1956

CANADA
LAW REPORTS

Supreme Court of Canada

Editors

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QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1957

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Hon. PATRICK KERWIN, P.C., C.J.C.
" " ROBERT TASCHEREAU J.
" " IVAN CLEVELAND RAND J.
" " ROY LINDSAY KELLOCK J.
" " JAMES WILFRED ESTEY J.
" " CHARLES HOLLAND LOCKE J.
" " JOHN ROBERT CARTWRIGHT J.
" " GÉRALD FAUTEUX J.
" " DOUGLAS CHARLES ABBOTT J.
" " HENRY GRATTAN NOLAN J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Stuart Sinclair Garson, Q.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. W. Ross Macdonald, Q.C.

MEMORANDA

On the 22nd day of January, 1956, the Honourable James Wilfred Estey, Puisne Judge of the Supreme Court of Canada, died.

On the 1st day of March, 1956, Henry Grattan Nolan, one of Her Majesty's Counsel, learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada.

ERRATA

in Volume 1956

Page 31, line 34. For "affirmed" read "reversed".

Page 52, fn. (1). Read "[1927] A.C. 844".

Page 380, fn. (1). Read "[1952] 1 S.C.R.".

Page 425, line 27 and second footnote. For "(1)" read "(2)".

Page 469, line 20. For "evidence" read "statement".

Page 877, the second sentence of the headnote should read: "In deciding whether or not one of these conditions exists the board must act judicially, and must give to the occupants of the premises in question, or other persons whose rights may be affected, an opportunity to know which of the causes is alleged to exist, and to answer the allegation."

NOTICE

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

St. Catharines Flying Training School Limited v. *The Minister of National Revenue* [1955] S.C.R. 738. Petition for special leave to appeal dismissed, 15th October, 1956.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between the 5th of December, 1955, and the 31st of December, 1956, delivered the following judgments which will not be reported in this publication:

Allen v. *Municipal Corporation of the City of Hamilton*, [1954] O.W.N. 803, 71 C.R.T.C. 348, appeal dismissed with costs, June 11, 1956.

Bélanger v. *Langlais*, [1955] Que. Q.B. 614, appeal dismissed with costs, November 27, 1956.

Boulanger v. *Minister of National Revenue*, [1956] Que. Q.B. 51, appeal dismissed with costs, November 12, 1956.

Brown and Brown v. *Williams and Reid*, 37 M.P.R. 160, [1955] 4 D.L.R. 454, appeal dismissed with costs, March 1, 1956.

Canadian Lift Truck Company Limited v. *Deputy Minister of National Revenue for Customs and Excise*, [1954] Ex. C.R. 487, appeal dismissed with costs, December 22, 1955.

Carnaghan v. *Yates*, [1955] O.R. 189, [1955] 2 D.L.R. 801, appeal dismissed with costs, March 2, 1956.

Chibok v. *The Queen*, (Ont.) (not reported), appeal dismissed, October 24, 1956.

Clatworthy Lumber Company v. *J. R. Stewart Motor Hotels Corporation*, (Ont.) (not reported), appeal dismissed with costs, June 27, 1956.

Coorsh v. *Coorsh*, [1956] Que. Q.B. 315, appeal dismissed with costs, March 6, 1956.

Darville v. *The Queen*, (Ont.) (not reported), appeal dismissed, October 24, 1956.

Haggerty v. *The Queen*, 15 W.W.R. 696, 112 C.C.C. 229, 22 C.R. 271, appeal allowed and order for preventive detention quashed, November 7, 1956.

Hercules Manufacturing Company Limited v. *Royal Trust Company and Laidlaw*, 12 W.W.R. 367, 62 Man. R. 398, appeal dismissed with costs, February 27, 1956.

Imprimerie Populaire Limitée v. *Asselin*, [1956] Que. Q.B. 529, appeal dismissed with costs, November 23, 1956.

Lang v. *The Queen*, (Ont.) (not reported), appeal allowed, conviction quashed and new trial ordered, June 7, 1956.

Langlois v. *Canadian Commercial Corporation*, [1954] Que. Q.B. 247, appeal allowed, judgments below set aside and judgment to be entered for the appellant for $20,000 with interest. Costs throughout, April 24, 1956.

Latouche v. *Plamondon*, [1955] Que. Q.B. 616, appeal dismissed with costs, March 9, 1956.

Lessard v. *Vézina-Bolduc*, [1954] Que. Q.B. 417, appeal dismissed with costs, November 12, 1956.

Létourneau v. *Martineau*, [1955] Que. Q.B. 862, appeal dismissed with costs, November 14, 1956.

Lowe v. *Rafter et al*, (Alta.) (not reported), appeal dismissed with costs and cross-appeal dismissed without costs, December 11, 1956.

Maheux v. *The Queen*, [1955] Que. Q.B. 783, appeal dismissed, June 27, 1956.

Marien v. *Lalonde and Town of St. Laurent*, [1955] Que Q.B. 697, appeal quashed with costs of motion on the motion to quash made by the respondents, March 22, 1956.

Marks v. *Commercial Travelers Mutual Accident Assurance of Canada*, [1956] Que. Q.B. 339, appeal allowed and judgment at trial restored with costs throughout, May 24, 1956.

Mitchell v. *The Queen*, [1956] O.W.N. 315, 115 C.C.C. 333, 23 C.R. 238, appeal dismissed, November 29, 1956.

Priddle v. *The Queen*, (B.C.) (not reported), appeal allowed and order for preventive detention quashed, November 7, 1956.

Queen, The v. *John Stuart Sales Limited*, [1955] C.T.C. 78, appeal dismissed with costs, Kellock J. dissenting, March 2, 1956.

Queen, The v. *Lee*, 114 C.C.C. 371, appeal quashed on a motion to quash, April 27, 1956.

Richard v. *Shawinigan Water and Power Company*, (Que.) (not reported), appeal dismissed with costs, November 27, 1956.

Strong v. *Staples and Ellis*, (Ont.) (not reported), appeal allowed with costs, December 22, 1955.

Swail Limited et al v. *Reeves et al*, (Man.) (not reported), appeal allowed and judgment at trial restored with costs if demanded, Cartwright J. dissenting in part, March 2, 1956.

Tardif v. *Labonté*, (Que.) (not reported), appeal dismissed with costs, November 26, 1956.

Turvey and Mercer v. *Lauder*, 12 W.W.R. 411, appeal allowed and judgments below set aside, Cartwright J. dissenting, May 24, 1956.

Wickley v. *The Queen*, [1956] Que. Q.B. 255, 23 C.R. 330, appeal dismissed, October 2, 1956.

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THE SUPREME COURT OF CANADA

GENERAL ORDER

IT IS HEREBY ORDERED pursuant to the powers conferred by Section 103 of the Supreme Court Act (R.S.C. 1952, Chap. 250) that, as of the date hereof:—

1. RULE 10 be amended by striking out the word 'given' in the first line thereof and replacing it by the word 'approved', so that the Rule will read as follows:—

> RULE 10: When security has been approved in the Court appealed from, the case shall be accompanied by a certificate under the seal of the court below, stating that the appellant has given proper security to the satisfaction of the court whose judgment is appealed from, or of a judge thereof, and setting forth the nature of the security to the amount of five hundred dollars as required by the Act, and a copy of any bond or other instrument by which security may have been given, shall be annexed to the certificate.

2. RULES 54, 55 and 56 be repealed and the following substituted therefor:—

> RULE 54.—All interlocutory applications in appeal shall be made by motion, supported by affidavits to be filed in the office of the Registrar.
>
> RULE 55.—Notices of motion returnable before a judge or a judge in chambers shall be served at least four clear days before the time of hearing and all affidavits and material to be used on such motion shall be filed with the Registrar at least two clear days before the motion is heard. The notice of motion shall set out fully the grounds upon which it is based, and in all motions for leave to appeal a copy of the pleadings and judgments in the courts below shall form part of the material filed and the applicant shall serve and file with his notice of motion a memorandum of points of argument containing a reference to any authorities relied upon.
>
> RULE 56.(1).—When a motion is returnable before the Court the notice of motion, the affidavits in support thereof, the material to be used and a memorandum of points of argument containing a reference to any authorities relied upon shall be served by the applicant upon the opposite parties four clear days before the time of hearing and filed with the Registrar with proof of service at least two clear days before the time of hearing.
>
> (2) In all motions to quash for want of jurisdiction, or for leave to appeal, a copy of the pleadings and judgments and reasons for judgment in the courts below shall form part of the material filed.
>
> (3) When a motion is returnable before the Court, ten copies of the notice of motion and of the other documents referred to in subsection (1) properly indexed shall be filed for the use of the Court at the same time as the original papers; provided however that in the

case of motions for leave to appeal other than motions made in cases coming under paragraphs (*a*) or (*b*) of section 44A of the Supreme Court Act, five copies only of the notice of motion and other material shall be filed.

(4) When a statute, regulation, rule, ordinance or by-law is cited or relied upon, so much thereof as may be necessary to the decision of the motion shall be printed at length in the memorandum, or five copies of such statute, regulation, rule, ordinance or by-law shall be filed for the use of the Court.

RULE 56A.(1).—A notice of motion may be served upon the solicitor or attorney of the opposite party or parties by delivering a copy thereof to the booked agent, or at the elected domicile of such solicitor or attorney to whom it is addressed, at the City of Ottawa. If the solicitor or attorney has no booked agent, or has not elected a domicile at the City of Ottawa, or if a party to be served with notice of motion has not elected a domicile at the City of Ottawa, such notice may be served by affixing a copy thereof in some conspicuous place in the office of the Registrar of this Court.

(2) Service of a notice of motion shall be accompanied by copies of affidavits filed in support of the motion.

RULE 56B.—Unless otherwise ordered, if a party who serves a notice of motion does not set the motion down, or, if having set the motion down he thereafter countermands the same by notice served on the opposite party, he shall be deemed to have abandoned such motion, and the opposite party shall thereupon be entitled without an order to the costs of such abandoned motion.

3. RULE 57 be repealed and the following substituted therefor:—

RULE 57.—Motions to be made before the Court shall be set down on a list or paper and, unless otherwise ordered by the Chief Justice or one of the puisne Judges at his direction, shall be called on the first day of any session and on the first day of each week on which the Court is in session.

4. RULE 104 be repealed and the following substituted therefor:—

RULE 104.(1).—Money required to be paid into Court or to be deposited with the Registrar as security under Section 66 of the Act, shall be paid into the Bank of Montreal at its Ottawa agency, or such other bank as shall be approved by the Minister of Finance.

(2) The person paying money into Court or depositing money with the Registrar, shall obtain from the Registrar a direction to the bank to receive the money.

(3) The bank receiving money to the credit of any cause or matter shall give a receipt therefor in duplicate; and one copy shall be delivered to the party making the deposit, and the other shall be posted or delivered the same day to the Registrar.

(4) The stamps for the fees payable on money paid into Court or deposited with the Registrar, shall be affixed to the receipt directed by this Rule to be posted or delivered to the Registrar.

5. RULE 141 be repealed and the following substituted therefor:—

RULE 141: In the absence of the Registrar through illness or otherwise, all powers and authorities vested in the Registrar under and by virtue of these Rules may be exercised by the Deputy Registrar, and in the absence of both the Registrar and the Deputy Registrar, the Chief Justice, or in his absence a judge of the Court may appoint an acting Registrar to perform the duties of the Registrar.

6. Form H in the Schedule to the Supreme Court Rules be amended by striking out the first line thereof and substituting therefor the following:—

On filing a Notice of Appeal .....$ 1.00
On filing a certified copy of the Appeal Case $10.00

7. Form I be amended by striking out the fifteenth and sixteenth items thereof as they appear at page 26 of the printed Rules and the following substituted therefor:—

The fees for motions to cover all preliminary proceedings, notices, certificates, correspondence, drafting orders, and settling and issuing the same but not to include disbursements or the preparation of the copies of the material required to be filed under the provisions of Rule 56(3).

For preparing the copies of a record or brief containing the material required to be filed under the provisions of Rule 56(3), per folio of 100 words ..... .20.

Dated at Ottawa, this 26th day of September, A.D. 1956.

P. Kerwin, C.J.
Robert Taschereau
I. C. Rand
R. L. Kellock
C. H. Locke
J. R. Cartwright
Gerald Fauteux
D. C. Abbott
H. G. Nolan

COUR SUPRÊME DU CANADA

ORDONNANCE GÉNÉRALE

En vertu des pouvoirs conférés par l'article 103 de la Loi sur la Cour suprême, chapitre 250 des Statuts revisés du Canada, 1952, il est par les présentes ordonné que, à compter de la date de celles-ci:

1. La règle 10 sera modifiée par le retranchement de l'expression "fourni", à la première ligne, et son remplacement par l'expression "approuvé", de manière que ladite règle se lise ainsi qu'il suit:

"RÈGLE 10.—Lorsqu'un cautionnement a été approuvé à la cour dont il est interjeté appel, le dossier imprimé doit être accompagné d'un certificat scellé par la cour inférieure, attestant que l'appelant a fourni un cautionnement convenable, à la satisfaction de la cour dont le jugement est porté en appel, ou d'un juge de ladite cour, et indiquant la nature du cautionnement au montant de cinq cents dollars, tel que la loi le requiert. Est jointe au certificat une copie de toute obligation ou de tout autre document en vertu duquel le cautionnement a pu être fourni."

2. Les règles 54, 55 et 56 seront abrogées et remplacées par ce qui suit:

"RÈGLE 54.—Toutes requêtes interlocutoires en appel doivent s'effectuer par voie de motion, appuyée sur des affidavits à produire au bureau du registraire.

"RÈGLE 55.—Les avis de motion dont la connaissance appartient à un juge ou à un juge en chambre doivent être signifiés au moins quatre jours francs avant la date de l'audition, et tous les affidavits et pièces devant servir à une telle motion seront produits au bureau du registraire au moins deux jours francs avant l'audition de la motion. L'avis de motion doit énoncer au long les motifs qu'elle invoque, et, pour toutes motions aux fins d'autorisation d'appel, une copie des plaidoiries écrites et des jugements dans les cours inférieures doit faire partie des pièces déposées. Le requérant doit signifier et produire, avec son avis de motion, un mémorandum des motifs de discussion renfermant un renvoi aux autorités invoquées.

"RÈGLE 56. (1) Dans le cas d'une motion dont la connaissance est réservée à la cour, l'avis de motion, les affidavits à l'appui, les pièces dont on doit se servir et un mémorandum des motifs de discussion, renfermant un renvoi à toutes autorités invoquées, doivent être signifiés par le requérant aux parties adverses quatre jours francs avant la date de l'audition et produits au bureau du registraire, avec une preuve de la signification, au moins deux jours francs avant la date de l'audition.

(2) Dans les motions en annulation pour défaut de compétence, ou aux fins d'autorisation d'appel, une copie des plaidoiries écrites et des jugements, ainsi que des notes à l'appui de ces derniers, dans les cours inférieures, doit faire partie des pièces déposées.

(3) S'il s'agit d'une motion dont la connaissance est réservée à la cour, dix copies de l'avis de motion et des autres documents mentionnés au paragraphe (1), avec un index approprié, doivent être produites à l'usage de la cour, en même temps que les originaux. Toutefois, s'il s'agit de motions aux fins d'autorisation d'appel, autres que les motions faites dans les cas relevant des alinéas *a*) ou *b*) de l'article 44A de la Loi sur la Cour suprême, on n'est tenu de produire que cinq copies de l'avis de motion et des autres pièces.

(4) Lorsqu'une loi, règle ou ordonnance, un statut ou règlement est cité ou invoqué, il faut imprimer au long, dans le mémorandum, telle partie qui en peut être nécessaire pour la décision de la motion, ou produire à l'usage de la cour cinq copies de ladite loi, règle ou ordonnance, dudit statut ou règlement.

"RÈGLE 56A. (1) Un avis de motion peut être signifié à l'avocat ou au procureur de la partie adverse ou des parties adverses par la remise d'une copie au correspondant désigné, ou au domicile élu de l'avocat ou du procureur à qui il est adressé, dans la ville d'Ottawa. Si l'avocat ou le procureur n'a pas de correspondant désigné, ou n'a pas élu domicile dans la ville d'Ottawa, ou si une partie à qui l'on doit signifier un avis de motion n'a élu aucun domicile dans la ville d'Ottawa, ledit avis peut être signifié par l'affichage d'une copie de ce dernier dans quelque endroit bien en vue au bureau du registraire de cette cour.

(2) La signification d'un avis de motion doit être accompagnée de copies des affidavits produits à l'appui de la motion.

"RÈGLE 56B. A moins qu'il n'en soit autrement ordonné, si une partie qui signifie un avis de motion n'inscrit pas la motion ou si, l'ayant inscrite, elle contremande ensuite ladite motion au moyen d'un avis signifié à la partie adverse, elle est censée l'avoir abandonnée. La partie adverse a droit alors, sans ordonnance, aux frais de cette motion abandonnée."

3. La règle 57 sera abrogée et remplacée par ce qui suit:

"RÈGLE 57.—Les motions à présenter à la cour doivent être inscrites sur une liste ou un rôle et, à moins que le juge en chef ou l'un des juges puînés, sur ses instructions, n'en ordonne autrement, lesdites motions doivent être appelées le premier jour d'une session quelconque et le premier jour de chaque semaine où la cour est en session."

4. La règle 104 sera abrogée et remplacée par ce qui suit:

"RÈGLE 104. (1) Les deniers qu'on est tenu de consigner à la cour ou de déposer au bureau du registraire à titre de cautionnement prévu par l'article 66 de la loi doivent être versés à la Banque de Montréal, succursale d'Ottawa, ou à toute autre banque agréée par le ministre des Finances.

(2) La personne qui consigne des deniers à la cour ou en dépose au bureau de registraire doit obtenir de celui-ci l'instruction, adressée à la banque, de recevoir les deniers.

(3) La banque recevant des deniers au crédit d'une cause ou affaire doit délivrer à cet égard un récépissé en double. Le premier exemplaire est remis à la partie qui fait le dépôt, et le second est envoyé par la poste ou remis le même jour au registraire.

(4) Les timbres pour les droits exigibles sur les deniers consignés à la cour ou déposés au bureau du registraire doivent être apposés sur le récépissé que la présente règle ordonne d'envoyer par la poste ou de remettre au registraire."

5. La règle 141 sera abrogée et remplacée par ce qui suit:

"RÈGLE 141.—En l'absence du registraire pour cause de maladie ou autrement, le registraire adjoint peut exercer tous les pouvoirs et attributions assignés au registraire en vertu et aux termes des présentes règles; en l'absence du registraire et du registraire adjoint à la fois, le juge en chef ou, en son absence, un juge de la cour peut nommer un registraire suppléant pour remplir les fonctions du susdit."

6. La formule H de l'Annexe des Règles de la Cour suprême sera modifiée par le retranchement de la première ligne et son remplacement par ce qui suit:

Sur production d'un avis d'appel .....$ 1.00
"Sur production d'une copie certifiée du dossier imprimé d'appel .....$10.00"

7. La formule I sera modifiée par le retranchement des quinzième et seizième postes, tels qu'ils figurent à la page 27 des règles imprimées, et leur remplacement par ce qui suit:

"Les honoraires pour motions englobent les procédures préliminaires, avis, certificats, correspondance, rédaction d'ordonnances, leur règlement et leur émission, mais ne comprennent pas les déboursés ni la préparation des copies des pièces à produire en vertu de la règle 56 (3).

"Pour la préparation des copies d'un dossier renfermant les pièces à produire en vertu de la règle 56 (3), le folio de 100 mots ..... .20"

Datée, à Ottawa, du
26 septembre 1956.

P. Kerwin, C.J.
Robert Taschereau
I. C. Rand
R. L. Kellock
C. H. Locke
J. R. Cartwright
Gerald Fauteux
D. C. Abbott
H. S. Nolan

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

EDWARD GORDON WARDLE (*Plaintiff*) .. APPELLANT;

AND

THE MANITOBA FARM LOANS ASSOCIATION and THE GOVERNMENT OF MANITOBA (*Defendants*) ..... RESPONDENTS

1955

*May 27, 30, 31
*Nov. 15

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Real Property—Land Titles—Mines and Minerals, title to—Tax sale lands vested in Crown, revested in Association by statute—"Crown Lands", meaning of—Certificate of title endorsed with reservation—Validity—Manitoba Farm Loans Act, R.S.M. 1940, c. 73, ss. 78, 79—Crown Lands Act, R.S.M. 1940, c. 48, ss. 2(d), 5(d)—The Real Property Act, R.S.M. 1940, c. 178.

The Manitoba Farm Loans Association (respondent) on acquiring the lands in suit in 1934 by an assignment of tax sale certificates, applied to have them brought under *The Real Property Act* (1934, Man. c. 38). The application was granted and a certificate of title issued to it in the usual form. *The Manitoba Farm Loans Act* (1917, Man. c. 33) as then amended, provided by s. 78 that lands to which the Association became so entitled should vest in the Crown in the right of the Province and that the district registrar of any land titles office in which such land was situate should on the request of the Provincial Treasurer issue a certificate of title in the name of the Crown. The Provincial Treasurer made the request and in Sept. 1934 a certificate of title was issued in the name of "His Majesty the King in the right of the Province of Manitoba." In 1937 s. 78 was repealed and a new s. 78 substituted which provided that land to which the Association had become entitled and was vested in the Crown was thereby revested in the Association and might be retransferred by a transfer under the hand of the Provincial Treasurer. Accordingly the Provincial Treasurer executed to the Association a transfer of all the Crown's estate and interest in the land and a certificate of title was issued to the Association in the usual form with the words added by the registrar "Subject to the reservations contained in the Crown Lands Act."

In 1945 the Association by an agreement of sale agreed to transfer its title to the appellant's father and in 1948, upon completion of the payments called for, at the father's request and upon execution of a quit claim deed by the father to the son, transferred the lands direct to the appellant. The transfer recited that the Association was the registered owner of an estate in fee simple in possession subject to the reservations contained in the *Crown Lands Act*. The certificate of title issued the appellant certified him to be seized of a similar estate and subject to a similar reservation.

Held (Kerwin C.J. and Locke J. dissenting): That the lands revested in the respondent Association by s. 78 of *The Manitoba Farm Loans Act* (as amended by 1937 S. of M. c. 15) were not "crown lands" within

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

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the meaning of *The Crown Lands Act*, S. of M. 1934, c. 38, and there was not a disposition of crown lands within the meaning of s. 2(*d*) of that Act. The reference to reservations under *The Crown Lands Act* noted on the certificate of title issued to the Provincial Treasurer was unauthorized and a nullity as were the similar notations entered on the subsequent certificates of title and should be cancelled.

Per Kerwin C.J. (dissenting): The respondent Association agreed to sell the lands "subject to the reservations contained in *The Crown Lands Act*" and that was what the transfer executed by it in favour of the appellant transferred,—and nothing more. The reference to the reservations contained in the Act was sufficient to bring in s. 5(*d*) thereof and the Association never agreed to transfer the mines and minerals and never did transfer them.

Per Locke J. (dissenting): The only question to be determined was the proper construction of the language of the agreement for sale which by its terms showed clearly that the mines and minerals were excluded from the subject matter of the sale. The question as to whether title to the mines and minerals was in the Government of Manitoba or in the Manitoba Farm Loans Association was an irrevelant consideration. The evidence did not disclose a cause of action.

Decision of the Court of Appeal for Manitoba [1954] 4 D.L.R. 572, reversed.

APPEAL from a judgment of the Court of Appeal for Manitoba (1), (Coyne J.A. dissenting) reversing the judgment of Williams C.J.Q.B. in favour of the plaintiff (2).

W. B. Scarth, Q.C., A. W. Scarth and *H. F. Gyles* for the appellant.

A. E. Hoskin, Q.C., F. O. Meighen, Q.C., J. G. Cowan, Q.C. and O. S. Alsaker for the respondents.

THE CHIEF JUSTICE (dissenting):—The dispute in this case is as to the mines and minerals in certain lands in the Province of Manitoba. On February 21, 1945, the Manitoba Farm Loans Association, by a document in writing and under seal, agreed to sell these lands to Gordon Eugene Wardle "Subject to the reservations contained in the Crown Lands Act". The land was being purchased by Wardle for his son, the present appellant, Edward Gordon Wardle, and when the payments under the agreement were completed the father asked the Association to convey the lands directly to the son. The Association consented if the father would

(1) (1954) 13 W.W.R. (N.S.) 49; [1954] 4 D.L.R. 572; (1955) 14 W.W.R. (N.S.) 289; [1955] 2 D.L.R. 23.

(2) (1953) 9 W.W.R. (N.S.) 529.

execute a quit claim deed to the appellant. Apparently the quit claim was given although the document has been lost and by a transfer under *The Real Property Act,* dated September 9, 1948, the Association transferred to the appellant all its estate and interest in the lands which had already been described and to which description was added the clause "Subject to the reservations contained in the Crown Lands Act". The transfer was mailed by the Association to the appellant who swore to the affidavit of value on September 11, 1948, and sent the transfer to the Land Titles Office for registration. The District Registrar issued a certificate of title, dated September 13, 1948, certifying that the appellant

> is now seized of an estate in fee simple in possession subject to such encumbrances, liens and interests as are notified by memorandum underwritten (or endorsed hereon) in all that piece or parcel of land known and described as follows,

and then follows the description and the clause "Subject to the reservations contained in the Crown Lands Act".

It was only in 1950 after oil had been discovered in the district and the appellant had made a lease of the oil rights to a third party that the title of the appellant to those oil rights was questioned, and this action was commenced by him on March 12, 1952, against the Association and the Government of Manitoba, under which name the Crown, defined as Her Majesty the Queen in right of the Province of Manitoba, is to be sued under *The Proceedings Against the Crown Act,* c. 13 of the Statutes of Manitoba, 1951. The statement of claim asks:—

(*a*) A declaration of this Honourable Court that the Plaintiff is entitled to all of the gas, oil, petroleum and mineral rights pertaining to or upon, in or under the said lands situate;

(*b*) A declaration that the Plaintiff is entitled as against the Defendant The Government of the Province of Manitoba to said oil, gas, petroleum and mineral rights;

(*c*) A declaration that there exists in favor of the Defendant The Government of Manitoba no reservation as to oil, gas, petroleum and mineral rights affecting said lands;

(*d*) An order that the Defendant The Manitoba Farm Loans Association do convey unto the Plaintiff the said oil, gas, petroleum and mineral rights;

(*e*) Alternatively to (*d*) above, an order that the Defendant The Manitoba Farm Loans Association do execute in favor of the

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Plaintiff such transfer, assignment or document as shall be necessary to clear the Plaintiff's title of the notation "subject to the reservations contained in the Crown Lands Act";

(*f*) Damages;

(*g*) Costs;

(*h*) Such further and other relief as the nature of the case may require or as to this Honourable Court may seem meet.

The Chief Justice of the Queen's Bench, who tried the action, gave judgment (1) declaring that the appellant is entitled to all of the petroleum and natural gas and related hydrocarbons within, upon or under the land and that he was entitled to them as against both defendants and that there exists no reservation in favour of either of the defendants. An appeal by the defendants, the present respondents, was allowed by the Court of Appeal for Manitoba (2) and the action dismissed.

In the view I take of the matter it is unnecessary to detail the various statutes referred to in the judgments below. By the amendment which came into force on April 28, 1933, to the Provincial Act respecting the Association, the lands in question became vested in the Crown since they were acquired by the Association under an assignment dated February 23, 1934, from the Rural Municipality of Wallace of certain tax sales certificates. By an application, dated February 28, 1934, and filed March 3, 1934, the Association applied to bring the land under the operation of *The Real Property Act* and the certificate of title granted upon that application is dated August 7, 1934, and is in the usual form and without the clause "Subject to the reservations contained in *The Crown Lands Act*". This application and certificate were not authorized by the amending statute and on September 13th the Provincial Treasurer, in accordance with s. 78 of that Act, applied for the issue of certificate of title in the name of the Crown, which was issued September 14, 1934, in the name of "His Majesty the King in the right of the Province of Manitoba". In 1937, by a further amendment to the Act respecting the Association, the land was vested in it. On June 18th of that year a transfer was executed by the Provincial Treasurer to the Association of all the Crown's estate and interest in the land, and on September 7, 1937, a certificate of title was issued by the

(1) (1953) 9 W.W.R. (N.S.) 529. (2) (1954) 13 W.W.R. (N.S.) 49; (1955) 14 W.W.R. (N.S.) 289.

District Registrar to the Association in the usual form but including the words "Subject to the reservations contained in the Crown Lands Act". The old certificate of title, dated 14th September, 1934, was marked cancelled with a notation "Transfer of all except Crown Lands Act Reservations".

I am willing to assume that the Registrar had no authority to insert the clause quoted in the certificate of September 7, 1937, or to cancel the certificate of September 14, 1934, in the manner described, i.e., by inserting the words mentioned, because the Statute of 1937 was sufficient to vest the land in the Association, although, as a matter of record, something additional might be required. However, the Association agreed to sell the lands "Subject to the reservations contained in the Crown Lands Act" and that is what the transfer executed by it in favour of the appellant transferred,—and nothing more. *The Crown Lands Act* as it stood at the date of the agreement was c. 7 of the Statutes of 1934, and by s. 5 thereof

> 5. In the absence of express provision to the contrary therein, there is reserved to the Crown out of every disposition of Crown land
>
> * * *
>
> (*d*) mines and minerals, together with the right to enter, locate, prospect, mine for and remove minerals.

In my view we are not concerned with the question as to whether the agreement or transfer was a "disposition of Crown lands" as defined in s. 2 (*d*) of the Act, because I agree with Mr. Justice Adamson (now Chief Justice of Manitoba), speaking for the majority of the Court of Appeal, that the only question is—What did the appellant purchase? There was no claim for rectification, or anything of that nature, and I think it is quite apparent that the subject of mines and minerals, (or oil), was not present to the mind of the father, in view of the following questions and answers in his evidence:

> Q. I direct your attention, Mr. Wardle, to a clause in the agreement just after the description of land "subject to the reservations contained in the Crown Lands Act." What have you to say to that?
>
> A. Well I didn't have any experience with titles, I thought it was just a natural matter that was in all agreements and titles. I wasn't acquainted with the general regulations regarding that and took it as a matter of course.
>
> Q. You didn't understand it referred to mines or oil?
>
> A. No, it wasn't discussed nor I didn't question it.

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Therefore, the only question which arises is as to the meaning to be ascribed to the clause.

It is pointed out in Vol. 10 of Halsbury, 2nd edit., p. 298, "A reservation may in substance be an exception, as where there is a reservation of part of the thing granted", but in this case we are not concerned with the category in which the clause falls because the reference to the reservations contained in *The Crown Lands Act* is sufficient to bring in s. 5 (*d*) thereof and the Association, therefore, never agreed to transfer the mines and minerals and never did transfer them. It was contended that if paragraph (*d*) of s. 5 is brought in then also the other paragraphs are also included, if applicable to the land in question. It was not suggested that any of these other clauses did apply and I, therefore, say nothing about them.

For these reasons the appeal should be dismissed with costs.

RAND J.:—This action concerns the title to the mines and minerals underlying the west half of sec. 24, township 10, range 28, west of the principal meridian in the province of Manitoba. The lands had been granted in quarter sections by the Dominion in 1886 and 1887 and the grants carried all minerals except gold and silver. In 1932 they were sold for taxes and were bid in by the municipality to which tax sales certificates were issued. They were not redeemed and on February 23, 1934 the certificates were purchased by the Manitoba Farm Loans Association. That organization had been established by *The Manitoba Farm Loans Act*, c. 33 of the statutes of 1917. Its authority to make the purchase and thereafter to deal with the lands as was done was not contested.

S. 78 of that statute, enacted in 1933, provided:—

> Land to which the association has become entitled by or through foreclosure, tax sale proceedings, conveyance, transfer or otherwise is hereby vested in the Crown in the right of the province, and land to which it hereafter in like manner becomes entitled shall thereupon become and be vested in the Crown in the right of the province; and the district registrar of any land titles district in which any parcel of such land is situate shall, on the request of the Provincial Treasurer, issue a certificate of title therefor in the name of the Crown.

The Provincial Treasurer made such a request in respect of the lands in question and a certificate of title was issued

in the name of His Majesty on September 7, 1934. Previously in that year the Association had itself obtained a certificate of title under its tax sales certificates and in the application of the Provincial Treasurer there was recited a certificate by the secretary of the Association that the latter had become entitled to the lands by way of tax sale proceedings.

In 1937 s. 78 was repealed and a substituted provision declared that:—

> 78. (1) Any land to which the association has become entitled by or through foreclosure, tax sale proceedings, conveyance, transfer or otherwise and which vested in the Crown in the right of the province under the section 78 which is repealed and substituted by this Act, is hereby revested in the association and may be reconveyed or retransferred, as the case may be, by conveyance or transfer under the hand of the Provincial Treasurer and no seal shall be required on any conveyance or transfer.
>
> * * *
>
> (3) Any such conveyance or transfer shall be conclusive evidence that the land described therein is land which hereby revests in the association without further or other proof thereof.
>
> (4) Any lands vested in the Crown by virtue of section 78 which is repealed hereby and which may have been sold under an agreement for sale or leased under the authority conferred by section 79 repealed hereby, shall be deemed to have been sold or leased in the name of the association.

To be "hereby revested in the association" means, as I interpret the section, that the beneficial ownership of the defaulting taxpayer passed back to the Association; the conveyance or transfer by the Provincial Treasurer seems to have been a formality operating on the bare legal title for the purpose of conforming to *the Real Property Act.*

In fulfilment of the section, a considerable number of parcels of land were included in a transfer executed by the Provincial Treasurer among which was the west half of sec. 24. By the instrument, given "in consideration of Bill No. 93-1937 Session—", His Majesty transferred to the Association "all His estate in the said pieces of land". The descriptions of the parcels were of the interest or estate held by the defaulting owners and in many instances they included a reference to reservations to the Crown contained in the original grant. This is significant when it is remembered that the fee, including all Crown reservations, was at the time of the enactment of 1937 vested in the Crown, and it can only mean that where reservations had been originally made they were intended to be retained, and

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where they had not been, they were not. The item for the west half of sec. 24 contained no reference to reservations.

I am unable to agree that the revesting in the Association by the amending s. 78 was a "disposition of Crown land" within s. 5 of *The Crown Lands Act* which, in the case of such an act, in the absence of an express provision to the contrary, reserved the mines and minerals to the Crown. The definition of "disposition" in s. 2(*d*) declared it to include

> . . . every act of the Crown whereby Crown lands or a right, interest or estate therein are granted, disposed of or affected or by which the Crown divests itself of or creates a right, interest or estate in land or permits the use of land; and the words "dispose of" shall have a corresponding meaning;

The key words are "act of the Crown"; but the revesting of lands by statute is not such an act.

The word "revesting" indicates that the object of the amendment was to restore the prior condition of title. It was in this view that the parcels of land transferred back to the Association were described as stated. For some reason, which we are not called upon to seek, a new policy of dealing with the lands was adopted. One reason may be mentioned to be rejected, that the vesting was for the purpose of bringing lands carrying minerals in their private title under the operation of s. 5 of *The Crown Lands Act* in subsequent dispositions. This is negatived by the repeal of the vesting and the statutory restoration of title. In these circumstances, the title in 1937 vested in the Association by the direct operation of the statute, completed by the transfer executed by the Provincial Treasurer, was a fee simple.

But the meaning and effect of the phrase "subject to the reservations contained in *The Crown Lands Act*" in the agreement of sale in 1945, and the certificate of title issued to the purchaser in 1948, remain to be considered. The reservations of s. 5 of *The Crown Lands Act* can be summarized shortly. Item (A) reserves a strip of land 1½ chains in width from ordinary high water where the land extends to the sea or navigable water or from the boundary where it touches another province or the United States; (B) reserves the public right of mooring boats and vessels where the land borders navigable waters; (C) provides for the reservation

of the bed of a body of water below ordinary high water mark and the public right of passing over a portage or trail in existence at the date of the disposition; (D) reserves mines and minerals; (E) reserves the right to and the use of the land necessary for the protection or development of adjacent water power; (F) the power to raise or lower the levels of a body of water adjacent to the land, subject to the payment of compensation. So far as the facts appear, none of these could be effective except (D) and they are not of the character to be reserved ordinarily by a private person or a corporation acting in its own interest and not representing the Crown.

The Court of Appeal appears to have been influenced by what, at first sight, seems to be an implication of the description of the land sold, that the purchaser was to receive the fee only as diminished by those items: but the reasonable construction of the language, to the benefit of which the purchaser is entitled, is that of their subtraction from the fee by operation of the statute and not by force of the contract or transfer: the reference to the statute is not a descriptive incorporation of the items for the purpose of an affirmative reservation. Their inclusion, on the part of the Association, resulted from a mistake of law and there is no evidence that the purchaser had any view or belief about it at all. It is not the case of a common mistake of the parties on a matter of law or fact fundamental to the contract. A unilateral misconception cannot here charge the conscience of the purchaser and the case must be dealt with on the basis of the strictly legal position.

A "reservation" of minerals is an exception, a subtraction from the larger content of the property described. Neither the word "reservation" nor "exception", often used interchangeably, is limited to its strict legal signification and the meaning of the expression in which it is used is to be gathered from the context. In some cases of a reservation, such as a *profit à prendre*, easement or other privilege, a regrant is implied even to a third person: *Wickham* v. *Hawker* (1). But the language here does not admit of that implication; it is not a case of "reserving" anything to the Crown: the words are "subject to" and these do not carry the meaning

(1) (1840) 7 M. & W. 63; 151 E.R. 679.

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of an original reservation as between the parties: it is rather a reference to a precedent operation of the statute, whatever that may have been.

The cognate expression as used with reference to Crown grants, "subject to the reservations contained in the original grant from the Crown", has become commonplace in Western Canada. There has been such an extensive retention of minerals by the Crown that the phrase is ordinarily contained in the standard forms of contract. It is used as an abbreviation describing the actual or possible withholding from a fee simple by reservation or exception as a protection to the vendor. If there happens to have been no reservation in an original grant, the entire fee passes.

A reference to statutory reservations is of the same nature. If the statute has operated so as to retain interests in the Crown, the clause protects the vendor: if it has not, the fee goes to the purchaser. The clause safeguards the vendor; it does not constitute a provision that, regardless of the operation of the statute, these limitations of the fee shall be effective either to the Crown or the Association by force of the contract.

It was urged by Mr. Hoskin that the Association was an agent of the Crown, and in that capacity it could effectuate the reservations of the statute. On this assumption the transfer by the Provincial Treasurer to the Association would not be a disposition since no beneficial interest would have passed out of the Crown. But the statute does not lend support to that contention. The Association, no doubt, bears the stamp of a public corporation, but it is a legislative creation with specified and limited objects. In many respects it is subject to governmental control; but these are powers which, with those given the corporation, make up the total functioning contemplated by the legislature. I find nothing to warrant the view that in administering the lands to which it became entitled it was acting as an agent or *alter ego* of the Crown; the statutory provisions regulating the relations between the Crown and the Association and the treatment of title are inconsistent with that relationship. When the title was in the Crown, the Association administered for and in the name of the Crown; but the fact and mode of restoration to the original

situation of title indicates an unmistakable intention to restrict the government's relations to those specifically provided in the Act.

It was also argued by Mr. Hoskin that at the outset there is the existence of two certificates of title, one embodying the reservation and the other the remaining interests of the fee. But the entry on the original certificate in the name of the Crown, issued upon the request of the Provincial Treasurer in September, 1934, was made by the Registrar of Land Titles as what he considered to be a legal consequence of the application of s. 5 of *The Crown Lands Act* to the revesting by the statute, followed by the transfer executed by the Provincial Treasurer. S. 5 effected no such reservation and there was no legal foundation for the endorsement. It, therefore, was improperly entered on the certificate of the Crown, and, as the Chief Justice of the King's Bench held, the entry is a nullity. There is, then, no conflict between the certificates. The title of the purchaser to the lands under the certificate issued to him in 1948 is not subject to the reservations specified in s. 5 of *The Crown Lands Act;* certificate No. 61305 must be read with the words of reference to that statute struck out: and the endorsement on certificate No. V-4338 of the reservations under The Crown Lands Act is without validity.

I would, therefore, allow the appeal and restore the judgment at trial, amending the latter, however, by adding thereto the direction to cancel the reference to the reservations under *The Crown Lands Act* in certificates Nos. V-4338, V-5208 and 61305. The appellant will have his costs in both courts.

KELLOCK J.:—This appeal is concerned with the title to the mines and minerals in certain lands described in an agreement of sale of the 21st of February, 1945, between the respondent Farm Loans Association and Gordon Eugene Wardle, as well as in a subsequent transfer dated September 13, 1948, to the appellant, and the certificate of title issued to the appellant on the same date.

The lands, as described in the agreement of sale were:

The West Half of Section Twenty-four in Township Ten and Range Twenty-eight, West of the Principal Meridian in Manitoba.

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This is followed by the sentence

Subject to the reservations contained in the Crown Lands Act.

The original purchaser, having completed his payments under the agreement, executed a quit claim deed to the appellant, in whose favour the respondent Farm Loans Association executed the above-mentioned transfer. This transfer recites the Association to be the registered owner of "an estate in fee simple in possession" in the lands described as in the agreement of sale and transfers to the appellant all its estate and interest in the "said piece of land." The certificate of title, dated the 13th day of September, 1948, certifies the appellant to be seized of an estate in fee simple in possession of the land similarly described, the sentence "Subject to the reservations contained in the Crown Lands Act" being also included.

In order to appreciate the nature of the interest of the respondent Association in the land at the time of the execution of the above-mentioned documents, it is necessary to refer to certain special legislation enacted by the legislature of Manitoba. By amendment to the "Manitoba Farm Loans Act", c. 13 of the Statutes of 1933, s. 78, it was enacted that

> Land to which the association has become entitled by or through foreclosure, tax sale proceedings, conveyance, transfer or otherwise is hereby vested in the Crown in the right of the province, and land to which it hereafter in like manner becomes entitled shall thereupon become and be vested in the Crown in the right of the province;

The section authorized the district registrar of land titles, on request of the Provincial Treasurer, to issue a certificate of title in the name of the Crown.

S. 79 is also important in that it provides that all land vested in the Crown by the Act should nevertheless continue to be administered by the respondent Association in its own name under the provisions of the Act, and that the Association should have the same powers as to such administration of the land *as if it had continued the owner,* including power in the name of the Crown to sell, assign, convey, transfer and otherwise dispose of the land or any estate or interest therein and to execute and deliver in the name of the Crown all necessary conveyances, transfers, agreements and documents. There is no dispute that prior to this legislation the title of the respondent Association extended to the minerals. This title accordingly passed to the Crown by virtue of the statute.

Subsequently, on the 17th of April, 1937, the legislature, by c. 15, repealed the amendments of 1933 and enacted new provisions. S. 78, s-s. (1), provides that any land to which the Association had become entitled and which had vested in the Crown under the repealed section "is hereby revested" in the Association and may be reconveyed and retransferred by instrument under the hand of the Provincial Treasurer. S-s. (3) enacts that any such conveyance or transfer shall be conclusive "evidence" that the land described therein is land which "hereby revests in" the Association.

It will thus be seen that it was the statute itself which "revested" the lands in the Association, the conveyance of the Provincial Treasurer being permissive and merely constituting evidence of such revesting. Title to the minerals was, of course, as much "revested" in the Association by the legislation as were the surface rights. This result could not in any way be affected by any error or insufficiency in any transfer by the Provincial Treasurer—and there was none—or in any certificate of title.

The lands with which we are here concerned were acquired by the respondent Association under an assignment by the Rural Municipality of Wallace of a tax sale certificate dated February 23, 1934. Accordingly, by force of the statute of 1933, they immediately became vested in the Crown. The issue on August 7, 1934, of a certificate of title to the Association is an irrelevant circumstance. It was not authorized by the statute. On the 13th of September following, the Provincial Treasurer, in pursuance of s. 78 of the Act of 1933, applied for the issue of a certificate of title in the name of the Crown, which issued the following day.

Upon enactment of the legislation of 1937, the Provincial Treasurer, pursuant to s. 78, s-s. (1), executed a transfer on the 18th of June, 1937, to the respondent Association of

> The West Half of Section Twenty-four in Township Ten and Range Twenty-eight West of the Principal Meridian in the Province of Manitoba

simpliciter, in accordance with the description in the certificate of title issued to the Crown on the 14th of September, 1934, and by the transfer, the Crown transferred to the Association "all its estate and interest" in the said lands

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without reservation. This, of course, was in accord with the statute, which made no reservation of minerals to the Crown.

The district registrar, however, in issuing the certificate of title to the respondent Association on the 7th of September, 1937, inserted the words "Subject to the reservations contained in the Crown Lands Act", in the evident belief that the last mentioned statute applied. The question is as to the effect, if any, of this language.

The Crown Lands Act was enacted on the 29th of March, 1934, as c. 7 of the Statutes of that year. By s. 5, it is enacted that, in the absence of express provision to the contrary therein, there is reserved to the Crown out of every "disposition" of "Crown land"

> (*d*) mines and minerals, together with the right to enter, locate, prospect, mine for and remove minerals;

S. 2, so far as material, reads as follows:

> 2. In this Act, *unless the context otherwise requires,* the expression
> (*b*) "Crown lands" includes land, whether within or without the province, vested in the Crown, and includes "provincial lands" whenever that expression is used in an Act of the Legislature;
> (*d*) "Disposition" includes every act of the Crown whereby Crown lands or a right, interest or estate therein are granted, disposed of or affected or by which the Crown divests itself of or creates a right, interest or estate in land or permits the use of land; and the words "dispose of" shall have a corresponding meaning;

While the definition in para. (*b*), taken alone, would, no doubt, include the lands vested in the Crown under the special legislation of 1933, it is to be observed that the expression "Crown lands" as used in the Act of 1934 is only to include lands as described in the paragraph "unless the context otherwise requires". For reasons which I proceed to give, the context of the statute, in my opinion, renders it abundantly plain that the statute has no application to the lands which the legislature had made the subject of the special Farm Loans legislation in 1933 and subsequently in 1937 and 1939.

By s. 3 of *The Crown Lands Act,* a branch of the Department of Mines and Natural Resources was established, to be known as the Lands Branch, under the control of the Minister, through which he was required to manage and administer "Crown Lands". The Minister referred to was (s. 2(*f*)) the Minister of Mines and Natural Resources "or

such member of the Executive Council as is appointed *to administer this Act.*" By s. 9, also, the Minister was to have not only the control and management of "Crown lands" but the "disposition" thereof and he was to execute all documents evidencing any "disposition" (s. 22).

Under the *Farm Loans Act* of 1933, however, although the land to which the Association had become or might become entitled became vested in the Crown, nevertheless by s. 79, as already mentioned, the land was to continue to be administered by the Association in its own name *under the provisions of that statute* and the Association was to have the same powers as to such administration as if it had continued *the owner,* including power "in the name of the Crown" to sell, assign, convey, transfer and otherwise dispose of the land and to execute and deliver all documents with relation thereto." It is, in my opinion, quite impossible that the same land could be subject at one and the same time to the provisions of both the *Farm Loans Act* and the *Crown Lands Act* and no such situation could have been in the contemplation of the legislature. The Farm Loans legislation is special legislation with respect to the lands thereby dealt with and although such lands from 1933 to 1937 or thereafter were Crown lands in the sense that they were the property of the Crown, they were not "Crown lands" within the meaning of the *Crown Lands Act.* Other provisions of the last mentioned statute emphasize this.

As already pointed out, s. 9 gives to the Minister of Mines and Natural Resources the control and management of "Crown lands" and of the "disposition" thereof. It is contended for the respondents that "disposition", as defined by s. 2(*d*), includes the revesting of the lands in the respondent Association by the statute of 1937. In the face of s. 9, however, this is an impossible contention. By no stretch of language can the statute of 1937 be brought within the scope of s. 9. While no doubt the statute did dispose of the lands, it was not a "disposition" with which the Minister of Mines and Natural Resources had anything to do, with which "dispositions" alone the *Crown Lands Act* is concerned. Neither the legislation of 1937 nor the transfer executed by the Provincial Treasurer on the 18th of June, 1937,

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pursuant to that legislation, were in any sense ever within "the control and management" of the Minister of Mines and Natural Resources.

Moreover, it is impossible, in my opinion, to bring the statute of 1937 within the words "act of the Crown" in s. 2(*d*), as the respondents contend. By s. 2(*a*)

(*a*) "Crown" means His Majesty the King, in the right of the province,

and there is no context in the statute affecting or enlarging this language.

The statute opens with the words

His Majesty, by and with the consent of the Legislative Assembly of Manitoba, enacts as follows:

Accordingly, the statute itself differentiates between the Crown and the Legislative Assembly, the statute, as in the case of that of 1937, being the concurrent act of both i.e., of the Legislature; *The Manitoba Act,* 33 Vic., c. 3.

It is therefore plain, in my view, that the context of the Crown Lands Act itself "otherwise requires" the exclusion from the operation of that statute of the lands here in question, any and all dealing therewith being governed by the special Farm Loans legislation to which I have referred. S. 5 of the Act of 1934 had, therefore, no relation to these lands and the transfer from the Crown to the respondent Association executed by the Provincial Treasurer pursuant to the legislation of 1937 on the 18th of June of that year became, by force of s. 78(3) of that legislation, "conclusive evidence" of the revesting of the land in the Association, including the minerals. The transfer itself did not purport to operate otherwise.

That this is the correct construction of the legislation is, in my opinion, strikingly emphasized by the amending legislation of 1939 as contained in c. 23 of the Statutes of that year, entitled "An Act to Consolidate and Amend the *Manitoba Farm Loans Act and to provide for Realizing on the Assets of the Association*". By s. 2(d) of the statute, land is defined to *mean* "land . . . and all mines, minerals and quarries unless specially excepted." The section does not contain the words "unless the context otherwise requires" as in the case of s. 2 of the *Crown Lands Act.* S. 28, s-s. (1), provides that "any" land acquired by the Association "shall" be disposed of by the Board at the

earliest favourable opportunity at such price and interest rate and upon such terms and conditions as the Board may approve. It would be remarkable if, as the respondents contend on the footing that the respondent Association became, after the date of this legislation, the mere agent of the Crown, the legislature should have required it to dispose at the earliest favourable opportunity of its land including the minerals, and yet, at the same time, that the minerals in all the land of the Association should, by force of s. 5 of the *Crown Lands Act,* be retained in the ownership of the Crown. In my opinion, such a construction would reduce the legislation to nonsense. Properly construed, the two statutes may stand together but operating in quite different spheres.

Accordingly, at the time of the agreement of sale of the 21st of February, 1945, the land here in question, including the minerals, was vested in the respondent Association and neither the words "Subject to the reservations contained in the Crown Lands Act" inserted by the registrar in the certificate of title issued to the respondent on September 7, 1937, nor the failure of the registrar to cancel in full the certificate of title previously issued to the Crown under the Act of 1933, affected the title of the respondent. These entries were and are, in my opinion, a nullity; *Balzer* v. *District Registrar* (1).

It is in these circumstances that the question arises as to the effect of the words "Subject to the reservations contained in the Crown Lands Act" in the agreement of sale of February, 1945, and the subsequent transfer. In the view of Adamson J.A., now C.J.M., who delivered the judgment of the majority in the Court of Appeal, their effect was to incorporate into these documents s. 5 of the *Crown Lands Act.* Even so, neither that section nor the statute in which it is found effect a reservation of minerals to the Crown in the case of an instrument which does not constitute a "disposition" of "Crown lands" within the meaning of that statute. The quoted language, which is to be construed *contra proferentem* is, in relation to the circumstances here in question, ineffective to produce the result for which the respondents contend, which, if it had been intended in fact, could have been effected by very simple language.

(1) [1955] S.C.R. 82.

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It may be pointed out that the respondents expressly plead that although the respondent Association did not own the minerals at the time of the agreement of sale and transfer, the appellant received from the Association "a conveyance of the whole of its interest in the said lands." As to the extent of that interest, the respondents were, as I have shown, mistaken, but the pleading clearly shows that the parties were dealing with regard to that entire interest.

I would, therefore, allow the appeal and restore the judgment at trial, amending the latter, however, by adding thereto a direction to cancel the reference to the reservations under *The Crown Lands Act* in certificates Nos. V-4338, V-5208 and 61305. The appellant will have his costs in both courts.

ESTEY J.:—The appellant (plaintiff) in this action asks a declaration that he is entitled to the gas, oil, petroleum and mineral rights pertaining to, or upon, in, or under the W½ 24-10-28 W.P.M. in Manitoba.

The Manitoba Farm Loans Association (hereinafter referred to as the Association), as vendor, sold to Gordon E. Wardle, as purchaser, under an agreement for sale in writing dated February 21, 1945, the above half section and concluded the description thereof with the words "subject to the reservations contained in the Crown Lands Act."

When Gordon E. Wardle had paid the purchase price he requested the Association to transfer the half section to his son, Edward G. Wardle, and, upon receipt of a quit claim deed from the vendor, Gordon E. Wardle, the Association issued the transfer to Edward G. Wardle, the appellant. This transfer to the appellant included the words "subject to the reservations contained in the Crown Lands Act." The appellant duly registered this transfer in the Land Titles Office and pursuant thereto Certificate of Title No. 61305 dated September 13, 1948, was issued to the appellant and concluded with the words "subject to the reservations contained in the Crown Lands Act."

In order to appreciate the respective contentions raised in this litigation it is necessary to study the legislation affecting this land and to understand how the words "subject to the reservations contained in the Crown Lands Act" came to be noted on the title thereof. The Association acquired

the above-mentioned half section by virtue of an assignment of tax sale proceedings in respect to this half section from the Rural Municipality of Wallace in the Province of Manitoba and, pursuant thereto, became the registered owner thereof under Certificate of Title dated August 7, 1934, and numbered V4319 issued under *The Real Property Act* (R.S.M. 1940, c. 178 and amendments thereto).

The respondent Association was incorporated by act of the Province of Manitoba in 1917 (S. of M. 1917. c. 33). This statute was consolidated in 1924 (S. of M. 1924, c. 71) and amended in 1933 (S. of M. 1933, c. 13) by adding ss. 78 and 79, which "vested in the Crown in the right of the province" the land which it had or would thereafter become entitled to "by or through foreclosure, tax sale proceedings, conveyance, . . . " and further that "the district registrar of any land titles district in which any parcel of such land is situate shall, on the request of the Provincial Treasurer, issue a certificate of title therefor in the name of the Crown."

The District Registrar, upon receipt of a request made under s. 78 of the 1933 amendment by the Provincial Treasurer in respect to the half section here in question, issued, in the name of His Majesty in the right of the Province of Manitoba, Certificate of Title No. V4338. There is no question but that at that time the land, including the mines and minerals, under that Certificate of Title, was vested in the Crown.

In 1934 the Legislature of Manitoba enacted *The Crown Lands Act* (S. of M. 1934, c. 7), s. 5 of which (effective, so far as relevant hereto, as of March 6, 1934) provides, in part, as follows:

> 5. In the absence of express provision to the contrary therein, there is reserved to the Crown out of every disposition of Crown Land
>
> * * *
>
> (*d*) mines and minerals, together with the right to enter, locate, prospect, mine for and remove minerals.

In 1937 *The Manitoba Farm Loans Act* was further amended (S. of M. 1937, c. 15) and ss. 78 to 81, as enacted in 1933, were repealed and new ss. 78 and 79 were enacted. The relevant portion of s. 78 reads as follows:

> 78(1) Any land to which the association has become entitled by or through foreclosure, tax sale proceedings, conveyance, transfer or otherwise and which vested in the Crown in the right of the province under the

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section 78 which is repealed and substituted by this Act, is hereby revested in the Association and may be reconveyed or retransferred, as the case may be, by conveyance or transfer under the hand of the Provincial Treasurer and no seal shall be required on any conveyance or transfer.

It may be pointed out that, notwithstanding that the land was vested in the Crown and title issued in the name of the Crown, throughout the Association has had the responsibility of administering the land.

It is the contention of the appellant that, notwithstanding the terms of the agreement for sale, the transfer and the Certificate of Title issued to him, he is, and has at all times relevant hereto been entitled to the mines and minerals. The respondents, on the other hand, contend that the revesting of the land in 1937 was subject to the provisions of s. 5 of the *Crown Lands Act,* under which the mines and minerals remained in the Crown; in effect, therefore, that Certificate of Title in the name of the Crown numbered V4338, dated September 14, 1934, has remained outstanding with respect to the mines and minerals and that the Certificate of Title issued to the Association by virtue of the revesting in 1937, being Certificate of Title No. V5208, dated September 7, 1937, is in respect to the land other than mines and minerals.

It would, therefore, appear that it is first essential to determine the meaning and effect, in the agreement for sale of February 21, 1945, of the words "subject to the reservations contained in the *Crown Lands Act.*" If that statute had no application to the half section here in question it must follow that in this agreement for sale these words are mere surplus and without meaning.

The Legislature, in enacting the amendment of 1937, made no reference to the *Crown Lands Act.* While such an omission is not conclusive, its significance is emphasized as one examines the intent and purpose of the Legislature in the enactment of the 1937 amendment. The statutory revesting therein provided for is followed immediately by a provision for a reconveyance or retransfer, which can only be for the convenience of the parties and to facilitate the keeping of the records in the Land Titles Offices. This reconveyance or retransfer is effected, not by any action on part of the Crown, as that phrase is usually used in relation

to the transfer of land, but rather by a statutory designation of the Provincial Treasurer as an agent of the Legislature to execute these documents. It is such a designation as that discussed by Sir Lyman Duff in *Lake Champlain and St. Lawrence Ship Canal Co.* v. *The King* (1).

Moreover, that the Legislature intended the purpose of the 1937 amendment should be effected separate and apart from the provisions of the *Crown Lands Act* is further evidenced by a reference to the provisions of both statutes. In my view it was never intended that the statutory revesting effected by the 1937 amendment should constitute a "disposition" within the meaning of the *Crown Lands Act*. The word "disposition" in the latter Act is defined in s. 2(*d*) to include "every act of the Crown whereby Crown lands, or a right, interest or estate therein, are granted, disposed of . . . " The "Crown" is defined by s. 2(*a*) of that statute to mean "His Majesty the King in the right of the province." Under this statute it is contemplated that the Crown is acting as Lord Macnaghten, speaking on behalf of the Privy Council, stated:

> The proper meaning of the expression "grant from the Crown" in the case of a land grant is a conveyance by Letters Patent under the Great Seal and, although, of course, Crown lands may be transferred to a subject by Act of Parliament, such a transfer would not ordinarily or properly be described as "a grant from the Crown." *Rex* v. *C.P.R.* (2).

This distinction expressed by Lord Macnaghten emphasizes the view that the Legislature, in enacting the amendment of 1937 under which the land was vested in the Association, was proceeding upon a basis entirely different from any disposition of land contemplated under the *Crown Lands Act*. This conclusion is not affected by the fact that the "Crown" is given a more extended meaning in *District Registrar Land Titles, Portage la Prairie* v. *Canadian Superior Oil of California Ltd. and Hiebert* (3).

In view of the foregoing, the question arises how did this notation "subject to the reservations contained in the Crown Lands Act" come into existence in reference to this half section. As already pointed out, when the Provincial Treasurer, acting pursuant to the amendment of 1937, executed a transfer dated June 18, 1937, reconveying the lands to

(1) (1916) 54 Can. S.C.R. 461 at 471. (2) [1911] A.C. 328 at 334.
(3) [1954] S.C.R. 321.

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the Association he included no reservation with respect to mines or minerals, nor any reference to the *Crown Lands Act*. When, however, this transfer was placed in the Land Titles Office the Registrar, under date of September 7, 1937, issued to the Association duplicate Certificate of Title No. V5208 in respect of this half section and he added thereon "subject to the reservations contained in the Crown Lands Act." Neither the legislation already referred to nor any legislative provision to which our attention has been directed justified this notation by the Registrar in respect to this half section. The position with respect to that notation is similar to that dealt with in *Balzer* v. *Registrar of Moosomin Land Registration District et al* (1), as well as other authorities that might be cited with respect to the removal of unauthorized notations upon Certificates of Title under the Torrens system. Such a notation, where the rights of third parties are concerned, may be important, but where, as here, all the parties are before the Court and third party rights are not in issue this notation must be regarded as an error which, as between the parties, is entirely ineffective and may be corrected.

This was the position of the title when the agreement for sale dated February 21, 1945, was made between the Association and Gordon E. Wardle. The position of the appellant, who is in the identical position of his father and has been so treated throughout this litigation, is not that the agreement for sale should be rectified, but that at all times relevant hereto the reservation here under discussion, as it appeared in the agreement, was meaningless and of no effect.

The position here is quite different from that in *Knight Sugar Co. Ltd.* v. *Alberta Railway and Irrigation Co.* (2). There the Privy Council held that the agreements for sale were merged in the transfers under the *Alberta Land Titles Act*. This is not a case where the purchaser has accepted a transfer of land on terms different from those contained in his agreement for purchase, but rather a case where the purchaser's contention is that the agreement and consequent transfer are to the same effect and asks that they be given effect to according to their true intent and meaning, or, as

(1) [1955] S.C.R. 82. (2) [1938] 1 W.W.R. 234.

otherwise put, the contention is that the reservation in the agreement for sale was, as between the parties, never effective.

The position is, therefore, that the appellant brings into Court the Association and the Government of Manitoba, being the only parties concerned, and asks, as already stated, that the Association be compelled to transfer to him the mines and minerals on the basis that the act of the Registrar in inserting the reservation was unauthorized. If, as already intimated, there were intervening rights of third parties, which would require a consideration of relevant provisions of the *Real Property Act*, the position might be entirely different. That, however, is not the position here and, in my view, the appellant's action should be allowed.

It is contended on behalf of the respondents that since the enactment of *The Manitoba Farm Loans Act* in 1939 (S. of M. 1939, c. 23), effective as of May 1, 1938, the Association has been but an agent of the Crown. In support of this it was pointed out that the Association no longer engaged in the lending of money, that in respect of the borrowing of money and other activities it was controlled by Order in Council and that the statute as a whole looked to the winding up of the Association. It, however, cannot be overlooked that the Association continued as a corporate body with the power of acquiring, holding and alienating property and, in particular, might make advances to purchase seed grain and generally lease and dispose of any land acquired by the Association "at the earliest favourable opportunity . . . at such price and interest rate and upon such terms and conditions as the Board may approve." I am, therefore, of the opinion that the degree of control here exercised was not sufficent to make the Association an agent of the Crown within the meaning of *City of Halifax* v. *Halifax Harbour Commissioners* (1); *Oatway* v. *The Canadian Wheat Board* (2); *Regina Industries Ltd.* v. *City of Regina* (3); as well as other authorities to the same effect.

With great respect to the learned trial judge, it would seem that this is a proper case in which the Court should make the corrections contemplated by s. 159 of the *Real Property Act*. I am, therefore, of the opinion that the

(1) [1935] S.C.R. 215. (2) (1945) 52 Man. R. 283.
(3) [1947] S.C.R. 345.

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appeal should be allowed and that the judgment of the learned trial judge should be restored, with additions directing that on Certificate of Title dated September 14, 1934, and numbered V4338 the endorsement, stating that the transfer to the Manitoba Farm Loans Association be "all except Crown Lands Act reservations," be deleted and, further, that the words "subject to the reservations contained in the Crown Lands Act," where they appear on Certificate of Title dated September 7, 1937, and numbered V5208, and on Certificate of Title dated September 13, 1948, and numbered 61305, be deleted; the appellant to have his costs throughout.

LOCKE J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for Manitoba by which the appeal of the respondents from a judgment delivered by the Chief Justice of the Queen's Bench in favour of the present appellant was allowed and the action dismissed. Coyne J.A. dissented and would have dismissed the appeal.

On February 21, 1945, the respondent, the Manitoba Farm Loans Association, entered into an agreement in writing to sell the west half of Section 24 in Township 10 and Range 28 West of the Principal Meridian in the Province of Manitoba, subject to the reservations contained in the Crown Lands Act, to Gordon Eugene Wardle, the father of the appellant, for the sum of $2,500, part of which was to be paid in cash and the remainder in yearly instalments, the last of which was payable on November 1, 1947. Upon the completion of these payments, the vendor agreed to convey the said land to the purchaser by a transfer under the *Real Property Act,* subject to the conditions and reservations contained in the original grant from the Crown.

In due course, the payments called for by the agreement were made. Wardle, who had apparently purchased the property for his son, the present appellant, who was a minor at the time the agreement was made, executed a quit claim deed in favour of the latter, which was delivered to the Association upon the completion of the payments with a request that the transfer be made to Edward Gordon Wardle. This was done and on September 9, 1948, the

Association executed a transfer in the form provided by the *Real Property Act* (c. 178, R.S.M. 1940), which read in part:—

> The Manitoba Farm Loans Association being registered owner of an estate in fee simple in possession subject, however, to such encumbrances, liens and interests as are notified by memorandum underwritten or endorsed hereon in all that piece or parcel of land known and described as follows:
>
> The West half of Section Twenty-four in Township Ten and Range Twenty-eight, West of the Principal Meridian, in the Province of Manitoba. Subject to the Reservations contained in the Crown Lands Act . . . transfers to the said EDWARD GORDON WARDLE all its estate and interest in the said piece of land.

In pursuance of this transfer a certificate of title issued to the appellant in which the land so transferred was described in the language of the transfer. The certificate, as required by the *Real Property Act,* bore the endorsement that the land mentioned should, by implication and without special mention in the certificate unless the contrary be expressly declared, be deemed to be subject, *inter alia,* to any subsisting reservation contained in the original grant of the land from the Crown.

In the Fall of 1951 the appellant, apparently believing that he was entitled to the oil and other mineral rights, proposed to grant a lease of such rights, oil having been discovered in the vicinity, but was informed by the solicitors for the proposed lessees that they were unwilling to accept his title. On March 12, 1952, the present action was brought.

At the time the agreement referred to was made, the Association held a certificate of title to the lands in question in its name dated September 7, 1937. The description in this certificate was in the same terms as the description in the agreement of sale and as in the certificate of title issued to the appellant in 1948.

The Statement of Claim, after reciting the circumstances under which the certificate of title had issued to the Association in the year 1937 and alleging that the latter was the owner in fee simple of the said lands, without any reservation to the Crown in the right of the Province of Manitoba of any oil, gas, petroleum or mineral rights at the date when the agreement of sale was entered into, said that, by the agreement, George Eugene Wardle "did purchase

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the said lands" from the Association and thereafter had quit claimed his interest in the said lands and in the agreement of sale to the plaintiff, and that the plaintiff upon payment of the purchase price:—

became entitled to a transfer and conveyance of the said lands clear of encumbrances and without any reservations as to oil, gas, petroleum or mineral rights.

After reciting the fact that the payments called for by the agreement had been made and that the Association had transferred to the plaintiff "all its estate and interest in the said piece of land" and that the certificate of title issued had been endorsed with a notation "subject to the reservations contained in the Crown Lands Act", it was alleged that the plaintiff had been entitled to a transfer and a certificate of title without any such notation or reservation. By the prayer for relief the plaintiff claimed a declaration that he was entitled to the oil and other mineral rights referred to and a direction that the Association do convey to him such rights.

While the plaintiff had not alleged that the written agreement of February 21, 1945, was not in accordance with such oral agreement, if any, as existed between G. E. Wardle and the Association prior to the execution of the agreement, Wardle was permitted at the trial to give evidence, without objection, that he had had no discussion with the officials of the Association as to the oil and mineral rights when he was negotiating the terms of the purchase. He said that he had been negotiating by correspondence during the year 1944 but there was some disagreement as to the price and, accordingly, he went to Winnipeg to see Mr. Griffith, the Chairman of the Board, and while the latter told him that he could not make a binding agreement without the approval of the Board, he would recommend that the property be sold at the price offered. When, in relation to this discussion, the agreement was signed is not disclosed by the evidence. Upon being asked whether anything had been said between him and any member of the Association about oil or minerals, he said there had not and that the

matter was not discussed. Asked as to the clause in the agreement reading "subject to the reservations contained in the *Crown Lands Act*", he answered:—

> Well, I didn't have any experience with titles. I thought it was just a natural matter that was in all agreements and titles. I wasn't acquainted with the general regulations regarding that and took it as a matter of course.

It is to be noted that the witness did not say that he did not understand what the clause meant, but rather that he thought it was a term commonly included in descriptions of land. In the absence, therefore, of any suggestion that any representation was made on behalf of the Association which led him to understand the language other than in its natural and ordinary meaning, or of some evidence that the clause was inserted in the agreement as a result of a mutual mistake, and neither is suggested either in the pleadings or the evidence, the only question is as to the proper interpretation of the expression in its context, since it is upon the written agreement, and not that agreement with a variation, on which the appellant based his claim.

The Crown Lands Act, as it was at the time the agreement of sale was entered into, was c. 48 R.S.M. 1940 (as amended by c. 98 S.M. 1943 and C.11 S.M. 1945). S.5 of the Act, which appears under a sub-heading "Reservations from Dispositions", provides that, in the absence of express provision to the contrary, there is reserved to the Crown out of every disposition of Crown lands, *inter alia*:—

> (*d*) mines and minerals, together with the right to enter, locate, prospect, mine in and remove minerals.

A term of the agreement read:—

> And it is further agreed that the Purchaser hereby accepts the title of the Vendor to the said lands and shall not be entitled to call for the production of any abstract of title or proof or evidence of title or any deeds, papers or documents relating to the said property other than those which are in the possession of the Vendor.

The evidence of the title of the Association was the certificate of title issued to it, as above stated, in 1937, which described the property in the same manner as it was described in the agreement of sale. While the nature of the property excepted might have been stated with greater particularity in the agreement, the interpretation to be placed upon the words "subject to the reservations contained in the *Crown Lands Act*" appears to me to be clear.

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The exceptions were enumerated by reference to s 5 of the *Crown Lands Act* and might be ascertained by reference to that section. It was not the Crown with whom Wardle was bargaining but with the Association, a separate entity. The rights reserved to the Crown by s.5 were excepted from the West Half of Section 24 in Township 10 and Range 28 West of the Principal Meridian and it was that property, with these exceptions, that formed the subject matter of the sale.

In the reasons for judgment delivered by Mr. Justice Adamson (now C.J.M.), with which the majority of the Court concurred, it is said that it makes no difference who presently has title to the mines and minerals when the question is, What did the appellant purchase? since if the Association owns the mines and minerals the clause is a reservation, while if the Government of Manitoba owns them it is an exception. With this I respectfully agree.

The transfer of the land subsequently made to the appellant by the Association described the property sold in the language of the agreement and the certificate of title which issued thereafter so describes it. In my opinion, the appellant received from the Manitoba Farm Loans Association exactly what the Association agreed to sell to George Eugene Wardle by the agreement of February 21, 1945, and the evidence discloses no cause of action.

In view of my conclusion, it is unnecessary for me to express my views upon the other questions which were so fully argued before us.

I would dismiss this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Thompson & Scarth.*

Solicitors for the respondents: *A. E. Hoskin, F. J. Meighen.*

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IN THE MATTER OF The Constitutional Questions Act, R.S.S., 1953, Chapter 78; and

*May 24, 25, 26, 27

IN THE MATTER OF a certain Order in Council of the Lieutenant Governor in Council referring for hearing and consideration by the Court of Appeal questions with respect to the Constitutional Validity, construction and application of certain Moratorium Legislation and Orders in Council issued thereunder.

*Nov. 15

THE CANADIAN BANKERS' ASSOCIATION, and THE DOMINION MORTGAGE and INVESTMENTS ASSOCIATION ..... APPELLANTS;

AND

THE ATTORNEY GENERAL OF SASKATCHEWAN ..... RESPONDENT.

Constitutional Law—The Moratorium Act—Constitutional validity—Insolvency legislation—The Moratorium Act, R.S.S. 1953, c. 98; B.N.A. Act, s. 91(21).

The Moratorium Act, Revised Statutes of Saskatchewan, 1953, c. 98, is *ultra vires* the Legislature of Saskatchewan.

Per (Kerwin C.J. and Taschereau, Locke and Cartwright JJ.): *The Moratorium Act,* as enacted in 1943, and as it appears as 1953, R.S.S., c. 98, is in pith and substance in relation to insolvency and, as those parts of it which might be justified as a proper exercise of provincial powers cannot be severed from those which clearly exceed those powers, the Act should be found *ultra vires* as a whole.

Per Rand J.: The Province in acting in relation to insolvency assumed the functions of Parliament and frustrated the laws of the Dominion in relation to the same subject.

Attorney General for Alberta v. *Attorney General for Canada* [1943] A.C. 356, followed. *Abitibi Power & Paper Co.* v. *Montreal Trust Co.* [1943] A.C. 536; *Attorney General of Ontario* v. *Attorney General of Canada* [1894] A.C. 189, distinguished.

Judgment of the Court of Appeal for Saskatchewan affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), on a Reference to that Court by Order of the Lieutenant Governor in Council made pursuant to *The Constitutional Questions Act,* R.S.S. 1953, c. 78 whereby

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright and Abbott JJ.

(1) [1954] 4 D.L.R. 599.

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IN RE THE MORATORIUM ACT (SASK.)

CANADIAN BANKERS ASSOCIATION AND DOMINION MORTGAGE & INVESTMENT ASSN. v. ATTORNEY GENERAL OF SASKATCHEWAN

there was referred to that Court eleven questions (set out in the reasons for judgment that follow) relating to the constitutional validity, construction and application of the following Saskatchewan legislation: *The Moratorium Act, 1943*, c. 18; S.2(3) of *An Act to Amend The Moratorium Act*, (S.S. 1949, c. 31); *The Moratorium Act*, R.S.S. 1953, c. 98. On the issue the majority of the Court of Appeal, Procter, McNiven and Culliton JJ.A., were of opinion that the Act is valid while Martin C.J.S. and Gordon J.A. were of opinion that the Act is invalid.

C. F. H. Carson, Q.C., E. C. Leslie, Q.C. and *Allan Findlay, Q.C.* for Canadian Bankers Association, appellant.

C. F. H. Carson, Q.C., F. L. Bastedo, Q.C. and *Allan Findlay, Q.C.* for Dominion Mortgage Investment Association, appellant.

L. McK. Robertson, Q.C. and *J. C. Treleaven, Q.C.* for Attorney General for Saskatchewan, respondent.

E. P. Varcoe, Q.C. and *D. W. H. Henry, Q.C.* for Attorney General of Canada.

The judgment of Kerwin C.J. and of Taschereau, Locke and Cartwright JJ. was delivered by:

LOCKE J.:—The questions referred to the Court of Appeal of Saskatchewan under the provisions of the Constitutional Questions Act of that province are as follows:—

1. Had the Legislature of Saskatchewan jurisdiction to enact *The Moratorium Act, 1943*, being Chapter 18 of the Statutes of Saskatchewan, 1943, as it read prior to its amendment in 1949, and if not in what particular or respect has it exceeded its powers?
2. Had the Legislature of Saskatchewan jurisdiction to enact Subsections (2) and (3) of section 2 of *The Moratorium Act, 1943*, as enacted by subsection (3) of section 2 of An Act to amend The Moratorium Act, being Chapter 31 of the Statutes of Saskatchewan, 1949, and if not, in what particular or respect has it exceeded its powers?
3. Is *The Moratorium Act*, Chapter 98 of the Revised Statutes of Saskatchewan, 1953, *ultra vires* of the Legislature of Saskatchewan either in whole or in part, and, if so, in what particular or particulars, and to what extent?
4. Did or do any of the said enactments contain within their purview any relationship other than that between debtor and creditor and if so, to what extent did or do they apply to other relationships?

5. Did or do any of the said enactments only enable the Lieutenant Governor in Council to effect a moratorium or general postponement of the payment of debts?

6. Did or do any of the said enactments empower the Lieutenant Governor in Council to stay for a limited period the commencement or continuance of proceedings in actions by landlords for the recovery of possession of land, or of proceedings against overholding tenants under Part IV of The Landlord and Tenant Act?

7. Did or do any of the said enactments empower the Lieutenant Governor in Council to prohibit for a limited period the issue of a writ of possession out of any one or more of the Courts of the Province in an action by a landlord against a tenant for the recovery of possession of land or in proceedings against an overholding tenant under Part IV of The Landlord and Tenant Act?

8. Did or do any of the said enactments empower the Lieutenant Governor in Council to prohibit for a limited period the execution of any such writ of possession?

9. Did or do any of the said enactments empower the Lieutenant Governor in Council to prohibit for a limited period the continuance of proceedings pending in any Court of the province in an action by a landlord against a tenant for the recovery of possession of land or against an overholding tenant under Part IV of The Landlord and Tenant Act?

10. Did or do any of the said enactments empower the Lieutenant Governor in Council to prohibit for a limited period the exercise or enjoyment by a person other than a creditor of all or any remedies, either judicial or extra-judicial for the enforcement of his civil rights within the province under or pursuant to a writ of possession issued in an action or under The Landlord and Tenant Act for recovery of possession of land and if so, would a Proclamation or Order in Council without Proclamation issued in exercise of such power prohibit such a person from exercising his right to apply under Queen's Bench Rule 476 for an order for the committal of a sheriff, or prohibit the entertaining of such an application under the said Rule?

11. Did or do any of the said enactments empower the Lieutenant Governor in Council to stay for a limited period the commencement of any civil action or proceeding in any Court of Saskatchewan or to stay any civil action or proceeding pending in any such Court or to stay the execution of any judgment or order of any such Court?

The Moratorium Act referred to in Question 3 appears as c. 98 in the Revised Statutes of Saskatchewan 1953. That Act is in the same terms as the Act of 1943, referred to in the first question, as amended by the Act of 1949, referred to in the second question. In so far as these three questions are concerned, it is accordingly the third only which requires consideration in disposing of the present appeal.

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Procter, McNiven and Culliton, JJ.A., a majority of the Court, found *The Moratorium Act* of 1953 to be "valid in whole but, it being a statute of general application, the validity of proclamations or orders in council made thereunder cannot be determined in advance." The Chief Justice of Saskatchewan and Gordon J.A. found the Act to be *ultra vires*, considering that while portions of it were *intra vires* they were so interwoven with those that were beyond the powers of the legislature that it was not possible to separate them and that the whole Act should be declared beyond its powers (1).

The Act to be considered reads:—

1. This Act may be cited as *The Moratorium Act.*

2. (1) The Lieutenant Governor may from time to time, in so far as within the legislative authority of the province, by proclamation published in *The Saskatchewan Gazette:*

(*a*) authorize the postponement of the payment of all or any debts, liabilities or obligations, existing or future, however arising, or of the enforcement of all or any liens, encumbrances or agreements of sale or other securities, whether created before or after the coming into force of this Act;

(*b*) prohibit in any judicial district or districts, or any part thereof, the issue of any process out of any one or more of the courts of the province in all or any cases of civil actions, or the execution of process already issued in such actions, or stay proceedings in civil actions and matters of any description pending in such courts, or extend or otherwise vary the exemption privileges which execution debtors now enjoy.

(2) The powers conferred upon the Lieutenant Governor by subsection (1) may be exercised in individual cases or with respect to any class or classes of cases, or in favour or for the protection of individuals or any class or classes of individuals, or by order in council without proclamation, and the Lieutenant Governor in Council may also by order in council without proclamation prohibit in any judicial district or districts, or any part thereof, the commencement or continuance of any specified proceeding or proceedings against any person or class or classes of persons, and any order in council made under this section shall take effect from the date specified therein.

(3) The Lieutenant Governor in Council may from time to time, in so far as within the legislative authority of the province, prohibit in any judicial district or districts, or any part thereof, or in the province or any part thereof the issue by any one or more creditors or any other person or persons of any process out of any one or more of the courts of the province in all or any classes of civil actions, or the execution of any process already issued in such actions, or the continuance of proceedings by such creditor or creditors, person or persons in civil actions and matters of any description pending in such courts, or the exercise or enjoyment by such creditor

(1) [1954] 4 D.L.R. 599.

or creditors, person or persons of all or any remedies either judicial or extra-judicial for the enforcement of civil rights by such creditor or creditors, person or persons within the province.

3. A proclamation or order in council made pursuant to section 2 shall state the period during which the proclamation or order shall remain in force, which period shall not be longer than two years from the date on which the proclamation or order takes effect.

The appellants contend that this is legislation in relation to bankruptcy and insolvency, within the meaning of Head 21 of s. 91 of the *British North America Act,* subjects which the preamble to that section declare to lie within the exclusive legislative authority of the Parliament of Canada.

In order to determine the true nature of this legislation, it is permissible and necessary, in my opinion, to consider certain of the legislation which has heretofore been passed by the Legislature of the Province restricting the rights of creditors to enforce their claims in the courts. A valuable summary of the earlier legislation, commencing with the passing of a Moratorium Act at the outbreak of the First Great War (c. 2, S.S. 1914), is to be found in the reasons for judgment delivered by Mr. Justice Procter. *The Debt Adjustment Act,* as first enacted by c. 88 of the Statutes of 1934-35, with minor amendments, appeared as c. 87 of the Revised Statutes of 1940. That Act, *inter alia,* set up a board styled the Debt Adjustment Board, the members of which were to be designated by the Lieutenant Governor in Council, and purported to vest extensive powers in that body, including the right upon the application of any debtor or any one or more of his creditors to issue a certificate which might be filed in the courts of the province and in all Land Title Offices, which had the effect of staying proceedings in the nature of execution or leading to the sale or foreclosure of real property or of any proceedings in court or otherwise which might lead to the seizure or sale of the property of the debtor. The Act further provided that without prior notice to the Board no legal proceedings of any kind should be taken to enforce, *inter alia,* any legal demand or debt where the amount claimed exceeded $100, with certain named exceptions. By s. 9 the Lieutenant Governor in Council was authorized by proclamation to declare what was in effect a moratorium of the same nature as that referred to in s. 2 of the Act of 1953.

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Similar legislation had been adopted in the Province of Alberta and a reference was directed by the Governor General in Council to determine its validity. The Alberta Act, as originally enacted in 1937 and as amended later in that year and in the years 1938, 1939 and 1941, was found to be *ultra vires* in whole by a judgment of the majority of this Court (1) (Crocket J. dissenting) delivered by Sir Lyman Duff C.J. An appeal to the Judicial Committee was dismissed by a judgment (2) delivered on February 1, 1943. That judgment proceeded upon the ground that the legislation was in relation to insolvency, a class of subject within the exclusive legislative authority of the Parliament of Canada, and constituted a serious and substantial invasion of the powers of Parliament. Having come to this conclusion, their Lordships expressed no opinion as to other matters which had been considered by the majority of this Court to affect the validity of the legislation.

On April 12, 1943, the *Provincial Mediation Board Act, 1943* by which, *inter alia,* the *Debt Adjustment Act* was repealed, and the *Moratorium Act,* referred to in the first question, were assented to. On the same date, the *Land Contracts (Actions) Act, 1943* which, *inter alia,* prohibited the commencement of any action for the foreclosure of the equity of redemption or the sale or possession of mortgaged premises or for specific performance or cancellation of an agreement for sale of land, except by leave of the Court of King's Bench, received the Royal assent.

The Provincial Mediation Board Act authorized the setting up of a board to be styled the Provincial Mediation Board, consisting of persons to be appointed by the Lieutenant Governor in Council. S. 5(1) reads:—

> Upon receipt of an application in writing by or on behalf of a debtor or any of his creditors, the board shall confer with and advise the debtor or his creditor and shall endeavour to bring about an amicable arrangement for payment of the debtor's indebtedness without recourse being had to legal proceedings, and for that purpose the board shall inquire into the validity of claims made against the debtor and his ability to pay his just debts, either presently or in the future, and shall endeavour to effect an agreement between the debtor and his creditors to provide for the settlement of the said debts, either in full or by a composition.

(1) [1942] S.C.R. 31. (2) [1943] A.C. 356.

Ss. 6 and 7 deal with proceedings to acquire title to land under various statutes relating to taxation which are prohibited, unless with the consent of the Board.

S.8 requires local registrars to inform the Board after the commencement of, *inter alia,* actions for foreclosure or sale of land or cancellation of agreements for sale or for the recovery of money where the amount claimed exceeds $100, other than in actions for tort and certain other types of actions.

S.15, by which the *Debt Adjustment Act* was repealed, declared further that, notwithstanding such repeal, all orders made by Debt Adjustment Boards constituted under that Act were confirmed in so far as they related to any matter within the Board's jurisdiction and should continue in full force but should be subject to the amendment or cancellation by the Board. It appears to me unnecessary to decide as to whether the language of this portion of the section was intended to vest in the Provincial Mediation Board the power to make orders of the same nature as those which were authorized by the *Debt Adjustment Act,* in substitution for those theretofore made under that statute.

The powers vested in the Provincial Mediation Board, except in so far as they related to proceedings under various tax statutes, differed, as will be seen, substantially from those given to the Debt Adjustment Board by the Act of 1940. Whereas by s. 5 of the latter Act the Board might, by issuing a certificate, stay or prohibit all proceedings of the nature referred to, the Mediation Board, with the exception of the powers given to it by s. 15, was by s. 5 restricted to bringing the parties together, discussing the financial position of the debtor and endeavouring to induce the parties to agree upon some compromise.

S. 2 of the *Moratorium Act* was taken almost verbatim from s. 9 of the *Debt Adjustment Act of 1940.* S-s. 3 of s. 9, as it appeared in the latter Act, was deleted and the other slight changes do not affect the meaning of the section. However, whereas the moratorium, if it may be so called, which might be proclaimed under s. 9 of the *Debt Adjustment Act* was not limited as to time, by the *Moratorium Act* the period during which the proclamation or order shall remain in force was restricted to two years from the date of its taking effect.

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The first general bankruptcy law, following the repeal in 1880 of the *Insolvent Act of 1875*, was enacted by c. 36 of the Statutes of 1919. The situation in Canada in this respect thereafter differed from that which existed when *Attorney General of Ontario* v. *Attorney General of Canada* (1), was decided. In that case it was held that the provisions of s. 9 of *An Act respecting Assignments and Preferences by Insolvent Persons of the Province of Ontario* (R.S.O. 1887, c. 124) which related to assignments purely voluntary and postponed thereto judgments and executions not completely executed by payment, were merely ancillary to bankruptcy law and, as such, within the competence of the Provincial Legislature so long as they did not conflict with any existing bankruptcy legislation of the Dominion Parliament.

Due to the depressed state of agriculture, Parliament in 1934 made special provision for the relief of farmers by the *Farmers' Creditors Arrangement Act* (c. 53). The Act contained, *inter alia,* provisions whereby a farmer who was unable to meet his liabilities might file a proposal for a composition with the Official Receiver appointed under the Bankruptcy Act. Upon the filing of such a proposal all remedies of the creditor were suspended for a period of sixty days, or for such further time as the Court might determine and the continuation of bankruptcy proceedings prohibited for the like period. If such offer was not accepted by his creditors, a Board of Review established by the Act was required to endeavour to formulate an acceptable proposal. If this was approved by the debtor and the creditors, it was to be filed in the Court and thereupon it became binding upon the debtor and all the creditors. If not accepted by them, the Board might nevertheless confirm the proposal and, when approved by the Court, the parties concerned were bound by it.

By c. 25 of the Statutes of 1943 the Act of 1934, as amended, was repealed and the *Farmers' Creditors Arrangement Act, 1943* enacted, which, *inter alia,* permitted farmers in Alberta, Manitoba and Saskatchewan, who were unable to meet their debts as they became due, to file proposals for

(1) [1894] A.C. 189.

compositions under the Act where two-thirds of the total amount of such debts were incurred before the 1st of May 1935. This Act appears as c. 111, R.S.C. 1952.

By the *Bankruptcy Act, 1949* (c. 7, S.C. 1949) (Can. 2nd Sess.) the Act of 1919, as amended, was repealed. The new statute which appears as c. 14, R.S.C. 1952, as in the case of the earlier Acts, makes provision for the relief of insolvent persons (a term defined by the Act) who wish to make an assignment for the general benefit of their creditors or to make proposals for the compromise of their debts, as well as providing for the making of receiving orders upon a creditor's petition and for the ultimate discharge of such persons as well as those declared to be bankrupt under the conditions defined in the statute.

Some light is thrown upon the question as to the true nature of the *Moratorium Act* by an examination of various so-called Debt Adjustment statutes passed earlier by the Saskatchewan Legislature. The first of these was the *Debt Adjustment Act, 1929* (c. 53) which authorized the appointment of a Commissioner who by s. 4 was charged with the duty of endeavouring to bring about an amicable arrangement between a resident farmer and his creditors for the payment of his debts, without recourse being had to legal proceedings, either in full or by a composition upon the application of either debtor or creditors. This Act was repealed by the *Debt Adjustment Act, 1931* (c. 59) and this, in turn, by the *Debt Adjustment Act, 1932* (c. 51). By c. 82 of the Statutes of 1933 the Act of 1932 was repealed and new legislation substituted. The Acts of 1929 and 1931 were restricted in their application to persons engaged in farming operations in the province. The 1932 Act extended as well to certain purchasers of property under agreements for sale and to retail merchants. The Act of 1933 applied to all persons resident in the province and to bodies corporate, other than banks, carrying on business in it. Provisions for the prohibition of a wide range of legal proceedings by a certificate of the Debt Adjustment Commissioner appeared in the Statutes of 1931 and 1932. Under the 1933 Act, a permit from the Debt Adjustment Board was required before actions of various natures, which were defined, might be undertaken, restricted, however, as to obligations under contracts to those made prior to April 1, 1933. The Act of 1933

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also gave to the Lieutenant Governor in Council powers similar to those described in s-s. (1) (*a*) and (*b*) of s. 2 of the *Moratorium Act, 1943*. The 1933 Act was amended and by s. 5 the Debt Adjustment Board, upon the petition of the debtor or of any creditor, authorized to enquire into the affairs of the debtor and:—

> make such order as it deems expedient for the relief of the resident and for a readjustment of the contractual relationship between the resident and his creditors.

This Act was assented to on April 7, 1934. The powers thus assumed to be given to the Debt Adjustment Board, as will be noted, closely approximated those vested in the Boards of Review by the *Farmers' Creditors Arrangement Act, 1934,* which was assented to on July 3 in that year.

It was on December 4, 1934, that the *Debt Adjustment Act, 1934* (c. 88, 1934-35) which repealed the existing legislation, with certain exceptions, was assented to. While the title of the Act remained unchanged, the statute did not contain any express direction to the Debt Adjustment Board to endeavour to bring about an agreement for a compromise between the debtor and the creditors nor any provision similar to s. 20, added to the 1933 Act by the amendment of 1934. As has been above stated, however, the power of the Board to issue a certificate staying proceedings of the nature above referred to, and the power given to the Lieutenant Governor in Council by s. 23 of the Act of 1933, were maintained and significantly extended by providing that the power conferred upon the Lieutenant Governor in Council might be exercised in individual cases in the same terms as s. 2(2) of the *Moratorium Act of 1943*. With some minor amendments which did not affect the nature of the Act, it appeared as c. 87 in the revision of the statutes in 1940.

While the duty theretofore imposed upon the Debt Adjustment Board of endeavouring to bring about a compromise between the debtor and his creditors was thus eliminated, it is perfectly clear that the powers continued in the Board to stay proceedings, and those conferred upon the Lieutenant Governor in Council by proclamation to stay and to prohibit proceedings against individuals were designed for the same purpose as the previous legislation.

