> quite an interesting conversationalist. Quite wordy, quite bright. Would gossip and interested in all we were doing.

She never heard Mrs. Brown speak of either the Sutcliffes or the McClures, and never heard her mention either gas or poison. Her memory was good and she did speak of her late husband and of her late sister-in-law. Mrs. Brown was very friendly with the staff and often came into the kitchen where the staff was having tea in the afternoons.

That Mrs. Brown possessed certain hallucinations and delusions of the type and character described by Dr. McKay must be conceded. The possession of such does not invalidate a will unless they have brought about the will or constituted "an actual and impelling influence" in the making thereof: *Sivewright* v. *Sivewright* (1). Dr. McKay describes her concern with respect to her husband's affairs as worries and does not associate the hallucinations and delusions therewith. The other witnesses make no reference to the hallucinations and delusions, and it may be that they looked upon her concern with respect to her husband's affairs in a manner that might be described as worries. Mr. O'Brian said she was "depressed and under great mental strain" and "tormented by her conscience". Mr. Watson said she

(1) 1920 S.C. (H.L.) 63.

seemed to be distressed because she had neglected to bequeath the money and property as her husband had requested her to, and she now desires to make amends.

Messrs. O'Brian, Watson and Dr. Gillies, who heard her make the remarks the appellants so much rely upon, were definitely of the opinion that Mrs. Brown was competent to make a will. A perusal of Dr. McKay's evidence as a whole, including his admission, indicates that he believed she was competent to make the will. The credibility of all of these witnesses is admitted. Mr. O'Brian had known Mrs. Brown over a long period of years and had been consulted professionally by her as early as 1920. Dr. McKay had her under his care as a patient since July 1929.

It is possible that a person may conduct herself in a very rational manner, even making a rational will, and still be motivated and governed by insane delusions. That is the reason the authorities require that in such a case as this "we have to go below the surface" and determine if in fact the will be or be not the result of a "free and capable testator".

In 1920 Mrs. Brown complied with her husband's request. In 1927, under the stress of circumstances then obtaining, she disregarded his request. In the course of time and changing circumstances she concluded that she had made a mistake and her conscience now dictated that her husband's request should be complied with. In order to do so she made her will of November 1929.

The proved hallucinations and delusions are not upon the evidence connected with the motives and reasons that led to the making of this will in question. Dr. McKay did not associate her hallucinations and delusions with her worries. In this regard it is significant that Mrs. Brown did not discuss her will with Dr. McKay and never mentioned the taste of poison or the smell of gas to Mr. O'Brian, Mr. Watson or Dr. Gillies. This is an indication that in her mind they were not related. Her statements of November 28, 1929, and January 23, 1930, already discussed, when read in relation to all the other facts and circumstances, are not more than the extreme or extravagant expressions of one's thoughts and feelings who finds herself in some such position as Mrs. Brown.

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In my opinion, when the evidence in this case is submitted to the test, so often quoted with approval, set forth in *Banks* v. *Goodfellow* (1), and which has been adopted in this Court, particularly in *Skinner* v. *Farquharson* (2) and *Ouderkirk* v. *Ouderkirk* (3), Mrs. Brown's will must be regarded as valid.

Counsel for the appellants, in a very forceful and exhaustive presentation of this case, contended that the learned judges of the Court of Appeal

did not appreciate that there is a much greater burden of proof when the facts actually show insanity or mental derangement.

It is true that some of the early authorities go far to justify such a statement. The decision of *Banks* v. *Goodfellow* (4), makes it clear that these earlier authorities go too far. That while the burden of proof always rests upon the party supporting the will, and that the existence of proved hallucinations and delusions often presents a "difficult and delicate investigation", it remains a question of fact to be determined as in civil cases by a balance of probabilities. In the determination of this fact the contents of the will and all the surrounding circumstances must be considered by the jury or the Court called upon to arrive at a decision. If satisfied that at the relevant time the testator was not impelled or directed by hallucinations or delusions and was in possession of testamentary capacity, the will is valid. *Boughton* v. *Knight* (5); *Smee* v. *Smee* (6); Halsbury, 2nd Ed., Vol. 2, p. 38.

The appeal should be dismissed with costs.

HUDSON J.:—I have had an opportunity of reading the judgment of my brother Estey and agree with him that the appeal should be dismissed with costs.

To what is said I wish to add only a few words. On the argument before us the point most pressed by Mr. Farris was that at the time of execution of the will the testatrix was suffering from delusions, and in particular from the delusion that she heard voices as from the dead which reproached her with having departed from her husband's wishes in making a previous will. Admitting that the evidence established that the testatrix did make the statements attributed to her, it does not seem to me that this is

(1) (1870) L.R. 5 Q.B. 549, at 565.
(2) (1902) 32 Can. S.C.R. 58.
(3) [1936] S.C.R. 619.
(4) (1870) L.R. 5 Q.B. 549.
(5) (1873) L.R. 3 P. & D. 64.
(6) (1879) L.J. 49 P.D. & A. 8.

sufficient to invalidate a disposition of property which she should have made in the absence of any delusion. What she heard would appear after all to have been the "voice of conscience" under the circumstances.

In *Banks* v. *Goodfellow* (1), the general principle is stated thus:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

The disposition of property here was entirely in accord with what might have been made by the most sane and well intentioned person.

RAND J.:—Notwithstanding the able argument of Mr. Farris, I think the evidence shows the testatrix to have been competent to make the impugned will. Her general rationality was conceded, and the case against capacity depends upon showing the presence of insane delusionary hallucinations so related to matters admittedly disturbing her conscience as to have governed her mind in making the dispositions. Those matters were, having saved money from household allowances without disclosure to her husband, having toward the end of his sister's life as a result of the financial pressure which the illness and necessary care of the latter made upon her become resentful of the limited allowance made to her under his will, and having failed in spirit at least to maintain toward the sister in her last days what a sense of duty to him as well as to her later seemed to dictate. That they gave rise to a body of deranged thought or sensations so rooted and substantial as to dominate her mind and pervert her judgment in the distribution of her husband's and her own property, is not, in my opinion, a proper conclusion from the facts disclosed.

Although Dr. McKay, in charge of the Home in which the testatrix lived voluntarily for 14 years, whose ability as a psychiatrist and veracity are unquestioned, knew of

(1) (1870) L.R. 5 Q.B. 549, at 565.

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her notions of tasting poison in food and of smelling gas forced through keyholes to do her physical injury, and observed delusionary thought of a persecutory character, which "at times" disturbed her, he looked upon them as transient and erratic wanderings "never very fixed at any time" rather than manifestations of deep-seated irrationalities; they were not directed toward any particular person or persons; nor could he say how long they lasted, but the implication is that they did disappear. He did not know of any worry about the will of 1927 nor of her desire to make a new one. But he rejected the view that these evanescent creations were associated morbidly in the true sense of mental disorder with such matters and that they were such as might influence her in making her will.

That was the opinion also of Dr. Gillies who, though he saw her only once, made an examination specifically directed to competency; and although she mentioned "hearing voices", nothing in her behaviour or speech betrayed or even indicated delusions or hallucinations in any way related to or connected with the property or the will. That her attention could be held to that field of her thought, over the whole of which his questions led her, and evoke no indication of delusionary ideas or sense irregularities that are said to have poisoned it and driven her to the change in beneficiaries she made, would seem to justify Dr. Gillies' confident assertion that at the time of that examination she was suffering from no such derangement. Whatever their character, they were dissociated phenomena.

Mr. O'Brian observed the same behaviour under similar questioning in relation to the same matters, full understanding, good memory, no sign of disorder. Dr. McKay's affidavit says that "at times she was very disturbed" but there can be no doubt, from the evidence, that at the time of making the will, if that language means "insanely disturbed", it was not then descriptive of her condition.