The constitutional validity of the *Farmers' Creditors Arrangement Act* was considered on a reference to this Court by the Governor General in Council. The legislation was held by a majority of the Court to be *intra vires* ([1936] S.C.R. 384). An appeal to the Judicial Committee was dismissed ([1937] A.C. 391), it being held that the Act was genuine legislation relating to bankruptcy and insolvency. In delivering the judgment of the Board, Lord Thankerton said in part (p. 403):—

> It cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation.

I am of the opinion that had the *Debt Adjustment Act* of Saskatchewan (c. 87, R.S.S. 1940) been attacked, it would have been found to be *ultra vires* for the same reasons as those given in the judgment of the Judicial Committee in dealing with the Alberta Act (*Attorney General for Alberta* v. *Attorney General for Canada* (1). It is a proper inference, in my opinion, that the advisers of the Crown in Saskatchewan held the same view and that it was for this reason that the legislation of 1943 was enacted and the *Debt Adjustment Act* repealed.

As the history of the various *Debt Adjustment Acts* shows, legislation which at the outset merely made available the services of a Debt Adjustment Commissioner to assist farmers in financial difficulties to work out some compromise with their creditors was extended to include, *inter alia,* retail merchants and then all persons and all bodies corporate carrying on business in the province, other that municipal corporations and school districts. The powers to stay legal proceedings given to the Debt Adjustment Boards thereafter and to the Lieutenant Governor in Council to postpone the time for payment of all debts were clearly designed to be utilized for the relief of debtors who were unable to meet their liabilities as they matured by effecting a compromise with their creditors. While the provisions added to the existing Act by c. 59 in 1934, which assumed to empower the Board to dictate the terms of a compromise, were omitted in the legislation of the following year and did not appear thereafter, the extension of the powers of the Lieutenant Governor in Council by s. 9 of the

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Act of 1934-35 to the cases of individual debtors, powers which were continued in the revision of 1940 and which might be exercised by Order in Council without proclamation, show that the real purpose of the Act was unchanged.

The practical effect of the legislation of 1943 was that the powers of the Lieutenant Governor theretofore contained in s. 9 of the *Debt Adjustment Act* were reenacted in the *Moratorium Act*, while a new body called the Provincial Mediation Board was charged with the duty of conferring with the debtor and his creditors in an endeavour to effect a compromise. It was only in certain proceedings that the Mediation Board might intervene, its powers being much less extensive than those of the Debt Adjustment Boards, but the power to postpone the debts of any insolvent person or corporation continued to be available, though the period in which the debts might be so postponed was limited to two years.

Power to declare a moratorium for the relief of the residents of a province generally in some great emergency, such as existed in 1914 and in the days of the lengthy depression in the thirties, is one thing, but power to intervene between insolvent debtors and their creditors, irrespective of the reasons which have rendered the debtor unable to meet his liabilities, is something entirely different. *The Moratorium Act*, as enacted in 1943 and as it appears as c. 98 of the Revised Statutes of Saskatchewan of 1953, is, in my opinion, in relation to insolvency and, as I consider that those parts of it which might be justified as a proper exercise of provincial powers cannot be severed from those which clearly exceed those powers, the Act should be found *ultra vires* as a whole.

The decision of the Judicial Committee in *Abitibi Power & Paper Co.* v. *Montreal Trust Co.* (1), so strongly relied upon by the respondents, does not, in my opinion, affect the matter. In that case the purpose of the impugned legislation was to stay proceedings in the action brought under the mortgage granted by the Abitibi Company until the interested parties should have an opportunity of considering such plan for the reorganization of the company as might be submitted by a Royal Commission appointed for such purpose. As to the objection that this was beyond provincial

(1) [1943] A.C. 536; 4 D.L.R. 1.

powers, Lord Atkin said (p. 548) that such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. In pith and substance it was held that the Acts were to regulate property and civil rights within the province. The considerations which lead me to the conclusion that the *Moratorium Act* is in pith and substance in relation to insolvency did not affect the question to be determined in that case.

In view of my conclusion, I express no opinion upon the questions as to whether the legislation might also be invalid as an infringement of the rights given to holders of bills of exchange by the *Bills of Exchange Act,* or the activities of banks under the *Bank Act,* or of companies incorporated by letters patent under the *Dominion Companies Act.*

I would allow this appeal with costs.

I would answer Question 3 as follows:—

The Moratorium Act, c. 98 of the Revised Statutes of Saskatchewan, 1953, is *ultra vires* of the Legislature of Saskatchewan.

In view of this conclusion, the other questions should not, in my opinion, be answered.

RAND J.:—This reference raises questions similar to those considered in that of the Alberta Debt Adjustment Act, the judgment of the Judicial Committee in which is reported in [1943] A.C. 356. The only significant difference lies in the fact that in the present case the material provisions of the Alberta statute are, in substance, contained in two statutes, the Moratorium Act and the Mediation Act. The earlier Debt Adjustment legislation of Saskatchewan followed the pattern of that of Alberta from which, as to validity, it does not seem to be distinguishable; but after the ruling of 1943 the distribution of its provisions mentioned was made and the Debt Act repealed. The validity of the Moratorium Act is challenged on the ground that it is, in substance, legislation in relation to Insolvency and Bankruptcy.

The Mediation Act provides for negotiation between a debtor and his creditors through the interposition of a provincial functionary. Taken by itself it is quite innocuous;

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nothing can result beyond compromise to which both parties agree; and it may be doubted that it would have been passed in the absence of legislation furnishing effective authority to deal with cases in which negotiation has failed. The Moratorium Act, on the other hand, empowers the Governor in Council to postpone the payment of debts generally, to suspend proceedings on a great variety of claims, and to prohibit any form of process, legal or extra-legal, against property of a debtor or against a lessee. The order may be general or confined to a single individual. The two statutes were assented to on the same day. Together they enable to be done what the Debt Adjustment Act, which they repealed, enabled. For this purpose, proceedings under the Mediation Act merely furnish limited grounds on the basis of which relief by way of suspension of remedies could plausibly be afforded debtors: under the Moratorium Act, the Governor in Council can exercise its powers on any grounds or for any reasons and on such terms as, in an uncontrolled discretion may seem proper. Obviously that action can be related to agreements or arrangements proposed by the Mediation Board.

On behalf of the Attorney General of the province it was urged that Saskatchewan is in a unique economic setting. The basis of its economical life is agriculture; its physical environment lends itself to sudden and extreme climatic fluctuations which produce corresponding tides in the volume and value of its products; and because of these abnormal factors, the exercise of the powers proposed has become a matter of local necessity. This is undoubtedly the philosophy behind the legislation and its frank avowal but confirms what would otherwise be fairly inferred. But it should be remarked that the operation of the statutes is not conditioned on the existence from time to time of any such temporary state of things.

The contention involves assumptions of fact which only a distant future could confirm. The unreliability of speculation regarding the economic resources of a province is significantly demonstrated in the case of Alberta in the contrast of the realities of today with what were accounted its dismal prospects of twenty years ago. But were the conditions

as described, however local or private they may be, by themselves they cannot furnish any warrant for invading an exclusive field of Dominion jurisdiction.

It may well be that special legislative consideration is called for; that can be assumed, although with the fact we are not concerned; but the responsibility for dealing with the affairs of debtors who, we must take it, are in financial straits, is one that has been exclusively allocated to Parliament. The enactment of the series of Farmers' Creditors Arrangement Acts from c. 53 of 1934 to the present c. 111, R.S.C. 1952 was an exercise by Parliament of that power and the residual legislation now in force is in large measure limited to the relief of farmers in the prairie provinces. The administration of such matters is essentially individual, and it is this that the statute under consideration has placed in the hands of the Governor in Council. In the light of that Dominion legislation, it would be a mistake to assume that the policy of Parliament would be one whit less sympathetic and sound in the interests of all concerned than that of a legislature.

The Moratorium Act provides no means for bringing to the attention of the Governor in Council the plaints of individuals for relief. The Governor in Council is charged with appreciating general conditions within the province which may call for appropriate general action; that is the normal course of government; but it would be unique in our modern polity that that body should be constituted a local tribunal to receive from individuals petitions for relief in respect of matters that are of a class ordinarily administered by courts of law. That the design of the two provincial statutes contemplates communication to the Governor in Council by the Mediation Board is confirmed by the proceedings in *Gumienny* v. *Mustatia* (unreported) the judgment in which is part of the material on this appeal. In that case the Board, in the language of its officer, "requisitioned" an Order in Council for the benefit of the debtor; and in the absence of procedure by which the Council is to be moved to action, it would be stultifying ourselves to ignore such an evidence that the provisions of one statute were intended to supplement those of the other in furnishing powers of coercion of the nature of those contained in the original Debt Adjustment Act. But the pertinency of the

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decision is its demonstration of the purpose of the Moratorium Act to furnish relief analogous to if not identical with that provided by the earlier statute.

But the Moratorium Act alone, in the scope of its language and its clear intent, is adequate to the virtual administration of the affairs of any debtor who is embarrassed, who cannot meet his obligations as they mature. It would be the judgment of the Executive to the hazard of which the interests of the creditors would be exposed. What is contemplated is individual relief which enables debtors to do in substance what would otherwise subject them to the law of Parliament.

Each of the two words, Bankruptcy and Insolvency, must be given its full force. Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors. To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

Insolvency, on the other hand, seems to be a broader term that contemplates measures of dealing with the property of debtors unable to pay their debts in other modes or arrangements as well. There is the composition and the voluntary assignment, devices which, in appropriate circumstances, may avoid technical bankruptcy without too great prejudice to creditors and hardship to debtors. These means of salvage from the ravages of misfortune are of the essence of insolvency legislation, and they are incorporated in the Bankruptcy Act.

The usual mark of insolvency is the inability to meet obligations as they mature; it constitutes an act of bankruptcy, and furnishes ground for proceeding against the debtor under the Bankruptcy Act. Provincial voluntary assignment legislation consisting of procedure enabling a debtor to deal with his creditors in the distribution of his assets is, in the absence of Dominion legislation, as *Attorney General for Ontario* v. *Attorney General of Canada* (1) shows, unobjectionable, but we are not here dealing with

(1) [1894] A.C. 189.

that situation. If the province steps in and actively assumes the general protection of such a debtor, by whatever means, it is acting in relation to insolvency, and assuming the function of Parliament; it is so far administering, coercively as to creditors, the affairs of insolvent debtors. In this it is frustrating the laws of the Dominion in relation to the same subject.

That the province may, in certain circumstances and in proper aspects, enact moratorium legislation was not seriously disputed and may be accepted; its validity will depend upon the facts, circumstances and means adopted, determining its true character. That the scope of the statute here may embrace an order of valid moratorium relief does not aid the argument: the total powers are inextricably interwoven and it is quite impossible to say that, even if the good could be severed from the bad, the legislation would, in a truncated form, have been enacted.

The case of *Abitibi Power & Paper Co.* v. *Montreal Trust Co.* (1) is relied upon. There, by leave of the court under *The Winding Up Act*, an action was brought by the trustee for bondholders for the foreclosure and sale of mortgaged property. In the course of the proceedings an order for sale was made but the sale proved abortive. A Royal Commission was appointed to inquire into the affairs of the mortgagor company with a view to recommending an equitable plan for solving its financial difficulties. Its report emphasized the interest of the Government and the public in the pulp and paper industry, and a scheme of arrangement was outlined. In the meantime the mortgagee had given a further notice of motion for sale which was ordered to stand over pending the report. Following the latter the challenged legislation was passed, staying the action professedly to enable an opportunity to all parties concerned to consider the scheme. It was argued that its real object was to compel the bondholders to accept a plan of reconstruction, and that otherwise it was within the Dominion field of bankruptcy. The language of Lord Atkin makes clear the view that the Judicial Committee took of the character of the legislation:

> (Leave) once granted, the action proceeded as a provincial action, subject to the provincial law regulating the law in such an action and

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subject to the sovereign power of the legislature to alter those rights in respect of property within the province. It could not be denied that the action proceeded subject to the possibility of being stayed under the ordinary rules of procedure as, for instance, for security for costs, default in pleading or discovery, or in special circumstances which the court might think demanded a stay.

and as to the object, he says:—

In the present case their Lordships see no reason to reject the statement of the Ontario legislature, contained in the preamble to the Act, that the power to stay the action is given so that an opportunity may be given to all the parties concerned to consider the plan submitted in the report of the Royal Commission.

If any implication is to be drawn it seems to me to be this, that coercion as the object would have invalidated the legislation. Coercion of some degree here is the only object that can fairly be attributed to the grant of such wide powers as are given the Lieutenant Governor in Council.

Counsel on both sides agreed that the only question put which calls for consideration is No. 3, dealing with the validity of the Moratorium Act, and I confine myself to that.

The appeal must therefore be allowed and the answer of the court below to question No. 3 modified accordingly.

KELLOCK J.:—I agree with the opinion of my brother Locke. I should only like to add that in my opinion, the decision of the Judicial Committee in *Abitibi Power & Paper Co.* v. *Montreal Trust Co.* (1), is clearly distinguishable. The *ratio decidendi* was stated by Lord Atkin at p. 548, viz:

Their lordships see no reason to reject the statement of the Ontario legislature contained in the preamble to the Act that the power to stay the action is given so that an opportunity may be given to all the parties concerned to consider the plan submitted in the report of the Royal Commission . . . The pith and substance of this Act is to regulate property and civil rights within the province.

I would therefore allow the appeal with costs and would answer question 3 as follows:

The Moratorium Act, c. 98 of the Revised Statutes of Saskatchewan, 1953, is *ultra vires* the legislature of Saskatchewan. In this view no other question need be answered.

(1) [1943] A.C. 536.

ABBOTT J.:—I agree with the reasons of Mr. Justice Rand and Mr. Justice Locke.

I would therefore allow the appeal with costs and would answer question 3 as follows:

The Moratorium Act, c. 98 of the Revised Statutes of Saskatchewan, 1953, is *ultra vires* the Legislature of Saskatchewan.

In this view no other question need be answered.

Appeal allowed.

Solicitors for the appellant, The Canadian Bankers Association: *MacPherson, Leslie & Tyerman.*

Solicitors for the appellant, The Dominion Mortgage and Investment Association: *Thom, Bastedo & McDougall.*

Solicitor for the Attorney General of Saskatchewan: *L. McK. Robinson.*

Solicitor for the Attorney General of Canada: *F. P. Varcoe.*

THE MINISTER OF NATIONAL REVENUE (*Respondent*) ..... APPELLANT;

AND

TRANS-CANADA INVESTMENT CORPORATION LIMITED (*Appellant*) ..... RESPONDENT.

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*May 12
*Nov. 15

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Assessment—Taxation—Income Tax—Dividends from taxable Canadian corporations paid Trustee of Investment Trust—Net income therefrom paid by Trustee to Trust's beneficiaries—Whether sums so received taxable—The Income Tax Act, 1948 (Can.) c. 52, ss. 27 (1), 58, 60.

Under an agreement entered into between the respondent as administrator, the Yorkshire and Canadian Trust Ltd., as trustee, and the holders of certificates in a fixed investment trust known as "Trans-Canada Shares Series 'B'", the respondent purchased a fixed number of shares in fifteen Canadian companies (called a "trust unit") and delivered them to the Trustee which registered them in its own name. Pursuant to the agreement the Trustee then issued certificates repre-

*PRESENT: Rand, Estey, Locke, Cartwright and Fauteux JJ.

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senting one thousand undivided one thousandths interests in the trust unit to the beneficiaries of the trust. The Trustee, as the registered owner of the company shares received all dividends paid thereon and after deduction of certain charges paid the balance to the beneficiaries of the Trust. In 1950 the respondent purchased on its own account one thousand "Trans-Canada Shares Series 'B'" and subsequently received from the Trustee payment of the net income earned by the trust unit. In its income tax return it claimed this amount as a deduction under s. 27 (1) of *The Income Tax Act* (1948, S. of C., c. 52). The deduction was disallowed by the appellant. An appeal by the respondent was disallowed by the Income Tax Appeal Board but on further appeal to the Exchequer Court of Canada was allowed.

Held (Rand and Estey JJ. dissenting): That the dividends received by the respondent were in the words of s. 27 (1) of *The Income Tax Act* received "from a corporation that (*a*) was resident in Canada in the year and was not by virtue of a statutory provision, exempt from tax under this Part for the year" and the mere interposition of a trustee between the dividend-paying companies and the beneficial owner of the shares did not change the character of the sum.

Per Cartwright and Fauteux JJ.: The fact that Parliament, by 1949, S. of C., c. 25, s. 27, added s-s 7 (to s. 58 of the Act), prescribing an arithmetical formula for apportioning between a trustee and an individual beneficiary the dividends from taxable corporations received in the first instance by the trustee and did not add a corresponding sub-section as to a corporate beneficiary, does not constitute a sufficient reason for construing s. 27 (1) in a manner contrary to the plain meaning of the words in which it is expressed.

Per Rand J. (dissenting): By s. 27 a corporation must have "received a dividend from a corporation" and on the face of it the respondent did not receive a dividend from the underlying companies. *In re Income Tax Acts, 1924-1928,* (1929) St. R. Qd. 276. *Baker* v. *Archer-Shee* [1927] A.C. 844, distinguished. In the light of the precise language of ss. 58 and 60 of *The Income Tax Act* and the scheme which it embodies, the respondent could not be said to have "received" from the underlying companies the dividends which were paid to the Trustee.

Per Estey J. (dissenting): The trust agreement read as a whole does not contain language to support a construction that either a legal or equitable right is created in favour of the certificate holders in respect of the dividends received by the Trustee from the underlying companies. *Baker* v. *Archer-Shee, supra,* distinguished.

Judgment of the Exchequer Court [1953] Ex. C.R. 292, affirmed.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada (1) allowing an appeal from a decision of the Income Tax Appeal Board (2) which had disallowed an appeal by the Respondent from an assessment made upon it for the taxation year 1950.

(1) [1953] Ex. C.R. 292; 53 D.T.C. 1227.

(2) (1953) 8 Tax A.B.C. 220.

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J. L. Farris, Q.C. and *T. E. Jackson* for the appellant.

K. E. Meredith for the respondent.

RAND J.: (dissenting)—The respondent is what is called the administrator of an investment trust. It raises money, purchases securities which it places in the custody of a trustee, in this case a corporate body, and disposes of certificates representing fractional interests in trust units of the securities deposited. A unit consists of a specified number of shares of common stock of named companies and is divided into 1,000 "Trust Shares Series B", each representing 1 $\frac{1}{1000}$ undivided interest in the unit.

But the administrator can, in addition, be itself a purchaser of these certificates, and that was the case here. Three agencies are thus concerned: the underlying companies earning income in respect of which dividends are paid; the intermediate trustee by which that stock is held and to which the dividends are paid; and the respondent the holder of Series B shares. Dividends declared out of income on which the underlying companies had paid taxes imposed on Canadian companies resident in Canada were received by the trustee. These and other incidental income arising in the course of administering the trust, after deductions for fees, etc. of both the trustee and the administrator, were distributed among the certificate holders including the respondent. As received by the respondent, they became income out of which dividends would be payable to its own shareholders.

Under the Act these moneys represented taxable income in the hands (*a*) of the underlying companies; (*b*) of the respondent; and (*c*) of its shareholders. But the respondent claims to be entitled to deduct from its income the amount so received as dividends received by it from the underlying companies under s. 27(1) which reads:—

> (1) Where a corporation in a taxation year received a dividend from a corporation that
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> (*a*) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year,
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> * * *
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> an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporation's income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

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and the question is the narrow one whether the moneys were so received by the respondent. The Minister was of the opinion that they were not, and this view was upheld by the Tax Appeal Board. But Cameron J. in the Exchequer Court, on the authority of *Baker* v. *Archer-Shee* (1), held they were and that the respondent was entitled to make the deduction as claimed.

I regret that I am unable to agree with that view of the statute or of the application of the authority mentioned. In Archer the question with which the House of Lords had to deal was quite distinguishable from that here. It was whether the moneys to which a life beneficiary under a trust was entitled were "income arising from securities"; and it was held they were. In this sense "arising from" is equivalent to "derived from", and here as there the moneys payable to the beneficiary by the trustee can, as held by Archer, be said to be "derived from" the dividends paid by the underlying companies; and it is true that, in this case, when a certain share of a trust unit is acquired through certificates, the holder is entitled to call for a fractional part of the underlying securities themselves, a circumstance not present in Archer.

But several obstacles lie in the way of the respondent: the language of s. 27, the provisions of s. 58 dealing with trustees and beneficiaries, and the nature of the trust itself. It is seen that by s. 27 a corporation must have "received a dividend from a corporation" and on the face of it the respondent did not receive a dividend from the underlying companies. *In Re Income Tax Acts, 1924-1928* (2) the expression "derived as dividends", held to extend to income in the hands of a life beneficiary received by the trustee as dividends, was argued by the Commissioner as meaning "received by a shareholder". On this Henchman J. observed:—

> Is there, then, anything in the words in s. 8, subsec. 8, of our Act, "income *derived as dividends* from any company," to compel me to set aside this reasoning and its result? Do the words "derived as dividends from any company" necessarily connote the meaning *"received by the taxpayer* from the company as dividends"?
>
> I do not think so. If that were the meaning, and if it had been intended to bring about a result different from that reached by the Victorian Court, it would have been easy to say "income received (or received by the taxpayer) as dividends from any company . . ." But the

(1) [1927] A.C. (2) (1929) St. R. Qd. 276.

words are *"derived as dividends,"* and these words appear to me to be directed to the nature of the "original source of the income, rather than to whether the ultimate recipient is the shareholder himself or a person otherwise entitled to the benefit of the dividend."

Then the trust is one for holders of certificates that may number among the thousands; the moneys are massed and the charges to be made against them represent the business return for the organization and management of the investments on the part both of administrator and trustee. The certificates may be payable to holders and transferable by delivery. The administrator has certain powers of directing the sale or purchase of constituent stocks and the investment of proceeds in bonds of or guaranteed by the Government of Canada or that the proceeds remain on deposit in a chartered bank; and all voting power in respect of the stock is vested in the administrator. What is created is an intermediate origin of income distinct from the underlying investments. In Archer the trustee was little more than a depository, but even that was seemingly thought sufficient to divorce the beneficiary from the primary securities by the Court of Appeal and by Lord Sumner and Lord Blanesburgh, dissenting, in the House of Lords.

Ss. 27 and 58 distinguish clearly between a corporation shareholder and a corporation beneficiary of a corporate trustee. S. 58 is headed "Trusts, Estates and Income of Beneficiaries and Deceased Persons". It provides that a trust or estate shall, for the purposes of the Act, be deemed an "individual"; and in this conception, rules out by s-s. (3) the basic deductions under s. 25 to individuals.

S-ss. (4) and (5) provide:—

(4) For the purposes of this Part, there may be deducted in computing the income of a trust or estate for a taxation year such part of the amount that would otherwise be its income for the year as was payable in the year to a beneficiary or other person beneficially interested therein or was included in the income of a beneficiary for the year by virtue of subsection (2) of section 60.

(5) Such part of the amount that would be the income of a trust or estate for a taxation year if no deduction were made under subsection (4) of this section or under regulations made under paragraph (*a*) of subsection (1) of section 11 as was payable in the year to a beneficiary or other person beneficially interested therein shall be included in computing the income of the person to whom it so became payable whether or not it was paid to him in that year and shall not be included in computing his income for a subsequent year in which it was paid.

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Rand J.

In relation to s. 11(1)(*a*) the right is given by s-s. (6A), enacted in 1950, to the beneficiary

> who is entitled, either contingently or absolutely, to the property of the trust or estate or some part thereof at some future time

to deduct from the amount that would otherwise be his income from the trust by virtue of s-s. (5), such part as would otherwise be deductible from the income of the trust under regulations authorized by para. (*a*) of s-s. (1) of s. 11, as the trustee may determine. S-s. (6B), enacted in the same year, deals with depletion and in a somewhat converse form it provides that no part of any amount payable to a beneficiary shall, for the purposes of s-ss. (4) and (5), be deemed to be payable out of an amount deductible in computing the income of the trust under para. (*b*) of s-s. (1) of s. 11 except such part as is designated by the trustee as being so payable. Then s-s. (7) makes applicable to the income of an individual beneficiary s. 35, which provides for a deduction from tax by an individual of a percentage of dividends received from taxable corporations. With this specific provision for an individual, how can the case of a corporate body as beneficiary be implied on an interpretation that would render the former superfluous? S-s. (8) provides for the deduction of foreign tax by the beneficiary. S. 60 extends taxation to all benefits received by a beneficiary as, for example, amounts paid by the trust for upkeep and maintenance of property for a life beneficiary. The comprehensive scope of these provisions makes it quite evident that Parliament intended them to be an exclusive code for dealing with the interests of beneficiaries in the conception of which the trustee is deemed to be an independent and individual taxpayer in relation to the income of the trust from which deductions and treatment of moneys payable to the beneficiary are expressly dealt with.

In the light of this precise language and the scheme which it embodies, the respondent as beneficiary cannot be said to have received from the underlying corporations the dividends which were paid to the trustee. What it received was a fractional income from a complex business trust, and whether or not the amount so received may be the subject of deduction in ascertaining the income of the beneficiary depends upon whether it is permitted by the statutory

prescriptions dealing with trust beneficiaries. The deduction claimed is not permitted and it results in what may be called triple taxation. That is a consideration which inclines a court to a rigorous scrutiny of the enactment before it, but it does not permit an interpretation that supplies what Parliament must be taken to have deliberately omitted.

I would, therefore, allow the appeal and restore the original assessment, with costs in this and in the Exchequer Court.

ESTEY J. (dissenting): The respondent, Trans-Canada Investment Corporation Limited (hereinafter referred to as administrator), is administrator of an investment trust, the terms of which are embodied in an agreement dated September 1, 1944, made between the administrator as the party of the first part, the Yorkshire and Canadian Trust Company Limited (hereinafter referred to as the trustee), the party of the second part, and the holders from time to time of the certificates representing the Trans-Canada Shares, Series "B", the parties of the third part (hereinafter referred to as certificate holders).

While in the ordinary course of the business under this investment trust the administrator receives funds to invest, as will be more fully explained, the issue here arises out of the fact that in 1950 the administrator invested its own funds in the purchase of 1,000 Trans-Canada Shares, Series "B" and received two half-yearly payments "of the net income less deductions" from the trustee in a total sum of $737.26. This amount, in its tax return, is shown as a receipt, but claimed as a deduction under s. 27(1) of the *Income Tax Act* (S. of C. 1948, 11 & 12 Geo. V, c. 52), the relevant part of which reads as follows:

> 27(1) Where a corporation in a taxation year received a dividend from a corporation that
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> (*a*) was resident in Canada in the year and was not, by virtue of a statutory provision, exempt from tax under this Part for the year,
>
> * * *
>
> an amount equal to the dividend minus any amount deducted under subsection (2) of section 11 in computing the receiving corporation's income may be deducted from the income of that corporation for the year for the purpose of determining its taxable income.

It is conceded that, if the administrator received, within the meaning of s. 27(1), the dividends from the underlying companies, it is entitled to succeed in this litigation.

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The Minister disallowed the deduction and in this he was supported by the Income Tax Appeal Board. It was, however, allowed in the Exchequer Court on the basis that the dividends received by the trustee from the fifteen underlying companies referred to in Clause 13 of the trust agreement (hereinafter referred to as the underlying companies) did not, as and when paid to the certificate holders, lose their character as dividends and, by virtue of s. 27(1), were deductible and, therefore, not taxable income.

In this appeal it is contended on behalf of the Minister that the $737.26 was received by the administrator as a *cestui que trust* under the terms of the trust agreement and not as dividends from the underlying companies and, in any event, this amount was not dividends received by a corporation from another corporation within the meaning of s. 27(1).

The trust agreement provides that the administrator, with the funds received by him for investment, must purchase the number of shares of common stock specified opposite the names of the respective underlying companies and when the shares there specified have been purchased they constitute, within the terms of the agreement, a trust unit. The administrator, having purchased these shares constituting a trust unit, is required to deliver them to the trustee, who registers the common shares in his own name and issues to the respective investors certificates evidencing Trans-Canada Shares, Series "B". Each share represents a one-thousandth undivided interest in the trust unit.

Though the shares are held in the name of the trustee, "the right to vote or consent or otherwise act in respect of such shares of stock or other securities shall vest solely in the Administrator" and the trustee "shall, upon demand of the Administrator, execute . . . valid proxies or powers of attorney to vote or consent or otherwise act in respect of such shares of stock or other securities." Moreover, the administrator may, under the provisions of para. 25 of the agreement, direct the trustee to sell shares of stock. Para. 25 reads as follows:

> 25. If the Administrator at any time shall deem it advisable that the shares of stock of any one or more or all of the Underlying Companies or any other property forming part of the Trust Units should no longer be held by the Trustee hereunder, whether the same shall have been sold and repurchased and as often as any sale and repurchase thereof may or shall

have been made, the Administrator may, in its sole discretion, direct the Trustee to sell such shares of stock or other property, and the Trustee, upon receipt of such direction from the Administrator, shall sell such shares of stock or other property in the manner provided in Clause 22 hereof.

Whenever the trustee shall sell the shares of stock it shall, after making certain deductions, hold the proceeds of the sale in a capital account subject to the detailed directions contained in the agreement.

The trust agreement provides that "the Certificates may be fully registered Certificates without coupons, or may be bearer Certificates with coupons attached." They are transferable. The holder of the bearer certificates may deal with them as the absolute owner and "every Holder waives or renounces all his equities and rights in such Certificate in favour" of a purchaser from a holder. Further, the trustee and the administrator, in dealing with the party in possession of such certificates, is protected by the express terms of the agreement.

The forms of the certificates evidencing Trans-Canada Shares, Series "B" are contained and set out as schedules to the agreement.

Reverting now to a trust unit, it is, under the terms of the trust agreement, included in the phrase "deposited property," which is defined in the trust agreement as follows:

> The term "Deposited Property" shall mean all Trust Units held by the Trustee hereunder, including all shares of stock, securities and other property, and any cash received by the Trustee in respect thereof, and the amount of any reserve established pursuant to the provisions of Clause 32 hereof and the amount of any accumulated Net Income.

The agreement then provides in para. 17:

> The Trustee shall receive all income profits earnings dividends interest and distributions from and proceeds of the Deposited Property and shall apply distribute and deal with the same under the terms and provisions hereof and to the extent that may be necessary or proper to carry out the powers hereby granted.

* * *

The agreement then provides that the trustee will distribute and pay on March 1 and September 1 in each year "shares represented by the several Certificates, of the Net Income received by the Trustee during the half-yearly period ending respectively fifteenth February and fifteenth August next preceding the date of each such payment, less the deductions hereinafter specified."

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The phrase "net income" is defined:

> The term "Net Income" shall mean the aggregate of (*a*) all cash received by the Trustee by way of dividends (except liquidating dividends) or interest in respect of the Deposited Property, and (*b*) the net cash proceeds received by the Trustee from the sale of any stock dividends (subject however as provided in Clause 19 hereof) subscription rights, warrants, securities and other rights and property, and (*c*) any interest allowed by the Trustee hereunder, after making the deductions from such aggregate authorized by Clause 31 hereof.

The deductions referred to in Clause 31 are the amount of the administrator's semi-annual fee provided for in the agreement, the amount of the trustee's semi-annual fee and expenditures also provided for in the agreement, as well as all necessary assessments and other governmental charges in respect of the "deposited property" or the income therefrom and also any amount set aside as a reserve fund.

Throughout this litigation the respondent relied upon the decision in *Baker* v. *Archer-Shee* (1). There the wife (Lady Archer-Shee) of the taxpayer, under the will of her father, Alfred Pell, who died domiciled in New York, was entitled, as tenant for life, to the income from an estate consisting of foreign government securities, foreign stocks and shares in other foreign property. This property was held in trust by the Trust Company of New York which received the income, made certain deductions, including sufficient to pay government taxes, and paid the balance to the order of Lady Archer-Shee into Morgan's Bank in New York. The majority of their Lordships, upon the assumption that the United States law was the same as that of England, held as expressed by Lord Wrenbury, that Lady Archer-Shee had "an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she is tenant for life . . . Her right under the will is 'property' from which income is derived." Lord Atkinson, who agreed with Lord Wrenbury, stated that her life interest had become "vested in her." In the opinion of the majority the trustee, in making the deductions, was acting as agent for Lady Archer-Shee.

In order to bring the facts of this case within the principle enunciated in *Baker* v. *Archer-Shee,* the respondent contended that the dividends received from the underlying companies retained their character as such, notwithstanding

(1) [1927] A.C. 844.

the manner in which they were dealt with by the trustee, until the latter paid them out, less deductions, to the certificate holders. It would seem that an examination of the provisions of the trust agreement indicates that such is untenable.

The intervention of a trustee or of more than one beneficiary will not, in circumstances such as existed in *Baker* v. *Archer-Shee,* destroy the identity of the dividends or cause them to lose their character as such. In the case at bar, however, there is much more. Under the trust agreement the trust unit provides the basis upon which the Trans-Canada Shares, Series "B" are issued. Constituted of shares of stock of varying proportions in fifteen underlying companies, this unit, in the hands of the trustee, becomes a part of the "deposited property" and the other sources of revenue specified, less deductions, constitute "net income" (the definition of which is above quoted) and it is "the proportionate part attributable to the Series B. Shares" thereof to which the holders of Trans-Canada Shares, Series "B" are entitled. That this "net income" may consist of items other than the dividends from the shares of stock in the underlying companies is evident from the definition of "net income," but, when regard is had to the responsibility of the administrator, in certain circumstances, to sell the shares in the underlying companies, this difference is particularly emphasized. Further, not only is there no express provision giving the certificate holders an interest in the dividends as received by the trustee, but the scheme, considered as a whole, would indicate an intention that the certificate holders should have a claim against the "net income" and only to "the proportionate part attributable to the Series B. Shares." With these factors in mind it would seem that the very purpose of the scheme, the importance therein of the "trust unit," the "deposited property" and the "net income," as well as the fact that the certificates evidencing Trans-Canada Shares, Series "B" are transferable, disclose a situation entirely distinguishable from that before the court in the *Archer-Shee* case. The certificate holder may, in the case at bar, direct the trustee as to in what manner it should deliver his return out of the proportionate part of the "net income" attributable to Trans-Canada Shares, Series "B", but, with respect to the dividends received from the underlying companies, they become a part of the fund out of

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which "net income" is derived and with respect to which the trustee must follow the directions of the trust agreement. Under this latter the control of these dividends remains at all times with the trustee and is never subject to change or direction on the part of the certificate holders. This trust agreement, read as a whole, with particular emphasis upon the portions already referred to, with great respect to those who hold a contrary opinion, does not contain language to support a construction that either a legal or an equitable right is created in favour of the certificate holders in respect to the dividends received by the trustee from the underlying companies.

The provisions of para. 34 of the agreement have been stressed as indicating that the certificate holders have an equitable interest in these dividends. Under para. 34 it is provided that

> At any time prior to the termination of this Agreement, the Holder of Certificates representing in the aggregate 200 Series B. shares, or any multiple thereof shall be entitled to receive
>
> * * *
>
> (*b*) Certificates duly endorsed and other instruments in proper form for transfer representing $\frac{1}{5}$th, or any multiple thereof as the case may be being the proportionate part thereof applicable to the shares of stock, securities and other property held by the Trustee which constitute one Trust unit.

It is further provided that the certificate holder is also entitled to the benefits which have accrued in respect of his shares. Under this para. 34 the certificate holder has a privilege or an option which he may exercise at any time. However, he may never exercise that option and neither the administrator nor the trustee, nor any other person, can compel him to do so. It is, moreover, a privilege which can be exercised only by those holding in the aggregate 200 Series B. shares or any multiple thereof. Under this clause, until such time as the holder may exercise his privilege or option, he has no property interest thereunder, equitable or otherwise. The language of Channell B. is appropriate:

> . . . when the position of things is that one party has a right to require a legal interest to be executed at his option and the other party has not a right to have the legal interest executed there then is no equitable interest until the option has been exercised. *Drury* v. *Rickard,* (1).

With great respect to those who hold a contrary opinion, it would appear that para. 34 does not create any equitable

(1) (1899) 63 J.P. 374 at 376.

rights in the certificate holder until he has exercised the privilege or option. Moreover, his rights are then with respect to the shares and whatever amounts may, as aforesaid, be attributable thereto, rather than to the dividends with which we are, in this litigation, concerned.

The appeal should be allowed with costs.

LOCKE J.:—The circumstances under which the shares in what have been referred to as the "underlying companies" were deposited with the Yorkshire and Canadian Trust Limited are described in the reasons for judgment of the learned trial judge. I respectfully agree with his conclusion and with his reasons for reaching that conclusion.

The matter to be determined is the proper interpretation of s. 27(1)(*a*) of the *Income Tax Act* of 1948. It is conceded that the underlying companies were of the nature defined in that portion of the section and, accordingly, if the respondent had been itself registered as the shareholder, the dividends would not have been subject to taxation in its hands. Since, however, the respondent did not receive payment of these dividends directly from the underlying companies but from the trustee, it is said that liability to tax attaches. If this argument were carried to its logical conclusion and a corporation shareholder of such a company should direct that instead of issuing dividend cheques to itself they be paid to its solicitors on its behalf or to its credit in a bank, the tax would apply since the dividend would not be "received" directly by the shareholder from the underlying company.

I think no such meaning is to be assigned to the language of the section. As pointed out by Cameron J., the shares in the underlying companies representing the trust unit were kept separate from all others by the trustee, and when dividends were received they were immediately placed in a special trust account and all distributions made out of that account. No question arises as to the portion of these moneys to which the respondent was entitled as administrator, income which would, of course, be subject to taxation in its hands. Indeed the fact that the respondent was named as the administrator with the functions described in the agreement of September 1, 1944 is an irrelevant circumstance in determining the present matter. From the

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Locke J.

funds so received, the trustee was entitled to deduct its own charges, any taxes or other governmental charges, and at its option an amount for any contingent tax liability: the balance of the dividends were held in trust for the respondent and in due course paid over to it.

I agree with the learned trial judge that the respondent was the beneficial owner of these shares, and I am quite unable to understand how the character of these moneys became changed through the intervention of the trustee or by the fact that by the agreement it was entitled to make the deductions I have mentioned before paying over the amount to the respondent.

I would dismiss this appeal with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—For the reasons given by the learned trial judge I agree with the conclusion at which he has arrived. I wish, however, to add a few observations as an argument, which is not referred to expressly by the learned trial judge, was addressed to us, i.e., that the terms of s. 58 of The Income Tax Act require a construction of s. 27 (1) different from that adopted by the learned trial judge.

If the words of s. 27 (1) alone are considered it would be my opinion that the words—"from a corporation that (*a*) was resident in Canada in the year and was not by virtue of a statutory provision, exempt from tax under this Part for the year"—constitute an adjectival phrase qualifying the word "dividend" and not an adverbial phrase qualifying the word "received". If this be the correct view, it follows that in applying the words of the section to the facts of this case the question to be answered is not, from whose hand did the appellant receive actual payment of the sum of $737.26, but rather, of what did such sum consist, and, in my opinion, the reasons of the learned trial judge make it clear that the answer to such question is that it consisted of dividends of the sort described in the phrase above quoted and that the mere interposition of a trustee between the dividend-paying companies and the beneficial owner of the shares did not change the character of such sum. The

finding of the learned trial judge that the appellant was the beneficial owner of the shares in the underlying companies was not questioned before us.

It is argued, however, that, assuming that this would be the correct construction of s. 27 (1) read by itself, when read with the rest of the Act, and particularly with s. 58 it must be construed as having no application to a case in which a corporation receives a dividend of the sort described through the medium of a trustee. It is said that s. 58 is a code dealing exhaustively with all cases in which income is received in the first instance by a trustee and paid over by it to a beneficiary, and that as s-s. 7 expressly provides the manner in which an individual beneficiary may avail himself of the provisions of s. 35 in respect of the part of the income received by him from the trustee which consists of income from the shares of the capital stock of taxable corporations and the section is silent as to corporate beneficiaries it must be inferred that a corporate beneficiary is left without relief in respect of such income received by it through the medium of a trustee.

This is a persuasive argument but I do not think it is entitled to prevail. In Statutes of Canada, 1948, 11-12 George VI c. 52, s. 58 ended with s-s. 6. As it then stood the effect of the section was to provide that a trustee in computing its income should deduct such part thereof as was payable to a beneficiary who in turn was required to add such part in computing his income. In so far as such part consisted of dividends from taxable corporations the beneficiary if an individual would have been entitled to the benefits of s. 35 and if a corporation to the benefits of s. 27, unless it could be maintained that the character of so much of such part as consisted of dividends had been changed by passing through the hands of the trustee and, in my opinion, the reasons of the learned trial judge make it clear that this could not be successfully maintained.

It does not appear to me that the fact that Parliament, by Statutes of Canada, 1949, 13 George VI, c. 25, s. 27, added s-s. 7, prescribing an arithmetical formula for apportioning between a trustee and an individual beneficiary the dividends from taxable corporations received in the first instance by the trustee and did not add a corresponding

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Cartwright J.

sub-section as to a corporate beneficiary constitutes a sufficient reason for construing s. 27 (1) in a manner contrary to what appears to me to be the plain meaning of the words in which it is expressed or for introducing the anomaly that the interposition of a trustee between a dividend-paying taxable corporation and the beneficial owner of its shares should leave unaffected in the case of an individual beneficial owner but destroy in the case of a corporate beneficial owner that protection against multiple taxation which it was the clear intention of Parliament to afford to all receipients of dividends from taxable corporations. As was pointed out by Fauteux J. in *Attorney General for Quebec* v. *Bégin* (1), the rule *expressio unius est exclusio alterius* must be applied with caution in construing a statute. To apply it in this case would, in my opinion, defeat the intention of Parliament.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *T. E. Jackson.*

Solicitors for the respondent: *Campbell, Meredith & Murray.*

1955

*June 21, 22
*Nov. 15

J. EDWARD BRESLIN and SAM BRESLIN, carrying on business under the firm name and style of Breslin Industries, (*Defendants*) . . APPELLANTS;

AND

SAMUEL JOSEPH DRISCOLL (*Plaintiff*) . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Invitee—Dangerous Premises property of Third Party—Liability of Invitor knowing of danger and failing to warn of hidden peril—Breach of City By-law.

The respondent with another truck driver was instructed by a fuel company to deliver two truck loads of coal to the appellants' premises. On arrival they were told to put the coal through a window in the

*PRESENT: Kerwin C.J. and Kellock, Estey, Locke and Cartwright JJ.

(1) [1955] S.C.R. 593.

east wall of the appellants' building by one of the appellants' employees who for the purpose removed a wooden covering from the window. The east wall was separated from the street curb by a sixteen foot concrete strip and a station wagon was parked near the window. After it was moved by the appellants' employees, the respondent's companion moved his truck close to the window. The appellants knew, but the respondent did not, that the truck was then over a part of the cellar which extended under the strip and that the latter formed part of the city sidewalk. The respondent was between the truck and the wall when the concrete collapsed causing the loaded truck to tilt and pin him against the wall. In an action in damages for injuries sustained.

Held (Locke J. dissenting): That the appellants were liable.

Per Kerwin C.J., Estey and Cartwright JJ.: The appellants invited the respondent to use a part of the highway adjoining their premises in the course of carrying out a mercantile transaction in which both they and the respondent were interested, without warning him that such use was attended by a hidden peril of which they knew and of which he was ignorant. The appellants' contention that the injuries were caused by the joint negligence of the two truck drivers in driving an overloaded truck on the sidewalk in contravention of a city by-law did not amount to negligence contributing to the accident. It was at most a *causa sine qua non*. The sole effective cause of the accident was the existence of the trap, consisting of the concealed cellar and the failure to warn the respondent of its existence. *Coburn* v. *Saskatoon* (1935) 1 W.W.R. 392 at 396-7; *Beven on Negligence* 4th Ed. Vol. I, p. 9, approved.

Per Kellock J.: There was sufficient evidence upon which the learned (trial) judge could make the finding of invitation.

Per Locke J. (dissenting): There was no evidence that the appellants either invited or authorized any one to invite the respondent or Day (his companion driver) to drive their loaded trucks on to the sidewalk in defiance of the by-law, and it cannot be suggested that the act of a servant in indicating the place where the appellants stored their coal should be construed as an invitation to deliver it there in a manner offending against the by-law, or that the appellants could reasonably anticipate that persons employed by the fuel company would deliver the coal in a manner involving a breach of the by-law.

Decision of the Ontario Court of Appeal [1954] O.R. 913, affirming the judgment of the trial judge, Judson J., affirmed.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming by a majority, the judgment of Judson J. (2) awarding the respondent damages for personal injuries. Laidlaw J.A. dissenting, would have allowed the appeal and dismissed the action.

B. V. Elliot, Q.C. for the appellant.

J. D. W. Cumberland for the respondent.

(1) [1954] O.R. 913; [1954] 4 D.L.R. 694.

(2) [1954] O.R. 62; [1954] 2 D.L.R. 124.

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The judgment of Kerwin C.J. and of Estey and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, affirming, by a majority, the judgment of Judson J., awarding the respondent damages for personal injuries. Laidlaw J.A., dissenting, would have allowed the appeal and dismissed the action.

The respondent was injured on November 26, 1951 as a result of being crushed between a coal truck owned by Toronto Fuels Ltd. and the wall of a factory building owned and occupied by the appellants. The respondent was the owner of a truck and, pursuant to a contract between him and Toronto Fuels Ltd., was delivering coal which had been purchased from that company by the appellants. Carl Day, an employee of Toronto Fuels Ltd., was also delivering coal to the appellants. Day drove to the appellants' premises and the respondent followed him. Neither of them had previously delivered coal to the premises of the appellants. It appears that Day and the respondent had arranged to assist each other in getting the coal from the trucks into the cellar. On arrival they made enquiries as to where they were to put the coal. Edward Numajari, an employee of the appellants, told them to put the coal through a window in the east wall of the appellants' building and removed a wooden cover from the window. The appellants' building is situate at the north west corner of Adelaide and Duncan streets in the city of Toronto. The east wall of the building is on the westerly limit of Duncan Street. The building is bounded on the north by a lane, 15 feet wide, running westerly from Duncan Street.

After receiving the directions given by Numajari, Day, whose truck was to be unloaded first, drove it from the north east corner of Adelaide and Duncan Streets northerly on Duncan Street and into the lane. He then backed out, drove southerly on Duncan Street and stopped the truck parallel to and distant 2 or 3 feet easterly from the east wall and a few feet north of the spot in which he intended to place it for the purpose of delivering the coal. The reason for stopping at this point was to place the conveyer, which was carried on the truck, in position for making delivery. Before driving the truck into this position, either the

respondent or Day asked Numajari to move a station-wagon which was standing on the street or sidewalk and this was done either by Numajari himself or by another employee of the appellants at his direction. I think that the learned trial judge drew the proper inference from all the evidence on this point, i.e. that Numajari had the truck moved so as to enable Day to drive his truck into the very position into which he did in fact drive it and into which he could not drive it until the station-wagon was moved.

The respondent was assisting Day in adjusting the conveyer and was standing between the truck and the wall. Day got back into the truck and started to drive it forward. As he did so the right rear wheel of the truck broke through the concrete surface of the sidewalk with the result that the truck tipped over against the wall crushing the respondent as it did so.

Beneath the concrete which collapsed was a cellar or vault occupied by the appellants and used by them for the storage of materials. There is no evidence of any agreement with the city as to the construction or maintenance of this cellar under the street.

By-law No. 12519 of the Corporation of the City of Toronto provides in part:—

20. (a) No person shall ride, drive, lead or back any horse, carriage, cart, wagon, sled, sleigh or any vehicle over or along any paved or planked sidewalk, unless at a regular crossing provided thereon. Provided, however that this prohibition shall not apply to prevent the sidewalk being crossed for a lawful purpose if permission prior thereto is obtained from the Commissioner of Works so to do, as follows:—

(1) For vehicle and load of gross weight of less than 10,000 pounds, the sidewalk must be covered with planking at least two inches in thickness, securely fastened, and chamfered or bevelled off at the ends and at the curb, so as to be no obstruction to pedestrians, and there shall be constructed across the drain, gutter or water-course opposite the proposed crossing, a good and sufficient bridge of planks or other proper and substantial material, so constructed as not to obstruct such drain, gutter or water-course.

(2) For vehicle and load of gross weight of more than 10,000 pounds the protection for the sidewalk shall be the same as provided in sub-section (1) above, except that the thickness of the planking shall be at least four inches.

The by-law does not define "sidewalk" but an employee of the City Works Department testified that the sidewalk on the west side of Duncan street extends out eight feet from the appellants' building. The respondent said that he

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knew it was forbidden to drive vehicles on the sidewalk but that he did not know that this strip of land was a sidewalk. Day gave evidence to the same effect and the learned trial judge accepted their evidence.

The licence issued to Toronto Fuels Ltd. for the truck driven by Day stated the weight of the vehicle to be 8,200 pounds and the gross weight of vehicle and load to be 20,000 pounds. The gross weight of the vehicle and load at the time of the accident was 22,150 pounds but the respondent did not know this. There was no evidence as to what weight the concrete over the cellar would have supported.

The learned trial judge made the following findings of fact; that the respondent and Day found a 16 foot concrete strip along the east wall of the appellants' premises; that the lay-out suggested to them that this strip was meant to be used for deliveries; that they were invited to use the space in the way they did; that they did not know that the truck was on the sidewalk; that someone in the employ of the appellants moved a station-wagon owned by the appellants to enable the truck to be placed in position; that the appellants knew that the cellar undermined the sidewalk; and that the respondent and Day did not know of the existence of the cellar. All of these findings of fact were concurred in by the majority in the Court of Appeal (1). Aylesworth J.A. with whose judgment F. G. MacKay J.A. agreed said:—

> In my view, the findings of fact made by the learned trial judge to which I have referred are findings which are supported by the evidence, either by way of direct testimony or by reasonable inferences therefrom, and I am therefore not prepared to disturb those findings.

I am unable to find any sufficient reason for disturbing these concurrent findings of fact.

On these findings the learned trial judge held the appellants liable on two grounds.

The first ground is stated as follows by the learned trial judge:—

> . . . My opinion is that the defendants and their employees should have foreseen the risk of danger here and should have warned a person making a heavy delivery to the premises not to drive a vehicle over the lightly bridged cellar. Had this warning been given, in some form or other, there would have been no accident. I am therefore finding that the defendants

(1) [1954] O.R. 913.

are liable in this case because they failed in their duty to warn against a foreseeable danger to persons with whom they were in business relations and who themselves were ignorant of the danger.

The second ground he states as follows:—

The facts of this case indicate an invitation on the part of the defendants or their servants to the truck drivers to make a delivery at the window and to make use of the concrete strip which at the trial was identified as a sidewalk. I think the case is within the principle stated in *Great Lakes Steamship Co.* v. *Maple Leaf Milling Co. Ltd.* (1) and *Drinkwater* v. *Morand* (2) in these terms:

> The principle thus established is that those who invite another to use the property of a third person or of a public body impliedly warrant that the place to be used is safe for the purposes indicated, and the invitation imposes a duty upon those who invite, to make sure that it is fit for the purposes suggested.

These cases were reviewed, I think with approval, in *MacDonald* v. *The Town of Goderich et al.* (3), although the Court found it unnecessary to express an opinion as to precise scope of the doctrine. It was, however, pointed out in the judgment of Aylesworth J.A. at p. 634 that in these cases the invitor had the right to issue an invitation to those having business with him to come on the premises of the third person. In the present case the defendants had no such right. However, they did, as I find, issue the invitation to use the sidewalk. They knew the place was a sidewalk and that it was undermined. The drivers did not know those things. I am finding, in these circumstances, that the duty still exists and that the case is within the general principle I have just set out.

I share the view of Aylesworth J.A. that it is unnecessary to deal with this second ground.

In my opinion the judgment of the learned trial judge should be affirmed on the first ground mentioned above. The finding of fact that the appellants invited the respondent and Day to use the sidewalk in the manner in which they did use it, which I have already indicated we should accept, appears to me to be fatal to the appellants' case and it would appear that it is because he rejects this finding of fact that Laidlaw J.A. dissented. That learned Justice of Appeal says in part:—

> . . . I prefer, however, to rest my judgment on the grounds that there was no duty on the part of the appellants to foresee and guard against the wrongful conduct of the respondent and that there was no evidence to support a finding that the respondent was invited by the appellants to use the sidewalk for the purpose of unloading the coal.

On the facts found by the learned trial judge and concurred in by the Court of Appeal no question can arise as to

(1) (1924) 41 T.L.R. 21. (2) (1929) 64 O.L.R. 124, 128.
(3) [1949] O.R. 619, 634.

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the appellants' duty to foresee the conduct of the respondent and Day. A person cannot be heard to say that he did not foresee the probability of another acting in the very way in which he has invited him to act. I agree with the view of the learned trial judge and of Aylesworth J.A. that the appellants should have foreseen the probability of the truck breaking through the concrete bridging the cellar.

It is unnecessary to consider whether in the circumstances of this case the appellants impliedly warranted that it was safe for the respondent and Day to use the strip of land in the way in which they had invited them to use it. The appellants are liable because they invited the respondent to use a part of the highway adjoining their premises in the course of carrying out a mercantile transaction in which both they and the respondent were interested, without warning him that such use was attended by a hidden peril of which they knew and of which he was ignorant. The fact that the appellants were personally absent at the time of the occurrence is unimportant. The invitation was extended by the words and actions of their servant acting within the scope of his authority. On his uncontradicted evidence, Numajari was entrusted with the duties of seeing to the proper delivery of the coal and the invitation was given in the course of performing such duties.

It is argued for the appellants that the injuries of the respondent were caused by the joint negligence of the respondent and Day in driving the truck, when loaded in excess of the maximum weight specified in the licence mentioned above, on the sidewalk in contravention of By-law No. 12519. On this point I agree with the learned trial judge and with Aylesworth J.A. who, in rejecting this defence, adopted the reasoning of the Court of Appeal for Saskatchewan in *Coburn* v. *Saskatoon* (1) and that of the learned author of *Beven on Negligence,* 4th Edition, Vol. 1, page 9. In particular I would adopt the language of Turgeon J.A., as he then was, in *Coburn's* case when he says at page 396:—

> Trespass is only a civil wrong against the owner or occupier of property and when, in some of the cases cited, it is said that the plaintiff in order to succeed must have been *lawfully* upon the premises at the time of the accident "lawfully" merely means *not tortiously* in respect to the defendant.

(1) [1935] 1 W.W.R. 392.

and at page 397:—

> It is also alleged by the defendants that if the deceased was a trespasser upon the Canadian National Railways right of way at the time he was killed he was thereby committing a statutory offence because s. 408 of the *Railway Act*, R.S.C., 1927, c. 170, punishes trespassers on railway property. But such a breach of the statute by the deceased cannot be considered as an element in the case unless it amounted to negligence contributing to the accident. The mere fact of the deceased being in breach of a statute at the time he suffered from the defendant's negligence is not sufficient to defeat the plaintiff's claim.

In the case at bar the breach of the by-law did not, in my opinion, amount to negligence contributing to the accident. It was at most *causa sine qua non*. The sole effective cause of the accident was the existence of the trap, consisting of the concealed cellar, and the failure to warn the respondent of its existence. With regard to the argument based on the load exceeding the maximum specified in the licence, it is sufficient to say that, as was pointed out by the learned trial judge, there was no evidence that the excessive weight was a cause of the accident.

I would dismiss the appeal with costs.

KELLOCK J.:—The appellants contend that the judgment below should be reversed upon the ground that there was no foreseeable danger with respect to which the appellants ought to have warned the respondent, and that there was no invitation from the former to the latter to enter upon the place below which the vault existed to the knowledge of the appellants but of which the respondent was unaware. These two questions are closely related.

The appellant Sam Breslin testified that the appellants began to purchase coal from Toronto Fuels Ltd. in October, 1951. While he said that it did not matter to him whether the coal came in bags or in bulk, he admitted that he knew that coal in bags was more expensive than loose coal and that in ordering the particular coal here in question, he had discussed price.

Further, his evidence that coal had always been delivered through the manhole and not through the wooden window was contradicted by the appellants' own employee Numajari, also called on their behalf, who testified that both were used. He said it made no difference which, as both led to the same place. This also contradicts the evidence of the appellant J. E. Breslin who, when asked as to whether he

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had ever "seen" anyone drive up where the station wagon had been parked to deliver coal, said that prior to the occasion in question "coal was always put into the coal chute and the truck was on the road."

It is, moreover, significant that when cross-examined as to his knowledge of the existence of the wooden window as a place for delivery of coal, Sam Breslin said "That is the window we got with the building, and that is what *we use.*" He also admitted that when trucks came with coal they would have to find somebody to tell them where to put it.

The witness Numajari further testified that, as well as being engaged in the industrial process carried on by the appellants on the premises, it was his duty to look after the furnace, to keep watch over the supply of coal, and when the supply got low, to inform one of them. In addition to that, when coal came to be delivered it was his duty to "see that it got in all right," that is, "into the proper place in the building."

Upon the occasion in question, Numajari was on the third floor when the coal trucks arrived and was called down to the basement by another employee. This would seem to indicate that Numajari's duty to see to the getting of the coal into the building was an understood thing among the appellants' employees.

The above evidence justifies the findings of the learned judge that the appellants knew that they were buying coal to be delivered in bulk and not in bags, that the cellar window was the delivery window for the coal and that it was part of the duty of Numajari, who opened the window, to tell the drivers that fact, and that he did so. These findings were affirmed in the Court of Appeal. In my opinion, it is implicit in these findings that Numajari was placed by the appellants in their place for the purpose of accepting delivery.

It is the contention of the appellants that the truck ought to have remained on the roadway east of the curb and that they had no reason to anticipate anything else, particularly in view of the city by-law. The learned trial judge, however, on the evidence, gave "no credit whatever" to the statement of both defendants that they reasonably expected the coal to be delivered in bags or by means of an unloading

apparatus operated from a truck standing on the road and passing over the sixteen feet of concrete lying to the east of the appellants' building into the cellar window.

The appellants next contend that the proper way in which delivery ought to have been made was for the truck to have backed up on the easterly eight feet of the sixteen feet of concrete between the curb and the building and discharged the coal, presumably by chute or conveyor, over the westerly eight feet. While the part of the sixteen feet occupied by the cellar vault was not stated in evidence, the inference would appear to be that so long as the truck was not driven closer to the building than eight feet, it would not have been over the vault.

As to this contention, Sam Breslin deposed that the whole sixteen feet were paved in exactly the same manner throughout, while the appellant J. E. Breslin refused "to accept the term 'boulevard' " with relation to the most easterly eight feet of the concrete. He testified as to the entire sixteen feet that

> My conception of it always was a sidewalk, and I believe most people would recognize it as such, because people approach off the roadway to that point in crossing roads and so on. There was never any question in my mind as to its ever being anything but a sidewalk.

Accordingly, the above contention on behalf of the appellants involved the use of at least part of the sixteen foot area, which, in the view of the appellant J. E. Breslin, constituted as much a use of the sidewalk as any other part, and so far as the by-law was concerned, equally within its provisions. The appellants themselves parked their station wagon in this area without obtaining the permission called for by the by-law. Such use would be some indication to persons coming to the premises for the purpose of making deliveries, as the respondent did, that from the standpoint of danger at least, there was no reason why it should not be driven upon.

Just why the appellants in this contention draw the line at eight feet is not, in the light of the above evidence, apparent. Moreover, Sam Breslin, in his evidence, testified that in his view, only the four feet, or four feet six inches immediately next to the building constituted the sidewalk.

Once, therefore, the idea is rejected, as the learned judge, properly in my view, did reject it, that the appellants expected the coal trucks to remain on the roadway, it is clear

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that they contemplated the trucks being driven upon the sixteen foot area in order to unload and there is no basis in the evidence upon which a line is to be drawn at the middle line of that area.

It may be remarked that there is no definition of "sidewalk" in either the *Municipal Act* or the by-law and there is really no basis upon which it can satisfactorily be said that all of the sixteen feet were not sidewalk even for the purposes of the by-law itself. The evidence of a city employee that the city regarded the westerly eight feet as sidewalk, adds nothing to the relevant considerations so far as the issues here in question are concerned, however relevant such evidence might be in a proceeding to which the city was itself a party.

The respondent admitted that he was well aware of the by-law but did not believe they were on the sidewalk. The learned judge accepted this evidence and further found that the "lay-out" of the area east of the building suggested to the truckers that it was meant to be used for deliveries. Unquestionably, that part of the area to the north was so used.

The respondent testified that the truck was not backed up on the sixteen foot strip because the conveyor by which the coal was to be unloaded was not long enough. He was not cross-examined upon this statement with relation to the fact that had the truck been backed up to the edge of the most westerly eight foot strip of concrete, with its overhang of two feet it would have been within six feet of the building, while the conveyor was from ten to twelve feet long. There may have been some reason due to the method of operation of the conveyor which would explain this, but, as I have said, the respondent was not asked. He further testified, in any event, that even had it been long enough, they would not have operated it that way, as to do so would have completely blocked the use of the whole sixteen feet by the combined means of the truck and the conveyor. It cannot be said that the appellants could have expected any such unreasonable method to be employed.

The learned trial judge drew the inference upon all the evidence that the appellants knew that the delivery would be made exactly as the respondent and Day proposed to make it and these findings were confirmed by the Court of

Appeal. That the learned judge was justified in so doing is, I think, further supported by the fact that when it was pointed out to Numajari by the truckers that they intended driving the truck into such a position with relation to the building that in order to do so the appellants' station wagon parked on the easterly eight feet of the strip would have to be moved, he had it moved. In so doing he did not in any way indicate that the course the respondent and Day were thus proposing to follow was in any way unusual or a departure from the method followed in the case of prior deliveries of loose coal through the window. Although called on behalf of the appellants, he was not examined on these matters. His removal of the station wagon was, in the circumstances, a sufficient invitation to use the area the trucks had indicated they proposed to use.

Accordingly, there was, in my opinion, sufficient evidence upon which the learned judge could make the finding of invitation upon which his judgment in favour of the respondent is founded. I would therefore dismiss the appeal with costs.

LOCKE J. (dissenting):—The facts disclosed by the evidence in this matter, in so far as it is necessary to consider them in determining the question of liability, appear to me to be as follows.

The appellants J. Edward Breslin and Sam Breslin are manufacturers and are the owners of a building in which they carry on their business, situate at the northwest corner of the intersection of Adelaide and Duncan Streets in Toronto and fronting on the former street. The building is approximately 82 feet in length and its westerly wall is built flush with the property line. At the rear there is a lane 15 feet in width. As shown by the evidence of an official of the Works Department of the City, a concrete sidewalk extends out 8 feet from the west wall of the building along the east side of Duncan Street. From the westerly limit of the sidewalk to the curb, a distance of 8 feet, what would normally be a boulevard is also paved with concrete. This concrete was built flush with the westerly limit of the sidewalk. Photographs put in evidence show that this portion so laid with concrete extended throughout the length of the appellants' building but was not carried past the lane to the north. The street curb is plainly visible in the photographs

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but, at a point opposite what was described as a delivery door in the west wall of the building some 20 feet from its northern extremity, the curb is shown as being lower than it was further south towards the intersection.

At some time prior to the date of the accident, the Breslins had ordered coal from Toronto Fuels Ltd. to be delivered at their premises, and that company instructed its employee Carl Day and the respondent, an independent contractor engaged in the trucking business, to deliver the fuel. Day drove a Ford truck, the property of his employer, the weight of which, empty, was 8,200 pounds and which was carrying a load of 13,950 pounds at the time of the accident. This was a weight about one ton in excess of the amount permitted to be carried upon the truck under the terms of the permit issued to the employer by the Motor Vehicles Branch of the Department of Highways.

Neither of the two drivers had delivered fuel to the premises theretofore and on their arrival, according to the respondent, he asked a Japanese named Numajari, who proved to be an hourly worker employed by the appellants part of whose duty was to attend the furnace in the building, where the coal was to be put. According to the respondent, Numajari opened a window, which the photographs show to have been to the south of the above mentioned delivery door and about 30 feet from the southerly limit of the building, and in answer to the question "Where does the coal go?" said "Go here." The photographs show the window in question to be between 2 and 3 feet in height and some 2 feet in width and let in to the wall, the bottom portion of the window being a few inches above the level of the pavement. Opposite the window the street curb is shown on the photograph Exhibit 4 as being of normal height. Day's account of the discussion with Numajari was expressed in these terms:—

> We walked across to the building, and I went around to the front to see who would look after the coal. I had not been there before. I didn't know just where to go. In the meantime, I think it was a Japanese fellow, a young fellow, he came and opened a slide down by the wall at the sidewalk, and he told us the coal went in there.

and said further:—

> When he opened this door (sic.) for us he told us that is where the coal went in. We asked him to move a car that was there. I don't know whether it was him or someone else that came out and moved the car up and left us room to get in between the car and the building.

The other car referred to was a station wagon owned by the respondents, which was standing on the concrete between the westerly limit of the sidewalk and the curb where, according to the evidence, it was parked with the permission of the police. The identity of the person who moved the station wagon was not disclosed, but it was undoubtedly an employee of the appellants.

It was decided by the two men to deliver the coal on the truck driven by Day first. There was let in to the sidewalk immediately in front of the window which had been opened by Numajari a manhole over a coal chute into which coal was, according to Samuel Breslin, customarily delivered but, while this is plainly visible in one of the photographs put in by the respondent, apparently it was not observed by either of the men. Day's truck was equipped with a conveyor specially designed for the delivery of coal from such conveyances which, he said, was either 10 or 12 feet in length and thus amply sufficient to have carried the coal from the rear of the truck either to the entrance of the manhole or to the window itself, had the truck been stationed with its rear wheels on the concrete to the west of the sidewalk. For reasons which are not explained in the evidence, this was not done. It is not suggested that Numajari or any one else had been asked for instructions as to the *manner* in which the coal was to be removed from the truck and put in to the basement of the building.

How they proceeded to do this may best be described in Day's language:—

> I got in my truck. I was on Adelaide Street. Drove around the corner to the right, up Duncan, and Mr. Driscoll, he followed me, and he left his truck there. We could only unload one at a time. And I drove up to the lane there, north of the building, west off Duncan. I drove in there, backed up, and then went down past the end of the building, along the wall, to the coal window.

After a reference to one of the photographs which I find to be unintelligible, the examination continued:—

> Q. When you got down there, what did you do? A. I stopped there, just before I got to the place, before I put the coal in the hole, to take the conveyer off, it is on that side.
>
> * * *
>
> Q. Why were you using the conveyer? A. You need the conveyer to put it through the hole in the wall, the window that is there.
>
> * * *
>
> Q. You took the conveyer off. What was Mr. Driscoll doing at this time? A. Mr. Driscoll took one end of the conveyer off. He took the

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front end off first. It is pretty heavy to lift. He put his end on the ground. I took the back end off, set it down on the ground. He picked up the front end immediately I put my end on the ground. I got back in the truck, backed up the truck and moved it up to the window so he could put the conveyer in crossways behind it.

Q. What happened? A. I started ahead and went six or seven feet, when the right hind dual wheel dropped through the concrete. I suppose that would be out may be two or three feet from the wall.

According to the respondent, the position in which the station wagon was standing interfered with placing Day's truck alongside the building opposite the window and they accordingly asked that it be moved. His account of the manner in which Day put his truck into position differs from that given by the latter, in that he says that, after Day had driven into the laneway facing west and backed up on to Duncan Street, he "cut across the front of the receiving door" and, continuing, said:—

For one reason, we are not supposed to drive on the sidewalk, and the receiving door is the most potent (sic) place to cross over, because I imagine it would be built up stronger, the portion of the sidewalk there, than it would be further down. Going over a curb with your tires is not very good either.

and said that Day had pulled up along the side of the building and that he was close to him "guiding him in."

At the place where the right rear wheel of the truck went through the pavement, which the photographs would indicate to have been some six or eight feet to the north of the window referred to, a vault for the storage of materials had been constructed under the sidewalk, apparently by one of the predecessors in title of the Breslins. This excavation was on city property and the evidence does not show that it had been constructed or used with the City's permission. The Breslins had purchased the property in 1945 and thereafter continued to use the vault for storage. Whether the fact that Day's truck was overloaded contributed to the occurrence is not disclosed by the evidence. The effect of the sidewalk caving in was that the respondent, standing near the rear of Day's truck, was pinned against the wall of the building and suffered serious personal injuries.

In the Statement of Claim the respondent alleged that on arrival at the premises he had proceeded to a place:—

where a delivery door or entrance way into the said lands and premises was located and to which a servant or agent of the defendants invited the plaintiff and the driver of the other coal truck to make delivery.

Referring to the vault under the sidewalk, it was alleged that the defendants maintained it:—

at or near the point where the plaintiff and the driver of the other coal truck had been invited or requested to make delivery of coal.

Negligence was alleged in maintaining the vault without providing it with a safe roof and in not warning the plaintiff of its existence and condition and in:—

inviting or requesting the plaintiff to make delivery of coal in such a manner and at such a place as to necessitate his standing on or near the said vault.

It was further said that the vault constituted a nuisance.

Upon this evidence, the learned trial judge made the following findings of fact which were accepted by the majority in the Court of Appeal:—

There is a large delivery door at the north end of the easterly wall and provision at the curb, in the form of a small ramp, for trucks to back up to the delivery door. Day drove his truck over this ramp in order to get alongside the wall.

* * *

The plaintiff and the other driver, Carl Day, found a 16 foot concrete strip along the east wall of the premises. The layout suggested to them that it was meant to be used for deliveries. They were invited to use the space in the way that they did. Further, somebody in the employment of the defendants moved a station wagon owned by the defendants to enable the truck to get into position . . . They did not in fact know that they were on the sidewalk. They thought that they were on land owned by the defendants and used for loading and unloading goods. Both drivers admitted knowledge of a City by-law prohibiting the presence on the sidewalk of a vehicle such as the one in question here.

On the other hand, the defendants knew that the easterly wall of their building was on the street line and that their cellar undermined the sidewalk. They also knew that the cellar window was the delivery window for coal. Their employee gave instructions for the delivery to be made at this window.

The negligence found was in failing to warn the respondent against a foreseeable danger of which the appellants were aware and the respondent ignorant.

In my opinion, the material part of these findings is not supported by the evidence. As the photographs show, the curb for some distance south from the lane was reduced in height and, according to Samuel Breslin, when they first occupied the building they had for a time taken advantage of this to have a truck back up to the delivery door across the sidewalk, but this practice had been discontinued on the instructions of the police. There was nothing in the nature of a ramp. At the point opposite the window

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indicated by Numajari, which the photographs would indicate was at least 30 feet to the south of the delivery door, the curb was of the usual height found in the city streets. There is no evidence to support the finding that the drivers were invited to use the sidewalk in the way that they did. They were told where the coal was to be delivered but there is not the slightest suggestion in the evidence that they were instructed as to the *manner* in which it should be put there, which was indeed none of the concern of the appellants. Neither of the drivers said that he thought he was on land owned by the appellants and I am sure neither would have made any such statement, which would have involved asserting a belief that the western boundary of the appellants' property extended to the curb line. The act of removing the station wagon standing on the portion of the concrete between the western boundary of the sidewalk and the curb line, done at the request of the respondent, cannot be held in itself to have constituted an invitation to drive the truck on the sidewalk. The fact that the station wagon was standing in this position might well indicate to the two drivers that it stood there with the permission of the police and might have justified them placing the truck on this space with its rear end towards the window and, with the aid of the conveyor, delivering the coal, either through the window or in the manner it had always theretofore been delivered, into the manhole. While Day said that the conveyor was not long enough to reach from the truck to the window, he must have meant that it was not long enough if the rear of the truck was at the curb since the width of the sidewalk itself was only 8 feet and the length of the conveyor from 10 to 12 feet.

The City by-law referred to prohibits any person from driving any vehicle over or along any paved sidewalk, except at a regular crossing provided thereon, without the permission of the Commissioner of Works and, if such permission should be obtained, the manner in which the sidewalk should be protected is specified. It is said in the reasons delivered at the trial that the fact that the actions of the respondent were in contravention of the City by-law does not afford a defence, though it might be that in an action against the City a claim of breach of the by-law or trespass would succeed. But this, with great respect, is not the point.

There is no evidence that the appellants either invited or authorized any one to invite the respondent or Day to drive their loaded trucks on to the sidewalk in defiance of the by-law, and it cannot, I think, be suggested that the act of a servant in indicating the place where the appellants stored their coal could be construed as an invitation to deliver it there in a manner offending against the by-law, or that the appellants could reasonably anticipate that the persons employed by Toronto Fuels Ltd. would deliver the coal in a manner involving a breach of the by-law. No one, as shown by the uncontradicted evidence of the appellant J. E. Breslin, had ever done so during the time they had owned the property. While moving the station wagon might be construed as an indication that the truck might be placed in the position thus made available, I fail to understand how that act can be construed as an invitation to drive the truck on to the *sidewalk* between the portion of the pavement so vacated and the window. It is suggested that the trial judge drew the inference that there had been such an invitation, but inferences may only be properly drawn from proven facts and here there are none such to support any such inference. To hold otherwise is to read something into the evidence that is not there. The fact—if it was a fact—that the drivers did not know they were driving on the sidewalk is, in my opinion, an irrelevant circumstance.

While the majority of the learned judges of the Court of Appeal have accepted the findings of fact made at the trial, and there are thus concurrent findings, this cannot be decisive of the matter in a case such as this where those findings are not supported by the evidence.

In agreement with Mr. Justice Laidlaw, I think the evidence in this case does not disclose a cause of action. I would allow the appeal, with costs throughout if they are demanded.

Appeal dismissed with costs.

Solicitors for the appellants: *Borden, Elliot, Kelley, Palmer & Sankey.*

Solicitors for the respondent: *Low, Honeywell & Murchison.*

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*May 9, 10
*Nov. 15

THE LABOUR RELATIONS BOARD OF SASKATCHEWAN (*Respondent*) — APPELLANT;

AND

HER MAJESTY THE QUEEN ON THE RELATION OF F. W. WOOLWORTH COMPANY LIMITED AND AGNES SLABICK *et al.* (*Applicants*) ..... — RESPONDENTS;

AND

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION ..... — INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Labour—Mandamus—Right of employees to seek decertification of union—Union's failure to conclude collective agreement—Whether right affected by moral and financial help from employer—Duty of Labour Board—Trade Union Act, R.S.S. 1953, c. 259, ss. 3, 5, 14, 26.

The intervenant union was, in January, 1953, certified as bargaining agent for the employees of the respondent company but failed to conclude a collective agreement. In June, 1953, an application for decertification made by some employees, claiming to be a majority, was dismissed as premature by the appellant, the Labour Relations Board. A second application, made in December, 1953, by 13 out of the 19 employees of the company, was also rejected on the grounds that it (1) was an application of the employees in form only, being in reality made on behalf of the company and (2) was not shown to be supported by a majority of the employees. The company joined the employees in their application before the Court of Appeal for a writ of mandamus which was ordered issued directing the Board to proceed to determine the application for decertification. The Board appealed to this Court.

Held: The appeal should be dismissed.

It was conclusively established by the evidence that the application had been made and supported by a majority of the employees.

The rights of employees, under s. 3 of the *Trade Union Act*, to bargain collectively through representatives of their own choosing are not forfeited if the employees receive help from their employer in asserting those rights. The evidence furthermore directly contradicted the statement that the employees had received financial help from their employer.

In view of the union's failure to negotiate an agreement with the employer, the right of the employees to choose another representative was not suspended nor affected.

*PRESENT: Kerwin C.J., Kellock, Estey, Locke and Cartwright JJ.

Although the language in s. 5 of the Act, by which the Board was given power to rescind or amend its orders or decisions, was permissive, it imposed a duty upon the Board to exercise this power when properly called upon to do so. (*Drysdale* v. *Dominion Coal Co.* (34 Can. S.C.R. 336) and *Julius* v. *Lord Bishop of Oxford* (5 A.C. 243) referred to).

The rejection of the application was made on grounds which were wholly irrelevant and amounted to a refusal on the part of the Board to perform its duties under the Act to deal with the statutory rights of the employees, which were not affected by any disputes between the employer and the union.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), Martin C.J.A. and Culliton J.A. dissenting, ordering the Labour Relations Board to consider an application for decertification.

F. A. Brewin, Q.C. and *R. C. Carter* for the appellant.

E. D. Noonan, Q.C. for the respondent F. W. Woolworth Co. Ltd.

G. Taylor for the intervenant.

The judgment of the Court was delivered by:—

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan (1), directing that a peremptory writ of *mandamus* do issue directed to the appellant, the Labour Relations Board of that province, ordering it to proceed to determine the application of the respondents, employees of the F. W. Woolworth Company Limited in the City of Weyburn, for the decertification of the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (hereinafter referred to as the union) as their bargaining agents. The Chief Justice of Saskatchewan and Culliton, J.A. dissented and would have dismissed the application. The respondent company joined with its said employees in applying to the Court of Appeal for the writ. The union was permitted to intervene in the appeal to this Court.

The Saskatchewan Labour Relations Board is a body composed of seven members appointed by the Lieutenant Governor in Council under the provisions of the *Trade Union Act* (c. 259, R.S.S. 1953). S. 3 of that Act declares the rights of employees (a term defined in s. 2) to bargain

(1) [1954] 4 D.L.R. 359; 13 W.W.R. (N.S.) 1.

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collectively through representatives of their own choosing and that the representatives selected for that purpose shall be the exclusive representatives of all employees in the unit of employees for such purpose. By s. 5 the Board is given power to make orders determining what trade union, if any, represents the majority of employees in an appropriate unit of employees and requiring an employer to bargain collectively. Among other powers vested in the Board by this section is that of rescinding or amending any of its own orders or decisions. S. 6 provides that in determining what trade union, if any, represents a majority of employees in an appropriate unit the Board may, in its discretion, direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question. Other sections of the Act declare that certain specified acts shall constitute unfair labour practices on the part of any employer or employers agent, these including the failure or refusal to bargain collectively with the representatives elected or appointed by a trade union representing the majority of the employees in an appropriate unit, and penalties are prescribed for the commission of any such practice. S. 17 provides that there shall be no appeal from any order or decision of the Board under the Act and that its orders shall not be reviewable by any court of law or by any *certiorari, mandamus,* prohibition, injunction or other proceeding whatever.

On January 13, 1953, on the application of the respondent union, the Board made an order finding that the employees of the respondent company at Weyburn, except the Manager and Assistant Manager, constituted an appropriate unit of employees for the purpose of bargaining collectively and that the applicant represented the majority of such employees and directed the respondent company to bargain collectively with the duly appointed or elected representatives of the union in respect to the employees in the unit.

On June 9, 1953, nine of the employees of the respondent company, asserting that they were the majority of the employees, applied to the Board for an order to rescind the order of January 13, 1953, on the ground that the union was not supported by a majority of the employees in the store. This application came on for hearing before the Board on July 21, 1953 and, being opposed by the union, was dismissed on the ground that the application was premature.

On December 9, 1953 a second application was filed with the Board to rescind the order of January 13, 1953 by thirteen of nineteen employees of the respondent company at Weyburn, the grounds for the application being the same as those advanced in support of the application made in the previous June. While the employees were residents of Weyburn, the application was first heard on January 5, 1954 at Saskatoon, and adjourned at the request of the union to Regina where a hearing was held and evidence taken *viva voce* on February 9 and 10, 1954. The Board reserved its decision which was subsequently delivered on March 9, 1954 dismissing the application.

Three of the seven members of the Board agreed with the reasons for the decision delivered by the Chairman. Three other members disagreeing would have directed the taking of a vote under the powers given to the Board by s. 6 to determine the wishes of the majority of the employees.

The reasons for the decision of the majority were: firstly, that the application was that of the employees in form only, being in reality made on behalf of the company, and secondly, that it was not shown to be supported by a majority of the employees.

As pointed out in the reasons for judgment delivered by Mr. Justice Gordon, no attempt was made in the Court of Appeal to support the second of these grounds, it being common ground that the majority of the employees had supported the application, and no attempt was made to support that finding on the argument before us. On this aspect of the matter, it may be added that the fact that the application was made and supported by a majority of the employees, as that term is defined in s. 2(5) of the Act, was conclusively established by the evidence.

As to the first of the grounds upon which the decision of the majority was based, the reasons delivered by the Chairman commenced with the following statement:—

> In the light of the evidence adduced the majority of the Board is satisfied that but for the moral and financial help of the employer neither of the two applications for decertification would ever have been brought.

As this statement indicates, the majority of the Board misconceived the nature of the rights given to the employees by s. 3 of the Act, they being of the opinion that if, in endeavouring to assert those rights, they received help from

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their employer those rights were forfeited. It is also not irrelevant to point out that all of the evidence referred to directly contradicts the statement that the employees received financial help from their employer in making either of the applications, even if doing so would have affected the employees' rights. I do not know what the expression "moral help" was intended to convey. If it was intended to indicate that the employer was sympathetic to the desire of the majority of its employees to rid themselves of an unsatisfactory bargaining representative, I am quite unable to understand how that fact could affect the employees' rights.

As I have pointed out, s. 3 vests in employees the right to bargain collectively with their employer through representatives of their own choosing. S. 26 declares that where a collective bargaining agreement has been entered into it is to remain in force for a period of one year from its effective date and thereafter from year to year unless terminated in the manner prescribed by that section. A trade union claiming to represent a majority of employees other than the union which has negotiated the agreement may, not less than thirty nor more than sixty days before the expiry of the agreement, apply to the Board for an order determining it to be the trade union representing the majority of the employees in the unit.

The Act does not otherwise define the time or restrict the manner in which the rights given to the employees by s. 3 may be exercised.

The union, for reasons which are irrelevant in determining the rights of the employees, had failed to negotiate an agreement with the employer and the right of the employees to choose another representative was thus neither suspended nor affected.

The language of s. 5, in so far as it affects this aspect of the matter, reads:—

> 5. The board shall have power to make orders:—
>
> .....
>
> (i) rescinding or amending any order or decision of the board.

While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power when called upon to do so by a party interested and having

the right to make the application (*Drysdale* v. *Dominion Coal Company* (1): Killam J.). Enabling words are always compulsory where they are words to effectuate a legal right (*Julius* v. *Lord Bishop of Oxford* (2): Lord Blackburn).

By s. 14 of the Act the Board, subject to the approval of the Lieutenant Governor in Council, may make such rules and regulations not inconsistent with the Act as are necessary to carry out its provisions according to their true intent. The rules made pursuant to this power are in the record and contain nothing defining the time within which the rights of the employees given by s. 3 may be exercised. The right of the employees to choose a new bargaining representative in circumstances such as existed in the present case must, no doubt, be exercised in a reasonable manner. If, after the order of January 13, 1953 was made, the employees had applied to substitute some other bargaining representative for the union before that body had had a reasonable opportunity to negotiate a collective agreement with the employer, the Board could undoubtedly, in my opinion, defer consideration of the matter until a reasonable time to effect that object had elapsed and no court could properly intervene. This, however, is not such a case and the application was not rejected on any such ground. The application with which we are concerned was not made until some eleven months had elapsed after the order sought to be rescinded had been made. The majority of the employees clearly did not wish this union to bargain on their behalf, for reasons which need not be enquired into, being entirely the concern of the employees themselves. It was the duty of the Board to hear the employees' application and to give effect to their statutory rights. While the Board considered the application, it was rejected upon grounds which were wholly irrelevant.

In my opinion, the manner in which the employees' application was dealt with amounted to a refusal on the part of the Board to perform the duties cast upon it by the sections of the *Trade Union Act* to which I have referred.

The majority of the Board, concerning themselves with what they considered to be the merits of the various disputes between the employer and the union, appear to have

(1) (1904) 34 Can. S.C.R. 328 (2) (1880) 5 A.C. 214 at 243.
t 336.

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lost sight of the fact that their duty was to deal with the statutory rights of the employees, which were not affected by the fact that there had been such disputes.

I would dismiss this appeal with costs to be paid by the appellant to the respondents, except that the appellant should be paid by the respondents its costs of the day on the adjournment of this appeal on February 16, 1955. There should be no costs to or against the intervenant.

Appeal dismissed with costs.

Solicitor for the appellant: *R. C. Carter.*

Solicitor for the respondent F. W. Woolworth Co. Ltd: *A. W. Embury.*

Solicitors for the respondents A. Slabick *et al.*: *Robinson, Robinson & Alexander.*

Solicitors for the intervenant Union: *Goldenberg & Taylor.*

DAME LAURETTE ROUSSEAU (*Plaintiff*) ..... APPELLANT;

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*Nov. 16
*Dec. 5

AND

HERMAN BENNETT AND ULRIC NUTBROWN (*Defendants*) .... RESPONDENTS.

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

Automobiles—Pedestrian injured—Onus of proof—Balance of probabilities —Presumptions—Article 1242 C.C.—Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53.

The appellant's husband stopped his truck on the paved portion of a road and was standing behind it talking to another person when the truck, which was without a driver, started forward going down a slight grade. The husband dashed away towards the road circling the rear of the truck in order to reach the cab. At the same time, two other trucks, property of the respondent, were proceeding in the opposite direction, loaded with pulp wood. The husband was found fatally injured and lying on the road after the two trucks had passed. No one saw how the accident happened. It is the contention of the appellant that her husband was struck by the second of these trucks.

The driver of the second truck testified that he suddenly saw a man, proceeding towards him at a fast pace, come out from the rear of the stopped truck. He sounded his klaxon, put his brakes on and turned more towards his right. The man then retreated back, either behind or on the side of the stopped truck. The driver said that he did not strike the man and that he proceeded along his route until someone advised him of the accident some two miles further.

The trial judge divided the liability equally between the respondent and the victim and maintained the action taken by the appellant on the ground that the balance of probabilities indicated that the victim was struck by the second truck. The Court of Appeal reversed this judgment on the ground that the presumptions were not so strong as to exclude all other possibilities.

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

In cases of automobile accidents, and specially in a case like the present, it is imperative to rely on what the trial judge saw and heard. The burden of establishing the contact between the respondent's truck and the victim, which rested on the appellant, could be met by presumptions of facts, the appreciation of which is to be left to the discretion of the trial judge (Art. 1242 C.C.).

There was no error in the exercise of that discretion. In civil proceedings, the balance of probabilities is the decisive factor. It was reasonable for the trial judge to find that the presumptions of facts were strong enough to conclude that the victim was struck by the respondent's

*PRESENT: Taschereau, Kellock, Estey, Cartwright and Fauteux JJ. Estey J. did not take part in the judgment on account of illness.

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truck. The relation between the truck and the damage being established, the presumption of s. 53 of the *Motor Vehicles Act* applies and since it has not been rebutted, the liability of the respondent is engaged.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing the judgment at trial.

P. Miquelon, Q.C. for the appellant.

N. Charbonneau, Q.C. for the respondents.

The judgment of the Court was delivered by:—

TASCHEREAU J.:—La demanderesse tant en sa qualité personnelle qu'en qualité de tutrice à ses enfants mineurs, et l'autre demandeur Alexandre Rousseau en sa qualité de curateur d'un enfant à naître, ont poursuivi les défendeurs et ont réclamé la somme de $49,700, comme résultat d'un accident d'automobile survenu le 27 novembre 1950, près de Victoriaville sur la route de Warwick.

La victime de cet accident, Wellie Marchand, époux de la demanderesse, qui était camionneur de son métier, avait stationné son camion à droite sur la route du Marché, près de Victoriaville dans la direction nord, à environ soixante-quinze pieds de l'intersection d'une route qui se dirige vers l'est, et qui est appelée le rang Cinq-Chicots.

La victime était descendue de son camion pour aller parler à une personne en arrière de ce camion. Comme le camion, stationné dans une légère pente, n'était pas complètement immobilisé et avançait lentement, la victime se dirigea vers l'avant du camion pour appliquer davantage les freins, et au cours de cette opération, elle aurait été frappée par le camion du défendeur, conduit par Ulric Nutbrown, préposé et employé de l'autre défendeur Herman Bennett. Comme conséquence du choc qu'il reçut, Marchand a subi une grave fracture au crâne dont il est décédé quelques heures plus tard.

L'honorable Juge de première instance est arrivé à la conclusion que la faute devait être partagée dans une proportion de 50%, a évalué les dommages à $22,000, dont $10,700 devant être attribués à la demanderesse personnellement, et $11,300 en sa qualité de tutrice à ses enfants

(1) Q.R. [1955] Q.B. 174.

mineurs. Il maintient l'action en conséquence pour la somme de $11,000 avec intérêts et dépens, y compris les frais de tutelle et curatelle. La Cour d'Appel (1) a unanimement infirmé ce jugement, et a débouté la demanderesse de son action tant personnellement qu'en sa qualité de tutrice.

La véritable question qui se pose, est de savoir si la victime a été frappée par le camion du défendeur, car aucun témoin oculaire n'a vu le choc qui aurait causé les blessures mortelles à Marchand.

L'honorable Juge de première instance en vient cependant à la conclusion que les présomptions sont suffisantes pour établir la cause de cet accident fatal. Le camion de Marchand était complètement à droite de la route, n'occupait pas plus de dix pieds de la surface pavée du côté droit de ladite rue, laissant à sa gauche un espace libre d'au moins quinze pieds, ce qui était un espace suffisant pour permettre à l'autre véhicule de passer librement. Il trouve que le chauffeur Nutbrown est passé trop près du camion stationné, et il en voit la preuve dans le fait que le chauffeur lui-même admit avoir dévié vers la droite et continué sa route sans se soucier de ce qui pouvait survenir derrière lui, après avoir aperçu Marchand près de son camion. D'après la preuve qui lui a été soumise, il conclut que le camion du défendeur allait à une trop grande vitesse par ce temps brumeux, alors que la visibilité était mauvaise, qu'il n'a pas gardé le contrôle de son véhicule lourd qui occupait une trop grande partie de la route, qu'il aurait pu arrêter immédiatement s'il avait été à une vitesse plus réduite, qu'il a négligé d'avoir une lumière sur le coin gauche inférieur de la boîte de son camion, ce qui aurait pu permettre à la victime qui se trouvait à peu de distance, de constater l'existence d'une charge de bois qui excédait la cabine du camion.

Il conclut également que l'époux de la demanderesse a commis une imprudence qui a aussi contribué à l'accident, en partant subitement derrière son camion pour avancer sur la rue en direction du volant de son véhicule, sans regarder s'il n'y avait pas de voitures qui circulaient en sens inverse.

La Cour d'Appel a cru qu'il y avait erreur dans ce jugement parce qu'il n'y avait pas au dossier une preuve directe

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d'un contact entre la victime et le camion des défendeurs, et qu'il n'y avait pas une série de faits pouvant permettre à la Cour de conclure *à une présomption tellement forte qu'elle excluait toute autre possibilité.* Elle a aussi été d'opinion que la position du corps de la victime après l'accident, qui était étendu dans une position contraire à celle qu'il aurait dû avoir normalement, s'il avait été projeté à terre par un choc avec le camion qui suivait une direction opposée, indiquerait que l'accident doit être attribué à une autre cause et non pas au fait que la victime aurait été frappée par le camion.

Je suis d'opinion que l'appel doit être maintenu et que le jugement du juge au procès doit être rétabli. En ces matières d'accidents d'automobiles, il est impératif, je crois, surtout dans des causes comme celle qui nous est soumise, de s'en rapporter en ce qui concerne les questions de faits, à ce qu'a vu et entendu le juge au procès. Il est vrai, tel qu'il l'a été dit dans cette Cour dans la cause de *Boxenbaum* v. *Wise* (1), qu'il doit nécessairement exister une relation entre le conducteur de l'automobile et le dommage souffert par la victime. La présomption établie à l'article 53 de la Loi des Véhicules-Moteurs ne s'applique pas pour établir l'existence du contact, comme dans le cas qui nous occupe. Cette présomption n'est pas que le conducteur de la voiture a causé un dommage. Il s'agit purement et simplement d'une présomption légale qu'il est responsable de ce dommage, quand il est prouvé qu'il l'a causé, et le demandeur a en conséquence le fardeau d'établir que c'est le défendeur qui a causé le dommage, et qu'il en est l'auteur. Mais la preuve peut établir des présomptions de faits et l'article 1242 du *Code Civil* nous dit comment elles doivent être appréciées. Cet article se lit ainsi:—

> Les présomptions qui ne sont pas établies par la loi sont abandonnées à la discrétion et au jugement du tribunal.

Ce que la loi a voulu c'est que ces présomptions soient laissées à la discrétion du juge qui voit et entend les témoins, et pour qu'une Cour d'Appel intervienne dans l'exercice de cette discrétion, il faut nécessairement trouver une erreur de la part du juge au procès, erreur qu'on ne trouve pas dans le cas présent.

L'honorable Juge de première instance a jugé suivant la balance des probabilités, ce qui est la preuve requise en

(1) [1944] S.C.R. 292, 293.

matière civile, et je crois que le jugement de la Cour d'Appel est erroné en droit quand cette dernière conclut qu'il n'y a pas de présomption *tellement forte qu'elle exclut toute autre possibilité*. Ce n'est pas ce que la loi requiert. Il y a une distinction fondamentale qu'il faut faire entre le droit criminel et le droit civil. En matière criminelle, la Couronne doit toujours prouver la culpabilité de l'accusé *au delà d'un doute raisonnable*. En matière civile, *la balance des probabilités est le facteur décisif*. Comme le disait M. le Juge Duff dans la cause de *Clark* v. *Le Roi* (1):

> Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has produced such a *preponderance of evidence* as to shew that the conclusion he seeks to establish is substantially *the most probable of the possible views of the facts.*

Les tribunaux doivent souvent agir en pesant les probabilités. Pratiquement rien ne peut être mathématiquement prouvé. (*Jérôme* v. *Prudential Insurance Co. of America* (2), *Richard Evans & Co. Ltd.* v. *Astley* (3), *New York Life Insurance Co.* v. *Schlitt* (4), *Doe D. Devine* v. *Wilson* (5)).

Il était raisonnable je crois, pour le juge au procès, de conclure comme il l'a fait, et de trouver que les présomptions étaient suffisantes pour lui permettre de dire que c'est bien le camion du défendeur qui a frappé la victime et qui a causé la mort. En effet, le chauffeur du camion admet avoir vu la victime à une courte distance de lui, et afin de l'éviter, a subitement incliné vers la droite alors que les deux camions n'étaient qu'à quelques pieds l'un de l'autre seulement, ce qui indique qu'il y avait amplement de place du côté droit de la route. Le corps de la victime a été trouvé gisant sur le pavé de la route quelques secondes plus tard. Il est raisonnable de penser, et c'est la conclusion la plus probable qu'il est logique de tirer, que la victime a été frappée par le côté gauche du camion ou par un billot qui dépassait la cage de ce même camion, et que c'est à cela qu'il faut attribuer l'accident. Toute autre conclusion ne

(1) (1921) 61 Can. S.C.R. 608 at 616.
(2) (1939) 6 Ins. L.R. 59 at 60.
(3) [1911] A.C. 674 at 678.
(4) [1945] S.C.R. 289 at 300.
(5) 10 Moore P.C. 502 at 532.

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reposerait que sur une hypothèse ou ne serait que du domaine des conjectures. Entre une probabilité et une conjecture, c'est de toute nécessité la probabilité qui doit être acceptée. Je ne crois pas que la position du cadavre sur le sol ait aucune signification. Il est clair que quand la victime a été frappée, elle a pu pivoter sur elle-même, et la façon dont le corps a été retrouvé n'indique en aucune façon la manière dont s'est produit l'accident.

La preuve qu'il a existé une relation entre le conducteur de la voiture de l'intimé et le dommage qui en est résulté, ayant été faite, l'article 53 de la Loi des Véhicules-Moteurs (c. 142 S.R.Q. 1941) trouve alors son application (*Boxenbaum* v. *Wise* cité supra). Cet article est à l'effet que quand un véhicule-automobile cause une perte ou un dommage à quelque personne dans un chemin public, *le fardeau de la preuve* que cette perte ou ce dommage n'est pas dû à la négligence ou à la conduite répréhensible du propriétaire ou de la personne qui conduit ce véhicule-automobile, incombe au propriétaire du véhicule ou à son conducteur.

Il me semble clair que cette présomption n'a pas été détruite. La défense repose principalement sur le fait que le camion n'aurait pas frappé la victime, et c'est le contraire qui est révélé par la preuve. Il s'ensuit donc que la responsabilité des défendeurs est engagée.

L'appel doit en conséquence être maintenu, et le jugement du juge au procès rétabli avec dépens de toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: *Miquelon & Perron.*

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

ACHILLE PROVENCHER .....APPELLANT; 1955

*Nov. 21
*Nov. 21

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Accomplice—Misdirection—Corroboration—Improper statement of Crown counsel.

The appellant was convicted by a jury of having broken and entered a garage and stolen property therein. His appeal was dismissed by the Court of Appeal.

The Crown's case rested chiefly on the evidence of an accomplice whom, according to the Crown's theory, the appellant had agreed to drive to the locality of the crime for the purpose, known to the appellant, of committing the crime. It is conceded that the accomplice did himself commit the crime. The appellant's case was that he had driven the accomplice without any knowledge of his guilty purpose, had left him at his destination and had returned home alone. There was some evidence which was capable of being regarded as corroboration of the evidence of the accomplice.

Held: The appeal should be allowed, the conviction quashed and a new trial directed.

It was misdirection for the trial judge to charge the jury with words from which they would normally understand that there lay an onus on the appellant to satisfy them of his innocence.

The trial judge failed also to direct the jury adequately as to the danger of convicting on the uncorroborated evidence of an accomplice and as to what constitutes corroboration; and particularly failed to explain that facts although independently proved could not be regarded as corroborative of the accomplice's evidence if they were equally consistent with the truth of the appellant's evidence.

The trial judge failed also to point out to the jury what was the theory of the defence and to tell them that they should acquit if, on all the evidence, they entertained a reasonable doubt of the appellant's guilt.

The statement of Crown counsel in the presence of the jury that he was going to have the appellant arrested for perjury on the following morning or that afternoon, was improper and could scarcely fail to prejudice the fair trial of the appellant.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec, affirming the conviction of the appellant.

J. Vernier for the appellant.

G. Normandin, Q.C. for the respondent.

*PRESENT: Taschereau, Kellock, Cartwright, Fauteux and Abbott JJ.

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The judgment of the Court was delivered by:—

CARTWRIGHT J.:—The appellant was convicted at his trial before Rhéaume J. and a jury of having, during the night of October 26 to 27, 1953, broken and entered the garage of Gaétan Poisson at Rougemont and stolen therein property of the said Gaétan Poisson of the value of about $125. His appeal to the Court of Queen's Bench, Appeal Side, was dismissed by a unanimous judgment for which no written reasons were given.

Pursuant to section 1025 (1) of the *Criminal Code* leave was granted to the appellant to appeal to this Court on the following questions of law:—

1. Did the learned trial judge err in failing to direct the jury correctly with reference to the burden resting upon the Crown to prove the guilt of the appellant beyond any reasonable doubt?

2. Did the learned trial judge err (*a*) in failing to direct the jury as to the danger of convicting on the uncorroborated evidence of an accomplice? (*b*) in failing to direct the jury that the Crown witness Chaput was an accomplice or as to what, in law, constitutes an accomplice? (*c*) in failing to direct the jury as to what constitutes corroboration? (*d*) in failing to direct the jury that evidence which is equally consistent with the evidence of an accomplice and that of the accused is corroborative of neither?

3. Did the learned trial judge err in failing to place the theory of the defence fully and fairly before the jury?

4. Did the learned trial judge err in failing to explain to the jury the application of the law to the facts?

5. Was the appellant deprived of a trial according to law by reason of the fact that at the conclusion of the evidence given by the appellant in his defence the Crown counsel stated in the presence of the jury that he was going to have the appellant arrested for perjury either on the following morning or that afternoon?

At the conclusion of the hearing the Court gave judgment allowing the appeal, quashing the conviction and directing a new trial and stated that written reasons would be delivered in due course.

As there is to be a new trial I will refer to the facts and the evidence only so far as is necessary to make clear what is involved in the questions submitted for decision.

The case for the Crown was that the accused had agreed with one René Chaput to drive the latter from Montreal to Rougemont for the purpose, made known to the accused at the time of the agreement, of committing the crime charged and which it is conceded that Chaput did himself commit. It is not suggested that the accused entered the garage or ever had possession of any of the stolen articles. His alleged

participation in the commission of the offence consisted in driving Chaput to Rougemont with guilty knowledge of his purpose. No doubt such participation would, if proved, be sufficient, under the provisions of s. 69 (1) (*b*) of the *Criminal Code,* to render the appellant guilty of the offence committed by Chaput. Driving Chaput under such circumstances would be doing an act for the purpose of aiding him to commit the offence.

The appellant's case was that he and Chaput were drinking together in a tavern in Montreal on the evening of the crime, that he agreed to drive Chaput to Rougemont for $5 which Chaput paid to him, that he left Chaput at Rougemont and returned alone to Montreal and that he acted throughout without any knowledge of Chaput's guilty purpose.

From this brief statement of the theories of the Crown and of the defence it at once becomes obvious that the Crown's case rested chiefly on the evidence of Chaput who was, on the Crown's theory, clearly an accomplice of the appellant. It will be convenient to first set out all the passages in the charge of the learned trial judge touching on (i) the onus resting upon the prosecution to prove the guilt of the accused and the duty of the jury to give the accused the benefit of any reasonable doubt, (ii) the way in which the jury should approach the evidence of an accomplice, and (iii) the theory of the defence.

The learned trial judge having said that the youth of counsel for the accused at the trial would excuse him for a little exaggeration continued:—

> Je fais allusion à la question du doute, quand il a dit que "si vous avez le moindre doute"; alors, je dis: "Ce n'est pas tout à fait ce que nos tribunaux exigent des jurés, ce n'est pas le moindre doute, c'est un doute sérieux, raisonnable, qui doit être interprété en faveur de l'accusé.

The only other portion of the charge making any reference to the three above matters is as follows:—

> Maintenant, je vais me limiter aux questions de droit. La Couronne a l'obligation de faire la preuve de l'accusation portée contre l'accusé. C'est à vous de l'apprécier. Et là, la question du doute intervient. Si vous avez un doute, un doute sérieux, non pas fantaisiste, mais un doute raisonnable, alors votre devoir est d'en donner le bénéfice à l'accusé qui est dans la boîte.
>
> Maintenant, il est question de la preuve d'un complice, dans cette cause-ci. Comme vous l'a fait remarquer le procureur de la Couronne, il faut accepter le témoignage d'un complice sous réserve. Cependant, la loi reconnaît un tel témoignage s'il est corroboré par des circonstances, d'autres

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témoignages et des circonstances. Il vous appartiendra de dire si les circonstances qui ont été placées devant vous rendent vraisemblable la véracité du témoignage du complice en cette cause.

Maintenant, comment apprécier la preuve, je laisse cela à votre entière liberté. Prenez d'abord l'expérience de la vie, vous avez droit de vous en servir, et vous apprécierez la preuve selon les dictées de votre conscience. Vous vous demanderez—il y a certaines questions que vous avez droit de vous demander pour arriver à la vérité—vous vous demanderez si les explications données par l'accusé et par ses témoins vous ont satisfaits; vous vous demanderez pourquoi ce voyage dans la nuit, qu'est-ce qui a motivé ce voyage dans la nuit, et vous vous demanderez si là il n'y a pas une circonstance qui fortifie le témoignage du complice.

As to the first point, it was argued that the learned trial judge erred in using the adjective "sérieux" which he coupled with the adjective "raisonnable" whenever the latter was used. As to this it may be recalled that in the reasons of the majority of the Court in *Boucher* v. *The Queen* (1), the use of the word "sérieux" in place of the word "raisonnable" when describing that doubt the existence of which requires a jury to return a verdict of not guilty was deprecated. However, the misdirection which, on this point, appears to me to be fatal is that contained in the following sentence and particularly in those words which I have italicized:—

. . . vous vous demanderez si les explications données par l'accusé et par ses témoins *vous ont satisfaits;* . . .

From these words the jury would normally understand that there lay an onus on the appellant to satisfy them of his innocence.

Turning now to the second ground of appeal, it is obvious that on the Crown's theory Chaput was an accomplice. There is to be found in the record some evidence which, if they believed it, the jury might regard as corroboration of that of Chaput. Under the circumstances of this case it was the duty of the learned trial judge; (i) to tell the jury that it is always dangerous to convict an accused on the uncorroborated evidence of an accomplice, although it is within their legal province to do so; (ii) to tell them that Chaput was an accomplice; while in doubtful cases the Judge will instruct the jury as to what in law constitutes an accomplice and leave it to them to say whether a particular witness is or is not an accomplice, in the case at bar this point was not in issue; (iii) to explain to the jury what is meant by

(1) [1955] S.C.R. 16.

the term corroboration; the classic statement as to this is found in the judgment of the Court of Criminal Appeal in *Rex* v. *Baskerville* (1):

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, "implicates the accused", compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

This statement has been repeatedly approved in this Court. See, for example, *Hubin* v. *The King* (2), *Thomas* v. *The Queen* (3) and *Manos* v. *The Queen* (4). The learned trial judge should have directed the jury in the sense of this passage and particularly should have made it plain to them that facts although independently proved could not be regarded as corroborative of Chaput's evidence if they were equally consistent with the truth of the evidence of the appellant. As to the first of these requirements the direction of the learned judge:—"il faut accepter le témoignage d'un complice sous réserve." was inadequate; as to the remaining two nothing was said. The concluding sentence from the portions of the charge quoted above:—"Vous vous demanderez pourquoi ce voyage dans la nuit, qu'est-ce qui a motivé ce voyage dans la nuit, et vous vous demanderez si là il n'y a pas une circonstance qui fortifie le témoignage du complice." is not helpful. It was common ground that the journey to Rougemont was made in the night and that admitted fact was equally consistent with the theory of the Crown and with that of the defence.

(1) (1916) 2 K.B. 658 at 667.
(2) [1927] S.C.R. 442 at 444.
(3) [1952] 2 S.C.R. 344 at 353.
(4) [1953] 1 S.C.R. 91 at 92.

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The third and fourth grounds of appeal may be dealt with together. The theory of the defence was simple enough and no elaborate direction was called for; it was however incumbent on the learned trial judge to point out to the jury that this theory was that the appellant drove Chaput to Rougemont because he was asked and paid to do so and that he was ignorant of Chaput's guilty purpose, and to tell them that they should acquit if, on all the evidence, they entertained a reasonable doubt of the appellant's guilt.

As to the fifth ground of appeal, the record shews that at the conclusion of the appellant's cross-examination he was being questioned as to the number of occasions during the night in question on which he had been stopped and questioned by the police. The police officers had testified that there were three such occasions and the appellant that there were only two, one on the way to Rougemont and one on his return journey. The cross-examination concluded as follows:—

D Mais, vous les avez vus une deuxième fois en revenant, arrêté dans une petite rue à Marieville?

R Non, ils m'ont arrêté seulement une fois en descendant.

D Et là, on vous aurait demandé qu'est-ce que vous faisiez dans ce bout-là, qu'est-ce que vous cherchiez?

R Non, il n'a pas été question de ça.

D Vous leur auriez répondu: "Je cherche mon chum qui est débarqué dans une rue, je ne le trouve pas"?

R Il n'a pas été question de ça.

D Vous jurez que c'est faux?

R Je jure ça.

D Deux officiers de police sont venus jurer, cet avant-midi, et vous jurez que c'est faux?

R Moi, je dis que je les ai vus seulement une fois en descendant.

D Je vais vous faire arrêter pour parjure, demain matin.

R C'est correct.

D Peut-être cet après-midi.

It will be observed that the last two "questions" by the learned counsel for the Crown are not questions at all; they are threats or statements of his intention, which it was improper for him to make, and the making of which before the jury could scarcely fail to prejudice the fair trial of the accused.

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For the above reasons, I would allow the appeal, quash the conviction and direct a new trial.

Appeal allowed; new trial directed.

Solicitor for the appellant: *R. Daoust.*

Solicitor for the respondent: *G. Sylvestre.*

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*Oct. 18
*Nov. 23

DONALD KEITH CATHRO.....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal Law—Murder—Conspiracy to Rob—Minimum force to be used—Death by strangulation at hands of one assailant—Liability of other—Jury, adequacy of charge—Whether furnishing jury with transcript of part of charge prejudicial to accused—Criminal Code, ss. 69(1), (2), 260(a), (c), 1014(2).

The appellant with three others conspired to rob a storekeeper. It was agreed that no weapons would be used and only the amount of force required to overcome such resistance as might be offered. The appellant seized the storekeeper from behind, placing a hand over his mouth and an arm around his throat and then hit him on the head with a can of meat. The victim was still struggling when the appellant handed him to an accomplice and started searching for money. The only evidence of what then happened was that of the appellant who stated his accomplice told him he had put his knee against the storekeeper's throat. The appellant and the accomplice were both charged with murder and tried separately. The appellant appealed his conviction.

Held by Kerwin C.J., Rand, Estey and Cartwright JJ. (Taschereau, Locke and Fauteux JJ. dissenting): 1. That the giving to the jury of a transcript of only a portion of the trial judge's charge, which emphasized the Crown's case but did not set out the theory of the defence, was in the circumstances such an irregularity as to justify a new trial.

2. That a new trial should also be directed because the judge in summarizing the law as related to the facts omitted to direct the jury that: (*a*) the appellant could only be a party to the offence of murder under s. 69 (1) of the *Criminal Code* if the jury thought that the accomplice had committed the murder and that the appellant had

*PRESENT: Kerwin C.J. and Taschereau, Rand, Estey, Locke, Cartwright and Fauteux JJ.

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aided or abetted him; (*b*) that under s. 69 (2) the appellant would be guilty only if the commission of the murder was known or ought to have been known to him to be a probable consequence of the prosecution of robbery.

Per Taschereau and Locke JJ. (dissenting): The appellant on his own testimony was ready to overcome any fight put up and s. 260(*a*) and (*c*) of the *Code* therefore applied and, as a result of their combined effect and of s. 69 (1), the killing amounted to murder. The appellant was guilty of abetting and procuring the commission of the crime if the strangulation was imputed to his accomplice and by virtue of s. 260 (*c*) if he himself stopped the breath of the victim. The jury was properly charged and directed and permitting it to take a portion of the judge's charge into the jury room could not vitiate the trial. It was open to it to ask for additional oral instructions which would have had the same result and which not only would have been proper but imperative for the judge to furnish.

Per Locke and Fauteux JJ. (dissenting): On the appellant's own testimony, the nature of the agreement and the manner in which it was executed are clear. The violence to be exerted was to be measured by the resistance of the victim. The appellant was the first to resort to violence and the injuries he inflicted, first alone and then with the assistance of his accomplice, amounted to grievous bodily injury as defined under the authorities. At that moment, both parties were then of one mind and there is nothing to suggest that when, in order to search the premises, the appellant handed over the victim to his accomplice, this situation was changed. The appellant left it to his accomplice to overcome their victim, and even if the blows then inflicted by the latter were ill-measured, the appellant is nonetheless a party thereto. The case comes squarely under the law as laid down in ss. 260 and 69 (1) and is a proper one for the application of s. 1014(2). *Beard's* case [1920] A.C. 470, followed, *The King* v. *Hughes* [1924] S.C.R. 517, distinguished.

APPEAL from a judgment of the Court of Appeal for British Columbia (1) affirming the conviction of the appellant on a charge of murder. O'Halloran and Davey JJ. A., dissented; the former would have substituted a conviction for manslaughter, the latter, a new trial. The appellant was tried separately on a charge of joining with three others in committing murder. In separate trials one of the other three was convicted of murder, one acquitted and the Crown did not proceed against the third.

J. G. Diefenbaker, Q.C. and *F. C. Munroe* for the appellant.

L. H. Jackson and *W. G. Burke-Robertson, Q.C.* for the respondent.

THE CHIEF JUSTICE:—I agree with Mr. Justice Estey.

(1) (1955) 15 W.W.R. 541; 112 Can. C.C. 154.

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TASCHEREAU J. (dissenting):—The charge against the appellant is:

THAT at the City of Vancouver, on the Sixth day of January, in the year of our Lord, one thousand nine hundred and fifty-five, he, the said Donald Keith Cathro, together with Eng Git Lee, Chow Bew and Richard Wong, unlawfully did murder Young Gai Wah, otherwise known as Ah Wing, against the form of the Statute in such case made and provided and against the peace of our Lady the Queen, her Crown and Dignity.

He was tried by Mr. Justice Manson and a jury, was found guilty and sentenced to death. His appeal was dismissed by the Court of Appeal of British Columbia (1), O'Halloran J.A. and Davey J.A. dissenting. The former would have substituted a verdict of manslaughter, and the latter would have ordered a new trial. No charge was laid against Richard Wong, Eng Git Lee was acquitted, and the present appellant and Chow Bew were found guilty. Mr. Justice Manson granted separate trials.

The evidence reveals that on the 6th of January, 1955, the appellant was approached by Bew, whom he did not know. Bew explained to him there was an old Chinese by the name of Ah Wing, owner of the MacDonald Market on MacDonald Street, and that "it would be easy", and in his evidence given on his own behalf, the appellant says that he knew "pretty well what he meant". At nine o'clock that night the appellant met Chow Bew, who was in a parked car with two friends in it, namely, Eng Git Lee who was driving the car, and Richard Wong sitting in front next to him. On the way to the restaurant, they discussed how to enter the premises, and the appellant was told that the Chinese had $5,000 in his store. They were familiar with the place where the money was, because two of them had been there previously to change a large bill, and Ah Wing had gone to the back of the store to make the change for them. The appellant was also told that the Chinese was an elderly man and "that there would be no trouble about it". He was informed "that there would be no violence" and that none of his companions "had any weapons or any club or anything of that kind". He nevertheless said that if the Chinaman "put up a fight", "he was going to do just what he did", and "that whatever fight the old man would put up he was ready to overcome it".

(1) (1955) 15 W.W.R. 541; 112 Can. C.C. 154.

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When they arrived at the restaurant, they parked their automobile across the street, waiting for the shop to close. They then moved the car around the corner and the appellant went in first. Several customers came in and left, and the appellant bought a "coke" and some other minor articles. The appellant helped Ah Wing to find a dentist's address and, as planned, when Bew came in, he asked the deceased for a can of meat, and when the Chinaman went to the back of the store to get the meat, the appellant put his arm around him and "took him into the backroom". Chow Bew unlocked the backdoor and put out the lights. A struggle ensued and the appellant told him that if he did not keep quiet he would hurt him. The deceased kept making a noise, so the appellant hit him on the head with a can of meat, and Wing started to yell putting up a good fight.

The appellant told Bew to get a flashlight and Chow Bew hit Wing with it. Bew tried to "wad" a cloth in the deceased's mouth so to stop him from yelling, but without success. The appellant then told Bew to hold the Chinese while he would look around for the money. The Chinaman was lying on the floor. They took a few bills from his pockets and when they heard somebody coming at the front door, they ran out through the back door to the waiting car.

The medical evidence reveals that the deceased had a minor cut over the right eye, scratch on the lips, a cut on the right side of the tongue from which there had been some bleeding. The skin of the chin and upper neck had a rubbed appearance, as though a rough cloth had been rubbed across the skin and there were several abrasions on the right side of the neck. The examination of the throat showed hemorrhage or bruising into the muscles of the neck. There was a fracture of the voice box with hemorrhage. There was obviously strangulation, and the pressure applied to the neck must have been very severe in order to fracture the voice box.

In his evidence given on his own behalf, the appellant swears that the deceased was alive when Bew "took charge of him". Very soon after, the four companions were arrested down town by the police, after the deceased had been found dead in his shop. They were in possession of

an old cigar box, that belonged to the deceased, in which there was a small amount of money. The appellant admits that he agreed with Bew, Lee and Wong *to join in the robbery of the grocery store* operated by Wing.

The appellant now appeals to this Court alleging that the judgment of the Court of Appeal for British Columbia, in dismissing the appeal is erroneous and ought to be set aside on the following grounds:—

1. In not holding that the learned trial judge failed to present the defence to the jury fairly, fully and adequately, in a way that would have brought out its full force and effect, and particularly in failing to fully and properly direct the jury as to a possible verdict of manslaughter.

2. The learned trial judge permitted the jury during their deliberations to take with them into the jury-room a transcript of a portion of his charge, said transcript containing a powerful exposition of the Crown's case, and including misdirection upon the law to which the defence counsel had objected, and remarks which directed the jury's attention to weaknesses in the defence, and not containing that part of the charge in which the learned trial judge explained the case for the defence to the jury.

3. The learned trial judge told the jury that a verdict of guilty, by the exercise of executive clemency, may not result in the carrying out of the death sentence.

4. The learned trial judge misdirected the jury on evaluating credibility and on determining the weight of evidence, particularly by repeated reference to the interest of the appellant in the verdict.

5. The learned trial judge erred in curtailing cross-examination of the Crown witness Det. Sgt. McCullough.

6. The learned trial judge instructed the jury that their verdict "must be unanimous" and "must be arrived at" without also saying "if you can agree upon a verdict".

For the purpose of the determination of this case, it will be necessary to deal only with grounds 1, 2 and 4, as there has been no dissent in the Court of Appeal on grounds 3, 5 and 6, and no special leave to appeal has been granted on these points.

It is clear as revealed by appellant's own evidence that he, with the others, joined a conspiracy with a common intention to commit *robbery,* and that although the appellant was told that there would be no violence, he was ready to overcome any fight that the Chinaman would put, *and that he was also prepared to do just what he has done.* It is also in evidence that when the robbery was planned between the appellant and the others, the fear of trouble from neighbours was discussed, and in his statement to the Police of January 10, 1955, he said he knew

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that the beauty-parlor next door, "was run by two women", and that they would "give no trouble". This, to my mind, is a clear indication of what the intention of the appellant and the others was.

The law on the matter is clear, and s-ss.(*a*) and (*c*) of s. 260 of the *Criminal Code* find here their application. These section and sub-sections are to the effect that in case of treason, piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary or arson, culpable homicide is also murder, whether the offender *means or not death to ensue,* or *knows or not that death is likely to ensue, if the offender meant to inflict grievous bodily injury* for the purpose of facilitating the commission of any of the above mentioned offences, *or if by any means he wilfully stops the breath of any person for either of the purposes above mentioned,* and death ensues.

I have no hesitation in reaching the conclusion that as a result of the combined effect of s. 260 (*a*), (*c*) Cr. C. and of s. 69 (1) Cr. C. the killing of the Chinaman amounts to murder. As stated above, it is in evidence that death was due to strangulation. It is also my opinion that the jury could not reasonably find, in view of the evidence, that the two assailants were not prepared to inflict grievous bodily injury, for the purpose of facilitating the commission of the offence of robbery. In such a case, it is immaterial that they meant or not death to ensue, or knew or not that death would likely ensue.

It necessarily follows that by virtue of s. 69 (1) Cr. C., the appellant is guilty of the offence for abetting and procuring the commission of the crime, if the strangulation is imputed to Bew, and by virtue of s. 260 (*c*) if he himself stopped the breath of the victim. In my opinion, there was no room for a verdict of manslaughter, and it was unnecessary for the trial judge in his charge to the jury to deal with this feature of the case. It is, therefore, quite irrelevant if his instructions on this point were inadequate. It was not necessary for the judge, as stated in *Manchuk* v. *The King* (1), to tell them that if as a result of the evidence as a whole, they were in reasonable doubt

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

whether the crime was murder or manslaughter, they should convict of manslaughter. Nothing in the evidence would justify a verdict of manslaughter.

The case of *Rex* v. *Hughes* (1) has no application. In that case, the learned trial judge told the jurors that the only possible verdict could be murder or acquittal, and completely eliminated the possible verdict of manslaughter. There were evidence however to show that the shot that killed Hughes went off accidentally, and it was found by this Court that it could not be said as a matter of law that this was an act of violence done by the accused in furtherance of, or in the course of the crime of robbery as held by the House of Lords in *Director of Public Prosecutions* v. *Beard* (2) and in *Rex* v. *Elnick* (3). Moreover, the law as it stood at the time of the Hughes decision given in 1942, was not the same as it is now, as s. 260 was amended in 1947 (Statutes of Canada, c. 55, articles 6 and 7) to cover the Hughes case, and paragraph (*d*) was added to the section.

I believe that the jury were properly charged, in view of ss. 260 (*a*) (*c*) and 69 (1) Cr. C. It has been argued that the jury should have been instructed that the act done was the probable consequence of the common purpose, and that it was known, or ought to have been known to the appellant that such consequence was probable. Sections 260 (*a*) (*c*) and 69 (1) Cr. C. negative these propositions, and I do not think they can prevail. They have their foundation on ss. 69 (*d*) and 69 (2) of the Criminal Code, but they totally ignore s. 260 (*a*) and (*c*), which clearly hold one or the other liable although he did not mean death to ensue, and also s. 69 (1). A party to an offence is a person who not only counsels, but *abets* or *procures* another to commit a crime. Such is the present case, and it is immaterial therefore that the appellant knew or ought to have known that the death of Ah Wing by strangulation, was a probable consequence of the prosecution of the common purpose.

If the opposite view should prevail, and if a new trial were ordered, I cannot imagine how the trial judge could logically instruct the jury. He would of course have to

(1) [1942] S.C.R. 517. (2) [1920] A.C. 479.
(3) (1920) 30 Man. R. 415.

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tell them that under s. 260 (*c*) Cr. C., in case of *robbery,* culpable homicide is murder *whether the offender means or not death to ensue,* if he wilfully stops the breath of the deceased. He would also have to instruct them, by virtue of s. 69 (2), that if the accused *knew or ought to have known* that the killing of the victim was a probable consequence of the common purpose, he was guilty of murder. That, to my mind, would constitute a flagrant contradiction. Section 69 (2), I think, contemplates an entirely different case. It would apply, for instance, if two persons formed the common intention of committing the crime of forgery, and one of the offenders killed a police officer with a hidden weapon, the possession of which was unknown to the other. In such a case, it could surely be said as an excuse, that he did not know or ought not to have known that the killing was a probable consequence of the common purpose of forgery.

I also believe that the fourth ground of error raised by the appellant is unfounded. It is my view that the learned trial judge properly directed the jury in evaluating credibility, and in determining the weight of evidence.

The last ground of appeal raised, and on which there was a dissent, is that the learned trial judge allowed the jury during their deliberations, to take with them into the jury-room a transcript of a portion of his charge. I do not think that this can vitiate in any way the trial. It is open to the jury to ask for whatever information they desire, and instead of being furnished with a part of the written address, they could have asked the trial judge for additional oral instructions which would have had the same result, and it would have been not only proper, but imperative upon the judge to furnish all this information. That the additional instructions were written instead of verbal, does not appear to me to have the effect of invalidating the verdict.

I would dismiss the appeal.

RAND J.:—The ground of dissent in which O'Halloran and Davey JJ.A. concurred was this. At the request of the jury, a transcript of a portion of the charge was furnished them which they retained during their deliberation;

it consisted in large measure of a forceful statement of the Crown's case and, in the opinion of these justices, it so overshadowed the defence as to obscure it.

The essence of the latter was that the death had been caused by an offence which was not "a probable consequence" in the prosecution of the robbery as required by s. 69 (2) of the *Criminal Code,* a requirement which seems to differentiate our law in respect of joint wrongdoers from that of England. The accused took the stand and gave evidence to the effect that the death could only have been caused while he was searching the premises for the money and the deceased was in the hands of the accomplice Bew. In the light of the violence of the force applied as indicated by its effects on the larynx, its mode of application was suggested by an alleged remark of Bew to the accused that he had put his knee on the victim's throat. It was also asserted by the accused that it had been expressly agreed that no force would be used beyond preventing the outcry of a small man of 65 years who was considered, apparently, to be unable to put up much resistance. Admittedly there were no weapons, although the accused, who for the first minute or so had tried to smother the noise by putting his right arm around the neck of the deceased and his left hand over his mouth, had struck the latter on the head with a can picked up in the shop, a blow which could have been found to have played no part in inflicting the "grievous bodily harm" or in the death. The truth of the whole or any part of this account, which is the only evidence of what actually took place in the shop, was for the jury. It was likewise for them, in the event of their believing it and in the light of the evidence as a whole, uninfluenced by overemphasis on any feature of it, to say whether the infliction of the grievous bodily harm or the strangulation by Bew was a "probable consequence" of the prosecution of the robbery. I am unable to say that the jury could not have found that it was not. They might equally have entertained a reasonable doubt that it was. They could, on the other hand, have come to the conclusion that the act either of that harm or strangulation was such a probability, but that determination was for them.

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I cannot agree, however, with O'Halloran J.A. that in this aspect we can substitute a verdict of manslaughter. S. 69 (2) means, in my opinion, this: the offence, here the culpable homicide under either paras. (*a*) or (*c*) of s. 260, which must be a "probable consequence" of carrying out the criminal plan of several persons, in this case robbery, must be such as severs the connection of the person not otherwise associated with it than by the original scheme. The accused and his companion, Bew, undoubtedly intended force to be applied to their victim; but was there such an excess in mode or degree as converted it into an act and an offence so outrageous or so unforeseeable as to be beyond the scope of probable consequence? On that question—which, by the charge, had been placed in doubtful adequacy before the jury—the transcript could easily have been the decisive factor.

I agree, therefore, with the dissenting justices and would order a new trial.

ESTEY J.:—The appellant's conviction for murder was affirmed by a majority of the learned judges in the Appellate Court of British Columbia. Mr. Justice O'Halloran, dissenting, would have substituted a verdict of manslaughter, while Mr. Justice Davey, also dissenting, would have awarded a new trial.

The appellant, in giving evidence on his own behalf, admitted that he, Chow Bew and two others, in the afternoon of January 6, 1955, had agreed to rob the deceased Ah Wing that night at his store in Vancouver. About 9:30 that evening the four proceeded in an automobile and parked at a place near the store of the deceased. Ah Wing was a Chinaman about sixty-five years of age whom they referred to as an old man who would not offer much resistance. Though they were without weapons, they were prepared to exercise physical strength in order to overcome such resistance as the deceased might offer. Only two of the four entered the store and, while in the course of their intent to rob, such force was applied to the person of the deceased, by the appellant and Chow Bew or one of them, as to cause his death.

The appellant admitted that, as arranged, he entered the store first and in a matter of minutes Chow Bew

entered. When there were no customers present the appellant asked the deceased for a can of meat which he knew would be toward the back of the store. In order to obtain this can the deceased turned his back upon the appellant, who thereupon put his hand over his mouth and an arm around his neck. At the same time Chow Bew put out the lights, locked the front and opened the back door. They were in the store approximately ten minutes and at some point appellant handed the deceased over to Chow Bew. At that time, the appellant deposed, the deceased was struggling and endeavouring to make a noise and was doing the same when later, while Chow Bew was still holding him, the appellant searched his person for money. The appellant further stated that when Chow Bew took over the deceased he searched the premises for money and, as the store was in darkness, he did not know what Chow Bew was doing to the deceased and, because of their understanding that they would not cause serious bodily harm to the deceased, he neither knew nor ought to have known that the infliction of grievous bodily harm upon, or the wilful stopping of the breath of Ah Wing was a probable consequence of what Chow Bew did to the deceased.

Under s. 260 of the *Criminal Code,* so far as its provisions are relevant to the facts in this case, one in the course of committing a robbery will be guilty of murder, whether he knew or ought to have known that death was likely to ensue, if he means to inflict grievous bodily injury for the purpose of facilitating the commission of the robbery and death ensues, or if he, by any means, wilfully stops the breath of a person in order to facilitate the commission of the offence and death ensues from such stoppage. Under this section it was open to the jury to find that the appellant's participation was such that he was guilty of murder.

However, the main contentions advanced on behalf of the appellant were that Chow Bew had inflicted the fatal injury (although based on what the appellant alleged had been told him by Bew) and that he was not a party to the murder as a participant under s. 260, nor was he made so by virtue of the provisions of s-ss. (1) and (2) of s. 69. Under s-s. (1) (s. 69), if the appellant did or omitted

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some act for the purpose of aiding Chow Bew to commit the offence of murder, or abetted Chow Bew in the commission of that offence, the jury might find the appellant guilty of murder. It was, however, the contention on behalf of the appellant that, however much he may have aided and abetted in the commission of the robbery, he never did aid or abet, or in any way assist Chow Bew in the commission of the murder within the meaning of s. 69 (1).

Under s-s. (2) (s. 69), if, as here, the appellant and Chow Bew had formed a common intention to rob Ah Wing and, while assisting each other in the prosecution of that robbery, Chow Bew murdered Ah Wing, the appellant would be a party to the offence of murder if the commission thereof was, or ought to have been known by him to be a probable consequence of the prosecution of such robbery. I agree with the appellant that these subsections ought to have been explained in such a manner that the jury would understand the difference between the two and the respective effects thereof in relation to the facts as adduced in evidence.

There was evidence in support of issues under the foregoing sections which counsel for both parties apparently discussed and certainly were dealt with by the learned trial judge in the course of his charge. The learned trial judge, at the outset of his charge, explained the functions of the jury, presumption of innocence, reasonable doubt and other matters, and then devoted approximately twelve pages to a discussion of the relevant statute law, including the foregoing ss. 260 and 69. In the course thereof he selected the relevant portions of the sections and, in illustrating their general effect, referred to parts of the evidence. Thereafter in about eighteen pages, he discussed the evidence as given by the respective witnesses. At the end thereof, and before discussing the evidence and the issues raised on behalf of the appellant, the learned judge deemed it advisable to summarize the law that he had explained in the earlier part of his charge.

I am in agreement with the learned trial judge that where, as here, he had discussed the law, with some reference to the facts, followed by a rather lengthly review of the evidence, the law should be restated and summarized

in relation to the facts in a manner to enable the jury to appreciate the issues upon which they had to decide. That the law should be so related to the facts has often been a matter of discussion in the decided cases, not only in this, but in other courts, and more recently in this Court in *Azoulay* v. *The Queen* (1). It may be added that this can seldom be accomplished by first a discussion of the law followed by a review of the evidence, unless there is some restatement, or summary, that will relate the law and the facts, as contemplated under the authorities. It would seem, and with great respect to the learned trial judge, that in his summary these two sub-sections of s. 69 were not sufficiently distinguished in relation to the facts. In particular, the summary did not include a statement to the effect that the appellant could only be a party to the offence of murder under s-s (1) of s. 69 if the jury thought Chow Bew had committed the murder and the appellant had aided or abetted Chow Bew in the commission of the murder, and that under s-s. (2) of s. 69 the appellant would be guilty only if the commission of the murder was known or ought to have been known by him to be a probable consequence of the prosecution of the robbery. These omissions were upon matters so vital in this prosecution as to largely nullify the purpose of the summary. Indeed the remarks of my Lord the Chief Justice (then Kerwin J.) are particularly appropriate:

> However, while the general statement of the law of conspiracy made by the trial Judge may be unimpeachable, it was of the utmost importance in this case that the application of the law to the facts should be explained fully to the jury, particularly so far as the evidence relating to Carson's activities was concerned. *Forsythe* v. *The King* (2).

It would, therefore, seem that because of these omissions the law was not related to the facts in respect of these vital issues, as required by the authorities. Moreover, from the appellant's point of view, these omissions prevented his case being fully presented to the jury. It, therefore, follows that a new trial must be directed. There were a number of other points raised with respect to the charge, but, inasmuch as there must be a new trial in which many of these may never arise, it seems unnecessary that they should be here discussed.

(1) [1952] 2 S.C.R. 495.

(2) [1943] S.C.R. 98 at 102.

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I am also in agreement with Mr. Justice Davey that giving to the jury a portion of the learned trial judge's charge constituted, in the circumstances, such an irregularity as to justify a new trial. At the conclusion of the learned trial judge's address the jury retired and were recalled when the learned judge supplemented the instructions he had already given. At the conclusion thereof the foreman of the jury requested a copy of the remarks made by his Lordship with respect to the law prior to the hearing of any of the witnesses. When his Lordship intimated that such would have to be considered in the light of his further instructions, the foreman stated: "Maybe we could have the section you read this morning." The word "section" had reference to that portion of the learned judge's charge dealing more particularly with the law. While counsel for the Crown concurred, counsel for the defence at once pointed out that this section contained a direction which the learned judge had supplemented in his further instructions and, notwithstanding that his Lordship stated that he would repeat the additional remarks in handing this portion to the jury, counsel for the appellant said he could not consent to this portion of the charge being handed to the jury. His Lordship felt that he should accede to the request of the jury and accordingly that portion of his charge dealing with the law, with such reference to the evidence as he deemed appropriate to explain and illustrate the respective sections, was extended and placed in the hands of the jury, together with the comment repeated by the learned trial judge as above mentioned.

At the conclusion of the portion so extended his Lordship dealt at length with the evidence and made some further observations with respect to the law. This latter part constituted a larger portion of the charge than that handed to the jury. It is well established that a charge must be considered as a whole. With this in mind, it seems impossible to conclude otherwise than that the jury, in the course of their deliberations, would inevitably give more weight to the portion transcribed than to that part which they had heard but verbally expressed in the court room. Moreover, in this particular case there was that portion which counsel for the defence had discussed at the

end of the learned trial judge's charge and upon which the learned judge made further comment, which he repeated to the jury as he handed them the typewritten portion. It would, therefore, seem, as a matter of principle, that a part of a charge should not be handed to the jury.

No case was cited in support of such a portion being handed to the jury. There are jurisdictions in the United States where the practice of delivering a copy of the judge's charge to the jury is recognized by statute. In other jurisdictions it seems to be permissible, even without a statute, and in that country there is authority for the giving of a copy of a penal section of the law to the jury, but there does not seem to be any decision which would support the view that a substantial portion of the charge could be delivered to the jury.

It may be that a section of the *Code,* or even a small passage of a learned trial judge's charge, with the consent of counsel concerned, may be handed to the jury, but even then the question must remain whether, in the circumstances, there has been prejudice or miscarriage of justice. Where, however, as here, the transcribed part of the charge contains important references to the evidence and contentions made on behalf of the Crown, and but slight reference to the evidence and none to the contentions on behalf of the defence, there can be no doubt but that the giving of such a portion to the jury ought not to be permitted.

The learned trial judge, discussing the duty of the jury to arrive at a fair and just conclusion, warned them that sympathy ought not to be a factor in their deliberations and went on to call their attention to the fact that sympathy might have a place in a consideration of executive clemency. At the conclusion of his charge counsel for the defence took the position that from his Lordship's remarks with respect to executive clemency the jury might conclude that he was of the opinion that this was a case in which a conviction should be found and executive clemency exercised. The learned trial judge, as a result of this comment, dealt further with it in his supplementary instructions to the jury and stated that he was not in any way suggesting what their verdict should be, or any view on his part that an "occasion might arise for an application for such clemency." Sir Lyman Duff, in commenting upon a reference

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to executive clemency in the course of a charge to the jury, described such as "unfortunate" and concluded his remarks as follows:

> Such a reference could not assist the jury in performing their duty to decide the issue of fact before them, and there is always some risk that a suggestion that the verdict is to be reviewed may result in some abatement of the deep sense of responsibility with which a jury ought to be brought to regard their duty in passing upon any criminal charge, and, preeminently, when the offence charged is murder, to which the law attaches the capital penalty. *McLean* v. *The King* (1).

In this case the Court concluded that no substantial harm or miscarriage resulted and, in view of the fact that here a new trial is directed, it is unnecessary to do more than to repeat the warning expressed by Sir Lyman Duff.

The appeal should be allowed, the conviction quashed and a new trial directed.

LOCKE J. (dissenting):—I agree with my brothers Taschereau and Fauteux and would dismiss this appeal.

CARTWRIGHT J.:—For the reasons given by my brothers Rand and Estey I would allow the appeal, quash the conviction and direct a new trial.

FAUTEUX J. (dissenting):—On the 6th of January, 1955, at the city of Vancouver, Ah Wing, a grocer of about sixty-five years of age, was murdered in his store while resisting the commission of a robbery perpetrated actually by both the appellant and one Chow Bew, pending which their accomplices stood ready, outside of the store, for the flight in an automobile; intending thereafter to share amongst themselves five thousand dollars of savings anticipated by them to be found in possession of their victim.

Cathro and Bew each had a separate trial and were found guilty of murder. These verdicts were upheld by majority judgments of the Court of Appeal. We are only concerned here with the case of Cathro.

The substance of the principal grounds of appeal, upon which there was a dissent, is related to the instructions of the trial Judge.

(1) [1933] S.C.R. 688 at 693.

I agree with Robertson and Bird JJ.A., that a verdict of manslaughter was not open to the jury in this case. Furthermore and—assuming the presence of certain illegalities—on a careful consideration of the evidence, and particularly of the testimony falling from the very lips of the appellant, who was the only one of the group to testify, I also agree with these two members of the Court of Appeal of British Columbia that this is a proper case, if any, for the application of section 1014(2).

In *Beard's* case (1), it was proved that there was a violent struggle in which the accused overpowered a child and stifled her cries by putting his hand over her mouth and pressing his thumb upon her throat, the acts which, in her weakened state resulting from the struggle, killed her. This, the House of Lords held, was murder, although the accused had no intention of causing death. In this country, as stated at page 524, by the then Chief Justice of this Court, Sir Lyman Duff, who delivered the uananimous judgment for the Court, in *The King* v. *Hughes et al.* (2), "a charge arising out of circumstances such as those considered in the *Beard's* case, would be disposed of under the law laid down in s. 260 of the *Criminal Code.*" The parts of this section relevant to the present case read:—

> 260. In case of . . . robbery . . . culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue.
>
> (*a*) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, . . . and death ensues from such injury; or
>
> * * *
>
> (*c*) if he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

Were there, in this case, but a single offender implicated in the robbery and the material facts leading to the death of Ah Wing, a verdict of murder could be the only proper one which a reasonable jury, properly instructed and acting judicially, could render; for the proof of the constituent elements of the substantive offence created under s. 260 is beyond doubt; death did ensue from grievous bodily injury meant and inflicted for the purpose of facilitating the commission of robbery.

(1) [1920] A.C. 479. (2) [1942] S.C.R. 517.

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However, because there is, in the present case, a plurality of offenders, and though both Cathro and Bew, acting individually as well as together, had a hand in the infliction of violence to advance their criminal and common purpose, the following submission is made, in the present appeal, on behalf of Cathro. The original agreement, it is contended, was that there would be no violence; strangulation, which was the cause of death, might, on one view of the medical evidence, have resulted from the acts of violence which Cathro—through evidence of doubtful admissibility—attempts to ascribe to Bew, rather than from the acts of violence which he admitted having committed; the acts of Bew would then be beyond the scope of the agreement; with the consequence that Cathro, having had, directly or by complicity, no part in the infliction of the fatal injury, could not be held guilty under s. 260.

The agreement. Of the agreement there is no other evidence than (i) what Cathro said it was and (ii) what, from the subsequent conduct of the parties in the store, as related by Cathro, is to be deduced.

(i) There was, of course, a clear agreement to rob the store owner of the five thousand dollars of savings he was estimated by them to possess. As to the means to be used to achieve this end, Cathro, in his examination in chief, says:—

> On the way to the store, they more or less discussed the situation, told me what it was all about, the other surrounding buildings, they said he was an old man and there wouldn't be no trouble, there was no necessity of any violence.

And later he repeats:—

> A Yes, I asked them if they had any weapon, anything to hit him with, or anything, and they said: No, there wasn't, there was no need of it.
> Q And no such thing was carried?
> A We understood before we went out there, that there would be no violence.

Whether this is tantamount to a restrictive agreement as to the means or rather to a simple understanding as to the anticipated measure of means to be used in the circumstances, it rested on an alleged expectancy that there would be no trouble, no necessity for violence. However, at no time, during the preparation of the plan,—or its actual execution, as will be seen later—was an abandonment of

the plan followed by an immediate withdrawal from the premises, even thought of as being the conduct to adopt in the event of resistance and necessity for violence arising and developing, as indeed it did to culminate into death. On the contrary, on Cathro's own evidence, notwithstanding his declaration that he had no intention to hurt, what was then to be done, failing the materialization of the expectancy, was not left in doubt. Pressed, in cross-examination, Cathro admitted the expectation of a fight and, on his understanding of the plan, the degree of violence to be then used upon Ah Wing was to be measured by the degree of resistance opposed by their victim to the fulfilment of their common aim:—

Q Well now, it is perfectly plain that if you had put up a fight for six hundred dollars (the biggest amount Cathro said he once had), the old Chinaman was to put up a fight for five thousand dollars?
A Yes.
Q Well, what were you going to do if he did?
A Hold him.
Q And you were to apply whatever force was necessary to silence him?
A Not necessarily.

* * *

Q And if he had put up a fight, you would have to put up a fight also?
A Well to a certain extent.

* * *

Q Well, just answer the question now. Wasn't that the situation, whatever fight that old man put up, you were there to overcome it?
A Yes, sir.
Q And that is what you did, isn't it?
A Yes, sir.

This evidence does not exclude grievous bodily injury, if needed in the judgment of either of the parties to the agreement.

(ii) The subsequent conduct of the parties. At closing hours, the appellant went in the store first to be followed thereafter by Bew. Each in turn bought soft drinks. The last customer having departed, Cathro went to the back of the store and asked the owner for a can of meat. The latter turned his back in order to fetch this object; Cathro grabbed him from behind, put an arm around his neck and the hand of the other on his mouth. Meanwhile Bew locked

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the front door, opened the back door and put out the lights. Examined in chief, he then, in a rather dimmed recital of the facts, proceeds to say:—

I then—the Chinaman was making quite a bit of noise, trying to struggle. I told him to keep quiet or I would have to hurt him, more or less as a threat. He kept making noise, so I hit him with the can, not intending to hurt him at all, more or less to scare him. He made more noise than ever.

Q Where did you hit him? A High on the head.

Q How many times did you hit him? A Once.

Q Then what happened? A Well, I had seen a flashlight before the lights had gone out. Billy, who had been looking around, I told him to get the flashlight so he could see better. Instead of putting the flashlight on, he hit the man with it, which I told him to stop and get something to put in his mouth. I heard some cloth tearing. He tried to put something in his mouth and it didn't seem to work, it was much too thick, he was still making noise.

Q Go on.

A I then asked Chow Bew to hold him while I looked around.

Cathro then went to the bedroom where he found rolls of coins underneath the bed, then to the till which he emptied and returned to the back room. At the request of Bew, who was with Ah Wing then lying down on the floor, he searched the pockets of the victim and obtained a few bills. Asked by Bew how much money he had, Cathro answered, "Very little". At the suggestion of Bew, he then went for further searches in the back room in which he was when somebody knocked at the door, whereupon both fled immediately. In cross-examination, Cathro testifies:—

Q Well, how could you stuff this cloth in his throat, or how could you expect to stuff this cloth in his throat if you took your hand off his mouth, even for an instant, without him making such an outcry that the whole neighborhood would hear?

A Just what I was saying, I was holding him, I had my arm around him and his head back, at the same time he was putting the cloth in his mouth.

Q At that time you had your hand off his mouth, didn't you?

A When the cloth was trying to be forced in.

Q How were you silencing him then?

A He did yell then, that is why I say it didn't work.

Q Well nobody next door heard it through this partition?

A It doesn't appear that way.

Q Why did you let him yell?

A Trying to put that cloth in his mouth.

Q I didn't ask that, I asked why did you let him yell?

A What else was I going to do when he tried to put something in his mouth.

Q You could just put the pressure on his throat with your good right arm, couldn't you?
A I guess so.
Q And that is what you did, didn't you?
A I might have put some pressure on his throat.
Q If the man didn't yell you would have to?
A The man was yelling after that.

* * *

Q Well, I'm suggesting that you would have to render him unconscious before you transferred him over to Chow Bew? Now, what do you say about that?
A The man was not unconscious.
Q Or practically so?
A No, he was yelling, putting up a fairly good fight, yet fairly active.

Cathro is referred to the small cut over the right eyebrow, scrapes of the lips, cut on the tongue from which there had been some bleeding in the mouth, the rubbed appearance of the skin of the chin and of the neck and abrasions on the right side of the neck of the victim, and asked:—

Q Actually you didn't know how much pressure you used on that man's neck, do you?
A I never used very much pressure.
Q Well, you don't know what you did in the excitement there, do you?
A Not in complete detail, no.

And as to the moment at which the victim went on the floor, the evidence of Cathro is:—

Q At what stage did the old fellow get down on the floor?
A When I was turning him over to Chow Bew, I guess.

* * *

Later:—

Q At what stage did you get the old man down on the floor?
A I don't know exactly.
Q Wasn't it a fact that he just fell down?
A No, he didn't fall down.
THE COURT: Q He didn't fall down?
A Not that I know of.
Q Well, he got there ultimately, didn't he?
A He was on the floor when I went through his left front pocket, the one I could get at.
Q And unconscious then too, wasn't he?
A Not to my knowledge.
Q Well, did he struggle when you were rifling his pockets?
A He might have, but the other man was holding him.
Q He was not gagged though?
A Not to my knowledge, no.

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Fauteux J.

On Cathro's own story:—he was the first to resort to violence in the manner planned for; he grabbed his victim from behind, he held him in a manner, known to him to permit strangulation; he hit him on the head with a meat can; both he and Bew, notwithstanding their combined strength, unsuccessfully attempted gagging. And it is then that Cathro turned Ah Wing over to Bew, with the implied request to take responsibility for the means to be adopted in order to permit him to search the premises, and later their victim, for the money.

As to the law. If death, whether intended, anticipated or not, ensues as a consequence of grievous bodily injury, meant and inflicted for the purpose of facilitating the commission of a robbery, the offence, under s. 260 standing alone, is murder. Under s. 69 (1) of the *Criminal Code*, every one is party to such offence who actually commits it, or whose conduct, in relation to its commission by another, comes within the description of either one of sub-paragraphs (*b*), (*c*) or (*d*) of paragraph 1 of section 69 reading:—

> 69 (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.

The fatal injury, in this case, was inflicted either by the appellant or by Bew. On the first hypothesis, Cathro is guilty of murder. On the second, Cathro is a party to murder under section 69 (1). For, on the two hypotheses, the evidence does not permit doubting either that the fatal injury was meant and inflicted for the purpose of facilitating the commission of the robbery in which both were engaged, or that, on Cathro's own evidence, both were at one mind as to the purpose and the means of their common plan, as made and as executed. In such circumstances, this case comes squarely under the law laid down in s. 260 and s. 69 (1) of the *Criminal Code*. As defined, "bodily harm becomes grievous whenever it seriously interferes with health or even comfort. It is not necessary that its effects should be dangerous or that they should be permanent." (Roscoe's *Criminal Evidence* 16th ed. p. 631; Russell

On Crime, 10th ed. Vol. 1, p. 690; Archbold's *Criminal Pleading, Evidence and Practice,* 32nd ed. p. 968; Harris and Wilshere's *Criminal Law,* 17th ed. p. 282; *Rex* v. *Cox* (1); *Rex* v. *Ashman* (2). Before he transferred him over to Bew, the violence which Cathro himself, first alone and then with the assistance of Bew, exerted upon Ah Wing, comes within that definition; hence Cathro and Bew were then at one mind as to inflicting grievous bodily injury. And there is nothing to suggest that, from the moment of transfer—when, in Cathro's own words, Ah Wing was still "yelling, putting up a fairly good fight, yet, fairly active yet", there was a modification in the mind of either party with respect to the flexible rule by which the degree of violence had to be measured. From then on, Cathro relied on Bew to overcome the resistance or yelling of Ah Wing. The evidence does not show that Bew did more than was necessary for that purpose; even if the fatal blow was ill-measured, Cathro, under s. 69 (1), is none the less party thereto.

Assuming that the grounds of appeal, upon the consideration of which we have jurisdiction to enter, might be decided in favour of the appellant, no substantial wrong or miscarriage of justice has actually occurred.

The appeal should be dismissed.

Appeal allowed, conviction quashed and new trial directed.

Solicitor for the accused (appellant): *F. C. Munroe.*

Solicitor for the Crown (respondent): *L. H. Jackson.*

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(1) (1818) Russ. & R. 362; 168 E.R. 846.

(2) (1858) 1 Fost. & Fin. 88.

1955

*Oct. 20
*Nov. 23

CHOW BEW .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal Law—Murder—Death resulting from robbery by violence at hands of accused or an accomplice—Whether proof of intent to kill necessary—Criminal Code, ss. 69 (2), 260 (a), (c).

The appellant charged with three others of murder, tried separately and convicted, appealed on the ground among others that the jury as charged could reasonably have believed that it was entitled to convict of murder under s. 260 (*a*) or (*c*) of the *Criminal Code* without proof of intent to kill and apart from s. 69 (2).

Held: 1. That upon a charge of murder based on s. 260 (*a*) or (*c*) proof of intent to kill is not necessary, nor is it when s. 69 (2) is invoked.

2. (Cartwright J. dissenting): That the charge upon this aspect of the matter was sufficient.

3. (By Kerwin C.J. and Taschereau, Locke and Fauteux JJ.): That it was not necessary that the jury be charged as to the defence of manslaughter since there was no evidence upon which such a defence could be based.

Per Taschereau, Locke and Fauteux JJ.: There was evidence from which the jury might properly infer that the appellant and his companion meant to inflict grievous bodily injury to the deceased and had aided and abetted each other in doing so for the purpose of facilitating the commission of robbery and that death had ensued. Such an offence is murder as defined by s. 260 whether they or either of them meant or knew that death was likely to ensue. In such circumstances it would be a matter of indifference which inflicted the fatal injury since each was liable for the other's act. The appellant might also be found guilty of murder if the jury inferred that a common intention had been formed by the appellant and his associates to rob the deceased and to assist each other in doing so and that the killing was an offence which ought to have been known to the appellant to be a probable consequence of such common purpose.

Per Cartwright J. (dissenting): The jury should have been instructed, that if they concluded from the evidence that the violence was inflicted by the appellant's companion alone, they could find the appellant guilty only if they were satisfied beyond a reasonable doubt: (i) that it was in fact a probable consequence of the prosecution of the common purpose of the appellant and his accomplice to rob the deceased that the accomplice, for the purpose of facilitating the robbery, would intentionally inflict grievous bodily injury on the deceased or would wilfully stop his breath, and (ii) that it was known or ought to have

*PRESENT: Kerwin C.J. and Taschereau, Rand, Estey, Locke, Cartwright and Fauteux JJ.

**Mr. Justice Estey, because of illness, took no part in the judgment.

been known to the appellant that such consequence was probable. While on the evidence it was open to a properly instructed jury to so find, the jury was not adequately instructed on this vital matter.

Judgment of the Court of Appeal for British Columbia (1955) 112 Can. C. C. 180, affirmed.

APPEAL from a judgment of the Court of Appeal for British Columbia (1) affirming, the appellant's conviction for murder. O'Halloran J.A. dissenting, would have set aside the murder conviction, substituted a verdict of manslaughter and imposed a sentence of ten years imprisonment.

In separate trials one of the other three was convicted of murder, one acquitted and the Crown did not proceed against the third.

F. G. P. Lewis for the accused, appellant.

L. H. Jackson and *W. G. Burke-Robertson, Q.C.* for the respondent.

THE CHIEF JUSTICE:—This appeal is based upon five grounds of dissent taken by Mr. Justice O'Halloran in the Court of Appeal for British Columbia (2). As to numbers two, three and five, I am of opinion that the charge of the trial judge is not open to the objections raised. These are as follows:—

(2) Upon the charge as given them the jury could reasonably believe they were entitled to convict of murder under *Code* s. 260(*a*) and (*c*) without proof of intent to kill and apart from *Code* s. 69(2).

(3) The jury were not instructed that proof of intent to kill was essential under *Code* s. 69(2) upon the evidence before them, in order to convict of murder.

(5) The instructions upon reasonable doubt did not bring home to the jury the distinction between the proof required in a criminal case of murder vis-à-vis manslaughter contrasted with that required in a civil case.

Numbers one and four may be considered together:—

(1) The Learned Judge omitted to put the defence of manslaughter adequately before the Jury and nowhere in the charge was the defence of manslaughter put in such a way that the Jury would realize that manslaughter vis-à-vis murder was the transcendent issue for them to decide.

(4) No mention of manslaughter was found at pages 189, 193, 195 and 197 in the Charge to the Jury where in eleven places it ought to have appeared with murder and acquittal as a verdict open to the jury.

(1) (1955) Can. C.C. 180. (2) (1955) 112 Can. C.C. 180.

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Kerwin C.J.

After a careful reading of the charge I am of opinion that the trial judge unequivocally directed the jury as to returning a verdict of manslaughter if they were not satisfied beyond a reasonable doubt that murder had been proved; but, in any event, there was no evidence in this case upon which any verdict of manslaughter could be based.

The appeal must be dismissed.

The judgment of Taschereau, Locke and Fauteux JJ. was delivered by:—

LOCKE J.:—The second and third grounds of dissent upon which this appeal has been taken imply that, in a charge of murder based on s. 260(*a*) or s. 260(*c*) of the *Code*, proof of intent to kill is necessary and that this is also so when s. 69(2) is invoked. I am unable, with respect, to agree with these conclusions in view of the terms of the sections mentioned.

S. 259 defines some of the circumstances in which culpable homicide is murder in law, and certain others are defined in s. 260. As declared by s-s. (*a*) of the latter section, if a person means to inflict grievous bodily injury for the purpose of facilitating the commission of the offences, *inter alia,* of robbery or burglary and death ensues from such injury, the offence is murder, whether the offender means or not death to ensue or knows or not that death is likely to ensue. S-s. (*c*) provides that if a person by any means stops the breath of any person for any such purpose and death ensues from such stopping of the breath, the offence is murder.

The first sentence of s. 69 provides, *inter alia,* that every one is a party to and guilty of an offence who actually commits it, or does or omits an act for the purpose of aiding any person to commit the offence, or abets any person in committing it. This section appeared as s. 61 when the *Code* was first enacted in 1892.

As it affects the present case, the matter is thus stated in the 10th Edition of *Russell on Crime,* at p. 1853, as follows:—

> Thus where several persons are together for the purpose of committing a breach of the peace, assaulting persons who pass, and while acting together in that common object, a fatal blow is given, it is immaterial

which struck the blow, for the blow given under such circumstances is in point of law the blow of all, and it is unnecessary to prove which struck the blow.

There was evidence in the present matter from which a jury might properly draw the inference that the appellant and Cathro had meant to inflict grievous bodily injury to Ah Wing and had aided and abetted each other in doing so for the purpose of facilitating the commission of the offence of robbery and that his death had resulted. If the jury chose to draw this inference, the offence was murder as defined by s. 260, whether they or either of them meant that death should ensue or knew that death was likely to ensue. In such circumstances, it would be a matter of indifference which of the two struck the fatal blow or inflicted the fatal injury, since each would be liable in law for the act of the other.

The appellant might also have been found guilty of murder, if the jury were to draw the inference that a common intention to rob Ah Wing had been formed by the appellant and his associates and to assist each other in doing so, and that the killing was an offence which ought to have been known to the appellant to be a probable consequence of the prosecution of such common purpose. The charge upon this aspect of the matter appears to me to have been sufficient.

As to the objections to the charge on the ground that what has been referred to as the defence of manslaughter was not put to the jury properly, I think nothing in the evidence raised any such issue and, accordingly, this criticism of the charge is not justified. In my opinion, upon the evidence only two verdicts were possible, that is, guilty or not guilty. I cannot think that it affected the appellant's position to his detriment that the jury were told, as they were, that they might find manslaughter.

I would dismiss the appeal.

RAND J.:—The evidence in this case, differing in this respect from that adduced in the trial of the accomplice, Cathro, whose conviction of murder has likewise been brought in appeal before us, did not go directly to what had taken place in the store resulting in the death. The facts before the jury were these: about 10:30 p.m. from his home a witness saw an automobile, draw up right opposite him

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on 24th Avenue on which a lane opened leading to the rear of the store of the deceased; a man was sitting slouched in the driver's seat, and the engine was running which upon the witness's coming out of the house was shut off; about this time Cathro was seen in the store drinking from a bottle by three other witnesses also inside; before the latter went out the accused entered and he and Cathro were left alone with the deceased on their departure; the lights of the store were noticed to be out earlier than usual; within ten or fifteen minutes from the time the car was observed by him, the first witness who had returned from a short errand in his car noticed two persons, one of them carrying a small box, running westerly along the avenue from the direction of the store to the parked automobile which they hurriedly got into and drove away at high speed; the witness, who had previously recognized the make of car, followed them and was able to obtain the license number; upon returning from this pursuit, he found the police in the store to whom he gave a description of the car, including its number; the police had been called in by a neighbour of the deceased upon hearing moaning within the store; a general alert was sent out at about 10:58 o'clock the police came upon the car with four occupants, the accused and Cathro being in the back seat with the former holding a small box containing about $50 and a receipt shown to have been given to the deceased. The cause of death was the force which not only had broken the walls of the larynx but by shutting off respiration had brought about asphyxia. On these primary facts the jury could admittedly have found the death to have been brought about in the course of robbery by acts of force to which both men were party: as is seen, there is nothing whatever on which a distinction could be made by the jury between the parts played by Cathro and the accused, the vital circumstances in which the evidence differs from the case of Cathro.

In that situation must a trial judge, in his charge, embark upon a speculation of the many possible modes in which the fatal occurrence might have taken place? Without more, it would, I think, be improper for him to invite the jury to indulge in any such imaginings. What they must do is to draw their conclusions from the evidence submitted to them or the reasonable inferences arising from it; but on any feature on which the evidence, including in that the

inferences to be drawn from the total circumstances disclosed, is silent, in general and specifically here no special direction is warranted.

A number of grounds were urged against the charge, but I find myself quite unable to say that as a whole it did not present the law and the case for the defence to the jury both fairly and adequately.

I would dismiss the appeal.

CARTWRIGHT J. (dissenting):—The appellant was tried before Manson J. and a jury at the Vancouver assize and on March 30, 1955, was convicted on the charge, "that he, the said Chow Bew at the City of Vancouver, in the County of Vancouver, in the Province of British Columbia, on the 6th day of January, 1955, together with Donald Keith Cathro, Eng Git Lee and Richard Wong, unlawfully did murder Young Gai Wah, otherwise known as Ah Wing."

His appeal to the Court of Appeal for British Columbia was dismissed. O'Halloran J.A., dissenting, would have allowed the appeal, quashed the conviction and substituted a verdict of manslaughter and a sentence of ten years imprisonment.

The following statement of the facts is taken from the reasons for judgment of Bird J.A.:—

> The case for the Crown rests upon the evidence of various persons who between approximately 10.30 and 11.00 p.m. on the night in question were either present in the store where the killing occurred or in its near vicinity; as well as that of police officers who investigated the circumstances surrounding the crime and of the physician who conducted the autopsy on the body of the deceased man.
>
> The facts now set out emerge from the uncontradicted testimony of these persons called as Crown witnesses:
>
> (1) The store is situate at 4017 MacDonald Street from the rear of which a passage leads to the 2800 block on West 24th Avenue, Vancouver, B.C.
>
> (2) At 10.30 p.m. January 6, 1955, Dickinson saw a car stop in the 2800 block W. 24th Avenue, from which two persons alighted and walked away in the general direction of the store. He said that the car, in which was one occupant, remained there with lights out.
>
> (3) About 10.40 p.m. the deceased man served in the store the witness Cowie, who, with his wife, occupied the premises adjoining the store to the north, as well as Shearer and Wood. Cathro was then observed in the store by Cowie, Shearer and Wood, and the appellant was seen entering by Shearer when the latter left the premises.
>
> (4) At 10.50 p.m. a groan from the store premises was heard by Cowie and his wife who then observed that the interior lights of the store were out. She called the police immediately by telephone.

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(5) About 10.45 p.m. Dickinson returned by car to his home in the 2800 block 24th Avenue West and soon after, in company with Scholes, saw two men, one of whom carried what looked like a cigar box, run west on 24th Avenue from the direction of MacDonald Street, and enter the parked car which then rapidly drove east without lights.

(6) Dickinson followed the eastbound car for two miles, observed that it was a Pontiac and noted its licence number which information soon after was reported by him to police officers whom he found near the store premises on his return.

(7) Shearer and Wood, who stood talking outside the store after leaving it, did not observe anyone enter or leave the premises before police cars arrived at 10.50 p.m. Meantime they had observed the store lights go out.

(8) Upon examination of the store premises made by police officers about 10.50 p.m. the front door was found locked, the rear door leading to the passage to 24th Avenue was open. The lights had been shut off from the fuse box and the dead body of Ah Wing was found within the premises.

(9) A Pontiac car bearing the licence number given to the police officers by Dickinson was stopped by a constable on a downtown street some miles from the store premises at 10.58 p.m. In the car were the four men charged in the indictment. The appellant then had in his possession a cigar box containing money, as well as a receipt which was shown to have been issued to the deceased man.

The facts thus elicited from the various Crown witnesses and particularly the fact that only Cathro, the appellant, and Ah Wing were present in the store between 10.40 and 10.50 p.m. do not appear to have been seriously questioned by defence counsel at the trial.

T. R. Harmon, a qualified physician and surgeon, retained as pathologist and autopsist by the City of Vancouver, expressed the opinion, founded upon his examination of the body of the deceased made January 7, 1955, that the latter had come to an "unnatural death from asphyxia due to strangulation with a fracture of the voice box". It was his belief that "death resulted from strangulation by pressure that shut off the breathing," that "very great pressure was required to fracture the voice box". The application of "a knee on the neck was the most likely cause of injury, very powerful hands could do it" but they would leave marks on the neck of which the witness found none. He said further that the identical type of injury to the voice box is not usual and he could not recall having seen another. There were superficial injuries to the face; left wrist, and scalp, none of which in the witness' opinion were likely to have caused death, though the injuries to the head may have caused loss of consciousness.

There was no direct evidence of what transpired in the store premises subsequent to 10.40 p.m. when Cathro, the appellant, and Ah Wing, were shown to have been the only occupants.

The appellant did not take the witness-box nor did the defence adduce evidence.

It may be added, as is pointed out by O'Halloran J.A., that there was no evidence that any weapon was in the possession of the appellant or of any of the other three named in the indictment or played any part in causing the death of Ah Wing.

It is apparent from this summary of the evidence that it was open to the jury to find that the appellant and Cathro had formed a common intention to rob Ah Wing and to assist each other in so doing, that Ah Wing came to his death as the result of an assault committed for the purpose of facilitating the carrying out of the robbery, that the force used was so great as to indicate that the person who applied it meant to inflict grievous bodily harm on Ah Wing or to stop his breath or to do both. It is, I think, also apparent that it was open to the jury to find that the evidence was not inconsistent with the view that the force which caused the death of Ah Wing was applied by one only of the two who were together committing the robbery and that it was impossible to say which one actually committed the assault. It therefore became of crucial importance that the learned trial judge should make plain to the jury the law by which they should be guided if they took the view of the evidence that all the injuries from which the death of Ah Wing ensued were inflicted by Cathro alone.

From the description of the injuries given by Dr. Harmon there could be little doubt that the individual who actually applied the force was guilty of murder under the provisions of either clause (*a*) or clause (*c*) of s. 260 of the *Criminal Code,* in force at the date of the offence and at the date of the trial. It would seem that such individual meant, for the purpose of facilitating the commission of the robbery, to inflict grievous bodily injury or, as an alternative to the intention just mentioned or in addition thereto, meant to stop the breath of Ah Wing. The question is how the jury should have been instructed as to what they must find before they could properly convict of murder the other individual taking part in the robbery on the assumption that he did not personally use any force from which the death of Ah Wing ensued.

In my view the law of Canada on this point is to be found in ss. 259, 260 and 69 of the *Criminal Code* and differs from the law of England as laid down in the cases of *Rex* v. *Betts and Ridley* (1) and *Rex* v. *Grant and Gilbert* (2).

Applying the relevant sections of the *Code* to the state of facts mentioned, I am of opinion that it should have been

(1) (1930) 22 Cr. App. R. 148. (2) (1954) 38 Cr. App. R. 107.

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made plain to the jury that, if, in their view, the circumstances proved were not inconsistent with the view that the violence inflicted on Ah Wing was inflicted by Cathro alone, they could find the appellant guilty of murder only if they were satisfied beyond a reasonable doubt of two things, (i) that it was in fact a probable consequence of the prosecution of the common purpose of the appellant and Cathro to rob Ah Wing, that Cathro, for the purpose of facilitating the commission of the robbery, would intentionally inflict grievous bodily injury on Ah Wing or would wilfully stop his breath, and (ii) that it was known or ought to have been known to the appellant that such consequence was probable. While in my view, on the evidence, it would have been open to a properly instructed jury to so find, I am in agreement with O'Halloran J.A. that the jury were not accurately instructed on this vital matter.

The learned trial judge having told the jury that in ss. 259 and 260 the word "offender" extended to all who were involved and that the singular included the plural if the evidence so required, went on to say in dealing with these two sections:—

> If you are of the opinion beyond a reasonable doubt that the Accused did intend to inflict grievous bodily harm, for the purpose of facilitating—when I say the Accused, I think I might well join with it the Accused *or his companion* or the two of them together—if you are of the opinion beyond a reasonable doubt that the accused did intend to inflict grievous bodily injury for the purpose of facilitating the commission of the robbery, then the earlier words of Section 260 come into play and the crime is that of murder, regardless of whether the offender meant or not death to ensue, or whether he knew or not that death was likely to ensue.

and a little later continued:—

> It seems to me—and the finding of fact is for you—that the acts of the offenders were for the purpose of facilitating the commission of the robbery, as it seems to me that the offenders wilfully stopped the breath of the deceased to facilitate the commission of the crime of robbery and death ensued. And if I am right in my view that that word "offender" as used in that section extended to the plural, then you at once arrive at the position that it is quite immaterial which of these two men that were in the premises, seemingly, stopped the breath of the Accused (sic—obviously the word "accused" should be "deceased") and it is immaterial whether they meant to cause death or not, or knew or not that death was likely to ensue, if they stopped the breath and death did ensue.
>
> I now leave those sections and turn to Section 69 of the *Code* . . .

It appears to me that the jury may well have understood from the passages which I have quoted, and in the first of which I have italicized some words, that it was open to

them to find a verdict of guilty against the appellant, even if in their opinion he had not personally used any force to Ah Wing, by the application of the terms of ss. 259 and 260 and without the necessity of considering or applying the terms of s. 69 (2); and I think that this was a fatal error. If I am right in my view as to the existence of this error, it is obvious that it could not be cured merely by an accurate direction, as to the effect of s. 69 (2), for, *ex hypothesi,* the jury might feel no need to consider that section at all; and I can find nothing in the remainder of the charge which has the effect of correcting or removing such error. I conclude therefore that the verdict cannot stand.

The ground of misdirection on which I have concluded that the appeal should be allowed appears to me to be sufficiently raised in the second ground of dissent of O'Halloran J.A. set out in the formal order of the Court of Appeal as follows:—

> Upon the charge as given them the jury could reasonably believe they were entitled to convict of murder under *Code* s. 260 (*a*) and (*c*) without proof of intent to kill and apart from *Code* s. 69 (2).

While I trust that it so appears from all that I have said above, I wish, so as to avoid the possibility of misunderstanding, to say explicitly that I do not agree with the view, implied in the wording of the ground of dissent just quoted, that in order to enable a properly instructed jury to convict of murder in this case proof of intent to kill was necessary. My view as to the misdirection which I regard as fatal would be correctly summarized as follows:—

> Upon the charge as given them the jury could reasonably believe they were entitled to convict of murder under *Code* s. 260 (*a*) and (*c*) apart from *Code* s. 69 (2).

As already indicated this ground is, I think, included in the ground of dissent which I have quoted. The greater includes the less.

It does not appear to me that this is a case in which the provisions of 1014 (2) can be applied. I have already indicated my view that the evidence was sufficient to permit a properly instructed jury to convict of murder but I do not think it can safely be affirmed that they must necessarily have done so.

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I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed.

Solicitor for the accused (appellant): *F. G. P. Lewis.*

Solicitor for the Crown, respondent: *L. H. Jackson.*

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*Dec. 12
*Dec. 22

JOSEPH WILFRED PARKES .....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeal—Jurisdiction—Whether finding by judge accused an habitual criminal a "judgment" and decision of Court of Appeal affirming a "final judgment"—The Supreme Court Act, R.S.C. 1952, c. 259, ss. 2 (b), 41 (1)—Criminal Code, s. 660.

The "charge" of being an habitual criminal is not a charge of an offence or crime but the assertion of the existence of a status or condition in an accused. *Brusch* v. *The Queen*, 1953, 1 S.C.R. 373. The decision of a judge that an accused is an habitual criminal is however a "judgment" and the decision of the Court of Appeal of a Province affirming such judgment is a "final judgment" within the meaning of s. 41 (1) of the *Supreme Court Act* and this Court has jurisdiction to grant leave to appeal therefrom.

MOTION by appellant under s. 41 of the *Supreme Court* Act, for leave to appeal from a judgment of the Court of Appeal for Ontario which dismissed the appeal of the appellant against the finding of Grosch J., County Court Judge, sentencing the appellant as an habitual criminal to an indeterminate term in the penitentiary.

E. P. Hartt for the motion.

W. B. Common, Q.C., contra.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—This is a motion for leave to appeal from a judgment of the Court of Appeal for Ontario pronounced on the 23rd of November, 1955, dismissing the

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Abbott JJ.
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appeal of the applicant from the decision of His Honour Judge Grosch finding that the applicant was an habitual criminal and sentencing him to an indeterminate term in the penitentiary under the provisions of s. 660 of the *Criminal Code*.

The motion is brought pursuant to s. 41 of the *Supreme Court Act*. Mr. Hartt submits that the judgment of the Court of Appeal falls within the terms of s. 41 (1) as being a final judgment of the highest court of final resort in the province in which judgment can be had in the particular case, and that it is not a judgment affirming a conviction of an indictable offence, or indeed of any offence, and therefore does not fall within the terms of s. 41 (3).

It appears to me that the majority of this Court decided in *Brusch* v. *The Queen* (1), that the "charge" of being an habitual criminal is not a charge of an offence or crime but is merely an assertion of the existence of a status or condition in the accused which, if established, enables the Court to deal with the accused in a certain manner. In so deciding the majority followed the reasoning of the English courts in *Rex* v. *Hunter* (2) approved by a court of thirteen judges presided over by Lord Hewart L.C.J. in *Rex* v. *Norman* (3).

It follows from this that when His Honour Judge Grosch decided that the applicant was an habitual criminal he was not convicting him of an indictable offence but was deciding that his status or condition was that of an habitual criminal. It was this decision which was affirmed by the Court of Appeal. That such a decision is a "judgment" within the meaning of that word in s. 41 (1) does not appear to me to admit of doubt. It is indeed a "final judgment" under the definition contained in s. 2 (*b*). It is a "decision which determines in whole...a substantive right...in controversy in a judicial proceeding"—i.e., the right of an accused to his liberty at the conclusion of whatever sentence might be imposed for the substantive offence of theft of which he was convicted prior to the trial and adjudication of the question whether his status

(1) [1953] 1 S.C.R. 373. (2) [1921] 1 K.B. 555.
(3) [1924] 18 Cr. App. R. 81.

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was that of an habitual criminal, or, alternatively, the right of the Crown to ask that he be sentenced to preventive detention.

Mr. Common's argument that for the purpose of determining whether or not a right of appeal is given the adjudication that the applicant is an habitual criminal should be treated as a conviction of an indictable offence cannot in my view be reconciled with the decision in *Brusch* v. *The Queen.* I conclude that we have jurisdiction to grant leave under s. 41 (1).

As to the merits, it was intimated at the hearing that it was the view of the Court that leave should be granted if we have jurisdiction to grant it and accordingly counsel for the applicant was directed to confine his reply to the question of jurisdiction.

I would accordingly grant leave to appeal, pursuant to the terms of s. 41 (1) of the *Supreme Court Act,* from the affirmation by the Court of Appeal of the decision of His Honour Judge Grosch that the applicant is an habitual criminal.

Motion granted.

IN THE MATTER OF THE RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT, R.S.O. 1950, c. 334.

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*Jun. 20, 21
*Dec. 22

THE ATTORNEY GENERAL FOR ONTARIO ..... APPELLANT;

AND

JOHN LEWIS SCOTT ..... RESPONDENT;

AND

THE ATTORNEY GENERAL FOR CANADA ..... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Validity of ss. 4 and 5 of the Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1950, c. 334—Prohibition—Husband and wife—Proceedings for maintenance made elsewhere than in Ontario—Whether enforceable.

The respondent applied for an order prohibiting a judge of the family court from taking any further proceedings under the *Reciprocal Enforcement of Maintenance Orders Act* (R.S.O. 1950, c. 334) in connection with a provisional order made by a magistrate in London, England, against him for the maintenance of his wife and children. Certain sums, stated in English currency, were to be paid weekly by the respondent. It was contended, inter alia, by the respondent, that the *Reciprocal Enforcement of Maintenance Orders Act* was *ultra vires*. The trial judge dismissed the application. The Court of Appeal directed that the order of prohibition be made, holding that the Act was *ultra vires* because the legislature had, in effect, delegated its legislative authority and had exceeded its jurisdiction by allocating the issue to an inferior court.

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

Per Kerwin C.J., Rand, Kellock and Cartwright JJ.: A province can confer on a non-resident a right to enforce a duty, incident to the marriage status, in the province in accordance with provisions prescribed by the law in England for the relief of a deserted wife.

The legislation is within head 16 of s. 92 of the *B.N.A. Act,* as a local or private matter. No other jurisdiction has any interest in the controversy and it concerns property within the province in a local sense. The action taken in England is only an initiating proceeding to adduce a foundation in evidence. It is unquestionable that a province can act upon evidence taken abroad either before or after

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Estey, Locke, Cartwright, Fauteux and Abbott JJ. Estey J. did not take part in the judgment on account of illness.

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proceedings are begun locally. In the converse situation, where the initiating step is taken within the province, there can be no conflict with Part II of the *Canada Evidence Act.*

The arrangement is not a treaty, as there is nothing binding between the parties to it; and it would be extraordinary if a province should be unable within its own boundaries to aid one of its citizens to have such a duty enforced elsewhere.

The legislation is a clear case of adoption and not of delegation. The action of each legislature is distinct and independent of the other. From the standpoint of legislative competency, there is no difference between the adoption of procedure and that of substantive law. No challenge could be made to the complementary English enactment here, and the province should be able to exercise the same power in relation to a subject of such a local and civil rights nature. (*Hodge* v. *The Queen,* 9 A.C. 117).

Duties of this nature are daily enforced in the inferior courts in the province and the residence of the complaining party cannot affect the judicial jurisdiction where the case is brought within the same class of legislative power. It is the same as if the wife had come to the province and there instituted the proceedings. The court is not completing an operative foreign order, it is making an original order of its own. The preliminary step taken elsewhere has no substantive efficacy until by acceptance it is adopted and incorporated in the action of the provincial court.

The family court, having statutory jurisdiction to make maintenance orders, is, therefore, a court to which the reference of the Attorney General may be made.

The modification from one currency to that of this country is not beyond provincial legislative power.

Per Taschereau, Fauteux and Abbott JJ.: Since maintenance orders fall within the jurisdiction of inferior courts, there is no valid reason why such courts could not make a provisional order under s. 4 of the Act or make and enforce an order, under s. 5, based upon proceedings initiated in another state. The maintenance of wives and children is a matter of a merely local or private nature in the province falling within head 16 of s. 92 of the *B.N.A. Act.*

It is clearly competent for any province to determine for the purpose of a civil action brought in such province, what evidence is to be accepted and what defences may be set up. There is not, under s. 5(2) of the Act, delegation of legislative power to another state. It is merely a recognition by the law of the province of rights existing from time to time under the laws of another, in accordance with the principles of private international law. S. 5 is legislation in relation to the administration of justice in the province, including procedure in civil matters in the provincial courts, and as such, within the exclusive legislative competence of the province under head 14 of s. 92 of the *B.N.A. Act.*

Per Locke J.: It is a valid exercise of provincial powers under head 13 of s. 92 of the *B.N.A. Act* to declare that the defences which may be relied upon in proceedings under the *Reciprocal Enforcement of Maintenance Orders Act* shall be those from time to time permissible

under the laws of England. In substance, those laws are adopted and declared to be the law in the province. There is no delegation of the authority of the legislature.

The objection that it is an attempt by the legislature to clothe an inferior provincial court with power to determine the legal rights of residents of the province, in respect of orders pronounced in another territorial jurisdiction, which would therefore be repugnant to s. 96 of the *B.N.A. Act,* cannot be sustained. The order does nothing more than to afford evidence upon which the magistrate may make an order against the husband. Any award made must depend entirely for its validity upon the order made by the magistrate under the Ontario statute.

The legislation does not amount to a treaty. There is no evidence to suggest that an agreement existed between the province and the reciprocating state to legislate in this manner.

APPEAL from the judgment of the Court of Appeal for Ontario (1), reversing the decision of the trial judge on an application for a writ of prohibition and on the validity of ss. 4 and 5 of the *Reciprocal Enforcement of Maintenance Orders Act,* R.S.O. 1950, c. 334.

C. R. Magone, Q.C. for the Attorney General of Ontario.

D. H. W. Henry for the Attorney General of Canada.

B. J. Mackinnon and *J. D. S. Bohme* for the respondent.

The judgment of Kerwin C.J., Rand, Kellock and Cartwright JJ. was delivered by:—

RAND J.:—I am unable to appreciate as fatal to this legislation the considerations which have been urged before us. It is said that the matter is one of international comity, that the legislation effects an international treaty, with both of which only Parliament can deal, that it delegates to a foreign legislature the power to enact provincial law, and that what are involved are civil rights which do not lie within the scope of provincial jurisdiction. Subordinate grounds go to the authority to allocate the issue to an inferior court or to enable such a court to deal with a matter involving the currency of a foreign state; that the magistrate to whom the matter was directed has not been clothed with authority over it; and that in any event there was no jurisdiction over the respondent by reason of non-residence and the absence of any act of wilful neglect in the county in which the proceedings were brought.

(1) [1954] O.R. 676; 4 D.L.R. 546.

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Rand J.

Whatever the nature or limits of what is known as "the comity of nations", it ordinarily signifies the respect paid by one state to the laws and to civil rights established by them of another relating to personal or property interests which touch both states.

With this in mind, the principal grounds rest, in my opinion, on a misconception of the true nature of the arrangement. Ontario has territorial jurisdiction over the respondent. His wife, alleging herself to have been deserted and remaining in England, is seeking to compel him to maintain her and their children. The province, recognizing the practical difficulty of enforcing the rights of a wife so placed, has intimated its willingness to exercise its authority over the husband by compelling him to the performance of a duty which both countries recognize as an incident of the marriage status. In carrying this out, the province has adopted provisions which the law of England prescribes for the relief of a deserted wife. The effect is to vest in the wife a right to enforce the duty in Ontario in accordance with the provisions adopted.

That the province can confer such a benefit on a non-resident seems to me to be beyond serious argument. Rights in property and in action in non-residents are created by the law of Ontario in transmissions through death or in the course of business as everyday occurrences. In the former, resort to the foreign law to determine the benefit or the beneficiary is a commonplace. I see no jural distinction between the creation and enforcement of a contract and the recognition and enforcement of a marital duty; the latter in fact arises out of or is attributable to a contract, that of marriage. A civil right within the province does not require that the province, in creating it, should have personal jurisdiction over both parties to it; and in its enforcement, the plaintiff by availing herself of the provincial judicature so far submits herself to the authority of the provincial court; it is the same as if she had come to the province and enforced a right in the circumstances given her. If these considerations were not recognized, by keeping property in a province other than that of his own and his creditor's residence, a debtor could effectually put it beyond the reach of the latter: the province of the situs would be powerless, by way of remedial right, to apply it to his debts. Such

a restriction upon provincial authority under head 13 of s. 92 would seem to contradict the unquestioned acceptance of the scope of that authority since 1867.

A distinction may properly be made between vesting a right and extinguishing it. The former is, in fact, a declaration that within the jurisdiction making it the attributes of ownership of property or of a claim against a person within the jurisdiction, are available to the non-resident. Generally, the right so declared would be recognized and enforced under the principle of comity by other jurisdictions. But a like declaration purporting to extinguish a right based on jurisdiction over the debtor only could not bind the non-resident creditor—in the case of a province, even in its own courts, *Royal Bank of Canada* v. *The King* (1)—outside of that jurisdiction unless otherwise supported by recognized elements furnishing jurisdiction over him or the right. In short, a state, including a province, does not require jurisdiction over a person to enable it to give him a right in personam; but ordinarily, and to be recognized generally, such a jurisdiction is necessary to divest such a right. That is not to say that jurisdiction of this nature is in itself always sufficient to divesting.

That the legislation is within head 16, as a local or private matter, appears to me to be equally clear. No other part of the country nor any other of the several governments has the slightest interest in such a controversy and it concerns ultimately property, actual or potential, within Ontario in a local sense.

Given, then, a right so created by the law of Ontario, the action taken in England is merely an initiating proceeding looking to effective juridical action in Ontario for the purposes of which it is a means of adducing a foundation in evidence. In the administration of justice the province is supreme in determining the procedure by which rights and duties shall be enforced and that it can act upon evidence taken abroad either before or after proceedings are begun locally I consider unquestionable. The form which the action in Ontario may take, as here, in the language of the statute, a confirmation of the provisional order, does not touch the substance indicated.

(1) [1913] A.C. 283.

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In the converse situation, the initiating step within the province is simply a local or private matter over which there is plenary jurisdiction, in a setting of cooperative action by two interested states. In that aspect there can be no conflict with Part II of the *Canada Evidence Act*. The latter is a code of provisions of a strictly evidentiary nature concerned with issues raised in existing litigation. The former is more than and different from that: its purpose is to establish the basis for a proceeding elsewhere through the proof of facts within Ontario: an originating proceeding which forms the jurisdictional basis of fact for the supplementary and effective process elsewhere.

The arrangement is said to be, in effect, a treaty to which the province has no authority to become a party. A treaty is an agreement between states, political in nature, even though it may contain provisions of a legislative character which may, by themselves or their subsequent enactment, pass into law. But the essential element is that it produces binding effects between the parties to it. There is nothing binding in the scheme before us. The enactments of the two legislatures are complementary but voluntary; the application of each is dependent on that of the other: each is the condition of the other; but that condition possesses nothing binding to its continuance. The essentials of a treaty are absent; and it would be an extraordinary commentary on what has frequently been referred to as a quasi-sovereign legislative power that a province should be unable within its own boundaries to aid one of its citizens to have such a duty enforced elsewhere. The alternative entrance upon such a field by Parliament needs only to be mentioned to be rejected: and that authority must lie in the one or the other to effect such an arrangement is, in my opinion, indubitable.