The deceased quite evidently had become deeply sensitive to the implications of her religious beliefs, and although under the pressure of straitening circumstances feelings of resentfulness had been aroused, when their cause had been removed and her mind become relaxed and reflective, that sensitiveness fastened upon and no doubt magnified

the deviations from the rigid duty that then appeared so plain to her. But throughout this period she seems to have had an adequate awareness of herself, including her remorse. It was not that she heard voices from the grave; they appeared to her to be "as if from the grave", she "felt sometimes she was going out of her mind", "the day sometimes seemed night and the night day", "she was at times in great torment", "there was no hope for her in the next world" and that she "would see neither her husband nor his sister" there. But here she was recounting objectively these experiences: the subjective had not been victimized by any of them. It was a case of repentance for shortcomings in the closing years of her life.

Mr. Farris stresses the heavy onus on the respondents under the law laid down by *Banks* v. *Goodfellow* (1) and in particular the language of Cockburn C.J. at page 572:

> Where delusions are of such a nature as is calculated to influence the testator in making the particular disposition, as was the case in *Waring* v. *Waring* (2) and in *Smith* v. *Tebbitt* (3), a jury would not in general be justified in coming to the conclusion that the delusion, still existing, was latent at the time, so as to leave the testator free from any influence arising from it; but in the present case the disposition was quite unconnected with the delusions, and consequently there is no reason to suppose that the omission to call the attention of the jury to this specifically can have affected the verdict.

He suggests that what Lord Haldane says in *Sivewright* v. *Sivewright* (4):

> The question is simply whether he understands what he is about. On the other hand, if his act is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But, in that case, if the testator is not generally insane, the will must be shown to have been the outcome of the special delusion. It is not sufficient that the man who disposes of his property should be occasionally the subject of a delusion. The delusion must be shown to have been an actual and impelling influence.

must be qualified, but it appears to me to be quite within the principle of the earlier case. Once there is shown the existence of a delusion which is calculated to influence the testator in making the dispositions of a will, then the Court must be convinced that in fact the delusion had no such effect. What then is the test by which we can say that a

(1) (1870) L.R. 5 Q.B. 549.
(2) (1848) 6 Moo. P.C. 341.
(3) (1867) L.R. 1 P. & D. 398.
(4) 1920 S.C. (H.L.) 63.

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delusion is so calculated? Obviously its nature and subject matter, and its relation in the mind of the testator to the matters material to testamentary disposition. Here, assuming that in the two respects mentioned there were real delusionary notions, they cannot be said, by themselves, to be so calculated and it does not appear that in her mind there was any connection between them and such matters. It is conceivable that the worry over what she looked upon as a moral dereliction gave rise to them—and there is a strange absence of evidence that from the making of the will until her death she was in the slightest degree disturbed —but they were not associated with such matters in her complaints, and nothing in her behaviour indicated that they were so associated either consciously or unconsciously in her mind. It was not fear but moral anxiety that actuated her. The principle, therefore, of *Banks* v. *Goodfellow* (1), on the facts, is strictly applicable and satisfied and we are remitted to her general capacity about which there is no question.

I agree with Bird, J. A. in his estimate of the weight to be given the statements in the affidavit upon which the case against capacity rests. The evidence as a whole establishes the freedom of her mind from any effect of abnormal elements at the critical time; and she then directed the distribution requested in her husband's will, which in substance she had done nine years before. We are asked to find that reflection on her moral failure had given rise to insane fears that dominated her rational faculty in testamentary judgment; but whether it is to be taken that the will was made at a time free from disturbance, that it was not one of those "times" at which she was "very disturbed", or that her intelligence and moral sense rose above and clear of the influence of any such ideas that might have lurked in her mind, I am unable to do that.

I would dismiss the appeal with costs.

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia dated 25th June, 1945, allowing an appeal from the judgment of Wilson J. which had dismissed an action brought by the respondents

(1) (1870) L.R. 5 Q.B. 549.

for the purpose of proving in solemn form a will of the deceased, Elizabeth Amelia Brown, dated November 28, 1929.

The trial judge arrived at his conclusion largely upon his view of the effect of the evidence of one of the medical witnesses of the respondents, Dr. J. G. McKay. The Court of Appeal, however, even on the basis that Dr. McKay's opinion was in reality that the deceased lacked testamentary capacity, held that the other evidence was sufficient to satisfy the burden cast upon the respondents to satisfy the conscience of the Court that the document propounded was the last will of a free and capable testator.

Upon the argument before us it was common ground that the testatrix had capacity to understand the nature of the act of making a will and its effect as well as the extent of the property of which she was disposing. The contention of counsel for the appellant was that the lack of testamentary capacity lay in want of sufficient comprehension and appreciation of the claims to which effect ought to have been given and that this was due to the existence of insane delusion. It was not contended that the case was in any sense one of total insanity.

In these circumstances counsel are at one that a burden of proof rests upon those propounding the will but they disagree as to the nature of that burden. Mr. Farris also complains that the Court of Appeal gave too much weight to the opinion of the lay witnesses. His contention is that in a case of this sort the evidence of medical experts is of paramount importance and that in any event no one, whether a professional or a lay witness, was justified in the circumstances in concluding that the delusions from which the testatrix suffered "could not" affect her testamentary capacity and that therefore the respondents must fail.

The leading authority in cases of this sort is of course *Banks* v. *Goodfellow* (1). Mr. Farris lays emphasis on certain passages in the judgments in that case and in *Smee* v. *Smee* (2), and submits that a testator suffering from delusion lacks capacity to make a will if the delusion is capable of affecting the making of the will and that in

(1) (1870) L.R. 5 Q.B. 549; 39 L.J. Q.B. 237.

(2) (1879) L.J. 49 P.D. & A. 8.

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such case no inquiry is to be made or can satisfactorily be made as to whether the will was actually affected by the delusion.

In an Ontario case, *McIntee* v. *McIntee* (1), the trial judge, Riddell J., held on a consideration of the authorities, including *Skinner* v. *Farquharson* (2), and *Jenkins* v. *Morris* (3), that

> whatever may be the law elsewhere, I think I am bound by authority to go into the question—not could the delusions possibly have an influence upon a disposition to be made by the testatrix?—but did the delusions influence or affect the disposition actually made.

The learned judge points out that in *Skinner* v. *Farquharson* (2), Taschereau J. said at p. 60—

> If the deceased's delusions had influenced the disposal of his property the respondent's contention should perhaps prevail. But that is a question of fact.

He found internal evidence in the will before the Court that the delusions there in question had not in fact influenced the result. Davies J. in the same case at page 86 refers to *Jenkins* v. *Morris* (3) and to the head-note which states

> the mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it even though the delusion is connected with the subject matter of such disposition or contract; it is a question for the jury whether the delusion affected the disposition or contract.

In *Jenkins* v. *Morris* (3), which was a case of a lease, Hall V. C. at page 680 has this to say on the point—

> It was in the course of the argument before me said that *Banks* v. *Goodfellow* (4) was only applicable where the delusion was wholly unconnected with the subject-matter of the disposition. I do not find the rule of law laid down with this qualification, although no doubt in the course of the judgment, the disposition being wholly unconnected with the delusion, and the delusion not being calculated to influence the particular disposition, were mentioned. It is manifest that where the delusion is connected with the disposition, such connection may in some cases shew beyond question that the testator had not testamentary capacity, whilst in other cases, if not in itself conclusive against testamentary capacity, it might have much weight in determining the point. I have not, however, to determine whether in every case where a delusion exists which is connected with the thing disposed of there can or cannot be testamentary capacity to dispose of that thing. The delusion may be trivial, and whether so or not the conviction of a jury or judge may, unless forbidden by law, be that it did not affect the disposition.

(1) (1910) 22 O.L.R. 241.
(2) (1902) 32 Can. S.C.R. 58.
(3) (1880) 14 Ch. D. 674.
(4) (1870) L.R. 5 Q.B. 549.

Reference may also be made to the judgments of the Lords Justices in the Court of Appeal.