Similar observations are pertinent to the contention of delegation. The action of each legislature is wholly discrete and independent of the other, a relation incompatible with delegation; and that it is a case of adoption is equally clear. But it is a circumscribed adoption; there is a single right involved, the private right of maintenance between husband and wife; the right touches a resident of each country; the obligation of support is recognized by both; and the material matters of adoption go to the grounds of

defence. There is no attempt to permit another legislature to enact general, or generally, laws for a province: that would obviously be an abdication. The adoption of rules and procedure from time to time in force in another jurisdiction is exemplified by rule 2 of the Exchequer Court; and the adoption of various provisions of the *Criminal Code* by provincial statutes is seen in R.S.O. 1950, c. 379, s. 3. From the standpoint of legislative competency I see no difference between the adoption of procedure and that of substantive law; in each case legislation is enacted by reference to the legislation as it may from time to time be of another legislature. No challenge could be made to the complementary English enactment here, and if the province cannot exercise the same power in relation to a subject of such a local and civil rights nature, then the oft-quoted words of Lord Fitzgerald in *Hodge* v. *The Queen* (1), that its power is "as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow" would seem to be somewhat rhetorical.

Being within the scope of provincial authority, the tribunal by which the cause is to be adjudged appears to be already determined. Duties of this nature are daily enforced in the inferior courts of Ontario and the residence of the complaining party cannot affect the judicial jurisdiction where the case is brought within the same class of legislative power. And in the result the case is the same as if, under a provincial statute providing for maintenance of wives so placed, the wife here had come to Ontario and instituted proceedings thereunder.

The Chief Justice says:—

> In the view I take of this case it becomes unnecessary to decide whether, when the provisional order in question was transmitted to the Family Court for the County of Simcoe, Magistrate Foster was intended to exercise the jurisdiction that existed in him in his capacity of a judge of the juvenile court or his jurisdiction in his capacity of magistrate, because I am of the opinion that in neither capacity can he lawfully exercise the power of confirmation of provisional maintenance orders made in another Province or in some other country.

In this, with great respect, the Chief Justice seems to have been misled by the expression "provisional maintenance orders". The Ontario court is not completing an operative

(1) (1883) 9 A.C. 117.

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foreign order whether in relation to a province or to another country; it is making an original order of its own, the preliminary grounds and condition of which is a step taken elsewhere; that step has no substantive efficacy until by acceptance it is adopted and incorporated in the action of the Ontario court. From the beginning it is intended to be a constituent of the proceedings against the debtor in Ontario from the law of which it will draw the only substantive effectiveness it can ever possess.

It is then urged that the family court judge is not capable of accepting the reference by the Attorney General. But the definition of "court" in the statute includes "any authority having statutory jurisdiction to make maintenance orders". Admittedly the family court has that jurisdiction, and it is, therefore, a court to which the reference may be made. The exercise of its authority over the respondent will be subject to the conditions of ordinary jurisdiction over a defendant, and that as the Chief Justice of the High Court held, will depend upon evidence. Finally, it is said that the provision in the order stating the maintenance in terms of sterling currency is beyond the authority of an inferior court to confirm; but as pointed out by Chief Justice McRuer under s-s. (3) of s. 5 the confirmation may be made with such modifications "as to the court may seem just". The modification from one currency to that of this country is simply adopting a measure to determine the amount which the law of Ontario will obligate the husband to pay for maintenance. I cannot agree that a reasonable basis of that sort can be objected to as beyond provincial legislative power.

I would, therefore, allow the appeal and affirm the dismissal of the application. There will be no costs in the Court of Appeal. The costs in this Court will be according to the terms of the Order of the Court of Appeal giving leave to appeal to this Court which this Court adopted in its Order granting leave to appeal. There will be no costs to or against the intervenant, the Attorney General of Canada.

The judgment of Taschereau, Fauteux and Abbott JJ. was delivered by:—

ABBOTT J.:—The principal question involved in this appeal is the constitutional validity of the *Reciprocal Enforcement of Maintenance Orders Act,* R.S.O. 1950, c. 334.

The learned Chief Justice of the High Court, by a judgment dated March 4, 1954, dismissed the application of respondent for an Order of Prohibition to prohibit His Worship, Magistrate Gordon R. Foster, Judge of the Family Court for the County of Simcoe, from taking further proceedings in connection with a Provisional Order and Show Cause Summons under the said Act. Respondent appealed to the Court of Appeal (1), which unanimously held the Act to be *ultra vires,* allowed the appeal and granted the Prohibition Order. Pickup C.J.O. for the full Court held that the Act is *ultra vires* for two principal reasons—firstly, by providing that in the proceedings in Ontario any defence may be raised that might have been raised if the defendant had been a party in the proceedings in England, the Legislature has, in effect, delegated legislative authority to other provinces and states; secondly, the Legislature has purported to confer on a tribunal other than a court mentioned in s. 96 of the *B.N.A. Act,* power to determine whether or not a resident of Ontario is liable to maintain a non-resident wife or children by reason of an Order made by a tribunal outside the province and has thereby exceeded its jurisdiction.

The relevant sections of the impugned Act are as follows:—

4. (1) Where an application is made to a court in Ontario for a maintenance order against any person, and it is proved that that person is resident in a reciprocating state, the court may, in the absence of that person and without service of notice on him, if after hearing the evidence it is satisfied of the justice of the application, make any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, but in such case the order shall be provisional only, and shall have no effect unless and until confirmed by a competent court in the reciprocating state.

5. (1) Where a maintenance order has been made by a court in a reciprocating state and the order is provisional only and has no effect unless and until confirmed by a court in Ontario, and a certified copy of the order, together with the depositions of witnesses and a statement

(1) [1954] O.R. 676; 4 D.L.R. 546.

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of the grounds on which the order might have been opposed is received by the Attorney-General and it appears to him that the person against whom the order was made is resident in Ontario, the Attorney-General may send the documents to the proper officer of the Supreme Court if the court by which the order was made was a court of superior jurisdiction or such court as is determined by the Attorney-General, if the court by which the order was made was not a court of superior jurisdiction, and upon receipt of the documents the court shall issue a summons calling upon the person against whom the order was made to show cause why the order should not be confirmed, and cause it to be served upon such person.

(2) At the hearing it shall be open to the person on whom the summons was served to raise any defence that he might have raised in the original proceedings had he been a party thereto but no other defence; and the statement from the court that made the provisional order stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings shall be conclusive evidence that those grounds are grounds on which objection may be taken.

In my opinion ss. 2 and 3 of the Act are clearly severable from ss. 4 and 5 and need not be considered for the purposes of this appeal.

Dealing first with the finding of the Court of Appeal that the Legislature has exceeded its jurisdiction in purporting to confer upon a tribunal other than a Court mentioned in s. 96 of the *B.N.A. Act*, power to determine the liability of a resident of Ontario to maintain a non-resident wife or children. Maintenance Orders have been held by this Court to be matters falling within the jurisdiction of inferior tribunals, see *Reference Re Adoption Act* (1). It was not suggested in argument before us that a judge of the Family Court would not have been competent to make a Maintenance Order under *The Deserted Wives' and Children's Maintenance Act*, R.S.O. 1950, c. 102, where all the parties resided within the province. This being so, I can think of no valid reason why that Court could not make a Provisional Order such as that contemplated in s. 4 of the Act impugned. Similarly, with the greatest respect, I see no reason why that Court is not equally competent to make and enforce an order under s. 5, based upon proceedings initiated in another province or in a foreign country.

The purpose of s. 4 is to enable a deserted wife or child in Ontario to take preliminary steps within the province to obtain maintenance from the husband or father residing

(1) [1938] S.C.R. 398.

outside the province. Conversely s. 5 is aimed at providing means of enforcement against a husband resident in the province, of an obligation to maintain a wife or children resident elsewhere.

In fact no rights are conferred and no issues settled, by the Provisional Order made under s. 4. Such order is merely a preliminary step taken in the province with a view to obtaining a Maintenance Order against the husband or father of deserted wives and children who reside in the province, and failure to compel the person responsible for such maintenance to provide it, might well result in the burden being thrown upon the local community. As Duff C.J. said in the *Adoption Act Reference* (*supra*) at p. 403:—"The responsibility of the state for the care of people in distress (including neglected children and deserted wives) . . . rests upon the province" and in my view the maintenance of such persons is a matter of a merely local or private nature in the province falling within head 16 of s. 92 of the *B.N.A. Act*.

So far as s. 4 of the Reciprocal Act is concerned, I am in respectful agreement with the following view expressed by the learned Chief Justice of Ontario in the Court below:—

> Civil rights outside of the Province are not affected by it (the Provisional Order made under s. 4) but by the confirmation order (if any) made in the reciprocating State. I am unable to see any valid legal reason why the Province of Ontario cannot, in relation to a subject matter within its legislative jurisdiction, make a reciprocal arrangement with another Province or a foreign State in relation to such subject matter. It is not, in my opinion, the exercise of any treaty-making authority vested in the Parliament of Canada. To hold otherwise would, I think, be to stultify the exercise within Ontario of the power which the Province undoubtedly has to provide for maintenance of wives and children who are resident within the Province. One means of doing this is by reciprocal arrangement with other States, such as appears in the statute. I would, therefore, not give effect to the contention of the appellant that the statute in question is *ultra vires* of the Legislature of the Province in that it deals with civil rights outside the Province, or deals with matters of international comity.

As to s. 5, it is clearly competent to any province to determine for the purpose of a civil action brought in such province, what evidence is to be accepted and what defences may be set up to such an action. With the greatest respect for the learned judges in the Court below who have expressed the contrary view, the provision contained in s. 5(2) that "it shall be open to the person on whom the

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summons was served to raise any defence that he might have raised in the original proceedings had he been a party thereto but no other defence" is not in my opinion a delegation of legislative power to another province or state. It is merely a recognition by the law of the province of rights existing from time to time under the laws of another province or state, in accordance with the well recognized principles of private international law. Section 5 is in my opinion legislation in relation to the administration of justice in the province, including procedure in civil matters in the Provincial Courts and as such, within the exclusive legislative competence of the province under head 14 of s. 92.

The other questions raised by respondent were satisfactorily disposed of in my opinion by the Courts below.

I would allow the appeal and restore the judgment of the learned Chief Justice of the High Court. There should be no costs on the application or in the Court of Appeal. The costs in this Court should be as stipulated in the Order of the Court of Appeal granting leave.

LOCKE J.:—On December 31, 1951, Elizabeth Scott, then a resident of London, England, applied before a magistrate in the Lambeth Metropolitan Magistrates Court in the County of London for a maintenance order under s. 3 of the *Maintenance Orders Facilities for Enforcement Act 1920* (Imp.), on the ground that the defendant, her husband John Lewis Scott, had wilfully neglected to provide reasonable maintenance for her and their two infant children.

Evidence given before the magistrate by Mrs. Scott showed that she had married John Lewis Scott in Scotland, that thereafter, following the birth of two children, they had come to Canada and lived here until December 1949 when after entering into a separation agreement she had returned to England, and, further, that Scott was at the time of the application a soldier in the Canadian Army stationed at Malton, Ont.

Upon this application, the magistrate made an order awarding custody of the children to the wife and directing that the defendant pay certain sums weekly, stated in English currency, to the Chief Clerk of the Lambeth Metropolitan Magistrates Court, for the use of the wife and the

maintenance of the children. The order signed by the magistrate declared that it was provisional only and was to have no effect unless and until confirmed by a competent court in Canada.

On August 1, 1952, a certified copy of the order and of the deposition made by the wife before the magistrate in London and the latter's statement of the grounds on which the order might have been opposed in the court in England was forwarded by the Department of the Attorney General to the Family Court for the County of Simcoe, under the provisions of s. 5 of the *Reciprocal Enforcement of Maintenance Orders Act* (c. 334, R.S.O. 1950). On August 6, 1952, a summons was issued by a justice of the peace for the County of Simcoe, reciting the terms of the provisional order made in England and directing Scott to appear before the judge of the Family Court for that county on August 21, 1952, to show cause why the order should not be confirmed.

Scott was served with this summons in the County of Simcoe though, according to an affidavit filed by him later upon the application for prohibition, he was not at that time resident in that county. On the matter coming before the judge of the Family Court, he decided that he had jurisdiction in the matter but adjourned the hearing, having apparently been informed that prohibition proceedings were contemplated.

On September 18, 1953, Scott launched an application for an order prohibiting the judge of the Family Court from taking any further proceedings in connection with the provisional order and, before the hearing of this application, gave notice of the grounds which would be urged in support of it, including the ground that the *Reciprocal Enforcement of Maintenance Orders Act* was *ultra vires* of the Legislature. This application was dismissed by the learned Chief Justice of the High Court, but the appeal (1) taken from his order by Scott was allowed by the unanimous judgment of the Court of Appeal delivered by the learned Chief Justice of Ontario, the Court directing that the prohibition order sought by the appellant be made.

(1) [1954] O.R. 676; 4 D.L.R. 546.

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The Imperial statute under which the proceedings were initiated in England was first enacted as c. 33, 10-11 Geo. V and provides by s. 3(1):—

> Where an application is made to a court of summary jurisdiction in England or Ireland for a maintenance order against any person, and it is proved that that person is resident in a part of His Majesty's dominions outside the United Kingdom to which this Act extends, the court may, in the absence of that person, if after hearing the evidence it is satisfied of the justice of the application, make any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, but in such case the order shall be provisional only, and shall have no effect unless and until confirmed by a competent court in such part of His Majesty's dominions as aforesaid.

The Ontario Act was first enacted in that province as c. 53 of the Statute of 1948. The statute is patterned upon the English Act and expressed in terms which are in many respects identical. The purpose of both statutes is clearly to provide the machinery for registering maintenance orders which are binding upon persons resident and subject to the jurisdiction of a reciprocating state, without the necessity of initiating proceedings anew in that state, and to provide a means whereby proceedings may be initiated for the purpose of taking evidence which may be used in support of an application for maintenance against a person who is subject to the jurisdiction of a reciprocating state and not within the jurisdiction of the court in which such proceedings are taken.

S. 2 of the Ontario Act is to the same effect as s. 1 of the English Act and provides that where a maintenance order has been made against any person by a court in a reciprocating state, that order may, in a manner specified, be registered in the appropriate court in Ontario and proceedings taken under it as if it had been originally obtained in the latter court. The section, while silent on the point, clearly contemplates that the order for maintenance so registered shall have been made by a court having jurisdiction over the person against whom the award is made. This point was so determined in *Re Kenny* (1) by the Court of Appeal. No question as to the power of the Legislature to enact s. 2 has been argued before us and I express no opinion upon the point.

S. 4(1) of the Act empowers the court to which the application is made to make a provisional order of the same

(1) [1951] O.R. 153.

nature as that referred to in s. 3(1) of the English Act. The application may be dealt with *ex parte*, the order made may be such as might have been made if the summons had been duly served upon the person against whom the application is directed and is to be provisional only and without effect until confirmed by a competent court in a reciprocating state.

S. 5 of the Ontario Act and s. 4 of the English Act prescribe the procedure to be followed when an application to "confirm" an order is made to the court in Ontario and England respectively.

As distinguished from orders which may be registered under the provisions of s. 2 of the Ontario statute made by a court having jurisdiction to make an effective award against a person, ss. 3(1) of the English Act and 4(1) of the Ontario Act appear to me to contemplate proceedings when, owing to the husband being a resident of a reciprocating state and thus not within the territorial jurisdiction of the court to which the application is made, an order which might be registered under the terms of s. 2 cannot be made.

The use of the word "confirmed", both in the English and Ontario statutes, seems to be unfortunate. To speak of confirming an order which of itself has no binding effect seems to me to be a misuse of language and it is, indeed, in my opinion, the use of this expression which has invited the attack upon the legislation. In effect, the evidence in the present matter given before the magistrate in London, the transcript of which was forwarded by him with the provisional order, is made evidence in the proceedings in Ontario. The provisional order for maintenance made for the wife and children is an indication of what the magistrate in England considers appropriate in their circumstances. In the proceedings in Ontario, the husband may, by virtue of s-s. 2 of s. 5, raise any defence that he might have raised in the proceedings in England and the magistrate to whom the application is made may "confirm" the order, with such modifications as might be considered just, meaning that he may make such order as he may think proper upon the evidence. The language employed in s-s. 3 of s. 5 again suggests that some legal effect is given

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to the order made in England, but this clearly cannot be so. The order made must derive its legal force and effect entirely from the applicable Ontario statute.

The first objection to the validity of the statute is directed to s-s. 2 of s. 5 which limits the available defences to those that might have been raised in the original proceedings in England. The defences permitted under the law of England, as of the date the *Reciprocal Enforcement of Maintenance Orders Act* came into force in Ontario, may have been extended or limited by legislation passed thereafter in England, and this, it is contended, amounts to a delegation of the authority of the legislature of its power to deal with the civil rights of residents of Ontario. That this cannot be done is made clear by the judgment of this Court in *Attorney General of Nova Scotia* v. *Attorney General of Canada* (1). I have come to the conclusion that this objection should not prevail. It is, in my opinion, a valid exercise of provincial powers under head 13 of s. 92 of the British North America Act to declare that the defences which may be relied upon in proceedings of this nature shall be those from time to time permissible under the laws of England, those laws in substance being adopted and declared to be the law in the province. The provisions of the *Summary Conviction Act of Ontario* which incorporate Part XV and certain other specified sections of the *Criminal Code,* as amended and reenacted from time to time, appears to me to well illustrate such legislation by adoption, if it may properly be so described, and to be valid.

Mr. Gordon R. Foster, to whom the application in the present matter was made, was a police magistrate having jurisdiction in all municipalities of Ontario, a judge of the Juvenile Court in the County of Simcoe and judge of the Family Court in that county. The various appointments to these offices were made by the province under the powers vested in it by head 14 of s. 92. That such appointments were within provincial power cannot be questioned since the decision of this Court in *Re The Adoption Act* (2).

The opinion of the Court of Appeal that the jurisdiction sought to be vested in the court by the *Reciprocal Enforcement of Maintenance Orders Act* was beyond provincial

(1) [1951] S.C.R. 31. (2) [1938] S.C.R. 398, 419.

powers was based upon the ground that it was an attempt by the Legislature to clothe an existing inferior court or some new provincial court with power to determine the legal rights of residents of the province, in respect of orders pronounced in another territorial jurisdiction, and that this was repugnant to the provisions of s. 96 of the *British North America Act*.

With great respect, I am unable to agree with this conclusion. I think the question as to whether courts such as these might decide whether the so called order made in England is enforceable against the husband does not arise in the present matter. The order, with the certified copy of the depositions of the witnesses heard by the magistrate in England, afford evidence upon which the magistrate may make an order against the husband and does nothing more. Any award made must depend entirely for its validity upon the order made by the magistrate under the Ontario statute. It is true that there will be questions of law to be determined when the application is heard as to the proper interpretation of s-s. 1 of s. 3 of the English statute. Such questions, I assume, will include that as to whether the court by which the order was made in London was of the nature referred to in that subsection, whether the order made was such as might have been made if a summons had been duly served on the person against whom the application was directed, as to the grounds of defence available at the time in England and as to the proper construction of portions of s. 5 of the Ontario Act. The important duties imposed upon the provincial judicial appointees charged with the administration of these Ontario statutes require them continually to determine questions of this nature which, of necessity, must be decided to enable them to discharge their functions, and I cannot think that the questions that may arise in this proceeding are in any essential respect different. For these reasons, I think this attack upon the legislation fails.

A further objection to the validity of the statute was that the adoption of this statute and of similar legislation by other reciprocal states indicates that an agreement had been made between the province and such states to legislate in this manner, and so was an entry by the province into matters of international comity and amounted in substance

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to a treaty. The short answer to this contention is that there is no evidence to suggest that any such agreement existed, and that the legislation may be repealed at any time by the legislature which enacted it. No agreement to the contrary by the province, even if it could be suggested that any such agreement had been made, would have any legal effect.

I would allow this appeal. The respondent should be allowed his costs to the extent provided in the order of the Court of Appeal of September 14, 1954, and there should be no other order as to costs.

Appeal allowed; costs as per terms.

Solicitor for the A.G. of Ontario: *C. R. Magone.*

Solicitor for the A.G. of Canada: *F. P. Varcoe.*

Solicitors for the respondent: *Wright & McTaggart.*

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*Oct. 24, 25, 26
*Dec. 22

HER MAJESTY THE QUEEN AND G. J. ARCHER (*Defendants*) .... APPELLANTS;

AND

J. R. C. WHITE (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Certiorari—Disciplinary measures against member of R.C.M.P.—Whether writ available to review proceedings—R.C.M.P. Act, R.S.C. 1952, c. 241.

This was an application by the respondent, a former member of the R.C.M.P., for certiorari to remove into the Supreme Court of British Columbia a record of convictions under the hand of the appellant Archer, a Superintendent of the R.C.M.P., whereby the respondent was convicted of four disciplinary charges laid under s. 30 of the *R.C.M.P. Act.* The trial judge held that certiorari did not lie since the principles denying review of disciplinary decisions of military tribunals applied in the present case. The Court of Appeal reversed this judgment on the ground that the military cases were not applicable.

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

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Estey, Locke and Abbott JJ. Estey J. did not take part in the judgment on account of illness.

Per Kerwin C.J., Taschereau, Rand and Kellock JJ.: Parliament has specified the punishable breaches of discipline and has equipped the R.C.M.P. with its own courts for dealing with them. Unless the powers given those courts to deal with domestic discipline are abused to such a degree as puts action taken beyond the purview of the statute or unless the action is itself unauthorized, that internal management is not to be interfered with by any superior court. Nothing has been alleged here and supported by evidence to show that the proceedings infringed or were outside the authority of either the statute or those underlying principles of judicial process deemed annexed to legislation unless impliedly excluded. Little assistance is to be received from the decisions in matters arising out of the disciplinary or other administration of other bodies.

Per Locke J.: The proper determination of this matter does not depend on whether or not the decisions as to the right of certiorari in courts martial proceedings are applicable. The right of the civil courts to intervene by way of certiorari is undoubted where it is shown that there has been either a want of or an excess of jurisdiction in proceedings taken under ss. 30 and 31 of the *R.C.M.P. Act*. The proceedings authorized under these two sections are of a judicial and not executive or administrative character, and the officer conducting them is obligated to act judicially.

The authority to impose the penalties provided by the Act for offences defined by the Act does not rest on the agreement of the member made at the time of his enlistment, but upon the terms of the statute itself, and it is only those powers authorized to be exercised by that statute that may be invoked against him. There was nothing in the material filed on the application to sustain the charges of fraud, bias or excess of or want of jurisdiction. (*In re Mansergh* (1861 1 B. & S. 400), *Rex* v. *Army Council: ex parte Ravenscroft* (86 L.J.K.B. 1087) and *Heddon* v. *Evans* (35 T.L.R. 642) referred to).

Per Abbott J.: The necessity for maintaining high standards of conduct and discipline in the R.C.M.P. is just as great as it is for the armed forces, and in this respect there is no distinction in principle between the two bodies. Therefore, the authorities which hold that the courts have no power to interfere with matters of military conduct and military discipline generally are applicable to matters involving the conduct and discipline of a force such as the R.C.M.P. The appellant Archer was not acting as a court or judge, but was an officer dealing summarily with breaches of conduct and discipline and was administering discipline in accordance with the statute and regulations to which the respondent voluntarily submitted when he joined the Force.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge on an application for a writ of certiorari.

D. H. W. Henry, Q.C. and *E. R. Olson* for the appellants.

A. Bull, Q.C. for the respondent.

(1) [1954] 12 W.W.R. (N.S.) 315.

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The judgment of Kerwin C.J., Taschereau, Rand and Kellock JJ. was delivered by:—

RAND J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) reversing an order of Wood J. in the Supreme Court refusing certiorari to bring up a conviction made in a proceeding under the *Royal Canadian Mounted Police Act,* R.S.C. 1952, c. 241. The respondent White was a constable of that Force and the appellant Archer a superintendent by whom the conviction was made.

The complaint against White contained four charges, the substance of which was that on November 24, 1952 he conducted himself in a manner unbecoming a member of the Force by condoning the consumption of intoxicating liquor by a female juvenile, by occupying a room in a hotel with such a person, by associating with a female of questionable character, by counseling another constable, his junior in rank, to register at the hotel under an assumed name, and by being intoxicated, however slightly, contrary to paragraphs (*t*), (*v*) and (*c*) of s. 30 of the Police Act. These charges were heard by the superintendent on the 19th and 20th of January, 1953 and the respondent was convicted of all except that of counseling his junior to do the act mentioned. A penalty of $100 and a reduction in rank from corporal to constable was imposed. The fine was reduced by the Commissioner to $50. Subsequently as of March 31, 1953 White was dismissed from the Force.

The application set forth fifteen grounds. In substance they embraced fraud in obtaining the conviction; want and excess of jurisdiction in procedural irregularities, by the improper admission of and want of sufficient evidence, in the disqualification of the superintendent through bias, through being an "advocate or partisan or in collusion with the prosecution" and in that two of the charges were not triable by such a tribunal; that the applicant was not advised of the superintendent's authority to compel witnesses to appear on behalf of the defence; that a full answer and defence were not allowed, that the charge "did not in fact constitute any offence as shown in the evidence pur-

(1) [1954] 12 W.W.R. (N.S.) 315.

porting to substantiate the offence"; and by the acceptance of evidence "pertaining to five separate offences" and adjudicating thereon.

S. 30 of the Act, describing 24 police offences, provides that

every member of the Force, other than a commissioned officer, who is charged with . . .

.....

(*c*) intoxication, however slight;

.....

(*t*) scandalous or infamous behaviour;

.....

(*v*) conduct unbecoming a member of the Force . . . may be forthwith placed under arrest and detained in custody, to be dealt with under the provisions of this Part.

By s. 31,

(1) The Commissioner, the Deputy Commissioner and Assistant Commissioner, a superintendent or other commissioned officer at any post or in any district may, forthwith, on a charge in writing of any one or more of the offences mentioned in this Act or any regulation made under the authority hereof being preferred against any member of the Force, other than a commissioned officer, cause the person so charged to be brought before him and he shall then and there, in a summary way, investigate the said charge, and, if proved on oath to his satisfaction, shall thereof convict the offender; every commissioned officer for the purpose of this section is empowered to administer the necessary oaths in dealing with a charge in a summary way.

(2) Any such offender is liable to a penalty not exceeding one month's pay, or to imprisonment, with hard labour, for a term, not exceeding one year, or to both fine and imprisonment, and also to reduction in rank, in addition in any case to any punishment to which the offender is liable, with respect to such offence, under any other law in force in the Northwest Territories or the Yukon Territory, or in the province in which the offence is committed.

S-s. (3) deals with stoppage of pay when the offender is convicted of absence without leave; s-s. (4) provides for the case of damage to or loss of Government or other property, for which the offender may be required to pay, and in the case of rendering himself unfit for duty, hospital and medical bills incurred; s-s. (6) permits lesser punishments to be imposed, such as confinement to barracks, reduction in seniority, extra fatigues or other similar duties, or being reprimanded, admonished or warned. S. 33 directs that the penalties exacted shall form a fund applicable to the payment of rewards for good conduct or meritorious service, the establishment of libraries and recreation rooms

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and for other objects beneficial to the members of the Force. By s. 43 all fines and sentences of imprisonment with the record of investigation are to be forthwith reported to the Commissioner by whom, in his discretion, they may be mitigated or reversed.

In addition to this internal procedure, for desertion, abstention from duties without leave, refusal to do duty, refusal to deliver up clothing, arms and accoutrements on discharge or dismissal, the offender is liable, on summary conviction, to fine and imprisonment. The demarcation between the two classes seems significant and its explanation appears to be this: the delinquencies in s. 30 are strictly of domestic discipline, that is, the member, by joining the Force, has agreed to enter into a body of special relations, to accept certain duties and responsibilities, to submit to certain restrictions upon his freedom of action and conduct and to certain coercive and punitive measures prescribed for enforcing fulfillment of what he has undertaken. These terms are essential elements of a status voluntarily entered into which affect what, by the general law, are civil rights, that is, action and behaviour which is not forbidden him as a citizen.

As gathered from the statute, what is set up is a police force for the whole of Canada to be used in the enforcement of the laws of the Dominion, but at the same time available for the enforcement of law generally in such provinces as may desire to employ its services. From the beginning it has been stamped with characteristics of the Army: the mode of organization, its barrack life, the uniform, address and bearing of the members, esprit de corps and discipline. On joining the Force he engages for a term of service not exceeding five years, an engagement which he may be compelled to fulfil, and oaths of allegiance and of office are taken. That character, essential in the early days of police functioning in the unsettled territories of the West, has become the badge of the Force and its record is a matter of common knowledge throughout the country. It is significant to this feature that by s. 10(2) of the Act it is declared that

> Notwithstanding the provisions of any Act inconsistent herewith, the Governor in Council has power to prescribe the rank and seniority in the militia that officers of the Force shall hold for the purpose of seniority and command when they are serving with the militia.

and that by s. 41 of the *Militia Act*, R.S.C. 1927, c. 132 it was provided that

> Commissions of officers of the Royal Canadian Mounted Police Force serving with the Militia by order of the Governor in Council shall for the purpose of seniority and command be considered equivalent to commissions issued to the officers of the Militia of corresponding rank from their respective dates according to the following scale, that is to say:—
>
> Commissioner—as lieutenant-colonel;
>
> Assistant commissioner—on appointment, as major,—after three years' service, as lieutenant-colonel;
>
> Senior superintendent—as major;
>
> Other superintendents—as captains; . . .

Parliament has specified the punishable breaches of discipline and has equipped the Force with its own courts for dealing with them and it needs no amplification to demonstrate the object of that investment. Such a code is prima facie to be looked upon as being the exclusive means by which this particular purpose is to be attained. Unless, therefore, the powers given are abused to such a degree as puts action taken beyond the purview of the statute or unless the action is itself unauthorized, that internal management is not to be interfered with by any superior court in exercise of its long established supervisory jurisdiction over inferior tribunals. The question, therefore, is whether or not in the application made before Wood J., including the materials furnished by affidavit, anything has been alleged and supported by evidence to show that the proceedings infringed or were outside the authority of either the statute or those underlying principles of judicial process to be deemed annexed to legislation unless excluded by its implications.

S. 31 directs and authorizes a superintendent in a summary way to "investigate" the charge and if proved "on oath to his satisfaction" to convict. What is being carried out is not a trial in the ordinary sense but an enquiry for the purpose of administration and the mere fact that Parliament has authorized fines and imprisonment does not affect that fact: the contemplated standards of conduct and behaviour of members of the Force are being maintained.

Many of the grounds taken are the usual objections to an ordinary conviction, but that mistakes the nature of what is challenged. On fraud there is not a semblance of evidence offered: and as for the others I put all of them aside except that alleging bias in the superintendent. If,

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taking into account the statutory provisions and the principles mentioned, the officer sitting in judgment on the constable is biased, then he would be disqualified unless, having regard to the character of the Force and to the persons upon whom the function of discipline has been conferred, that conclusion is negatived.

Like an army group, the rank and file are in close association with officers; there is a daily interchange of orders, instructions and reports, and the general conduct and performance of the men comes under continuous and close observation. All are in duty bound to see that in every respect the standards of efficiency and obedience are preserved, and this is the special obligation of officers. In such a self-contained establishment the governing traditions gradually evolved become the instinctive inheritance of one generation of members from another. When s. 31 authorizes a superintendent "or other commissioned officer at any post or in any district" to investigate charges and on proof to his satisfaction to convict the offender, it contemplates an administration of discipline by men sharing a special life in which those who are to be judged participate.

It was said that the superintendent had been furnished with statements of what had taken place and had edited or formulated the charges, but such steps in disciplinary administration, if only for the purpose of formal accuracy, are inevitable. He was said, during the course of the hearing, to have had dinner with the prosecutor, an inspector of the Force, and one of the witnesses: but whatever the purpose and however questionable the judgment exercised by the superintendent, it could not on what is before the Court nullify the proceedings. Parliament has placed reliance for the proper execution of this important function in the responsibility and integrity of these officers. The very existence of the Force as it is conceived depends upon this administration by men of high character, and the Act contemplates the proceedings of discipline to be what may be called as of domestic government. If, within the scope of authority granted, wrongs are done individuals, and that is not beyond possibility, the appeal must be to others than to civil tribunals, or, as in the case of the Army, they must be looked upon as a necessary price paid for the vital purposes of the Force.

Most of the offences enumerated in s. 30 call for judgment based on long experience in the service. The daily round of duty of the superintendent and other officers and the knowledge and information of the experience and vicissitudes of the Force inevitably reaching them were known to Parliament which gave to them the power of disciplinary adjudication; and if the circumstances objected to here were to be held to invalidate such investigations the intendment of the statute would, in large degree, be frustrated. The Commissioner and his staff preserve and create the standards and they are best able to appreciate departures from them.

We were referred to a great many decisions in matters arising out of the disciplinary or other administration of such bodies as ordinary police forces, fire departments, licensing and local boards, but from these I receive little assistance. The nearest analogy is the law of the Army. In *Sutton* v. *Johnstone* (1), although the reasons of Gould J., delivering the opinion of the judges, are not available, the House of Lords seems to have held that no action lay for malicious prosecution in a court-martial and in *Dawkins* v. *Lord Rokeby* (2), that judgment was treated generally to have been to that effect by Willes J. in a dictum which remitted to the military law itself the only remedy for such a wrong; in *Dawkins* v. *Lord Rokeby* (3), an action for libel, the absolute privilege of those engaged in legal proceedings of common law courts, judges, counsel, witnesses, was declared for military courts of enquiry; and in *Dawkins* v. *Paulet* (4), in an action for libel in a letter written to a superior officer in the course of military duty a replication that the letter had been written maliciously was held bad.

What the expression "disciplinary powers" means includes at least sanctions wielded within a group executing a function of a public or quasi-public nature where obedience to orders and dependability in carrying them out are, for the safety and security of the public, essential and their maintenance of standards the immediate duty of every member. This distinguishes the case from such bodies as legal or medical societies of which the members carry on

(1) 1 E.R. 427.
(2) 176 E.R. 800.
(3) (1873) L.R. 8 Q.B. 255.
(4) (1869) L.R. 5 Q.B. 94 at 120.

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their profession independently of the governing body which, in this respect, is concerned only with the investigation of complaints placed before it.

It was argued by the Attorney General of Canada that the disciplinary jurisdiction in the case before us was within the scope of criminal law as committed to the Dominion by the Confederation Act and that, therefore, no appeal lay to the Court of Appeal from the refusal of Wood J. to issue the order, but in the view I take of the case, I find it unnecessary to pass upon that contention.

I would, therefore, allow the appeal, set aside the judgment of the Court of Appeal and restore the order of the court of first instance. There will be no costs in this Court or in the Court of Appeal.

LOCKE J.:—Upon the application of the respondent, a summons was issued out of the Vancouver Registry of the Supreme Court of British Columbia on July 4, 1953, directed to the appellant Archer, a Superintendent of the Royal Canadian Mounted Police, to the Attorney General of British Columbia and two other named officers of the Force, giving notice that the appellant would on July 20, 1953, move for a writ of *certiorari* to remove into that court a certain record of convictions under the hand of the said Archer, as Superintendent, made on January 22, 1953, whereby the respondent was found guilty of four charges laid under the provisions of the *Royal Canadian Mounted Police Act*.

In support of the application, the respondent filed his own affidavit and those of eight other persons containing statements which, it was apparently thought, supported the right of the applicant to claim the issue of such a writ.

The summons came on for hearing before Wood J. and was dismissed. That learned Judge was of the opinion that the Royal Canadian Mounted Police Force was constituted on a military basis, that the principles applicable to the issuance of writs of *certiorari* in relation to the proceedings of military tribunals applied to disciplinary measures such as this, taken against constables of the Force, and that *certiorari* did not lie. Holding this view, he did not discuss the facts disclosed in the various supporting affidavits or the question as to whether they disclosed any want of jurisdiction on the part of the Superintendent to find the

respondent guilty of the charges, or as to whether there had been any act done by him in excess of his jurisdiction.

The respondent appealed to the Court of Appeal (1) and, by the unanimous judgment of that court, the appeal was allowed. The formal order of the Court adjudges:—

> That the said appeal be and the same is hereby allowed and this matter be and it is hereby remitted to the Supreme Court of British Columbia for hearing and determination.

It would appear from the reasons for judgment delivered by the learned Chief Justice of British Columbia, speaking on behalf of the Court, that the only question considered was as to whether *certiorari* would lie to remove into court convictions under the hand of a Superintendent of the Royal Canadian Mounted Police Force. Differing from the view expressed by Wood J., the Court expressed the opinion that the cases dealing with writ of *certiorari* in the case of convictions by Army Courts Martial, of which *Rex* v. *Army Council: ex parte Ravenscroft* (2) is an example, were inapplicable to proceedings of the nature referred to under the *Royal Canadian Mounted Police Act* (c. 160, R.S.C. 1927; c. 241, R.S.C. 1952). No opinion was expressed as to whether the affidavits filed on the application before Wood J. justified the granting of the writ and that question has, accordingly, been neither considered or determined in either court.

The procedure for obtaining the issue of writs of *certiorari* in British Columbia is to be found in the Crown Office Rules (civil), which are simply a transcript of the English Rules of 1886 and, for convenience of reference, the English numbering was adopted in British Columbia. Rule 28 provides that the application shall, except in vacation, be made for an order *nisi* to show cause. It has been held in England that, while the writ is demandable as of absolute right by the Crown, it is granted to the subject at the discretion of the court (*Short and Mellor Crown Practice,* 2nd Ed. 15). The cases cited support this statement.

While cause was shown against an order *nisi,* no material was filed by those to whom the summons was directed.

Had the dismissal of the application been made by Wood J. in the exercise of his judicial discretion, or had

(1) [1954] 12 W.W.R. (N.S.) 315. (2) (1917) 86 L.J.K.B. 1087.

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the Court of Appeal done more than to determine as a matter of law that the principles which have been enunciated in dealing with applications for writs of *certiorari* directed to proceedings before courts martial were inapplicable, it would be necessary for us to consider whether any appeal lay to this Court, by reason of the provisions of s. 44 of the *Supreme Court Act*. In these circumstances, the question does not arise.

The charges laid against the respondent, of which he was found guilty, were declared to be offences by s. 30 of the *Royal Canadian Mounted Police Act* (c. 160 R.S.C. 1927) and punishable under the provisions of s. 31. The punishment imposed was a penalty of $100 and reduction in rank from Acting Corporal to First Class Constable. The Superintendent also recommended, though not as part of the punishment, that the respondent be dismissed from the Force.

Under the Rules and Regulations for the government of the Force approved by the Governor General in Council, any member of the Force other than a Commissioned Officer, feeling himself aggrieved by a recommendation made for his dismissal or by a conviction and punishment awarded him under the provisions of s. 31 of the Act, may appeal to the Commissioner in writing. The respondent availed himself of this privilege and, in the result, the Commissioner reduced the penalty to $50. He, however, exercising the powers vested in him by the Act, dismissed the respondent from the Force.

I do not think that the proper determination of this matter depends on whether or not the decisions as to the right of members of the Armed Forces to invoke the aid of a writ of *certiorari* in proceedings held before courts martial are applicable. A consideration of c. 35 of the Statutes of 1873, by which the Police Force in the Northwest Territories which subsequently became known as the Northwest Mounted Police, and later, by virtue of c. 28 of the Statutes of 1919, the Royal Canadian Mounted Police, was constituted, and of the subsequent statutes dealing with the matter, with their provisions patterned upon those to be found in Acts relating to armies, both in Canada and England, in relation to organization and discipline, lends strong support, in my opinion, to the view that there is

no sound reason why the principles which have been adopted as to the manner in which proceedings before courts martial may be examined and, if found to be in excess of jurisdiction, quashed in proceedings taken in civil courts, should not apply to proceedings of the nature in question here under the *Royal Canadian Mounted Police Act*. It was, apparently, considered necessary at the very outset, when the Force was originally constituted and sent into the unsettled areas of the Northwest Territories, that discipline should be maintained in the same manner as had been found necessary in Military Forces. While conditions have changed, the same plan has been followed in the various Acts by which the original legislation has been amended and extended and which have culminated in the Act which appears as c. 241 of R.S.C. 1952. There may well be circumstances in time of war when the application of these principles to proceedings taken by Armed Forces on active service might be governed by different principles upon grounds of public policy, but this need not be considered in dealing with the present case.

It is unnecessary, in my opinion, to say more than this, that, where it is shown upon an application for a writ under the Crown Office Rules and the proceedings thereafter taken, there has been either a want of jurisdiction or an excess of jurisdiction in proceedings taken under ss. 30 and 31 of the Act, the right of the court to intervene by way of writ of *certiorari* is undoubted. That this is equally so in the case of the proceedings of courts martial in the Army appears to me equally undoubted.

In the present matter, s. 31 of the Act authorizes a Superintendent or other Commissioned Officer, on a charge in writing of any one or more of the offences mentioned in the Act or in any regulation made under its authority being preferred against any member of the Force, to cause the person charged to be brought before him:—

> and there, in a summary way, investigate the said charge and, if proved on oath to his satisfaction, shall thereof convict the offender.

While the offences mentioned in s. 30 are mainly of a character which, in Army parlance, would be described as contrary to good order and military discipline, and the purpose of penalizing them is clearly for the maintenance of discipline in the Force, the proceedings authorized are

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none the less, in my opinion, of a judicial and not executive or administrative character, and the officer conducting the proceedings is obligated to act judicially.

In *Re Mansergh* (1), Cockburn C.J. said in part (p. 406):—

> I quite agree that where the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this Court ought to interfere to protect those civil rights: e.g. where the rights of life, liberty or property are involved, . . .

The decision in *Rex* v. *Army Council: ex parte Ravenscroft* is not, in my opinion, an authority to the contrary. In that case, the application was for a rule *nisi* for a *mandamus* to the Army Council, commanding them to cause a court of inquiry to reassemble and determine, according to law, the case against Colonel Ravenscroft on the grounds that, by a court of inquiry which had been held in France, he had been condemned on certain charges properly classified as breaches of discipline without his defence being fully heard, and that the statutory rules of procedure governing courts of inquiry had not been complied with. The statement of Viscount Reading C.J. (p. 508) that he had:—

> no doubt that this Court has no power to interfere with matters of military conduct and purely military law affecting military rules for the guidance of officers or discipline generally.

cannot be taken as a statement that, where in proceedings directed to the maintenance of good order and military discipline there is an excess of jurisdiction or convictions are rendered in matters beyond the jurisdiction, the courts are powerless to intervene. To so hold would be contrary to long established authority. Thus, in the case of *Humphrey Wade* in 1784, referred to in a note to *Richard Blake's Case* (2), Lord Mansfield C.J. granted a rule directed to General John Bell, to show cause why Wade, a sergeant of Marines then in military custody, should not be discharged. In *Blake's Case,* before Lord Ellenborough C.J. the Attorney General did not oppose the granting of the rule *nisi.* As was pointed out by Lord Mansfield in *Burdett* v. *Abbott* (3), by becoming a soldier a man does not cease to be a citizen. The cases are reviewed by McCardie J. in

(1) (1861) 1 B. & S. 400. (2) (1814) 2 M. & S. 432.
(3) (1812) 4 Taunt. 401 at 449.

Heddon v. *Evans* (1). The following passage from the judgment in that case appears to me to accurately state the position of a member of the Armed Fores (p. 643):—

> The compact or burden of a man who entered the Army, whether voluntarily or not, was that he would submit to military law, not that he would submit to military illegality. He must accept the Army Act and Rules and Regulations and Orders and all that they involved. These expressed his obligations; they announced his military rights. To the extent permitted by them his person and liberty might be affected and his property touched. But save to that extent, neither his liberty nor his person or property might be lawfully infringed. Where, indeed, the actual rights he sought to assert were given not by the common law, but only by military law, then it might well be that in military law alone could he seek his remedy. For if a code at once provided the right and also the remedy, it might rightly be said that he must look to the code alike for the remedy and its method of enforcement. If, however, the rights which he sought to assert were fundamental common law rights, such as immunity of person or liberty, save in so far as taken away by military law, then the common law right might be asserted in the ordinary Courts.

This statement applies, in my opinion, equally to a member of the Royal Canadian Mounted Police, the rights of its members, in this respect, being at least not less than those of members of the Armed Forces. The authority of the Superintendent and the Commissioner of the Force to impose the penalties provided by the Act for offences defined by the Act does not rest on the agreement of the member made at the time of his enlistment, but upon the terms of the statute itself, and it is the powers authorized to be exercised by that statute, and none other, that may be invoked against him.

I do not find in the material filed on the application before Wood J. any evidence to warrant the issue of the writ. There is nothing to sustain the charges of fraud, bias or excess or want of jurisdiction, either in the affidavit of the respondent or in the supporting affidavits. The complaints that there was an absence of legal evidence to support the findings or of evidence as to the age of the Witness Moraes are not matters that go to the jurisdiction (11 Hals. (Simonds Ed.) 62).

While, with respect, I am unable to agree with the reasons which led the learned Judge to dismiss the application, I think it should have been dismissed for the reasons I have stated. I would, accordingly, allow this appeal and set aside the judgment appealed from. I think there should be no costs, either in this Court or in the Court of Appeal.

(1) (1919) 35 T.L.R. 642.

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THE QUEEN AND ARCHER v. WHITE

Locke J.

In view of my conclusion, I refrain from expressing an opinion as to whether an appeal properly lay to the Court of Appeal.

ABBOTT J.:—The principal question in issue in this appeal is whether or not Orderly Room proceedings held under the *Royal Canadian Mounted Police Act,* R.S.C. 1952, c. 241, are subject to review by way of *certiorari.*

The respondent White, a non-commissioned member of the Royal Canadian Mounted Police, was charged with intoxication, scandalous behaviour and conduct unbecoming a member of the Force in breach of s. 30, sub-ss. (*c*), (*t*) and (*v*) of the said Act.

Following an orderly room hearing before the appellant Archer, a superintendent of the Royal Canadian Mounted Police, held under s. 31 of the Act, respondent was found guilty of the conduct complained of, demoted to the rank of constable, and fined $100.

Upon appeal to the Commissioner, in accordance with the Act, the pecuniary penalty was reduced to $50 and respondent was subsequently dismissed from the Force. Respondent then applied to the Supreme Court of British Columbia for a writ of *certiorari* to remove into that Court the record of the proceedings before the appellant Archer, for the purpose of having the same quashed on the ground *inter alia* that the said appellant acted without or in excess of jurisdiction and was biased. The application was dismissed by Wood J. on the ground that the proceedings in question were not subject to review on *certiorari.* The merits were not considered. On appeal (1), this judgment was reversed and the matter referred back to the Supreme Court for hearing and determination.

This appeal is by special leave from the judgment of the Court of Appeal for British Columbia.

The *Royal Canadian Mounted Police Act* and the regulations made thereunder constitute a code of law regulating the recruitment, administration and discipline of the Force.

Although not part of Canada's armed forces, the Royal Canadian Mounted Police are in many respects organized on a military basis, and the terms of recruitment and the provisions made for uniforms, quarters, rations, discipline

(1) [1954] 12 W.W.R. (N.S.) 315.

and pensions closely resemble those of the Army, Navy and Air Force. The necessity for maintaining high standards of conduct and of discipline in the Royal Canadian Mounted Police is just as great as it is for the armed forces, and in this respect I can see no distinction in principle between the two bodies.

In my opinion, therefore, the authorities which hold that the Courts have no power to interfere with matters of military conduct and military discipline generally are applicable to matters involving the conduct and discipline of a force such as the Royal Canadian Mounted Police. See *Rex* v. *Army Council ex parte Ravenscroft* (1) and the authorities discussed and approved therein.

In every application for *certiorari* the real test must be the nature and character of the proceedings which are the subject of such application. That nature and character can be ascertained by an examination of the results to which such proceedings may lead. Applying that test to the present case, in my opinion the appellant Archer was an officer dealing summarily with breaches of conduct and discipline and was administering discipline in accordance with the statute and regulations to which the respondent voluntarily submitted when he joined the Force.

No doubt commanding officers, in hearing charges involving breaches of discipline, should act in a judicial manner. In the Royal Canadian Mounted Police, as in the Army, Navy and Air Force, under the regulations and in the interest of the prisoner, Orderly Room proceedings involving breaches of discipline may and often do follow the forms of law. Nevertheless in such proceedings, in my view, a commanding officer is acting not as a court or judge but as an officer administering discipline.

In the result, therefore, in my opinion the proceedings before Superintendent Archer were not subject to review by way of *certiorari* and I would allow the appeal and set aside the judgment of the Court below. There should be no costs.

Appeal allowed; no costs.

Solicitor for the appellants: *F. P. Varcoe.*

Solicitors for the respondent: *White & Shore.*

(1) [1917] 2 K.B. 504.

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*Oct. 12
*Dec. 22

JOSEPH LEWKOWICZ sometimes known as JOZEF LEWKOWICZ (*Plaintiff*) ..... APPELLANT;

AND

JOSEPH KORZEWICH (*Defendant*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and Wife—Evidence—Marriage—Foreign marriage certificate produced—Presumption as to validity placed in doubt by evidence of prior marriage—Criminal Conversation, Action for—Onus on plaintiff to establish strict proof of marriage relied on—Evidence Act (Imp.) 14-15 Vict. c. 99, R.S.O. 1897, Vol. 3, p. XXIII.

In an action in damages for alienation of affection and criminal conversation the defendant pleaded that the plaintiff's marriage was bigamous by reason of a prior subsisting marriage of the plaintiff's purported wife. At the trial the plaintiff produced a certificate of the marriage performed in England in 1949 in which his wife was described as a spinster. On cross-examination of the plaintiff and his alleged wife, called as a witness for the plaintiff, it appeared that she had in 1946 gone through a form of marriage with one M before a priest in Poland. Later they came to Germany where a prosecution was initiated against M for his subsequent marriage there. The "wife" had been informed by a letter written by a "Summary Court Officer" that the Intermediate Military Government had dropped the proceedings for lack of evidence and that according to the law the Polish marriage was not valid as no civil marriage was performed and the "wife" was entitled to consider herself not married.

Held (Cartwright J. dissenting): That while the certificate of the English marriage was admissible in Evidence (Imperial Evidence Act, 14-15 Vict. c. 99; R.S.O. 1897, Vol. 3, p. XXIII) it could have no more probative value that it would have in the English courts. Its production did not constitute "strict" proof but at most raised a presumption as to its validity and, the presumption having been placed in doubt, the burden resting upon a plaintiff in an action for criminal conversation to establish that the "real" relation of husband and wife existed fell upon the appellant which he failed to discharge. *Catherwood* v. *Caslon* 13 L.J. M.C. 334 at 335; *The King* v. *Bailey* 31 Can. S.C.R. 338; *In re Stollery* [1926] 1 Ch. 284; *Rex* v. *Naguib* [1917] 1 K.B. 359.

Per Cartwright J. (dissenting): The certificate of the English marriage was admissible in evidence and constituted *prima facie* evidence of the facts which it recorded. *Bogert* v. *Bogert and Finlay* [1955] O.W.N. 119, approved. The evidence of the appellant together with the English marriage certificate established a valid marriage unless at the time it was solemnized the "wife" was already married to M. *Burt* v. *Burt* 29 L.J. N.S. (P.M. & A.) 133 and *Catherwood* v. *Caslon* 13 M. & W. 261, distinguished. Whether the *prima facie* case for a valid marriage was displaced by the evidence of the marriage

*PRESENT: Kerwin C.J. and Kellock, Estey, Cartwright and Abbott JJ.
**Estey J. because of illness took no part in the judgment.

ceremony in Poland depended upon the evidence in the record as to that ceremony There being no proof therein that the latter constituted a valid marriage there was no evidence to rebut the *prima facie* case made by the appellant. *Rex* v. *Naguib* [1917] 1 K.B. 359 at 361, 362, followed. *Rex* v. *Wilson* 3 F. & F. 119 and *Re Peete* [1952] 2 All E.R. 599, distinguished. The evidence of the ceremony in Poland without any proof of its validity was not evidence to lead the court to doubt the validity of the English marriage. Evidence of the marriage Law of Poland was equally available to both parties and it would be an anomaly to hold that evidence as to an alleged foreign marriage (which marriage if valid would be a defence to the charge or action as the case may be) which would be insufficient to afford any defence to one accused of bigamy, would yet be sufficient to furnish a defence to one sued for damages for criminal conversation. *Rex* v. *Christie* [1914] A.C. 545 at 564. The trial judge was right in ruling, as a matter of law, that there was no evidence in the record on which the jury could find the appellant's marriage was invalid, and in directing them to proceed on the basis that such marriage was established.

Judgment of the Court of Appeal for Ontario [1954] O.W.N. 402, affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) setting aside the judgment of Wilson J. entered on the finding of a jury and awarding the plaintiff $2,800 damages in an action for criminal conversation and alienation of the affections of the plaintiff's wife.

S. L. Robins for the appellant.

C. D. Gibson for the respondent.

The judgment of Kerwin C.J. and of Kellock and Abbott JJ. was delivered by:—

KELLOCK J.:—The sole question in issue in this appeal is as to whether the appellant sufficiently established a valid marriage in England in 1949 to the other party to that ceremony, having regard to the burden of proof resting upon a plaintiff in an action for criminal conversation.

The law in such case was stated by Parke B. (delivering the judgment of the court consisting of himself, Pollock, C.B., Alderson B., and Rolfe B.) in *Catherwood* v. *Caslon* (2). The marriage there in question had taken place at the office of the British Consul in Beyrout, Syria. In the course of his judgment, Parke B., said, at p. 335:

. . . it was contended, that in an action for criminal conversation, being an action against a wrong-doer, it is quite sufficient to shew that the parties intended to celebrate, and in their minds did celebrate a lawful form of marriage; and that if they afterwards cohabited as man and

(1) [1954] O.W.N. 402.

(2) (1844) 13 L.J. M.C. 334.

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wife on the faith of this *bona fide* belief, it constituted *primâ facie* a sufficient marriage *de facto,* and was a good foundation for the plaintiff's maintaining an action against the defendant, at least until the defendant should affirmatively shew that the marriage was unlawfully contracted, . . .

In rejecting this contention, the learned judge said, at p. 336:

> The cases of *Morris* v. *Miller* (1) and *Birt* v. *Barlow* (2) *and uniform practice ever since their decision,* seem to have settled that in actions of this nature (as in indictments for bigamy), it is necessary for the plaintiff to shew what the Courts call a marriage *de facto,* which, we think, means an actual valid marriage, or one which is voidable only, and good until it is avoided; . . . and unless the plaintiff proves a marriage *whereby the real relation of husband and wife is created,* he cannot succeed . . . It must be proved to be really a contract sufficient according to the law, at least sufficient in the first instance.

With respect to the particular facts before the court, Parke B., had said, at p. 335:

> Upon the facts stated, we do not know what was the marriage law of Syria, where this took place, as to marriages of British subjects there residing, or whether British subjects might not marry by such a form of marriage in that country. We are left in complete uncertainty whether the marriage be unlawful, if it be necessary for the defendant to shew that to be the case. And the question then is, whether the plaintiff, in the first instance, must shew this marriage to be clearly legal, or whether he has done sufficient to cast the burthen of shewing the contrary on the defendant; and, we think, the burthen is on the plaintiff, and that he has not done sufficient to establish a *prima facie* case against the defendant.

The above states accurately the law of Ontario, as was decided by this court in *The King* v. *Bailey* (3). In delivering the judgment of the court, Gwynne J., said at p. 342:

> Evidence of an actual marriage, i.e., a marriage *de jure,* was undoubtedly necessary although there was no plea on the record denying the marriage and expressly putting it in issue.

The marriage there in question had been, as in the case at bar, performed in England. It may be observed that in the affidavit of the Superintendent Registrar at Nottingham a certificate of the marriage was produced and the witness deposed that according to the laws of England, the said marriage was a legal and valid marriage "providing there were no legal obstacles existing at the time the ceremony was performed". This is a correct statement of the law and it was supplemented by an affidavit of an English solicitor who deposed that a legal marriage had been con-

(1) 4 Burr. 2057. (2) 1 Doug. 171.
(3) (1901) 31 Can. S.C.R. 338.

summated between the parties mentioned in the certificate. There was no evidence in the record raising any doubt upon the matter.

The decision of the Appellate Division in *Mellen* v. *Dobenko* (1), is in accord. The judgment of Grant J., as he then was, at the trial (2), in which he did not strictly apply the rule recognized in *King* v. *Bailey, ubi cit,* was reached without reference to that decision, which was apparently not cited.

In the case at bar, the "wife", whose maiden name was Janina Wicherkiewicz, and who was called as a witness on the appellant's behalf, testified that before she had gone through the marriage to her "second" husband, the appellant, she had been previously married to one Bartolomie Majcher, in Poland. The appellant admitted that at the time of the marriage of 1949, he knew of this previous marriage, but said that "she had the papers she was divorced" and that it was "on the basis" of these papers that the marriage took place.

The "papers" referred to consisted of a marriage certificate signed by a parish priest in Poland of the marriage performed by him between Janina Wicherkiewicz and Bartolomie Majcher, both giving their religion as Roman Catholics, the date of the marriage being stated as the 22nd of April, 1946. There was also another marriage certificate produced relating to a subsequent marriage of Bartolomie Majcher to one Wanda Irene Krol on the 2nd of April, 1947. The alleged "divorce" was a carbon copy of a letter, dated the 5th of November, 1947, purporting to have been written by one Capt. W. J. Quick, described as "Summary Court Officer" to Janina, stating that

> The Intermediate Military Government Court has dropped the bigamy case of Bartolomie Majcher for lack of evidence. According to the law your marriage is not valid as no civil marriage was performed and you are therefore entitled (sic) to consider yourself not married.

Apart from the last mentioned document, which is, of course, of no evidentiary value, the position of the appellant and Janina was that the previous marriage of the latter was subsisting. It was evidently assumed that Majcher was still living and no effort was made to prove the contrary.

(1) (1927) 61 O.L.R. 340. (2) 60 O.L.R. 555.

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Dealing first with the marriage upon which the appellant relies, that of 1949 in England, it is, of course, a foreign marriage so far as the courts of Ontario are concerned, and while there is no doubt that the certificate of this marriage is admissible in evidence under the *Imperial Evidence Act*, 14-15 Victoria, c. 99, which is in force in Ontario; see R.S.O., 1897, Vol. 3, p. XXIII, it can have no more probative force that it would have in the English courts, either from the standpoint of the validity of the marriage to which it relates or to any of the statements which it contains, such as that Janina was a "spinster" at the time. The English authorities are quite clear.

In *in re Stollery* (1), the Court of Appeal had to consider the probative force of statements in certain birth and death certificates as to the marriage of the persons stated in the certificates to have been the parents of the persons whose births and deaths were in question. As in the case at bar, the "Act for Registering Births, Deaths and Marriages in England" (1836) 6 & 7, Wm. IV, c. 86, was the relevant statute. Pollock M.R., in the course of his judgment, at p. 311, said:

> It would appear, therefore, . . . that these certificates ought to be received in evidence, and that they would appear to be some evidence—I do not at all say conclusive evidence—of the facts and of the date of birth and of the date of death recorded in them;

At p. 314, Pollock M.R., continued:

> In my judgment these certificates are admissible in evidence upon the issue whether or not the parents of Cecilia Stollery were married. I do not say that they are *prima facie* evidence proving that marriage, in the sense that in the absence of a rebuttal they ought to be acted upon without more. I do not mean so to hold. In any case evidence of identification of the persons named in the certificates will be required. But it appears to me that these certificates are admissible in evidence in the inquiry.

At 323, Scrutton L.J., said:

> . . . it is quite clear, as I have said, that the statement in the certificate alone is not prima facie evidence, because on that statement alone you have no evidence of identification, and therefore it is quite obvious that it is not prima facie evidence by itself. It appears to me that the statement is admissible in evidence, and what its effect is must be determined in conjunction with the other evidence which is put before the Master at the inquiry.

In *Tweney* v. *Tweney* (2), a petition for divorce, the petitioner had been twice married and in the certificate

(1) [1926] 1 Ch. 284. (2) [1946] 1 All E.R. 564.

relating to the second marriage she was described as a "widow". She had given this information because she had not heard from her first husband for several years. At p. 565, the trial judge, Pilcher J., said:

> The way in which the matter should be regarded is in my view this. The petitioner's marriage to the respondent being unexceptionable in form and duly consummated remains a good marriage *until some evidence is adduced that the marriage was, in fact, a nullity.*

Again, in *Re Peete* (1), before Roxburgh J., the plaintiff claimed to be entitled under the *Inheritance (Family Provision) Act, 1938*, as the widow of the deceased. To prove this she produced a certificate of marriage with the deceased in which she was so described. She gave evidence that her first husband had died previously, but was unable to produce a certificate of his death. Roxburgh J., after pointing out that the registrar under the relevant legislation "is charged with no duty to require proof that the parties are capable of being married", or to satisfy himself that any information given him by the parties to any marriage is true (being merely empowered by s. 7 of *The Marriage Act* of 1836, s. 85, to ask the parties certain questions), held

> . . . if the production by the plaintiff of the certificate and the statement that her previous husband died in 1916 had stood alone, and no evidence had been called which led the court *to doubt* the fact of his death, it would have been right and proper to act on the certificate and to hold that she had been duly married to the testator, and, therefore, was now his widow. On the other hand, it seems to me that once the matter is put in issue by evidence which *suggests a doubt about it,* the certificate is of little value. Once the circumstances are investigated, the certificate carries the matter no further.

Again, in *Re Watkins* (2), also a case under the *Family Provision* legislation, Harman J. acted upon the same principle as had Pilcher J. and Roxburgh J. This view of the law has been recently acted upon in Ontario by Gale J. in *Bogert* v. *Bogert* (3).

These authorities, as well as others to which I shall have occasion to refer, clearly indicate that the mere production of the English marriage certificate in the case at bar did not constitute "strict" proof of the marriage to which it relates but, at the most, raised a presumption as to its validity and constituted "some" evidence of the statements it contains. Any expert evidence, had it been tendered, could not have

(1) [1946] 2 All E.R. 599. (2) [1953] 2 All E.R. 1113.
(3) [1955] O.W.N. 119.

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gone further than did the evidence in *King* v. *Bailey*, namely, that the marriage would have been valid barring any existing legal obstacle such as the fact of the "wife" having been previously married. Such evidence would not, of course, have proved the validity of the marriage at all.

Accordingly, the statement in the marriage certificate, originally emanating from Janina, that she was a "spinster", while no doubt some evidence, and doubtless sufficient evidence of that fact had it stood alone, does not stand alone but is contradicted by evidence, which also emanates from her, that she was already married. This status continued unless there had been a "divorce" or unless (as was really intended by the use of the word) the previous marriage was invalid, or unless her first husband was dead, as to which the appellant adduced no evidence.

As already pointed out, in an action of this character it is the marriage *upon which he relies* that a plaintiff must prove strictly. This requirement in no way interferes with but, on the contrary, requires that the operation of the presumption as to the validity of any other marriage established by such cases as *Rex* v. *Inhabitants of Brampton* (1), and *Spivak* v. *Spivak* (2), must be overcome. Even putting aside any such presumption, it was quite open to the appellant to admit the previous marriage as he in fact did. Such admissions are admissible without question, as was the case in *Baindail* v. *Baindail* (3), and *R.* v. *Dolman* (4). In these circumstances, therefore, it cannot be said in my opinion that the appellant has met the onus resting upon him.

The matter may be tested from the standpoint of a prosecution for bigamy. In such case it is the first marriage which it is incumbent upon the Crown to prove strictly and that the prisoner went through a subsequent form of marriage while his first wife was still alive. The second marriage need not be shown to have been such as to constitute a valid marriage but for the first; *Reg.* v. *Brierly* (5) at 537; *Reg.* v. *Allen* (6); *R.* v. *Robinson* (7). In *Reg.* v. *Orgill* (8), the *second* marriage was held sufficiently proved

(1) (1808) 10 East. 282.
(2) (1930) 142 L.T. N.S. 492 at 495.
(3) [1946] 1 All E.R. 342.
(4) (1949) 33 Cr. App. R. 128.
(5) 14 O.R. 525.
(6) L.R. 1 C.C.R. 367.
(7) (1938) 26 Cr. App. R. 129.
(8) 9 C. & P. 80.

by the evidence of the woman herself if the jury believed her. This is on the same footing as the proof of the earlier marriage given by Janina herself in the case at bar, it being the "last" marriage with respect to which, in cases of criminal conversation, it is incumbent upon a plaintiff to prove strictly.

In *Rex* v. *Naguib* (1), the Crown proved that the appellant had been married twice in England, once in 1903 and again in 1914. The appellant contended that the marriage of 1903 was invalid on the footing of his own evidence that he had been previously married in Egypt in 1898. This defence failed for the reason that as it was the appellant *who was relying upon the foreign marriage,* it was for him to establish its validity. Viscount Reading C.J., put the matter thus, as reported in the Law Times, at p. 641:

> There can be no doubt that *where the case for the prosecution is based upon* a foreign marriage, the Crown must prove everything which is essential to the validity of a marriage according to the law of the foreign country, and that law can only be proved by someone who knows the law . . . This court is clearly of opinion that *a claimant who relies* on a foreign marriage, or the Crown in a prosecution for bigamy, where an earlier marriage in a foreign country is alleged, must bring forward expert evidence in order that the validity of the marriage according to the law of the foreign country may be proved. There can be in our opinion no difference in the law as applied to the case of defendants.

In the Law Reports, at p. 361:

> There is no doubt that, *where the prosecution relies upon a foreign marriage,* it is incumbent upon the Crown to prove the essential requisites of a valid marriage according to the law of the foreign country, and that the foreign law can only be proved by someone conversant therewith. . . . Therefore we are clearly of opinion that a claimant relying on a foreign marriage, or the Crown in a prosecution for bigamy alleging an earlier marriage in a foreign country, must adduce expert evidence to prove the validity of the marriage according to the law of the foreign country. We see no difference in the law applicable to defendants.

In *Rex* v. *Shaw* (2), also decided by the Court of Criminal Appeal, the appellant had been married in England in 1942 and again in 1943. The first marriage was proved by the evidence of the wife and by the production of a certificate of the marriage. One of the witnesses for the Crown stated in cross-examination that the appellant had stated to him that at the time of the marriage of 1942, he had been previously married in Canada but the appellant himself gave no evidence. It was held by the Common

(1) [1917] 1 K.B. 359; 116 L.T. 640.

(2) (1943) 60 T.L.R. 344.

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Serjeant that the evidence given for the Crown, including the certificate of marriage, *created a presumption* that that marriage was a legal and effective marriage. There being no evidence to the contrary, the presumption remained. The conviction was affirmed.

Atkinson J., in delivering the judgment of the court, pointed out that even if the fact were as contained in the statement made by the appellant to the police, the only result would be that he had committed bigamy twice instead of once, and that following the earlier decision of the court in *Rex* v. *Morrison* (1), the presumption as to the validity of the first English marriage had not been displaced.

In *Morrison's* case, one "H" had been married in England and then went to live in this country with her husband, whom, however, she last saw here in 1928. On March 11, 1938, she was married to the appellant, describing herself as a "widow". Later, on the 16th of the same month, the appellant married "I" and was charged with bigamy. The jury were directed that the first marriage of March 11, being *prima facie* lawful, it was for them to consider whether the evidence was such as to make it unlawful, and that *if they had any doubt* about the legality of the first marriage, they must acquit the prisoner. It was held by the Court of Criminal Appeal that this was a proper direction.

In the case at bar, the evidence on behalf of the appellant never at any time advanced his case beyond a state of doubt. That being so, he has failed to discharge the burden of proof resting upon him to establish that the "real" relation of husband and wife existed between himself and the witness Janina.

I would dismiss the appeal with costs.

CARTWRIGHT J. (dissenting):—This action, for damages for alienation of affection and criminal conversation, was tried before Wilson J. and a jury and the appellant was awarded $2,800 damages. This judgment was set aside by the Court of Appeal on the ground that the plaintiff had not proved that he was validly married to the woman who is described in the statement of claim as his wife and to whom it will be convenient to refer as Janina Lewkowicz.

(1) (1938) 27 Cr. App. R. 1.

In view of their decision on this point the Court of Appeal did not find it necessary to deal with the other grounds set out in the notice of appeal.

The pleadings so far as they are relevant to this point are as follows. In the statement of claim the appellant alleges in paragraph 1 that he is the husband of Janina Lewkowicz. Paragraph 2 is as follows:—

> The plaintiff says that the plaintiff on or about the 15th day of January, 1949, was lawfully married to one Janina Lewkowicz, whose maiden name was Janina Wicherkiew, in Brighton, England, and the plaintiff and the plaintiff's spouse came to Canada and have been residing in Toronto, Canada, since 1951.

In paragraph 2 of the statement of defence the respondent pleads:—

> The defendant alleges that the purported marriage of the plaintiff alleged in the second paragraph of the Statement of Claim herein was bigamous, null and void *ab initio,* by reason of a prior subsisting marriage of Janina Lewkowicz, the purported wife of the plaintiff.

In his reply the appellant denies paragraph 2 of the statement of defence and joins issue.

At the trial there was filed as Exhibit 1, a certified copy of an entry of marriage, pursuant to the Marriage Acts, 1811 to 1939, in which is recorded a marriage solemnized by licence at the Register Office in the District of Hove on January 5, 1949, between the appellant and Janina Wicherkiewicz he being described as a bachelor and she as a spinster. It was proved that the parties named in this exhibit were the appellant and Janina Lewkowicz. Evidence was given that they had thereafter lived together and been known as man and wife.

For the reasons given by Gale J. in *Bogert* v. *Bogert and Finlay* (1), I agree with his conclusion that a certificate such as Exhibit 1 is admissible in evidence in the courts of Ontario and constitutes *prima facie* evidence of the facts which it records. It was not questioned that, provided the parties to it had the capacity to marry, the marriage recorded in Exhibit 1 was valid according to the law of England and of Ontario. No question was raised as to the capacity of the appellant but only as to that of Janina Lewkowicz. At the trial, it appeared from the cross-examination of the appellant and of Janina Lewkowicz that she had, on April 22, 1946, gone through a form of marriage

(1) [1955] O.W.N. 119.

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before a priest in Poland with one Bartlomie Majcher. While Janina Lewkowicz stated she had been divorced from him it is clear that what she meant was that, before marrying the appellant, she had been informed that her supposed marriage with Majcher was void as there had been no civil marriage. No evidence was given at the trial as to the law of Poland or to shew whether according to that law the supposed marriage between Janina Lewkowicz and Bartlomie Majcher had any legal validity. There was no evidence to suggest that Bartlomie Majcher was not still living at the date of the marriage between the appellant and Joseph Lewkowicz. The question is whether, on this record, the appellant had satisfied the onus of proving that Janina Lewkowicz was his wife.

In *Birt* v. *Barlow* (1), Lord Mansfield said:—

> An action for criminal conversation is the only *civil* case where it is necessary to prove an *actual* marriage. In other cases, cohabitation, reputation, etc. are equally sufficient since the marriage act as before. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by persons giving the name and character of *wife* to woman to whom they are not married, it struck me, in the case of *Morris* v. *Miller,* that in such an action, a marriage in fact must be proved.

The sense in which Lord Mansfield used the words "actual marriage" appears from his statement in *Morris* v. *Miller* (2):—

> Proof of *actual* marriage is always used and understood in opposition to proof by cohabitation reputation and other circumstances from which a marriage may be *inferred.*

It appears to me that the evidence of the appellant, together with Exhibit 1, established an actual marriage duly solemnized and valid in law, unless at the time it was solemnized Janina Lewkowicz was already married to Majcher. This, I think, distinguishes the case at bar from *Burt* v. *Burt* (3), in which there was no proof that the marriage of the defendant in Australia which was claimed to be bigamous would have been valid according to the law of that country if solemnized between persons with the capacity to marry, and from *Catherwood* v. *Caslon* (4) in which there was no proof that the marriage in Syria

(1) (1779) 1 Doug. 170 at 174.
(2) (1767) 4 Burr. 2057 at 2059.
(3) (1860) 29 L.J. N.S. (P.M. & A.) 133.
(4) 13 M. & W. 261.

between the plaintiff and the woman whom he claimed to be his wife was valid according to the marriage law of Syria.

Can it be said that the *prima facie* case for a valid marriage made by the appellant is displaced by the evidence of the marriage ceremony in Poland? The answer to this question appears to me to depend upon the evidence in the record as to that ceremony regardless of whether such evidence was elicited from the appellant and his witnesses or introduced through the witnesses called for the respondent. In my view there being no proof in the record that the ceremony performed in Poland constituted a valid marriage there is no evidence to rebut the *prima facie* case made by the appellant. The applicable law is, I think, accurately stated by Viscount Reading C.J. in delivering the judgment of the Court, the other members of which were Bray and Atkin J.J., in *Rex* v. *Naguib* (1), as follows:—

> There is no doubt that, where the prosecution relies upon a foreign marriage, it is incumbent upon the Crown to prove the essential requisites of a valid marriage according to the law of the foreign country, and that the foreign law can only be proved by some one conversant therewith.
>
> * * *
>
> Therefore we are clearly of opinion that a claimant relying on a foreign marriage, or the Crown in a prosecution for bigamy alleging an earlier marriage in a foreign country, must adduce expert evidence to prove the validity of the marriage according to the law of the foreign country. We see no difference in the law applicable to defendants.

In *Naguib's* case the Crown proved that the accused went through a form of marriage according to English law in England in 1903 with one Annie Wheeler and that in 1914, Annie Wheeler being still alive he went through a form of marriage according to English law in England with Teresa Sullivan. The defence proved that in 1898 the accused went through a form of marriage with a woman in Egypt who was still living when he married Annie Wheeler and whom he had divorced in 1913. The accused, who was not a lawyer, deposed that the Egyptian marriage was valid according to the law of that country, but there was no competent evidence of the marriage law of Egypt. Avory J. at the trial ruled that the evidence of the Egyptian marriage was no defence to the charge and his ruling was affirmed by the Court of Criminal Appeal.

(1) [1917] 1 K.B. 359 at 361, 362.

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The analogy between *Naguib's* case and the case at bar appears to me to be very close. In *Naguib's* case the Crown made out a case of a marriage in England in 1903 valid unless the accused was then already married. In the case at bar the appellant made out a case of a marriage in England in 1949 valid unless Janina Lewkowicz was already married. In *Naguib's* case it was held that proof of a former marriage ceremony in a foreign country could not avail the defendant without proof of the marriage law of that country to establish the legal validity of the ceremony. I think the same holding should be made in the case at bar.

It is suggested that the decision in *Naguib's* case is at variance with that in *R.* v. *Wilson* (1), but it will be observed that in the last mentioned case, Crompton J. did not decide as a matter of law that a defence was made out without proof of the marriage law of Canada. He suggested to counsel for the prosecution that "although there might be some technical difficulty in proving the marriage in Canada" (which marriage if established furnished a defence to the indictment), he ought not to press the charge, and counsel fell in with this suggestion.

Re Peete (2), referred to by the Court of Appeal, appears to me to be correctly decided but to be distinguishable on the facts. In that case the marriage relied upon by the claimant was valid unless at the time it was solemnized her husband by a former marriage, admittedly valid, was alive. Roxburgh J. held that there was no admissible evidence to shew that the former husband was not still living at the date of the later marriage. At page 602 Roxburgh J. accepts what was said by Pilcher J. in *Tweney* v. *Tweney* (3):—

> This court ought to regard the petitioner, who comes before it and gives evidence of a validly contracted marriage, as a married woman, until some evidence is given which leads the court to doubt that fact.

Applying this to the case at bar, it is my view that evidence of the ceremony in Poland without any proof of its validity under Polish marriage law is not evidence to lead the court to doubt the validity of the 1949 marriage in England.

(1) (1862) 3 F. & F. 119. (2) [1952] 2 All E.R. 599.
(3) [1946] 1 All E.R. 564.

It was argued for the respondent that the onus of proving that the Polish ceremony was invalid was upon the appellant and reliance was placed on the words of Ferguson J.A. in *Pleet* v. *Canadian Northern Quebec R. W. Co.* (1):—

> Where the subject matter of the allegation lies particularly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character.

But in the case at bar the subject matter as to which there is a complete lack of evidence is the marriage law of Poland and that does not lie particularly within the knowledge of either party. While the obtaining of such evidence might well be attended with both difficulty and expense it is equally available to both parties.

I have examined all the other cases cited to us but none of them appear to me to furnish sufficient grounds for rejecting the view of the law expressed in *Naguib's* case. If I am right in my view that *Naguib's* case was correctly decided, it would be an anomaly to hold that evidence as to an alleged foreign marriage (which marriage if valid would be a defence to the charge or action as the case may be) which would be insufficient to afford any defence to one accused of bigamy would yet be sufficient to furnish a defence to one sued for damages for criminal conversation. While Lord Mansfield assimilated an action for criminal conversation to a criminal prosecution he did not suggest that the party sued should be in a better position in relation to the rules of evidence than the party indicted. To so hold would be contrary to the general rule which was stated in the following words by Lord Reading in *Rex* v. *Christie* (2):—

> The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action.

I conclude that the learned trial judge was right in ruling, as a matter of law, that there was no evidence in the record on which the jury could find that the appellant's marriage to Janina Lewkowicz was invalid, and in directing them to proceed on the basis that such marriage was established. It follows that the appellant is entitled to succeed so far as this point is concerned.

(1) (1921) 50 O.L.R. 223 at 227. (2) [1914] A.C. 545 at 564.

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It remains to consider the other grounds relied on by the respondent and with which the Court of Appeal found it unnecessary to deal. These are set out in the respondent's factum as follows:—

1. That the facts disclosed that the plaintiff's alleged wife left the plaintiff in January 1952, after a quarrel. Under those circumstances there was no alienation of affection.

2. The learned trial judge allowed evidence of adultery to be given by Janina Lewkowicz in Reply. He commented unfavourably at the trial on this evidence, but the harm had been done, and even though the learned trial judge told the jury to disregard such evidence, the evidence was very prejudicial to the defendant and amounted to a substantial wrong or miscarriage of justice. In effect the plaintiff split his case by giving evidence of adultery in chief and in reply.

3. Such evidence was given without any warning as is required by Section 8 of the *Evidence Act,* R.S.O. (1950) chapter 119.

4. The learned trial judge told the jury that damages could be awarded in respect of each act of adultery. It is respectfully submitted that His Lordship erred in so charging the jury and in doing so, he failed to give a proper charge to the jury as to the principle of awarding damages in an action for criminal conversation.

5. The learned trial judge failed to charge the jury that the onus was on the plaintiff to prove adultery beyond a reasonable doubt.

As to ground 2 above, it is clear that the appellant having called evidence of adultery as part of the case opened by him was not entitled to divide his case and call further evidence in support of that charge in reply; but it appears from the record that counsel for the appellant had no such intention and that the witness Janina Lewkowicz volunteered the evidence as to adultery in an answer which was not strictly responsive to the question put to her. The learned trial judge warned the jury to disregard this evidence, and counsel for the respondent did not ask that the jury be discharged and the case tried again before a different jury. There may well be cases where, a piece of inadmissible evidence having been heard by the jury, no warning from the judge can remedy the harm which has been done; but this is not such a case. The evidence was not inadmissible *per se* but only because it was heard at the wrong stage in the proceedings and there was ample other evidence in the record to support the jury's finding on the issue of adultery.

Ground 3 above is disposed of adversely to the appellant by the decision of this Court in *Welstead* v. *Brown* (1). In

(1) [1952] 1 S.C.R. 3 at 22, 23.

that case the following passages from the judgment of Logie J. in *Elliott* v. *Elliott* (1) were cited with approval:—

> As a matter of practice, the Judge, before any evidence is given, should inform the witness of the privilege given to him or her by sec. 7, and it would be well for counsel to advise the witness before he or she goes into the box at the trial or before the party is sworn in an examination for discovery, that he or she is not liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery unless such witness falls within the exception provided by the section itself.
>
> * * *
>
> Nevertheless the privilege is the privilege of the witness, and if not taken advantage of by him or her, the evidence both at the trial and upon examination is admissible.

In the case at bar it cannot be suggested that the learned trial judge should have informed the witness of her privilege as he had no reason to anticipate that she was about to volunteer evidence that she had been guilty of adultery; and the failure to give such information, even in a case in which it should be given, does not, in Ontario, render the evidence inadmissible.

Ground 5 above is disposed of by the judgment in *Smith* v. *Smith and Smedman* (2); in my view, the charge of the learned trial judge as to the onus lying on the plaintiff was adequate and in accordance with the principle of the decision in that case.

Grounds 1 and 4 above may be dealt with together. The charge to the jury must of course be read as a whole and in the light of the evidence; and, when this is done, it appears to me that the learned judge instructed the jury fully and accurately as to the law in regard to damages for alienation of affection and for criminal conversation, giving due weight to all matters in the evidence which told in favour of the respondent, including specifically the fact that the appellant was separated from his wife when the respondent commenced paying attention to her. I am unable to find any misdirection.

For the above reasons I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *B. J. S. Pitt.*

Solicitors for the respondent: *Hazel & Gibson.*

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(1) [1933] O.R. 206 at 211, 212. (2) [1952] 2 S.C.R. 312.

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*Dec. 5
*Dec. 9

REFERENCE RE REGINA v. COFFIN

MOTION DECLINING THE COURT'S JURISDICTION

Jurisdiction—Power of this Court to hear Reference by Governor General in Council—Criminal case—Supreme Court Act, R.S.C. 1952, c. 259, s. 55.

In a preliminary objection to the jurisdiction of this Court to hear the Reference made by the Governor General in Council in *Regina* v. *Coffin* (1956 S.C.R. 191), it was contended by the Attorney General of Quebec that the Order-in-Council went beyond the terms of s. 55 of the *Supreme Court Act* (R.S.C. 1952, c. 259), in that a judicial opinion was asked on a matter as to which there was *res judicata;* that it was an interference with the administration of justice in a province and that under s. 596 of the *Criminal Code* there was no power to refer the matter to this Court.

Held: The motion should be dismissed.

Per Kerwin C.J., Taschereau, Locke, Cartwright and Fauteux JJ.: By the terms of s. 55(6) of the *Supreme Court Act,* the opinion of the Court is a final judgment only for the purposes of appeal to Her Majesty in Council. While the opinion will be followed as a general rule, there is no *lis* between the parties. S. 55 and particularly s-s. (1)(*e*) is wide enough to cover this case and there is precedent for such a reference. Furthermore, whether the Governor General in Council desired the opinion in order to come to a conclusion on the question of clemency or in order to assist the Minister of Justice in deciding what action he should take under s. 596 of the *Criminal Code,* the reference was authorized by s. 55.

Per Rand and Kellock JJ.: The reference falls under s. 55(1)(*d*) and (*e*) of the *Supreme Court Act.*

Objection raised by the Attorney General of Quebec to the jurisdiction of this Court to hear the Reference in *Regina* v. *Coffin.*

N. Dorion, Q.C. and *P. Miquelon, Q.C.* for the motion.

G. Favreau, Q.C. and *A. J. MacLeod, Q.C.* contra.

A. E. M. Maloney, Q.C. and *F. de B. Gravel* for the accused.

The judgment of Kerwin C.J., Taschereau, Locke, Cartwright and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—The Attorney General of Quebec raised a preliminary objection to the jurisdiction of this Court to hear this Reference and it is, therefore, advisable

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

to set out the relevant parts of s. 55 of *The Supreme Court Act*, R.S.C. 1952, c. 259, under the authority of which the Order of Reference was made:—

> 55 (1) Important questions of law or fact touching
>
> (*a*) the interpretation of the British North America Acts;
>
> (*b*) the constitutionality or interpretation of any Dominion or provincial legislation;
>
> (*c*) the appellate jurisdiction as to educational matters, by the British North America Act 1867, or by any other Act or law vested in the Governor in Council;
>
> (*d*) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised; or
>
> (*e*) any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;
>
> may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.
>
> (2) Where a reference is made to the Court under sub-section (1) it is the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.
>
> * * *
>
> (6) The opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to Her Majesty in Council, be treated as a final judgment of the said Court between parties.

Mr. Dorion did not argue that this section was *ultra vires* Parliament, but he did contend that the Order-in-Council went beyond the terms of the section and submitted that what was asked was a judicial opinion, as to which the doctrine of *res judicata* would apply. Sub-section (6) was relied upon as indicating that the opinion was a final judgment but, as the sub-section itself states, this was only for the purposes of appeal to Her Majesty in Council. In any event, while undoubtedly the opinions expressed by the Members of the Court on a Reference will be followed as a general rule, there is no *lis* between parties. In view of the wide terms of the provisions of the section, and particularly of s-s. (1) (*e*), this contention cannot be sustained.

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Kerwin C.J.

Mr. Dorion next contended that it was an interference with the administration of justice within a province which matter, by Head 14 of s. 92 of *The British North America Act*, was committed exclusively to the Provincial Legislature. In that connection he pointed to the following language used by Chief Justice Fitzpatrick in *In re References by Governor General in Council* (1):

> If in the course of the argument or subsequently it becomes apparent that to answer any particular question might interfere with the proper administration of justice, it will then be time to ask the executive, for that reason, not to insist upon answers being given; and this might very properly be done notwithstanding that such answers would not in any circumstances have the binding force of adjudications, like decisions given in regular course of judicial proceedings.

and to Chief Justice Fitzpatrick's conclusion at p. 558:

> For all these reasons I hold:
>
> 1. That the Governor in Council has the power under the constitution to make this reference;
>
> 2. That it is the duty of the members of this court to hear the argument of counsel and to answer the questions, subject to our right to make all proper representations if it appears to us during the course of the argument, or thereafter, that to answer such questions might in any way embarrass the administration of justice.

Reference was also made to the statement of Mr. Justice Duff, as he then was, in the same case, at pp. 589-590:

> The objection to some extent is also rested upon section 92, subsection (14), of the Act. I quite agree that if section 60 on its true construction required this court to do any act directly affecting the action of the courts of any of the provinces in respect of such a question either by way of declaring a rule which those courts should be bound to follow or creating a judicial precedent binding upon them, or upon this court in its capacity as a court entertaining appeals from the provincial courts under section 101 or *imposing on this court any duty incompatible with the due exercise of its jurisdiction in respect of such appeals*—such for example as pronouncing, *ex parte*, at the behest of the executive upon a question raised, *inter partes*, in such an appeal—I quite agree, I say, that if that were the effect of section 60 then the validity of that section might be open to objection as Dominion legislation professing to deal with subject of the administration of justice in the provinces after a manner not justified by the "British North America Act". But I do not think the submission (for advice) of questions relating to the legislative jurisdiction of the provinces or the giving of such advice necessarily constitute such an interference with the administration of justice.

Mr. Dorion relied on the following extract from the argument of Counsel for Canada at p. 579 of the report of the appeal from the decision of this Court when it was before

(1) (1910) 43 Can. S.C.R. 536 at 547.

the Judicial Committee, *Attorney General for Ontario* v. *Attorney General for Canada* (1): "The Court, if it considered that its answers to the questions put might prejudicially affect the administration of justice in future cases, might refuse to answer the questions, stating their reasons for so doing."

It is true that in that case the point raised was that the then s. 60 authorizing References was *ultra vires,* but at pp. 575-6 of the Report in the Judicial Committee Counsel argued that the exercise of the power given would be highly prejudicial to the administration of justice and, notwithstanding this argument, the Judicial Committee upheld the conclusions of the majority of this Court in determining that the section was operative. It is permissible, I think, as their Lordships did in that case, to point to the fact that many References have been made to this Court upon different matters and particularly the question submitted in the *Reference as to the Minimum Wage Act of Saskatchewan* (2):

> Was the Saskatchewan Court of Appeal right in holding in its decision in *Williams* v. *Graham* that The Minimum Wage Act, Chapter 310 of the Revised Statutes of Saskatchewan, 1940, was applicable to the employment of Leo Fleming in the Post Office at Maple Creek, Saskatchewan?

The Order of Reference there before the Court recited that an appeal did not lie from the decision of the Court of Appeal in the Williams case. It is significant that no question was raised that the Reference was not authorized by the terms of s. 55 of *The Supreme Court Act.*

Closely allied to the point under discussion is another which may be treated either as a branch or under a separate heading. This is to the effect that while by s. 596 of the *Criminal Code,* c. 51 of the Statutes of Canada 1953-4, the Minister of Justice may direct a new trial for a person who has been convicted in proceedings by indictment, or may refer the matter or any question to the provincial Court of Appeal, these very terms indicate that there was no power to refer the Coffin matter to this Court. Mr. Favreau called our attention to para. XII of the Letters Patent con-

(1) [1912] A.C. 571. (2) [1948] S.C.R. 248.

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stituting the office of Governor General of Canada, effective February 1, 1947, which is to be found at p. 6432 of Vol. VI, R.S.C. 1952:—

XII. And We do further authorize and empower Our Governor General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of Canada has been committed for which the offender may be tried thereunder, to grant a pardon to any accomplice, in such crime or offence, who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further to grant to any offender convicted of any such crime or offence in any court, or before any Judge, Justice or Magistrate, administering the laws of Canada, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our Governor General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. And We do hereby direct and enjoin that Our Governor General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of Our Privy Council for Canada and, in other cases, the advice of one, at least, of his Ministers.

The Order-in-Council directing the present Reference recites:—

* * *

THAT in an application for the mercy of the Crown Wilbert Coffin has requested that the Minister of Justice, pursuant to section 596 of the Criminal Code, direct a new trial and in support thereof represents that there are, in this case, questions of law that relate to the issue whether he received a fair trial.

* * *

THAT, in the opinion of the Minister, it is in the public interest that the Minister should have the benefit of the views of the Supreme Court of Canada on the question of what disposition of the appeal would, after argument of the said appeal, have been made by the Court if the application made by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been granted on any or all of the grounds alleged on the said application.

Upon these and other recitals His Excellency the Governor General-in-Council referred the question to this Court for hearing and consideration. In whichever aspect the matter is looked at I have no doubt the Order of Reference was authorized by s. 55 of *The Supreme Court Act,* whether the Governor General-in-Council desired to have the opinions of the Members of the Court in coming to a conclusion as to whether clemency should be exercised, or whether he desired that those opinions should be available to the Minister of Justice in coming to a conclusion as to what action, if any, the latter would take under s. 596 of the *Criminal Code.* It may also be pointed out that by Head 27

of s. 91 of *The British North America Act* the exclusive legislative authority of Parliament extends to all matters coming within:—

> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

The objection to the jurisdiction of the Court to hear the Reference fails on all grounds.

The judgment of Rand and Kellock JJ. was delivered by:—

RAND J.:—I agree that the reference here comes within the jurisdiction of this Court under s. 55 of *The Supreme Court Act* as a question "of law or fact touching" . . . (*d*) "the powers . . . of the respective governments" and (*e*) "any other matter . . . with reference to which the Governor in Council sees fit to submit any such question". The preliminary objection is not well founded and the motion must be dismissed.

Motion dismissed.

Solicitors for the A.G. of Quebec: *N. Dorion & P. Miquelon.*

Solicitor for the A.G. of Canada: *F. P. Varcoe.*

Solicitor for the accused: *F. de B. Gravel.*

IN THE MATTER OF A REFERENCE RE REGINA v. COFFIN

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1956
*Jan. 24

Criminal law—Murder—Circumstantial evidence—Recent possession of stolen goods—Hearsay evidence—Witness attended cinema as guard for jury—Mixed jury—Refreshing memory of witness—Canada Evidence Act, R.S.C. 1927, c. 59, s. 9—Criminal Code, ss. 923, 944, 1011, 1014(2).