With respect to the decision in *Jenkins* v. *Morris* (1), Viscount Haldane in *Sivewright* v. *Sivewright* (2), said at page 65—

> Their view was that the jury had been rightly directed that the mere existence of a delusion was not sufficient to avoid a deed, even though the delusion was connected with the subject-matter. It was a question for the jury whether the delusion had influenced the bargain, and the jury had thought otherwise. The delusion was not conclusive against capacity, although the fact of its existence might well be evidence bearing on this question. It is not necessary for us on this occasion to discuss the fashion in which the principle was applied in *Jenkins* v. *Morris* (1); the importance of the case lies in the way in which it lays down the general principle that the delusion need not be held fatal, even if not wholly unconnected with the subject-matter.

These authorities dispose of the contention above mentioned.

The husband of the testatrix had predeceased her in 1919, leaving him surviving his widow and a sister who in turn died in 1927. By the terms of his will the husband, John Brown, appointed his wife and the Royal Trust Company executors and left the testatrix a legacy of $2,000, plus an annuity of $150 per month, with a general power of appointment by will. In default of appointment the estate was to go to the sister for life and after her death to two grand nieces of John Brown, namely, the respondents, Ellen and Eva McClure. The will contained the following clause:

> I earnestly request my wife to make a will leaving the entire estate to my said sister Esther Jane Brown for her life and after her death to my grand nieces Ellen and Eva McClure.

In the year 1920, shortly after the husband's death, the testatrix made a will substantially carrying out the request of her late husband. She later became dissatisfied with the terms of her husband's will and in 1927 executed a new will, leaving her own property and exercising her power of appointment over her husband's estate in favour of her own niece and nephew, the appellants, the Sutcliffes. On July 12, 1929, the testatrix was admitted as a voluntary patient into a sanitarium owned and operated by Doctor McKay, and remained in this institution until her death

(1) (1880) 14 Ch. D. 674. (2) 1920 S.C. (H.L.) 63.

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on the 24th of July, 1943, with the exception of one week in November, 1929. By the will here in question, which was executed on the 29th of November, 1929, the testatrix devised and bequeathed her own estate to the respondents, the McClures, and also exercised in their favour her power of appointment over the estate of her husband.

The wills of 1920 and 1929 were both drawn by Mr. C. M. O'Brian, who had also drawn the will of John Brown. He had been a visitor at the home of the testatrix before and after her husband's death and appears to have been on a basis of some friendship with them. The sister-in-law became ill in 1925 and in the following year became confined to her bed. She required close medical attention and considerable nursing care at the hands of the testatrix. During this period the latter told Mr. O'Brian that she considered it most unfair that she personally should have to stand the expense of Miss Brown's illness. She said to him that her husband ought to have left her his whole estate and that the provision he had made for her was quite insufficient. She said she considered the will "terrible."

When Miss Brown died the testatrix, being called upon to pay the funeral expenses, requested the Royal Trust Company, the co-executor with her of her husband's estate, to advance the necessary funds. Their refusal and an earlier refusal to advance her some $25 added fuel to the flames of her dissatisfaction. She had also been required to leave her home in order that it might be leased or sold which did not make her any the less dissatisfied. The result of all this is thus described by Mr. O'Brian:

Witness—So that the result of it all was that within a month or so after Miss Brown's death in 1927 she expressed herself to me that she didn't like the Royal Trust Company, she didn't want them as executors, and thought her husband's estate was being handled very badly, that is to say, so far as she was concerned herself.

Q. Did she do anything about it?

A. She came in in September or October of 1927 and got the 1920 will. She told me she had a right to leave Mr. Brown's property to whom she liked and that if she so desired she could leave it to her own grand-nieces the Sutcliffes. I told her that I considered the directions contained in Mr. Brown's will to be binding on her conscience and that if she didn't carry out the directions contained in his will she was doing something very wrong. She remarked to me that that was her own particular business. She took the will and we didn't leave on the ordinary cordial terms.

It was following this incident that the will of 1927 came into existence. Notwithstanding the circumstances the testatrix does not appear to have retained any particular dislike of Mr. O'Brian. He and his wife visited her on two or three occasions in the following two years, one of those at least being on the invitation of the testatrix.

Finally, as the result of a message from the testatrix, Mr. O'Brian, accompanied by a Mr. H. H. Watson, went to the sanitarium on November 28, 1929, taking with him some drafting paper, a copy of the 1920 will and, he thinks, a copy of the 1927 will also. He says that he had a discussion with the testatrix and that she appeared to him to be clear mentally.

Without detailing the evidence as to what occurred on this occasion it is sufficient to say that if the evidence of Messrs. O'Brian and Watson be accepted, (and the credibility of none of the witnesses is challenged) the opinion formed by Mr. O'Brian was well grounded. The reason given by her at that time for changing her then existing testamentary disposition was that she was under great mental strain owing to the fact that she, as she said, had deceived her sister-in-law as well as her husband in concealing from them the fact that she had accumulated several thousand dollars from housekeeping allowances given her by her husband and that she had not used these monies as she might have done to give Miss Brown proper nursing attention during her last illness. She went on to say that it was her firm desire to change the will of 1927 and to leave everything, not only her own estate, but the estate of her husband, to the McClures. Mr. O'Brian suggested to her that instead of drawing a new will she should execute a codicil to the will of 1927 but she would not have this. She did not want the Trust Company nor the executors named in the 1927 will to act, but requested Mr. O'Brian to act as her executor. During the course of the conversation the testatrix made several references to the fact that she had been a bad woman, that she had deceived her husband and sister-in-law and that she was tormented by her conscience and did not rest either night or day thinking about it. There was nothing, however, in the interview which indicated in any way to Mr. O'Brian that the testatrix was suffering from delusion.

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Mr. O'Brian says he had suspected that there was something irrational about the testatrix in the spring or summer of 1928, but he does not give and was not asked any particulars and, as already stated, when he saw her in November, 1929, he thought she was perfectly rational. As to the concern which the testatrix expressed for not having spent the money which she had accumulated in engaging nursing assistance for the sister-in-law, Mr. O'Brian says that at one time during the sister-in-law's illness the testatrix had not engaged a nurse and that he had then thought she should have done so. A nurse was at some time engaged but whether it was before or after that time does not appear.

In January, 1930, proceedings were initiated for the appointment of a committee to manage the affairs of the testatrix and on the 6th of that month Doctor McKay made an affidavit which included the following paragraph:

(4) At the time of her admission she was restless, delusional and hallucinatory her delusions being of the persecutory character. She possessed hallucinations of taste believing she could taste poison in her food. She also had hallucinations of smell claiming that she could smell gas which was being forced into her room with the idea of doing her bodily harm.

At times she is very disturbed which is altogether due to these false ideas that she possesses. Owing to the delusions and hallucinations that were present, the said Mrs. Elizabeth Amelia Brown is incompetent to look after herself or her affairs.

An order was subsequently made on March 17, 1930, declaring the testatrix

by reason of mental infirmity arising from age or otherwise, incapable of managing her affairs

and appointing a committee of her estate, pursuant to the provisions of R.S.B.C. 1924, c. 149.

While this proceeding was pending, and no doubt because of it, Mr. O'Brian visited the testatrix on January 23, 1930, taking with him Doctor Gillies, who testified that in his opinion she was on that occasion competent. He says that there was no indication that the testatrix entertained any delusion and that had such been the case his examination would have revealed it.

At this interview the testatrix showed that she was perfectly aware of the three wills she had made and referred to them, as well as to the assets of herself and her husband's

estate. She said she now thought her husband's will a proper one, although at one time she had not thought so and she again expressed regret at not having taken better care of Miss Brown and for her concealment of the housekeeping moneys she had accumulated. She thought she might feel better if she was sure the McClure children would take. She was concerned, as she had been on November 28th previous, because Mr. O'Brian had drawn the will by hand, and she felt there might be trouble later and the McClures might be deprived of what she intended them to take. As described by Mr. O'Brian she went on to say that:

* * * she got very depressed at times; had a pain in the top of her head; that the day seemed to be the night sometimes, and the night the day; felt sometimes she was going out of her mind; that voices spoke to her at night as if from the grave; and she was at times in great torment. She felt she would never see Mr. Brown or Miss Brown; that she had done wrong; that she hadn't been fair to them; that there was no hope for her in the next world; that if she could only be sure the McClures would get the whole estate, she might feel better. She complained several times she wasn't well, but she read a little—newspapers and books—found it difficult to keep her mind on the subjects. She made some complaint about there being spots on her.

Mr. Farris stresses this part of the evidence, and apart from the other evidence it would require careful consideration. However, each case has to be considered on the evidence as a whole, and so considered, the evidence satisfies me that at the time of the making of the will here in question, the testatrix had sufficient capacity to meet the requirements of the authorities in a case of this kind. I now come to the evidence of Dr. McKay and the view of the learned trial judge regarding it.

Dr. McKay, the proprietor and medical superintendent of the sanitarium, which is a private hospital, said in chief that according to the testatrix she would be seventy-eight at the time of her death but that in his opinion she was actually between eighty-five and ninety. He describes how she was brought to the sanitarium by some friends and he says she was quite willing to stay there throughout her life. Mr. O'Brian also said that he had been consulted by the testatrix about going to the sanitarium and that he had advised her to go. According to Dr. McKay, when she first entered the sanitarium the testatrix had certain

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peculiarities, that she was a "little erratic" on certain things and had certain ideas but not in any way directed "towards any person or persons". To particularize he said that she used to have an idea that there was either gas in her room or dusting powder and that she had hallucinations of taste and smell, but her delusions or hallucinations were never "very fixed at any time". In his opinion she was quite competent to make a will in November, 1929, and he gave in chief ample basis for that opinion. He said that the only worries he could recall the testatrix having had were worries regarding things she had done to her husband, that she hadn't treated him well and had not lived up to the request in his will. He stated that in his opinion the testatrix did not possess any delusions or hallucinations or illusions that would govern her one way or the other in making a will.

In cross-examination the affidavit already referred to was brought to the attention of the witness. He affirmed its correctness but said, as he had in chief, that as to the delusions they were of a minor character and were not fixed on any person or persons.

Cross-examining counsel proceeded on the view that a person who had been adjudged incapable of looking after his affairs under the provisions of the relevant *Lunacy Act* of British Columbia was *per se* incapable of making any testatmentary disposition. On that basis he cross-examined as follows:

Q. Now doctor, do you remember that on the 6th of January, 1930, you swore that owing to the delusions and hallucinations that were present, the said Mrs. Elizabeth Amelia Brown is incompetent to look after herself or her affairs? A. I only say this, Mr. McAlpine. I do remember the letter. I don't remember the document. I must have put it in there, and signed it, so I stand by it.

Q. So that on the 6th of January, 1930, she was in your opinion, incompetent to look after herself? A. Well, I signed it and don't go back on my signature.

Q. So that given the assumption that is so, if she were incompetent to look after herself, or incompetent to look after her affairs, she had not the testamentary capacity to make a will. A. I don't think, Mr. McAlpine, you have the right to combine those two features.

Q. Please don't tell me what my right is. My right is to ask you questions—

Mr. Robertson: And the witness has the right to answer the questions as he thinks.

Mr. McAlpine: The witness had no right to ask that and I say I have the right to ask that question.

The Court: I do not see, myself, why you cannot answer it. It is really a simple question. A. Well, I will answer it this way. If I put my name on there, I am liable for it. I mean I must have believed it at that time.

It would appear that the witness had answered the question which the learned trial judge appears to have thought had not been answered and that the witness did not agree that the two things were the same. All he appears to say in the above is that if he signed the affidavit he stands by what it says. In the cross-examination which follows counsel, however, proceeded on the basis that his own view that the two things were synonymous had been accepted by the witness.

Mr. McAlpine: Q. Now then, doctor, if you believed it at that time, you were then of the opinion that this woman was incompetent to make a will. Is that correct? A. No. I don't say that, because a will was not mentioned to me or anything of that kind.

Q. What has that got to do with it. You have sworn an affidavit that, owing to delusions and hallucinations that are present, the said Elizabeth Amelia Brown is incompetent to look after herself or her affairs. A. I say I signed it.

Q. Doctor, will you please listen. I may be stupid, and if I am in your opinion, please bear with me. I am asking you to answer a very simple question. If that was your opinion, on the 6th of January, 1930, it was your opinion that she had not testamentary capacity to make a will, whether you knew she had made one or had not made one. Is that right? A. I don't feel like answering that. But that must speak for itself, as far as I am concerned.

The Court: Doctor, I would like you to answer it. You are here to help me. You see, you said she was incompetent to look after herself or her affairs. Now, I would like you to tell me, if you can, whether or not that incompetency to look after herself or her affairs would not be incompetency to make a will. I think you can tell me that. A. That would be incompetency to look after her affairs.

Q. In your opinion she was incompetent to look after herself or her affairs. Does that also mean incompetency to make a will? A. I feel now, and I will ask you, at this time, if I may explain. I had a reason for giving that affidavit, which reason, of course, is for your lordship to hear. I felt that owing to my experience with these cases, I do certain things especially in the case of elderly people who have not any relatives to look after them, and I recommend as in this case, that a committee be appointed knowing she has no relatives, and I talked it over with Mr. Robert M. McGougan, who was then living, and I believe he had a committeeship or power of attorney, and I recommended that a committeeship be appointed to look after her affairs, and that is how I came

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to make that affidavit, because I had done that for the protection of these people for many, many years, knowing the pitfalls that result when such is not done.

Mr. McAlpine: Q. Now, doctor, are you seriously suggesting to his lordship that you committed perjury? A. No.

Q. Now then would you mind telling me—I think you have already said that your memory is not very good as to the condition of this woman when she first came in, for the first three or four months. In the first place, I understand you to agree that it would be your opinion when she was incompetent to look after herself or her affairs, that she was insane, is that right? A. If I signed that, I signed that, and therefore I hold myself responsible for it.

Q. I don't care what you hold yourself responsible for. What I want to know is—did you commit perjury. A. No.

Q. Well then, if you did not commit perjury, what you say in this affidavit of the 6th of January is true? A. Well, it must have been true.

Q. Well, what you said on the 6th of January, 1930, was, in your opinion—you said, owing to delusions, and hallucinations that are present, the said Elizabeth Amelia Brown is incompetent to look after herself or her affairs. That was your truthful opinion at that time? A. Probably it was. Q. If it was your truthful opinion at that time, then it means that, in your opinion, at that time, she was not competent to make a will, does it not? A. We would only be starting another argument, so I will admit it.

The Court: I could not see very well, how you could avoid that admission. I take it your affidavit is true, and you say she is incompetent to look after her affairs.

For my part I find very little value in the answer thus extracted from the witness. In my opinion the basis of the question was a false basis and this, being pressed forcefully to the witness, who considered himself in an embarrassing position as the result of his affidavit if the basis upon which counsel proceeded was not false, but true, resulted in the answer above quoted. I think it perfectly apparent that the real opinion of the witness was that the testatrix had testamentary capacity in November, 1929, and I also think that is the result on the evidence as a whole.

I have not referred to all the evidence and I do not think it necessary to do so. Its result I have already stated. With regard to delusion, I take the facts to be as stated in the affidavit of Dr. McKay, that the testatrix did have the hallucination that she could taste poison in her food and that she had also the hallucination that she could smell gas which had been forced into her room by somebody intending to do her harm. Neither with respect to taste

or smell, however, did she lay the authorship upon any definite person. In my opinion the testatrix was prompted in making the will of 1929 by a change of view as to her moral obligation and self-reproach with respect to her conduct in handling the housekeeping monies without taking her husband into her confidence. There was no delusion about either. Her frame of mind was based on solid fact so far as these matters were concerned. The argument urged with much force by Mr. Farris is that the "voices" the testatrix described in the interview of January, 1930, were in fact the voices of the husband and sister-in-law of the testatrix, that these voices reproached her for her conduct in their lifetime and urged her to give effect to the wish of the husband as expressed in his will and that will of November, 1929, was the result. I do not think that one should make these assumptions and conclude that this amounted to insane delusion which brought about the making of the will but that the will, made at a time when the testatrix showed full command over herself and full realization of all the elements necessary to competent will-making, was the logical product of existing facts which should justly have produced such a will from a perfectly rational testator.