The accused was found guilty of murder by a mixed jury. His conviction was unanimously affirmed by the Court of Appeal. His appeal from the dismissal by a judge of this Court of his application for leave to appeal was dismissed on the ground that this Court was without jurisdiction.

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

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Pursuant to s. 55 of the *Supreme Court Act*, R.S.C. 1952, c. 259, the Governor General in Council then referred the following question to this Court: "If the application made by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been granted on any of the grounds alleged on the said application, what disposition of the appeal would now be made by the Court?"

Held: Kerwin C.J., Taschereau, Rand, Kellock and Fauteux JJ. would have dismissed the appeal. Locke and Cartwright JJ. would have allowed the appeal, quashed the conviction and directed a new trial.

Per Kerwin C.J. and Taschereau J.: The evidence was such that a legally instructed jury could reasonably find the accused guilty.

If the possession of recently stolen goods is not explained satisfactorily, they are presumed to have been acquired illegally. That possession may also indicate not only robbery, but a more serious crime related to robbery. There is no doubt that the jury did not accept the accused's explanations and that they could justly conclude that he was the thief. Thus they could see therein a motive for the murder and it was a circumstance which they could legally take into account.

The judge was not obliged to tell the jury that they were not entitled to convict of murder simply because they came to the conclusion that he was guilty of theft. The recent possession not only created the presumption, failing explanation, that he had stolen, but the jury had the right to conclude that it was a link in the chain of circumstances which indicated that he had committed the murder.

Any possible inaccuracies in the early part of the judge's direction in regard to the nature of the evidence, was subsequently remedied. The rule in the *Hodge's* case was entirely respected.

The evidence of the police officer that as the result of "precise information" he searched for a rifle at the accused's camp, was not hearsay evidence. The witness was not trying to prove the truth of his information but merely to establish the reason for his visit.

All necessary precautions to prevent irregularities were taken to the judge's satisfaction when he allowed the jury to go to the cinema. All the constables were under oath and it is not suggested that any indiscretions were committed. Moreover, the judge was exercising his discretion when he gave the permission after both parties had consented.

It is within the judge's discretion to grant a jury composed exclusively of persons who speak the accused's language, but if he refuses, he must grant a mixed jury. He must consider what will best serve the ends of justice. The interests of society must not be disregarded. The judge decided that the ends of justice would not be effectively served by granting the accused's request, for that would have eliminated eighty-five per cent of the population from taking part in the administration of justice.

Even if there had been any irregularities concerning the list of jurors, they would be covered by s. 1011 Cr. C.

There was nothing more logical, since a mixed jury was concerned, than to have the judge, counsel for the Crown and for the accused address the jury in French and in English.

Nothing in what counsel for the Crown said was such as to suggest that the jury bring in a verdict based on sentiments and prejudices and not exclusively on the evidence.

S. 9 of the *Canada Evidence Act* does not forbid refreshing the memory of a witness by means of a previous testimony which he has given. There was no attempt to discredit or contradict the witness Petrie. She admitted that her memory was better at the time of the preliminary inquiry. Moreover, this is a question for the judge's discretion.

Even if there had been some irregularities, s. 1014(*c*) Cr. C. would apply, as no substantial wrong or miscarriage of justice occurred. The evidence left the jury no alternative. It was entirely consistent with the guilt of the accused and inconsistent with any other rational conclusion.

Per Rand, Kellock and Fauteux JJ.: The court has a discretion, not open to review, to permit leading questions whenever it is considered necessary in the interests of justice. Moreover, a witness may refresh his memory by reference to his earlier depositions and s. 9 of the *Canada Evidence Act* applies only when it is attempted to discredit or contradict a party's own witness.

The contention that, because of the differences between the addresses of counsel in one language and the other, and between the two charges delivered by the trial judge, the accused was tried by two groups of jurymen, and further that s. 944 Cr. C. requires that the jury be addressed by one counsel only on each side, cannot succeed. The practice followed has been the invariable one in Quebec since 1892. Neither the differences in the addresses nor in the charges were of a nature to call for the interference of this Court.

The judge, in exercising his discretion under s. 923 Cr. C., was right in his view that the ends of justice would be better served with a mixed jury.

It cannot be said that the accused gave any reasonable explanation of how he came to be in possession of the things as to which he even attempted to make an explanation. There was, therefore, abundant evidence from which the jury could conclude, as they have done, that the possessor of the money and other items was the robber and murderer as well.

Per Locke J.: The evidence of the police officer that he acted on "precise information" in searching for a rifle in the vicinity of the accused's camp, was clearly hearsay evidence and, therefore, improperly admitted. That evidence, to which so much importance was attached by counsel for the Crown and by the trial judge when the matter was presented to the jury, was on a point material to the guilt or innocence of the accused. It cannot, therefore, properly be said that there has been no substantial wrong or miscarriage of justice and consequently, s. 592 Cr. C. has no application. (*Makin* v. *A.G. for New South Wales* [1894] A.C. 57 and *Allen* v. *The King* 44 S.C.R. 331 followed).

Per Locke and Cartwright JJ.: The evidence that the police officer had information that a rifle was concealed in a precisely indicated spot near the accused's camp, was inadmissible as being hearsay evidence. Proof that an accused has suppressed or endeavoured to suppress evidence is admissible, but, here, the foundation of the whole incident on which

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the jury were invited to find that he had suppressed evidence was this inadmissible hearsay evidence. It related to a vital matter and in view of the way it was stressed at the trial, counsel for the Crown cannot now be heard to belittle its importance.

The transcript of the evidence given at the preliminary inquiry by the witness Petrie was used not for the purpose of refreshing her memory but for the purpose of endeavouring to have her admit that she was mistaken or untruthful in giving her evidence at the trial. The cross-examination of this witness was unlawful and was attended by further error in that no warning was given to the jury that any evidence of what she had said at the preliminary inquiry was not evidence of the truth of the facts then stated but could be considered by them only for the purpose of testing the credibility of the testimony which she had given at the trial.

Although there is no evidence to suggest that any improper communication took place on the occasion of the visit to the cinema, this unfortunate incident falls within the principle stated in *Rex* v. *Masuda* 106 C.C.C. at 123 and 124. There is no escape from holding that the incident was fatal to the validity of the conviction.

The judge did not direct his mind to the question whether the ends of justice would be better served by empanelling a mixed jury. The reasons given for the exercise of his discretion under s. 923 Cr C. were irrelevant. Whether the empanelling of a jury of the sort requested by the accused would be attended with difficulty or whether the language of the accused was or was not that spoken by the majority of the population of the district were irrelevant considerations. The record has failed to disclose any ground sufficient in law to warrant the accused being denied his right to a jury composed entirely of persons speaking his language. The error is not cured by s. 1011 Cr. C.

S. 1014(2) does not avail to support the conviction as it is impossible to affirm with certainty that if none of the above errors had occurred the jury would necessarily have convicted; furthermore, even if this could be affirmed, the error in law in admitting the hearsay evidence as to the rifle was so substantial a wrong that the sub-section can have no application, as the accused was deprived of his right to a trial by jury according to law. The errors pertaining to the episode of the cinema and to the empanelling of the mixed jury are also such as cannot be cured by the sub-section.

REFERENCE by His Excellency the Governor General in Council (P.C. 1552, dated October 14, 1955) to the Supreme Court of Canada in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C. 1952, c. 259) of the question stated (*supra*).

A. E. M. Maloney, Q.C. and *F. de B. Gravel* for the accused.

N. Dorion, Q.C. and *P. Miquelon, Q.C.* for the Attorney General of Quebec.

G. Favreau, Q.C. and *A. J. MacLeod, Q.C.* for the Attorney General of Canada.

THE CHIEF JUSTICE:—For the reasons given by Mr. Justice Taschereau, my answer to the question referred to the Court is that I would have dismissed the appeal.

TASCHEREAU J.:—L'appelant a été traduit devant le tribunal de Percé, district judiciaire de la Gaspésie, pour répondre à l'accusation d'avoir, au début de juin 1953, assassiné Richard Lindsay de Holidaysburg, Pennsylvanie, U.S.A.

Le procès, présidé par l'honorable Juge Gérard Lacroix, s'est instruit devant un jury de langue française et de langue anglaise, et l'appelant a été trouvé coupable dans le cours du mois d'août 1954. Ce verdict a été confirmé unanimement par la Cour du Banc de la Reine de la province de Québec (1), et, s'autorisant alors des dispositions du Code Criminel, l'appelant s'est adressé à l'un des juges en chambre de cette Cour pour obtenir une permission spéciale d'appeler. Cette permission a été refusée par l'honorable Juge Abbott, mais les procureurs de l'appelant ont tout de même demandé à cette Cour de réviser ce jugement de M. le Juge Abbott et d'entendre son appel au mérite. La Cour en est venue unanimement à la conclusion qu'elle n'avait pas jurisdiction dans l'espèce, et a en conséquence refusé la demande.

L'appelant a ensuite fait parvenir une requête au Ministre de la Justice, demandant qu'un nouveau procès lui soit accordé. Le Gouverneur Général en Conseil, en vertu des dispositions de l'article 55 de la *Loi de la Cour Suprême du Canada,* a demandé l'opinion de cette Cour afin de savoir quel aurait été le jugment rendu, si celle-ci avait entendu l'appel à son mérite.

La preuve révèle que Eugene Hunter Lindsay, accompagné de son fils Richard, et d'un ami de ce dernier, Frederick Claar, tous trois de Holidaysburg, Pennsylvanie, quittèrent leur résidence le 5 juin 1953, pour se rendre faire la chasse à l'ours en Gaspésie. Le voyage qui s'effectuait en camionnette devait durer environ une dizaine de jours, et les chasseurs projetaient de revenir chez-eux vers le 15 juin.

Le 8 juin, à Gaspé, ils obtinrent tous trois leur permis de chasse et de circulation dans la forêt. A la même date, ils

(1) Q.R. [1955] Q.B. 620.

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achètent diverses épiceries chez les marchands locaux, et le soir, ils s'engagent dans la forêt de Gaspé. Un garde-feu du nom de Jerry Patterson raconte qu'au sud-ouest de Gaspé, sur une petite route qui longe le nord de la Rivière St-Jean, leur camionnette s'est enlisée dans la vase d'un ruisseau qu'ils avaient tenté de traverser, et qu'à cause de l'humidité le moteur avait cessé de fonctionner. Comme Patterson ne réussit pas à les remettre sur la route pour leur permettre de continuer leur voyage, il retourna seul à Gaspé, situé à quelque dix milles seulement, et leur envoya de l'aide, soit Thomas et Oscar Patterson et Wellie Eagle, qui arrivèrent à bord de leur camion le matin du 9 juin et les tirèrent du ruisseau. On remit le moteur en marche, et le midi du 9, on revit les trois chasseurs à Gaspé même. Evidemment, ils sont revenus sur leur chemin, et déclarent à un marchand local d'essence qu'ils désirent retourner aux camps 24, 25 et 26, situés à l'ouest de Gaspé, mais cette fois non pas en longeant le côté nord de la Rivière St-Jean, mais par une route différente.

Le lendemain, soit le 10, un garagiste revoit à Gaspé le plus jeune des trois chasseurs en compagnie de Coffin lui-même, dans un camion d'une demi-tonne et de marque Chevrolet, et portant une licence canadienne. Le jeune Lindsay, qui était accompagné de Coffin, informa le garagiste qu'ils sont venus tous trois en Gaspésie faire la chasse à l'ours, mais que contrairement à leurs habitudes ils n'ont pas eu cette fois recours aux services d'un guide. Quant à Coffin, alors qu'il est seul avec le témoin, il explique qu'il est revenu avec un individu au village pour faire réparer une pompe à gazoline défectueuse. Dans un bar où il achète une demi-douzaine de bouteilles de bière, il reconte qu'en se rendant prospecter dans la forêt, il a rencontré les trois chasseurs dont la camionnette était en panne. Coffin dit qu'il a décelé une défectuosité dans la pompe et qu'il a remené les américains à Gaspé à bord d'un truck, que Billy Baker lui aurait prêté. Le même jour, Coffin se rend chez un nommé Napoléon Gérard, un garagiste, accompagné du jeune Lindsay, et achète une pompe à gazoline au prix de $8.80. Coffin n'a demandé à personne de réparer la pompe défectueuse.

Evidemment, Coffin et les trois sont retournés immédiatement dans la forêt, dans le camion conduit par Coffin, et le 12, Coffin est revu à Gaspé dans le même camion, et un

témoin affirme avoir vu dépasser le canon d'une carabine. Quant aux voyageurs, on n'en a plus eu de nouvelles. La période de vacances qu'ils s'étaient fixée s'écoula, et les familles Lindsay et Claar n'en entendent plus parler.

La preuve révèle que tard dans la soirée du 12 juin, Coffin a quitté Gaspé dans le camion antérieurement emprunté de Baker, mais sans la permission de ce dernier pour ce nouveau voyage. Avant de partir cependant, il se procura un permis de conducteur, paya quelques dettes contractées depuis quelque temps, acheta à divers endroits plusieurs bouteilles de bière, paya l'un des vendeurs avec un billet américain de $20 et exhiba un canif à usage multiple, plus tard identifié comme étant la propriété du jeune Lindsay. Il se rendit chez sa soeur madame Stanley à qui il montra le même canif. Il se changea de vêtements et quitta sa soeur sans mentionner sa destination. Dans la nuit du 12 au 13 juin, vers 1:30 heure du matin, il arrêta chez un nommé Earle Turzo de York Centre, à qui il remit une somme de $10, empruntée cinq semaines auparavant, et se fit remettre un revolver qu'il avait donné en garantie. Il paya la traite au whisky à Turzo ainsi qu'à la mère de celui-ci. A 3:30 heures A.M., près de Percé, son camion tomba dans le fossé. Un nommé Elément lui aida à en sortir et se fit payer en billets américains.

A six heures du matin, le 13, Coffin est rendu à Percé. Il fait son plein d'essence et fait réparer ses freins. Le coût de la réparation s'élève à $8. Coffin remet au garagiste un billet américain de $20 et se fait remettre $10, laissant la différence comme pourboire. Il expliqua au garagiste qu'il lui fallait se rendre à Montréal, ayant reçu un appel téléphonique en rapport avec une prétendue compagnie américaine, et qu'il ne pouvait transmettre ses informations ni par téléphone ni par lettre.

Coffin se rend ensuite vers la Vallée de la Matapédia. Il s'arrête près de Chandler où il fait monter à bord de sa camionnette un nommé Diotte. Là, il s'arrête chez le coiffeur où il "paye la traite". Il donne $10 à Diotte pour acheter un paquet de cigarettes. Pendant ce temps, il se fait tailler la barbe, couper les cheveux, laver la tête, et verse la somme de $3 en paiement quand il ne devait que $1.50. Au cireur de chaussures qui lui demande $0.15, il lui fait cadeau de $1. Vers midi, le 13 juin, il arrive à

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St-Charles Caplan, verse dans un fossé. Un camionneur vient lui aider et Coffin tire d'un porte-feuilles bien garni, de couleur brune, un billet américain de $20 et ne demande que $10 de change. A Black Cape, il fait de nouveau son plein d'essence chez un nommé Campbell, et lui laisse un pourboire de $1. Il arrête ensuite, vers trois heures de l'après-midi, à Maria dans le comté de Bonaventure, où il s'endort au volant de son camion. Un nommé Audet vient le réveiller, invite Coffin à entrer chez-lui où Coffin prend un repas. Coffin lui donne $2 et $1 à l'un des enfants. Entre cinq et six heures, il part en direction de Québec. Le dimanche matin, il est rendu à St-André de Kamouraska chez un nommé Tardif où il déjeûne, et paye avec un billet de $20 de dénomination américaine. Comme on ne peut faire la monnaie, il laisse $5 refusant de recevoir la balance. Apparemment, il a aussi laissé $10 sous une chaise. Madame Tardif a constaté qu'en payant, il avait tiré de sa poche un gros paquet de billets. A Montmagny, il tombe de nouveau dans un fossé. Un nommé Chouinard de Rivière-du-Loup le tire de ce fossé, et Coffin lui laisse $5 sur un billet de $10. A St-Michel de Bellechasse où il couche, il repart le lendemain matin vers sept heures, et malgré qu'on lui demandait la somme de $2.50, il laisse à l'hôtelier $5. L'hôtelier remarque que le porte-feuilles est bien garni de papier-monnaie. Le dimanche 14, il arrive à Montréal chez sa "common law wife" Marion Petrie Coffin. Dans la camionnette de Baker qu'il conduisait toujours, Marion Petrie remarque des œufs contenus dans une boîte de biscuits soda et une bouteille de sirop "Old Type", précisément une boîte semblable à celle acquise par les chasseurs chez un épicier de Gaspé, et une bouteille portant la même marque que celle achetée au même endroit. Marion Petrie voit également une pompe à gazoline qui n'a jamais été utilisée, et qui est évidemment celle achetée à Gaspé pour les américains. Dans une valise placée également dans le camion et que les détectives retrouvent plus tard chez madame Stanley, sœur de Coffin, et qui est identifiée comme appartenant au jeune Claar, on y trouve des serviettes, deux paires de salopettes que la mère du jeune Claar reconnaît comme étant la propriété de son fils. Evidemment, ces objets avaient été apportés par le jeune Claar pour aller faire la chasse au camp 26, et sont demeurés

dans le camion de Coffin qui est allé le reconduire. Coffin apporta également à Montréal une paire de jumelles appartenant aussi à Claar.

Coffin séjourna à Montréal durant environ dix jours où il achète des épiceries, huit à dix bouteilles de bière quotidiennement, et dépense sans travailler. En quittant Montréal, il se rend à Val d'Or, rencontrer un nommé Hastie, courtier en valeurs minières, et celui-ci consent à se rendre en Gaspésie avec Coffin pour y examiner certains dépôts de cuivre. Le 20 juillet, le lendemain de son arrivée à Gaspé, Coffin informe Hastie qu'il lui est impossible de l'accompagner, car il lui faut aider les policiers dans leurs recherches commencées depuis quelque temps déjà.

Avant l'arrivée de Coffin, on avait retrouvé vers le 11 juillet la camionnette des chasseurs à un demi-mille du camp 21, et dans laquelle se trouvent une carabine et une paire de pantalons.

Le lendemain de la découverte de la camionnette, les recherches se poursuivent. Les camps sont visités et, le 15 juillet, d'importantes découvertes sont faites. Entre les camps 21 et 24 séparés d'une distance d'environ trois milles, on voit des traces de roues de camions, et du côté gauche de la route on découvre divers objets, et le lendemain on en découvre d'autres dissimulés dans les feuillages et d'autres reposant dans le lit de la rivière qui coule à environ cinquante pieds du chemin. Entre autres, on y trouve un poèle, un réservoir à essence, un coupe-vent de couleur bleue, un sac de couchage, qui appartenaient aux américains. On constate aussi la présence d'un kodak contenant un film qui n'a pas été entièrement exposé, et qui en est rendu à la cinquième pose sur un total de huit. Il était la propriété du jeune Claar. On retrouve également un étui à jumelles dans lequel on peut facilement introduire les jumelles que madame Lindsay a identifiées, et que l'on trouvera plus tard dans la forêt à proximité des ossements du jeune Lindsay; on trouve également l'étui à carabine qui a été retrouvé aux environs du camp 26, non loin des ossements du jeune Claar. Tous ces objets ont été retrouvés à au delà de trois milles où la camionnette abandonnée par les américains a été localisée. Le 15 juillet, une carabine et divers autres objets sont retrouvés. Dans le bois de cette carabine on y voit une impression laissée par un coup qui

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semble avoir été le résultat d'une balle d'une autre arme à feu. Le magasin de cette carabine était plein de cartouches, et le cran de sûreté était à la position "sure".

Près de cent pieds plus loin, de l'autre côté de la rivière qui est large de quinze à vingt pieds, on trouve un squelette humain complètement décomposé, et le Docteur Roussel ayant transporté ces restes à Montréal, conclut qu'il s'agit là des restes d'une personne de sexe masculin, mesurant environ cinq pieds sept pouces, âgée d'au delà de quarante ans et dont la mort remonte à au moins un mois depuis l'examen. On trouve également un porte-feuilles identifié comme appartenant à Lindsay père, avec certains documents qui lui appartiennent, mais il n'y a plus un seul sou des $650 qu'il avait apportés avec lui en billets américains. Il n'est certainement pas permis de douter qu'il s'agit là du cadavre de Lindsay père.

Les officiers de police ont continué leurs recherches afin de trouver les cadavres du jeune Claar et du jeune Lindsay, et ce n'est que le 23 juillet, aux environs du camp 26 qui se trouve à deux milles et demi du camp 24, où ont été trouvés les ossements de Lindsay père, que sont découverts les restes des deux autres américains. A proximité on y relève des pièces de vêtements, une paire de jumelles qui appartenait au jeune Lindsay, et madame Lindsay la mère a identifié d'autres vêtements trouvés sur les lieux comme appartenant à son fils. On a produit en outre à l'enquête un gilet blanc et une chemise de couleur verte à travers lesquels on aperçoit un trou entouré d'une tache noirâtre. Tout près, on voit dissimulée une veste de cuir à fermeture éclair, propriété du jeune Lindsay, et dont les poches sont retournées et vides. Il est en preuve que les taches qui entourent les perforations sont du sang humain et que les trous portent des traces de plomb. Leur site correspond au poumon et au coeur, et il est logique de conclure qu'il s'agit de perforation produite par un projectile d'arme à feu. Le Docteur Roussel témoigne que dans les deux cas il s'agit des cadavres de deux jeunes gens de moins de vingt-cinq ans dont la date de la mort remonte à la même période que la date de la mort de Lindsay père. Sur la chemise du jeune Claar on y aperçoit également des perforations au niveau du bassin et autour desquelles la présence de dépôts métalliques indique qu'elles sont attribuables à un projectile

d'arme à feu. Les mêmes constatations ont été faites au niveau de la poitrine, par conséquent au niveau d'organes vitaux.

Coffin n'est revenu en Gaspésie qu'après la découverte de la camionnette et des ossements de Lindsay père, et ce n'est que le 20 juillet que les détectives peuvent l'interroger. Ses réponses ne sont pas satisfaisantes. Ses explications des faits sont boiteuses, contradictoires et incomplètes, et le récit de ses allées et venues dénote une obstination persistante à vouloir voiler la vérité. Ainsi, il prétend n'être jamais allé au camp 21, et après s'être repris, il soutient qu'il n'est pas allé aux camps 25 et 26, les deux endroits où ont été trouvés les ossements, quand il est en preuve que ceci est faux.

Le matin du 10 après être revenu avec MacDonald du bois, et avec qui il est entendu qu'il doit retourner, il lui fausse compagnie, et repart seul dans la direction des chasseurs. Il explique qu'il préférait faire de la prospection seul. Mais au lieu d'aller faire de la prospection à la fourche sud de la Rivière St-Jean, il se rend au camp 21. Il est certain que quand il est retourné, il avait une carabine, car, elle est vue le soir du 12 par MacGregor. Sur ces points, il ne fournit pas d'explications. Comment s'est-il procuré tout cet argent américain, qu'il distribue à profusion? Où a-t-il pris les épiceries, cette valise, les vêtements, les jumelles, le canif, la pompe à gazoline, tous la propriété des chasseurs? Il n'explique pas qu'il ait emprunté une carabine d'un nommé John Eagle, qui n'a jamais été retournée, et qui n'a jamais été retrouvée. Il ne dit pas non plus la raison de son voyage à Montréal le soir du 12, ni pourquoi il est parti sans avertir personne.

Coffin prétend, évidemment pour détourner les soupçons, que deux autres américains sont allés à la chasse à l'ours avec les victimes. Personne cependant n'a eu connaissance de leur séjour à Gaspé ou ailleurs dans la région, à cette période. Aucun permis ne leur aurait été donné, et on ne retrouve aucune de leurs traces. Ce qui est vrai, c'est que deux autres américains sont venus à la chasse, en "jeep" de marque Willys, et sont entrés dans la forêt le 27 mai par York River, et qu'ils ont quitté Gaspé le 4 juin, c'est-à-dire plusieurs jours avant l'arrivée de Lindsay et de ses compagnons. De plus, ces chasseurs entendus comme témoins, ont juré n'être jamais allés aux camps 21, 24, 25 et 26.

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Au cours des recherches dans le bois avec les détectives, qu'il a consenti à accompagner, il feint de ne pas connaître les lieux. Au camp 24, accompagné des chercheurs, il demande au cours du repas, où est la source pour aller chercher l'eau, lui qui est né et a vécu dans ce pays, et qui le 8 au soir s'était rendu à ce même camp 24 avec MacDonald, et qui le matin du 9, sur le bord du ruisseau, avait allumé un feu. Il est en preuve que jamais il ne porte ses regards du côté gauche de la route, précisément aux endroits où les cadavres ont été trouvés, et où évidemment leur ont été enlevés tous les objets trouvés en la possession de Coffin.

Avec cette preuve, le jury légalement instruit, et maître des faits, pouvait raisonnablement trouver l'accusé coupable. C'est donc avec raison que devant cette Cour, le procureur de l'accusé a abandonné l'un de ses moyens d'appel, qui était à l'effet qu'il n'y avait pas de preuve suffisante pour justifier un verdict de culpabilité. La question de savoir si la "common law wife" de Coffin, Marion Petrie, était en vertu de l'article 4 de la Loi de la Preuve du Canada, un témoin compétent à témoigner contre l'accusé, a été abandonnée également, et n'a pas été soumise à la considération de cette Cour. Il en est de même d'un grief concernant la possession récente des objets volés, et se rapportant aux objets qui auraient été volés et n'appartenant pas à la victime, que Coffin est accusé d'avoir assassinée. On a aussi abandonné le point concernant une prétendue preuve illégale, se rapportant aux photographies des ossements des victimes, ainsi que celui relatif à la réplique, exercés par l'un des avocats de la Couronne.

Il reste donc à être déterminés par cette Cour, les points suivants, que je reproduis en anglais, la langue dans laquelle ils nous ont été soumis:—

1. Did the Learned Trial Judge err in respect to the instructions he gave to the jury with reference to the doctrine of recent possession in the following manner:—

(*a*) Should the jury have been permitted to apply the doctrine at all?

(*b*) Were the jury misdirected with reference to the burden resting on the Appellant to explain his possession of items allegedly stolen?

2. Did the Learned Trial Judge err in failing to instruct the jury that they were not entitled to convict the Appellant of murder simply because they came to the conclusion that he was guilty of the theft of the various articles proved to have been the property of the victim, Richard Lindsay, and his associates?

3. Did the Learned Trial Judge err by instructing the jury in a manner that would indicate the statements and declarations made by the Appellant to various witnesses were not to be regarded as circumstantial evidence and evidence therefore to which the rule in Hodge's case should be applied?

4. Did the Learned Trial Judge err in admitting evidence concerning a certain rifle, the property of one Jack Eagle?

5. Did the Learned Trial Judge err in permitting the jury to attend a moving picture theatre in the company of two police officers who were subsequently called as witnesses for the Crown?

6. Did the Learned Trial Judge err in refusing the application made on behalf of the Appellant to be tried by a jury composed entirely of English-speaking citizens?

7. Was the Appellant deprived of a trial according to law by reason of the failure of the Sheriff of the County in which the Appellant was tried to comply with the provisions of the Quebec Jury Act (1945, 9 George VI, Chap. 22)?

8. Was the Appellant deprived of a trial according to law by reason of the improper mixture of the English and French language?

9. Was the Appellant deprived of a trial according to law by reason of the fact that Crown Counsel in their addresses to the jury used inflammatory language?

10. That Marion Petrie, being a Crown Witness, was submitted to a cross-examination by the Crown counsel, although she was not declared hostile.

Au soutien de son premier point, le procureur de l'accusé prétend que le jury n'aurait pas dû appliquer la doctrine de la possession récente, pour établir que l'accusé était l'auteur des vols commis, et que le juge a donné des instructions erronées concernant le fardeau qui repose sur l'accusé, d'expliquer la possession des objets volés.

La doctrine et la jurisprudence enseignent que si une personne est en possession d'objets volés peu de temps après la commission du crime, elle doit expliquer cette possession, et si elle ne réussit pas à le faire de façon satisfaisante, elle est présumée les avoir acquis illégalement. De plus, c'est aussi la doctrine et la jurisprudence que la possession d'effets récemment volés, peut indiquer non seulement le crime de vol, mais aussi un crime plus grave relié au vol. (*Rex* v. *Langmead* (1); Wills pages 61 et 62; *Regina* v. *Exall* (2)).

Dans le présent cas, je n'ai pas de doute que le jury n'a pas accepté les explications données par l'accusé aux policiers, et que le jury pouvait justement conclure que Coffin était l'auteur du vol. En concluant ainsi, le jury

(1) (1864) 9 Cox C.C. 464 at 468. (2) (1866) 4 F. & F. 922.

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pouvait y voir un motif du crime de meurtre, et c'était une circonstance dont il pouvait légalement tenir compte. Je ne vois rien dans la charge du juge qui soit de nature à vicier le procès sur ce point.

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Je crois également le second point non fondé. Je suis d'opinion que le juge ne devait pas dire au jury ce qu'on lui reproche d'avoir omis. Le fait pour Coffin d'avoir en sa possession des effets récemment volés, faisait naître non seulement la présomption, faute d'explication, qu'il les avait volés, mais le jury avait le droit de conclure que c'était un lien dans une chaîne de circonstances, qui indiquait qu'il avait commis le meurtre. Dans *Regina* v. *Exall* (supra page 924) Pollock C.B. dit:—

> And so it is of any crime to which the robbery was incident, or with which it was connected, as burglary, arson, or murder. For if the possession be evidence that the person committed the robbery, and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime.

Il est certain que le juge en adressant le jury leur a dit que la Couronne avait offert deux sortes de preuve, soit la preuve circonstancielle, et la preuve de conversations ou paroles dites par l'accusé. Après avoir défini la preuve circonstancielle, et avoir énoncé aux jurés les principes de la cause de *Hodge,* il ajouta:—

> Il est évident que sur l'ensemble de ces faits, l'on ne trouvera aucune preuve directe nulle part et c'est précisément là que l'on vous demande d'extraire des circonstances, la ou les conclusions que, dans votre estimation, vous devez voir comme résultant de ces faits.

Je suis fermement convaincu que s'il a pu y avoir quelques incorrections au début de ses remarques, sur ce point, le juge y a complètement remédié par les dernières paroles que je viens de citer. Les règles contenues dans la cause de *Hodge* ont en conséquence été totalement respectées.

J'ai signalé déjà que Coffin avait emprunté une carabine d'un nommé John Eagle, qui n'a jamais été remise à ce dernier, et qui n'a jamais été retrouvée. Quand l'accusé est revenu du bois dans la soirée du 12 juin, on a remarqué dans son camion la présence d'une carabine. On sait aussi qu'il n'en avait pas le 8, quand il est allé dans le bois avec MacDonald pour prospecter, et qu'il n'en avait pas non plus le 10, quand il est retourné seul dans la forêt. Il me semble nécessaire que la Couronne fît des efforts pour

trouver cette arme. En revenant le 12, Coffin n'a pas laissé la carabine chez son père où il vivait, et il ne l'avait pas avec lui quand il est parti pour Montréal le soir du 12. La théorie de la Couronne est que le soir du 9, tel que prouvé par MacDonald qui l'accompagnait, Coffin est allé à son camp situé à l'ouest de Gaspé, pour y chercher la carabine, et qu'il l'avait retournée au même endroit après la commission du crime. Cette théorie est d'autant plus vraisemblable, qu'un jour, alors qu'il était détenu au mois d'août à la prison de Gaspé, Coffin eut une entrevue avec son frère, et dans la même nuit, un camion s'est rendu au camp de Coffin, dont le conducteur n'a pas demandé d'ouvrir la barrière qui conduit dans la forêt. Au contraire, cette barrière a été contournée, et des traces fraîches sur la route indiquaient le passage récent d'un camion que l'on croit être d'une capacité d'une tonne, comme celui du frère de Coffin. Ces traces indiquent que le camion s'est rendu au camp et en est revenu en contournant toujours la barrière.

Au mois d'août, le sergent Doyon s'est rendu au camp de Coffin, y a constaté les mêmes traces, et au cours de son témoignage, il a dit qu'ayant reçu une "information précise", il s'était rendu faire des recherches au camp de Coffin, essayant de trouver quelque preuve qui lui aiderait à retrouver cette carabine. On prétend que cette preuve est illégale vu qu'il s'agirait de ouï-dire. Je ne puis admettre cette prétention. A mon sens, il ne s'agit nullement de ouï-dire, car quand Doyon a dit qu'il avait agi après avoir reçu une "information précise", il n'entendait pas prouver la véracité de son information, mais bien établir la raison de sa visite au camp. Comme le dit Roscoe Nisi prius, page 53:—

> When hearsay is introduced not as a medium of proof in order to establish a distinct fact, but as being in itself part of the transaction in question and explanatory of it, it is admissible, words and declaration are admissible.

A la page 55, il ajoute:—

> It has been justly remarked by recent text writers that many of the above cases are not strictly instances of hearsay (i.e. second hand evidence) though commonly so classed. The res gesta in each case is original evidence and the accompanying declaration being part of it is also original.

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Phipson (hearsay) page 223:—

In some cases a verbal act may be admissible as original evidence although its particulars may be excluded as hearsay. Thus, though the fact that the prosecutor made a communication to the Police, in consequence of which they took certain steps, is allowed to be proved, yet what was actually said is excluded as hearsay, is a very dangerous form.

Dans la cause de *Rex* v. *Wilkins* (1), M. le Juge Erle dit:—

Half the transactions of life are done by means of words. There is a distinction, which it appears to me is not sufficiently attended to, between mere statements made by and to witnesses, that are not receivable in evidence, and directions given and acts done by words, which are evidence. The witness, in this case, may say that he made inquiries, and in consequence of directions given to him in answer to those inquiries, he followed the prisoners from place to place until he apprehended them.

Les détectives agissent souvent comme conséquence d'informations qu'ils reçoivent, et le fait de dire qu'ils ont été "informés" ne constitue nullement une preuve illégale. Ce n'est pas un moyen de preuve de nature à établir un fait particulier.

Un autre grief de l'accusé, est que le juge a erré en permettant aux jurés, durant le procès, d'assister au cinéma, accompagnés de plusieurs officiers de police, qui furent subséquemment appelés comme témoins de la Couronne. Je suis satisfait que toutes les précautions nécessaires ont été prises, à la satisfaction du juge pour que rien d'irrégulier ne s'est passé. Tous les constables ont été assermentés, et il n'est pas suggéré qu'aucune indiscrétion n'ait été commise. D'ailleurs, cette permission d'assister au cinéma a été donnée par le juge lui-même, exerçant sa discrétion, après qu'il eût obtenu le consentement de l'avocat de la Couronne et de celui de l'accusé.

En ce qui concerne le 6ème grief, il est nécessaire en premier lieu de citer l'article du *Code Criminel*, qui détermine les droits d'un accusé à un jury mixte, ou composé entièrement de personnes parlant la langue française ou anglaise. Cet article se lit ainsi:—

923. Dans ceux des districts de la province de Québec où le shérif est tenu par la loi de dresser une liste de petits jurés composée moitié de personnes parlant la langue anglaise, et moitié de personnes parlant la langue française, il doit, dans son rapport, mentionner séparément les jurés qu'il désigne comme parlant la langue anglaise, et ceux qu'il désigne comme parlant la langue française, respectivement; et les noms des jurés ainsi assignés sont appelés alternativement d'après ces listes.

(1) (1849) 4 Cox C.C. 92.

2. Dans tout district, le prisonnier peut, lorsqu'il est mis en jugement, demander par motion, d'être jugé par un jury entièrement composé de jurés parlant la langue anglaise, ou entièrement composé de jurés parlant la langue française.

3. Sur présentation de cette motion, *le juge peut ordonner* au shérif d'assigner un nombre suffisant de jurés parlant la langue anglaise ou la langue française, *à moins qu'à sa discrétion il n'apparaisse que les fins de la justice sont mieux servies par la composition d'un jury mixte.*

Je suis fermement d'opinion qu'il n'y a pas eu d'erreur de la part du juge en ordonnant un jury mixte. Quand un accusé demande la composition d'un jury exclusivement composé de personnes parlant sa langue, comme la chose a été faite dans le cas présent, *il est à la discrétion du juge* d'accéder à cette demande, mais s'il la refuse, il doit accorder un jury mixte. Le droit de l'accusé à douze jurés de sa langue, n'est pas un droit absolu, et le juge devra prendre en considération ce qui doit le mieux servir les fins de la justice. Malgré que dans un procès criminel, l'intérêt de l'accusé soit primordial, l'intérêt de la société ne doit pas être méconnu. (*Alexander* v. *Regem* (1); *Mount* v. *Regem* (2); *Bureau* v. *Regem* (3); *Duval* v. *Regem* (4)). Dans la présente cause, exerçant sa discrétion le juge a décidé que les fins de la justice ne seraient pas utilement servies, en accordant la demande de l'accusé, car il aurait ainsi éliminé 85% de la population française, à la participation de l'administration de la justice. Il n'appartient pas à cette Cour d'intervenir dans l'exercice de cette discrétion.

Je disposerai brièvement du grief N° 7, où l'on prétend que les dispositions de la loi (1945, 9 Geo. VI, c. 22) concernant la liste des jurés n'ont pas été suivies. Ainsi, et c'est le grief qu'on invoque, les jurés doivent être choisis dans un *rayon* de 40 milles de la municipalité (art. 1) et ils l'ont été, non pas dans un *rayon de 40 milles,* mais bien jusqu'à une distance de 40 milles, mesurés sur la route.

Même s'il y avait là une irrégularité, elle serait couverte par l'article 1011 C. Cr. qui dit:—

1011. Nulle omission dans l'observation des prescriptions contenues dans une loi à l'égard de la compétence, du choix, du ballotage ou de la répartition des jurés, ou dans la préparation du registre des jurés, le choix des listes des jurys, l'appel du corps des jurés d'après ces listes, ou la convocation de jurys spéciaux, ne constitue un motif suffisant pour infirmer un verdict, ni n'est admise comme erreur dans un appel à interjeter d'un jugement rendu dans une cause criminelle.

(1) Q.R. (1930) 49 K.B. 215.
(2) Q.R. (1931) 51 K.B. 482.
(3) Q.R. (1931) 52 K.B. 15.
(4) Q.R. (1938) 64 K.B. 270.

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Je trouve que cette objection ne repose sur aucun fondement sérieux.

Le grief N° 8 ne me semble pas plus sérieux. On reproche au juge, aux avocats de la Couronne, comme d'ailleurs pas ricochet aux avocats de la défense d'avoir adressé le jury en français et en anglais. Y avait-il rien de plus logique d'agir de la sorte quand il s'agit d'un jury mixte? D'ailleurs, il semble qu'on peut facilement disposer de cette objection en référant à la cause de *Veuillette* v. *Le Roi* (1), et particulièrement aux raisons de M. le Juge Brodeur à la page 424:—

> Ce serait, suivant moi, un droit bien illusoire si, malgré le droit qu'aurait un anglais, par exemple, de choisir un jury mixte, il était permis à la couronne de faire entendre les témoins en langue française et de ne pas traduire leurs témoignages en anglais de manière à ce que la teneur de ces témoignages fût comprise par les jurés de langue anglaise. Cela constituerait un grave déni de justice.
>
> Il en serait de même pour le résumé (charge) du juge. Ce dernier devrait voir à ce que son allocution soit comprise de tout le jury.
>
> Il est vrai que la loi est silencieuse sur la manière dont une cause devra être conduite devant un jury mixte. Mais je ne veux pas de meilleure interprétation de la loi que cette pratique, constamment suivie depuis plus de cent cinquante ans, que dans le cas de jury mixte les dépositions de témoins sont traduites dans les deux langues et le résumé du juge est également fait ou traduit en anglais et en français.

Et M. le Juge Mignault s'exprime de la même façon aux pages 430 et 431.

Je ne crois pas nécessaire de discuter le 9ème grief, car je ne trouve pas que les procureurs de la Couronne, s'ils ont parlé avec énergie, ont employé un langage enflammé. Rien dans ce qu'ils ont dit était de nature à suggérer aux jurés de rendre un verdict non pas exclusivement basé sur la preuve, mais aussi sur les sentiments et les préjugés.

Il reste donc le dernier motif d'appel qui est à l'effet que Marion Petrie, appelée comme témoin de la Couronne, aurait été transquestionnée par le procureur de la Couronne, sans avoir été déclarée hostile. L'objection est basée sur l'article 9 de la *loi de la Preuve du Canada*. Il se lit ainsi:—

> 9. La partie qui produit un témoin n'a pas la faculté d'attaquer sa crédibilité par une preuve générale de mauvais réputation, mais si le témoin est, de l'avis de la cour, défavorable à la partie en cause, cette partie dernière peut le réfuter par d'autres témoignages, ou, avec la permission de la cour, peut prouver que le témoin a en d'autres occasions fait une déclaration incompatible avec sa présente déposition; mais avant de

(1) (1919) 58 Can. S.C.R. 414.

pouvoir établir cette dernière preuve, les circonstances dans lesquelles a été faite la prétendue déclaration doivent être exposées au témoin de manière à désigner suffisamment l'occasion en particulier, et il doit lui être demandé s'il a fait ou non cette déclaration.

On voit donc, que ce que défend cet article est de discréditer ou contredire son propre témoin, mais nullement de rafraîchir la mémoire d'un témoin, au moyen de témoignages antérieurs qu'il a rendus. Quand l'avocat de la Couronne a questionné madame Petrie sur la bouteille de sirop d'érable, la pompe à gazoline, la présence des deux autres américains, retournés aux Etats-Unis avant l'arrivée de Lindsay et de ses compagnons, comme ses réponses ne concordaient pas entièrement avec celles données à l'enquête préliminaire, elle a lu elle-même ses réponses pour se rafraîchir la mémoire. Elle admet que sa mémoire était meilleure au temps de l'enquête préliminaire une année auparavant. Je ne vois aucune tentative de discréditer le témoin ou de la contredire. Il s'agissait seulement de savoir quelle était la véritable version, et le témoin a accepté celle de l'enquête préliminaire. C'est là d'ailleurs une question de discrétion pour le juge, qui décide suivant les circonstances et l'attitude du témoin.

Je suis donc d'opinion que j'aurais rejeté cet appel, si la Cour avait eu jurisdiction pour l'entendre. Il y a dans toute la preuve qui a été faite un faisceau de circonstances telles que même si j'avais trouvé dans les griefs soulevés par le procureur de l'accusé, non pas des erreurs fondamentales, auxquelles on ne peut remédier, mais quelques irrégularités affectant le procès, je n'aurais pas hésité à appliquer l'article 1014(*c*) du *Code Criminel,* car il ne s'est produit aucun tort réel, ni déni de justice. *Allen* v. *The King* (1). Les circonstances établies, ne laissaient aucune alternative au jury. Elles sont entièrement compatibles avec la culpabilité de l'accusé, et incompatibles avec toute autre conclusion rationnelle.

Ma réponse, en conséquence, à la question posée par Son Excellence la Gouverneur Général en Conseil est que j'aurais rejeté l'appel.

RAND J.:—For the reasons given by my brother Kellock, my answer to the question referred to the Court is that I would have dismissed the appeal.

(1) (1911) 44 Can. S.C.R. 331.

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KELLOCK J.:—The appellant first contends that while the jury were properly charged as to the treatment of circumstantial evidence, the learned trial judge removed from the ambit of such evidence all statements made by the accused himself to the various witnesses.

Initially that is so but the learned trial judge had previously told the jury that, with respect to both direct and circumstantial evidence, the Crown must establish beyond a reasonable doubt that it was the accused who had committed the crime for which he was indicted, and immediately following the direction objected to, proceeded to particularize the evidence of "the circumstances" and included therein not only what had been stated by the various witnesses as to the conduct of the appellant but also the statements made by him. Not only so, but he told the jury that "considering the whole of these facts, no direct proof can be found anywhere" and charged them that if they were not convinced by the evidence "beyond a reasonable doubt that the accused has committed the offence for which he stands indicted, this doubt must work in his favour and it is your duty to discharge him." In these circumstances, all basis for any objection on the above ground, in my opinion, disappears.

The appellant further contends that the examination on behalf of the Crown of the witness Petrie, with respect to whom the learned judge had refused an application to declare her a hostile witness, amounted to cross-examination and was for that reason inadmissible, and, in particular, that the use made by counsel for the Crown of her previous depositions was illegal.

In the course of her examination as to articles which Coffin had brought to Montreal, the witness stated that she had seen a certain maple syrup bottle while giving evidence at the preliminary hearing a year before. She went on to say that it was "like" the one produced at the trial but smaller "as far as I can remember". Crown counsel agreed that "we are talking about evidence that had been given over a year ago" and asked the witness if she would care to refresh her memory, to which she responded that she "wouldn't mind". After having read her depositions to herself, she stated what she had said at the earlier hearing and agreed that her earlier memory was to be preferred.

Similarly, on a question as to her having seen a gas pump with Coffin, the witness at first said she had seen only the box in which it was contained. But on refreshing her memory by reference to her depositions, she said her memory had been better on the former occasion and that she had seen the pump.

Evidence had already been given at the trial of a statement made to the police by Coffin that when he had last seen the Lindsay party, two other Americans, driving a yellowish-coloured jeep, were with them. Evidence had also been given that two Americans driving a vehicle of the above description had been in the Gaspé area some days earlier but had recrossed the border to the United States on June 5, the day the Lindsay party had left Pennsylvania. This was the only evidence of the presence in the district at any time of any similar American party.

On this subject the witness Petrie deposed that Coffin had, a few days after his arrival, told her the same story he had told the police but not on the night of his arrival, when he had told her the other things. She also said, in answer to a question to that effect, that she had not made such a statement on any previous occasion, including an occasion when she had given a statement to the police. She was then asked as to her memory of the facts at the time of the preliminary inquiry. Having answered that it was "a little better than they are now", she looked at her depositions and testified that she had previously said that Coffin had told her only of the Lindsay party. She said that her memory when she had thus testified was "not too bad I guess". In my opinion, in this answer the witness was adopting as the fact what she had said at the preliminary inquiry and her evidence is to be taken accordingly.

It is quite true that the initial answers made by the witness as to these three matters were not "accepted" by counsel for the Crown but while, as a general rule, a party may not either in direct or re-examination put leading questions, the court has a discretion, not open to review, to relax it whenever it is considered necessary in the interests of justice, as the learned judge appears to have considered was the situation in the case at bar; *ex parte Bottomley* (1); *Lawder* v. *Lawder* (2). Moreover, the authorities

(1) [1909] 2 K.B. 14 at 21-23. (2) (1855) 5 Ir. C.L.R. 27 at 38.

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make it clear that a witness may be allowed to refresh his memory by reference to his earlier depositions and that it is only where the object of the examination is to discredit or contradict a party's own witness that s. 9 of the *Canada Evidence Act* applies. In the present case it is evident that the object was to show that the mention by the appellant to the police of having left the Lindsay party in the company of two other persons was an afterthought which had not occurred to him when he gave his earlier account to the witness Petrie. Counsel did not wish, therefore, to discredit Petrie but to obtain from her the evidence she had given in her depositions if, on bringing the depositions to her attention, her memory would permit her to adopt them.

In *Reg.* v. *Williams* (1), a witness for the prosecution, having replied in the negative to a question put to him, was permitted by Vaughan Williams J., to have his depositions put into his hands, and, after having looked at them, to answer the question. Similarly, in *Melhuish* v. *Collier* (2), a witness for the plaintiff was asked by the plaintiff's counsel as to whether or not she had not made a certain answer in previous proceedings before the magistrate. The question being objected to on the ground that it went to discredit the party's own witness, the learned trial judge ruled that the question was a proper one. Upon a rule *nisi* for a new trial, the rule was discharged. At p. 496, Coleridge J., said:

> A witness from flurry or forgetfulness may omit facts and on being reminded may carry his recollection back so as to be able to give his evidence fully and correctly, and a question for that purpose may properly be put.

As to the difference between a question directed to refreshing memory and contradicting one's own witness, the learned judge continued:

> But as to the first point it is objected that the object of the question put here was to contradict and not to remind a witness and that therefore it could not be put. It is certainly very difficult to draw the line of distinction in practice and I am not now disposed to do it. In the present case I do not think the question objected to went further than was proper . . .

See also *The King* v. *Laurin* (3), distinguishing *R.* v. *Duckworth* (4).

(1) (1853) 6 Cox C.C. 343.
(2) (1850) 19 L.J. Q.B. 493.
(3) (1902) 6 C.C.C. 135.
(4) (1916) 37 O.L.R. 197.

In the case at bar the learned trial judge, having come to the conclusion that the witness was not hostile in the legal sense and having therefore refused to permit her to be cross-examined, was, nevertheless, entitled, in his discretion, to permit leading questions to be put, and, similarly, was right in allowing the memory of the witness to be refreshed by reference to her previous statements. As in each case the witness adopted what she had previously said, no such situation arose as in *Duckworth's* case, *ubi cit,* or *Rex* v. *Darlyn* (1), where the earlier statements were not adopted.

The very fact that the learned judge did not regard the witness as hostile, i.e., as not giving her evidence fairly and with a desire to tell the truth because of a hostile animus toward the prosecution, would seem to indicate the propriety of his permitting the examination to proceed and the attention of the witness to be called to her statements when her memory as to the matters to which she deposed was, as she herself said, much better than at the time of the trial, a year later.

A further objection made is that two of the guards attending the jury at a moving picture theatre during an adjournment of the trial, subsequently gave evidence for the Crown. The evidence given was of a statement made by the appellant to his father during the coroner's inquest that "They are not men enough to break me." Only one of the witnesses could depose as to what was said. The other did not understand English and could testify only that Coffin had spoken to his father on the occasion in question.

The jury had been permitted to attend the theatre by the learned trial judge upon the consent of counsel for the accused as well as the Crown. The guards were provincial police and all took the usual oath as to communication with the jury. It is not suggested that there was any breach of this oath on the part of the witness nor any of the other members of the guard. It would appear from the *procès-verbal* that the selection of the guard and the administering of the oath was left by all concerned to the clerk of the court, and that the inclusion of the two constables was a pure oversight by him. In these circumstances, I see no reason for assuming that either constable

(1) (1946) 88 C.C.C. 269.

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was guilty of any impropriety in communicating, in breach of his oath, with the jury on the subject of his prospective evidence, any more than it would be assumed that any constable in attendance at a trial, during the course of which he is required to guard a jury during an adjournment, had discussed with them anything he had heard at the trial or from any other source. We have been referred to reported cases involving facts in which the courts there concerned considered a new trial called for but I cannot agree that the present circumstances call for such a result.

The appellant further calls attention to the fact that the trial took place before a mixed jury, the evidence being translated from one language into the other; that the learned trial judge charged the jury in both languages, and that one counsel for the prosecution as well as one for the defence addressed the jury in one language while his associate in each case addressed the jury in the other. It is contended that because of differences between the addresses in one language and the other and between the charges delivered by the learned judge, the result is that the appellant was really tried by two groups of jurymen composed of six men each. It is also contended that s. 944 of the *Criminal Code* requires that the jury be addressed by one counsel only on each side.

When it is remembered (as we were told by Crown counsel without contradiction) that the practice followed with respect to translation, the charge and the addresses has been the invariable practice in the Province of Quebec since 1892 at least, when the *Code* was first enacted, and that during all of that time s. 944 has been in its present form, the contention, in so far as it is based on that section, cannot, in my opinion, succeed.

In *Veuillette* v. *The King* (1), the appellant, being tried on an indictment for murder, stated through counsel that the language of the defence was French. The jury impanelled was a mixed jury, each of the French-speaking members stating to the court on his selection that he understood and spoke both languages. The proceedings were carried on throughout in English and the summing up was in English only. It was held by this court that even assuming there was any error in law in so proceeding, no

(1) (1919) 58 Can. S.C.R. 414.

substantial wrong or miscarriage of justice had been thereby occasioned to the appellant. In the course of his judgment, Mignault J. said at p. 430:

> Revenant maintenant à la disposition de la loi 27-28 Vict. ch. 41, il est clair que cette disposition serait illusoire si, dans un procès instruit devant un jury mixte, les témoignages n'étaient pas traduits du français en anglais, et réciproquement, et si l'adresse du juge présidant le procès n'était pas faite, *du moins quant à ses parties essentielles,* dans ces deux langues. Telle a toujours été la pratique en la province de Québec, . . .

At p. 431, the same learned judge said:

> Je suis bien d'avis qu'il a été fait quelque chose de non conforme à la loi pendant le procès, c'est-à-dire que l'accusé avait droit à ce que le procès fût instruit dans les deux langues, et à ce que l'adresse du juge au jury fût faite ou traduite, *au moins dans ses parties essentielles,* dans les deux langues, . . .

In my opinion, neither the differences to which we were referred as between the address on behalf of the prosecution in the one language and the other, nor the charges, were of a nature to call for the interference of this Court in the grant of a new trial.

It is next contended that the trial judge erred in refusing the appellant's application under s. 923 of the *Code* to be tried by an exclusively English-speaking jury. The foundation for this contention is certain evidence given by the sheriff that in preparing "the list of jurors", only the names of those who resided within a distance of forty miles *by road* from the court-house were included. The appellant relies upon the interpretation section of the *Jury Act,* 9 Geo. VI (Quebec), c. 22, s. 1, para. (*a*), which defines "municipality" as any municipality situated wholly or in part within a *radius* of forty miles, and he says that "it would appear from the evidence of the Sheriff that had this method of selection been used, a larger number of jurors of English tongue could then have been obtained."

The appellant therefore submits that

> when it was brought to the attention of the trial judge that the Jurors had not been selected in the manner prescribed by the *Jurors' Act,* that it was the duty of the trial judge to order the sheriff to summons a sufficient panel of jurors speaking the English language under the provisions of s. 923, ss. (3) and that *in the circumstances* there was no proper exercise by the trial judge of his discretion in the instant case, and the appellant was thus deprived of a trial according to law.

The italics are mine.

While the definition of "municipality" is as above, the statute provides, by s. 6 and following, for the preparation

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of a permanent jury list in each judicial district by a "special officer", from extracts furnished to him by the secretary-treasurer of each municipality. Upon the completion of this list, the special officer is required, by s. 23, to submit it for approval to a judge of the Superior Court, which approval "shall render the list valid and incontestable" and upon its deposit in the office of the sheriff, s. 18 provides that it shall be the "only" list in force in the judicial district.

It is from the list thus prepared that the sheriff is required to prepare the panel of jurors for any particular sittings but the sheriff has nothing to do with the preparation of "the list" itself. That duty falls upon the special officer and the Superior Court judge. The contention of the appellant under this head is therefore founded upon a complete misconception of the statute. Moreover, it is provided by s. 1011 of the *Criminal Code* that

> No omission to observe the directions contained in any Act as respect . . . the selecting of jury lists, the drafting of panels from the jury lists . . . shall be a ground for impeaching any verdict or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case.

On this reference we are, as is the appellant, restricted to a consideration of "the grounds alleged" upon the application for leave. If, however, anything is open under this head of objection which is not disposed of by what I have already said, I am of opinion that there was, in the circumstances of this case, no error on the part of the learned judge in exercising his discretion under s. 923 of the *Code* against the motion. The learned judge took the view that, even if a full panel of English-speaking jurors could be obtained from the list, which appeared extremely unlikely, "the ends of justice" would be better served by a trial with a mixed jury, as to do otherwise would exclude eighty to eighty-five per cent of the population of the district who were French-speaking from all participation in the administration of justice so far as that trial was concerned.

The ground of objection concisely put is that "the ends of justice" could only be "better served" by what the accused conceived to be in his interests. In my opinion, the section is not to be so construed. It is to be noted that the statute does not say "the interests of the accused" but the "ends of justice." In my opinion, the interests of the

accused are gathered up in the larger interests of the administration of justice. I do not think, therefore, that in the exercise of his discretion under the section for the purposes of this trial, the learned judge took into consideration any matter which can be said to be outside the scope of what was proper in the due administration of justice.

It is next contended that certain comment by counsel for the Crown while addressing the jury in French with respect to the statement by the appellant to his father already referred to, was inflammatory. Having considered that comment, however, I am unable to say that it was not one which might not fairly be made.

The appellant also contends that the address of Crown counsel was inflammatory in its reference to the responsibility resting upon the jury in a case which had undoubtedly received international attention, as indeed the appellant in his factum expressly states. Having read the portion of the address referred to, the impression made upon my mind is best expressed in the language of Duff J., as he then was, in *Kelly* v. *The King* (1), as follows:

> . . . although some of the observations of the learned Crown counsel were no doubt excessively heightened, it is impossible to think that in the circumstances of this case the accused could suffer in consequence of them. Such expressions could not deepen the effect of a bare recital of the facts in the story which the officers of the Crown had to put before the jury.

It is also contended that evidence relating to a rifle borrowed by the appellant from one Eagle, was irrelevant and inadmissible and of so prejudicial a nature as to call for a new trial.

In May, 1953, the appellant had borrowed from Eagle a .32-40 rifle and Eagle also gave him eighteen or twenty cartridges for it. Eagle subsequently gave the police other cartridges of this kind. He further said that early in June, Coffin had told him he had the rifle at his home at York Centre. Eagle, who was quite obviously an unwilling witness for the Crown, further testified that he had had a conversation with Coffin in August following but that the subject of the rifle was not mentioned.

An expert witness called by the Crown testified that in the case of the bullet holes found in the clothing of

(1) (1916) 54 Can. S.C.R. 220 at 260.

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Lindsay Jr., and the bullet mark on the stock of the rifle of Lindsay Sr., there was no deposit of potassium nitrate, which deposit, according to the expert evidence, is found in the case of all calibres of rifle excepting the .32-40. It was also proved that the cartridges Eagle had given to the police, when fired in the type of rifle he had loaned to Coffin, did not leave such a deposit either. None of the four rifles possessed by the Lindsay party were of this calibre.

While, according to the evidence of MacDonald, the appellant did not have a rifle with him on June 8th or 9th, and while the appellant stated to the police that he had not had a rifle with him in the bush between June 10th and 12th, the witness MacGregor saw the muzzle of a rifle in the back of the truck which Coffin was driving immediately upon his coming out of the bush on the evening of the 12th.

Coffin had a camp of his own some ten miles from Gaspé on a bush road which led nowhere beyond that point but faded out into the bush. Access to this road was protected by a gatekeeper, as in the case of the other roads in the neighborhood leading into the forest area. The gatekeeper testified that on June 9 Coffin had passed the gate going toward his camp. This could only have been after his return from the bush that day.

Coffin told the police that he had left for the bush very early on the morning of the 10th. This according to MacDonald, was in breach of Coffin's agreement with MacDonald of the day before to go back into the bush with him at 6.00 a.m. on the 10th. It was also shown that while Coffin had left his home around midnight on June 12 without telling anyone of his plans, he had, by 3.00 a.m., progressed only about thirteen miles on the way to Montreal. He had, therefore, plenty of opportunity to visit his camp in the interim, had he so desired, and to place the rifle there if he did not wish to leave it at his home in York Centre. On arrival in Montreal in the early morning of June 15, he did not have a rifle.

On the 27th of August the appellant, while in custody, was visited by a brother who parted from the appellant in tears. The following morning the police went to Coffin's camp and made a search for the rifle, without result. They, however, found tracks in the soft earth of a vehicle which had preceded them, which they were able to follow to the

camp, where the vehicle had turned about and gone back. The night of August 27-28 had been a very wet night and the marks of the truck were clearly visible in the soft ground. The gatekeeper and his wife deposed that late on the evening of the 27th or the early morning of the 28th, sounds of a vehicle rushing past the barrier had been heard. The driver did not stop to have either his entrance or exit cleared, as was required. The tracks of the vehicle around the barrier were clearly visible. When the police arrived at the camp, they made a search for the missing rifle but found nothing. Had there been no other evidence with regard to the rifle it might be that the evidence of the visit of the police, as well as that of the nocturnal visitor who preceded them, should be considered too remote to be properly admissible. But there was other evidence.

Eagle testified that when he "lost" the rifle loaned to Coffin he bought another in its place in October, 1953. It is a legitimate inference from this evidence, and one the jury were entitled to draw, that Mr. Eagle had learned, from some source, that his rifle was irrevocably gone when he spent his money on a new one. It is also a fair inference that when the rifle was not mentioned between them when Eagle was talking to Coffin on the occasion of the August interview, the realization of his "loss" must have come to him subsequently. When it is realized that no person would have any business at Coffin's camp except the appellant himself or someone under his direction or with his permission, it is also a fair inference that the object of the police officers and that of the nocturnal visitor of August 27-28, was the same, namely, the rifle. All of the above evidence is part of a whole, which, in my opinion, was admissible, its weight, of course, being a matter for the jury. Moreover, all of this evidence was merely incidental to the main fact deposed to by the witness MacGregor that the latter had seen a rifle in Coffin's truck immediately upon his coming out of the bush on the evening of June 12, as well as to the fact that the rifle loaned to Coffin by Eagle was not accounted for.

In *Blake* v. *Albion* (1), Cockburn C.J., said at p. 109:

> . . . with a few exceptions on the ground of public policy . . . all which can throw light on the disputed transaction is admitted—not of course matters of mere prejudice nor anything open to real, moral or sensible objection, but all things which can fairly throw light on the case.

(1) (1878) L.R. 4 C.P.D. 94.

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In my opinion, however, that portion of the evidence of the police officers that it was because of having obtained "precise" information that they had gone to the appellant's camp to make the search, was not proper. For reasons to be given, however, I am satisfied that, in the circumstances of this case, neither the admission of this statement nor the reference to it in the judge's charge produced any substantial wrong or miscarriage of justice.

It is next said for the appellant that the learned judge did not instruct the jury in accordance with the principle in *Schama's* case (1), with reference to such account as Coffin gave of his possession of the property of the deceased hunters. In so far as the early part of his charge is concerned, I think there is room for objection. However, the learned judge went on to point out to the jury that the appellant had given no explanation at all to account for his possession of some of the articles and, after putting before them such explanation as the appellant did make with regard to others, he asked the jury to consider whether the explanation given was "likely". Also, after asking the jury to consider which of the respective contentions of counsel for the Crown and the appellant as to the appellant's conduct they considered "the most logical, the most plausible, the most likely and the most reasonable, according to the facts" which had been proved, the learned judge again returned to the appellant's possession of articles belonging to the deceased, of American money and his story of having been paid by Lindsay Sr., as well as his failure to make any explanation at all as to certain articles, and, placing before the jury the theory of the prosecution and the defence, concluded:

> Gentlemen, you have two theories which are opposed to one another. Is one more likely than the other? Does the theory of the Crown rest on a body of evidence which points beyond any reasonable doubts towards Coffin and towards his guilt as to the crime he stands indicted? Does the theory of the Defence spring reasonably from *the same facts,* and may it cause you to believe in the incompatibility of the proven circumstances with the guilt of Coffin and their compatibility with his innocence?

In re *R.* v. *Garth* (2), Lord Goddard C.J., in reference to the decision in Abramovitch, said, at p. 101, that "a much more accurate direction to the jury is: 'if the prisoner's account raises a doubt in your minds, then you

(1) (1914) 11 Cr. App. R. 45. (2) (1949) 33 Cr. App. R. 100.

ought not to say that the case has been proved to your satisfaction.'" See also *Richler* v. *The King* (1), per Sir Lyman Duff C.J. In my opinion, the charge of the learned judge, on this subject, when read as a whole is not open to the objection which the appellant takes. If it could be said to fall short of what is required, I would, in any event, be of opinion that, in the circumstances of this case, no substantial wrong or miscarriage of justice occurred because of it.

The appellant further contends that the learned trial judge erred in failing to direct the jury that they were not entitled to convict of murder "simply because they came to the conclusion that he was guilty of theft" of the various articles. In his factum the appellant says:

> While the jury might well have seen fit to conclude that the appellant had stolen the items found in his possession from the abandoned truck of the victims there was nothing in the evidence to compel them to conclude that he had killed the deceased tourists and had stolen from their persons.

In this connection it is necessary to refer to the evidence at some length.

The deceased, with his father, Eugene Lindsay, and another youth, Frederick Claar, left their homes in Pennsylvania on June 5, 1953, intending to return by the 15th of that month. As they did not return, a search was instituted and ultimately the remains of all three were found. Little more than bones remained as the bodies had been eaten by bears and other wild animals. According to the expert evidence, the death of each had occurred not later than June 17.

The country where the remains were found is a forest area adjoining a bush road which, some distance to the east of the locality in question, has two branches which commence at what is called the "Mine Road", which runs from Gaspé to Murdockville. The westerly end of this bush road again meets the Mine Road approximately six miles to the east of Murdockville. This country is, so far as the evidence shows, completely uninhabited, and resorted to only by prospectors and hunters.

Approximately midway between the point where the two branches join and the point where its westerly terminus meets the Mine Road, there are four hunting camps used

(1) [1939] S.C.R. 101 at 103.

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spasmodically by hunting parties, the camps being numbered, from east to west, 21, 24, 25 and 26. They are approximately three miles apart. Access to the bush road is obtained only through barriers for which a pass must be presented to the attendants in charge.

On July 10, the truck of the deceased was found abandoned on the bush road at a point about three miles east of camp 21. On July 23, the remains of Lindsay Jr., were found in a heavily wooded area at a distance of approximately 175 feet from Camp 26. With them were found a sweater and two shirts, each perforated by a bullet hole in what would have been the vicinity of the heart had the clothing been worn at the time of the death. Undoubtedly they had been so worn as the bullet holes were in the same place in each garment. There was also found nearby a watch, a silver ring, and a cigarette lighter, all belonging to the deceased, as well as his rifle, the muzzle being buried in the earth, suggesting that as he fell the rifle had been pushed into the ground. The left pocket of the trousers of the deceased had been turned inside out and his wallet was missing. It was proved that he had had a wallet made of brown leather.

In a locality of the same character approximately 200 feet away, the remains of Claar were also found the same day. Nearby there were some of his clothing, boots, a camera, as well as his rifle. Beneath a large stump, under which it had been stuffed, a leather windbreaker belonging to Claar was also found, as was also his wallet which had been rifled. Holes in the bones of the lumbar region of Claar were similar to the bullet holes found in the clothing of Lindsay Jr., but the experts were not able to swear positively that they were bullet holes.

The remains of Lindsay Sr. had previously been found on July 15, at a distance of approximately one hundred and fifty feet from Camp 24, near the bank of a small stream. On July 27, his wallet was discovered in the bed of this stream. The zipper had been pulled open and most of the documents it contained were partly pulled out, but the wallet was empty of money. When the deceased had left his home on the 5th of June, he had with him at least $650. On the butt of his rifle, which was found approximately fifty feet from his remains, there was evidence of blood and

human hair, and there was more hair on the ground. In addition, there was a mark on the butt suggesting it had been caused by being grazed by a bullet.

In the vicinity of Camp 24 also, there were first discovered a sleeping bag containing some bread, a camera case and a couple of jackets. The sleeping bag had been tightly rolled up and tucked under some trees in the bush away from the road. This discovery led to a further examination in the vicinity with the result that, spread over an area of approximately one hundred feet in the bush, other articles were found, including a camp stove, the legs of which were in the branches of the trees, while the stove itself was down below in the bushes. All these articles were proved to have belonged to one or other of the deceased. It was apparent to the searchers from the places in which they were found that these latter articles had been thrown away. In addition to the three rifles mentioned, another was found in the abandoned truck, from which nothing else appeared to have been taken. None of the rifles had been recently fired. The Lindsay party had taken with them four rifles only.

It is reasonably apparent from the articles not taken, and the jury could so conclude, that the motive for the killing was robbery and that it was money which the robber chiefly wanted.

Coffin, with one MacDonald, had been in the area in question on the 8th and 9th of June, had spent the night at Camp 24 and had gone as far as a mile and a half west of Camp 26 before returning to Gaspé on the afternoon of June 9, arranging to meet MacDonald next morning at Coffin's home at six o'clock for the purpose of returning to the area for prospecting purposes. Coffin did not, as already mentioned, keep this appointment. Instead, according to his own story, very early on the morning of June 10, he set out for Camp 21 alone in the truck which he had borrowed from one Baker and which he and MacDonald had used on the two preceding days. He told the police that he had come upon the three Americans about three miles east of Camp 21 and had had breakfast with them.

According to Coffin, Lindsay Sr., had requested him to go to Gaspé with Lindsay Jr., to have the gas pump of the Lindsay truck, which Coffin said was not working, repaired. He did so and the presence of the two in Gaspé that day was independently proved. On arrival at Gaspé, Coffin said

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they found it impossible to repair the pump and young Lindsay purchased a new one. They then returned, reaching the others about four or five o'clock that afternoon. At this time, according to Coffin's story to the police, there were the two other Americans there with a yellowish plywood jeep. Coffin said he was introduced but did not remember their names.

Coffin stated that Lindsay Sr. took out his wallet and paid him $40 in American currency, a $20 bill and two $10 bills. Coffin stated that after having a meal with the Americans, he left for Camp 21 and that he prospected in the vicinity until June 12, when he set out on the return trip to Gaspé. On reaching the place where he had left the five Americans on the evening of the 10th, he said the Lindsay truck was there but no person. After waiting some time, he went on, reaching the home of MacGregor, a neighbour, in the early evening. Subsequently and about midnight, he left for Montreal, where he remained until on or about July 14.

On arrival in Montreal, Coffin had in his possession a knife having a number of attachments, the property of Lindsay Jr., as well as a pair of binoculars, the property of Claar's father, which the latter had lent his son for the purposes of the trip. These binoculars had a value of $65. Coffin had also the gas pump and a valise of Claar Jr., which contained a shirt, two pairs of shorts, two pairs of socks, a pair of blue jeans and two towels. According to the witness Petrie, Coffin told her that the knife and the binoculars had been given to him as souvenirs by some Americans he had helped in the Gaspé bush. He made no explanation to her or to anyone else with respect to the valise or any of its contents nor as to the pump. When Coffin returned to Gaspé he had the valise and the knife with him. The valise was unpacked by his sister, Mrs. Stanley, who found in it the two towels and the pair of jeans. He made the same statement to her with regard to the knife as he had made to Petrie but said nothing about any of the other articles.

As already pointed out, the appellant concedes that there was sufficient evidence of the theft of the various articles but not of any connection between the theft and the killing.

With respect to Coffin's account of his possession of the knife and the binoculars, it is to be kept in mind that he made no attempt to explain to anyone his possession of the other articles. That Coffin would be paid $40 for going back to Gaspé with Lindsay Jr. on June 9 would, taken by itself, seem likely to cause some raising of eyebrows among the jury, but when that story is coupled with the further statement that Coffin had, in addition, been "given" binoculars of a value of $65, a gift which no one but Claar Sr., who was in Pennsylvania could make, and the knife, which was of a special character and which had been a special gift to young Lindsay, the limits of credulity are surely overpassed. It cannot, therefore, be said, in my opinion, that the appellant gave any reasonable explanation of how he came to be in the possession of the things as to which he even attempted to make an explanation; *R.* v. *Curnock* (1).

Moreover, if the jury did not believe the story that Coffin had been "paid" $40 by Lindsay Sr., it was established out of his own mouth that he was in possession on June 10 of part, at least, of money belonging to Lindsay Sr.

In my opinion, therefore, there was abundant evidence from which the jury could conclude that the possessor of the money and the other items was the robber and the murderer as well. I think they have done so.

In *Regina* v. *Exall* (2), Pollock C.B., said at 924:

> The principle is this, that if a person is found in possession of property recently stolen, and of *which he can give no reasonable account*, a jury are justified in coming to the conclusion that he committed the robbery.
>
> And so it is of any crime to which the robbery was incident, or with which it was connected, as burglary, arson, or murder. For, if the possession be evidence that the person committed the robbery, and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime.
>
> The law is, that if recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to *account* for the possession, that is, to give an explanation of it, which is not unreasonable or improbable.

In a note to the above case at p. 850 of vol. 176 of the English Reports, the editor refers to the case of *R.* v. *Muller* at p. 385 of the same volume, where the murder in question had occurred in a railway carriage on a Saturday

(1) (1914) 10 Cr. App. R. 207. (2) (1866) 4 F. & F. 922.

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evening and on the following Monday the prisoner was found in possession of the watch of the murdered man which he said he had bought off a pedlar at the London docks. The question arose as to whether, supposing the jury were not satisfied of the accused's guilt upon the evidence apart from the recent possession of the hat and watch, such possession would be sufficient proof of the prisoner's guilt of the murder. The note reads:

> That it would have been sufficient, if no explantion at all had been offered, would be conceded. For the absence of explanation would have amounted to an admission.

In the case at bar the evidence which I have thus far discussed, does not stand alone.

Very shortly after Coffin came out of the bush on the evening of June 12, he went to see the witness Boyle and paid him an "old debt" of $5.25. The same evening, also, he went to the hotel of the witness White where he purchased a case of ale, in payment for which he tendered a $20 American bill, and on being told that he owed White $5 "from last year", he paid that. Change was given to him in Canadian money.

At 1.30 a.m. on June 13, before he had left York Centre for Montreal, he also visited one Tuzo and paid him $10 which the latter had loaned him approximately five weeks earlier.

About 3 a.m. on the same morning, Coffin got into the ditch at a place called Seal Cove about twelve miles on the road to Montreal from Gaspé and was helped out by the witness Element, who was paid by Coffin $2 in American bills.

At about 6.30 a.m. the same day, the witness Despard testified that he had filled the tank of Coffin's truck at Percé and repaired the brake at a cost of $8, for which Coffin tendered him a $20 American bill, asking for only $10 in change, thereby tipping him $2.

Later, at a place called Chandler, Coffin received a haircut, a shave and a hair wash at the barber shop of the witness Poirier at a cost of $1.50. In addition to paying this, he left a tip of $1.50, and paid $1 for a shoeshine. He also paid for the haircut of another customer in the shop and left as well a tip of $1.75.

Later the same morning, Coffin got into the ditch again near a place called St-Charles de Caplan, out of which he was assisted by the witness J. P. Poirier, to whom he tendered another $20 American bill. Poirier testified that Coffin took the money out of a *brown* wallet which was filled with bills to a depth of approximately half an inch.

At noon the same day, at Black Cape, Gaspé, the appellant incurred a small garage bill and left the proprietor a tip of $1. About 8.30 a.m. on June 14, he went to the home of the witness Tardif at St-André de Kamouraska where he purchased toast and coffee and seven bottles of beer, for which he paid $5. After he had left, a $10 Canadian bill was found under the chair which he had occupied.

Prior to leaving York Centre for Montreal, the only money which Coffin was known to have had was $20 which he had received from MacDonald on the evening of the 9th of June to enable him to buy gas and other supplies for their return trip into the bush. This is apart from the $40 in American funds which he alleged he had received from Lindsay Sr. Coffin's last known employment was in May but how long he had worked or how much money he had was not shown.

The character of the above expenditures was such as to call as much for explanation as the recent possession of stolen goods; *Wills on Circumstantial Evidence,* 7th ed., p. 105.

On Coffin's return from Montreal on July 20, when the remains of Lindsay Sr. had been found but the search for the others was proceeding, he was asked by the police to assist. He went with them the next day and it was then that he gave the account of his movements between June 10 and 12 to which I have already referred.

Coffin told the police, also, that on his visit from June 10 to 12 inclusive, he had not gone beyond Camp 21 but on July 21, when the search party were having lunch at Camp 24, cold water was asked for and Coffin went out to get it. He had, however, gone only five or ten feet beyond the door when he turned and asked "Where is the brook?", and did not go farther. The brook was within sixty feet of the shanty and readily visible. Upon Coffin saying this, one of the other men of the party, one Adams, said to him

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that he knew the country as well as Adams did himself. To this Coffin made no answer. Moreover, MacDonald testified that he and Coffin had eaten a meal within ten feet of that brook on June 9. It will be remembered that it was in the bed of this brook that the rifled wallet of Lindsay Sr. was later found on July 27. When the search party reached Camp 24, Coffin said he remembered having "come up to" Camp 24 with MacDonald. According to the latter, he and Coffin had gone beyond Camp 26 about a mile and a half on June 9.

Members of the search party testified that Coffin participated on a small scale in the search, during which he kept away from the sides of the road where the various articles thrown into the bush had been found.

As was said by Cockburn C.J., in *Moriarty* v. *Ry. Co.* (1):

> . . . it is evidence against a prisoner that he has said one thing at one time and another at another, as shewing that the recourse to falsehood leads fairly to an inference of guilt.

This is clearly applicable to the case at bar, which, in my opinion, is completely covered by the principle stated by Lord Tenterden C.J., in *R.* v. *Burdett* (2):

> No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; *can human reason do otherwise than adopt* the conclusion to which the proof tends?

This being so, the circumstances, in my opinion, are such as to call for the exercise of the jurisdiction conferred by s. 1014(2) of the *Criminal Code*, notwithstanding error in the proceedings as already mentioned.

The effect of the sub-section has been variously expressed but the underlying principle was thus stated by Viscount Simon in *Harris* v. *Director of Public Prosecutions* (3):

> If it could be said that a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt have convicted . . ., the proviso should be applied. This is the test laid down by this House in *Stirland* v. *Director of Public Prosecutions*, 1944 A.C., 315 at 321.

Similar language had previously been used by Anglin J., as he then was, in delivering the judgment of the majority

(1) (1870) L.R. 5 Q.B. 314 at 319. (2) (1820) 4 B. & Ald. 95 at 161.
(3) [1952] A.C. 694 at 712.

in *Kelly* v. *The King* (1), where the decisions of the Privy Council in *Makin* v. *Attorney General of New South Wales* (2) and *Ibrahim* v. *The King* (3), were referred to. It may be observed that in the latter case, Lord Sumner, at p. 616, called attention to the former, as follows:

> Even in Makin's case, however, reservation was made of cases "where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the Jury," *and this reservation is not to be taken as exhaustive.*

Again, in *Stein* v. *The King* (4), Anglin C.J.C., after referring to *Makin's* case, *Ibrahim's* case, *Allen* v. *The King* (5) and *Gouin* v. *The King* (6), said:

> It may be that sometimes objectionable testimony as to which there has been misdirection is so unimportant that the court would be justified in taking the view that in all human probability it could have had no effect upon the jury's mind, and on that ground, in refusing to set aside the verdict.

In that case the court considered the section inapplicable as the trial judge had erred in a most vital matter. In my opinion, the error in the case at bar was confined to matter of a comparatively minor character. Even where there has occurred misdirection in a material matter, the section is applicable if the court is satisfied that the jury, properly directed, must have reach the same conclusion: *Boulianne* v. *The King* (7).

In the case at bar, the evidence being as above reviewed with no explanation attempted by the appellant as to some of the articles in his possession and no explanation as to the others that could reasonably be true, no reasonable jury could, in my opinion, have done "otherwise than adopt the conclusion to which the proof tend(ed)."

Accordingly, if the application made by Wilbert Coffin for leave to appeal had been granted on any of the grounds alleged on the said application, I would have dismissed the appeal.

LOCKE J.:—The facts, so far as it is necessary to consider them, are stated in the reasons for judgment to be delivered by my brother Cartwright which I have had the advantage of reading.

(1) (1916) Can. S.C.R. 220 at 260.
(2) [1894] A.C. 57.
(3) [1914] A.C. 599.
(4) [1928] S.C.R. 553 at 558.
(5) (1911) 44 Can. S.C.R. 331.
(6) [1926] S.C.R. 539.
(7) [1931] S.C.R. 621 at 622.

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As to the fourth ground of appeal, that portion of the evidence of Sergeant Doyon as to the "precise information" on which he acted in searching for the rifle in the vicinity of Coffin's camp was clearly hearsay. During the course of the argument of counsel for the Crown, he was asked if he could suggest any meaning which could be given to the language employed, other than that some one (unnamed) had given the witness information that the rifle was to be found there. He was unable to do so. I also find myself unable to attribute any other meaning to the words. The answer made by Constable Synnett that:—

> We proceeded to the place where Sergeant Doyon had got his information from—where the indicated spot was supposed to be, and we got there at the indicated place, and the rifle was not there.

amounted to repeating the inadmissible evidence of Doyon.

The fact that the learned trial judge and both of the counsel who presented the case of the Crown to the jury accentuated its importance in determining the issue of the guilt or innocence of the accused appears to me to be decisive of the question as to the material nature of the evidence.

In *Allen* v. *The King* (1), this Court considered an appeal, by a person convicted of murder in British Columbia, upon a reserved case, the basis for the appeal being that evidence had been improperly admitted at the trial. At the time *Allen's Case* was considered, s. 1019 of the *Criminal Code* (c. 146, R.S.C. 1906), dealing with appeals in criminal cases to a court of appeal, read:—

> No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.

It was contended for the Crown that this section should be applied in disposing of the appeal. Sir Charles Fitzpatrick C.J., with whom Duff J. (as he then was) agreed, said in reference to this (p. 339):—

> It was argued that the section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where

(1) (1911) 44 Can. S.C.R. 331.

the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitæ*. To say that we are in this case charged with the duty of deciding the extent to which the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused in a capital case of the benefit of a trial by jury.

Having said this, the Chief Justice said that the law on the point had been laid down by the Judicial Committee of the Privy Council in 1893 in *Makin* v. *Attorney General for New South Wales* (1), and quoted the following extract from the judgment of Lord Chancellor Herschell:—

It was said that if without the inadmissible evidence there were evidence sufficient to sustain the verdict and to shew that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction transfers from the jury to the court the determination of the question whether the evidence—that is to say, what the law regards as evidence—established the guilt of the accused. The result is that, in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

It is impossible to deny that such a change of the law would be a very serious one, and the construction which their Lordships are invited to put upon the enactment would gravely affect the much-cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly affected the jury to return a verdict of guilty, and the rest of the evidence which might appear to the court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the court might, under such circumstances, be justified, or even consider themselves bound to let the judgment and sentence stand. These are startling consequences. . . .

Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice where, on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the judge to consider, in arriving at their verdict, matters which ought not to have been submitted to them. In their Lordships' opinion, substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence.

The language above quoted was followed by the following, which was the concluding paragraph of the Lord Chancellor's judgment:—

Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is

(1) [1894] A.C. 57 at 69 and 70.

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impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as for example where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence.

While this was not quoted by the Chief Justice, it was clearly adopted by him in the passage from his judgment above recited.

Anglin J., saying that to accept the construction of s. 1019 urged on behalf of the Crown would be, in effect, to substitute the court for the jury in determining the question whether the evidence which was admissible established the guilt of the accused, quoted that passage from the judgment of the Lord Chancellor in which it was said that in their Lordship's opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence and there were substituted for it the verdict of the court founded merely upon the perusal of the evidence. While both the Chief Justice and Anglin J. noted that the enactment considered in *Makin's Case* differed from the language of s. 1019 in that it read:—

> Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice.

both clearly were of the opinion that there was no real distinction between the statutory provisions.

S. 592(1)(*b*)(iii) of the new *Code* which applies to the disposition of the present matter by virtue of s. 746 provides that the court may dismiss the appeal, notwithstanding that it is of the opinion that, on any question of law, the appeal might be decided in favour of the appellant if "it is of the opinion that no substantial wrong or miscarriage of justice has occurred." The meaning of the language quoted is indistinguishable from that of the section 1019 considered in *Allen's Case*. In my opinion, we are bound by the decision of the Judicial Committee in *Makin's Case* and by that of the majority of this Court in *Allen's Case*. It cannot, in my opinion, be said that the evidence in question, to which so much importance was attached by the learned trial judge and by Crown counsel when the matter was presented to the jury, was evidence of the nature referred to in the concluding passage of the Lord Chancellor's judgment above referred to. Once it is determined that the evidence improperly admitted is on a point

material to the guilt or innocence of the accused, it cannot properly be said that there has been no substantial wrong or miscarriage of justice and the section has, in my opinion, no application.

The decision of this Court in *Schmidt* v. *The King* (1), was not in a case in which there had been an improper admission of evidence of this character and was not intended to be at variance with *Allen's Case,* in my opinion.

On all of the other questions discussed by my brother Cartwright I agree with his conclusions and with his reasons for those conclusions.

If leave to appeal had been granted on those grounds advanced on the application for leave to appeal, dealt with by my brother Cartwright and by me, it would have been my opinion that the appeal should be allowed, the conviction quashed and a new trial directed.

CARTWRIGHT J.:—On August 5, 1954, following his trial at Percé in the Province of Quebec before Lacroix J. and a jury, Wilbert Coffin was convicted of having, between June 1, 1953 and July 23, 1953, murdered Richard Lindsay. He appealed to the Court of Queen's Bench (Appeal Side) (2), and his appeal was dismissed without dissent. He then applied to a Judge of this Court for leave to appeal to this Court upon a number of questions of law; this application having been dismissed, he appealed to the Court from such dismissal; and the Court, being of opinion that it was without jurisdiction, dismissed the appeal.

His Excellency the Governor General in Council has referred the following question to the Court:—

> If the application made by Wilbert Coffin for leave to appeal to the Supreme Court of Canada had been granted on any of the grounds alleged on the said application, what disposition of the appeal would now be made by the Court?

We have had the assistance of full and able arguments by counsel for the Attorney General of Quebec and for Coffin.

The grounds alleged on the application for leave to appeal to this Court which were argued before us are as follows:—

> 1. Did the Learned Trial Judge err in respect to the instructions he gave to the jury with reference to the doctrine of recent possession in the following manner:—
>
> (*a*) Should the jury have been permitted to apply the doctrine at all?

(1) [1945] S.C.R. 438. (2) Q.R. [1955] Q.B. 620.

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(b) Were the jury misdirected with reference to the burden resting on the Appellant to explain his possession of items allegedly stolen?

2. Did the Learned Trial Judge err in failing to instruct the jury that they were not entitled to convict the Appellant of murder simply because they came to the conclusion that he was guilty of the theft of the various articles proved to have been the property of the victim, Richard Lindsay, and his associates?

3. Did the Learned Trial Judge err by instructing the jury in a manner that would indicate the statements and declarations made by the Appellant to various witnesses were not to be regarded as circumstantial evidence and evidence therefore to which the rule in Hodge's case should be applied?

4. Did the Learned Trial Judge err in admitting evidence concerning a certain rifle, the property of one Jack Eagle?

5. Did the Learned Trial Judge err in admitting the evidence of one Marion Petrie Coffin, common law wife of the Appellant?

6. Did the Learned Trial Judge err in permitting the jury to attend a moving picture theatre in the company of two police officers who were subsequently called as witnesses for the Crown?

7. Did the Learned Trial Judge err in refusing the application made on behalf of the Appellant to be tried by a jury composed entirely of English-speaking citizens?

8. Was the Appellant deprived of a trial according to law by reason of the failure of the Sheriff of the County in which the Appellant was tried to comply with the provisions of the Quebec Jury Act (1945, 9 George VI, Chap. 22)?

9. Was the Appellant deprived of a trial according to law by reason of the improper mixture of the English and French languages?

10. Was the Appellant deprived of a trial according to law by reason of the fact that Crown Counsel in their addresses to the jury used inflammatory language?

The evidence indicated that Richard Lindsay, aged 17 years, his father, Eugene Lindsay and a friend Frederick Claar left their home in Pennsylvania on June 5, 1953, in a truck to go on a hunting trip in the District of Gaspé from which they never returned. Their remains were discovered by search parties in July 1953, those of Eugene Lindsay on July 15 about 150 feet from a camp known as Camp 24 and those of Richard Lindsay and Claar, about two hundred feet apart, in a heavily wooded area in the vicinity of a camp known as Camp 26 which is distant about two and a half miles from Camp 24. Camp 24 is about 60 miles from Gaspé. The medical evidence was that their deaths had occurred not later than June 17.

As is pointed out by Hyde J. the Crown's case against Coffin was based on circumstantial evidence. The main circumstances claimed to be established were:—

(*a*) that Richard Lindsay was shot;

(*b*) that property belonging to him and his two deceased companions was stolen;

(*c*) that Coffin had an opportunity to commit the crime;

(*d*) that a weapon (Eagle's rifle), which could have been used to shoot Richard Lindsay, was loaned to Coffin prior to the date of the crime and was never returned to its owner;

(*e*) that when Coffin came out of the bush on June 12 the muzzle of a rifle was seen in his truck;

(*f*) that the motive of the murder was theft;

(*g*) that Coffin had possession of articles which were the property of the three deceased;

(*h*) that as to some of these he gave no explanation and as to others no reasonable explanation of having them in his possession;

(*i*) that when he left home Eugene Lindsay had about $650 in cash but that when his wallet was found there was no money in it;

(*j*) that after June 12 Coffin had possession of a substantial amount of money although prior to that date he was shewn to owe some small debts;

(*k*) that Coffin made contradictory statements as to his actions during the period when the murder was committed;

(*l*) that Coffin's conduct during the search for the remains of some of the deceased, in which he took part, was suspicious;

(*m*) that Coffin, after being arrested, arranged to have Eagle's rifle made away with.

Coffin did not testify and no witnesses were called for the defence. Statements which he had made to police officers and to Marion Petrie Coffin, who was described as his common law wife, were proved as part of the Crown's case. Some parts of these statements, if true, were exculpatory; they contained no admission of guilt. This brief

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summary, while far from complete, is, I think, sufficient to indicate the evidentiary background against which the questions of law raised for decision must be considered.

Ground 4.

I propose to deal first with ground 4 above. There was evidence that in May 1953 the witness Eagle had loaned his Marlin .32-40 calibre rifle to Coffin; that up to the time of the trial the rifle had not been returned to him; and that the holes in the clothing of Richard Lindsay, indicating that he had been shot, could have been made by a bullet of the calibre of Eagle's rifle. It was part of the theory of the Crown that Coffin had shot Richard Lindsay with Eagle's rifle. The evidence objected to was introduced in an endeavour to establish that at some time after the murder and probably before leaving for Montreal on June 13 Coffin had hidden this rifle near his camp; that on August 27 he had told his brother Donald Coffin where he had hidden it and that in the night of August 27 Donald Coffin had gone in a truck to Wilbert Coffin's camp, got the rifle and made away with it.

Coffin's camp is in wooded country about 14 miles from Gaspé. On the forest road leading to this camp there is a barrier at which persons going into the bush to hunt are required to obtain a permit. Coffin had been taken into custody on August 10. On August 27 he was allowed to have a private interview with his brother Donald at Police Headquarters in Gaspé. Donald came out from this interview in tears. In the early morning of August 28 the sound of a motor vehicle was heard rushing past the barrier on the road leading to Coffin's camp. Later on the morning of August 28 Sergeant Doyon and Police Constable Synnett went to Coffin's camp; they saw marks on the road of the tires of a truck. It was said that Donald Coffin had a truck but there was no evidence as to whether the marks of its tires were similar to those seen on the road. Doyon and Synnett made a search in the vicinity of Coffin's camp but found no rifle.

The evidence objected to is found in the following passages in the evidence in chief of Sergeant Doyon and Police Constable Synnett.

Sergeant Doyon—

Q Maintenant, il y a un monsieur Eagle qui a été entendu au sujet d'une carabine qu'il avait prêtée à Coffin. Voulez-vous dire à la Cour et à messieurs les jurés si vous avez fait quelques recherches au sujet de cette carabine?

R Oui, j'avais eu une information précise, et j'ai fait certaines recherches aux alentours du camp de Coffin à la grande fourche, et plus précisément . . .

Q A quelle date?

R En date du 28 août.