With respect to the declaration of the incompetency of the testatrix to look after her affairs in 1930, it is perhaps unnecessary to say that the existence of such an order is not, *per se,* synonymous with lack of testamentary capacity. The statute under which the order was made, R.S.B.C., 1924, c. 149, provides for management and administration of the estate of persons with regard to whom it is proved (sec. 2 (d))

that such person is through mental infirmity arising from disease or age or otherwise incapable of managing his affairs.

In *Banks* v. *Goodfellow* (1), Cockburn C.J. refers with approval to a number of American authorities, including *Harrison* v. *Rowan* (2), a case in the United States Circuit Court for the District of New Jersey, where the presiding judge said

his capacity may be perfect to dispose of his property by will and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men

(1) (1870) L.R. 5 Q.B. 549; 39 L.J. Q.B. 237, at 246.

(2) (1820) 3 Washington 580, at 585.

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at different periods of their lives have meditated upon the subject of their disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new.

In his evidence Mr. O'Brian testified that in his opinion Mrs. Brown had never been capable of looking after her own affairs since her husband's death. Those affairs involved sales of real estate, leases and investment of monies. His evidence indicates that his opinion was founded on nothing more than that the testatrix was not a business woman and not capable of conducting such business matters.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *E. A. Burnett.*

Solicitor for the plaintiff respondent: *C. M. O'Brian.*

Solicitor for the defendants respondents: *E. M. C. McLorg.*

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measures taken by Orders—Considerations, which led Governor General in Council to adopt Orders, not open to review by courts of law—Orders in Council dealing with deportation from Canada of Japanese nationals, naturalized British subjects of the Japanese race, natural born British subjects of the Japanese race and of wives and children under 16 of these persons—Request in repatriation—Order in Council enacting British subject by naturalization to cease to be either a British subject or a Canadian national—Order in Council appointing a commission to make inquiry concerning the activities and loyalty during the war of persons of the Japanese race—Whether Orders in Council ultra vires in whole or in part—Comments on meaning of the words "deportation", "exclusion", "exile", "repatriation"—Person detained pending deportation "deemed to be in legal custody"—Whether recourse to habeas corpus abolished by provision of Order in Council—War Measures Act, R.S.C., 1927, c. 206, s. 3—National Emergency Transitional Powers Act, 1945, 9-10 Geo. VI, c. 25—Naturalization Act, R.S.C. 1927, c. 138—British Nationality and Status of Aliens Act (Imp.) 4-5 Geo. V., c. 17.—On the 15th of December, 1945, three Orders, purported to be made pursuant to section 3 of the *War Measures Act*, were adopted by the Governor General in Council (nos. 7355, 7356 and 7357). The reasons for the adoption of Order 7355 are stated in the preamble: "Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise; And whereas other persons of the Japanese race have requested or may request that they be sent to Japan; And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above; And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly". Section 2 then provides that "(1) Every person of sixteen years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who, *(a)* has, since the date of declaration of war by the Government of Canada against Japan, on December 8, 1941, made a request for repatriation; or *(b)* has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946, * * * 1943, as amended by P.C. 5637, * * * 1945, and was so detained as at midnight of September 1, 1945, may be deported to Japan. (2) Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to midnight the first day of

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September, 1945. (3) Every natural born British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan; Provided that such person has not revoked in writing such request prior to the making by the Minister of an order for deportation. (4) The wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person." Section 3 provides that "Subject to the provisions of section 2 of this Order a request for repatriation shall be deemed final and irrevocable for the purpose of this Order or any action taken thereunder." Order 7356 refers to Order 7355 and further provides that "Any person who, being a British subject by naturalization * * * is deported from Canada under the provisions of Order * * * 7355 * * * shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national." By Order 7357 provision is made for the appointment of a Commission "to make inquiry concerning the activities, loyalty and the extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada * * * with a view to recommending whether in the circumstances of any such case such person should be deported," and, also, to "inquire into the case of any naturalized British subject of the Japanese race who has made a request for repatriation and which request is final under the said Order in Council and may make such recommendations with respect to such case as it deems advisable." *Held* that the Orders in Council, apart from the question as to the validity of their provisions upon which opinions are hereinafter reported, contain legislation that could have been adopted by Parliament itself; that under the *War Measures Act* the Governor General in Council was empowered to adopt any legislation which Parliament could have adopted; that such legislation was, expressly and impliedly, adopted because it was deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of war; that the Governor General in Council was the sole judge of the necessity or advisability of these measures and it is not competent to any court to canvass the considerations which may have led the Governor General in Council to deem such Orders necessary or advisable for the objectives set forth.—*Re Gray* (57 Can. S.C.R. 150); *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press* ([1923] A.C. 695) and *Reference re Chemicals* ([1943] S.C.R. 1). *Per* Rand, Kellock and Estey JJ:—Although the Orders in Council

ceased to derive any force from the provisions of the *War Measures Act* from and after January 1, 1946, after that date, they derive their force from the *National Emergency Transitional Powers Act, 1945* by reason of the existence of the emergency therein referred to. *Held* that subsections (1) and (2) of section (2) of Order 7355 are *intra vires* of the Governor General in Council. *Per* The Chief Justice and Kerwin, Hudson, Taschereau and Estey JJ.:—The provisions of the three Orders in Council are *intra vires*, Hudson and Estey JJ. excepting subsection (4) of section 2 of Order 7355. *Per* Hudson, Rand, Kellock and Estey JJ.:—Subsection (4) of section 2 of Order 7355 (deportation of wife and children under 16 of person ordered to be deported) is *ultra vires*.—*Per* Rand J.:—It is *ultra vires* in relation to wives and children under 16 who do not come within the first two classes ((1) and (2) of s. 2 of 7355). *Per* Rand and Kellock JJ.:—Subsection (3) of section 2 of Order 7355 in relation to the compulsory deportation of natural born British subjects resident in Canada is *ultra vires*. *Per* Kellock J.: Section 3 of Order 7355 is *ultra vires* insofar as it prevents such persons from withdrawing consent at any time and in any manner. *Per* Rand and Kellock JJ.:—Order 7356 is *intra vires* insofar as it takes away incidental rights and privileges of persons of the Japanese race as Canadian nationals; but it is *ultra vires* to the extent that it provides for loss of the status of a British subject by naturalization. *Per* Rand J.: Order 7357 is not *ultra vires*, subject to the observance of the requirements of the *Naturalization Act* as to grounds for the revocation of naturalization. *Per* Kellock J.:—Order 7357 is *intra vires* save insofar as it may purport to authorize a departure from the provisions of the *British Nationality and Status of Aliens Act, 1914*. *Per* The Chief Justice and Kerwin and Taschereau JJ.:—The powers of the Governor General in Council, under section 3 of the *War Measures Act*, are not strictly limited to such "deportation" as means "the forcible removal of aliens." Such word, in subsection (b), has not that exclusive meaning, and, according to quotations from reputed dictionaries, could well include the word "exile" which admittedly means the banishment of a national from his country. However, subsection (b) also contains the word "exclusion" which would be apt to cover the measures adopted through Order 7355. Moreover, assuming that these measures are not strictly and specifically contemplated by the use of these two words, they are undoubtedly covered by the general terms of the *War Measures Act*, the enumeration contained in the last part of section 3 being stated not to restrict the generality of the terms of the first part of that section. *Per* Rand J.:—The words "deport" and "repatriation" are appropriate to the return to

his native country of an alien. The power of Parliament to deal with aliens is unquestioned, and that field is under delegation to the Governor General in Council. The obligation of his own state to receive him must be deemed correlated with the power of the foreign state to expel him. *Per* Kellock J.:—The consideration of the word "deportation" as the equivalent of "to remove into exile" or "to banish" involves the idea of penal consequences. Such a meaning is not apt in the case of citizens who have committed no offence nor, in modern times, in application to a national born citizen of a country on the assumption that some other country is under some obligation to receive him by reason of some previous connection of the citizen with that country. No country is under any obligation to receive the natural born citizen of another country and any attempt to force such a citizen upon another country would involve an infringement of sovereignty—The consent of Japan through General MacArthur is a consent to "repatriation," *i.e.* to restore a person to his *own* country and, thus, is no consent to the reception of natural born Canadians who have no country but Canada. *Per* Estey J.:—The word "deportation" has been restricted to aliens in one case and applied to native-born in another. The standard dictionaries do not agree as to its exact meaning. Upon this reference, it is not necessary to precisely define the word. It is enough to emphasize that, as it is applied in law, it is a compulsory sending out of, or, as stated in the Oxford Dictionary, "a forcible removal," and that, while it need not be restricted to aliens, it does apply to them. *Per* Estey J.:—The terms of subsection (3) of section 2 of 7355 cannot be regarded as enacting compulsory deportation. The persons therein mentioned having expressed a desire to be repatriated to Japan, the Governor General in Council decided to facilitate their going by perfecting the necessary arrangements. This matter is more one of policy for the Government than a question of jurisdiction. Section 9 of Order 7355 provides that "any person * * * who is detained pending deportation * * * shall * * * be deemed to be in legal custody," and section 5 of the *War Measures Act* enacts that "no person who is held for deportation under this Act * * * shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice." *Held* that there is no conflict between these two sections. The words "be deemed to be in legal custody" in section 9 do not rule out any remedy provided for in section 5, and, more particularly, the wording of section 9 does not indicate any intention of the Order that the recourse to *habeas corpus* was thereby abolished. *Per* Kellock and Estey JJ.:—The provisions of section 6 of Order 7355, relating to the sale of real and personal property of deportees by the

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Royal Canadian Mounted Police, had, on May 7, 1944, together with another constable by the name of Massicotte and a corporal Dubé who was in charge, gone to the village of St. Lambert, situated at some thirty miles from the city of Quebec, for the purpose of apprehending one Georges Guénette wanted on a charge of having conspired with others to assist one Plante to escape from the custody of a peace officer, some ten or more attempts having previously been made. These constables and three others had made on the same day an earlier trip and, after having searched the premises of Guénette's father unsuccessfully, decided to return to their headquarters in the city of Quebec. After proceeding some distance, the four abovenamed constables turned about and went back to St. Lambert on the chance that Guénette might have returned to his father's house thinking that the coast was clear, Corporal Dubé stationed the appellant Lizotte and Massicotte outside the house, while he himself entered it followed by the appellant Savard. While so engaged, Dube's attention was attracted by a sound upstairs and he went up just in time to see Guénette jump from a window. Savard immediately ran from the house in pursuit of Guénette, and, seeing he was losing ground, and as Guénette ignored his calls to stop, he fired four shots in the air from his revolver. As Guénette still paid no attention, Savard lowered his revolver toward a point approximately, so he says, six feet to the left of Guénette so that the latter would not only hear the bullet but see the spurt of the ground where it hit. As Savard fired this fifth shot, Guénette was in the act of jumping a fence, at a distance of more than two hundred feet from the house, and, as he reached the other side, he appeared to bend forward with the left hand resting on the fence and the right hand on the ground. He then straightened himself and ran for a distance of approximately seventy-eight feet where he stumbled and fell face down. According to medical evidence, he was then dead or died very shortly thereafter. The appellant Lizotte and Massicotte also ran in pursuit of Guénette, Lizotte firing one shot in the air and a second one toward a point, he says, some thirty feet to Guénette's right and Massicotte also firing one shot in Guénette's direction. The indictment charged that the appellants "have together and illegally inflicted corporal wounds which caused the death of (Guénette), thus committing manslaughter." In view of the uncertainty as to the identity of the person who had fired the fatal shot (only one bullet hit Guénette), counsel for the Crown at the opening of the trial declared expressly that the case fell within the provisions of subsection 2 of s. 69 Cr. C., and they submitted to the jury that the appellants had formed a common intention to bring about the arrest of Guénette by any means, that

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such intention involved an unlawful purpose, namely, the use of force beyond the limits permitted by section 43 Cr. C., that each of the appellants was an accomplice in the commission of a crime by one or the other and that it was immaterial which of them actually fired the fatal shot, as the death of Guénette was or ought to have been known to each of them to have been a probable consequence. Counsel for the Crown further submitted that the common wrongful intention originated from the acts of the appellants and their companions and the incidents occurring during their trip, which showed a fixed purpose to use more violence than necessary to take Guénette into custody, or that the common intent started to be illegal at the moment of the simultaneous firing by the appellants and Massicotte. The trial judge, after having read subsection 2 of section 69 Cr. C., charged the jury in so many words that it applied; he also stated that there was no illegality attaching to the appellants' conduct prior to the moment of the firing, but that the illegality then started, if the jury was of the opinion that they had then used undue violence (s. 43 Cr. C.). The appellants were found guilty and condemned respectively to twelve and nine months' imprisonment. The conviction was affirmed by a majority of the appellate court, the two dissenting judges being of the opinion that a new trial should be granted. *Held* that the appeal should be allowed, the convictions quashed and the appellants be discharged. There is no evidence upon which a finding could be made that the appellants formed at any time a common wrongful intention as required by subsection 2 of section 69 Cr. C.—Moreover the erroneous directions given by the trial judge have necessarily influenced the jury's minds and have totally rendered defective and void the conclusion they have reached.—Their verdict, being thus illegal, must be quashed.—Counsel for the Crown also contended that, if the verdict was held to be illegal, the only remedy this Court could grant would be an order for a new trial, as the Court could not go beyond what was directed by the dissenting judgments: the appellants could then be proceeded against individually under subsection (1) of section 69 Cr. C. or additional evidence might be forthcoming which would make subsection (2) applicable. *Held* that, in a case like the present, such an order ought not to be made, so as to permit an entirely new case to be made against the appellants. While the existence of a dissent on a question of law (s. 1023 Cr. C.) is a condition precedent for an appeal to this Court, the Court once seized of the appeal is not limited to the remedy considered appropriate in the dissent, but has complete jurisdiction to direct the remedy which in its opinion the Court appealed from ought to have granted (s. 1024 Cr. C.). Under the circumstances

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derived from many decisions rendered by the Quebec courts. Thus, when a child is found to be guilty of contributory negligence, he is evidently guilty of negligence and answerable for the full liability attached to his illegal act, unless there is evidence that another person has contributed with him to cause the damages: he is solely responsible, being the *causa causans*. In the present case, the military men cannot be charged with gross negligence for having willingly and knowingly left on the ground a dangerous explosive, as, upon the evidence, they were ignorant of the fact that a thunderflash had remained unexploded. Assuming that, because the military men did not ascertain before leaving that no thunderflash was left unexploded, it would constitute negligence on their part, there is no evidence that they were aware, or should have been aware, that children would enter the ground after the manœuvres had taken place; on the contrary, the evidence shows that there could not be such possibility. Moreover, in view of the opinion expressed by the trial judge that the two boys possessed sufficient intelligence to have foreseen the possible consequences of their acts, they should be treated the same as if they had been adults; and the Crown would not have been held liable if adults had committed these acts. On the whole, the minor sons of the respondents have conducted themselves with the full knowledge of the possible consequences of their acts and they have suffered injury through their own want of prudence. In any event, there has been, from the time the explosive has been found to the time when the accident occurred, a sequence of intervening events which makes of the alleged negligence of the military men a most remote cause *(causa sine qua non)* of the accident and of the damages resulting from it, but not a *causa causans*. *Per* Kerwin J.:—On the facts of the case, there was negligence on the part of the officers in charge of the military exercises, while acting within the scope of their duties or employment, in leaving, without making a search, the unexploded thunderflash, a dangerous article, on Giroux's farm, where the two boys on the day in question went with at least the implied permission of the owner. Under all circumstances, steps should have been taken to see that all the thunderflashes used had been exploded; and, in the absence of such steps, it should have been anticipated that an unexploded one would be found by children on Giroux's farm and that such children might so play with it as to cause injuries to themselves. While the two boys were normal and intelligent enough to understand to a certain extent the imprudence of their acts, they were, nevertheless, of such an age as not fully to comprehend the dangerousness of their actions: such was the finding of the trial judge and it should not be disturbed. *Per* Hudson and Estey JJ.:—The Crown