Q Etait-ce quelle partie de la journée?

R A bonne heure le matin.

Q Et avec qui avez-vous fait ces recherches?

R Avec l'agent Synnett de la Police de la Route.

Q Alors, où vous êtes-vous rendus?

R De Gaspé, nous nous sommes rendus jusqu'au petit camp de Coffin à l'endroit appelé Grande Fourche.

Q Et quelle partie avez-vous visitée ou fouillée?

R Plus précisément, à environ quarante à cinquante pieds au nord du petit camp de Coffin.

Q Qu'est-ce que vous avez fait, là?

R J'ai fait des recherches avec Synnett dans cette partie de la forêt, principalement près de petits sapins.

Q Et puis, combien de temps avez-vous cherché comme ça?

R A partir de sept heures et demie du matin aller jusqu'à onze heures de l'avant-midi, je crois.

Q Et avez-vous trouvé quelque chose?

R Non monsieur.

Q Pour aller au camp de Coffin et à l'endroit où vous avez fait des recherches sur l'information précise que vous aviez obtenue, est-ce qu'il faut passer par une barrière?

R Oui, il y a une barrière à environ un demi-mille de la route nationale, qui conduit de Percé à Gaspé.

Police Constable Synnett—

Q. Now, Mr. Synnett, had you the occasion to accompany Mr. Doyon in order to make any searches in the vicinity of a camp belonging to Coffin?

A. Yes, we went there on the day of the last Coroner's inquest, or the day following the last Coroner's inquest.

Q. Do you remember what date it was?

A. On the 28th day of August.

Q. Now, will you tell us in what circumstances you made that trip, and what you noticed at that occasion?

A. We were going to look for a rifle.

Q. Do you know to whom belonged that rifle?

A. Yes, I did, at the time.

Q. Who?

A. John Jack Eagle.

Q. Will you go on?

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A. We proceeded to the place where Sergeant Doyon had got his information from—where the indicated spot was supposed to be, and we got there at the indicated place, and the rifle was not there.

Q. How long did you spend for your search?

A. About an hour.

In my view all those parts of these passages which shewed that Doyon had information that Eagle's rifle was concealed in a precisely indicated spot in the neighbourhood of Coffin's camp were inadmissible as being hearsay evidence. Their meaning is not doubtful; and the jury could only understand them as a statement that someone, unnamed and not called as a witness, had told Doyon that Eagle's rifle was concealed near to some small fir trees 40 or 50 feet to the north of Coffin's cabin and had given Doyon precise information as to its hiding-place. On this illegal foundation there was erected and placed before the jury the theory that Coffin had told his brother Donald where the rifle was and had prevailed on him to get it and make away with it and that Donald was the driver of the vehicle heard to rush past the barrier in the early morning of August 28. Without evidence that Eagle's rifle was in fact hidden near Coffin's camp prior to the night of August 27/28 the whole incident was of negligible probative value and connected with the accused so remotely, if at all, as to be inadmissible because irrelevant; but with evidence that the rifle was so concealed counsel for the Crown was in a position to ask and did ask the jury to infer a conspiracy between Coffin and his brother to destroy what was, in the Crown's theory, the murder weapon. Evidence that an accused has suppressed or endeavoured to suppress evidence is admissible circumstantial evidence against him, but here the foundation of the whole incident on which the jury were invited to find that he had suppressed evidence was the inadmissible hearsay evidence dealt with above.

In my view, the admission of this hearsay evidence was a grave error in law. I do not think that counsel for the Crown can be heard to say that the evidence was unimportant for it was forcibly put to the jury, in the address of counsel, as a circumstance pointing to Coffin's guilt and throwing upon the defence the onus of calling Donald Coffin as a witness which they had not done.

When he came to charge the jury the learned trial judge did so first in English and then in French. His charge in English concluded at 12.15 p.m. and the Court adjourned; on resuming at 2.15 p.m. the learned judge addressed the jury in English as follows:—

Gentlemen, before I address you in French, I want to make certain corrections. There is an incident in the evidence which I had noted and I intended to draw your attention to, and I unfortunately overlooked it this morning.

I told you that on the occasion of that trip in the bush, MacDonald had declared that he had not seen any rifle in the equipment, and that on the 12th of June MacGregor at Murray Patterson's place, had testified to the fact that he had seen a rifle in the pick-up which was driven by Coffin.

Now, maybe something could be said to complete that part of the evidence, because there is the testimony of Doyon who later went to Coffin's camp, following what he declared to be a precise information, the nature of which has not been established, though; and he says that he had not found any rifle at that place.

And you have then the conversation which on the previous day Coffin would have had with his brother at Gaspe, and during that night the gate keeper's wife, on the road leading to Coffin's camp, would have heard the noise of an automobile, and the following morning, they saw tracks that didn't cross on the highway through the gate, but went around.

You will give to these facts the interpretation that should be given in the light of your judgment and the evidence.

The learned trial judge dealt with the incident in substantially similar terms when he charged them in French. We find therefore that inadmissible testimony which had been vigorously stressed by Crown counsel was again brought to the attention of the jury by the learned trial judge with an instruction that they should consider it.

In my view the following words of Anglin C.J.C., giving the unanimous judgment of the Court in *Stein* v. *The King* (1), are applicable to the case at bar:—

It is impossible to say that in the case now before us there has been no miscarriage of justice. It may be that sometimes objectionable testimony as to which there has been misdirection is so unimportant that the court would be justified in taking the view that in all human probability it could have had no effect upon the jury's mind, and, on that ground, in refusing to set aside the verdict. But it is impossible so to regard this case, where, in a most vital matter, the learned judge did not merely fail to warn the jury to disregard the objectionable matter contained in the statements which had been admitted in evidence, but actually stressed it.

It is my view that this hearsay evidence in the case at bar related to a vital matter and, as I have already mentioned,

(1) [1928] S.C.R. 553 at 557.

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I do not think that, in view of the way in which they stressed it to the jury, counsel for the Crown can now be heard to belittle its importance. *Allegans contraria non est audiendus.*

Ground 5.

I will deal next with ground No. 5. In the memorandum filed on the application for leave to appeal, this ground was extended to read as follows:—

> It is respectively submitted that the crucial testimony given by Marion Petrie was inadmissible for two reasons:—
>
> (*a*) Her testimony was privileged by virtue of the provisions of section 4 of the Canada Evidence Act; and
>
> (*b*) She was submitted to a severe cross examination by Crown Counsel notwithstanding the fact that the Trial Judge had refused the application of Crown Counsel to have her declared a hostile witness.

Before us, Mr. Maloney did not argue ground (*a*), on which the authorities seem to be conclusive, but pressed ground (*b*).

The witness Marion Petrie Coffin was called by the Crown; she was shown to have lived with Coffin for some years as his wife. According to her evidence he arrived at her residence in Montreal at about 2.00 a.m. on June 15 and remained for some days. Some of her evidence assisted the Crown's case, for example she deposed that Coffin had possession of articles which other witnesses testified had belonged to the deceased. Her evidence in chief reads, in part, as follows:—

> . . . When we were talking, he told me about when he went in the woods, he met three Americans, they had their truck that was broke down, and he took one of the fellows down to Gaspe to get a gas line or something fixed; he brought the fellow back, they gave him a pair of binocu.ars and a knife as a souvenir. He didn't mention anything about any money.
>
> Q. Did he say he had left the three Americans in the bush?
>
> A. Yes, when he came back, he left the other fellow with the other two.
>
> Q. You mean the one . . .
>
> A. The one that he had taken down to Gaspe, he brought back.
>
> Q. That he had left him in the bush with the other two?
>
> A. With the other two.
>
> Q. Is that all he said?
>
> A. Oh, when I asked him if they got the truck fixed, he said there was another two chaps there the last time he seen them.
>
> Q. Did he say who those fellows were?

A. He just said he left them with another two friends, he didn't say who, and I didn't bother to ask him.
Q. He gave you no more details on that?
A. No, I was not interested.

* * *

Q. So, when did Coffin mention for the first time that there were two others but the three Americans that we are interested in?
A. Well, it was a few days after he had arrived, I had asked him, it was just something that was going through my head, and I asked him if they got the truck fixed. When I asked him if they got the truck fixed, he said: "The last time I seen them, there was two chaps with them."

It is obvious from the record that Crown counsel did not accept as truthful the witness' statement, that Coffin had told her that when he last saw them he had left the Lindsays and Claar in company with two other Americans; and counsel proceeded, against the repeated objections of defence counsel and in spite of the definite refusal of the learned trial judge to declare Miss Petrie an adverse witness, to conduct a cross-examination, in the course of which he referred her to a statement she was alleged to have made to a police officer and to the evidence she had given at the preliminary inquiry. The examination of this witness by Crown counsel concludes as follows:—

Q. Do you recall having been heard as a witness at the preliminary inquiry?
A. Yes sir.
Q. And that was about a year ago?
A. Yes sir.
Q. Was your memory fresh over the facts we are concerned about, at the time?
A. A little better than they are now.
Q. Now, would you like to refresh your memory?
A. .....
Q. What did your memory tell you at the time?

Mr. Raymond Maher,

For the Defence:

OBJECTED to the way of putting the question.

Mr. Paul Miquelon, Q.C.

For the Prosecution:

Q. What did your memory tell you at the time?
A. He just said three; he mentioned the three when he went out with them.

OBJECTION BY Mr. Francois Gravel,

For the Defence:

Mr. Paul Miquelon, Q.C.

For the Prosecution:

Q. How did your memory serve you at the time?
A. Not too bad, I guess.

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Q. Well, what did it say?
A. He just said "three", he mentioned the three when he went out with them.
Q. To what question did you give that answer at the time?
A. Did he talk about one American hunter or a second group or a party.
Q. And, to that question, the answer was the one you just gave us?
A. He just said three.
Q. And that answer was?
A. He just said three, he mentioned the three when he went out with them.

It was argued before us that, whether or not counsel was entitled to cross-examine his own witness, he was entitled to have her refresh her memory by reading inaudibly to herself the evidence which she had given at the preliminary inquiry. In *Lizotte* v. *The King* (1), the question whether a witness may refresh his memory by referring to the transcript of his evidence at the preliminary hearing was left open after attention had been called to the views expressed by eminent writers and I do not find it necessary to decide that question in this case, as it seems clear from reading the record that the transcript of the preliminary hearing was used not for the purpose of refreshing the memory of the witness, who had already without assistance testified as to her conversations with Coffin, but for the purpose of endeavouring to have her admit, (i) that at the preliminary inquiry she had not referred to any statement by Coffin that he had left the three deceased with two other Americans, and (ii) that she must have been mistaken or untruthful in her evidence at the trial in saying that Coffin had made such statement to her.

When all of the evidence of this witness is read it does not appear to me that there was any unexplained difference between her evidence at the preliminary inquiry and that which she gave at the trial; but the jury may well have taken a different view as they were invited to do by Crown counsel as appears from the following passages in his address:—

> Now, I am not here to judge Coffin's personal life, nor his wife's personal life, but on the other hand you know that that person who goes around as Mrs. Coffin is not Mrs. Coffin, they live as man and wife, I could not expect, and neither could you expect her to come here and tell us the whole story. I could not expect that, and she wouldn't be his wife, common wife or otherwise, and even if she did deny that Coffin confessed everything to her, but there is one other important point, after

(1) [1951] S.C.R. 115 at 129.

many contradictions, she admits—and keep that in mind—she admits that Coffin never mentioned two other American and she, at the last part of her testimony, she came back to what she had said at the preliminary inquiry when she told us her memory served her much better, that he only mentioned three Americans, and remember that later on, when we get Coffin back in Gaspe, because if there is one person in the world to whom he should have confided during that night, it was Mrs. Coffin, not his mother but his common-law wife.

* * *

Did Coffin try to point those two Americans as possible culprits? I know he did, we brought them here to tell us their story. Do you think that story is true when you have heard the story of Marion Petrie to whom he never mentioned, according to her own testimony—and you can believe that woman when she comes up and says anything that would hurt Coffin—I don't say she should be believed as easily when she says something in favour of Coffin, but when she states something against Coffin, it is because she has to say it and can't get out of it.

In my view the cross-examination of this witness by Crown counsel was unlawful, and was attended by a further error in that no warning was given to the jury that any evidence of what the witness had said at the preliminary inquiry was not evidence of the truth of the facts then stated but could be considered by them only for the purpose of testing the credibility of the testimony which she had given before them at the trial. Similar errors were treated as grounds for quashing a conviction in *Rex* v. *Duckworth* (1) and in *Rex* v. *Darlyn* (2).

Ground 6.

I will deal next with ground No. 6. It appears that during the course of the trial the jury asked permission to attend a moving picture theatre. The learned trial judge consulted counsel and a consent in the following terms was signed by Coffin and his counsel:—

Nous soussignés consentons que les jurés se rendent au cinéma à Chandler ce 27e jour de juillet 1954, sous les conditions suivantes:

1. Que six gendarmes aient la charge des jurés, sous la direction du sergent Cassista;

2. Que la représentation ne représente aucun procès quelconque;

3. Que les jurés et les gendarmes soient tenus complètement à part du public dans le théâtre et à la sortie.

Six constables were sworn to escort the jury to and from the moving picture theatre at Chandler, the journey being made in automobiles. The record does not disclose the oath administered to the constables. There is nothing in the

(1) (1916) 37 O.L.R. 197. (2) (1946) 88 C.C.C. 269.

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record to suggest that during the course of this excursion any of the jury had communication with any member of the public or that there was an improper conversation between the constables and the members of the jury; but a few days later two of these constables were called and examined as Crown witnesses. One of them, Poirier, did not give evidence of any importance, but the other, Pépin, gave evidence of a conversation between Coffin and his father which took place after Coffin had been in custody for about 17 days. As to this Pépin said:—

> A. Well, all I heard was this: Mr. Coffin, Wilbert's father, said: "are they treating you well?" He says: "Yes, I am well." He says: "don't worry Dad, I'll be home soon," and before he left, the accused: "they are not man enough to break me."

In the Court of Queen's Bench, Hyde J. after quoting the above answer continues:—

> This is certainly not one of the essential links in the chain of circumstances. I do not regard it as necessarily incriminating but certainly, looked at in a certain light, it could be prejudicial to the Appellant.

At the trial however it had been stressed by Crown counsel in the following terms:—

> Et je terminerai par ce dernier mot qui a été également l'un des derniers de la preuve, celui-là qu'il a prononcé lui-même devant les hommes de police à l'adresse de son père: "They are not man enough to break me." Ils ne sont pas assez hommes pour me casser ou me briser.
>
> Messieurs, est-ce là le langage d'un innocent? Est-ce là le langage d'une personne qui n'a rien à se reprocher? Est-ce là le langage d'une personne qui ne fuit pas la justice? Est-ce là le langage d'une conscience qui véritablement est en paix?
>
> Je vous pose la question, et je crois que ces derniers mots sont lourds de signification. Il ne crie pas: "Je suis innocent, mon père," il ne crie pas: "Je n'ai rien fait de tel, mon père." Non: "Non, ne vous inquiétez pas, ils ne sont pas assez hommes pour me casser ou pour me briser." En d'autres termes: Non, la vérité, ils ne la connaîtront jamais, la vérité, je l'ai enfouie avec mon crime dans les profondeurs des bois où j'ai abattu ces trois Américains; la vérité n'éclairera pas, et si la vérité n'éclate pas, la justice sera muette.
>
> Eh bien non, messieurs les jurés, j'ai confiance que la justice ne sera pas muette, et que vous allez donner l'exemple d'abord à votre district, . . .

and in his charge the learned trial judge invited the jury to consider whether or not Coffin's statement to his father indicated a guilty mind. I mention this not to suggest that either the learned judge or counsel for the Crown made improper use of this piece of evidence but to shew the importance assigned to it in the conduct of the Crown's case at the trial. While, as mentioned above, there is no

evidence to suggest that any improper communication in fact took place between this officer and any member of the jury, this unfortunate incident appears to me to fall within the principle stated by Sloan C.J. in *Rex* v. *Masuda* (1), as follows:—

> Stripped to its bare essentials, there can be no escape from the fact that three Crown Witnesses dined with the jury during a murder trial. It seems to me that to countenance such a situation as is thus presented, violates two essentials of justice. The one is that the jury must be kept completely free from any opportunity of communication during the trial, except under the most exceptional circumstances calling for a direction from the Court; and, secondly, that nothing must occur during the trial of a case from which a suspicion may arise that any taint attaches to the proper and meticulous fairness which must always surround the administration of public justice, more especially when a man is on trial for his life.
>
> * * *
>
> Moreover, if Crown witnesses are permitted to join the jury in an atmosphere of sociability during the adjournment of a murder trial, the confidence of the public in our present system of trial by jury would be shaken. The Courts are the custodians of that confidence and it must be upheld and not weakened. Thus it appears to us that the opportunity for communication, while a factor for consideration, is not the whole test to be applied in the circumstances. The test, in our opinion, is that enunciated by Lord Hewart, C.J. in *R.* v. *Sussex Justices,* (1923) 93 L.J.K.B. p. 129 at p. 131 wherein he said: "Nothing is to be done which so much as creates even a suspicion that there has been an improper interference with the course of justice", and "it is . . . of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seen to be done."

I agree with everything that was said by the learned Chief Justice in the passages quoted; and I am unable to find any such essential difference between the circumstances under which the jury were in company with the Crown witness in the case before us and those in the case with which the learned Chief Justice was dealing as would justify our refusing to apply the principle which he enunciated. In my view, unless we are prepared to overrule the judgment in *Rex* v. *Masuda,* there is no escape from holding that the incident on which this ground of appeal is founded was fatal to the validity of the conviction.

Ground 7.

I will deal next with ground No. 7. It appears from the *Procès-verbal* that Coffin's trial commenced at Percé on July 15, 1954, and that on May 29, 1954 a notice had been

(1) (1953) 106 C.C.C. 122 at 123 and 124.

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served on the Attorney General of Quebec and the Clerk of the Queen's Bench, Criminal Assize Division, Percé, on behalf of Coffin, indicating that he could not speak or understand the French language and that he would ask at his trial for a jury of his own tongue. On his arraignment on July 15, 1954 the defence moved that Coffin be tried by a jury composed entirely of jurors speaking the English language. On this motion Crown counsel called as a witness the Sheriff of the district of Gaspé who deposed that of the jurors on the list of those qualified for the district about twelve to fifteen per cent were English-speaking and the remainder were French-speaking. The learned trial judge reserved judgment on the motion and gave judgment the following day rejecting the motion and ordering that the trial proceed before a mixed jury. The reasons for this decision are set out in full in Volume I of the record at pages 25 to 30 inclusive. As I read these reasons the decision of the learned judge was based upon the following considerations: (i) that the persons whose names appeared upon the list of jurors who were English-speaking was twelve to fifteen per cent of the total, the remainder being French-speaking; (ii) that because of exemptions granted by the Court and the anticipated challenges, either for cause or peremptory, it appeared almost impossible to obtain a jury composed entirely of persons speaking the language of the accused; (iii) in the words of the learned judge:—

> CONSIDERING that it does not seem to be in the spirit of the law that to exercise its discretion, in the sense of paragraph 3, Section 923, the Tribunal must eliminate eighty-five to eighty-eight per cent of the qualified talesmen in one district;

Section 923 of the *Criminal Code,* in force at the date of the trial, reads as follows:—

> 923. In those districts in the province of Quebec in which the sheriff is required by law to return a panel of petit jurors composed, one-half of persons speaking the English language, and one-half of persons speaking the French language, he shall in his return specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists.
>
> 2. In any district, the prisoner may upon arraignment move that he be tried by a jury entirely composed of jurors speaking the English language, or entirely composed of jurors speaking the French language.

3. Upon such motion the judge may order the sheriff to summon a sufficient panel of jurors speaking the English or the French language, unless in his discretion it appears that the ends of justice are better served by impanelling a mixed jury.

This section was considered by this Court in *Piperno* v. *The Queen* (1). After re-reading the judgment of the majority in that case, delivered by my brother Fauteux, and all the authorities to which reference is made therein, it is my view that the proper construction of s. 923 as applied to the facts of the case before us is as follows. Coffin having moved that he be tried by a jury entirely composed of jurors speaking the English language, and it being conceded that English is his mother tongue and that he does not speak the French language, was *prima facie* entitled to be so tried and could be required to stand his trial before a mixed jury only if it appeared to the learned judge presiding at the trial in his discretion that the ends of justice would be better served by empanelling a mixed jury. Provided the learned judge exercised his discretion on relevant grounds and in accordance with the law an appellate court would not interfere with his decision; but, with respect, it appears to me that he did not direct his mind to the question whether the ends of justice in the case before him would be better served by empanelling a mixed jury; that the three reasons, set out above, which he assigns for exercising his discretion in the way he did, and particularly the last mentioned of these reasons, were irrelevant considerations; and that, in the result, Coffin was deprived of a right of which he could only be lawfully deprived by the learned judge exercising his discretion on relevant and legal grounds.

On a proper construction of s. 923 of the *Criminal Code* the question which the learned judge was required to put to himself was whether in the case which he was about to try the ends of justice would be better served by empanelling a mixed jury rather than one composed entirely of jurors speaking the language of the accused, and not whether the empanelling of a jury of the sort last mentioned would be attended with difficulty or whether the language of the accused was or was not that spoken by the majority of the residents of the district in which he was on

(1) [1953] 2 S.C.R. 292.

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trial for his life. I respectfully agree with the following passage in the judgment of Langlais J. in *Rex* v. *Twyndham and McGurk* (1):

> If I refer to s. 923 of the Criminal Code, subsection (2), I read: "In any district, the prisoner may upon arraignment move that he be tried by a jury entirely composed of jurors speaking the English language, or entirely composed of jurors speaking the French language."
>
> Therefore the prisoner when English or French has a right to move for a jury of his own tongue. It is his privilege and unless there are special grounds not to grant him such a motion he has an absolute right to it.
>
> Is there a restriction and what is it?
>
> We find it in subsection (3) of the same section which reads as follows: "Upon such motion the judge may order the sheriff to summon a sufficient panel of jurors speaking the English or the French language, unless in his discretion it appears that the ends of justice are better served by impanelling a mixed jury."
>
> That subsection gives a discretion to the presiding Judge.
>
> Then it is quite clear that the general rule favours granting the motion unless there are special reasons to refuse it.

In *Piperno* v. *The Queen* (*supra*) at page 295 my brother Fauteux said:—

> Ce qui est sanctionné par la loi, c'est une faculté donnée à un prévenu, dans la province de Québec, de demander à être jugé par des jurés familiers avec la langue qu'il parle lui-même—pourvu que ce soit le français ou l'anglais—et le droit d'obtenir alors au moins un jury mixte si, dans la discrétion du Juge, il apparaît que les fins de la Justice soient ainsi mieux servies qu'en faisant droit à sa demande.

There was no need in that case to consider the nature of the grounds on which the exercise of the discretion given to the trial judge by s. 923 (3) can lawfully be based. An examination of the record in the case before us has failed to disclose any ground which appears to me to be sufficient in law to warrant the accused being denied a jury composed entirely of persons speaking his language.

This error does not appear to be cured by the provisions of s. 1011 of the *Criminal Code*. It was, in my respectful view, an error in law on the part of the learned trial judge in deciding how the case should be tried. If the provisions of s. 1011 were an answer in this case they would equally have been an answer to the objection to which effect was given in *Alexander* v. *Regem* (2), which was one of the decisions approved in *Piperno* v. *The Queen*. Had this ground alone been raised it would, in my opinion, require

(1) (1943) 79 C.C.C. 395 at 395 and 396.

(2) Q.R. (1930) 49 K.B. 215.

the setting aside of the verdict; and consequently I do not find it necessary to consider the related grounds numbers 8 and 9.

Ground 3.

I will deal next with ground No. 3. What is here complained of is not that the learned trial judge failed to direct the jury in the manner required by the rule in *Hodge's* case but rather that, having properly instructed them as to how they should approach a case resting solely on circumstantial evidence, he mistakenly gave them to understand that the case against Coffin did not consist solely of circumstantial evidence, as, in fact, it clearly did. The passages which are chiefly objected to are as follows:—

> In the present case, the evidence which has been adduced by the Crown is of two distinctive kinds.
>
> There is: 1) The circumstantial evidence which I have explained; and 2) The declarations which would have been made by the accused.
>
> * * *
>
> We can say, I believe, that the evidence offered by the Crown can be divided in two kinds:
>
> 1. Circumstantial evidence.
>
> 2. Evidence of conversation or words spoken by the accused.

It is argued by counsel for the Attorney General that any harm done by these passages was remedied later in the charge and particular reference is made to the following passage:—

> It is evident that considering the whole of these facts, no direct proof can be found anywhere and it is precisely there where you are asked to extract from the circumstances the conclusions which, in your estimation, you must take as the result of these facts.

It should be borne in mind, as was pointed out by Middleton J.A. in *Rex* v. *Comba* (1) and by some members of this Court in *Boucher* v. *The Queen* (2), that the rule in *Hodge's* case is quite distinct from the rule requiring a direction on the question of reasonable doubt; and if, on reading the charge as a whole, I came to the conclusion that the jury were left in doubt as to whether the rule in *Hodge's* case did not apply to all the evidence in the case before us I would have regarded this as serious error. When the charge is read as a whole I incline to the view that the jury were not misled in the way suggested; but, as on several other grounds I have concluded that there should be a new

(1) (1938) 70 C.C.C. 205 at 207. (2) [1955] S.C.R. 16 at 30.

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trial, I do not pursue this further. For the same reason I find it unnecessary to deal with grounds numbers 1, 2 and 10 and I express no opinion in regard to them.

Mr. Miquelon, while maintaining that there had been no error in law at the trial, argued, alternatively, that, even if we should be of opinion that any of the errors alleged by Coffin's counsel were made out, the legally admissible evidence was overwhelming and that, had such errors not occurred, the jury must inevitably have reached the same verdict; and that the Court should apply the provisions of s. 1014 (2) of the Criminal Code and dismiss the appeal. That the Crown's case was a very strong one cannot be denied but I find myself unable to affirm with certainty that if none of the matters which I regard as errors had occurred the jury must necessarily have convicted. Reading the written record we cannot say to what extent each witness weighed with the jury or how much importance they attached to one or another of the items of evidence; and, to borrow the words of Viscount Sankey in *Maxwell* v. *Director of Public Prosecutions* (1), it may well be that the hearsay evidence as to Eagle's rifle or the effect which the jury were invited to give to the unlawful cross-examination of Marion Petrie Coffin may have been the last ounce which turned the scale against the accused. But the matter does not rest here. Section 1014 (2) reads as follows:—

> The court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

This sub-section has often been considered by this Court and its meaning is stated in the following passage in the judgment of Kerwin J., as he then was, in *Schmidt* v. *The King* (2):

> The meaning of these words has been considered in this Court in several cases, one of which is *Gouin* v. *The King*, from all of which it is clear that the onus rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if the charge had been correct or if no evidence had been improperly admitted. The principles therein set forth do not differ from the rules set forth in a recent decision of the House of Lords in *Stirland* v. *Director of Public Prosecutions*, i.e., that the proviso that the Court of Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred

(1) [1935] A.C. 309 at 323. (2) [1945] S.C.R. 438 at 440.

in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

It will be observed that, once error in law has been found to have occurred at the trial, the onus resting upon the Crown is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred. The satisfaction of this onus is a condition precedent to the right of the Appellate Court to apply the terms of the sub-section at all. The Court is not bound to apply the sub-section merely because this onus is discharged. Even if the onus referred to could be regarded as having been satisfied by the Crown in the case before us it would nonetheless be my opinion that the error in law which I have dealt with under ground 4 above was so substantial a wrong that the verdict could not be saved by the application of s. 1014 (2). To hold otherwise would, I think, be contrary to the principles enunciated in *Makin* v. *Attorney General for New South Wales* (1), *Allen* v. *The King* (2), *Northey* v. *The King* (3) and the judgment of my brother Locke in *Boucher* v. *The Queen* (4).

In *Makin's* case at page 70 Lord Herschell L.C. said in dealing with a provision similar to s. 1014 (2):—

> Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.
>
> In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

This passage is I think applicable to the case before us.

What I have said as to s. 1014 (2) has been related primarily to the grounds other than grounds numbers 6 and 7. As to ground 6 the passages which I have quoted from the reasons of Sloan C.J. seem to me to show that the conviction must be set aside on this ground even if the Court should be of the view that there was in fact neither substantial wrong nor miscarriage of justice because one

(1) [1894] A.C. 57.
(2) (1911) 44 Can. S.C.R. 331.
(3) [1948] S.C.R. 135.
(4) [1955] S.C.R. 16 at 28.

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of the main grounds of the decision of Sloan C.J. rests on the importance of justice being not merely done in fact but being plainly seen to be done.

As to ground 7, I think that the error which occurred is such that by its very nature it cannot be cured by the application of s. 1014 (2).

In the result, if leave to appeal had been granted on those grounds advanced on the application for leave to appeal with which I have dealt above, it would have been my opinion that the appeal should be allowed, the conviction quashed and a new trial directed.

FAUTEUX J.:—For the reasons given by my brother Kellock, my answer to the question referred to the Court is that I would have dismissed the appeal.

Solicitor for the accused: *F. de B. Gravel.*

Solicitors for the Attorney General of Quebec: *N. Dorion, P. Miquelon.*

Solicitor for the Attorney General of Canada: *F. P. Varcoe.*

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*Oct. 6

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*Jan. 24

GEORGE ROSS DAVIDSON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Pension—Whether appellant entitled to benefits of Part V of the Militia Pension Act, S. of C. 1946, c. 59.

Section 43 of the *Militia Pension Act* (S. of C. 1946, c. 59), provides that Part V therein "applies to every member of the forces (*a*) who was not a member . . . on March 31, 1946, and who was or is appointed to or enlisted in . . . after the said day" or (*b*) "who was appointed to or enlisted in . . . on or before the said day and was still in the forces on the said day and who elects to become a contributor . . . on or before March 31, 1948".

Held (affirming the judgment appealed from): That the appellant, who served in the forces from 1935 to July 20, 1946, and who made his election in 1947, was not entitled to the benefits of Part V of the Act.

Per Rand, Kellock, Fauteux and Abbott JJ.: March 31, 1946, is specified as the day upon which a claimant was either not then in the forces, never having been in, but who joined subsequently, or as having enlisted on or before that day, and if before, then as having been still in on that day.

*PRESENT: Rand, Kellock, Locke, Fauteux and Abbott JJ.

Per Locke J.: Para. (*a*) refers to members who were appointed or enlisted after March 31, 1946, whether or not they had, prior to that date, been members whose services had terminated, and para. (*b*) refers to those who were appointed or enlisted prior to March 31, 1946, were in the forces as of that date and were members when the amendment became effective. To construe the section otherwise would make it and the Part retrospective, an interpretation which is not warranted.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J., holding that the appellant was not entitled to the benefits of Part V of the *Militia Pension Act*.

G. E. Beament, Q.C. and *S. A. Gillies* for the appellant.

K. E. Eaton and *R. W. McKimm* for the respondent.

The judgment of Rand, Kellock, Fauteux and Abbott JJ. was delivered by:—

KELLOCK J.:—The appellant, who served in the armed forces from the 13th of June, 1935, to the 20th day of July, 1946, on which date he was retired on medical grounds, claims to be entitled to the benefits provided for by Part V of *The Militia Pension Act* enacted on the 31st of August, 1946. As to whether he is so entitled depends, in the first instance, upon a proper construction of s. 43, which is as follows:

> 43. This Part applies to every member of the forces
>
> (*a*) who was not a member of the forces on the thirty-first day of March, 1946, and who was or is appointed to or enlisted in the forces after the said day, or
>
> (*b*) who was appointed to or enlisted in the forces on or before the said day and was still in the forces on the said day and who elects to become a contributor under this Part on or before the thirty-first day of March, 1948.

S. 42(1)(*f*), speaking in the present, defines "member of the forces" (unless the context otherwise requires) "as any officer, warrant officer, non-commissioned officer or man of the forces, excluding an officer appointed temporarily or under a commission for a fixed term."

It is the contention of the Crown, and this was given effect to in the court below, that as the appellant was not a member of the forces at the date of the passing of the Act, he is not entitled to claim under it. For the appellant, it is contended that it is sufficient that he was a member on the 31st day of March, 1946.

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Kellock J.

Appellant contends that if the words "every member of the forces" in the opening line of the section are construed as meaning "every member of the forces on or after the effective date of this Part", then the phrase "and was still in the forces on the said day" (i.e., March 31, 1946) is superfluous, whereas if no such qualification is implied in the quoted words in the first line, the quoted words from para. (*b*) are meaningful as defining a class by reference to circumstances antecedent to the date upon which Part V came into force. It is also contended that even if the quoted words in para. (*b*) are not to be considered as superfluous, the word "still" indicates the continuance of the condition of being in the forces existing prior to March 31, 1946, in contrast to a future continuance beyond that day, and indicates that any continuance beyond that day is not a requirement of the statute.

I am unable to accept these contentions. Para. (*a*), which deals with persons who are compulsorily subject to Part V, is, of course, by itself, entirely unambiguous. It specifies a person who enters the forces after March 31, 1946, not having been in the forces on that day, and is not concerned with whether or not such person was or was not a member of the forces prior to that day. Apart from para. (*b*), therefore, this paragraph would include an officer who was in the forces both before and after the day specified, so long as he was not a member on that day.

Para. (*b*), however, which deals with persons who may be subject to Part V if they elect to do so, refers specifically to a person who was in the forces prior to the day named. Para. (*a*), therefore, must be taken as dealing only with persons who entered the forces after that day.

In this view it cannot be said that the words "and was still in the forces on the said day" are surplusage, or otherwise, a person who was a member of the forces before the day mentioned but was not a member on that day, would be included. This is clearly contrary to the intention of the statute as the very words said to be superfluous require that such a person must have continued a member down to and including the named day. These words, of course, have no function with respect to one who entered the forces on the named day.

The clear intention of both paragraphs read together, in my view, is to specify the 31st day of March, 1946, as the day upon which the person claiming was either not then in the forces, never having been in the forces, but who joined subsequently, or as having enlisted "on or before the said day", and if before, then as having been "still in the forces on the said day".

There is nothing, therefore, to exclude the operation of the words in the first line of the section in that, whether para. (*a*) or (*b*) applies, the person in question must be a "member of the forces" in order that Part V may have any application to him. Accordingly, as the appellant did not qualify at the time he sought to elect, he was not entitled to do so. In this view it is not necessary to consider the other points argued.

The appeal should be dismissed with costs.

LOCKE J.:—The facts, in so far as they affect the claim advanced by the appellant, are stated in the judgment from which this appeal is taken.

Part V of the *Militia Pension Act* (c. 133, R.S.C. 1927) is stated by s. 43 to apply to every member of the Forces. The appellant was not a member of the Forces on August 31, 1946, when the amendment came into force.

S. 44 provides that every person to whom Part V applies shall, by reservation from his pay and allowances, contribute to the Consolidated Revenue Fund. The word "contributor" is defined by s. 42 to mean a member of the Forces who contributes under the Part to the Consolidated Revenue Fund. The appellant was not and could not at any time become a contributor since he was not a member of the Forces on August 31, 1946, or thereafter.

These considerations, in my opinion, are sufficient to make it clear that para. (*a*) of s. 43 refers to members of the Forces who were appointed or enlisted after March 31, 1946, whether or not they had, prior to that date, been members of the Forces whose services had terminated, and that para. (*b*) refers to those who were appointed or enlisted prior to March 31, 1946, were in the Forces as of that date and were members when the amendment became effective. None of the language of the latter paragraph appears to me to be superfluous.

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DAVIDSON v. THE QUEEN

Locke J.

I respectfully agree with Mr. Justice Cameron that to construe s. 43 otherwise would be to interpret the section and the Part retrospectively. I see no warrant for any such interpretation.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Beament, Fyfe & Ault.*

Solicitor for the respondent: *F. P. Varcoe.*

1956

*Jan. 11

*Jan. 11

ERNEST CARROLL ..... APPLICANT;

AND

THE CORPORATION OF THE CITY OF OTTAWA ..... RESPONDENT.

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Appeal—Forma pauperis—Whether test of rule 142 of the Supreme Court of Canada met.

The applicant, an unmarried man of twenty-eight years of age, earning $3,600 a year, contributing $70 to $75 a month to the family expenses, having a life insurance policy of $5,000 with a cash surrender value of $450, and having debts of $2,003, half for medical bills arising out of injuries which are the subject of the present litigation and the other half for monies borrowed to cover costs in the courts below, has failed to satisfy the onus that he is not worth the amount fixed by rule 142 of the Supreme Court of Canada. Leave to appeal to this Court in forma pauperis should, therefore, be refused (*Benson* v. *Harrison* [1952] 2 S.C.R. 333 applied).

MOTION by the applicant before Mr. Justice Abbott in Chambers for leave to appeal in forma pauperis.

S. J. Gorman for the motion.

R. K. Laishley, Q.C. contra.

ABBOTT J.:—This is an application for leave to appeal *in forma pauperis*. The affidavit of the applicant made under Rule 142 sets out that he is "not worth five hundred dollars in the world excepting my wearing apparel and my

*PRESENT: Abbott J. in Chambers.

interest in the said matter of the intended appeal" and that he has debts amounting to $2,003, of which approximately one-half represent unpaid medical bills arising out of his injury and the other half a loan from a relative to cover costs of the litigation in the courts below.

The applicant was examined on his affidavit and from this examination it appears that he is a locomotive engineer, twenty-eight years of age, employed by the Canadian Pacific Railway with ten years' seniority. He is unmarried, lives at home with his parents and two unmarried sisters, the two latter, with himself, contributing to the expenses of running the house. He earns about $3,600 a year and testified that these earnings would probably be increased in the near future under the operation of the seniority system in force in the railway. He has no debts or liabilities other than those set out in his affidavit, is contributing about $70 to $75 a month to the expenses of the family home, and during the past year has been paying off about $100 a month on account of obligations incurred, largely arising out of this litigation. He has insurance policies on his life of a face value of $5,000 and with a present cash surrender value of approximately $450.

The onus is on the applicant to satisfy the Court that he is not worth $500, the amount fixed by the rule, and as to the test to be applied in determining this question, I am in agreement with the view expressed by my brother Rand in *Benson* v. *Harrison* (1), when he said:—

> In determining that question, the matter should, I think, be approached, not as an inquiry whether the person has actually $500 worth of property, but whether, in the ordinary business judgment, it can be said that he is good for $500. That was the view taken by Buckley L.J. in *Kydd* v. *The Watch Committee of Liverpool* 24 T.L.R. 257.

Applying this test to the present case, the applicant has failed to satisfy me that he is not worth the amount fixed by the rule.

The application is therefore dismissed but without costs.

Leave refused.

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(1) [1952] 2 S.C.R. 333 at 334.

1955
*Nov. 17
1956
*Feb. 10

LA COMPAGNIE DE TRANSPORT PROVINCIAL (*Defendant*) ..... APPELLANT;

AND

CLEMENT FORTIER (*Plaintiff*) ..... RESPONDENT.

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

Damages—Assault committed by bus driver on disembarked passenger—Whether driver in the performance of his work—Whether employer ratified action of driver—Whether employer liable—Article 1054 C.C.

The respondent and a companion boarded the appellant's bus at Montreal. Both were under the influence of alcoholic liquors. During the voyage, they spoke almost continuously in loud voices, making insulting remarks about the driver who did not speak to them during that time. At Ste-Thérèse, the destination of the bus, all the passengers disembarked, including the respondent and his companion who were the last to do so. They crossed in front of the bus and were half-way between the left side of the bus and the opposite sidewalk when they were violently assaulted from behind by the driver.

The respondent sued the driver and the appellant for damages. The action was maintained jointly and severally against both defendants by the trial judge. This judgment was affirmed by a majority in the Court of Appeal. The driver did not appeal in the Court of Appeal nor in this Court.

Held: The appeal should be allowed and the action dismissed.

There was nothing in the alternative plea of the appellant which constituted an approbation or ratification of the action of its employee, the driver (*Roy* v. *City of Thetford Mines* [1954] S.C.R. 395 applied).

A delict caused "a l'occasion des fonctions" is a delict caused "pendant le temps des fonctions" and, consequently, is not the one contemplated by Art. 1054 C.C. where the responsibility of the master is engaged by a delict caused in "the performance of the work for which the servant is employed". The assault here was committed when the voyage had terminated and the contract with the passengers had come to an end. The appellant was at that time relieved of its duties towards the passengers. There was no relation between the work and the assault. The relations between the passengers and the driver were purely personal and foreign to the driver's functions. The latter was not, therefore, within Art. 1054 C.C.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Barclay and McDougall JJ.A. dissenting, the judgment at trial in an action for assault.

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Abbott JJ.

(1) Q.R. [1954] Q.B. 755.

J. L. O'Brien, Q.C. and *E. E. Saunders* for the appellant.

J. Fortier, Q.C. and *C. L. de Martigny, Q.C.* for the respondent.

The judgment of the Court was delivered by:—

TASCHEREAU J.:—L'appelante est une compagnie de transport, propriétaire d'autobus, faisant le service dans divers endroits de la province de Québec, et entre autres de la Cité de Montréal à Ste-Thérèse, dans le comté de Terrebonne. Le 16 juillet 1947, l'intimé, accompagné d'un nommé Parent, était passager à bord de l'un de ces autobus en destination de Ste-Thérèse, et conduit par un nommé Coulombe. Rendu au point d'arrivée, alors qu'il était descendu du véhicule, l'intimé fut violemment assailli par le chauffeur et subit de sérieuses lésions corporelles.

Il institua des procédures judiciaires contre Coulombe et la compagnie appelante leur réclamant des dommages, et l'honorable Juge Brassard devant qui la cause fut entendue à St-Jérôme, a maintenu l'action contre les deux défendeurs, conjointement et solidairement, pour la somme de $3,667.05 avec intérêts et dépens. La Cour du Banc de la Reine (1) a confirmé ce jugement, MM. les Juges Barclay et McDougall étant dissidents. Ces derniers auraient maintenu l'appel et rejeté l'action. Seule la compagnie de transport a interjeté appel devant cette Cour.

C'est la prétention de l'intimé que l'appellante doit être tenue responsable des actes de son employé parce qu'en premier lieu, l'appelante, en prenant fait et cause dans son plaidoyer pour le conducteur, aurait engagé sa responsabilité, et en second lieu, parce que Coulombe, au moment où il a commis l'assaut qui lui est reproché, était dans l'exercice des fonctions auxquelles il était employé.

Je ne vois rien dans le plaidoyer qui puisse constituer une approbation ou une ratification de l'acte posé par Coulombe. Le plaidoyer écrit se résume à dire que Coulombe dans les circonstances n'a pas commis de délit ou de quasi-délit, et *alternativement*, l'appelante allègue que si une faute a été commise, elle ne peut en supporter les conséquences, car Coulombe, au moment où il aurait commis l'assaut, n'était pas dans l'exercice de ses fonctions. Un

(1) Q.R. [1954] Q.B. 755.

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cas semblable a été récemment soumis à cette Cour dans une cause de *Roy* v. *La Cité de Thetford Mines* (1), et il a été décidé qu'un plaidoyer alternatif comme celui dont nous sommes en présence, ne constitue nullement une ratification des actes d'un employé. Les principes exposés dans la cause ci-dessus doivent donc sur ce point nous guider dans la détermination de la présente.

Le second point invoqué soulève des difficultés plus sérieuses. Coulombe, quand il a assailli l'intimé, était-il dans l'exécution des fonctions auxquelles il était employé? Il faut tout d'abord bien se garder de confondre les expressions "à l'occasion des fonctions" et "dans l'exécution des fonctions". Dans le premier cas, il n'y a aucun rapport entre la faute et la fonction du service, aucun lien qui rattache cette faute à l'exécution du mandat confié au préposé. (*Eaton* v. *Moore* (2)). Le délit causé "à l'occasion des fonctions" est un délit causé "pendant le temps des fonctions", (*Moreau* v. *Labelle* (3)) et, en conséquence, n'est pas celui envisagé par l'article 1054 qui exige, pour qu'il y ait responsabilité du patron, un délit causé "dans l'exécution des fonctions". Mazeaud (Vol. 1, 4e éd. pages 840 et 841) illustre ce principe de quelques exemples concrets:—

> Au contraire, il n'y a aucun lien entre la fonction du conducteur d'une camionnette, chargé de transporter des journaux, et le fait, par ce conducteur, après avoir arrêté sa voiture au bord de la route, de tuer un faisan aperçu dans un champ voisin: même dans la théorie extensive, le commettant ne peut être tenu des conséquences civiles du délit de chasse ainsi commis.
>
> Pas plus que le patron d'un café ne doit répondre de l'incendie allumé par l'un des ses garçons en jetant un pétard, alors qu'il revenait de faire une course.
>
> Le commettant n'a pas non plus à répondre des conséquences d'une rixe survenue entre le chauffeur et un cycliste, même si la discussion a pour origine la manière dont le chauffeur a doublé le cycliste.
>
> Pour une raison identique, on ne saurait rendre le commettant responsable du délit d'outrage public à la pudeur commis par un chauffeur dans la voiture de son patron, bien que la personne avec laquelle le délit a été commis ait été recontrée sur la route.
>
> Il n'y a pas de lien non plus entre les fonctions d'une infirmière en chef et le détournement de sommes qui lui avaient été confiées volontairement par des infirmières; le commettant de l'infirmière en chef n'est donc pas responsable en vertu de l'article 1384, par. 3.

(1) [1954] S.C.R. 395. (2) [1951] S.C.R. 470.
(3) [1933] S.C.R. 201 at 210.

On refusera également d'engager, en vertu de l'article 1384, par. 3, la responsabilité du fermier dont le domestique se rend coupable d'un incendie volontaire; celle d'un patron dont l'employé, chargé de surveiller l'exécution de travaux, se fait donner une leçon de conduite par l'entrepreneur chargé d'effectuer ces travaux.

Dans le même volume, à la page 835, Mazeaud dit également ce qui suit:—

Si l'on consulte les travaux préparatoires du Code civil, l'hésitation n'est pas permise. Dès que le dommage a été causé non plus "dans l'exercice des fonctions", mais seulement "à l'occasion des fonctions", le commettant ne doit pas être déclaré responsable.

En France, tous les auteurs ne partagent pas ces vues de Mazeaud et plusieurs soutiennent que la responsabilité de l'employeur est engagée, du moment que le délit ou le quasi-délit de l'employé est commis "à l'occasion du travail". Mais je crois que la véritable doctrine est celle de Mazeaud et qu'elle est plus conforme au texte de l'article 1054 et de l'enseignement de la jurisprudence dans la province de Québec, réaffirmé par cette Cour dans la cause de *Eaton* v. *Moore* (*supra*). D'ailleurs, dans cette cause, la Cour ne faisait que rappeler ce qu'elle avait déjà dit à maintes reprises. Ainsi, dans *Curley* v. *Latreille* (1), voici ce que disait M. le Juge Mignault:—

Étant donné que l'interprétation stricte s'impose en cette matière, je ne puis me convaincre que le texte de notre article nous autorise à accueillir toutes les solutions que je viens d'indiquer. Ainsi, dans la province de Québec, le maître et le commettant sont responsables du dommage causé par leurs domestiques et ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés,* ou, pour citer la version anglaise de l'article 1054 C.C., *in the performance of the work for which they are employed.* Ceci me paraît clairement exclure la responsabilité du maître pour un fait accompli par le domestique ou ouvrier *à l'occasion seulement de ses fonctions,* si on ne peut dire que ce fait s'est produit dans l'exécution de ses fonctions. Il peut souvent être difficile de déterminer si le fait dommageable est accompli dans l'exécution des fonctions ou seulement à leur occasion, mais s'il appert réellement que ce fait n'a pas été accompli dans l'exécution des fonctions du domestique ou ouvrier, nous nous trouvons en dehors de notre texte. L'abus des fonctions, si le fait incriminé s'est produit dans l'exécution de ces fonctions, entre au contraire dans ce texte et entraîne la responsabilité du maître.

Dans *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (2), Sir Lyman Duff s'exprimait dans les termes suivants:—

Le fait dommageable must be something done in the execution of the servant's functions as servant or in the performance of his work as servant. If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within *l'exécution des fonctions,*

(1) (1919) 60 Can. S.C.R. 131 at 175. (2) [1923] S.C.R. 414 at 416.

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then by the plain words of the text responsibility rests upon the employer. Whether that is so or not in a particular case must, I think, always be in substance a question of fact, and although in cases lying near the border line decisions on analogous states of fact may be valuable as illustrations, it is not, I think, the rule itself being clear, a proper use of authority to refer to such decisions for the purpose of narrowing or enlarging the limits of the rule.

Et plus loin, à la même page, il ajoutait:—

In France the doctrine has been widely accepted and has more than once been affirmed by the highest tribunal that the employer is responsible for acts done by his employee *à l'occasion* of his service. It cannot be insisted upon too strongly that an act done by an employee *à l'occasion* of his service may or may not be one for which the employer is responsible under Article 1054 C.C., depending in every case upon the answer to the question: "Was the act done in the execution of the employee's service or in the performance of the work for which he was employed?"

Dans *Moreau* v. *Labelle* (*supra*) à la page 210, M. le Juge Rinfret disait:—

Ils font sentir d'une manière très nette l'erreur qui assimilerait au délit commis *dans l'exécution des fonctions* du préposé le délit commis *pendant le temps de ces fonctions.*

Dans la cause qui nous est soumise, c'est précisément la distinction qui doit être faite. Sans doute, Coulombe était l'employé de la compagnie intimée, et c'est à lui qu'incombait la charge de conduire les passagers à destination. Tant qu'il était dans l'exercice de ses fonctions, la compagnie appelante était nécessairement responsable des délits ou quasi-délits dont il pouvait être l'auteur. Même s'il abusait de ses fonctions, il existait quand même un lien de droit entre la victime de son délit et l'employeur dont il était au service. (*Curley* v. *Latreille, supra,* page 175).

Ici, la preuve révèle qu'à Montréal, au point de départ, après une assez longue hésitation, le conducteur Coulombe, parce que l'intimé et son compagnon Parent semblaient en état d'ivresse, consentit finalement, après un refus, à les accepter à bord de l'autobus. Au cours du trajet, ces derniers, assis près du chauffeur, ne cessèrent de l'invectiver, de parler à haute voix, et certainement de créer une atmosphère de querelle. Coulombe supporta le tout avec patience, mais rendu à Ste-Thérèse, au point de destination, quand l'intimé et son compagnon furent descendus le l'autobus, pour prendre un autre moyen de transport pour se rendre à St-Jérôme, Coulombe les suivit et les assaillit violemment.

Cet assaut pour lequel Coulombe, avec raison, a été personnellement tenu responsable par les tribunaux civils, a cependant été commis alors que le voyage était terminé, et que le contrat vis-à-vis les passagers avait pris fin. La compagnie était libérée de ses devoirs, et les obligations de cette dernière envers ceux-là étaient remplies. Les querelles des employés avec les passagers devenaient des affaires personnelles, qui ne regardaient pas l'employeur. Sans doute, Coulombe a commis cet acte répréhensible "durant les heures de travail", mais à un moment où il n'y avait aucune relation entre son travail, et l'acte qu'il a posé. Rien ne peut nous justifier de dire qu'il existe un lien entre ses fonctions et l'assaut qu'il a commis. Entre lui et la victime, une fois rendus à destination, seules des relations personnelles entre deux individus, étrangères aux fonctions de l'employé, étaient en cause. Le chauffeur n'était plus dans l'exercice de ses fonctions au sens de l'article 1054 (*Code Civil*). Il a agi en dehors du cadre qui limite ses activités vis-à-vis les clients de son employeur, et ce dernier ne peut donc être tenu responsable des dommages subis par l'intimé.

Je m'accorde avec Messieurs les Judges Barclay et McDougall de la Cour du Banc de la Reine, et je maintiendrais l'appel, et rejetterais l'action, avec dépens de toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: *St-Germain & Renaud.*

Solicitor for the respondent: *J. Fortier.*

1955
*Nov. 10, 11
1956
*Jan. 24

LORD NELSON HOTEL COMPANY LIMITED ..... APPELLANT;

AND

THE CITY OF HALIFAX ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Taxation—Assessment, municipal—Hotel—Whether assessment as hotel or lodging-house—Transient and permanent guests—Portion of building rented to tenants—Ss. 357 and 375(B) of the Halifax City Charter.

The appellant, who operates a hotel in Halifax, was assessed for business tax under s. 357 of the city charter for the whole building less a portion rented to tenants. There were 25 permanent guests residing therein and occupying 15% of the bedroom area. These received the same facilities and services as transient guests, although some had their own furniture. The appellant contends that it should have been assessed under s. 375(B) of the charter since its entire business was within its description, and alternatively that the rooms of the permanent guests should have been excepted.

By s. 357, a business tax is payable by the occupier of a real property for the purposes of any trade, profession or other calling carried on for purposes of gain, . . . and is payable by such occupier, whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not.

S. 375(B) deals with an occupier conducting the business of "a lodging-house or rooming-house or renting rooms for living purposes or for sleeping purposes only or who is engaged in the business of providing meals for gain in such real property and who has in any one building, . . . during the civic year . . ., provided accommodation for five or more lodgers, roomers, or boarders". The resulting tax under the latter section is less than under s. 357.

The appeal from the assessment was dismissed by the Court of Tax Appeals and by the Supreme Court of Nova Scotia in banco.

Held (Rand and Cartwright JJ. dissenting): The appeal should be allowed.

Per Kellock, Locke and Abbott JJ.: The business of the appellant was not that of a lodging-house or rooming-house, but in so far as the words "renting rooms for living purposes or sleeping purposes or providing meals for gain" are concerned, they describe one of the functions of a hotel, and, therefore, of the appellant.

The statute is to be applied distributively. It contemplates that if any part of a building is not occupied for one or other of these purposes, such part would fall outside the section.

Per Rand and Cartwright JJ. (dissenting): The language of s. 375(B) excludes the appellant's business. The appellant neither keeps a lodging-house nor conducts the business of a rooming-house nor is it the keeper of either kind of house. The words "or who is engaged

*PRESENT: Rand, Kellock, Locke, Cartwright and Abbott JJ.

in the business of providing meals for gain in such real property" cannot be taken independently. They do not describe a restaurant. They refer back to the real property occupied by a person carrying on the business of lodging-house or rooming-house.

Except as to the rented portions, the appellant was in possession of the entire building and, therefore, within s. 357.

APPEAL from the judgment of the Supreme Court of Nova Scotia in banco (1), affirming the appellant's assessment for business tax under s. 357 of the Charter of the City of Halifax.

I. M. MacKeigan, Q.C. for the appellant.

C. P. Bethune, Q.C. for the respondent.

The judgment of Rand and Cartwright JJ. (dissenting) was delivered by:—

RAND J.:—This appeal is against the assessment of the business carried on by the appellant in the City of Halifax. The main contention is that the assessment should have been made under s. 375B of the city charter; a subsidiary claim is that if properly made under s. 357 it should have excepted the general bedroom space of the hotel as occupied for residential purposes and the rooms of permanent guests as being in their possession.

The only qualification of ordinary hotel activities here is the presence of these special guests. They reside in the hotel and are charged a weekly or monthly rate. A number of them are winter residents only but the remainder live there the year round. They receive substantially the same facilities and services as transient guests, though a number have brought furnishings of their own with them. Of a total of 170 rooms the permanent guests occupy 25, about 15% of the total bedroom area.

The two sections of the charter read as follows:

357 (1) The Business Tax shall be a tax payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt as is herein provided, and shall be payable by such occupier, whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not.

(2) (*a*) Except as in this section hereinafter provided such tax shall be at the rate fixed as hereinafter provided by sub-section 3 of section 409, on fifty per cent of the value of the premises so occupied, except in the case of premises the value of which is less than two thousand dollars and

(1) (1955) 36 M.P.R. 231.

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occupied solely for the purpose of selling merchandise by retail, in respect to which the tax shall be at the said rate on twenty-five per cent of the value of the premises so occupied.

(3) The occupant of any real property for any purpose other than for the purpose of any trade, calling or profession, or other calling carried on for purposes of gain, and not for residential purposes and not otherwise exempted, shall be liable to a tax and such tax shall be at the rate fixed as hereinafter provided on 25 per cent of the value of the premises so occupied.

375B (1) Any person occupying real property whether or not such person resides therein in which such person conducts the business of a lodging-house or rooming-house or renting rooms for living purposes or for sleeping purposes only or who is engaged in the business of providing meals for gain in such real property and who has in any one building, at any time during the civic year in which the assessment is being made, provided accommodation for five or more lodgers, roomers, or boarders, shall be liable to pay a Business Tax on twenty-five per cent of the total value of such real property at the rate then current in respect of real property of a business character or nature, in place of fifty per cent of the value of the premises occupied, as provided in sub-section (2) of section 357, and a Household Tax at the rate hereinafter provided for such tax on ten per cent of the remaining seventy-five per cent of such value.

(2) Where any person occupies real property, whether or not such person resides therein, and such real property is divided and let out by such person for living purposes but the occupants of more than one of the portions into which the said real property is let out use in common a bathroom or other sanitary facilities, such person shall be deemed to be conducting the business of a lodging-house or rooming-house in such real property and the persons occupying the said portions of such real property shall for the purpose of this Section be deemed to be lodgers or roomers.

It seems to have been assumed by MacDonald J. in the court below that the contention of the application of s. 375B was based on the occupancy of the special guests, but that was disclaimed on the argument before us; it is rather that the entire business carried on by the appellant is within the description of that section and alternatively as already mentioned.

I am unable to entertain any doubt upon either of these propositions. S. 375B is, in my opinion, an exception to s. 357 and the ordinary rule of interpretation is that one claiming under an exception must show that he is clearly within it. So far from that being so here, an examination of the language satisfies me that the section clearly excludes the company.

The person who comes within s. 375B is an occupant of real property who "conducts the business of a lodging-house, etc." The words "lodging-house" and "lodger" are

of current and long established meaning. Both are examined in the Encyclopedia of the Laws of England, vol. 8, pp. 385-395; and in Stroud's Judicial Dictionary, 2nd ed., vol. 2, pp. 1190 to 1192: and Black's Law Dictionary, 4th ed., deals with them at p. 1091. From the authorities cited by these works it is clear that, in its plain and ordinary meaning and although in any case there may be various incidental features annexed, "lodging-house" signifies a house containing furnished rooms which are privately let out by the week or month. In the complementary sense a lodger is a qualified occupier of a room so let in a house of and over the whole of which the owner or proprietor retains possession, dominion and control. The interest of the lodger is in the exclusive enjoyment, that of the owner in the control. The situation of a transient guest in a hotel resembles that of the lodger in the respect that the proprietor retains an underlying control and the guest a qualified possession; to that extent there is a minimum of apparent identical use of the property; but, as will appear, even that identity is not complete. Lodging-houses, rooming-houses and the renting of rooms for sleeping purposes ordinarily furnish modest and relatively cheap living quarters; and when meals are served in connection with the lodging there is the unmistakable category to which the word "boarder" in the section harks back. One who should describe the Lord Nelson Hotel as a "lodging-house" or "rooming-house" or as in the business of providing meals for "lodgers, boarders or roomers" in the context of the section would not be speaking in the vernacular of Canadians generally. Lodging-houses in most cases are undoubtedly maintained on a high level of care and cleanliness, but that does not qualify their main function as being to furnish more or less permanent accommodation to persons of moderate means. This, at one extreme, is illustrated by the fact that as to sanitary and other features "lodging-houses" at seaports are specifically subject to s. 214 of the *Merchant Shipping Act, 1894* (Imp.), c. 60; and that by 34-35 Vic., c. 112, s. 10 (Imp.), the *Prevention of Crimes Act, 1871,* the harbouring of thieves by a keeper of a lodging-house is punishable on summary conviction.

The characteristic differences between a hotel and a lodging-house are many and significant. An inn is bound by law, to the extent of its means, to receive as guests and

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to furnish lodging and food to all travellers; the innkeeper is, at common law, an insurer of the property carried by guests; that property is not liable to distress by a superior landlord: the innkeeper has a lien on goods and effects brought by the guest even though they may be stolen; if a guest ceases to be a traveller, the innkeeper may turn him out after reasonable notice: a guest has no contractual right to a particular room and, for good cause, he may be transferred. These incidents are dealt with in Halsbury (2nd ed.) vol. 18, pp. 144, 145, and Bullen on Distress (2nd ed.) p. 110. The lodging-house keeper has no such obligations; his lodgers or roomers, as licensees, are selected and, subject to contractual terms and, strictly at law, may, at any time, be ejected; his liability for their property is not that of an insurer; at common law he has no lien on the goods or effects of the lodger, and the latter were subject to distress by a superior landlord although by R.S.N.S. (1954), c. 287, s. 15 certain relief is now given. The unquestioned distinction between various modes of accommodation in the way of lodging and food is exemplified by the *Innkeepers Act*, R.S.N.S. (1954), c. 129, s. 2(6) where it speaks of "innkeeper, boarding-house keeper, lodging-house keeper" which puts beyond serious controversy their disparate classification by the legislature. In the Halifax charter itself, the distinction is made: s. 724 dealing with building restrictions and specifications defines "lodging-house" for those particular purposes as "a building in which persons are accommodated with sleeping apartments, and includes hotels and apartment houses in which cooking is not done in the general apartments."

It is argued that the sentence in the section "or who is engaged in the business of providing meals for gain in such real property" is to be taken as independent of and so detached from what has gone before that it extends the section to a restaurant. I think this would be an extraordinary circumlocution by which to describe a restaurant. The phrase "such real property" refers back to real property occupied by a person carrying on a business described; and its expansion to include restaurant keepers seems to be a conclusive demonstration of the error of such a construction.

The essence of the appellant's case is that we must look inside the concept of "the business of a lodging-house"—and similarly of the others—to the element of "lodging" in

its purely functional form: the hotel does give "lodging". But the section does not deal with lodging or the renting of rooms in that sense; it describes certain self-contained businesses; and the simple and testing question is whether the appellant can properly, in ordinary parlance, be said to conduct any such business or can be called a lodging-house keeper or rooming-house keeper. It seems to me that the answer is almost self-evident: the company neither keeps a lodging-house nor conducts the business of a rooming-house nor is it the keeper of either kind of house. The defect of the contention lies in the confusion of functional uses with business entireties.

These views furnish an answer likewise to the second ground. The company is, in law, except as to certain portions rented, in underlying possession of the entire building; that being so the assessment comes squarely within s. 357.

I would, therefore, dismiss the appeal with costs.

The judgment of Kellock, Locke and Abbott JJ. was delivered by:—

KELLOCK J.:—This appeal involves the interpretation of s-s. (1) of s. 375(B) of the Halifax City Charter, which provides for payment of a business tax on twenty-five per cent of the total value of real property in which the person "occupying" conducts the business of "a lodging-house or rooming-house or renting rooms for living purposes or for sleeping purposes only or who is engaged in the business of providing meals for gain in such real property and who has in any one building, at any time during the civic year in which the assessment is being made, provided accommodation for five or more lodgers, roomers, or boarders." Unless this section applies the appellant would fall within s. 357, under which it has been assessed.

In the construction of this statute it is relevant to refer to what was said by Viscount Simon in *Canadian Eagle Oil Company Limited* v. *The King* (1), as follows:

> In the words of the late Rowlatt J., ". . . in a taxing Act one has to look merely at what is *clearly* said. There is no room for any intendment. There is no equity about a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

The italics are mine.

(1) [1946] A.C. 119 at 140.

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As, however, s. 375(B) is to be regarded as an exception to the provisions of s. 357, it is also relevant to point out, as stated by Cohen L.J., as he then was, in *Littman* v. *Baron* (1), that

> . . . the principle that in case of *ambiguity* a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section *clearly* imposing liability.

Where the excepting provision is clear, however, the ordinary principle referred to by Viscount Simon applies.

In construing s. 375(B) I agree with the court below that merely because some of the guests of the appellant may have taken on the character of "lodgers", the appellant is not thereby brought within the meaning of "lodging-house" or "rooming-house" as those words are to be understood in this statute. I do not think that in ordinary parlance a hotel would be understood to be either a "rooming-house" or a "lodging-house" or be referred to as such. Probably the main difference in ordinary understanding between a "hotel" and either a "lodging-house" or a "rooming-house" is that the former holds itself out as accepting all applying for accommodation while the latter do not. If, therefore, there were nothing more in the sub-section, the appellant would fail.

However, that is not the case as the statute differentiates between businesses of the character mentioned and those of "renting rooms for living purposes" or "for sleeping purposes" or of "providing meals for gain". The question accordingly is whether these latter words, to which some effect must be given, include, in whole or in part, the business of the appellant which, as I have stated, is not that either of a "lodging-house" or a "rooming-house" within the meaning of the statute.

The respondent contends that the words "renting rooms for living purposes" are confined to rooms rented for the purposes of all the ordinary activities of living, including the getting of meals. I cannot accept this contention. In my opinion the business described by the statute would come within the fair meaning of these words whether the tenants do or do not prepare their own meals. "Living", in contradiction to "sleeping only" connotes merely something more than is comprised by the latter.

(1) [1951] Ch. 993 at 1103.

In consideration of the question as to what businesses, other than that of a lodging- or rooming-house, are included within the language of the section, one must have in mind not only hotels of the class of the respondent which supply a varied number of services under the one roof, but also the smaller and humbler hostelries whose only services, apart from the sale of liquor, may be confined to the renting of rooms and the provision of meals. In many cases, the renting of rooms and the provision of meals are the only services furnished. This is also the case with the modern "motel", many of whom do not, however, provide food. The motel is, of course, in direct competition with the hotel. In so far, therefore, as the words "renting rooms for living purposes" or "for sleeping purposes" are concerned, they clearly describe one of the functions of a hotel, and therefore of the appellant.

As to the words "providing meals for gain", it might, at first blush, appear, in the light of the presence in the section of the word "boarders", that they could be equated with "boarding-house", a term not normally applied to a hotel any more than the words "lodging-house" or "rooming-house".

It is significant, however, that the statute has not employed the word. Had this been the intention, it would have been very easy for the legislature to have so said, as it did in 1931 in c. 7 of the statutes of that year, by s. 3 of which provision is made for a lien in favour of every "innkeeper", "boarding-house keeper" and "lodging-house keeper" on the baggage of his "guest", "boarder" or "lodger" for the value or price of any food or accommodation furnished to him or on his account.

As the words "boarding-house" are not mentioned in the present statute, I do not think that the word "boarder", which is used, can be said to have been used to exclude its quite ordinary application to people who obtain meals at hotels as well as at private houses with some degree of regularity. In this view, the words "providing meals for gain" also apply to the appellant.

If it be the fact that any part of the appellant's premises are not occupied for one or other of the above purposes, it follows that such part or parts would fall outside the section. This is a situation which the statute expressly contemplates.

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By s. 379(A) the duty is imposed upon the assessor of determining, in the first instance, the character or nature of all real property which he proposes to assess. S. 381 provides that if any real property occupied for either residential, business or other purposes, is a part only of a property which has been valued as an entirety for real property tax, the assessor shall determine the value of such part for the purposes of the residential, business or other occupation tax as the case may be in respect of the occupancy of such part. If, therefore, for example, the appellant were carrying on a retail merchandising business in a part of the building otherwise occupied for the purposes of any of the businesses mentioned in s. 375(B), such part would require assessment under s. 357.

Nor do I think that the statute is to be interpreted as producing the effect that an occupier who carries on one or more of the specified businesses dealt with by s. 375(B) as well as other types of business in the same building, is, for that reason, to be classified as carrying on a business not named in the section with the result that the section ceases to apply to any part of the premises. In my opinion, the fair reading of the statute is that it is to be applied distributively so that such parts of a building occupied for the purposes of the kinds of businesses mentioned in s. 375(B) shall be assessed under the terms of that section and the remainder as may be otherwise provided for by the statute. I see no reason why a person carrying on the business of a rooming-house, who also provides meals for gain in the same premises, comes within s. 375(B) with respect to both businesses or what may be really one business, while if he also carries on in conjunction therewith the business of a retail gift shop, the sub-section would have no application to him at all.

In my opinion, therefore, the appeal should be allowed and the matter referred back to the Court of Tax Appeals to be dealt with in accordance herewith. The appellant is entitled to its costs here and below.

Appeal allowed with costs.

Solicitor for the appellant: *I. M. MacKeigan.*

Solicitor for the respondent: *C. P. Bethune.*

HUGO O. SCHARFENBERG (*Plaintiff*) ..APPELLANT; 1955 *Nov. 1, 2

AND

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EDITH KORTES (*Defendant*) .....RESPONDENT. *Jan. 24

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contract—Agreement to build house—Interpretation—Evidence—Rectification—Substantial performance.

The appellant, who had some twenty years experience as a building contractor, signed a contract to build a house for the respondent. During the negotiations, prior to the signing, he had been supplied with a set of plans, which were later attached to the contract, supplying the data for finishing both the main floor and the basement of a one-storey building. The appellant testified that he quoted a price of $30,000 for the completion of the ground floor and basement and a price of $18.000 for the completion of the ground floor but only structural parts of the basement, and that the latter figure was agreed upon. The respondent denied that any other figure than $18,000 was ever mentioned.

The appellant claimed for a balance owing upon the contract and for a lien upon the land under the *Mechanic's Lien Act*. A claim for rectification of the contract was later made by the appellant. The defence was that the appellant had not completed the building as required by the agreement since, as admitted, the basement had not been finished. The trial judge rejected the claim for rectification, found that the contract had not been substantially performed and dismissed the action. This judgment was affirmed by the Court of Appeal.

Held (Locke J. dissenting): The appeal should be allowed and a new trial directed.

Per Rand, Kellock and Abbott JJ.: The evidence, which the appellant attempted to make at the trial to support the case that it would have been absurd for an experienced contractor to have agreed to "finish" the entire building at the price of $18,000, that ambiguities and uncertainties in the plan demonstrated that the actual contract was for the finish of the ground floor and rough structural completion of the basement only, and which would also have shown the amount of money required to finish the basement, should not have been rejected by the trial judge. That rejection was not material nor warranted. The evidence might have had a decisive influence on the mind of the trial judge in coming to an opinion on the veracity of the appellant, particularly in view of the fact that the reasons for judgment give no indication that the anomalies and inconsistencies in the plan and the evidence were given serious consideration. There is no doubt that its rejection operated to the serious detriment of the case for the appellant.

Per Locke J. (dissenting): As the evidence of the respondent and the witness Hoffman had been accepted by the trial judge and the Appellate Division, the claim for rectification failed.

*PRESENT: Rand, Kellock, Estey, Locke and Abbott JJ. Estey J. died before the delivery of the judgment.

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The proposed evidence which, it was claimed, had been rejected was not properly tendered (*Penn* v. *Bibby* (1866) L.R. 2 Ch. 137). As the appellant had deliberately refrained from arguing the question as to the rejection of the evidence raised by his notice of appeal in the Appellate Division and the matter had accordingly not been considered in that Court, the point should be treated as abandoned or waived (*Hamelin* v. *Bannerman* (1901) 31 S.C.R. 534; *Attorney General of Canada* v. *Ritchie Contracting Co.* (1915) 52 S.C.R. at 92).

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, affirming the dismissal of the action by the trial judge.

M. J. A. Lambert for the appellant.

J. W. K. Shortreed for the respondent.

The judgment of Rand, Kellock and Abbott JJ. was delivered by:—

RAND J.:—This appeal concerns a contract by which the appellant as contractor agreed to build a house for the respondent, the owner. Following preliminary discussions plans were prepared for the owner by a third person and the contractor was called in for a general examination of them with the owner and her stepson Hoffman who lived with her. Certain changes of a minor nature were made after which the contractor was furnished with a set on which to give a price. On their face they supply data for finishing both the main floor and the basement of a one-storey dwelling. The basement layout included bedrooms, bathroom, den, rumpus room, etc.

Later, in submitting a price to the owner, the contractor says he mentioned two figures: one for the final completion of both ground floor and basement and the other for the completion of the ground floor but only structural parts—a rough finish—of the basement. The former is said to have been $30,000 and the latter $18,000. In the result it was agreed that the latter amount should be the contract price, and the dispute is whether the house was to be completed in its entirety or to the modified extent mentioned.

A written contract in simple form was drawn up which, generally, provided for the construction according to the plans, that the work should be prosecuted with diligence,

and that payment would be made in three instalments of $4,000 each and a final instalment of $6,000 "on completion of the building". Clause 3 reads:—

> The contractor covenants that he will well and sufficiently execute and perform in a thorough and workmanlike manner the erection and completion of the said building, and will purchase, use and obtain the best of materials and labour that may be available to him as may be necessary in connection with the construction of the said building, and in particular but without restricting the generality of the foregoing, the Contractor agrees to use Number One materials throughout and to install standard double plumbing. "and to furnish & install the items listed in Schedule 'A' hereto."

Schedule "A" was as follows:—

1. Forced air furnace worth approximately $1,000.
2. One-half inch oak floor throughout except in the kitchen and bathroom.
3. Rubber tile on floor of bathroom and kitchen. Plastic tile 4½ feet in kitchen and bathroom walls.
4. Colored toilet, bath and wash basin in bathroom and kitchen.
5. Thermopane windows in living room, dining room, front bedroom.
6. Asphalt red shingles on roof.
7. Fireplace in living room.
8. Mercury light switches throughout.
9. Single garage.

The contract was signed on May 15, 1953 and the work was begun about that time. On November 23 the contractor presented a bill for the final instalment plus certain extras which are not disputed; on some excuse, he was told to return in a few days. Three days later he was informed that the work had not been completed according to the contract although he contends that no mention then was made of the omission to finish the basement. A mechanics' lien was thereupon filed and in January, 1954, these proceedings were brought.

In the course of the trial the plaintiff offered the evidence of an architect to support the case that it would have been utterly absurd for an experienced contractor such as the appellant to have agreed to "finish" in the manner indicated the entire dwelling at the price of $18,000 and that ambiguities and uncertainties in the plan, including items in Schedule "A", demonstrated the actual bargain between the parties to have been not for the finish of the two floors but the finish of the ground floor and rough structural completion of the basement. That evidence would have led not only to the comparison of any reasonable range of price for the one degree of completion as contrasted with the other,

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but also the amount of money which it would have taken to finish the basement. On the objection of counsel for the respondent the evidence was rejected, and the question which meets us at the outset is whether that rejection was, in the circumstances, material and warranted.

In considering that question, there are certain indisputable and significant facts which should be mentioned. It will be seen that section 3 provides that the contractor will install "standard double plumbing". That may or may not be intended to include fixtures but light is thrown on this by Schedule "A". In item 2 we find that a one-half inch oak floor is to be laid throughout except in the kitchen and *bathroom*. Item 3 speaks of the floor of "*bathroom* and kitchen" and "kitchen and *bathroom* walls". Item 4 specifies the type of "*bath* and *wash basin* in *bathroom* and kitchen". The bathroom fixtures were chosen by the respondent and only one set selected. In these circumstances it is obviously striking that the singular "bathroom" is used through the Schedule and that only one set of fixtures was selected. Its effect seems, in fact, to define "standard double plumbing" as meaning what the contractor contends: the installation of the pipe system exclusive of fixtures.

Then, on the plan a four-inch concrete floor in the basement is specified. That, on its face, seems to me to exclude oak flooring which is claimed under the word in item 2 "throughout"; and no light is thrown on the method or practicality of placing oak over a concrete basement floor. In this aspect the word "throughout" in Schedule 'A" is confined to the ground floor, as its ordinary signification in the context seems to indicate.

A further item is of importance. The third instalment of $4,000 was to be paid "when the building has been plastered". A request for this payment was made shortly before or after the 1st of August but was refused on the ground that some of the work done was defective. This refusal was followed by a letter dated August 5 from solicitors of the contractor to the respondent which pointed out that by the terms of the contract she was "to pay $4,000 *when the building has been plastered"*; that Mr. Scharfenberg had informed them that *"the plastering was completed several weeks ago"*; and that "We are writing to remind you

of the terms of the contract into which you entered . . ."; and it asked for immediate payment. Evidently the respondent then had some communication with the solicitors and on August 11 a further letter was written to the effect that the contractor was unwilling to consent to any variation of those terms. It was again pointed out that according to the agreement the $4,000 was to be paid *"when the building had been plastered"* and it reiterated the completion of the plastering. The stepson Hoffman in his evidence said that sometime in July or "even in June" he had spoken to the contractor about the plastering and was told, "don't you worry, I am building the house". In spite of all of this, the payment was made shortly after the receipt of the letter of August 11.

Another such circumstance is that the wires running through the concrete walls of the basement which held the construction forms together were only in part clipped off and the remaining four or five inches left as they were. The significance of this is that according to the contractor cutting was discontinued when Hoffman indicated that he would like to have them left to be used later in finishing the walls of the basement. If that request was made, it would tell strongly against the contention that the contractor was to plaster the basement walls. Mr. Lambert urged that it would be quite unreasonable to assume that when the contractor had finished plastering the walls on the ground floor he would discontinue that work, complete the ground floor and then weeks later return to finish plastering in the basement. At least this item of plastering shows beyond question that from the early part of July the understanding of the contractor in this respect was clearly indicated to the owner.

There were also on the plans two descriptions that remain yet to be explained if the contract is as urged by the respondent. One corner of the basement is on the plan described as "future rumpus room". To give the adjective "future" any meaning at all it is that the finishing was not intended at that time. This is supported by the absence of any mention of the room on Schedule "A". Then an area is marked "proposed bath". How that description can be reconciled with complete finishing, including fixtures, remains to be shown.

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The appellant, although he has been a contractor in Edmonton for about thirty years, has not, as his evidence indicates, such an acquaintance with the English language as gives him facility in its use; on the other hand, both the respondent and her stepson appear to be quite at home with it. Since the plan and Schedule "A" furnished the data not only for a final completion of both floors but also for that of the ground floor and the partial construction of the basement, it does not require much imagination to appreciate how the contractor could have fitted his understanding of what had been agreed to be done into the inclusion of the plan in the contract. If evidence had been admitted to show the extreme unlikelihood of a bargain to build for $18,000 a finished house such as claimed, then obviously it might have had a decisive influence on the mind of the trial judge in coming to an opinion on the veracity of the contractor, particularly in view of the fact that the reasons give no indication that the anomalies and inconsistencies which I have, in part, mentioned, were given serious consideration. The evidence tendered should, in my opinion, have been admitted and that its rejection might have operated to the serious detriment of the case for the contractor I have no doubt.

I would, therefore, allow the appeal and direct a new trial. The appellant will be entitled to his disbursements of the appeal in this Court but otherwise there will be no costs in this Court or in the Court of Appeal. The costs of the first trial will be in the discretion of the judge presiding at the rehearing.

LOCKE J. (dissenting):—The appellant, by the Statement of Claim, alleged that the defendant was indebted to him for a balance owing upon a contract dated May 15, 1953, for the erection of a house in the City of Edmonton, and claimed a lien upon the land for such amount under the provisions of the *Mechanics' Lien Act of Alberta.*

By the Statement of Defence the respondent pleaded that the plaintiff had not completed the building, as required by the agreement, and, in addition, claimed that there had been various defects in certain of the work which had been done. Particulars of the work called for by the contract which had not been done and of the alleged defective work were furnished by the respondent on demand. The

unfinished work related almost entirely to the basement of the dwelling. Upon this defence the appellant joined issue.

At the opening of the trial before Macdonald J. the appellant obtained leave to amend the Statement of Claim by the addition of the following:—

3. (*a*) The Plaintiff says that the said contract to which were attached a certain set of plans inadvertently and by mistake incorporated certain plans for a finished basement whereas the Plaintiff says that the parties hereto had agreed verbally prior to the execution of the said contract that the basement would not be finished as shown in the said plans and would contain the bearing partitions only and roughed in double plumbing and the Plaintiff asks that the said contract be rectified to correct the said mutual mistake.

(a.a.) An Order of this Honourable Court directing that the certain contract dated the 15th day of May, 1953, be rectified to delete any plans for a finished basement as shown in the plans attached to the said contract.

The Statement of Defence contained a general denial of the allegations of fact in the Statement of Claim and upon these issues the action was tried.

The appellant has had twenty years' experience as a building contractor in the Edmonton District. Shortly prior to May 15, 1953, the parties entered into negotiations for the erection of a house upon the respondent's property. During most of the negotiations the respondent was represented by her adopted son, Hubert Hoffman. The learned trial judge accepted the evidence of the respondent and Hoffman, in preference to that of the appellant, and, accordingly, it is their version of what took place that is to be considered.

After some preliminary discussions, the appellant introduced Hoffman to a Mr. MacDonald, an employee of the City of Edmonton, who, the appellant had suggested, was a suitable person to prepare a plan. Upon the information given to him by Hoffman, MacDonald prepared plans for a one storey house, with a basement, the latter to contain two bedrooms, a den or study, a bathroom, what was called a rumpus room, a utilities room where the furnace was to be placed, and at least two other rooms which bore no designation. Upon receiving this, the parties and Hoffman met at the respondent's home, went over the plans in detail, and, upon one of the blue prints taken from them, marked in the appellant's presence certain changes which, it was agreed,

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were to be made. The appellant said that he would consider the plans and give an estimate of the price for which he would construct the building and, two days afterwards, Hoffman says that he came and quoted the figure of $18,000. The appellant suggested that they have an agreement drawn by a solicitor he knew. The respondent and Hoffman were strangers in Edmonton and did not know any solicitor and agreed to this. The appellant went alone to Mr. J. H. Jamieson, a member of a well known Edmonton firm, taking with him a copy of the blue prints upon which the agreed changes were marked, and instructed him to draw the agreement.

According to Hoffman, it was on May 11 that he and the respondent went to Mr. Jamieson's office and read the draft agreement which had been prepared. The agreement, as drawn, required the appellant as contractor, *inter alia*, to:—

> provide all materials and perform all the work mentioned in the specifications and shown in the drawings and details supplied by the owner.

the contract price to be the sum of $18,000 and the building to be completed by October 1, 1953. No specification had been prepared. There were certain discussions between the parties in the solicitor's presence but the matter was not then concluded and the respondent and Hoffman left taking the draft agreement home to be studied. Some two days after, Hoffman says he went with the respondent to Mr. Jamieson's office and there met again Scharfenberg and a discussion took place in regard to certain changes which the respondent wished to have made. Hoffman had made a list of these and the details were taken down by Mr. Jamieson after they had been agreed to by the appellant. The respondent returned alone to the solicitor's office on May 15. A change had been written into clause 3 of the draft in pen and ink, requiring the contractor to furnish and install the items listed on a page described as Schedule A, which was attached. These included a forced air furnace worth approximately $1,000 and eight other changes or additions to the plans. In the presence of Mr. Jamieson, the parties then signed the agreement upon which the action was brought and the blue prints, being the "drawings" referred to in it.

The appellant gave evidence that when he received the plans he gave an estimate of $30,000 to build the house, this

including the entire work indicated. According to him, the respondent and Hoffman said this was too much. He then claims to have said to them that the property was in a one family zone and that he could not "build a suite" (referring to the basement rooms) and that it was then agreed that he would build only the first floor shown on the plans and "roughed in double plumbing" in the basement. The respondent and Hoffman both flatly denied this and said that no figure other than $18,000 was ever mentioned during the negotiations. According to both the respondent and Hoffman, their only discussion with the appellant during the negotiations was for a price for all of the work indicated by the plans, evidence which the learned trial judge, after hearing the witnesses, has accepted, a finding that has been affirmed on appeal. While, in view of this, it is unnecessary in my opinion, to consider further the evidence bearing upon these questions of fact, it may be noted that the appellant can read, and that he himself gave instructions to Mr. Jamieson for the drawing of the agreement, in the absence of the respondent, that Hoffman and the respondent were in the solicitor's office twice discussing the matter with the appellant in his presence, and the respondent alone, on the day that the agreement was signed, again in the presence of the appellant, and that Mr. Jamieson was not called as a witness by the appellant to support the contention that there had been some mistake. It may be added that the statement that there was any difficulty in getting a building permit from the City for the house as shown on the plans, if ever made, was shown to be untrue.

It may further be noted that both the respondent and Hoffman were in touch with the work as the building progressed and both questioned the appellant as to when he was going to do the work called for in the basement. Hoffman asked him as to this several times from June onward, but the only answer made to him was that he was not to worry as the appellant was building the house. Mrs. Kortes says that she also asked him specifically when he was going to finish the basement, to which he replied:—"I will see",

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or some such phrase, and she says that at no time did he tell her that he was not going to do the work called for by the plan. All this is completely inconsistent with the appellant's story. To this evidence there was no answer as the appellant did not give evidence in rebuttal.

That there was a material part of the work called for by the plans which had not been completed at the time the action was commenced and which the appellant declined to complete is admitted. Of the work required to be done in the basement, only what the appellant referred to as the bearing partitions were erected. In addition, there was what he referred to as "roughed in double plumbing." Asked as to what was meant by standard double plumbing, the term employed in the contract, he said that it included a bath, toilet and a basin. The walls of the various rooms, the closets in the bedrooms and the den or study and the doors were not built and none of the lathing and plastering, which the appellant admitted were indicated by the plans was done.

The learned trial judge found that the claim for the rectification of the agreement failed, that the appellant had not substantially performed the contract, and dismissed the action. Upon the later point, he applied, properly in my opinion, the principle referred to in the judgment of our brother Cartwright in *Fairbanks Soap Company* v. *Sheppard* (1). In a short judgment delivered by Johnson J.A. for the Appellate Division, agreeing, after consideration of the evidence, with the findings of the learned trial judge, the appeal was dismissed.

As to the claim for the rectification of the agreement, the matter does not appear to me to admit of argument when, as here, the evidence of the respondent and Hoffman as to what took place during the negotiations which led up to the signing of the agreement has been accepted. The learned trial judge, in considering the evidence necessary to support such a claim, referred to a passage from the

(1) [1953] 1 S.C.R. 314.

judgment of Duff J., as he then was, in *The Ship M. F. Whalen* v. *Point Anne Quarries Ltd.* (1), where the following language, taken from the judgment of Sir W. M. James in *MacKenzie* v. *Coulson* (2), was adopted, reading:—

> that it is always necessary for the plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified . . . It is impossible for this court to rescind or alter a contract with reference to the terms of the negotiation which preceded it.

There was no such proof in the present matter, in the opinion of the learned trial judge and of the learned judges of the Appellate Division.

A point which arose during the argument of this appeal remains to be considered, touching what was then said to be a wrongful rejection of evidence tendered by the appellant. Upon this ground a new trial is sought. The appellant called an architect, James B. Bell, who had examined the plans and the building as constructed. Counsel for the plaintiff at the trial said that he wished to show by the witness the cost of the house as it stood and "that the house is a house without a completed basement." Later, he said that:—

> my question now would be limited to that particular phase of the cost of this house and the cost of building the house according to the letter of those plans as corroboration of the position taken by the plaintiff.

Both of these statements appear to me to be lacking in clarity. When the learned trial judge said at once that he did not see that the suggested evidence would be relevant, counsel for the plaintiff made no attempt to explain the ground upon which he contended that it was and dropped the matter. Some explanation of the nature of the proposed evidence and of its suggested relevancy may perhaps be found in the Notice of Appeal given by the plaintiff in appealing to the Appellate Division. Of the seven grounds of appeal given, the fifth alone complains of the wrongful rejection of evidence and reads:—

> That the learned trial judge erred in failing to accept evidence as to the interpretation of the contract.

This is not what was suggested to the learned trial judge at the time and he, accordingly, had not ruled as to whether it was admissible for this purpose. We are informed that

(1) (1921) 63 Can. S.C.R. 109 at 131.

(2) (1869) L.R. 8 Eq. 368 at 375.

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no question as to the improper rejection of evidence was argued before the Appellate Division. There is no reference to any such question in the reasons for judgment delivered by Mr. Justice Johnson to that, apparently, the matter was not considered. Had the question been argued and the suggested evidence found to be admissible, no doubt the court would have considered the application of Rule 604 of the Supreme Court of Alberta which provides, *inter alia*, that a new trial shall not be granted on the ground of the improper rejection of evidence unless, in the opinion of the court, some substantial wrong or miscarriage has been thereby occasioned.

The argument advanced on behalf of the appellant before us, if I correctly appreciate it, is that the evidence proposed to be given was to show that the cost of completing the entire work shown on the plans was so much in excess of the contract price of $18,000 that no experienced contractor would have agreed to do so for that amount, and not, as suggested in the Notice of Appeal, as an aid to the interpretation of the blue prints. If this was what was intended at the time, it does not appear to have been made clear to the presiding judge. Had it been admitted on the suggested basis, I think it is most probable that the defendant would have called evidence on the point.

On the argument before us, counsel for the appellant was asked if it was his opinion that the evidence that was rejected would have had any effect upon the judgment of the trial judge as to the veracity of the witnesses. He candidly stated that, in his opinion, it would not. Had the question, which was clearly considered to be not worth arguing before the Appellate Division, been raised there and had such a question been asked of counsel, no doubt the same answer would have been given, with the result that the Appellate Division, I would expect, would have applied Rule 604.

In *Penn* v. *Bibby* (1), where the defendant had not been permitted at the trial to cross-examine some of the plaintiff's witnesses upon matters which, it was contended, were relevant, Chelmsford L.C. said in part:—

> In order to ground this objection, however, the question proposed to be put should have been formally tendered to the Judge, and rejected by him as inadmissible. Now, it appears that his Honour was never dis-

(1) (1866) L.R. 2 Ch. 127 at 137.

tinctly requested to admit any specific question, but from some cursory remarks it is assumed that he would not have permitted a particular line of cross-examination.

This, however, is not sufficient. The Judge should have an opportunity of deciding upon some distinct question, and have refused to allow it, before there can be a motion made for a new trial on account of the rejection of evidence.

In my opinion, this principle is applicable in the present matter. I do not think that the nature of the proposed evidence was adequately explained to the learned trial judge to enable him to rule upon its admissibility. Nor was any distinct question put to the witness upon which he was asked to rule.

I am further of the opinion that where litigants deliberately refrain from arguing questions such as this before the Appellate Court of the Province, it should not be open to them to raise the question in this Court. The failure to argue the question as to the rejection of evidence raised by the fifth ground of the Notice of Appeal to the Appellate Division was obviously deliberate. Had the matter been argued, we would have had the advantage of having the opinion of the Appellate Division as to whether, in their judgment, the matter was one for the application of Rule 604. The course followed in this case has deprived us of that advantage. In *Hamelin* v. *Bannerman* (1), where an appellant sought to raise for the first time in this Court an objection that arbitration and award were conditions precedent to the right to bring an action for damages, Taschereau J., whose judgment was concurred in by Sir Henry Strong C.J., Sedgwick and Davies JJ., said that, as the matter had not been mentioned in the factums filed in either court, the point must be considered as abandoned. The improper rejection of evidence is not one of the errors alleged in Part 4 of the appellant's factum in this Court, though the matter is briefly mentioned in the following written argument. In my opinion, this is a case for the application of the same principle and the point should be

(1) (1901) 31 Can. S.C.R. 534.

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considered as abandoned or waived. See also *Attorney General for Canada* v. *Ritchie Contracting Company* (1), Fitzpatrick C.J.

I would dismiss this appeal with costs.

Appeal allowed; new trial directed.