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appellant has failed to prove that after the manœuvres all the thunderflashes were accounted for and had, in fact, exploded. Notwithstanding that no permission had been obtained to use Giroux's land in any way, and in spite of the fact that these thunderflashes were thrown from a point adjoining it and in its direction, no effort was made to see that these thunderflashes did not reach it, nor to warn Giroux of the possibility that some of them might have reached his farm, upon which the boys who found the explosive were not trespassers. Under the circumstances, these facts constituted negligence. The conduct of the two boys, having regard to their capacity, knowledge and experience, constituted also negligence, but that the boys were negligent, however, does not necessarily relieve the first party negligent of liability. Nevertheless, in spite of their partial knowledge of the possibility of injury with which they were confronted, they cannot be entirely excused because in part their negligent conduct has contributed to their own injuries. *Per* Rand J. (dissenting on the cross-appeal):—A highly dangerous explosive has been unlawfully placed and left on land where two boys who shortly thereafter found it had permission to be. The high degree of care required of those who control such articles means the anticipation of a greater range of probable mischief and, in this case, reaching to the children injured. The natural consequences of that initial *culpa* extend then to the injuries suffered unless it can be said that at some point a new and independent actor has intervened. The intervening act in this case, if an adult had been concerned rather than a boy of 12, would be held to be new and independent; it was not a situation in which contributory negligence could operate; it would have been an intermeddling by a responsible person with what he would know could be dangerous. There are degrees of liability for consequences between two or more participants in a negligent cause, but there is no binding authority which attributes fractional liability or deprivation of right to an infant in proportion to his appreciation of a particular situation; in relation to a specific act, he must be either responsible or not responsible, there is no halfway culpability and these boys of 11 and 12 cannot be held to conduct that in the circumstances would have avoided the results which happened. The act of both boys, moving to pick up the explosive after the fuse had been lighted, not only negatives intelligence and general capacity which would have placed them in an older age or adult category, but demonstrates their inadequate appreciation of the danger they were courting. Their conduct then was normal, likely and, just as prudent behaviour in an adult, innocent: that excludes any qualification or limitation of the right to recover full damages from the Crown.—The Crown contended that its

FRANCHISE—*Act of provincial legislature authorizing erection and exploitation of toll-bridge—Exclusive right to cross river and charge tolls—Crown to have right, after fifty years, to take possession of bridge and dependencies upon payment of their value—Crown then to have right to charge and collect tolls—Construction of the Act—Taking of possession by Crown not constituting expropriation in its strict sense—Crown solely exercising rights conferred to it by Act—Mere execution of clauses of contract between Crown and grantee—Franchise not perpetual, but ceasing to exist from date of taking of possession by Crown—Provision in Act of 1830 and subsequent enactment in 1940 as to taking of possession upon payment of value of properties—Taking of possession allowed without making immediate payment—Interest payable on amount of indemnity from date of taking of possession—Statute of Lower Canada (1830) 10-11 Geo. IV, c. 56—(Que.) (1940) 4 Geo. VI, c. 33 and c. 71—Arts. 1066 (a) and seq. C.C.P.*—The appellant company was vested with all the rights, prerogatives and privileges conferred to one J.P., in 1830 by a provincial statute of Lower Canada (10-11 Geo. IV, c. 56). Under that Act, J.P. was authorized to erect and exploit a toll-bridge with its dependencies, for a league round, in the upper and lower part of the river Jésus, opposite the village of Sainte-Rose and was granted the exclusive right to cross the river and to charge tolls in accordance with the tariff established by the Act. But it

was also provided that, after the expiration of a period of fifty years, the Crown would have the right at any time "to assume the possession and property" of the bridge and dependencies, upon paying to the grantee the "full and entire value", and it was further stipulated that, from the moment of that taking of possession, the Crown would be substituted to all the rights of the grantee to charge and collect the tolls. The Crown took such possession on July 1, 1940. Proceedings were taken by the appellant under the expropriation law (Arts. 1066 *(b)* and *(c)* C.C.P.) and the record was referred to the Public Service Board for the purpose of fixing the indemnity. Subsequently the Crown made an offer of $109,398 which was refused. The appellant then filed its claim for $2,387,093, $1,848,000 being the alleged value of the franchise and $539,093 as value of the physical assets, damages, interest and other items. The Public Service Board fixed the amount of the indemnity at $109,899. The Superior Court homologated that decision and the appellate court affirmed that judgment. *Held* that the appeal should be dismissed. Upon a proper construction of the Acts of 1830 and 1940, under whose provisions the appellant's claim must exclusively be decided, the appellant company has been granted by the courts below the full amount of compensation to which it was entitled. *Held* that, under the enactments of the Act of 1830, the taking of possession by the Crown, whenever effected, did not constitute an expropriation in its strict legal sense. The Crown, by taking possession, did not do more than exercising the rights which had been conferred to it by the Act and to which the grantee had acquiesced in advance. It is purely and simply the execution of the clauses of a contract passed between the Crown and the grantee. *Held*, also, that, upon a proper construction of the Act of 1930, the franchise, which the grantee has acquired through that statute, ceased to exist from the moment of the taking of possession by the Crown and the grantee or his successors or assigns cannot lay any claim to the tolls collected thereafter.—The Act of 1930 stipulated that "it shall and may be lawful for His Majesty * * * to assume the possession and property of the said bridge * * * upon payment to the said J.P. * * * the full and entire value which the same shall, at the time of such assumption, bear and be worth". But by a subsequent Act, in 1940 (Que. 4 Geo. VI, c. 33), "The Minister of Public Works (was) authorized to take possession, in the name of His Majesty, of the toll-bridge * * * and dependencies * * * and the Provincial Treasurer (was) authorized to pay * * * to the * * * assigns of the grantee J.P. the full and entire value of the whole at the time when the Minister of Public Works shall so take possession thereof." *Held* that the stipulation in the

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binding respondent, as to the proportion of shares in appellant held by the English company, appellant must be taken not to be controlled directly or indirectly by the English company, and therefore the disallowance of the deductions was not authorized under s. 6 (1) *(i)* of the Act, the provisions of which were applicable to the case, and the Minister could not act under s. 6 (2) in contravention of what was prescribed under s. 6 (1) *(i)*; further, there was evidence, uncontradicted, that the advice and services of the English company were worth the amounts paid; further, s. 6 (2) did not apply to the facts: the sums claimed as deductions were not "expenses" within the meaning of s. 6 (2) (which contemplates expenses in the ordinary course of business); they were the price or consideration of the contract and of the due performance by the English company of its obligations; without them there would have been no contract and appellant would not have been in business. (The opinion was expressed that the assessment should be set aside to all intents and purposes, but, in view of conclusions by Hudson, Kellock and Estey JJ. that the matter should be referred back to the Minister, such disposition was agreed to.) *Per* Hudson J.: S. 6 (1) *(i)* of the Act did not exclude the exercise of the Minister's discretion under s. 6 (2) under which he proceeded. The sums for which appellant claimed deductions could not be considered as part of its "net profit or gain" under s. 3, and there should be special reasons to support the disallowance. The Minister's ruling did not disclose reasons. The Court should know the reasons, so as to decide whether or not they are based on sound and fundamental principles. The report of the local inspector should have been before the Court under s. 63 *(g)* of the Act; appellant was entitled to see it and reply to it. The matter should be referred back to the Minister for reconsideration. *Per* Kellock J.: Having regard to the matters for which the commissions were paid, s. 6 (1) *(i)* did not apply; and the Minister did not purport to act under it but expressly acted under s. 6 (2). His discretion under s. 6 (2) should be exercised on proper legal principles. Appellant had a statutory right to have deducted, in the computation of its net profits or gains, "expenses wholly, exclusively and necessarily laid out or expended" for the purpose of earning those profits or gains. For the Minister to disallow any excess over what was reasonable or normal for appellant's business, he first had to determine what was reasonable or normal. His formal decision threw no light as to the grounds upon which it rested. He could not ignore the agreement between appellant and the English company nor its legal consequences; and there was nothing before the Court upon which it could be said that there was any unreasonableness attaching to the commissions or to the agreement to pay them.

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What evidence there was, was to the contrary. The ground of the Minister's decision was unexplained and his decision was made to appear as a purely arbitrary one. Whether the local inspector's report disclosed grounds for the Minister's decision the Court had no means of knowing. Therefore it was the duty of the Court to refer the case back to the Minister. Further, s. 63 *(g)* of the Act made the report of the local inspector evidence, and appellant was entitled to have it produced to him before the assessments were made and to have an opportunity to meet whatever it contained; and his not having been accorded this right was in itself a ground for setting aside the assessments and sending the case back for further consideration.—*Per* Estey J.: The Minister acted under s. 6 (2) of the Act, as stated in his decision and the correspondence; also s. 6 (1) *(i)* was inappropriate, in view of the matters for which the commissions were paid; moreover, there was no evidence before the Minister upon which he could determine by whom appellant was controlled "directly or indirectly" within the provision in s. 6 (1) *(i)*. The Minister's discretion under s. 6 (2) is a judicial discretion, to be exercised on proper legal principles. Apart from the local inspector's report, which was not produced before the Court, there were no facts before the Minister which provided a basis upon which a discretionary determination could be made that the items in question were excessive within the terms of s. 6 (2). The said report, admitted by the Deputy Minister to have contained representations from the taxpayer, was "relative to the assessment" and should have been filed as required by s. 63 *(g)* of the Act. As it was not so filed, and also as further information might well have been requested from and given by appellant, the case should be referred back to the Deputy Minister as provided under s. 65 (2) of the Act. *Per* Kerwin, J., dissenting: On the evidence it could not be said definitely that appellant was not "controlled directly or indirectly" by the English company within the meaning of s. 6 (1) *(i)* of the Act; in any event, s. 6 (2) (enacted in its present form subsequently to the enactment of s. 6 (1) *(i)*) conferred upon the Minister a power which he might exercise even if appellant had been able to bring itself within s. 6 (1) *(i)*, and that power is a purely administrative one. Even if it were held to be of a quasi-judicial nature, appellant was given a fair opportunity to be heard and to make its representations, and there was nothing to indicate that the discretion was not exercised on proper legal principles. Appellant's payments to the English company fell within the term "expense" in s. 6 (2). As the substantial matter in the appeal to the Deputy Minister (acting for the Minister) was the same as what was involved in the exercise of his discretion, the decision in *Local Government*

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Leave to appeal was granted by the appellate court. *Held*, The Chief Justice and Taschereau J. dissenting, that this appeal should be dismissed and the respondent's action maintained.—It was not the intention of the contract that the shipper or his representative should at all times be present with the horses to act as a guard, but only at such times as it might be expected that the horses would require care and attention. It was common ground that neither the respondent, nor anyone on his behalf, accompanied the shipment. There is no liability, however, upon the respondent on that account, as there has been no evidence that failure to provide an attendant caused or contributed to the loss or damage suffered by the horses. As a result of the terms of the contract and upon a proper construction of the relevant provisions of the freight classification referred to in the contract and of the tariff applicable to the shipment, the onus of establishing the cause of the loss or damage was upon the appellant railway and the latter has failed to adduce sufficient evidence to satisfy such onus. *Per* The Chief Justice and Taschereau J. (dissenting)—The appellant railway should not be held responsible for the loss or damage suffered by the respondent. The Special Contract is valid and binding and its terms and conditions are determinative of the issue. One of its relevant provisions is that the live stock to be carried thereunder was received subject to the Classification and Tariffs in effect on the date of its issue, under which the rates and weights may be either at "carrier's risk", subject to the terms and conditions of the bill of lading issued by the originating carrier or at "owner's risk" subject to the terms and conditions of the Special Contract signed by the shipper or his agent. The shipper of live stock may thus choose how and to what extent he wishes to be protected by the carrier against loss or damage which may occur to his shipment in transit. In the present case, the respondent could have had the carriage performed at carrier's risk, through the terms and conditions of a standard bill of lading and by paying double the rate he paid, but he executed the Special Contract, whereby he agreed to ship at his own risk, upon whose terms and conditions the carrier's obligations and its liability were restricted and under which the rate applicable was lower. The shipment was thus carried at owner's risk and the carrier was relieved from liability for damage even if resulting from its negligence and that of its servants, such conclusion not being inconsistent with the terms and conditions of the Special Contract. Therefore, the respondent agreed to assume the risk of loss or damage to his horses during the journey, unless he could establish that such loss or damage was due to the non-fulfilment of the appellant's obligations under the contract. The respondent has failed to do so or to

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prove any negligence of the appellant railway, which was not even alleged. Moreover, the damage, in any event, was attributable to the respondent's failure to accompany, attend to and care for his shipment during the journey, as he was bound to do under the contract. By force of article 1681 C.C., the special regulations made in accordance with the *Railway Act* must be recognized and applied in preference to article 1675 C.C., which is thereby superseded, and, therefore, the Special Contract in this case and the "owner's risk" clause forming part of it clearly eliminated the presumption created by article 1675 C.C. *Per* Hudson J.:—The Special Contract itself does not contain any direct reference to the shipment being made at "owner's risk", as contended by the railway appellant; but it is expressed to be subject to the classification and tariff in effect on the date of the issue of the bill of lading. Upon a proper analysis of the provisions of the contract, the classification and the tariff, the shipper accepted the terms of the special live stock contract and nothing else. None of the causes of loss, other than failure to provide attendant, from which the carrier may be relieved from liability under section 6 of the contract, apply to the facts of this case, and the *Railway Act* does not give the appellant railway any immunity beyond that expressed in the contract, which was in a form approved of by the Board of Transport Commissioners. *Per* Kellock J.:—The result of the various provisions of the contract, the classification and the tariff is that the shipment was carried "at owner's risk subject to the terms and conditions of the special live stock contract", under which the appellant railway agreed to carry the shipment at destination. The terms "owner's risk" cannot be construed here, as contended by the appellant railway, as throwing upon the respondent all risks including risk of loss or damage from negligence of the carrier, except wilful neglect or misconduct of the carrier. More particularly, section 6 of the contract pre supposes that the appellant is liable as common carrier with some additional exceptions to that liability. Delivery of the horses in their mutilated condition was not a compliance with this underlying obligation resting upon the appellant, and it lay upon the latter, who contended that the loss fell within either one or two of those exceptions, namely "the act or default of the shipper" or "causes beyond the carrier's control", to adduce evidence bringing the case within the one or other of those exceptions. The appellant adduced no evidence to enable a finding to be made as to how the loss occurred, and it is insufficient to prove something equally consistent with the loss having been due to the respondent's default or to the default of the appellant railway. *Per* Estey J.:—The provisions of the Special Contract