Solicitors for the appellant: *Lindsay, Emery, Ford, Massie, Jamieson & Lambert.*

Solicitors for the respondent: *Shortreed & Shortreed.*

1955

*Mar. 16, 17, 18

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*Jan. 24

JOHN JOSEPH CLEMENS (*Plaintiff*) ....APPELLANT;

AND

JOHN C. CLEMENS ESTATE, CROWN TRUST COMPANY, JAMES B. BROWN, EXECUTORS (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Parent and child—Advancement—Presumption of—Whether rebutted—Father and son with same name—Shares of stock registered—Whether resulting trust.

The appellant and his father had identical Christian names, J. J. C., but the father, throughout his life and in all his business dealings with a few exceptions, was known as and used the name J. C. C. In 1928, the father purchased shares and caused them to be registered in the name J. J. C. He used his own money for the purchase and retained physical possession of the certificates during his lifetime. At the same time he bought other shares which he registered in the names of his daughter, his other son and the name J. C. C.

The appellant sued his father's executors to recover the shares registered in the name J. J. C. The trial judge dismissed the action and the Court of Appeal for Ontario, by a majority, affirmed this judgment.

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

Per Kerwin C.J., Rand and Cartwright JJ.: The inference from the evidence is irresistible that by causing the certificates to be issued in the name J. J. C., the father was designating the appellant and not himself.

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*PRESENT: Kerwin C.J., Rand, Estey, Cartwright and Abbott JJ. Estey J. died before the delivery of the judgment.

(1) (1915) 52 Can. S.C.R. 78 at 92.

The respondents have failed to adduce sufficient evidence of any contemporaneous act or declaration by the father to rebut the presumption of advancement. Furthermore, there was evidence of subsequent declarations of the father to support the view that the appellant was the beneficial as well as the legal owner of the shares. There was no evidence that the appellant gave up that ownership and became a trustee for his father.

Per Abbott J. (dissenting): The father was designating the appellant and not himself and, in consequence, a rebuttable presumption of advancement was created. The contemporaneous acts of the father in dealing with the certificates are not only inconsistent with any intention on his part to convey the beneficial interest in the shares to the appellant, but they indicate clearly that he intended to retain the right to deal with them as he might see fit. These acts are in themselves sufficient to rebut the presumption of advancement; the presumption is further rebutted by the acts and declarations of the appellant since he first learned of the shares registered in the name J. J. C., showing that he considered himself only a trustee.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming, Laidlaw J.A. dissenting, the dismissal by the trial judge of the action.

J. J. Clemens in person.

H. F. Parkinson, Q.C. and *M. J. Mowbray* for the respondents.

THE CHIEF JUSTICE:—After anxiously considering the evidence in the record, the judgments in the Courts below and the arguments addressed to us I have concluded: (1) That when the deceased caused the Certificates of Shares to be issued in the name of John Joseph Clemens he meant them to be in the name of, and for, the appellant; (2) the presumption is that he intended to advance the appellant and there is nothing in the record to rebut that presumption. I have had the opportunity of perusing the reasons for judgment of Mr. Justice Cartwright and I agree with them. On the second point, I merely add a reference to the decision of the House of Lords in *Shephard* v. *Cartwright* (2).

The judgment of Rand and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario (1), pronounced on January 12, 1953, dismissing an appeal from a judgment of

(1) [1953] O.R. 87; 2 D.L.R. 290. (2) [1955] A.C. 431.

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Judson J., delivered at the conclusion of the trial on May 1, 1952, dismissing the appellant's action. Laidlaw J.A., dissenting, would have allowed the appeal.

The respondents are the executors of the last will of the appellant's father, hereinafter usually referred to as Clemens Senior, who died on January 31, 1943.

In the pleadings the appellant asks (a) an order requiring the respondents to deliver to him 3,300 shares of the common stock of The International Nickel Company of Canada, Limited, represented by certificates numbers T.T.C. 9613 to 9645 inclusive, each for 100 shares and registered in the name of John Joseph Clemens; (b) payment of all dividends received by the respondents on such shares; (c) an order requiring the respondents to account for 200 shares of the common stock of International Nickel Company of Canada, Limited, represented by certificates numbers T.T.C. 9646 and 9647 registered in the name of John C. Clemens alleged to have formed part of the estate of Clemens Senior and to have been wrongfully given by the respondents to the appellant's sister Elizabeth Clemens Brown; (d) damages for wrongfully depriving the appellant of his property in the said shares; and (e) such further and other relief as might seem meet.

The respondents plead that 400 of the shares referred to in (a) above, represented by certificates numbers T.T.C. 9642 to 9645 inclusive, and the 200 shares referred to in (c) above never came into their hands; that the other shares referred to in the Statement of Claims were the property of Clemens Senior; and that the appellant is estopped by reason of the accounts of the estate having been passed in the Surrogate Court of the District of Sudbury on October 18, 1946. They also plead the Statute of Limitations and the Trustee Act.

Clemens Senior was born on or about December 24, 1879. He was married to Catherine (or Katherine) Droste on September 27, 1911. Three children were born of this marriage, Elizabeth Louise Clemens on September 18, 1912, the appellant on December 20, 1914, and Richard A. Clemens on April 5, 1917.

Throughout his life and in all his business dealings, except in a few instances to be mentioned hereafter, Clemens Senior was known as John C. Clemens or John

Casper Clemens. It appears however from copies of a birth certificate and a baptismal certificate, which while not strictly proved were filed without objection, that Clemens Senior was baptized John Joseph so that his baptismal name was the same as that of the appellant.

On a date or dates not fixed by the evidence but prior to October 30, 1928, Clemens Senior purchased shares of common stock in the International Nickel Company of New Jersey and received certificates of deposit under an agreement dated October 30, 1928, in the following names and amounts:—

Elizabeth Louise Clemens	200 shares
Richard A. Clemens	600 shares
John Joseph Clemens	600 shares
John C. Clemens	140 shares

In exchange for these certificates of deposit certificates for shares of the common stock of The International Nickel Company of Canada Limited were issued, on a basis of six for one, on January 25, 1929, as follows:—

to Elizabeth Louise Clemens	1,200 shares
to Richard A. Clemens	3,600 shares
to John Joseph Clemens	3,600 shares
to John C. Clemens	840 shares

The certificates for the 3,600 shares in the name of John Joseph Clemens were each for 100 shares, were numbered T.T.C. 9610 to T.T.C. 9645 inclusive, and so include the certificates for 3,300 shares claimed by the appellant in this action.

The two main questions which arise in this appeal are (i) whether Clemens Senior in causing the original 600 shares and the 3,600 shares which were issued in exchange therefor to be registered in the name John Joseph Clemens intended to designate himself or to designate the appellant, and (ii) whether, if he intended to designate the appellant, the transaction was an advancement to the appellant or created a resulting trust for Clemens Senior.

As to the first of these questions, the learned trial judge was of opinion that Clemens Senior caused the 3,600 shares to be registered in his own name but that if his intention was to register them in the name of the appellant he did not intend the latter to become the owner thereof but was using his son's name "as a mere alias". In the Court of Appeal, Henderson J.A. agreed with the learned trial judge;

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Aylesworth J.A., with whom Hope J.A. concurred, also agreed with the learned trial judge and added reasons for holding that even if a presumption of advancement arose it was rebutted by the evidence; Laidlaw J.A. and Hogg J.A. were both of opinion that the shares in question were registered in the name of the appellant; Laidlaw J.A. held that the presumption of advancement had not been rebutted and would have allowed the appeal; Hogg J.A. held that such presumption had been rebutted and so concurred with the majority in dismissing the appeal.

I share the view of Laidlaw J.A. and am in substantial agreement with his reasons, but, as I am differing from the learned trial judge and the majority in the Court of Appeal, I will state my reasons in my own words.

With the greatest respect for those who entertain a contrary view, the reasons given by Laidlaw J.A. and by Hogg J.A. for holding that Clemens Senior was designating the appellant when he caused the certificates in question to be registered in the name John Joseph Clemens appear to me to be unanswerable.

The evidence that both in his domestic and business life Clemens Senior used the name, and was known as, John C. Clemens or John Casper Clemens is overwhelming. I propose to mention only some of the items. In the certificate of his marriage on September 27, 1911 he is described as "John C. Clemens". On October 8, 1924, he applied to the Sun Life Assurance Company for a policy on the life of the appellant whom he described in the application as John Joseph Clemens while describing himself and signing as "John C. Clemens". On December 6, 1934, he applied to the same company for another policy on the life of the appellant whom he described as John J. Clemens while describing himself and signing as John C. Clemens. He did all his banking in the name John C. Clemens and signed all cheques in that name. Mr. Van Norman, manager of one of the banks at Sudbury where Clemens Senior had his account and who knew and dealt with him from September 1929 until his death did not know that his baptismal name was John Joseph until he heard it at the trial. Clemens Senior invested in the stocks of numerous companies and at the time of his death held shares registered in the name John C. Clemens in the International Nickel Company of

Canada, Limited and in eleven other companies and shares represented by street certificates in four other companies. There was no suggestion in evidence or in argument that he had ever used the name John J. Clemens or John Joseph Clemens in purchasing any stock for himself in any company other than the International Nickel Company. In conveyances of land and in affidavits attached thereto he described himself as John C. Clemens. On June 16, 1938, he obtained a power of attorney from the appellant in which he was described as John C. Clemens. His sister, Mrs. Kaiser, who was 12 years his junior, always knew him as John C. Clemens. She said that the "C." stood for Casper which was a family name and she did not know that he had been baptized John Joseph until she was told so at the trial. Elizabeth Louise Brown stated that she knew her father as John C. Clemens and her brother, the appellant, as John Joseph Clemens.

In addition to the above there were other items of evidence given and it is not surprising to find the learned trial judge saying to the appellant's counsel who was tendering further evidence on this point:—

> There is a limit to this. It is abundantly established that Mr. John Clemens, Senior, was known everywhere as John C. Clemens, and it is merely proving the obvious. I know this now, and I do not need to be told this.

and a little later:—

> I am convinced that he was known as John C., everybody knew him as John C. or John.

The only instances disclosed in the record in which Clemens Senior referred to himself or caused himself to be referred to as John Joseph Clemens or John J. Clemens or J. J. Clemens are as follows:—

In a will dated February 9, 1939, and a codicil thereto dated December 2, 1941, he was described as "John Joseph Clemens (sometimes known as John C. Clemens)". He signed both will and codicil John C. Clemens. He was similarly described in a will dated September 22, 1942, which he signed John J. Clemens. In his last will dated December 12, 1942, he was similarly described and signed John C. Clemens. In certain correspondence carried on in 1939 and 1940 by the witness Stanley R. Brunton with Bankers Trust Company of New York on the instructions

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of Clemens Senior the latter is referred to as John Joseph Clemens Senior or as "John Joseph Clemens, father". In a trust agreement dated December 31, 1942, signed by the appellant and which was prepared on the instructions of Clemens Senior, the latter is referred to as "John Joseph Clemens Sr., father of the Settlor". It will be observed that the earliest of these instances is in 1939 ten years after the registration of the shares which are in question in this action.

It is against the background of this evidence as to how Clemens Senior described himself and was known in his business affairs that the dealings in International Nickel stock with which we are particularly concerned must be examined.

Particulars of the shares of International Nickel issued on January 25, 1929, have already been stated. Certain other transactions in the stock of this company must now be considered. On December 28, 1928, certificates T.T.C. 2709 to T.T.C. 2713, inclusive, each for 100 shares, were issued in the name of John Joseph Clemens. On January 4, 1929, these certificates, each of which was endorsed "John Joseph Clemens" in the handwriting of Clemens Senior, were cancelled and certificates replacing them were issued, for 475 shares to Stewart McNair and Company, and for 25 shares to William Thomas Brown. On January 26, 1929, certificates for a total of 1,000 shares, being numbers T.T.C. 9704 to T.T.C. 9713, inclusive, for 100 shares each, were issued in the name of "John Joseph Clemens" and on the same day there were issued certificates for a total of 1,000 shares in the name of Elizabeth Louise Clemens and certificates for a total of 1,000 shares in the name of Richard A. Clemens. All the shares above mentioned were purchased on the instructions of Clemens Senior and the certificates were received and kept by him. While it was questioned during the argument, I will assume for the purposes of this appeal that, as contended by the respondents, all of the purchase money of all of these shares was furnished by Clemens Senior and was his own money.

As a result of the transactions of Clemens Senior up to and including January 26, 1929, certificates had been issued

and were in his hands for shares of the common stock of the International Nickel Company of Canada, Limited, in the following names and amounts:—

Elizabeth Louise Clemens	4,180 shares
John Joseph Clemens	4,600 shares
Richard A. Clemens	4,600 shares
John C. Clemens	840 shares

Aylesworth J.A. attaches considerable significance to the purchase of 500 shares in the name of John Joseph Clemens on December 28, 1928 and the sale thereof a week later, but this circumstance does not appear to me to be of assistance in determining whether Clemens Senior was at that time designating himself or the appellant by that name. There is nothing to indicate that he did not intend these shares to be registered in the name of the appellant or that he did not use the proceeds of their sale in part payment for the 1,000 shares purchased in the name John Joseph Clemens on January 26, 1929. In dealing with the shares registered in the names of each of his children Clemens Senior appears to have proceeded on the view that he was entitled to endorse their names, a view which was clearly erroneous even on the theory that they held such shares on a resulting trust for him. The probative effect of the transaction in these 500 shares appears to me to be neutral.

I agree with Laidlaw J.A. and Hogg J.A. that the inference is irresistible that by the name John Joseph Clemens in which he caused the certificates for the 4,600 shares above mentioned to be issued Clemens Senior was designating the appellant and not himself. Whatever may have occurred some years later, the evidence establishes that at the time of the issue of such shares he was devoted to his three children, all of whom were then still infants. That he should purchase shares in the names of two of his infant children, Elizabeth and Richard, and none in the name of his elder son, John Joseph, seems unlikely. It is more unlikely that when he caused 3,600 shares to be registered in the name of John Joseph on the same day that he caused 3,600 to be registered in the name of Richard and 1,000 to be registered in the name of John Joseph on the same day that he caused 1,000 to be registered in the name of Richard

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he was not designating the appellant by the name John Joseph. The inference is clear that he was placing an equal number of shares in the name of each of his infant sons. The matter appears to me to be put beyond doubt when it is remembered that on the same day that he caused 3,600 shares to be registered in each of the names John Joseph and Richard he caused 840 shares to be registered in the name John C. Clemens which, so far as the record discloses, was the only name in which up to that time he had ever described himself in any transaction. I conclude that the 4,600 shares above referred to, registered in the name John Joseph Clemens, were registered in the name of the appellant and not of the father.

Turning now to the second point, as to whether, in causing the shares to be registered in the name of the appellant, Clemens Senior intended to advance his child or to create a resulting trust in his own favour, it must be borne in mind that the question is what was his intention at the time of the transaction. It is nothing to the point to shew that years later he endeavoured to appropriate some of the shares in question to his own use or purported to dispose of them as his own property.

There is, of course, a rebuttable presumption that a gift was intended. The principle is succinctly stated in Halsbury's Laws of England, 2nd Edition, Vol. 17, page 677, as follows:—

> Where a father purchases either real or personal estate in the name of a child alone . . . there is no resulting trust for the father; but the father is presumed to have intended to advance the child, especially where he is an infant. . . . The presumption may be rebutted by evidence of a contrary intention.

In speaking of the nature of the evidence required to rebut the presumption the Master of the Rolls in *Jeans* v. *Cooke* (1) said:

> Still, however, as it is a presumption, it may be repelled by evidence, and, in my opinion, the burden of proof lies on the plaintiff to rebut the presumption of advancement, by evidence sufficiently strong to lead to an opposite conclusion. The evidence ought to be distinct, because, as observed in several cases, this is a principle which is not to be frittered away by nice refinements. The evidence ought to be contemporaneous, or nearly so, because subsequent acts or subsequent declarations by a father will not enable him to convert an advancement for his son into a beneficial purchase for himself.

(1) (1857) 24 Beav. 513 at 521.

As to what evidence is admissible, the law appears to me to be correctly stated in *Lewin on Trusts,* 15th Edition at page 152, as follows:—

> So the father may prove a parol declaration of trust by himself; either before or at the time of the purchase, not that it operates by way of declaration of trust, for the Statute of Frauds would interfere to prevent it; but as the trust would result to the father, were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration of intention. The father cannot defeat the presumption of advancement by any subsequent declaration of intention, but his evidence is admissible for the purpose of proving what was the intention at the time.
>
> On the other hand, the son may produce parol evidence to prove the intention of advancement, and *a fortiori* such evidence is admissible on his side, as it tends to support both the legal operation and equitable presumption of the instrument. And it seems the subsequent acts and declarations of the father may be *used against* him by the son, though they cannot be used *in his favour,* and so the subsequent acts or declarations of the *son* may be used against *him* by the father, provided he was a party to the purchase, and his construction of the transaction may be taken as an index to the intention of the father; but not otherwise, for the question is, not what did the *son,* but what did the *father,* mean by the purchase.

In my opinion the effect of the evidence in the case at bar is accurately summarized by Laidlaw J.A. when he says:—

> There is no evidence of any act or expression of the father or of the appellant contemporaneous with the transfer and there is no evidence of any subsequent act or expression of the appellant touching the question of the father's intention when he transferred the shares and directed that they be registered in the name of the appellant.

With the greatest respect, it appears to me that the learned trial judge and the majority in the Court of Appeal, when considering the evidence as to the conduct and statements of the appellant, have failed to take into consideration the fact that he took no part whatever in the transactions in which the shares in question were purchased in his name and indeed, as it is put in the respondent's factum, "he was not even aware of the existence of the shares until long after their acquisition." It is impossible that the appellant could have any knowledge of his father's intention at the time of the purchase of the shares except such as he might have acquired by hearsay long after the event.

I am unable to find evidence of any contemporary act or declaration by the father sufficient to defeat the presumption of advancement. It was suggested in argument that the father endorsed all the certificates in question in

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blank in the name of John Joseph Clemens at about the time of their issue. As has already been pointed out there is ample evidence that Clemens Senior endorsed the names of all of his children on share certificates that he had caused to be registered in their names. All the 36 certificates T.T.C. 9610 to T.T.C. 9645 issued in the name of John Joseph Clemens on January 25, 1929, are endorsed John Joseph Clemens in the handwriting of Clemens Senior but I can find no evidence that these endorsements were made at or near the date of the issue of the certificates. The endorsements bear the following dates; Numbers T.T.C. 9610 to T.T.C. 9612 inclusive, November 11, 1932; Numbers T.T.C. 9613 to T.T.C. 9641 inclusive, December 1, 1943; on Numbers T.T.C. 9642 to T.T.C. 9645 inclusive, the endorsements are undated. The 3 certificates in the first mentioned group were cancelled and new certificates were issued to Livingstone and Company on April 20, 1933. The endorsements on the 29 certificates in the second group bear a date subsequent to the death of Clemens Senior; they all came into the possession of the respondents. The 4 certificates in the third group are those alleged to have been given by Clemens Senior to his daughter shortly before his death; they never came into the hands of the respondents or either of them in their character of executors. It is said for the respondents that it may be inferred that when Clemens Senior endorsed the certificates he left the endorsements undated. This would seem to be probable as obviously he could not have filled in the date in the group of 29 certificates; but assuming this to be so it does not assist the respondents for it leaves the date on which the endorsements were signed uncertain. In the case of all 36 certificates the signature John Joseph Clemens is guaranteed by The Bank of Toronto and the guarantee stamp is signed by W. E. Van Norman, Manager, Sudbury, Ont. It is in evidence that Mr. Van Norman did not come to Sudbury until September 1929, that is nine months after the certificates in question were issued in the appellant's name. As there is no proof that Clemens Senior endorsed the certificates in question at or near the time of their issue it is unnecessary to consider whether it would have assisted the case of the respondents if there had been such proof.

The learned trial judge appears to have placed some reliance on the correspondence carried on between Mr. Brunton and Bankers Trust Company to which some reference has been made above but when Mr. Brunton's evidence is examined it becomes clear that this whole correspondence was carried on on the instructions of Clemens Senior and there is no evidence that the appellant had any knowledge of it or that he ever signed or even saw any of the letters of which it was said to consist.

The fact that the appellant signed the trust agreement of December 31, 1942, does not assist the respondent's case. The effect of the evidence on this point is that in 1942 the appellant at the request of his father signed the agreement which had been prepared on the father's instructions placing in a trust for the appellant's own benefit, but subject to a spendthrift clause, 900 of the 1,000 shares which his father had caused to be registered in his name on January 26, 1929. This is not evidence to rebut the presumption of gift which arose when the father purchased in the appellant's name, some time prior to October 30, 1928, the 600 shares in exchange for which 3,600 shares were issued to him on January 25, 1929. The fact that the father retained possession of the certificates and received the dividends and that the appellant, after he came of age and learned that his father had possession of certificates registered in his name, failed to demand delivery thereof and to ask for an accounting of the dividends does not rebut the presumption as to the father's intention at the time the shares were placed in the appellant's name some years before. On this point reference may usefully be made to *Sidmouth* v. *Sidmouth* (1), and to *Commissioner of Stamp Duties* v. *Byrnes* (2).

In my view the respondents have failed to adduce evidence sufficient to rebut the presumption that the shares in question were a gift to the appellant. But the decision of the appeal need not rest on a mere failure of the respondents to discharge the onus which rested upon them. The evidence of Mr. Cushing and the terms of the will of November 7, 1933 which he prepared on the instructions of Clemens Senior and which was duly signed and attested support the view that the children were the beneficial as

(1) (1840) 2 Beav. 447.
(2) [1911] A.C. 386.

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well as the legal owners of the shares which Clemens Senior had purchased in their names. Clause (c) of paragraph 7 of the will reads as follows:—

(c) Upon the death of my said wife the corpus of my estate shall be divided into three parts, and in such division I direct my trustee to take into consideration the following facts and govern such division, having such facts in mind, namely:—I have in the past invested and speculated with private funds of my children and have accumulated for each of them as their own respective separate property certain stocks, bonds, cash and securities in varying amounts for each of them. I direct my trustee to investigate and ascertain as of the date of my wife's death what the value then may be of the said stocks, bonds, cash and securities of my said children and, then, when that has been so ascertained to divide the said corpus of my estate in such a manner that the three shares thereof, when respectively added to the ascertained value of each of my said children's securities, shares, bonds and cash, shall respectively make three equal amounts, such shares to be then held for the benefit of my children, Elizabeth Louise, John Joseph and Richard Aloysius, in manner hereinafter set forth.

It is difficult to see how the executors could carry out the direction in this clause to ascertain the value of the stocks of each child otherwise than on the assumption that shares in the possession of Clemens Senior registered in the name of a child of his belonged to that child.

In the course of Mr. Cushing's evidence there is the following passage the effect of which was in no way weakened in cross-examination and which is not contradicted by any other evidence:—

Q. Did Mr. Clemens indicate to you whether or not he considered that the children owned the shares that were registered in their names?

A. I would have to answer your question in this way—he stated to me that he had from time to time purchased shares in the names of his children, and that in so doing he was building up separate estates for them, putting stock in their names, mentioning to me in particular this point—that if he lost his own fortune, there would always be something in the name of his children.

It is, of course, true that although Clemens Senior had made a gift of the shares in question to the appellant the latter, after coming of age, could have given them back to his father or constituted himself a trustee for his father. I am in complete agreement with the reasons given by Laidlaw J.A. for holding that there is no evidence of any such action on the part of the appellant.

In my opinion it is established that from the time Clemens Senior purchased the 600 shares of The International Nickel Company of New Jersey in the name of the

appellant the latter was both beneficial and legal owner thereof and that he was equally the beneficial and legal owner of the 3,600 shares of The International Nickel Company of Canada, represented by certificates T.T.C. 9610 to T.T.C. 9645 inclusive, which were issued in exchange.

We are not concerned with the 300 shares, represented by certificates T.T.C. 9610 to T.T.C. 9612 inclusive, transferred to Livingstone and Company on April 20, 1933, as no claim in regard to them is asserted in this action.

Of the remaining 3,300 shares 2,000, represented by certificates T.T.C. 9622 to T.T.C. 9641 inclusive are still in the hands of the respondents, and the appellant is entitled to an order that they be forthwith delivered to him. The respondents in the course of administration sold 900 of the shares represented by certificates T.T.C. 9613 and T.T.C. 9621 inclusive. In regard to these shares the appellant is entitled to an accounting. The certificates T.T.C. 9642 to T.T.C. 9645 inclusive representing 400 shares were given by Clemens Senior to Elizabeth Louise Brown shortly before his death. On June 7, 1944 Mrs. Brown surrendered these certificates and received new certificates in her own name. Mrs. Brown is not a party to these proceedings. It follows from the holding that these shares were the property of the appellant, that Clemens Senior could not pass title to them and that the certificates were invalidly endorsed. It has already been mentioned that these shares did not at any time come into the hands of the respondents in their character of executors. It does not appear to me that the claim in regard to these 400 shares can be satisfactorily dealt with in an action to which neither Mrs. Brown nor The International Nickel Company of Canada Limited is a party.

The claim asserted in the pleadings in regard to the 200 shares represented by certificates T.T.C. 9646 and T.T.C. 9647 registered in the name of John C. Clemens fails on the evidence.

The appeal should be allowed and the judgment of the learned trial judge should be varied to provide:—

(a) that the respondents do forthwith deliver to the appellant certificates T.T.C. 9622 to T.T.C. 9641 inclusive representing 2,000 shares of the common stock of The International Nickel Company of Canada Limited;

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(b) that it be referred to the proper officer of the Supreme Court of Ontario to ascertain and report what amounts are due from the respondents to the appellant in respect of dividends received by them on the 2,000 shares referred to in (a) and in respect of their dealings with the 900 shares represented by certificates T.T.C. 9613 to T.T.C. 9621 inclusive;

(c) that further directions including the costs of the reference hereby directed be reserved until after such officer shall have made his report;

(d) that this judgment be without prejudice to the right of the appellant to assert such claim in respect of the 400 shares represented by certificates T.T.C. 9642 to T.T.C. 9645 inclusive as he may be advised.

The appellant moved under the provisions of Section 68 of The Supreme Court Act for special leave to have further evidence received. This motion was adjourned to be heard, and was heard, at the time of the hearing of the appeal. As in my view the appellant is entitled to succeed on the record as it stands I do not find it necessary to consider this motion further and I would make no order as to the motion or as to the costs thereof.

The appellant is entitled to his costs of the trial, of the appeal to the Court of Appeal and of the appeal to this Court.

ABBOTT J. (dissenting):—I have had the advantage of reading the reasons for judgment to be delivered by my brother Cartwright and which I understand are concurred in by a majority of the Court. For the reasons which he has given, I agree that by the name John Joseph Clemens, in which the deceased caused shares of the International Nickel Company stock to be issued, he was designating the appellant and not himself, and that in consequence a rebuttable presumption of advancement was created. Since I am of the opinion, however, that such presumption has been rebutted, I should perhaps state briefly the reasons which have led me to this conclusion.

The contemporaneous acts of the father relied upon to rebut the presumption of advancement are (a) the purchase of 500 shares of International Nickel stock in the

name of John Joseph Clemens on December 28, 1928, and the subsequent sale of the same shares a few days later, on January 5, 1929, and (b) the endorsement in blank by the father of certificates for 4,600 shares of International Nickel stock, registered in the name of John Joseph Clemens.

So far as the purchase and sale of the 500 shares are concerned, which took place shortly before the issue of the 4,600 shares in the name of John Joseph Clemens, there is no evidence in the record as to the reason for such purchase and sale or whether it resulted in a profit or a loss.

As to 1,000 shares of the said stock purchased on January 26, 1929, and evidenced by Certificates Nos. TTC9704/13 there can be no question but that these certificates were endorsed in blank by the deceased on or about the date he received them. This is admitted by the appellant in his factum when he states:—"The endorsements on Certificates TTC9704/13 were forged on January 29, 1929." The endorsements on these certificates were guaranteed by Stewart McNair and Co., the brokers through whom the shares had been purchased, thus putting these certificates in what is commonly known as "street form".

As to the certificates representing the 3,600 shares registered in the name of John Joseph Clemens on January 25, 1929, here again appellant has admitted in his factum that his father had converted the shares "into negotiable securities by endorsing in his own handwriting 'John Joseph Clemens' on each and every certificate." The exact time when such endorsement was made is not established but it most certainly was prior to April 20, 1933, when the father sold 300 of the said shares. In my opinion, an examination of the certificates themselves and of the surrounding circumstances, indicates clearly that the father endorsed all these certificates in blank at or about the time he received delivery of them, namely, on January 25, 1929.

These acts of the father in purchasing and selling securities in the name of John Joseph Clemens, endorsing the certificates in blank, and having some of them, at any rate,

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converted into street form, in my opinion, are quite inconsistent with any intention on his part to convey the beneficial interest in such shares to the appellant. On the contrary, I think they indicate clearly that the deceased intended to retain the right to deal with the shares as he might see fit, and as in fact he did deal with them, as well as with other shares issued in the names of other members of his family which were similarly endorsed.

These contemporaneous acts of the father are, in my opinion, in themselves sufficient to rebut the presumption of advancement arising out of the registration of the shares in the name of the appellant but I am further of opinion that this presumption is also rebutted by acts and declarations of the appellant between 1936, when he testified he first learned that there were several thousand shares of International Nickel stock registered in his name and June 21, 1950, when the present action was taken.

These acts and declarations have been fully reviewed by Mr. Justice Hogg in his reasons delivered in the Court below and I need not repeat them here. To borrow the words of Sir John Romilly, Master of the Rolls, in *Jeans* v. *Cooke* (1), evidence of such acts and declarations of the appellant "may be used for the purpose of showing that he considered himself only a trustee."

For the reasons I have given and since I find myself in entire agreement with the findings of the learned trial judge, concurred in by the majority of the Court of Appeal that any presumption of advancement was rebutted by evidence of contemporaneous acts of the father and of subsequent acts and declarations of the son, I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the respondents: *Facer & Shea.*

(1) (1857) 24 Beav. 513 at 521.

THE GOODYEAR TIRE AND RUBBER COMPANY OF CANADA LIMITED, DOMINION RUBBER COMPANY LIMITED, DUNLOP TIRE AND RUBBER GOODS COMPANY LIMITED, GUTTA PERCHA AND RUBBER LIMITED, THE B. F. GOODRICH RUBBER COMPANY OF CANADA LIMITED .....APPELLANTS;

1955 *Oct. 14, 17, 18
1956 *Feb. 10

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Prohibition—Validity of s. 31 of the Combines Investigation Act, R.S.C. 1927, c. 26, as re-enacted by 1952, c. 39, s. 3.

Section 31 of the *Combines Investigation Act* (R.S.C. 1927, c. 26, as re-enacted by 1952, c. 39, s. 3) empowers the court to order in addition to any other penalty the prohibition of the continuation or repetition of the offence of which the person has been convicted.

The appellants pleaded guilty to a charge of conspiracy under s. 498(1)(*d*) of the *Criminal Code* and were fined. Upon application by the Crown, the trial judge directed that an order of prohibition issue under s. 31 of the *Combines Investigation Act*. The appellants appealed against that order and contended that s. 31 was *ultra vires* the Parliament of Canada in whole or in part. The appeals were dismissed by the Court of Appeal for Ontario, with a variation in the terms of the order.

Held: The appeals should be dismissed. The portion of s. 31 invoked by the trial judge is *intra vires*.

Per Kerwin C.J., Taschereau, Kellock, Locke and Fauteux JJ.: Even though the offence for which the prohibitory order was made is prohibited by s. 498 of the *Criminal Code* and penalties are provided by the *Code* and by the *Combines Investigation Act*, the power of Parliament to deal with the matter under s. 91(27) of the *B.N.A. Act* is not exhausted. Whether the portion of s. 31, giving the power to make the order of prohibition, was intended to define a new crime or to provide the means of preventing the commission of the offence, it is within the power of Parliament under s. 91(27) (*Provincial Secretary of Prince Edward Island* v. *Egan* [1941] S.C.R. 396 and *A.G. for Ontario* v. *Canada Temperance Federation* [1946] A.C. 193 referred to).

The words in s. 31 "any other person" should be construed in the case of corporations as meaning their directors, officers, servants and agents.

Per Rand J.: The scope and object of s. 31 are to provide additional means for suppressing a public evil of the order of those cognizable by Parliament under s. 91(27) of the *B.N.A. Act*. The section is not

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Estey, Locke and Fauteux JJ. Estey J. died before the delivery of the judgment.

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concerned with the civil aspect of the relations involved in the agreement condemned, but solely with their harmful effects upon the economic life of the public.

The incidental objection that the order is unlimited as to time, that it is aimed against "any other person", that the act seized upon is one "directed towards", that it may be made at any time within three years of the conviction, that it may affect intra-provincial trade and that the procedure of civil courts is to apply, do not go to the matter of jurisdiction.

The part of the section dealing with mergers, trusts or monopolies has no relevancy to the proceedings taken here. In any event, the clause is severable.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming with a variation an order of prohibition and holding that s. 31 of the *Combines Investigation Act* was *intra vires*.

J. J. Robinette, Q.C. and *P. B. C. Pepper* for the Goodyear Tire & Rubber Co. of Canada Ltd.

J. D. Arnup, Q.C. and *P. B. C. Pepper* for Dominion Rubber Co. Ltd.

A. J. MacIntosh and *M. Hay* for Dunlop Tire & Rubber Goods Co. Ltd., Gutta Percha & Rubber Ltd. and B. F. Goodrich Rubber Co. of Canada Ltd.

F. P. Varcoe, Q.C. and *D. H. Christie* for the respondent.

The judgment of Kerwin C.J., Taschereau, Kellock, Locke and Fauteux JJ. was delivered by:—

LOCKE J.:—These are appeals pursuant to leave granted by this Court from a judgment of the Court of Appeal for Ontario (1) affirming, with a variation, an order made by Treleaven J. under the provisions of s. 31 of the *Combines Investigation Act* (c. 26, R.S.C. 1927 as amended).

The appellants were indicted together on the charge that they:—

during the period from 1936 to the 31st day of October, 1952, both inclusive, within the jurisdiction of this Honourable Court, did unlawfully conspire, combine, agree or arrange together and with one another and with BARRINGHAM RUBBER & PLASTICS LIMITED; G. L. GRIFFITH & SONS, LTD.; VICEROY MANUFACTURING COMPANY LIMITED; FIRESTONE TIRE & RUBBER COMPANY OF CANADA, LIMITED and CANALCO LIMITED to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply in the City of Toronto, in the County of York,

(1) [1954] O.R. 377.

and other places throughout the Province of Ontario, and in the City of Montreal, in the Province of Quebec, and other places throughout the Province of Quebec and elsewhere in Canada where the articles or commodities hereinafter mentioned are offered for sale, of articles or commodities which may be the subject of trade or commerce, to wit,

(then followed a description of the commodities)

contrary to the provisions of the Criminal Code, Section 498, subsection 1(*d*).

S. 31 of the *Combines Investigation Act* reads:—

31. (1) Where a person has been convicted of an offence under section thirty-two or thirty-four of this Act or under section four hundred and ninety-eight or four hundred and ninety-eight A of the *Criminal Code*

(*a*) the court may at the time of such conviction, on the application of the Attorney General of Canada or the attorney general of the province, or

(*b*) a superior court of criminal jurisdiction in the province may at any time within three years thereafter, upon proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section,

and in addition to any other penalty imposed on the person convicted, prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed towards the continuation or repetition of the offence and where the conviction is with respect to the formation or operation of a merger, trust or monopoly, direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger, trust or monopoly in such manner as the court directs.

(2) Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person is about to do or is likely to do any act or thing constituting or directed towards the commission of an offence under section thirty-two or thirty-four of this Act or section four hundred and ninety-eight or four hundred and ninety-eight A of the *Criminal Code,* the court may prohibit the commission of the offence or the doing of any act or thing by that person or any other person constituting or directed towards the commission of such an offence.

(3) A court may punish any person who contravenes or fails to comply with a prohibition or direction made or given by it under this section by a fine in the discretion of the court, or by imprisonment for a term not exceeding two years.

(4) Any proceedings pursuant to an information of the Attorney General of Canada or the attorney general of a province under this section shall be tried by the court without a jury, and the procedure applicable in injunction proceedings in the superior courts of the province shall, in so far as possible, apply.

(5) This section applies in respect of all prosecutions under this Act or under section four hundred and ninety-eight or four hundred and ninety-eight A of the *Criminal Code* whether commenced before or after

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the coming into force of this section and in respect of all acts or things, whether committed or done before or after the coming into force of this section.

(6) In this section "superior court of criminal jurisdiction" means a superior court of criminal jurisdiction as defined in the *Criminal Code*, 1952, c. 39, s. 3.

All of the appellants pleaded guilty to the charge and Crown counsel, representing The Attorney General of Canada and the Attorney General of Ontario, then applied for an order under the provisions of s. 31 and, on September 24, 1953, the learned trial judge imposed a fine of $10,000 upon each of the accused and directed that an order of prohibition issue, as permitted by the section.

On September 25, 1953, an order issued out of the Supreme Court of Ontario which, after reciting the convictions, read:—

1. This Court doth prohibit the continuation or repetition of the said offence by the persons convicted.

2. This Court doth further prohibit the doing of any act or thing by the persons convicted or by any other person directed towards the continuation or repetition of the said offence.

The appellants obtained leave to appeal to the Court of Appeal and contended before that court that s. 31 was *ultra vires* of Parliament. That appeal was dismissed, the court, however, directing that para. (2) of the order be altered so that it reads:—

This Court doth further prohibit the doing of any act or thing by the persons convicted, and/or their directors, officers, servants and agents, directed towards the continuation or repetition of the said offence.

While, pursuant to the direction of this Court, all of the provincial attorneys general were notified of the questions to be raised on the appeal, none were represented before us, the argument in support of the validity of the legislation being made on behalf of the Attorney General of Canada.

Stated shortly, the contention of the appellants is that s. 31 is either wholly or partially *ultra vires* of Parliament, being a colourable attempt, under the guise of enacting legislation in relation to criminal law, to trench upon the field of property and civil rights in the province assigned exclusively to the legislature by head 13 of s. 92 of the *British North America Act*. A subsidiary point is that the Court of Appeal erred in interpreting the reference in s-ss. 1 and 2 of s. 31 to "any other person" as meaning only those

who stood in such a relation to the accused that a prohibitory order against them would affect the accused and be a penalty on the accused.

Counsel for the Attorney General supports the legislation as a valid exercise of the powers of Parliament under head 27 of s. 91 as criminal law, and under head 2 as the regulation of trade and commerce.

Since 1888 there has been legislation in Canada prohibiting the offences referred to in s. 498 of the Code. In substantially the same form, that section appeared as s. 520 when the Code was first enacted in 1892 (c. 29).

Following the decision of the Judicial Committee finding the *Board of Commerce Act* and the *Combines and Fair Prices Act,* enacted in 1919, to be *ultra vires* (1), the *Combines Investigation Act, 1923* (c. 9), which repealed the said statutes, was enacted.

In 1929 the Governor General in Council referred to this Court the question as to whether that Act, either in whole or in part, and s. 498 of the *Criminal Code* were *ultra vires.* Both the statute and the section were held to be within the power of Parliament (2) and that decision was upheld by the Judicial Committee in *Proprietary Articles Trade Association* v. *Attorney General of Canada* (3). In dealing with the argument that s. 498 of the *Criminal Code* could not be supported under head 27, Lord Atkin, who delivered the judgment of the Board, said in part (p. 323):—

> In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense": *Attorney General for Ontario* v. *Hamilton Street Ry. Co.* 1903

(1) [1922] 1 A.C. 191. (2) [1929] S.C.R. 409.
(3) [1931] A.C. 310 at 319.

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A.C. 524. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes.

As to ss. 29 and 30 of the Act, he said (p. 325):—

> It is, however, not enough for Parliament to rely solely on the powers to legislate as to the criminal law for support of the whole Act. The remedies given under ss. 29 and 30 reducing customs duty and revoking patents have no necessary connection with the criminal law and must be justified on other grounds. Their Lordships have no doubt that they can both be supported as being reasonably ancillary to the powers given respectively under s. 91, head 3, and affirmed by s. 122, "the raising of money by any mode or system of taxation," and under s. 91, head 22, "patents of invention and discovery."

It had been contended also before the Board that the legislation could be supported by reference to head 2 of s. 91 but, after saying that it was unnecessary to discuss this matter in view of their conclusion previously expressed, Lord Atkin said that their Lordships desired to guard themselves from being supposed to lay down that the legislation could not be supported on that ground.

S. 31 was not part of the Act in 1929, having been first enacted by c. 39 of the Statutes of 1952. It is not a valid objection, in my opinion, to that portion of the section which has been invoked in the present matter that, since, the offence is prohibited by s. 498 of the *Criminal Code* and penalties are provided both by the Code and by the *Combines Investigation Act*, the power to deal with the matter under head 27 is exhausted. It is to be noted that the making of a prohibitory order is authorized "in addition to any other penalty", being thus treated as a penalty. The power to legislate in relation to criminal law is not restricted, in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime. It was, apparently, considered that to prohibit the continuation or repetition of the offence by order, a breach being punishable under s-s. 3 of s. 31, would tend to restrain its repetition. As to the language:—

> or the doing of any act or thing by the person convicted . . . directed toward the continuation or repetition of the offence,

this appears to me to be properly construed as forbidding the taking of any step by the person to whom the order is directed, looking to the continuation of the offence dealt with by the conviction or its repetition by forming another

combine, and I do not think it is intended to deal only with attempts to commit the offence. The language appears to me to permit the prohibition of any act such as a preliminary proposal to others regarding the formation of a combine which, in itself, might not fall within the definition of an attempt under s. 72. As Parliament apparently considered that such an order might be of use in preventing the formation of such combines, I think the matter to be wholly within its powers.

This view is supported, in my opinion, by a passage from the judgment of Sir Lyman Duff C.J. in *Provincial Secretary of Prince Edward Island* v. *Egan* (1). S. 285(7)(*a*) of the Code provides that, where a person is convicted of an offence defined by s.-ss. (1), (2), (4) or (6) of that section, the court may:—

> in addition to any other punishment provided for such offence, make an order prohibiting such person from driving a motor vehicle or automobile anywhere in Canada during any period not exceeding three years.

Dealing with the argument that the making of such a prohibitory order did not fall under head 27, the Chief Justice said (p. 400):—

> I may say at once I cannot agree with this view . . . It appears to me to be quite clear that such prohibitions may be imposed as punishment in exercise of the authority vested in the Dominion to legislate in relation to criminal law and procedure.

In *Attorney General for Ontario* v. *Canada Temperance Federation* (2), Viscount Simon, referring to and rejecting an argument that Parliament was without power to reenact provisions with the object of preventing a recurrence of a state of affairs which had been deemed to necessitate the passage of an earlier statute, said that to legislate for prevention appears to be on the same basis as legislation for cure.

Whether or not it can properly be said that the language referred to was intended to define a new offence, or whether it should be construed as merely providing the means of preventing the commission of the offence, it is, in my opinion, equally within the power of Parliament under head 27 of s. 91.

It is further contended that the power to make a prohibitory order directed to the person convicted "or any other

(1) [1941] S.C.R. 396 (2) [1946] A.C. 193.

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person" is not legislation authorized by head 27. While, literally construed and divorced from the context, these words would permit the making of an order against persons quite unconnected with those against whom a conviction has been made, it is impossible that this was the intention of Parliament and I agree with the learned judges of the Court of Appeal that it should properly be construed as meaning, in cases such as this where the accused are corporations, the directors, officers, servants and agents of the various companies.

The appellants further submitted that that part of s-s. 1 which reads:—

> and where the conviction is with respect to the formation or operation of a merger, trust or monopoly, direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger, trust or monopoly in such manner as the court directs.

is *ultra vires*.

This power was not exercised by the court in the present case and as, in my opinion, this portion of the subsection is clearly severable from that portion which has been invoked, the point as to whether this is within the powers of Parliament should not, in my opinion, be determined. This is not a reference to the court in which we are asked to determine the validity of s. 31 as a whole, but rather that portion of it purporting to give to the court the powers which have been exercised in making the order complained of.

In view of my conclusion that the impugned legislation is *intra vires* of Parliament under head 27, it is unnecessary to consider the question as to whether it might not also fall within head 2.

I would dismiss the appeals.

RAND J.:—The appellants were charged before the Supreme Court of Ontario with conspiracy unduly to prevent or lessen competition in the production, manufacture, sale, etc. in Canada of certain specified rubber products contrary to s. 498, s-s. (1)(*d*) of the *Criminal Code*, to which a plea of guilty was entered. Upon this, counsel on behalf of the Attorneys-General of Canada and of Ontario applied for and obtained an order of prohibition under s-s. (1) of s. 31 of the *Combines Investigation Act* which, in part reads:

31. (1) Where a person has been convicted of an offence under section thirty-two or thirty-four of this Act or under section four hundred and ninety-eight or four hundred and ninety-eight A of the Criminal Code

(*a*) the court may at the time of such conviction, on the application of the Attorney General of Canada or the attorney general of the province, or

(*b*) a superior court of criminal jurisdiction in the province may at any time within three years thereafter, upon proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section,

and in addition to any other penalty imposed on the person convicted, prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed towards the continuation or repetition of the offence and where the conviction is with respect to the formation or operation of a merger, trust or monopoly . . .

S-s. (3) provides that:

A court may punish any person who contravenes or fails to comply with a prohibition or direction made or given by it under this section by a fine in the discretion of the court, or by imprisonment for a term not exceeding two years.

What is challenged is the power of Parliament within its jurisdiction over criminal law to enjoin a continuation or repetition or the doing of any act "directed towards" the continuation or repetition of such an illegal combination and its enforcement by fine or imprisonment. It is accepted that head 27 of s. 91 of the Confederation statute is to be interpreted in the widest sense, but that breadth of scope contemplates neither a static catalogue of offences nor order of sanctions. The evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously arguable.

What has called for the device of injunction and punishment for its contravention is undoubtedly the experience in dealing with these offences. The burden of proving the combination and its operation is, for obvious reasons, complicated and time consuming and the procedure of enforcement by conviction and fine has tended to exhibit a course of things bearing a close likeness to periodic licensing of illegality. That sanctions cannot be made more effective, that an offence by its nature continuing cannot be dealt with as criminal law by an enjoining decree that will facili-

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tate enforcement, might go far towards enabling self-confessed lawlessness to set the will of Parliament at defiance.

Mr. Robinette stressed language used by members of this Court and in the reasons given by Viscount Haldane in the Judicial Committee in *In re The Board of Commerce Act, 1919,* and *The Combines and Fair Prices Act* (1) and (2). I do not think it necessary to say more than that the statutes there challenged were found by the Judicial Committee to have been in substance enactments for the regulation in a civil aspect of the production and distribution of the necessaries of life throughout the Dominion and the penal measures authorized were necessarily bound up with that primary object. The essence of the judgment is stated at p. 199:

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

So far as the language of Viscount Haldane at p. 198 on the scope of head 27 appears to require the subject matter of criminal law to be such as "by its very nature belongs to the domain of criminal jurisprudence" it must be taken to have been rejected by the Committee in *Proprietary Articles Trade Association* v. *Attorney General for Canada* (3), where the validity of the *Combines Investigation Act,* R.S.C. (1927) c. 26 and of s. 498 of the *Criminal Code* was in issue. In the reasons there given, Lord Atkin at p. 324 buries any lingering notion that acts denounced as criminal by law possess any special taint or quality in themselves which places them in that category:

> The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?

This view was affirmed by the Judicial Committee in the *Margarine case* (4).

As it has so many times been reiterated, the first and fundamental question in these matters is whether the real purpose and object of the enactment is a legislative accomplishment within one or other of the heads of s. 91 or s. 92.

(1) (1920) 60 Can. S.C.R. 456.
(2) [1922] 1 A.C. 191.
(3) [1931] A.C. 310.
(4) [1951] A.C. 179.

Here it is whether the purpose and object are to provide additional means for suppressing a public evil of the order of those cognizable by Parliament under head 27. To this my answer is unhesitatingly yes. The section is not concerned in the slightest degree with the civil aspects of the relations involved in the agreements condemned; it is concerned solely with the harmful effects upon the economic life of the public of the control and the exactions for which they provide.

The incidental objections that the order is unlimited as to time, that it is aimed against "any other person", that the act seized upon is one "directed towards", that it may be made at any time within three years of the conviction, that it may affect purely intra-provincial trade and that the procedure of civil courts is to apply, do not go to the matter of jurisdiction; and their wisdom or unwisdom is not a question for the courts. The interpretation to be given them will be determined when the appropriate situation arises.

The last clause of s-s. (1), s. 31 dealing with mergers, trusts or monopolies was brought into the argument, but it has no relevancy to the proceedings taken. The most that could be contended is that the subsection must be treated as an entirety and that the invalidity of the clause debases the whole. I do not find it necessary to examine the contention of invalidity because I take it to be clear that the clause is severable: it is one of a number of cumulative measures towards eliminating what Parliament has declared to be criminal activity; and from the purpose and object of the subsection I have no doubt that the intention was to authorize the several steps each independently of the others.

I would, therefore, dismiss the appeals.

Appeals dismissed.

Solicitor for the Goodyear Tire & Rubber Co. of Canada, Ltd.: *J. J. Robinette.*

Solicitors for Dominion Rubber Co. Ltd.: *Mason, Foulds, Arnup, Walter & Weir.*

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Solicitors for Dunlop Tire & Rubber Goods Co. Ltd.: *Blake, Cassels & Graydon.*

Solicitors for Gutta Percha & Rubber Ltd.: *Blake, Cassels & Graydon.*

Solicitors for B. F. Goodrich Rubber Co. of Canada Ltd.: *Edmonds, Maloney, Nelligan & Edmonds.*

Solicitor for the respondent: *F. P. Varcoe.*

1955

*Nov. 15

1956

*Feb. 10

OLIVA ROSSIGNOL AND RODOLPHE ROSSIGNOL (*Plaintiffs*) ..... APPELLANTS;

AND

MOE HART (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Labour—Workmen's compensation—Refusal by Board to entertain claim—Finding that no injury sustained—Whether conclusive and binding in subsequent action against co-employee for negligence—Whether action precluded—Workmen's Compensation Act, R.S.N.B. 1952, c. 255, ss. 9, 11, 32.

The determination by the Workmen's Compensation Board of New Brunswick that an employee sustained no injury as the result of an employment accident, does not preclude that employee from suing a co-employee in a common law action on the grounds of negligence. That determination by the Board is not conclusive nor binding between the two parties.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), holding, Michaud C.J.Q.B. dissenting, that the finding of the Workmen's Compensation Board was conclusive in a subsequent negligence action.

P. E. Pelletier for the appellants.

E. N. McKelvey for the respondent.

The judgment of the Court was delivered by:—

RAND J.:—The question here arises out of the Workmen's Compensation Act of New Brunswick. The appellant, Oliva Rossignol, wife of Rodolphe, was a fellow

*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ. Estey J. died before the delivery of the judgment.

(1) [1955] 2 D.L.R. 823; 37 M.P.R. 284.

employee of the respondent Hart and was allegedly injured in the course of her employment through the negligence of Hart. A claim for compensation was made on her behalf but the Compensation Board found that she had not in fact suffered any injury. This action was thereupon commenced in which the defence raised the ground that that finding of fact by the Board was binding in this proceeding on the appellants. A question of law was by consent referred to the Appellate Division (1) in the following words:

Is the determination by the Workmen's Compensation Board of the Province of New Brunswick that the plaintiff Oliva Rossignol did not suffer an injury of any kind or degree as a result of an accident occurring on the 6th day of April, 1951, while she was in the employ of Dalfen's Department Store in the City of Edmundston in the said province, in which said accident she was hit on the head by a falling manikin, conclusive and binding between the plaintiffs and the defendant herein, so that this court, in determining the issues herein, is precluded from reconsidering the question determined as aforesaid by the said Board?

The court by a majority judgment of Richards C.J. and Hughes J. held the ground to be well taken and answered the question in the affirmative; Michaud C.J. of the Trial Division dissented and the question comes before us by special leave.

The respondent relies upon certain sections of the statute:

9. (1) Where an accident occurs to a workman in the course of his employment in such circumstances as to entitle him or his dependents to an action against some person other than his employer, the workman or his dependents, if entitled to compensation under this Part, may either claim compensation or bring the action.

(2) If the workman or his dependents bring an action, and less is recovered and collected than the amount of the compensation to which the workman or his dependents would be entitled under this Part, the workman or his dependents shall be entitled to compensation under this Part to the extent of the amount of such difference.

(3) If the workman or his dependents, or any of them, have claimed compensation under this Part, the Board shall be subrogated to the position of such workman or dependents as against the other person for the whole or any outstanding part of the claim of such workman or dependents against such other person.

11. The provisions of this Part are in lieu of all claims and rights of action, statutory or otherwise, to which a workman or his dependents are or may be entitled against the employer of the workman for or by reason of an accident in respect of which compensation is payable under this Part.

(1) [1955] 2 D.L.R. 823; 37 M.P.R. 284.

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32. (1) Except as provided in Section 34 the Board has exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court, and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court.

(2) Without thereby limiting the generality of the provision of subsection (1), it is declared that such exclusive jurisdiction extends to determining,

(a) the existence of, and degree of, disability by reason of any injury;

* * *

It is clear that the statute deals primarily with the relations between employers and employees and except in certain cases of wilful or reckless conduct gives an absolute right to compensation regardless of negligence in the employer or third person; injuries to employees occurring within the course and out of their employment are gathered within the area of ordinary wastage of business and industry and are accorded compensation analogous to any other loss or expense therein.

Only incidentally are third persons, whether fellow employees or not, affected. S. 9(3), in providing subrogation, does not effect a statutory novation of the claim against the third person to the Board, as s-s. (2) conclusively indicates, and that interpretation was given to similar language of the Ontario Act in *Toronto Railway Company* v. *Hutton* (1) and of the British Columbia statute, in the case of *The King* v. *Snell* (2). Whatever rights in such a claim vest in the Board are equitable in nature and are a matter of interest only between the Board and the employee receiving compensation.

I think it beyond serious argument that the respondent has no interest in the investigation by the Board of a claim for compensation; and it would be contrary both to the statutory provisions and to principle generally that a person should be bound by a finding pronounced in his absence. If he is to be bound, then certainly he is entitled to notice of and to participate in the enquiry. Not only the actual wrongdoer but every other third person liable vicariously for his tortious act should also be brought before the Board.

(1) (1919) 59 Can. S.C.R. 413. (2) [1947] S.C.R. 219.

But the statute is silent on this essential consideration and counsel could not point to any case in which such a third party has ever been treated as interested in the adjudication of a claim. But if, as between the respondent and the appellants, the latter are barred, so must the former be; a ruling in rem such as was found below would bind everybody: it would be impossible, as between themselves, that one should be free and the other bound.

It would, moreover, in any case, be a novel procedure that a claimant or a third party, employee or employer, must submit to the adjudication of such an administrative body on an essential element of his common law right or liability. It would in ordinary cases be ultra vires of the province to confer that power on a provincial tribunal. Even assuming that the issue of negligence could ever be committed to an inferior court, beyond petty jurisdiction the judges, for such purpose, must, by the Confederation Act, be of Dominion appointment.

The case of *Noell* v. *Canadian Pacific Railway Company* (1), was relied upon by Richards C.J., but with the greatest respect the question there raised was wholly different from that here. An action had been brought in Ontario against the employer company and an application was made by the latter to the Compensation Board of New Brunswick for a determination whether the accident from which the injury arose had arisen "out of and in the course of the employment". If that had been determined affirmatively, by the express language of s. 11 no action at law against the employer would lie. What was held by this Court was that the employer was entitled to call upon the Board to decide that question and that the finding by the Board to that effect was, vis a vis the claimant, binding on the employer for all purposes. The decision involved the provisions of the Act both as to the conclusiveness of the findings of the Board and the effect on the right of action against the employer and it dealt solely with the issue as between the parties before the court. The reasons for a judgment must, as it has so frequently been said, be read *secundum subjectam materiam;* the subject matter of the Noell issue was whether the accident was or was not a case for compensation. Who, then, was interested in that question? As I

(1) [1952] 2 S.C.R. 359.

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have endeavoured to show, not any third person who might, by his own negligence or vicariously, have caused or was liable for the injury. It must be one whose interest is derived through or bound up with that of the injured employee or his employer. For example, another employer in the same class whose assessment would depend on the claims established against his class might possess that interest. How, then, the case can be taken to be an authority for the proposition that a finding as between employer and employee, on a subsidiary issue, the fact and degree of injury, can, in the absence of clear statutory provision, absolve a third party from liability under the general law I am quite unable to appreciate. This was the view of Michaud C.J. and with it I am in entire agreement.

The appeal should be allowed and the question answered in the negative. The appellants will be entitled to their costs in both courts.

Appeal allowed with costs.

Solicitors for the appellants: *Pichette & Pelletier.*

Solicitors for the respondent: *McKelvey, Macaulay & Machum.*

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*Feb. 9

THE ATTORNEY GENERAL OF CANADA ..... APPELLANT;

AND

SHIRLEY KATHLEEN BRENT .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Immigration — Habeas corpus — Certiorari — Alien — Deportation order — Whether quashable—Whether order-in-council making regulations, invalid—Delegation of authority—Jurisdiction to review case—Immigration Act, R.S.C. 1952, c. 325, ss. 39, 61—Immigration Regulation 20(4).

S. 61 of the *Immigration Act* (R.S.C. 1952, c. 325) authorizes the Governor in Council to make regulations respecting the prohibiting or limiting of admission of persons by reason of an enumerated list of matters.

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock and Fauteux JJ.

By Regulation 20(4), the Governor in Council enacted that admission is prohibited "where in the opinion of a Special Inquiry Officer such person should not be admitted by reason of" the same enumerated list of matters that are found in s. 61 of the Act.

The respondent, a citizen of the United States of America and who did not have a Canadian domicile, was ordered deported by a special immigration officer as unsuitable under this regulation. The respondent applied for a writ of habeas corpus with certiorari in aid and also for an order by way of certiorari quashing the deportation.

The judge of first instance ordered her discharged from custody. In view of the decision of this Court in *Masella* v. *Langlais* ([1955] S.C.R. 263), the Court of Appeal for Ontario struck out the direction for the respondent's discharge but quashed the deportation order.

Held: Upon appeal by leave of the Court of Appeal its order should be confirmed.

Regulation 20(4) is invalid because there is no power, under s. 61 of the *Immigration Act,* in the Governor in Council to delegate, as was done by this regulation, his authority to immigration officers. In view of this invalidity, s. 39 of the Act does not prevent the Court from exercising its jurisdiction by way of certiorari and quashing the deportation order.

APPEAL from the judgment of the Court of Appeal for Ontario (1), quashing a deportation order.

D. W. Mundell, Q.C., J. S. Pickup, Q.C. and *L. A. Couture* for the appellant.

F. A. Brewin, Q.C., and *J. F. McCallum* for the respondent.

The judgment of the Court was delivered by:—

THE CHIEF JUSTICE:—At the conclusion of the argument on behalf of the appellant, this appeal was dismissed with costs.

The respondent is a citizen of the United States of America and has not a Canadian domicile. She applied at the Immigration Station in Toronto for admission to Canada for permanent residence where she was examined by an Inspector and referred to a Special Immigration Officer. The latter made an order for her deportation and her appeal to the Minister of Citizenship and Immigration was dismissed. She then applied for a writ of *habeas corpus* with *certiorari* in aid to determine the validity of the deportation order and also made application for an order by way of *certiorari* quashing that order. Mr. Justice Wilson,

(1) [1955] O.R. 480; 3 D.L.R. 587.

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before whom the matter came in the first instance, ordered her discharge from custody. In view of the decision of this Court in *Masella* v. *Langlais* (1), the Court of Appeal for Ontario (2), since the appellant was not in custody, amended the order of Wilson J. by striking out the direction for her discharge but quashed the deportation order. By leave of the Court of Appeal, the Attorney General of Canada appealed to this Court. It is sufficient to refer to one of the reasons for which the Court of Appeal quashed the deportation order.

By s. 61 of *The Immigration Act*, R.S.C. 1952, c. 325:—

61. The Governor in Council may make regulations for carrying into effect the purposes and provisions of this Act and, without restricting the generality of the foregoing, may make regulations respecting .....

.....

(*g*) the prohibiting or limiting of admission of persons by reason of

(i) nationality, citizenship, ethnic group, occupation, class or geographical area of origin,

(ii) peculiar customs, habits, modes of life or methods of holding property,

(iii) unsuitability having regard to the climatic, economic, social, industrial, educational, labour, health or other conditions or requirements existing, temporarily or otherwise, in Canada or in the area or country from or through which such persons come to Canada, or

(iv) probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their admission.

The relevant part of the Order-in-Council purportedly passed in pursuance of this section is paragraph (4) of Clause 20 which reads:—

(4) Subject to the provisions of the Act and to these regulations, the admission to Canada of any person is prohibited where in the opinion of a Special Inquiry Officer such person should not be admitted by reason of

(*a*) the peculiar customs, habits, modes of life or methods of holding property in his country of birth or citizenship or in the country or place where he resided prior to coming to Canada;

(*b*) his unsuitability, having regard to the economic, social, industrial, educational, labour, health or other conditions or requirements existing, temporarily or otherwise, in Canada or in the area or country from or through which such person comes to Canada, or

(*c*) his probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after his admission.

(1) [1955] S.C.R. 263.

(2) [1955] O.R. 480; 3 D.L.R. 587.

I agree with Mr. Justice Aylesworth, speaking on behalf of the Court of Appeal, that Parliament had in contemplation the enactment of such regulations relevant to the named subject matters, or some of them, as in His Excellency-in-Council's own opinion were advisable and not a wide divergence of rules and opinions, everchanging according to the individual notions of Immigration Officers and Special Inquiry Officers. There is no power in the Governor General-in-Council to delegate his authority to such officers.

S. 39 of the Act was relied upon by the appellant:—

> 39. No court and no judge or officer thereof has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister, Deputy Minister, Director, Immigration Appeal Board, Special Inquiry Officer or immigration officer had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.

However, the order of deportation of the Special Inquiry Officer was not "had, made or given under the authority and in accordance with the provisions of this Act" because the regulation relied upon is invalid and the section, therefore, does not prevent the Court from exercising its jurisdiction by way of *certiorari* and quashing the deportation order.

Appeal dismissed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitor for the respondent: *F. A. Brewin.*

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*Nov. 11, 14, 15
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*Feb. 10

CAR AND GENERAL INSURANCE CORPORATION LIMITED (*Third Party*) ..... APPELLANT;

AND

THELMA ISABELLE SEYMOUR (*Plaintiff*) ..... RESPONDENT;

AND

EDWIN LEWIS MALONEY (*Defendant*) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, IN BANCO

Automobiles—Negligence—Gratuitous passenger injured—Intoxicated driver—Gross negligence—Whether assumption of risk—Whether contributory negligence.

The respondent (plaintiff) was injured through an accident while a gratuitous passenger in an automobile driven by the respondent (defendant) who had invited the plaintiff to ride in the automobile. The driver, to her knowledge, had started drinking intoxicating liquor at breakfast and had kept it up until the accident about an hour and a half later. The trial judge found gross negligence against the driver. This finding was affirmed in the Court of Appeal and was not questioned in this Court. The defences of *volenti non fit injuria* and of contributory negligence were raised. The trial judge found that the passenger had assumed the risk. The Court of Appeal reversed this judgment but found contributory negligence.

Held: The appeal should be dismissed.

The defence of *volenti non fit injuria* had not been established. However, there had been contributory negligence on the part of the passenger, and the apportionment of liability, made below, should not be disturbed.

APPEAL from the judgment of the Supreme Court of Nova Scotia, in banco (1), in an action by a gratuitous passenger for damages.

A. L. Thurlow, Q.C. and *J. W. E. Mingo* for the appellant.

N. D. Blanchard and *L. A. Bell* for the respondent.

RAND J.:—This action arises out of injuries to the young woman plaintiff through an accident while in an automobile driven by the respondent Maloney. Two defences are

*PRESENT: Rand, Kellock, Locke, Cartwright and Abbott JJ.

(1) [1955] 36 M.P.R. 337; 4 D.L.R. 104.

raised, assumption of risk, and contributory negligence. The risk lay in the fact that Maloney, at the time of and for some time prior to the occurrence, was, in some degree, under the influence of alcohol, and the question of its assumption in such circumstances comes before us directly for the first time. It is an important question and calls for an examination of that conception.

The form in which the principle has traditionally been stated is that if a person is aware of all the facts of a danger and voluntarily exposes himself to it, he is held to have accepted the risk of any resulting injury. It seems to have originated in matters between master and servant involving hazardous conditions, the simplest case being that of entering upon work inherently dangerous. The next step was taken in *Priestley* v. *Fowler* (1), which extended the risk to the negligence of a fellow servant. In the developing conceptions of duty, the scope of the assumption was reduced by the requirement of reasonably safe working conditions including statutory provision for machinery and other protection. Complications of the principle are presented by the multiplying risks of modern modes of carrying on business and of social life, and among them is that of the relation between a driver of an automobile and a gratuitous passenger. In several provinces the judgment of the legislature has been expressed in an absolute denial of any claim against the operator; but in Nova Scotia where gross negligence has, as here, been found, the question is at large.

The risk in this case arises out of a special relation which, in turn, results from an undertaking in the original sense of that word: Maloney accepts from the respondent Seymour a commitment of herself to a quasi-custody which he assumes for a purpose involving special hazards under his control or within his general responsibility on terms which include one relating to care in executing the purpose. The degree of care on his part engaged or the risk on hers assumed, qualified or unqualified, may be expressly stipulated, and if so, it would be as determinative during the course of the undertaking as if consideration had passed; but in the generality of cases this term including qualifications is to be implied from the total circumstances.

(1) 150 E.R. 1030.

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The initial question is whether the undertaker is capable, as if it were in contract, of entering into such an engagement; if he is, what is to be implied as to continued fitness and ability to carry it out until the relation is ended or modified? If he is not originally capable, the passenger acts alone; if self-caused incapacity develops during the performance, its effect will depend on the original terms. No other aspects of the relation are brought into discussion; it is not argued, for instance, that there was a joint venture which would introduce new elements.

This stress upon the deduction of terms is made because whether we treat the duty of care as being an incident imposed by law or as an element of the understanding taken to be present between the parties, the actual implication of the facts as it would be inferred by the ordinary reasonable man should, in any event, constitute the legal imposition. The argument, therefore, proceeding on either basis, should reach the same result.

In its application to such a situation, I demur to the usual form of the question by which the principle is raised: did the injured person assume the risk that has brought about the injury? The injured person is generally the passenger but it might be the operator not only of automobiles but of airplanes and other machines. So put, the question tends to disguise the governing fact that the other party is setting up in defence the acceptance of the risk as a term of the undertaking, the burden of proving which lies upon him. In such commitments the question ought, I think, rather to be, can the defendant reasonably be heard to say, as an inference from the facts, that the risk of injury from his own misconduct was required by him to be and was accepted by the complainant as such a term? At common law an undertaking of this species, regardless of consideration, was pleaded in the sub-form of case called assumpsit (he undertook), originally in tort but possibly developing into an independent category: Maitland, Forms of action at Common Law p. 68-9; its essence was the commitment of an interest of one person to a course of action by another; and its terms were to be gathered as an interpretation of the total circumstances on the footing of which the commitment was made and accepted.

That the risk should be so dealt with follows from what was said by Lord Watson in *Smith* v. *Baker* (1). That was a case of master and servant in which a workman, engaged in an employment which was not in itself dangerous, was exposed to danger arising from an operation in another department over which he had no control. At p. 355 Lord Watson, in his speech, says:

> The maxim, "Volenti non fit injuria," originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave, in order that he might share in the price, suffered a serious injury; but he was in the strictest sense of the term volens. The same can hardly be said of a slater who is injured by a fall from the roof of a house; although he too may be volens in the sense of English law. In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his masters. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case.

Whether, in any event, the parties could engage that the risk might extend to such recklessness as would likely cause maiming or death would depend on considerations of policy mentioned later in dealing with contributory negligence; but for the generality of cases, the circumstances may present such variety in particulars that a reference to typical situations may clarify what is intended.

If A is driving an automobile for private purposes from X to Y and is hailed on the road by B who requests a lift toward Y, what would most likely be said by A if the question of misconduct of either during the trip was at that moment raised? I think he would ordinarily say, or at least it could reasonably be found that he implies—as he does when asked to allow a licensee to pass over his land—"You may come along, but you must take my skill and care and

(1) [1891] A.C. 325.

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the risk of my ordinary conduct as I myself am doing, from which I am not likely to but might have a minor lapse". At the same time it would equally be understood that he would not engage in reckless or grossly careless driving. This is not in conflict with the holding in *Harris* v. *Perry & Company* (1), in which other elements were present.

If, on the other hand, A, for his own purpose, takes the initiative by inviting B—assuming always the absence of any special circumstances or notice—then it could be deemed to be unreasonable for A to urge that he did not intend to assure B that he could expect the ordinary care of prudent drivers to be exercised in operating the machine. The question, as before, is what conditions as terms can A reasonably claim to have laid down, and B reasonably held to have accepted. If the driver was a beginner, that, again, would be a special circumstance. These examples illustrate the fact that the basic understanding must be reduced to an actual or constructive exchange of terms under which the commitment of the interests of both is brought. To this we have an analogy in Bailment the exposition of which is given by Holt C.J. in *Coggs* v. *Bernard* (2).

The evidence shows that on Sunday morning the respondent Maloney started drinking at breakfast and in some measure kept it up until the fatal event which was estimated to be about an hour and a half later. There is no serious complaint of reckless or even excessive speed until the last mile or so. Maloney was apparently able to stand considerable liquor and still to retain much, at least, of his ability as a competent driver. Some minutes before the accident an argument between him and his brother had arisen over the year of make of a car that had just then passed them and a bet was made. Speeding ahead and drawing to the side of the road, he waved the other car to a stop. Going back and calling in a curt manner upon the driver, a Mrs. Sweeney, to lower the window, he mentioned the bet and asked her the model of her car and upon being informed returned to his own. Mrs. Sweeney in her testimony did not mention any indication that he was unfit through drink to be driving; his shirt collar was unbuttoned, his necktie loose, he was perspiring and was ill-mannered, but nothing else was referred to. On the other hand, one

(1) [1903] 2 K.B. 219. (2) 92 E.R. 107.

of the occupants of her car, a Mr. Sterne, spoke of glassiness of eyes and that he talked thickly. But neither mentioned any staggering or swaying in his walk although they had noticed earlier the car as "weaving" or "zigzagging" over the centre line of the road.

Following this incident, the Sweeney car again passed Maloney. He seems to have been annoyed at the "snootiness" of Mrs. Sweeney, and immediately set out to overtake her. In doing so he is said to have reached a speed estimated by the witness Sterne at 70 or more miles an hour, and by Mrs. Sweeney at between 40 and 50. In the course of this career the car went out of control at a curve, jumped the ditch, crashed into a high embankment, skidded back to the other side of the road and ended overturned in the reverse direction. One of the young women occupants was killed and serious injuries were caused the respondent.

The latter is a young woman of 19 years of age whose home was in Windsor and who, for some months, had been engaged as a waitress at Halifax. We have very little of her history, but there is sufficient to conclude that her sophistication was not of the deepest sort. Maloney seems, toward those with him, to have been somewhat dominating and aggressive. We have no more than general circumstances surrounding the original decision to make the journey; but there is enough to enable me to infer that the weight of the proposal and persuasion came from him. Neither at that point, Halifax, from which they originally set out nor at Chester can his capacity to engage for the journey and for careful driving to the destination, Windsor, be successfully challenged; is it then to be implied that he did so engage? Or was the engagement subject to the condition that he should not render himself incapable through liquor either of reaching Windsor or of driving safely or, put conversely, that the respondent would take the risk of any negligence which could be attributed to that eventuality?

The road they were travelling led from Chester to Halifax from which they were still over 30 miles distant, and Windsor is about 45 miles northwest of Halifax. They had originally tried out a gravelled road from Chester in a more direct line to Windsor but after going some miles turned back to the paved road and the route via Halifax. The

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young woman was, therefore, in a section of country with which she was not familiar and in surroundings by which she was most likely to be intimidated. The answer to her request to him to let the brother drive is significant: it was to the effect that he knew what he was doing and did not want to be interfered with.

In that situation the prima facie implication of reasonable care in the original undertaking—subject to the provisions of the statute—is confirmed and that of any such qualifying condition rebutted.

These considerations are, in my opinion, substantially the same as those underlying *Dann* v. *Hamilton* (1), where Asquith J. on facts almost identical found against the driver. The decision has been the object of some criticism. In *Insurance Commissioner* v. *Joyce* (2), Dixon J., dissenting, after an analysis of the principle in terms of relations, observes,

> If he knowingly accepts the voluntary services of a driver affected by drink he cannot complain of improper driving caused by his condition, because it involves no breach of duty.

That conclusion depends on the terms of the undertaking and so far as it implies the determination to be unilateral I am unable to agree with it. Of the judgment in *Dann* v. *Hamilton* he says:

> No doubt the issue his Lordship propounded for decision was one of fact, but, with all respect, I cannot but think that the plaintiff should have been precluded. Every element was present to form a conscious and intentional assumption of the very risk from which she suffered.

For the reasons already given, I cannot concur in the validity of that criticism. It fails, in my opinion, to give sufficient emphasis to the original undertaking in which the passenger has primarily the interest and the driver, the responsibility, and in the performance of which itself the risk resides. The unilateral formula, adequate to the early situations, is both inadequate and inappropriate to a bilateral relation in which two persons are co-operating in complementary action. It confines the enquiry into the fact sought to the external conditions evident to the passenger, paying—apparently—no regard to the elements of the undertaking or the governing role of the driver. In the other view the court starts with his original acceptance

(1) [1939] 1 K.B. 509. (2) (1948) 77 C.L.R. 39.

of responsibility, whatever it may have been, and from the subsequent circumstances finds whether the undertaking has been carried out according to its terms.

In the light of these considerations, Maloney has not established his case that the passenger at any time accepted the continuing journey, or gave him any reason to infer that she did, on the terms that she released him from responsibility for care and would take the risk of any consequences resulting from the effects on him of liquor. Nor has he shown that any condition arose which modified that responsibility within the terms of the original undertaking.

There remains the question of contributory negligence. The theory underlying that defence is not as clear as it might be. In recent times the idea of a breach of duty owing to one's self has been introduced: the injury suffered by A has been caused by the breach of duty toward A by B and the joint or concurrent breach of a duty toward A by A himself. But if B at the same time suffered injury, is it to be taken as caused by a breach of duty on the part of A towards B and a similar breach of duty towards himself by B, so that the same act in each case becomes a breach of one of two different duties depending on which claim for injury is being considered? The self-duty would seem to be a rationalization for the purpose of logical consistency and completeness of the theory of a several duty toward an injured party as against a generalized duty to be prudent in every situation and in all directions. These contrasting conceptions have their clearest statement in *Palsgraf* v. *Long Island Railway Company* (1). There Cardozo C.J. gave that of the former and Andrews J. of the latter, in the setting of which causation becomes the determinant of liability. In the illustration just put it seems clear that the so-called duty to one's self is of the same standard and content as that toward another and is identical with the duty under the second or generalized principle.

The rule that courts will not assist a claimant to recover damages to person or property which he could reasonably have mitigated is analogous to, although, as regards the character and extent of measures required to be taken, perhaps not identical with the duty involved in contributory negligence; and both seem cognate with the principle

(1) (1928) 248 N.Y. 339.

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that a person may ordinarily injure his person or damage or destroy his property or allow others to injure him or damage or destroy his property as he pleases, except that, in the aspect of criminal law at least, leave and licence do not extend to maiming, much less killing, and attempted suicide is a crime.

On either principle injury or damage to one's own interest attributable to failure to observe the standard of care of ordinary prudence, and conceived either as having been so caused or as having been licensed or suffered, will be given no redress by courts. In this case the failure charged against the plaintiff is that she maintained herself in a situation fraught with too great possibility of danger. On that question I am unable to say that the finding of either the fact or the degree of fault by the trial judge and by the Appeal Division is wrong.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.:—The question in this appeal is as to whether or not upon the evidence the appellant is entitled to invoke the maxim *volenti non fit injuria*. The learned trial judge, having found Maloney (the defendant) guilty of gross negligence, applied the maxim and dismissed the action of the respondent Seymour (the plaintiff). Had he not been of that view, the learned judge would have held the defence of contributory negligence established and the plaintiff entitled to recover seventy-five per cent of her loss. The full court (1) considered the latter to be the correct view, the plaintiff's appeal being allowed accordingly.

The defendant, having invited the plaintiff to ride in his automobile to her home in Windsor, thereby placed himself in the position of a person "who undertakes to provide for the conveyance of another" and although he did so gratuitously, he was "bound to exercise due and reasonable care"; per Parke B. in *Lygo* v. *Newbold* (2). This statement of the law was adopted by the Court of Appeal in *Harris* v. *Perry* (3). In the course of his judgment in the latter case, the Master of the Rolls referred to the statement of Blackburn J. in *Austin* v. *G. W. Ry. Co.* (4), namely: "I think

(1) [1955] 36 M.P.R. 337; 4 D.L.R. 104.
(2) 9 Ex. 302 at 305.
(3) [1903] 2 K.B. 219 at 226.
(4) L.R. 2 Q.B. 442 at 445.

that what was said in the case of *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (1), was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

A finding of *volenti* involves the consequence that no such duty existed, the onus of establishing which lay upon the defendant.

In *Smith* v. *Baker* (2), Lord Halsbury points out at p. 338 that a person who relies upon the maxim must show that the plaintiff consented to the "particular thing being done and consented to take the risk upon himself." While such consent may be inferred from a course of conduct as well as proved by express consent, it is not established merely by showing that the plaintiff knows there is a risk of injury to himself. The question in each particular case is, in the language of Lindley L.J., in *Yarmouth* v. *France* (3), "not simply whether the plaintiff knew of the risk, but whether the circumstances are such as *necessarily* to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff." As put by Lord Watson in *Smith's* case at p. 355, the question "is not whether he (the plaintiff) voluntarily and rashly exposed himself to injury, but whether he *agreed* that, if injury should befall him, the risk was to be his and not his master's."

It is useful also to refer to the language of Lord Herschell in the same case at p. 362, where, in speaking of the particular facts there before the House, his Lordship said:

> It was a mere question of risk which might never eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable. . . .

The principle of these judgments was formulated by the Judicial Committee in *Letang* v. *Ottawa Electric* (4), per Lord Shaw of Dunfermline, in the language of Wills J., in *Osborne* v. *London & North Western Railway* (5):

> . . . if the defendants desire to succeed on the ground that the maxim "Volenti non fit injuria" is applicable, they must obtain a finding of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly *agreed* to incur it."

(1) (1851) 11 C.B. 655.
(2) [1891] A.C. 325.
(3) 19 Q.B.D. 647 at 660.
(4) [1926] A.C. 725 at 731.
(5) 21 Q.B.D. 220 at 223.

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In my opinion, these authorities establish that the true question is that stated in Salmond, 10th ed., at p. 34, "Did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care?" Having regard to the statute law in force in Nova Scotia, that question becomes in the case at bar, "Did the plaintiff agree, expressly or by implication, to exempt the defendant from liability for any damage suffered by the plaintiff during the carrying out of the undertaking of the latter, occasioned by the gross negligence of the defendant?"

In his finding as to the applicability of the maxim in the case at bar, the learned trial judge said:

> That when the final phase of the journey (from Ingramport) began, the plaintiff was aware of the intoxicated condition of the defendant and of the character of his driving; she appreciated the risk of proceeding with him under those circumstances; and she knew that he was likely to continue his dangerous mode of driving and would not be deterred therefrom by protests from his passengers; and that with such knowledge of his condition and appreciation of the risk obviously incident to the driver's manner of driving, she freely and voluntarily accepted that risk by continuing with him as driver.

In my opinion, the learned trial judge does not address his mind to the proper point of time, namely, the inception of the defendant's undertaking which, at the latest, was the commencement of the journey at Chester on the morning of the accident. I have had the advantage of reading the opinion of my brother Rand and agree with him that that was the relevant time. In this view, I do not think it arguable that the situation was then such as *necessarily* to lead to the conclusion either that the plaintiff agreed to take upon herself the whole risk or that the defendant accepted her into his automobile on such a footing.

If this be so, then, again in agreement with my brother Rand, I do not understand how the defendant has established that, by reason of anything thereafter occurring, the terms of his undertaking were altered. The result is, as was the view of the court below, that the present is a case of contributory negligence on the part of the plaintiff, who "did not in her own interest take reasonable care of herself and contributed, by this want of care, to her own injury," to adapt the language of Viscount Simon delivering the

judgment of the Judicial Committee in *Nance* v. *B.C. Electric Railway Co.* (1). The plaintiff had full opportunity to leave the car while it was stopped at Ingramport and she then had the knowledge of the facts and an appreciation of the risk to herself in continuing, which the learned trial judge has above described.

I would therefore dismiss the appeal with costs.

LOCKE J.:—The learned trial judge found that the accident in which the respondent Thelma Seymour, to whom I will refer hereinafter as the respondent, suffered the grave injuries giving rise to this action, was caused by the gross negligence of the respondent Maloney, and this finding has been affirmed by the unanimous judgment of the Supreme Court in banco and is not questioned on this appeal.

Upon the issue as to whether the respondent had voluntarily assumed the risk attendant upon driving with Maloney when he was under the influence of liquor, the learned trial judge made the following finding:—

> That when the final phase of the journey (from Ingramport) began, the plaintiff was aware of the intoxicated condition of the defendant and of the character of his driving; she appreciated the risk of proceeding with him under those circumstances; and she knew that he was likely to continue his dangerous mode of driving and would not be deterred therefrom by protests from his passengers; and that with such knowledge of his condition and appreciation of the risk obviously incident to the driver's manner of driving, she freely and voluntarily accepted that risk by continuing with him as driver.

The unanimous judgment of the Court *in banco* has reversed this finding, the learned judges being all of the opinion that the defence *volenti non fit injuria* had not been made out.

Under Order LVII, Rule 1, of the Supreme Court of Nova Scotia, all appeals to the court are by way of rehearing, the rule being a replica of Order LVIII, Rule 1 of the Supreme Court in England. Rule 5 of the same Order declares that on the appeal the court shall have power to draw inferences of fact and to give any judgment and make

(1) [1951] A.C. 601 at 611.

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any order which ought to have been made. The corresponding rule in England is Rule 4 of Order LVIII. In *Powell* v. *Streatham Manor* (1), Lord Atkin, speaking of the English Rules referred to, said in part:—

> I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial judge.

This statement which expresses the opinion of the House was followed by a statement as to the considerations which apply when the findings at the trial turn on the conflicting testimony of witnesses and their credibility.

In the present matter, the question as to whether or not the respondent "freely and voluntarily, with full knowledge of the nature and extent of the risk" she ran "impliedly agreed to incur it", the test approved by the Judicial Committee in *Letang* v. *Ottawa Electric Railway Company* (2), was one of fact. As to the veracity of the respondent, the learned trial judge said that, having observed her closely at the trial and having since scrutinized her evidence with great care, he had come to the conclusion that she was a truthful witness in the main, but that her evidence as to the character of the various protests as to the speed of the car made by herself and the other passengers was not too reliable. In my opinion, the question as to whether the evidence showed that the plaintiff had given a real consent to the assumption of the risk, absolving the defendant from the duty to take the limited degree of care imposed upon him by s. 183 of the *Motor Vehicles Act* (c. 6, 1932), did not in this case depend upon the views of the trial judge as to the respondent's veracity, but rather upon the inferences to be drawn from facts which were not in dispute.

In exercising the powers vested in the learned judges who heard this appeal to draw inferences of fact, they have unanimously concluded that the necessary agreement to support the plea had not been made out. This conclusion, as is indicated by the reasons for judgment delivered, has been reached after the most careful examination and consideration of the evidence and is not based upon the opinion of the members of the court as to the credibility of the

(1) [1935] A.C. 243 at 255. (2) [1926] A.C. 725, 731.

plaintiff on any matter which would, in my opinion, affect the issue. In these circumstances, I think that finding should not be interfered with in this Court.

Upon the issue of contributory negligence, I agree that it was shown that the respondent did not, in her own interest, take reasonable care of herself and had contributed by this want of care to her own injury, to adopt the language of Viscount Simon in *Nance* v. *British Columbia Electric Railway* (1). I think we should not interfere with the apportionment of liability made by the judgment appealed from.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—The relevant facts are stated and the applicable authorities are collected and discussed in the reasons of other members of the Court, all of which I have had the advantage of reading, and I propose only to state shortly the conclusions at which I have arrived.

I agree with my brother Rand that the question to be answered in deciding whether the defence of *volenti non fit injuria* was established in this case is whether the defendant can reasonably be heard to say, as an inference from the facts, that the risk of injury from his own misconduct was required by him to be and was accepted by the complainant as a term of his undertaking to carry her gratuitously; and I agree that, on the evidence, the answer should be in the negative and that accordingly the defence mentioned should be rejected.

As to the defence of contributory negligence, it will be observed that the respondent plaintiffs do not question the decision of the Court en banc attributing 25% of the responsibility for the accident to the infant plaintiff. I can find nothing in the evidence to warrant interference with the apportionment made by the learned trial judge and concurred in by the Court en banc.

I would dismiss the appeal with costs.

(1) [1951] A.C. 601 at 611.

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ABBOTT J.:—There is nothing that I can usefully add to the very able reasons for judgment delivered by Mr. Justice Doull in the Court below, and with which I am in respectful agreement. I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. P. MacKeen.*

Solicitor for the respondent (plaintiff): *N. D. Blanchard.*

Solicitor for the respondent (defendant): *R. A. Kanigsberg.*

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*Oct. 28

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*Mar. 2

THE ATTORNEY GENERAL OF BRITISH COLUMBIA (*Defendant*) ..... APPELLANT;

AND

THE DEEKS SAND & GRAVEL COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Crown lands—Lease—Transfer of leased land from Dominion to Province—Whether Province entitled to alter terms of lease on renewal—Whether compromise agreement enforceable—Railway Belt Re-transfer Agreement Act, 1930 (B.C.), c. 60; 1930 (Can.), c. 37; 1930 (Imp.), c. 26.

In 1910, the predecessors in title of the respondent obtained two renewable quarrying leases from the Dominion for 21 years, at a fixed rental, the lessees covenanting to observe regulations made from time to time. There was no mention of royalty. In 1930, the lands subject to the leases were, by statute, vested in the Province of British Columbia, the Province being bound to carry out the leases. When the respondent applied to the Province in 1931 for renewal, the latter claimed the right to vary the rental and to impose a royalty. A compromise agreement was made providing that the leases would be "thereafter subject to adjustment . . . both with regard to rental and to royalty". The rental was subsequently increased and a royalty was demanded. The respondent paid the increased rent only and sued the Province for a declaration that it was not liable for the royalty. The trial judge and the Court of Appeal for British Columbia held the compromise to be *ultra vires* the Province and maintained the action.

Held: The appeal should be allowed. The agreement by way of compromise was not *ultra vires* the Province.

*PRESENT: Kerwin C.J., Rand, Kellock, Estey, Locke, Fauteux and Abbott JJ. Estey J. died before the delivery of the judgment.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment at trial in a declaratory action.

D. N. Hossie, Q.C. for the appellant.

A. Bull, Q.C. for the respondent.

THE CHIEF JUSTICE:—This appeal may be disposed of on a short ground. The parties compromised a dispute which had arisen between them and the terms thereof appear in the following endorsement on each lease:—

> Renewed for a period of twenty-one years from June 20, 1931, at a rental of one dollar per acre per annum, free from royalty, for the first five years and thereafter subject to adjustment for each successive five year period both with regard to rental and royalty.

I agree with the trial Judge that there is no uncertainty about this agreement and that its terms gave the Minister power to vary the rentals and impose a variable royalty in order to have the leases conform with similar leases granted by him. There was a dispute, as to which the Minister believed he was in the right, and, therefore, the easing of the provisions in favour of the respondent constituted good consideration. Under these circumstances there appears to be no doubt as to the law which, for present purposes, is sufficiently stated in para. 203 of Vol. VII of the Second Edition of Halsbury's Laws of England.

The respondent succeeded in the Courts below on the ground that the agreement was *ultra vires* the Province. This, however, is not a case of an attack on legislation enacted by the Legislature. In *Attorney General of Canada* v. *Western Higbie and Albion Investments, Ltd.* (2), it was held that para. 4 of a certain British Columbia Order-in-Council was an admission by the executive authority of the Province that certain harbours were "public harbours" within the meaning of Item 2 of Schedule 3 of *The British North America Act, 1867*. While that was a case of the power of the executive to make an admission, the circumstances, here present, that it might be held if action had then been taken that the Province could not insist upon altered terms, does not affect the matter.

(1) [1955] 2 D.L.R. 17; 15 W.W.R. (N.S.) 114.

(2) [1945] S.C.R. 385.

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Kerwin C.J.

The decision of this Court in *Anthony* v. *Attorney General for Alberta* (1), is quite distinguishable, as Alberta's claim had not been agreed to by the other party. In *Attorney General for Alberta* v. *West Canadian Collieries, Ltd. et al. and Attorney General for Manitoba and another* (2), s. 8 of an Alberta statute of 1948 was "a naked assertion" that the terms of pre-1930 Dominion leases and grants could be wholly disregarded (p. 549). Here there was no such attempt, but a *bona fide* agreement was entered into by two parties, each of which was capable of so contracting.

The appeal should be allowed and the action dismissed with costs throughout.

The judgment of Rand, Kellock, Locke, Fauteux and Abbott JJ. was delivered by:—

KELLOCK J.:—The liability asserted by the appellant herein to rest upon the respondent depends, in the first place, upon the binding nature or otherwise of an agreement of compromise made at the time of renewal by the province of two quarrying leases made on August 13, 1910 by Canada to predecessors in title of the respondent, and, in the second place, upon the proper construction of that agreement.

Each lease was for a term of twenty-one years from June 20, 1910, at an annual rental of $1 per acre,

renewable for a further term of twenty-one years, provided the lessee can furnish evidence satisfactory to the Minister of the Interior to show that during the term of the lease he has complied fully with the conditions of such lease, and with the provisions of the regulations regarding the disposal and operation of quarrying allocations which may have been made from time to time by the Governor in Council.

The leases were granted pursuant to regulations passed by virtue of s. 4 of the *Dominion Lands Act*, 7-8 Ed. VII, c. 20, which authorized the Governor in Council "from time to time to make such regulations for the survey, administration and disposal" of the lands as "he deemed suited to the conditions thereof." While by the terms of the regulations, as well as by the leases themselves, the lessee was required to keep books showing the quantities of material obtained under the leases, to make returns as to

(1) [1943] S.C.R. 320. (2) [1953] A.C. 453.

its working and operations and to "abide by all the obligations, conditions, provisoes and restrictions in or under the said regulations imposed upon lessees or upon the said lessee", neither in the leases nor in the applicable regulations is there any mention of royalty.

By an agreement between the Dominion and the province under date of the 20th of February, 1930, validated by Imperial, Dominion and provincial legislation, the interest of the Dominion in these and other lands was vested in the province upon terms, *inter alia,* binding the province to carry out, in accordance with the terms thereof, "every contract to purchase or lease any interest in the lands transferred and every arrangement whereby any person had become entitled to any interest therein as against Canada."

Subsequent to the expiry of the original term, negotiations took place between the respondent and the province as to renewal. The province claimed to be entitled to stipulate that the rent should be "subject to adjustment" for each succeeding five-year period after the first five years of the renewal term and that the lessee should pay a royalty of five cents per cubic yard on all material removed, it being contended that such right had pertained to the Dominion upon the proper construction of the regulations as well as the provision as to renewal in the leases themselves, and that the province had succeeded to the rights of Canada under the terms of para. 4 of the Dominion-Provincial agreement, which provides that

> any power or right which, by any agreement or other arrangement relating to any interest in the lands hereby transferred or by any Act of Parliament relating to the said lands, or by any regulation made under any such Act, is reserved to the Governor in Council, or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by the Lieutenant-Governor of the Province in Council or by such officer of the Government of the Province as is authorized to exercise similar powers or rights under the laws of the Province relating to the administration of Crown lands therein.

The respondent's solicitors took the position that neither under the terms of the leases nor the regulations had the Dominion reserved any power to alter the rent or impose any royalty, and they threatened proceedings to compel the issuance of the renewals in accordance with their view of the respondent's rights.

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In the result, a compromise was arrived at and embodied in an endorsement on each lease as follows:

> Renewed for a period of twenty-one years from June 20, 1931, at a rental of one dollar per acre per annum, free from royalty, for the first five years and thereafter subject to adjustment for each successive five year period both with regard to rental and royalty.

While in the correspondence prior to the making of this agreement the province had stated that provincial regulations were in force providing for the payment of royalties, that was not the fact, but the parties have made no point of this in argument before us. That this matter may have been the subject of discussion when the agreement of compromise was entered into, is perhaps indicated by the letter of May 16, 1932, to the respondent from the provincial Superintendent of Lands which does not refer to any provincial regulations but to the understanding arrived at between the parties that the respondent had "no objection to the principle of the conditions attached to all Provincial leases of this nature." These conditions were inserted in provincial leases by the Minister of Lands under the authority of s. 80 of the *Provincial Lands Act;* R.S., 1924, c. 131.

Upon the expiry of the first five years of the renewal period, the province advised the respondent that thereafter the leases would be subject to royalty, but this claim was waived for a further five year period when the province increased the rental and demanded payment of royalty. The increased rental has been in fact paid so that no question arises with regard to it. The royalty, however, has not been paid.

The respondent contends that the agreement of compromise was without consideration in that the leases themselves and the Dominion regulations properly construed conferred no right upon the Dominion and therefore none on the province, to insist upon the inclusion of a term as to royalty. The respondent thus seeks to revert to the position taken by it when the discussion arose which eventuated in the compromise. It is further contended that the compromise itself did not, properly construed, impose liability for royalty upon the respondent but amounted to no more than an agreement to discuss.

The learned trial judge was of opinion as a matter of construction that the agreement did obligate the respondent to pay, with which opinion I agree, and that the province, at the time the agreement was negotiated, entertained a reasonable hope that its contention would be maintained if litigated and that it had an honest belief in its chances of success. He therefore concluded that the endorsement on the leases constituted a binding compromise, and authorized the increase in rental and imposition of the royalty "unless it was *ultra vires* the Province."

As to this, the learned judge was of opinion that, upon the proper construction of the terms of the leases and the regulations, the position taken by the province in 1931 as to its rights was, in reality, untenable in law, and that because the obligation of the province toward the respondent under the Dominion-Provincial agreement of 1930 had been constituted by statute, "the compromise, if not illegal, was at least beyond the powers of the Minister and the Province, and was therefore invalid." The learned judge saw no distinction in principle between unilateral action on the part of a province by way of legislation which proved ultimately to be *ultra vires* as in opposition to the terms of the statutory agreement between the Dominion and the province and an agreement between a province and a lessee arrived at by way of composition of conflicting views as to the proper construction of that agreement and the rights thereby accruing to each.

The learned judge said:

> The present case is one of the Province of British Columbia asserting and thereby exacting by compromise rights which it did not enjoy under the original lease, or the Railway Belt Agreement, by which it nullified in part its obligation under clause 3 of the latter agreement to carry out the lease granted by the Dominion according to its terms, and the Plaintiff's rights under those contracts.
>
> There is no distinction in principle. The Imperial Act and the Statute of Canada confirming the Railway Belt Agreement imposed the same constitutional limitation on the prerogative of the Crown, in the right of the Province of British Columbia, that Natural Resources Agreement and the confirming Statutes imposed on the authority of the Alberta Legislature; in neither case would the consent of the contracting parties allow the Province to break the bounds imposed by that limitation.

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In this view, for which he found support in the decision of this court in *Mark Anthony* v. *Attorney General of Alberta* (1), the learned judge decided:

> It is unnecessary to consider whether the Province and the lessee could amend the leases without the authority of Dominion and Provincial legislation by an agreement fairly and freely made to meet their mutual requirements under circumstances which did not involve a compromise of untenable claims made by the Province in conflict with the Railway Belt Agreement.

This judgment was upheld on appeal (2), O'Halloran J.A., who wrote the judgment of the court, stating:

> Once it appears, therefore, that the Province has no power to impose a royalty on the leased lands, it is beyond the capability of the Province, or of any official on its behalf, to enter into an agreement in virtual effect forcing the Respondent to subscribe to payment of a royalty which there was no power in the Province to demand.
>
> If, therefore, it is argued that a compromise agreement came out of such conditions it becomes apparent that such compromise agreement must be invalid and not binding on the Respondent, because the subject-matter of such attempted agreement was *ultra vires* the Province to bring into being. Since the subject-matter never could have had a legal existence, there remains no foundation for an agreement; in short, there could not be an agreement.

What is, in effect, being said by both these learned judges is that, having construed the terms of the leases and the regulations and come to the conclusion that the province was wrong in law in the view taken by it in 1931 when the compromise was entered into, the province lacked the capacity which an ordinary individual, entertaining an honest opinion as to the construction of an instrument or a statute and his rights arising thereunder, would have had to compromise a dispute with a person holding a conflicting view of such rights. In forming his own opinion on the question of construction in the case at bar, the learned judge himself had "not found it easy to decide whether the terms of the original lease authorized a subsequent imposition of royalty or increase in rent."

I find it impossible to agree with the view upon which the courts below have proceeded. It clearly cannot be said that the province was without capacity to accept a surrender of even the entire interest of the respondent in the leases nor of something less than the entire interest had such been proferred. Nor can it be said that the province

(1) [1943] S.C.R. 320.

(2) [1955] 2 D.L.R. 17; 15 W.W.R. (N.S.) 114.

was without capacity *bona fide* to place its interpretation on the terms of the leases and the regulations even though such interpretation might subsequently be found to be in error. In my opinion, this is self-evident and any question of constitutional limitation on the part of the province does not arise. The question involved is merely as to whether or not the agreement of compromise was validly arrived at, the test not differing in the case at bar from that which applies as between individuals. What is really being said by the learned judges below is that a claim which may subsequently be determined to be unfounded in law, cannot validly form the basis of an agreement of compromise. That was undoubtedly the law formerly, as the earlier authorities show. But it has not been the law for a considerable period.

In *Cook* v. *Wright* (1), the plaintiffs, trustees under a local Act, had called upon the defendant, who was not the owner but the agent of the owner, of certain houses, to pay expenses chargeable under the statute to the owner. The defendant attended a meeting of the trustees at which he advised them that he was not the owner and gave them the name of his principal. The trustees, however, took the position that the defendant was the owner within the statutory definition of that term and advised him that unless he paid he would be proceeded against. As a result, a compromise was entered into under which the defendant agreed to pay.

It was held that although the defendant was not personally liable under the statute, the plaintiffs honestly believed that he was and that was sufficient even although the defendant himself never did so believe but entered into the agreement in order to avoid being sued. Blackburn J., who delivered the judgment of the Court, said, at p. 324:

> The real consideration, therefore, depends not on the actual commencement of a suit, but on the reality of the claim made, and the bona fides of the compromise.

It will be observed that in this case the dispute between the parties was, as in the case at bar, namely, the construction of a statute.

Again, in *Callisher* v. *Bischoffsheim* (2), the plaintiff, alleging that certain monies were due and owing to him from the Government of Honduras, threatened legal pro-

(1) 30 L.J., Q.B., 321. (2) L.R., *V*, Q.B., 449.

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ceedings to enforce payment, whereupon the defendant promised to deliver to him certain securities provided he would forbear taking proceedings for an agreed time. It turned out that in fact there were no monies owing by the Honduras Government but that the plaintiff honestly believed there were. The defendant was held liable. Cockburn C.J., said, at p. 452:

> Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. . . .
>
> It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent.

Blackburn J., said also, on the same page:

> If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated.

In *Miles* v. *New Zealand Alford Estate Company* (1), Cotton L.J., at p. 283, put the matter thus:

> Now, what I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good "consideration" for a contract; . . . Now, by "honest claim", I think is meant this, that a claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which shew that his claim is a bad one. Of course, if both parties know all the facts, and with knowledge of those facts obtain a compromise, it cannot be said that that is dishonest. That is, I think, the correct law, and it is in accordance with what is laid down in *Cook* v. *Wright* and *Callisher* v. *Bischoffsheim* and *Ockford* v. *Barelli* (20 W.R. 116).

Bowen L.J., in the same case said at p. 291:

> I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession.

The learned Lord Justice went on to say:

> Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all.

(1) 32 Ch.D., 266.

Again, in *Jayawickreme* v. *Amarasuriya* (1), Lord Atkinson, speaking on behalf of the Judicial Committee said, at p. 873:

> The legal validity or invalidity of the claim the female plaintiff threatened to enforce by action is entirely beside the point if she, however mistakenly bona fide, believed in its validity.

The effect of the authorities was thus expressed by Lord Westbury in *Dixon* v. *Evans* (2), as follows:

> In dealing with a compromise, always supposing it to be a thing that is within the power of each party, if honestly done, all that a Court of Justice has to do is to ascertain that the claim or the representation on the one side is *bonâ fide* and truly made, and that on the other side, the answer, or defence, or counter claim, is also *bonâ fide* and truly made. I mean by *bona fides*, the truth of parties, and above all this, that the compromise is not a sham, or an instrument to accomplish or to carry into effect any ulterior or collateral purpose, but that the thing sought to be done is within the very terms of the compromise—that all that the parties contemplate and desire to effect and to deal with is, whether the claim on the one side or the defence on the other side shall be admitted or not; or whether, if both things are *bonâ fide* brought forward, there may not be some concession on the one side, and some concession on the other side, so as to arrive at terms of agreement, which, if honestly made, is an honest settlement of an existing dispute. That is the characteristic of a compromise, and if it be not manifestly *ultrà vires* of the parties, it is one that a Court of Justice ought to respect, and ought not to permit to be questioned.

The last mentioned case affords an illustration of a situation in which one of the parties to a compromise (there the directors of a corporation), may lack capacity to enter into a particular agreement. Reference may also be made to *Holsworthy Urban District Council* v. *Rural District Council of Holsworthy* (3). In the present case no such question arises.

In my opinion, therefore, the compromise here in question fully meets the requirements of the authorities. There was, as the learned trial judge found, an honest difference of opinion as to the construction of the leases and the regulations to which they were subject. Although the respondent was at the time acting under the advice of solicitors and had been advised that it was entitled to receive renewals free from the claims being put forward by the province, it saw fit to enter into the compromise which involved concessions on both sides. In these circumstances, as it cannot be said, in my opinion, that the provincial

(1) 1918, A.C., 869.
(2) L.R., V House of Lords, 606 at 618.
(3) (1907) 2 Ch., 62.

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A.G. OF BRITISH COLUMBIA v. DEEKS SAND & GRAVEL CO. LTD.

Kellock J.

claims were either frivolous or vexatious or other than "real" within the meaning of the authorities, the compromise was a binding one.

In my opinion also, the decision of this court in *Anthony* v. *Attorney General for Alberta* affords no support for the judgments below. The licensee in that case, while he had accepted renewals from the province in which a reference to the *Provincial Lands Act* was substituted for the *Dominion Lands Act,* and regulations passed by the Lieutenant Governor in Council for the former Dominion regulations, was held not to have consented by such acceptance to any alteration in the agreement with the Dominion which would vest in the province a right to destroy or nullify indirectly the contract which he had with the Dominion Government. The consent, therefore, which was in question in that case did not, in the view of the court, involve a consent to the claim which the province was there putting forward, namely, a claim to exact fees which, as the court found, amounted to a destruction of the grants themselves. The decision, therefore, has no application in the case at bar where the claim which the province is asserting was covered by an express term of the agreement of compromise.

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

Appeal allowed with costs.

Solicitor for the appellant: *D. N. Hossie.*

Solicitor for the respondent: *G. E. Housser.*

REPORTER'S NOTE: Following the handing down of the judgment on March 2, 1956, Mr. R. G. McClenahan, appearing for both parties, moved on March 15, 1956, to vary the judgment as to the disposition of costs in view of the provisions of the Crown Costs Act, R.S.B.C. 1948, c. 85. The motion was granted and the Court ordered that the judgment be amended to read as follows: "The appeal is allowed and the action dismissed. The appellant is entitled to his costs in this Court".

MIKE RUPTASH AND WILLIAM C. LUMSDEN (*Defendants*) ..... APPELLANTS;

1955
*Nov. 3, 4

1956
*Mar. 2

AND

DAVID MICHAEL ZAWICK (*Plaintiff*) ..RESPONDENT;

AND

WILLIAM ZAWICK .....DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Tenancy in common—Agreement to repair building—Moneys furnished by one tenant and covenant by co-tenant to repay proportionate share—Caveat filed claiming only right of pre-emption given by agreement—Sale of interest by co-tenant before paying share of repair costs—Whether title of purchaser subject to lien or charge for share of repair costs owed by vendor—Land Titles Act, R.S.A. 1942, c. 205, s. 189.

The respondent as to a 213/332 interest and his brother, W.Z., as to a 119/332 interest were the registered owners of a property in Edmonton. They entered into an agreement providing for the managing, renting, improving and repairing of the property; all the costs of the repairs were to be provided by the respondent, and W.Z. covenanted to repay his proportionate share; the agreement also provided for a semi-annual accounting and division of the net rentals. Mutual rights of pre-emption were also provided. The respondent filed a caveat specifying as the interest which he claimed his right of pre-emption. The agreement was later amended to prohibit the sale of the interest of either party without the consent of the other. A caveat was filed by the respondent to protect his interest under the amending agreement but after W.Z. had transferred his interest for good consideration to the appellants and they had received certificates of title. At the time of the transfer W.Z. had not paid his proportionate share of the repairs to the respondent.

The respondent commenced this action after being required by the appellants to take proceedings on the two caveats. The appellants counterclaimed for a declaration that they had acquired a good title and for an accounting. In this Court, there was no question of fraud on the part of the appellants nor of setting aside the transfer to them; but the respondent contended, as was held by the trial judge and the Appellate Division, that the appellants' title was subject to a lien or charge for the proportionate share of the repairs owed by W.Z.

Held: The appeal should be allowed, and it should be declared that the appellants have a good title free from the claims asserted in the caveats and in the agreements.

*PRESENT: Taschereau, Estey, Locke, Cartwright and Fauteux JJ. Estey J. died before the delivery of the judgment.

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The purpose of filing a caveat is to give notice of what is claimed. If an unregistered document gives a party more rights than one in a parcel of land and such party files a caveat claiming one only of such rights, any person proposing to deal with the land is entitled to assume that the claim expressed is the only one made. Even if the caveats were to be regarded as claiming every interest conferred on the respondent by the agreement, on its proper construction, the agreement gave the respondent no interest in or charge on W.Z.'s share in the land other than the first right to purchase, which the respondent no longer seeks to enforce.

Apart from contract the right of a tenant in common who has made repairs to the property of which his co-tenant has taken the benefit is limited to an equitable right to an accounting which can be asserted only in a suit for partition; he does not acquire a lien or charge on the property itself. Even if the respondent had acquired an equitable charge on W.Z.'s interest, s. 189 of the *Land Titles Act* provides in plain words that as purchasers from a registered owner the appellants (fraud having been negatived) would take free from such a charge unless registered, even if they had notice of it.

The fact that the agreement was expressed to be binding upon the assigns of the parties does not assist the respondent, since the covenant to pay for repairs, being positive, would not run with the land and there is no question of novation.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming, with a variation, the judgment at trial continuing a caveat on the appellants' title to an interest in land.

W. G. Morrow, Q.C. for the appellants.

L. D. Hyndman, Q.C. for the respondent.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—On and prior to June 23, 1951 the respondent was the registered owner of an undivided 213/332 interest in a parcel of land in Edmonton known as the Craig Nair block and his brother William Zawick was the registered owner of the remaining 119/332 interest therein. The building on this land was in a run down condition and the income therefrom was not sufficient to pay the carrying charges. Apparently the respondent had the necessary financial resources to undertake the renovation of the building and William Zawick had not. Following some negotiations they entered into an agreement under seal dated and executed on June 23, 1951, made between

(1) [1955] 15 W.W.R. 518; 4 D.L.R. 195.

the respondent of the first part and William Zawick of the second part, the recitals and terms of which are as follows:—

WHEREAS the parties hereto are now the owners of the Craig Nair Block situate on part of Lot "H" River Lot 10, Plan "A", Edmonton, the said First Party owning an undivided 213/332nds thereof and the Second Party owns the remaining 119/332nds thereof.

AND WHEREAS the First Party also owns the business and assets formerly carried on by Georgia Cafe Limited in the said building;

AND WHEREAS there is pending in the Supreme Court of Alberta an action between the parties hereto and others and the parties hereto have agreed to settle such action;

NOW THEREFOR IN CONSIDERATION OF the mutual covenants and agreements hereinafter set forth the parties hereto mutually covenant and agree each with the other as follows:—

1. Each of the parties hereto agree that the agreement of sale dated 24th August 1948 made by the Second Party as Vendor to the First Party as Purchaser in respect of the Second Parties estate and interest in the said Craig Nair Block premises be and the same is hereby cancelled and determined.

2. It is agreed that as from the date hereof the Party of the First Part shall be the Manager of the said Craig Nair Block premises and shall have full authority and discretion to repair and fix up the said building and to rent the same and/or all parts thereof upon such terms and conditions as the First Party may deem fit; and to collect all rents therefrom and out of the moneys collected pay all taxes, fire insurance premiums and costs of repairs and upkeep thereof, and the Party of the Second Part agrees not to interfere with the Party of the First Part's management thereof so long as such management is efficient.

3. The Party of the First Part will at least twice in each year prepare in writing statements showing all receipts and disbursements which the Party of the First Part may receive or pay out, and deliver a copy thereof to the Party of the Second Part.

4. The Party of the First Part will at least twice in each year divide any net profits from the renting of the said Block, paying 119/332nds thereof to the Party of the Second Part and the remaining 213/332nds thereof to himself the Party of the First Part.

5. The Party of the First Part agrees to open a separate Bank Account in the Bank of Toronto, Edmonton, and deposit therein all rents and other receipts from the said Block and pay all expenses in connection therewith by cheques drawn against said Bank Account.

6. The Party of the Second Part agrees to vacate and deliver up possession of all parts of the said Block now in his possession to the Party of the First Part.

7. The Party of the First Part hereby releases all claims which he may now have or be entitled to against the Party of the Second Part in respect of any and all rents in respect of the said Block up to the date hereof.

8. Each of the parties agree to the said action now pending in the Supreme Court of Alberta, Action No. 40979, be discontinued, including Counterclaim, and that each of the parties hereto pay their own respective costs of their respective solicitors.

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9. The Party of the Second Part agrees to pay and contribute to the Party of the First Part 119/332nd share of all costs of repairing the said Block.

10. It is agreed that the term of this agreement shall be for a term of five years ending on the 31st day of August, 1956 or until the parties hereto mutually agree to the determination thereof prior thereto provided that should either party make a bona fide sale of his interest in said property the party selling may cancel this agreement on thirty (30) days' notice to the other party.

11. If either party desires to sell his interest in said property he shall first offer it for one month to the other party at the price and on the terms he is willing to accept and if the other does not accept such offer within said period the party offering may proceed to sell to any other person, but no sale may be made to any other person at a price or on terms more favourable, without first again offering it to the other at such better price and terms.

12. The terms, covenants and provisions of this agreement shall enure to the benefit of and be binding upon each of the parties hereto and their respective heirs, executors, administrators and assigns.

At the date of this agreement William Zawick was occupying some of the rooms in the Craig Nair Block and he continued to do so for a few months thereafter. The respondent arranged with a contractor to undertake the renovation and repair of the building; the work was done during the period from February 1952 to May 1952 at a cost somewhat in excess of $20,000. According to the respondent's evidence the value of the property before the doing of this work was between $25,000 and $30,000 and after it was done was in the neighbourhood of $50,000.

On November 19, 1951 the respondent filed a caveat giving notice that he claimed an estate or interest in the Craig Nair Block, which was duly described by metes and bounds, and specifying that the estate or interest claimed consisted of the first right to purchase the 119/332 share and interest of William Zawick in the premises described in the event of the said William Zawick desiring or deciding to sell his said share or interest therein, "which said right has been granted by the said William Zawick to David Michael Zawick under an agreement in writing dated the 23rd day of June A.D. 1951, and which said agreement inter alia grants and provides:—" Immediately following the words just quoted the wording of paragraph 11 of the agreement is set out in full in the caveat. Apart from the use of the words "inter alia" the caveat makes no reference to any of the other terms of the agreement of June 23, 1951.

On December 13, 1951, the respondent and William Zawick entered into a further agreement under seal reciting the agreement of June 23, 1951 and providing:—

1. Clause 10 of the agreement between the parties hereto dated June 23rd, 1951 is hereby cancelled and the following clause substituted in its place.

10. It is agreed that the terms of this agreement shall be for a term of twelve years from the 23rd day of June A.D. 1951.

Clause 11 of the said agreement dated June 23rd, 1951 is cancelled and the following substituted in its place—

11. Neither party is to sell his interest in the said property without the consent of the other party.

In all other respects the parties hereto ratify and confirm the said agreement dated the 23rd day of June, A.D. 1951.

By transfer dated January 28, 1953, executed on behalf of William Zawick by his attorney Nicholas Hrehorick, William Zawick transferred his 119/332 interest as to $\frac{2}{3}$ thereof to the appellant Ruptash and as to $\frac{1}{3}$ thereof to the appellant Lumsden. This transfer was apparently executed on the date which it bears as the attached affidavits are sworn on that date. In the affidavits of the transferor and of the transferee it is stated that the true consideration passing between the parties is $19,000 which is fairly apportioned between land and improvements as follows: Land $1,239.65, Improvements $17,760.35. It appears that of the $19,000, $4,637 was paid in cash and the balance of $14,363 by the transfer to William Zawick of a third mortgage held by the appellants on other property.

Before the completion of this purchase the solicitor who was then acting for William Zawick sent four letters to the respondent, dated November 2, 1951, August 5, 1952, September 17, 1952 and September 29, 1952; the last of these read:—

Further to my letter of September 17, 1952, I have been instructed to inform you that William Zawick will be selling his shares in the Craig-Nair Block only for $19,000. If you wish to carry out your option you must notify me within 30 days, otherwise the share will be sold. To date you have ignored my correspondence.

The respondent denied having received any of these letters; the learned trial judge found as a fact that he had received them all, but was of opinion that they failed to comply with the terms as to notice contained in the agreement of June 23, 1951 and were consequently ineffective.

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On May 1, 1953, the transfer from William Zawick to the appellants was registered in the Land Titles Office and on the same day a Certificate of Title was issued certifying that as to an undivided 238/996 interest the appellant Mike Ruptash and as to an undivided 119/996 interest the appellant William C. Lumsden were the owners of an estate in fee simple in the Craig Nair Block, subject to the caveat filed on November 19, 1951, and to an earlier caveat and a lease, as to which two last mentioned instruments no question arises in this appeal.

On May 27, 1953, the respondent filed a further caveat claiming:—

> an estate or interest in the 119/332 thereof formerly registered in the name of William Zawick by virtue of an Agreement in writing made between myself of the one part and William Zawick of the other part, and dated the 23rd day of June, A.D. 1951, as varied and amended by a further agreement in writing dated the 13th day of December, 1951, made between myself and the said William Zawick under which we mutually covenanted and agreed each with the other that neither of us would sell our respective estates or interests in the hereinafter described property without the consent of the other and under such Agreement and amending Agreement I was appointed Manager of the said premises with full power and authority to fix up and repair the building situate thereon and to collect rents and pay liabilities, all as set forth in such agreement as amended and that the terms of such appointment and the other provisions of such agreement should continue and be in force for a term of twelve (12) years from the 23rd day of June, 1951, and whereby the said William Zawick further agreed to pay and contribute to me 119/332 share of all costs of repairing such block.

On August 11, 1953, the appellants served on the respondent notices, pursuant to section 137 of the Land Titles Act, requiring him to take proceedings on both caveats. This action followed; and was tried before Primrose J. without a jury.

It is not necessary to review the pleadings, which were amended at the opening of the trial and again after all the evidence had been heard, as the issues presented to us are considerably narrower than those raised at the trial.

The learned trial judge expressly negatived the charges of fraud made against the appellants although he found that they deliberately refrained from making any inquiry into the state of the accounts between the respondent and William Zawick as to the operation of the block. He found that the appellants knew of the existence of the agreement of June 23, 1951 and the amending agreement of Decem-

ber 13, 1951, to the extent at least of knowing that the respondent was entitled to notice before William Zawick could sell his interest, "although they did not make any specific inquiry or have the terms of the agreements fully explained to them by their solicitor"; and that the appellants intended the four letters referred to above to operate as compliance with the agreement of June 23, 1951 as to notice.

The learned trial judge held that the appellants could not be heard to say that paragraphs 10 and 11 of the agreement of June 23, 1951 were not effective at the date they obtained registered title since they were not willing to accept as effective the paragraphs substituted therefor by the amending agreement of December 13, 1951; that the agreement of June 23, 1951 in its original form must be regarded as binding in toto; that the respondent had a lien on the interest of William Zawick for the latter's proportionate share of the amount, expended by the former in repairs; that this lien bound the interests acquired by the appellants; that both the caveats should be maintained; that, subject to the caveats and subject to the agreement dated June 23, 1951 and all the rights of the respondent thereunder and the provisions therein contained, the title of the appellants to the undivided 119/332 interest was a good and valid title; that the respondent had the right to purchase the title acquired by the appellants from William Zawick at the same price and on the same terms as they had acquired it from William Zawick; that the respondent was entitled to contribution from the appellants of an amount equivalent to 119/332 of the expenditures made by him on the block, such amount to be determined on an accounting by the Clerk of the Court; that all other questions of accounting between the parties should also be referred to the Clerk of the Court; and that the respondent should recover his costs of the action from the appellants. Judgment was entered accordingly.

The appellants appealed to the Appellate Division; and the respondent served a notice of intention to apply to vary the judgment of Primrose J. to provide that the appellants did not acquire a valid title from William Zawick and that the former title of William Zawick should be restored subject to the respondent's rights.

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The Appellate Division (1) varied the judgment of Primrose J. by striking out the declaration that the respondent was entitled to purchase the interest of the appellants in the block, and by depriving the respondent of the costs of the trial because of his having made charges of fraud which he failed to substantiate and because it was only after all the evidence had been heard that he amended the Statement of Claim to ask that it be declared that he had a lien on the appellants' interest, and subject to such variations dismissed the appeal with costs.

From this judgment the appellants appeal to this Court. The respondent did not serve any notice of cross-appeal or of intention to apply to vary the judgment of the Appellate Division but states his position in his factum as follows:—

> Therefore, Respondent's position now is that the judgment of the Trial Judge as amended by the decision of the Appellate Division should be affirmed subject to the restoration to the Respondent of his costs of the trial.

In the result, William Zawick is not made a respondent in this Court; and there is now no question of setting aside the transfer of his interest to the appellants. The question to be determined is whether the title of the appellants is subject to a lien or charge in favour of the respondent for 119/332 of the amount expended by the latter in repairing the buildings.

It is clear that the concurrent findings of fact absolving the appellants from fraud cannot be questioned successfully; and, that being so, the relevant facts are substantially undisputed. The appellants have purchased the 119/332 interest in the block of which William Zawick was the registered owner; accepting as accurate the valuation made by the respondent of the property after the completion of the repairs and improvements, the appellants have paid William Zawick the full value of his proportional interest in the improved property (subject only to the suggestion as to which no finding was made, that the mortgage which they assigned in part payment was not worth its face value); their transfer has been registered and they have received a certificate of title expressed to be subject only to the caveat dated November 19, 1951, referred to above.

(1) [1955] 15 W.W.R. 518; 4 D.L.R. 195.

In these circumstances the appellants rely on the terms of s. 189 of *The Land Titles Act*, which reads as follows:—

189. Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land in whose name a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

Fraud having been negatived it is argued for the appellants that they have obtained an indefeasible title to the 119/332 interest in the block free of any unregistered interest of the respondent; that the lien which has been declared by the learned trial judge was not registered when they obtained title; that they had in fact no notice of its existence (if as between the respondent and William Zawick it did exist); and, that if they had had notice direct, implied or constructive, it would have been irrelevant in view of the express terms of s. 189.

To this two answers are made. First, it is said that the caveat of November 19, 1951 sufficiently protected the respondent's alleged lien and, secondly, that, quite apart from the effect of the caveat the provisions of *The Land Titles Act*, and particularly s. 189, have no application to the equities of tenants in common or to their consequent rights to liens. These will be considered in the order in which they are stated.

Section 132 of the *Land Titles Act* provides that every caveat filed shall state, amongst other matters, "the nature of the interest claimed". The words, in which the nature of the interest claimed is stated in the caveat with which we are concerned, have already been quoted and limit the claim to "the first right to purchase the interest of William Zawick". No doubt the caveat protected that right but the respondent no longer seeks to enforce it. While such right was declared by the judgment at the trial it has been disallowed by the order of the Appellate Division and the respondent has not appealed from that order except as to the disposition of costs. It was suggested in argument that as the caveat made reference to the agreement of June 23,

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1951, and stated that it granted the right claimed *"inter alia"*, it had the effect of a caveat claiming every right conferred upon the respondent by such agreement. I am unable to accept this view. The purpose of filing a caveat is to give notice of what is claimed by the caveator against the land described. If an unregistered document in fact gives a party thereto more rights than one in a parcel of land and such party sees fit to file a caveat claiming one only of such rights it appears to me that any person proposing to deal with the land is entitled to assume that the claim expressed is the only one made. *Expressio unius est exclusio alterius.* With the greatest respect for the contrary view expressed by the learned trial judge and the Appellate Division it is my opinion that the filing of the caveat was effective to protect only the respondent's first right to purchase the interest of William Zawick. If, contrary to the view which I have just expressed, the appellants were to be treated as having purchased subject to a caveat claiming every estate or interest in William Zawick's undivided share of the land conferred on the respondent by the agreement of June 23, 1951, I would be of opinion that on its proper construction such agreement gave the respondent no interest in or charge on William Zawick's share in the land, other than the first right to purchase.

For the purpose of construing it, I will assume, as was found by the courts below, that the agreement of June 23, 1951 in its original form remained binding notwithstanding the cancellation of paragraphs 10 and 11 thereof by the amending agreement. It is, I think, too clear for argument that the appellants were unaffected by the terms of the amending agreement of which no notice appeared on the registered title.

The only paragraphs affecting the question whether on its proper construction the agreement conferred upon the respondent any lien or charge on, or other interest in, the share in the land owned in fee simple by William Zawick appear to me to be the following:—

Paragraph 2: The respondent is appointed manager of the premises with full authority (i) to "repair and fix up" the building, (ii) to rent the same, (iii) to collect all rents, (iv) out of the moneys collected, i.e., the rents, to pay all

taxes, fire insurance premiums and costs of repairs and upkeep; but the continuance of this arrangement is to be so long only as such management is efficient.

Paragraphs 3 and 4: There is to be a semi-annual accounting and division of net profits. This appears inconsistent with the view that the respondent was to be entitled to retain all the rents until he had recouped himself for his capital expenditure of over $20,000.

Paragraph 6: William Zawick agrees to vacate possession of all parts of the said building "now in his possession".

Paragraph 9: William Zawick agrees to pay to the respondent 119/332 of all costs of repairing the block.

Paragraph 10: The term of the agreement is to be five years; but it is of significance that either party may terminate it on 30 days notice in the event of making a bona fide sale of his interest.

Paragraph 11: Mutual rights of pre-emption are provided.

It will be observed; (i) that no charge or mortgage on William Zawick's share is given in express terms, nor is his share of the future rents assigned as security for payment of the sum which, in paragraph 9, he covenants to pay; nothing would have been simpler than to insert either or both of such provisions had they been intended by the parties; (ii) that the obligation undertaken by William Zawick under paragraph 9 is to pay 119/332 of all costs of repairing and, as no time is stated in which such payment is to be made, the respondent could have brought action for the amount payable as soon as the repairs were completed; (iii) that the rights of termination of the contract contained in paragraphs 2 and 10 are inconsistent with the view that the respondent was to have a continuing charge on the rents.

With respect, I am unable to accept the view of the effect of paragraph 6 which was taken in the Appellate Division. As to this, Clinton Ford J.A., with whom Porter J.A. agreed, says:—

> The defendant, William Zawick, granted to his co-tenant, the plaintiff, sole possession of the property held in common, thereby relinquishing to him his equal right of possession to the property; and also gave him the right as sole occupant and landlord to rent it and collect the rents, carrying with it the sole right to distrain for rents in arrear. He also gave to his co-tenant the right to repair and improve the property, and charge such

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expenditures to the rents. I think that this created not only the legal right to sole possession, but also an equitable interest in the land, both properly protected by the caveat.

The learned Chief Justice of Alberta took the view that paragraphs 2 and 6 of the agreement constituted a lease of William Zawick's interest.

Read in the context of the whole agreement, paragraph 6 appears to me to provide no more than that William Zawick was to relinquish to the respondent possession of those parts of the building of which he was in actual physical possession so that the contemplated repairs could be carried out. The provisions for termination of the respondent's powers and for periodical accounting and division of the proceeds of the property are, I think, inconsistent with the view that William Zawick was transferring his rights as a tenant in common or leasing his interest.

For the above reasons I conclude that on its proper construction the agreement did not by its terms grant any estate or interest to the respondent in the undivided share in the land owned by William Zawick or give him any charge thereon or any assignment of the future rents. It gave him rather a terminable right to manage the property and collect the rents on behalf of William Zawick as well as on his own behalf and the personal covenant of William Zawick to pay his proportionate share of the cost of the repairs.

This leaves for consideration the respondent's contention secondly mentioned above. This may be briefly stated as follows. Firstly, even if it should be held that the agreement of June 23, 1951, in so far as it relates to the repairing of the building, did not in terms give the respondent any charge on the undivided share owned by William Zawick but only his personal covenant to pay his proportion of the cost, it is clear that the repairs were made and paid for by the respondent with the consent and approval of William Zawick who accepted the benefit of the resulting increase in value of the property, and, in such circumstances, by operation of law an equitable lien on the undivided share owned by William Zawick was conferred upon the respondent until his claim for payment of the proportion of the cost of repairs chargeable to William Zawick was satisfied; and, secondly, even if it should be

held that the caveat of November 19, 1951, was ineffective to protect or give notice of such lien, the title of the appellants is nonetheless subject to it as s. 189 of the *Land Titles Act* has no application to the equities of tenants in common or to their consequent rights to liens.

The first branch of this argument appears to have been accepted by Clinton Ford J.A. but not the second. The learned Justice of Appeal says in part:—

I do not think that the lack of a restrictive covenant running with the land could be said to over-ride what I have just concluded to be the rights of co-tenants to contract with respect to improvements and repairs to the premises held in common so as to bind themselves and their assignees who had actual knowledge of the agreement under a caveat filed pursuant to Section 131 of the Act.

In this connection I quote from Corpus Juris Secundum, Vol. 86, at p. 460:—

> Recording laws have no application to the equities of tenants in common or to their consequent rights to liens. Where one co-tenant agreed to pay his proportionate share of necessary expenditures, but sold his interest without making payment thereof, his co-tenant has a lien on the interest conveyed for the amount due him.

I think that the last part of this statement is true in this jurisdiction only where the purchaser had, as here, notice in accordance with the provisions of The Land Titles Act.

Immediately after the passage from Corpus Juris Secundum quoted by Clinton Ford J.A. this sentence follows:—

While a proportionate share of necessary expenditures could have been impressed as a lien on the noncontributing cotenant's interest in the realty prior to conveyance of such interest to a bona fide purchaser for value without notice, on failure to do so, the cotenant making the expenditure is merely a creditor of the noncontributing cotenant as against a purchaser of the latter's interest.

and earlier on the same page there is the following statement:—

A claim for contribution does not of itself constitute a lien on the premises but only a right to have a lien decreed on a cotenant's interest for the protection of the claim against such cotenant.

In Halsbury's Laws of England, 2nd Ed. Vol. 20, p. 573 under the title "Lien" the learned author says:—

Thus a tenant in common has been held to have no lien against the share of his co-tenant for payments made for the benefit of the estate.

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I have examined all the cases cited as authority for this statement and they appear to me to support it. The contrary view which was expressed by Lord Hardwicke in *Doddington* v. *Hallet* (1), has been over-ruled by the cases collected in Halsbury at the page mentioned above.

In view of the wording of the passage from Corpus Juris Secundum quoted by Clinton Ford J.A. it may be observed that the following passage from the judgment of the Vice-Chancellor in *Green* v. *Briggs* (2), indicates that a different view of the law was adopted in America:—

> The case of *Doddington* v. *Hallet* was referred to in argument by the plaintiff's counsel, but only (as I understand) for the purpose of excluding the suggestion that the plaintiff relied upon it, or upon the doctrine it contains, for supporting his claim in this suit. I collect from Story on Partnership that upon principles of public policy and convenience, America has adopted *Doddington* v. *Hallett*. But, however that may be, it is certain that Lord Eldon, in *Ex parte Harrison* and in *Ex parte Young* deliberately overruled it.

In the case at bar the respondent had a contractual right to recover from William Zawick the latter's proportionate share of the moneys expended by the former on repairs. I have already stated my reasons for concluding that on its proper construction the contract did not create a lien or charge. The nature of the rights of the respondent apart from contract is, I think, accurately stated in the following passage from the judgment of Cotton L.J. in *Leigh* v. *Dickeson* (3):

> Therefore, no remedy exists for money expended in repairs by one tenant in common, so long as the property is enjoyed in common; but in a suit for a partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs; the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition. Tenancy in common is an inconvenient kind of tenure; but if tenants in common disagree, there is always a remedy by a suit for a partition, and in this case it is the only remedy.

(1) (1750) 1 Ves. Sen. 497. (2) (1848) 6 Hare 395 at 401.
(3) (1884) 15 Q.B.D. 60 at 67.

In my opinion, apart from contract the right of a tenant in common who has made repairs to the property of which his co-tenant has taken the benefit is limited to an equitable right to an accounting which can be asserted only in a suit for partition; he does not acquire a lien or charge on the property itself. This view is I think supported not only by the English cases referred to in Halsbury but also by at least some of the American decisions referred to in Corpus Juris. For example, in *Deitsch* v. *Long* (1), one of the questions which arose was whether the purchaser in good faith of the share of one of several tenants in common took such share subject to a claim for contribution to the cost of repairs made prior to the transfer and which could have been enforced against the transferor by his co-tenants. In holding that the purchaser did not take subject to such claim it was said, *per curiam,* at page 917:—

> The persons seeking to impress their claims on the real estate conveyed were not at any time owners of any interest in the real estate conveyed but had only equitable rights for an accounting against the grantor, which, if they had pursued their remedies prior to the transfer, by proper proceedings in equity, could have had impressed as liens on the real estate conveyed. Hence they were creditors.

The second branch of this argument was not accepted by Clinton Ford J.A., as appears from the last sentence in the passage from his reasons last quoted above; he was however of opinion that the interest claimed by the respondent was sufficiently protected by the caveat filed.

I have already indicated my reasons for holding that the caveat noted on the register when the appellants obtained title did not give notice of the claim for the proportionate share of the cost of repairs. It follows that the appellants are in the position of purchasers in good faith and for value who have obtained the legal title to the land formerly owned by William Zawick without notice of an equitable right claimed against him. While in my opinion that right was a personal one only and did not amount to a charge on the land, the appellants having acquired the legal estate would (fraud having been negatived) hold it free of an equitable charge of which they had no notice; this would be so apart from the provisions of the *Land Titles Act;* and s. 189 of that Act appears to me to provide in plain terms

(1) (1942) 43 N.E. (2nd) 903.

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that as purchasers from a registered owner who have received a certificate of title they take free from such a charge, even if they had notice of its existence, unless it is registered. To hold that a purchaser from the registered owner of an undivided fractional share in a parcel of land is put upon inquiry as to the state of the accounts between his vendor and the latter's co-tenants and takes the land subject to a charge for the balance if any in favour of such co-tenants as of the date of purchase would, I think, be to disregard the plain wording of s. 189.

The fact that the contract of June 23, 1951, was expressed to enure to the benefit of and be binding upon each of the parties and their respective assigns does not assist the respondent, in the circumstances of this case, as the covenant to pay for repairs being positive would not run with the land and there is no question of novation. In the result the respondent is left to his rights against William Zawick personally under the contracts referred to above.

For the above reasons I would allow the appeal and substitute for the judgments below a judgment (i) declaring that the title registered in the name of the appellants is a good and valid title free from the claims asserted in caveats Numbers 7063 H.V. and 6823 J.H. and free from the claims of the respondent under the agreements of June 23, 1951 and December 13, 1951, (ii) directing that the said two caveats be expunged from the Register, and (iii) referring it to the Clerk of the Court to take the accounts between the appellants and the respondent in respect of the Craig Nair Block from January 28, 1953, pursuant to the applicable Rules of Court. The appellants are entitled to their costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Morrow & Morrow.*

Solicitors for the respondent: *Harvie, Yanda & Nisbet.*

MARGARET BJORKMAN AND TORONTO FLYING CLUB LIMITED (*Plaintiffs*) ..... APPELLANTS;

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*Jan. 26, 27
*Mar. 2

AND

THE BRITISH AVIATION INSURANCE COMPANY LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Aviation—Personal accident—Insured killed during night flight—Warranty by insured to abide by regulations issued by air authority—Whether breached.

This was an action by the beneficiary of an aviation personal accident insurance policy. The deceased, a member of the Toronto Flying Club Ltd., crashed and was killed when flying at night in an aircraft piloted by him and owned by the club. The respondent contested liability under the policy on the ground, inter alia, that the insured flying club had breached the warranty in the policy that "all air navigation and airworthiness orders and requirements issued by any competent authority should be complied with in every respect".

The Department of Transport had issued certificates authorizing this plane to fly by night "for instructional purposes only" and further prohibiting the club from "flying for recreational purposes by night".

Held (affirming the judgment at trial and of the Court of Appeal): That the appeal should be dismissed. The flight made at night by the deceased was not a training or instructional flight but a recreational one, and as such was prohibited as was the use of the aircraft.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the dismissal by the trial judge of an action upon a policy of aviation personal accident insurance.

B. J. MacKinnon for the appellants.

B. V. Elliot, Q.C. and *W. L. N. Somerville* for the respondent.

The judgment of the Court was delivered by:—

ABBOTT J.:—The facts in this appeal can be briefly stated.

The action is one by appellants against the respondent under a policy of aviation personal accident insurance issued by the respondent, and arises out of the death of

*PRESENT: Kerwin C.J., Kellock, Cartwright, Fauteux and Abbott JJ.

(1) [1954] 3 D.L.R. 224.

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Abbott J.

Kermit Ernest Bjorkman which occurred during the night of March 31-April 1, 1950, on a flight which he was making from Malton airport to Detroit, Michigan, via Buffalo. After leaving Buffalo at about 9.15 p.m. the deceased apparently encountered bad weather, lost his way, crashed into Lake Huron on the Michigan side, and was drowned.

The deceased was flying a single engine aircraft owned by appellant, Toronto Flying Club Limited, of which he was a member, and he had taken off from Malton airport at about 6.15 p.m. in the evening of March 31, 1950, on a flight which apparently he had planned to make to Wichita, Kansas, and return.

The policy covered "all persons riding in the Club's aircraft excluding Instructors". Unless otherwise provided by special endorsement, the policy excluded from the risk, loss sustained arising out of death or bodily injury while the insured was engaged in night flying, but in fact the policy did contain such an endorsement extending the risk to night flying "provided all such flying is carried out in accordance with the regulations of the Toronto Flying Club Limited".

The respondent contested liability under the policy on the principal grounds (1) that the onus was on the plaintiffs to establish compliance with the regulations referred to in the endorsement and that they had not discharged this onus; (2) that in any event the deceased had not complied with the regulations of the Flying Club respecting night flying as required by the endorsement and (3) that under the terms of the policy, the named insured, the Toronto Flying Club Limited, had "warranted that all air navigation and airworthiness orders and requirements issued by any competent authority should be complied with in every respect", and that this warranty had been breached.

I find it necessary to deal only with this third defence.

On this aspect of the case a vital point to be determined, it seems to me, is whether the flight in question was an "instructional" flight or a "recreational" flight. If it was in the latter category, I do not think the appellants can succeed.

The Certificate of Airworthiness issued by the Department of Transport for the plane flown by the deceased bore the following endorsement:—

Valid for day flying only

Valid for night flying (instructional purposes only) 1/12/48 C.A.B.

The Operating Certificate issued by the Department of Transport to the appellant club contained the following conditions:—

5. Special Conditions

(1) Operations from Malton Airport are permitted as follows:—

(a) By day—with aircraft equipped with a radio receiver capable of receiving radio telephone messages on the Malton Tower frequencies;

(b) By night—with aircraft equipped with functioning two-way radio capable of receiving and transmitting radio telephone messages on the Malton Tower Frequencies.

(2) In addition to The Air Regulations governing night flight, cross-country flights by night are subject to the following conditions:—

(a) Authority to carry out Night Flying is to be obtained from the District Inspector, Air Regulations, and prior clearance is to be obtained from the Aerodrome Control Officer where aerodrome control is provided;

(b) Night cross-country training flights may only be undertaken if:—

(i) the student is accompanied by an instructor holding a valid Public Transport Pilot's Licence;

(ii) undeteriorating VFR weather conditions are forecast;

(iii) the aircraft is equipped with functioning two-way radio capable of communicating with D.O.T. control towers and radio range stations;

(iv) flight plans and arrival reports are filed.

(3) Flying for recreational purposes by night is not permitted.

After a careful consideration of all the evidence, I have regretfully reached the conclusion that the flight which the deceased made on the evening of April 1, 1950, was not a training or instructional flight, and as such permitted under Condition 5(2) of the Operating Certificate.

The Superintendent of Air Regulations of the Ontario District one D. W. Saunders testified that the type of flight upon which the deceased was engaged at the time of his death was not necessary for the purpose of qualifying him for the advanced certificate for which he had applied, and that he was at the time merely getting more experience. So far, therefore, as the ordinary meaning of the word "recreational" is concerned, the meaning which must be given to it in the certificate the flight on which the deceased was engaged was of a recreational nature.

The appellants tendered in evidence, subject to objection, a circular letter written some six months after the death here in question by the Secretary-Manager of the Royal Canadian Flying Clubs Association, in which he gives

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an interpretation of "recreational flying" which he had obtained from some unnamed officials of the Department of Transport to the effect that the meaning of the term as used in the certificate was "carrying passengers for hire or reward on sight-seeing flights."

The document was, in my opinion, inadmissible for the purpose for which it was tendered. Although Mr. Saunders placed the same meaning upon the term, he admitted that was merely his own interpretation and was not justified by anything in the Air Regulations. In the circumstances, I think the flight in question must be considered as having been a flight for "recreational purposes" which was prohibited under Condition 5(3) of the said certificate, as was the use of the aircraft under the certificate of airworthiness.

On this point I do not think there was any error in the judgment of the Court below and I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Kennedy & Ross.*

Solicitors for the respondent: *Kilmer, Rumball, Gordon & Beatty.*

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*Dec. 13, 14, 15

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*Mar. 2

THOMAS ROSS (*Plaintiff*) .....APPELLANT;

AND

ALLAN LAMPORT (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Libel and Slander—Defamation—Statements to reporters published in newspapers—Whether all innuendos should have been placed before jury—Whether words in relation to calling of plaintiff—No actual damage shown—Inflammatory address to jury—Excessive damages awarded.

The appellant, a taxi cab driver and owner, brought this action for damages for libel and slander against the respondent who, at the time, was the Mayor of the City of Toronto and Chairman of its Board of Police Commissioners, a body responsible for the issuance or refusal of licences to taxi cab drivers and owners. The appellant had appealed successfully from a refusal by the Board to grant him a

*PRESENT: Kerwin C.J., Rand, Locke, Cartwright and Abbott JJ.

licence and had moved to commit the respondent for failing to comply with the decision of Lebel J. that a licence should be issued. Oral reasons given by the Chief Justice of the High Court in disposing of this motion were published in the press and contained statements which the respondent regarded as reflecting on himself and the Board. The respondent, in interviews with reporters from two newspapers commented on these statements and charged the appellant with, inter alia, "trafficking in licences". The interviews were reported in these newspapers. The trial judge ruled that the statements made by the respondent were published on an occasion of qualified privilege. The jury found that the words spoken referred to the appellant in his occupation, that in their natural and ordinary meaning they were defamatory of the appellant, that they were also defamatory of him in the sense ascribed to them in some of the innuendos pleaded, that they were published with express malice, and assessed the damages at sums totalling $40,000.

In this Court the respondent contended, as was held by the Court of Appeal, (1) that all the innuendos should not have been placed before the jury as the words published were not capable of bearing the meaning assigned to some of them, (2) that the words spoken were not in relation to the appellant in his calling and that no actual damage was shown, (3) that the address of counsel for the appellant had been inflammatory and (4) that the damages were excessive.

Held: The appeal should be allowed and the new trial directed should be limited to the amount of damages. If the appellant does not elect to have his damages assessed only on the basis that the words were defamatory of him in their natural and ordinary meaning, the judge presiding at the new trial will decide on each innuendo as to whether the words are reasonably capable of the meaning ascribed and will instruct the jury accordingly.

Per Kerwin C.J. and Rand J.: In view of the position taken at the trial by counsel for the respondent where he sought to use all the innuendos in order to strengthen his argument that the respondent had brought himself within his claim of privilege and was therefore entitled to comment fairly on a matter of public interest, counsel cannot now change his ground and complain that one or more innuendos were not capable of the meaning ascribed.

Per Locke, Cartwright and Abbott JJ.: The course of the trial in regard to the submission of the innuendos to the jury was not satisfactory, and it has not been established that it was such as to preclude counsel for the respondent from relying on that ground of appeal.

Per Curiam: Since the words "trafficking in licences" clearly referred to the appellant in relation to his calling as a taxi cab driver and owner, they were actionable without proof of special damage.

Considering the circumstances, the address of counsel for the appellant to the jury was not inflammatory.

It cannot be said that the Court of Appeal was wrong in holding that the jury acting reasonably could not have awarded so large a sum.

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ROSS v. LAMPORT

APPEAL from the judgment of the Court of Appeal for Ontario (1), ordering a new trial in an action tried by a jury for damages for libel and slander.

R. N. Starr, Q.C. for the appellant.

J. J. Robinette, Q.C. for the respondent.

THE CHIEF JUSTICE:—In an action for libel and slander the plaintiff secured a judgment for $40,000 damages against the respondent upon the answers of the jury made to these questions:—

1. Were the words complained of spoken to:
   (*a*) Hamilton Yes
   (*b*) Belland Yes
2. Did the defendant authorize or intend the publication of the words complained of
   (*a*) in Exhibit 2—*Globe and Mail* Yes
   (*b*) in Exhibit 4—Toronto *Star* Yes
3. With respect to slander do the words refer to the Plaintiff in the way of his trade or calling? Yes.
4. Are the words defamatory to the plaintiff
   (*a*) in their natural and ordinary meaning Yes
   (*b*) in any of the meanings attributed to them in the innuendo Yes
5. Are the words in their natural and ordinary meaning true in substance and in fact? No
6. In so far as the words are comment, are they fair comment on facts truly stated? No
7. Was there express malice on the part of the defendant? Yes
8. Damages:

for slander to Hamilton and/or	2,500.00
for slander to Belland and/or	2,500.00
for libel in *Globe and Mail* and/or	25,000.00
for libel in Toronto *Star*	10,000.00

We find for the Plaintiff.

The Court of Appeal for Ontario (1) set aside the judgment and ordered a new trial generally, because, in the opinion of the Members of that Court:—(1) The trial judge erred in allowing all the innuendos to be placed before the jury; (2) The address to the jury of Counsel for the appellant at the trial was inflammatory; (3) The damages awarded by the jury were so excessive as to amount to a wholly incorrect estimation. The plaintiff now appeals.

(1) [1955] O.R. 542; 4 D.L.R. 826.

The appellant's calling was that of a taxi driver and owner and the respondent was Mayor of Toronto and Chairman of the Board of Police Commissioners for the city. The appellant and one Smith had been partners in various taxi cab businesses and in 1950 these businesses were sold for a substantial sum. The necessary approval of the Board was given to the transfer of the licenses from the appellant and Smith. In the spring of the following year Smith obtained the Board's approval of the purchase by him of a business known as Imperial Taxi and in this new business the appellant was a partner.

Smith was drowned in the autumn of 1951 and the appellant, in addition to doing what he could for Smith's widow, applied to the Board for a taxi cab license in his own name. This was refused, but, on appeal, Mr. Justice Lebel ordered the Board to issue the license. It becoming apparent that the Board did not intend to obey this order, a motion was launched to commit the Members of the Board who thereupon moved to rescind, or vary, the order of Lebel J. Both motions were heard before the Chief Justice of the High Court on the 29th and 30th of October, 1953. On the morning of the latter day Counsel on behalf of the Board Members undertook that the appellant would be granted the license if the appellant would withdraw the committal proceedings. An order was subsequently issued incorporating these terms and disposing of the question of costs which had been left by the parties to Chief Justice McRuer, but, in the meantime, on October 30, the respondent was interviewed by Hamilton, of the *Globe and Mail* newspaper, and by Belland, of the Toronto *Star* newspaper. The words spoken by the respondent to these men and the reports in the two newspapers contain the slanders and libels in issue.

As to the first point upon which the Court of Appeal set aside the judgment at the trial, I am of opinion that, in view of the position taken at the trial by Counsel for the respondent, the latter cannot change his ground and complain that one or more innuendos were not capable of the meaning ascribed. What occurred at the trial is set out at pages 340, 341 and 342 of the record at a point in the trial where Counsel for the respondent was seeking to use all the innuendos in order to strengthen his argument that the

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respondent had brought himself within his claim of privilege and was therefore entitled to comment fairly on a matter of public interest.

At this stage a point raised by Mr. Robinette may be dealt with. He argued that no actual damages having been proved, the spoken words were not said in relation to the appellant in his calling. The calling of the appellant was that of a taxi cab driver and owner and, in view of the authority conferred upon the Board in relation to licensing, the charge, as it appears in the defamations of "trafficking in licenses" refers clearly, in my opinion, to the appellant in relation to his calling. The Board, including the respondent, had taken a decided stand with reference to people who, in their opinion, were obtaining licenses and then attempting to build up a good will, for both of which they might be able to obtain a substantial sum upon the transfer of the license, the approval of which transfer came under the jurisdiction of the Board. A license was necessary for the plaintiff to carry on a taxi business and the charge that he was trafficking in licenses, in my opinion, clearly brings the case within the well settled rule as set forth in the 3rd edition of Gatley on Libel and Slander, at pp. 61 et seq. Upon this point the 4th edition of this textbook must be read with care in view of *The Defamation Act, 1952,* which was enacted in Great Britain subsequent to the appearance of the 3rd edition. The decision of the House of Lords in *Jones* v. *Jones* (1), is distinguishable as is apparent from a reading of this part of the headnote:—

> An action of slander will not lie for words imputing adultery to a schoolmaster, in the absence of proof of special damage, unless the words are spoken of him touching or in the way of his calling.

Here the defamations claimed show that there was nothing personal like that which occurred in the case of the schoolmaster but it affected the very means of livelihood of the appellant.

The Court of Appeal considered that the address of the appellant's Counsel had been inflammatory. It is impossible to lay down any hard and fast rule, but it should be emphasized that in such an action as this the damages may be punitive and furthermore it must be remembered that by reason of the holding of the trial judge that the occasions

(1) [1916] 2 A.C. 481.

were privileged, it was necessary to secure from the jury an affirmative finding that there was malice. The reference by Counsel for the appellant to the larger question of autocratic behaviour on the part of some Boards was made only to bring in the particular application of the words in issue in this litigation. Upon consideration of what was said by Counsel, I am, with respect, unable to agree that, considering the setting and all the circumstances, his address was inflammatory.

Finally, the Court of Appeal considered that the amount awarded amounted to a wholly incorrect estimation. In *Deutch* v. *Martin* (1), this Court decided that:—

> When an appellate court is considering whether a verdict should be set aside on the ground that the damages are excessive (there being no error in law), it is not sufficient for setting it aside, that the appellate court would not have arrived at the same amount; its rule of conduct is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence; this is the rule in contract cases (*Mechanical and General Inventions Co. Ltd.* v. *Austin* (1935) A.C., 346, at 378), and the same rule applies in cases of tort.

In the *Mechanical* case (2), Lord Wright referred to *Praed* v. *Graham* (3), where the Court of Appeal had refused to set aside a judgment in an action for damages for libel because they thought that, having regard to all the circumstances of the case, the damages were not so large that no jury could reasonably have given them. I would certainly not have awarded the substantial sums fixed by the jury in the present case, but that by itself is not sufficient and the question to be determined is whether the jury appreciating the evidence could reasonably have awarded the appellant the various amounts. My conclusion is that they could not.

The appeal should therefore be allowed and a new trial directed but only as to the amount of damages. The appellant has the finding of the jury in his favour that the words were defamatory of him in their natural and ordinary meaning and he may decide to have his damages assessed on that basis only. However, as a practical matter, if he elects to ask the jury for damages in the light of any of the innuendos set forth in the statement of claim, the presiding judge

(1) [1943] S.C.R. 366. (2) [1935] A.C. 346.
(3) (1889) 24 Q.B.D. 53.

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will decide in each case as to whether the words are reasonably capable of the meaning ascribed. Where he decides in the negative, that will be the end of the matter; but, where he decides in the affirmative, it will be left to the jury to assess the damages. The appellant should have his costs of the action down to and including the trial and the costs of the appeal to this Court, but the respondent should have his costs in the Court of Appeal. The costs of the new assessment of damages should be in the discretion of the presiding judge.

RAND J.:—This is an action for slander and libel. The respondent Lamport was mayor of Toronto when, in 1953, the Police Commission of which he was chairman was directed by an order of a judge of the High Court to issue a taxi-cab owner's license to the appellant Ross. The Commission did not comply with the order and a motion was made before the Chief Justice of the High Court to attach the respondent and one other member in contempt. At the same time a cross-motion was launched to set the order aside. By consent and on the undertaking of the Commission to issue the license both motions were dismissed except as to costs which were to be settled by the court. A direction that they should be paid by the Commission was accompanied by reasons which reviewed the facts of the controversy in detail. Upon these being called to his attention, the mayor in an interview gave out for publication, first, to a reporter of the Toronto *Star* newspaper and a few hours later to two representatives of the *Globe and Mail,* a violent criticism of the original order and of the reasons given by the Chief Justice. Included in the remarks were words to the effect that Ross had been guilty of "trafficking" to his profit in taxi licenses and that the Commission had been acting in the best interests of the public in its refusal to issue one. This action was thereupon brought.

The jury found that the words had been spoken maliciously of Ross in the way of or relating to his occupation and were defamatory, and fixed the damages as follows: for the words spoken to the first reporter, $2,500 and for the publication in the *Star* $10,000; for the second communication, $2,500 and on the publication in the *Globe and Mail* $25,000.

On appeal a new trial was directed. Mr. Robinette, for the respondent, supported that direction on four grounds: that of four innuendoes alleged, two were beyond any reasonable interpretation of the language used; that the words spoken were not in relation to Ross in his calling and that no actual damage was shown; that the address of counsel had been inflammatory; and that the damages were excessive.

The first of these objections is disposed of by what took place at the trial. The role of the court in dealing with innuendoes was expressly raised by counsel for Lamport at the trial, and the following exchange is sufficient to conclude the point taken:

HIS LORDSHIP: Of course, if the jury comes to the conclusion—if it is left to them, for instance, the innuendo in paragraph 5 that Ross had obtained in some way the good offices of the Chief Justice of the High Court, in my view I have grave doubts whether they believe that was a fact that would be germane to the business of his living.

HON. MR. HAYDEN: My friend has set up that innuendo and there is no way in which—that I know in law in which we can get the benefit of the opinion of the jury—

HIS LORDSHIP: Any defence—

HON. MR. HAYDEN: No, or even on the question of whether it is capable—whether that innuendo has been established or not, because the verdict of the jury is a general verdict on the libel but I think your lordship has the right to determine whether or not the words in their natural and ordinary meaning are capable of a defamatory—are capable of being said to be of a defamatory nature, and also I think your lordship is entitled to rule so far as the innuendo is concerned they are capable of such an innuendo, I think that is all part of the duty which your lordship has, but what I am arguing in connection with the qualified privilege is something more basic, your lordship's function as to determine whether or not qualified privilege exists on this occasion.

These remarks were made in the course of an argument which sought to bring all the innuendoes within the privilege of fair comment on a matter of public interest. For the purposes of the trial the respondent thus committed himself to allowing them to go to the jury as fair interpretations of the language used; and having done so, he cannot be heard to complain on appeal that they should have been withdrawn.

The second point presents a question of some nicety in the examination of which a distinction must be made between the several statements made. The main charge was that of "trafficking in licenses": could this be found to be a slander actionable without proof of actual damage?

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The law on this question was thoroughly reviewed by the House of Lords in *Jones* v. *Jones* (1), from which the scope and character of this genre of slander can be summarized as follows: words spoken of a person following a calling, imputing lack of fitness for or misconduct in the calling, are per se actionable. The statement here was expressly made of Ross and in its plain meaning it is directed to him in his calling. "Trafficking in licenses" implied both a lack of good faith toward the Commission and a direct object in obtaining licenses which the appellant knew to be in the face of its administrative policy, an object which would justify the Commission in refusing a license or a transfer. The business was the carrying of passengers and with that as the sole end in view; to enter upon it for the purpose of building up a quasi-franchise that could be sold at a profit is, I should say, carrying on that business illegitimately and is misconduct in the course of it.

The cases in which difficulties have been encountered in this category have generally been concerned with moral or other delinquency not necessarily incompatible with the continuance of the calling but an imputation of which might have repercussions upon it. In them the courts have required that the imputation either by express reference or necessary implication touched the calling prejudicially, and it is argued that a license in no aspect can in the proper sense be said to do that to a taxi business. In considering this we must take the law of slander to be more than a mere series of specific and disparate rulings; as Lord Sumner in *Jones* v. *Jones, supra,* at p. 500, says:

> The Court of Appeal in the present case says (1) "the law of slander is an artificial law. . . . It is not like a law founded on settled principles, where the Court applies established principles to new cases, as they arise." I think this does the common law on the subject less than justice. . . . (4) when words are spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling. The classification is one of words, not of persons, but it is a classification only. There is no reason why all four classes of words should be held to import legal damage for the same or for some analogous reason. I think these rules are as well established, as worthy of being called principles, and as capable of being applied to new cases when they arise, as are most rules or principles of law or equity. Perhaps they are neither ideally just nor ideally logical, but principles are like that.

(1) [1916] 2 A.C. 481.

Apart from special cases, the consideration underlying oral defamation is that the language in the reasonable judgment of men could not but have a damaging effect on the person in the occupation he pursues; anything short of that would open the door to a flood of actions over mere "words" which experience shows, for the most part, to be evanescent in effect. But the language before us describes not only misconduct but also a want of capacity: a license is as essential as the skill to drive, which also must be satisfactorily shown; and in this there is a clear analogy in the cases. A charge of insolvency spoken of a trader "touches a man in his trade because it is an attack upon a necessary part of his trading equipment": Lord Wrenbury in *Jones* v. *Jones, supra,* at p. 507: in like manner the license is a necessary part of the equipment of a taxi business; and both in this aspect and as misconduct, the imputation of trafficking takes us directly within the structure of the operations.

On the other hand the innuendoes imputing dishonesty toward the Chief Justice of the High Court in the application for attachment and that in some way Ross had succeeded in winning his good offices do not touch Ross, the taxi operator; their stigma affects him as a litigant and an individual. But, as Pickup C.J. says, the failure to make this distinction clear to the jury could have affected only the quantum of damages which will now be dealt with.

The third ground was argued as interlocked with the fourth. The inflammatory address was said to have produced damages beyond the limits of any reasonable relation to the offence and the authorities cited in support of the objection were, without exception, cases where the damages were found to be in that sense excessive. But the grounds are distinct and severable. An inflammatory address, in the proper understanding of that expression, is sufficient in itself to call for a re-assessment unless, among other things, it can be said that the amount awarded demonstrates that the jury could not have been influenced by it. But an excessive award as an individual objection must be examined from the standpoint of other considerations.

On the former ground I am constrained to observe that, as it was once, in effect, put in the Court of Appeal for Ontario by Riddell J.A., a lawsuit is not a tea party, and except where there has been a clear and objectionable

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excess, we should hesitate to put shackles on the traditional scope allowed counsel in his plea to the tribunal of his client's countrymen. The attempt to divest a trial of any feeling would not only be futile but might defeat its object which is to ascertain the reality of past events. In libel damages can be punitive or exemplary, and malice can be an ingredient, and from these it is impossible to dissociate all feeling. The objectionable elements in inflammatory remarks are primarily irrelevant ideas which are highly provocative of hostility; but I should have found difficulty in finding anything in Mr. Starr's address of this character. The reference to the tendency of present day administrative bodies to become arbitrary and to resent interference with their action is surely legitimate: the illustration of the particular by the general has been a useful and effective device since the institution of the jury. In many cases it is almost necessary to convey a real appreciation of the full nature and significance of the action assailed. But that the verdict here represents a castigation of the respondent for the sins of all of his brother administrators does not, I fear, do justice to those who found it. The best test for such a question is experience, and I doubt that the previous generations of advocates would have been moved to raise an eyebrow, much less be shocked, by anything uttered in this case.

But I put that question aside. I am unable to say that the Court of Appeal was wrong in finding the damages awarded were excessive in the second sense. Although in such a matter damages are substantially what a jury thinks fit to find, whether as speculatively estimated actual damages, as so-called general damages, or as exemplary or punitive damages—the words simply define an area almost at large—yet the judgment upon these considerations must be proportionate to the situation in which they were uttered. Here Lamport was acting as a public official. Towards Ross as an inconspicuous individual he can be taken to have had no resentment but toward him as an applicant for a license who had been guilty of causing a violent irruption upon the otherwise placid proceedings of the Commission, amounting almost to a subversion, the attitude was quite different. The view of the jury was probably that the mayor had struck out against him as

against a marauder, recklessly and regardless of the facts intending to administer a chastisement that would demonstrate both his culpability and the outrageous treatment accorded the Commission. That was not the object or purpose of the privileged occasion, the protection of which he sought to invoke: *Royal Aquarium* v. *Parkinson* (1). What resulted was a substantial wrong to Ross. On the other hand, the mayor was attempting, though in a somewhat crude manner, to vindicate the action of a public body; and however objectionable the insolence of office may be, it is certainly not desirable that zeal, however misguided, in protesting what can be taken to be believed to be an injury to the public interest, should draw upon itself such an exorbitant condemnation.

But I see no reason to have all of the issues in this case threshed out anew. As Laidlaw J.A. in *Arland* v. *Taylor* (2), in his valuable review of the law dealing with new trials, said, it is against the interest of the administration of justice that they should be directed if it is clear that substantial justice has been done in determining the real issues; and although it was intimated by Pickup C.J. that in some other but unstated respects the trial seemed to be unsatisfactory, that there was substantial justice done here on the main questions is, I think, beyond controversy. I should add that before the Court of Appeal the circumstances of the two innuendoes objected to do not appear to have been made as clear as they were in the argument before us. I would therefore limit the rehearing to a re-assessment of damages.

On that rehearing, however, the answer of the jury to question 4(*b*),

> Are the words defamatory to the plaintiff . . .
> (*b*) in any of the meanings attributable to them in the innuendo?
> Answer, yes.

requires consideration. The innuendoes set forth in para. 5 of the statement of claim can be treated as being five in number, and the jury were asked to find whether "any" of them were defamatory. In that situation it cannot be said which specifically is or are intended by the answer "yes", and the answer, concluding an undisclosed fact, cannot form a factual basis of damages for a new jury. If, then,

(1) (1892) 1 Q.B. 431. (2) [1955] O.R. 131 at 138.

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the appellant desires to rely upon the innuendoes, the verdict as to them must be opened and it will be necessary for the new jury to deal with them *ab initio*. I should remark, however, that whether the innuendoes are relied upon or abandoned, the item included in para. 4 by the words "that he was concerned only in trafficking in licenses as a profit to himself and in preference to serving the public in his trade" is not to be taken as restricting the plain and ordinary meaning of the libel to be drawn from the words used.

I would allow the appeal and modify the judgment of the court below by limiting the new trial accordingly. The appellant will be entitled to his costs of the trial and of the appeal to this Court and the respondent to the costs in the Court of Appeal. The costs on the re-assessment will be as directed by the judge before whom it is made.

The judgment of Locke, Cartwright and Abbott JJ. was delivered by:—

CARTWRIGHT J.:—The facts out of which this action arises and the questions raised before us are set out in the reasons of my Lord the Chief Justice and of my brother Rand. I agree with the conclusion at which they have arrived and propose to state my reasons briefly.

Before charging the jury the learned trial judge submitted to counsel the questions which are set out in the reasons of my Lord the Chief Justice. Counsel for the appellant indicated that he found these satisfactory. Counsel for the respondent, while not expressly objecting to questions being put, made it clear that he did not consent to this course being followed and submitted that if questions were to go before the jury they should be amended. Having heard the submissions of counsel the learned judge decided to put the questions before the jury without amendment. At the beginning and again at the end of his charge the learned judge made it clear to the jury that they were free to answer the questions or to leave them unanswered and to bring in a general verdict. This was, in my opinion,

a permissible course authorized by the terms of s. 4 of the *Libel and Slander Act*, R.S.O. 1950, c. 204, reading as follows:—

> On a trial of an action for libel the jury may give a general verdict upon the whole matter in issue in the action, and shall not be required or directed to find for the plaintiff, merely on proof of publication by the defendant of the alleged libel, and of the sense ascribed to it in the action; but the court shall according to its discretion, give its opinion and directions to the jury on the matter in issue as in other cases, and the jury may on such issue find a special verdict, if they think fit so to do, and the proceedings after verdict, whether general or special, shall be the same as in other cases.

By answering the questions the jury have in effect returned a special verdict, as they were free to do. In adding at the end of their answers the words—"We find for the Plaintiff"—they may be said to have also found a general verdict but such general verdict is consistent with the facts found in the special verdict and in my view the case should be treated as one in which a special verdict has been found.

I am of opinion that the findings of the jury in the answers to questions 1(*a*), 1(*b*), 2(*a*), 2(*b*), 3, 4(*a*), 5, 6 and 7 are all supported by the evidence, that the charge of the learned trial judge in respect of the matters dealt with in such answers was adequate and that such findings established the appellant's right to recover damages. I do, however, share the view of the learned Chief Justice of Ontario that the course of the trial in regard to the submission of the innuendoes to the jury was not satisfactory, and I am not altogether satisfied that the course of the trial was such as to preclude counsel for the respondent from relying on that ground of appeal. It is true that counsel who appeared for the respondent at the trial used the words —"I think your Lordship is entitled to rule so far as the innuendo is concerned they (i.e. the words complained of) are capable of such an innuendo"—but after reading the whole of the discussion in the course of which this statement was made I am doubtful whether it was intended or understood as an invitation to the learned judge to so rule; and I am unable to see that such a ruling if made would have assisted the argument as to qualified privilege with which counsel was then dealing. The basis of that argument was that the respondent and the commission of which he was the chairman had been attacked as arbitrarily

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depriving the appellant of his living, that such attack had been published in the press, that is to the world, that the respondent was entitled and under a duty to address a reply and defence to the same audience and that, so long as in so doing he did not go beyond what was reasonably germane to answering such attack, what he caused to be published was published on an occasion of qualified privilege. The duty of the learned judge in dealing with such a submission is stated as follows in *Douglas* v. *Tucker* (1):

> . . . The appellant was entitled to reply to such a charge and his reply would be protected by qualified privilege, but I think it clear that this protection would be lost if in making his reply the appellant went beyond matters which were reasonably germane to the charge which had been brought against him. It is for the judge alone to rule as a matter of law not only whether the occasion is privileged but also whether the defendant has published something beyond what was germane and reasonably appropriate to the occasion so that the privilege does not extend thereto.

A ruling that the words complained of were capable of bearing all the meanings ascribed to them in the innuendoes would appear to have increased the likelihood of the learned trial judge ruling that the respondent's answer had gone beyond what was germane to the occasion. However, as the jury have found that the words complained of were defamatory of the appellant in their natural and ordinary meaning, any error that occurred in regard to the innuendoes could affect only the quantum of damages; and as I have concluded that there must be a new assessment of damages, I do not pursue this point farther.

With the greatest respect for the contrary view entertained by the Court of Appeal I am unable to find anything in the address of counsel for the plaintiff to the jury which would warrant any interference with the verdict found.

I have already indicated my view that the finding that the spoken words complained of referred to the appellant in the way of his trade or calling cannot be successfully attacked.

There remains the question of the amounts at which the damages were assessed. These amounts are much larger than I would have fixed had it been my duty to assess them but that, of course, would not of itself be a sufficient reason for interference. However, the Court of Appeal have unanimously reached the conclusion, as a distinct ground of

(1) [1952] S.C.R. 275 at 286.

decision, that the jury acting reasonably could not have awarded so large a sum and I am unable to say that they were wrong in so deciding.

For the reasons given by my brother Rand I agree with his conclusion that the new trial should be limited to the assessment of damages and I wish only to add that a similar course has been followed in actions for libel by the Judicial Committee in *Abraham* v. *Advocate Company* (1), and, as has been called to my attention by my brother Locke, by the House of Lords in *Tolley* v. *J. S. Fry and Sons, Limited* (2).

In regard to the innuendoes, it is my opinion that, even if it should be held that counsel for the respondent is precluded from complaining of the manner in which they were left to the jury at the first trial, the position of the parties at the new trial will not be affected by the findings of the jury in answer to question 4 (*b*), as that answer is inconclusive. Paragraph 5 of the Statement of Claim ascribes five innuendoes to the words published, viz, that the plaintiff, both in his personal capacity and in his capacity as a taxi-driver and owner, (i) had been dishonest with the Honourable the Chief Justice of the High Court; (ii) had been dishonest with the Board of Police Commissioners for the City of Toronto; (iii) had been dishonest in his relations with the public; (iv) was concerned only in "trafficking" in licenses at a profit to himself in preference to serving the public in his trade, and (v) had obtained in some way the good offices of the Chief Justice of the High Court. It is impossible to tell from the answer of the jury whether they found that the words were understood to have the meaning alleged in one only or in some or in all of the innuendoes.

As it has now been established in the plaintiff's favour that the words in their natural and ordinary meaning are defamatory of him and that he is entitled to have his damages assessed, it may be that at the new trial he will not insist on the questions raised by the innuendoes being submitted to the jury. If he does, it will be for the presiding judge, after having heard the evidence, to decide as to each innuendo whether the words published are reasonably capable of bearing the meaning thereby attributed to them

(1) [1946] 2 W.W.R. 181. (2) [1931] A.C. 333.

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and in the case of those innuendoes in regard to which he decides this question in the affirmative to leave it to the jury to say whether the words were understood to have the meaning so ascribed to them. I do not mean by anything I have said above to suggest that the jury at the new trial should be asked to answer any questions other than a question as to the amounts at which they assess the damages on the four heads set out in question 8 put at the first trial. The whole conduct of the new trial will, of course, be in the hands of the presiding judge subject only to this that the findings of the jury at the first trial in their answers to questions 1(*a*), 1(*b*), 2(*a*), 2(*b*), 3, 4(*a*), 5, 6 and 7 must all be taken as established.

I would dispose of the appeal as proposed by my Lord the Chief Justice.

Appeal allowed and new trial directed limited to the amount of damages.

Solicitors for the appellant: *Sinclair, Goodenough, Higginbottom & McDonnell.*

Solicitors for the respondent: *McCarthy & McCarthy.*

JOHN BRUCE ENGLISH (*Plaintiff*) ....APPELLANT;

AND

SAMUEL RICHMOND AND FRANKLIN PULVER (*Defendants*) .....} RESPONDENTS.

1955
*Nov. 30
1956
*Mar. 2

MARGARET MILLICENT LAING (*Plaintiff*) .....} APPELLANT;

AND

SAMUEL RICHMOND AND FRANKLIN PULVER (*Defendants*) .....} RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Automobiles—Collision—Negligence—Plea of guilty to careless driving charge entered by counsel in criminal court—Whether evidence of plea admissible in civil court—Whether trial judge right in discharging jury and hearing case alone—Negligence Act, R.S.O. 1950, c. 252—Judicature Act, R.S.O. 1950, c. 190—Supreme Court Act, R.S.C. 1952, c. 259, s. 44.

Following a motor vehicle collision at an intersection, the appellant E. brought an action against the respondents for personal injuries and damages to his car.

A second action was brought by the appellant L. against the same respondents pursuant to the *Fatal Accidents Act* for the death of her husband who was a passenger in the car driven by the appellant E.

Both actions were tried together and were dismissed by the trial judge on the ground that the sole cause of the accident had been the negligence of the appellant E. This judgment was affirmed by the Court of Appeal.

At the trial, the judge, in the absence of the jury and without deciding as to its admissibility, heard evidence, subject to objection, of a plea of guilty which had been entered by counsel for the appellant E. in the latter's presence in a court of criminal jurisdiction on a charge of careless driving under the *Highway Traffic Act*. No conviction was tendered in evidence. Following the admission of this evidence, the trial judge, of his own motion and without hearing counsel, decided to discharge the jury and continue the trial himself. Counsel for the appellants did not take objection to that course, and the parties agreed that the evidence taken in the absence of the jury should be treated as evidence in the case. The trial judge, in his reasons for judgment, did not find it necessary to rule on the admissibility of the evidence. Before the Court of Appeal and this Court, the appellants contended that the jury should not have been discharged.

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

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Held (Cartwright and Abbott JJ. dissenting): The appeals should be dismissed.

Per Kerwin C.J. and Taschereau J.: The trial judge's discretion to discharge the jury was properly exercised since the evidence of the plea of guilty was admissible. The contention that the plea was inadmissible because it had been entered by counsel and not by the appellant, that it was only for the purposes of the criminal proceedings and that counsel's authority did not extend to that fact being treated as an admission in the present trial, is not tenable.

The appellants failed to establish that the trial judge's finding of negligence, concurred in by the Court of Appeal, was wrong.

Per Locke J.: There were concurrent findings as to the negligent act which caused the accident, and no sufficient grounds have been shown for interference with that finding.

In view of the undoubted jurisdiction of the trial judge by virtue of the *Judicature Act* to discharge the jury, and in view of the fact that, as was found by the Court of Appeal, it was not shown that in so doing he proceeded upon a wrong principle, no appeal lies to this Court from that discretionary order by reason of s. 44 of the *Supreme Court Act*.

Furthermore, since the trial had proceeded on the footing that there was no objection by counsel for the appellants to what had been done, it was too late thereafter to raise the objection that the order dispensing with the jury had been improperly made (*Scott* v. *Fernie Lumber Co.* (1904) 11 B.C.R. 91 at 96 referred to).

The evidence of the charge and of the plea of guilty was relevant and admissible. Even if it were not so, there should not be a new trial as it would be impossible to find that any wrong or miscarriage had resulted: s. 28 of the *Judicature Act*.

Per Cartwright J. (dissenting): The rule that the trial judge should decide questions as to the admissibility of evidence as they arise applies not only to criminal but also to civil cases whether tried with or without a jury.

In the circumstances of this case, counsel should not be held to have acquiesced in the course taken at the trial simply because he did not attempt to argue against it after the trial judge had not merely stated that he proposed to follow such course but had announced his decision to do so, and consequently the rule in *Scott* v. *Fernie Lumber Co.* ((1904) 11 B.C.R. at 96) has no application.

The failure of the trial judge to rule as to the admissibility of the evidence at the time when it was his duty to do so, deprived the appellants of their substantial right to have the action tried by a jury and there should be a new trial before a jury.

Semble, for the reasons given by Abbott J., that the evidence in question was inadmissible.

Per Abbott J. (dissenting): The plea of guilty implied no more than a desire for peace, and as such was not an admission at all, had no probative value in the subsequent civil action and the evidence that it had been entered should have been rejected. Furthermore, an admission made by counsel on behalf of an accused in a criminal proceeding is not evidence in a civil matter unless the authority to

make such admission was an authority to make it for the purposes of a civil action as well (*Potter* v. *Swain and Swain* [1945] O.W.N. 514 referred to). In view of the inadmissibility of that evidence, there was in fact no reason for depriving the appellants of their prima facie right to a trial by jury. There was here a deprivation of a substantial right and not an exercise of discretion.

Even had the evidence been admissible, counsel should have been given full opportunity to be heard on the point as to whether the trial should proceed with or without a jury.

APPEALS from the judgment of the Court of Appeal for Ontario, affirming the judgment at trial and dismissing two actions arising out of a motor vehicle collision.

R. N. Starr, Q.C. for the appellants.

W. E. McLean, Q.C. for the respondents.

The judgment of Kerwin C.J. and Taschereau J. was delivered by:—

THE CHIEF JUSTICE:—These are appeals by the plaintiffs from the judgments of the Court of Appeal for Ontario affirming the judgments at the trial which dismissed two actions and awarded damages in a third action brought by one of the defendants in those two actions against one of the plaintiffs. Previously in a court of criminal jurisdiction an information charging the plaintiff English under the *Criminal Code* with the crime of dangerous driving had been withdrawn and a plea of guilty accepted to a charge of careless driving under the provisions of The Ontario Highway Traffic Act. This plea was entered by Counsel for English in the latter's presence. All this was admitted by English in his cross-examination at the trial of the three actions and certain alleged explanations were given as to the reason of the plea of guilty. This testimony was given in the absence of the jury. The trial judge decided to admit in evidence, subject to objection, the fact that the plea had been entered, but he considered that the trial of the actions should then continue before him alone, and the jury, already empanelled, was thereupon discharged.

Mr. Starr objected to the discharge of the jury on the ground that the plea of guilty was improperly admitted. It must be emphasized that no conviction was tendered in evidence. It has been held in this Court in a case from

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the Province of Quebec, *La Foncière Compagnie d'Assurance de France* v. *Dame Blanche Perras and René Mongeau and Octave Daoust* (1), that a conviction registered by a court of criminal jurisdiction has not the effect of creating before the civil courts the presumption *juris et de jure* resulting from the authority of a final judgment, but several decisions in England on the common law were referred to, among them *Castrique* v. *Imrie* (2), in which Blackburn J., speaking for himself and Baron Bramwell, Mellor J., Brett J. and Baron Cleasby, stated as follows:—

> A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged.

Mr. Justice Davis, who wrote a separate judgment in the *Perras* case (1), referred to *In re Crippen* (3) and *Mash* v. *Darley* (4), and to the judgment at the trial in *Hollington* v. *Hewthorn & Co. Ltd.* (5). Subsequently, in the last mentioned case, the Court of Appeal (6), while affirming the judgment at the trial, in a judgment delivered by Lord Goddard considered the whole matter carefully and overruled the *Crippen* and *Mash* cases. Even there, however, Lord Goddard pointed out at pp. 599 and 600:—

> It may frequently happen that where bigamy or any other crime has to be proven in a civil proceeding, the prisoner on his trial had pleaded guilty. Proof of the confession by a witness present at the trial is admissible because an admission can always be given in evidence against the party who made it. In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial.

All that was proved in the present case was the fact that English had pleaded guilty through his Counsel and, while I understood Mr. Starr to admit that if English himself had pleaded guilty that fact would be admissible in evidence, in case I am wrong as to his position, I think such a statement would be admissible. Mr. Starr raised the narrow point that since here it was the Counsel for English who had entered the plea, that was only for the purpose of the particular proceedings before the Magistrate and that his

(1) [1943] S.C.R. 165.
(2) (1870) L.R. 4 H.L. 414.
(3) [1911] P. 108.
(4) [1914] 1 K.B. 1.
(5) [1943] K.B. 27.
(6) [1943] K.B. 587.

authority did not extend to that fact being treated as an admisison in the trial of these actions. He relied upon the decision of the Court of Appeal in Ontario in *Potter* v. *Swain* (1). The note of that decision is not a full report, but if it purports to decide that an admission by Counsel in the form of a plea of guilty to a charge of crime, or what is known as a provincial crime, in the presence of the accused is not admissible, I am unable to agree with it.

The statement in Wigmore on Evidence, 3rd ed., vol. 4, p. 24, also relied on, relates to offers of compromise and the cases referred to by Mr. Starr at p. 44 do not detract from the statement at p. 43 "but conversely all his (i.e. the attorney's) admissions during that managament including the utterances in the pleadings do affect the client". The statement in the 11th ed. of Bowstead's Digest of the Law of Agency, at p. 232, is as follows:—

> A solicitor or counsel is retained to conduct an action. Statements made by him in the conduct and for the purposes of the action are evidence against the client. But statements made by him in casual conversation, and not in the course and for the purposes of the action, are not. So, statements made by a solicitor for the purposes of one action cannot be used as evidence in another action which the solicitor is conducting on behalf of the same client; and admissions made by counsel at a trial have been held not to be binding at a new trial which had been ordered by the Court of Appeal (*d*).

The case referred to in note (*d*), *Dawson* v. *Great Central Railway* (2), is merely a decision that an admission by counsel at the first trial of an action is not binding on a new trial.

Mr. Starr's next contention that even if there were an admission by or on behalf of English it was not evidence as to the cause of the accident really goes to the question of weight and not admissibility.

These are the only grounds suggested as to the impropriety of the trial judge dispensing with the jury and, in my opinion, the trial judge's discretion was properly exercised.

Finally, it was argued that the judgment of the trial judge, although concurred in by the Court of Appeal, was wrong. As to this, it is sufficient to say that Mr. Starr has not persuaded me that this is so. The trial judge disregarded the evidence of the plea of guilty in coming to

(1) [1945] O.W.N. 514. (2) (1919) 88 L.J.K.B. 1177.

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his conclusion and the reasons given by him for dismissing the two actions and awarding damages in the third appear to me to be well founded as it is admitted that the plaintiff Margaret Millicent Laing is in the same position as English.

The appeals should be dismissed with costs.

LOCKE J.:—These two actions were tried together by Wilson J., and dismissed upon the ground that the sole cause of the accident was the negligence of the appellant English. As Murray Gordon Laing, who died of the injuries sustained by him, was a passenger in the car driven by English, the action brought by his widow failed by reason of the provisions of s. 2(2) of the *Negligence Act* (R.S.O. 1950, c. 252).

The unanimous judgment of the Court of Appeal delivered by Hope J.A. dismissed the appeals taken from the judgment at the trial, the reasons delivered stating that no grounds had been shown upon which the court should interfere with the trial judge's finding of negligence. There are thus concurrent findings as to the negligent act which caused the accident.

The appellants appeal against this finding and alternatively ask for a new trial on the ground that evidence was improperly admitted at the hearing and upon the further ground that in discharging the jury during the course of the trial the learned trial judge had exceeded his jurisdiction.

It is necessary to consider with some care the record as to what took place upon this latter aspect of the matter at the hearing. The appellant English was the first witness called by the plaintiffs and gave evidence as to the manner in which the accident occurred. When cross-examined, counsel for the defendants asked him whether a charge had been laid against him in connection with the matter. The learned trial judge at once raised the question as to the relevancy of this and directed that the jury retire while the matter was argued. After hearing counsel for the respective parties, in the absence of the jury, he permitted the appellant English to answer the question as to whether it was a fact that a charge had been laid against him in the Police Court at Barrie arising out of the accident, charging him with unlawfully driving a motor vehicle without due

care and attention or without reasonable consideration for other persons using the highway, contrary to the provisions of the *Highway Traffic Act* (R.S.O. 1950, c. 167). This he admitted and, further, that the information was read to him and that, in his presence, counsel representing him pleaded guilty on his behalf. Following this, English was reexamined by counsel appearing for the plaintiffs and explained the circumstances under which this plea had been entered. This disclosed that a further charge had been laid against him under the *Criminal Code,* charging him with dangerous driving, and that, after this charge had been partially heard, counsel for the prosecution had informed the magistrate that he did not consider the evidence supported the charge and that he proposed to withdraw it and that, immediately afterwards, English pleaded guilty to the charge under the *Highway Traffic Act.* Counsel for English then called Mr. Thompson, the Crown Attorney for the County of Simcoe who had prosecuted the two charges, who said that before he withdrew the charge under the Code he had suggested to counsel for the accused that, if the latter would plead guilty to the charge under the Act, he would withdraw the charge under the Code and that this was done.

Following the taking of this evidence in the absence of the jury, the learned trial judge decided, without determining the question as to the admissibility of the evidence, that he would admit it subject to the objection but would discharge the jury. His reasons for adopting this course were explained in the following terms:—

> I think it is obvious that the question of the admissibility of the statement made by Mr. English on the occasion of his prosecution on the charge of dangerous driving is one which presents some difficulties. If the evidence is admitted the plaintiffs fear they may be adversely affected. On the other hand, the importance of such an admission to the defendant is not to be overlooked. I think the proper course in this case is to admit the evidence but I shall discharge the jury, which will mean that in the event of either side being dissatisfied with the judgment the Court of Appeal will be able to pronounce a final judgment without the necessity of sending this action back for another trial, which undoubtedly would be the case if it did not agree with the ruling which I should make concerning admissibility.
>
> As to the admissibility itself. I have still an open mind but I propose to take the evidence subject to objection and, of course, I shall have to reserve judgment.

The parties then agreed that the evidence taken in the absence of the jury should be treated as evidence in the

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case and, without objection on the part of counsel for the plaintiffs, the trial proceeded before Wilson J. Seven witnesses in support of the plaintiffs' case gave evidence following the dismissal of the jury and six were called for the defence. The jury had been discharged early in the afternoon of November 23 and the balance of that day, all of the day following, and part of the morning of November 25 were taken up with the hearing of this evidence. The matter was then argued and judgment reserved.

As I have pointed out, counsel for the plaintiffs raised no objection to the order made dismissing the jury and, as the reasons for judgment thereafter delivered by Wilson J. make no mention of the matter, I assume that the propriety of that order was not questioned on the argument.

S-s. 3 of s. 57 of the *Judicature Act* (R.S.O. 1950, c. 190) provides that, notwithstanding the giving of the notice referred to in s-s. 1:—

> the issues of fact may be tried or the damages assessed without the intervention of a jury if the judge presiding at the sittings so directs or if it is so ordered by a judge.

For the reasons given in the passage above quoted, the learned trial judge evidently thought that, since he considered the admission of the evidence as to the plea of guilty upon the charge under the *Highway Traffic Act* might be injurious to the plaintiffs if improperly admitted before the jury and to the defendants if it were improperly excluded, and, being in doubt as to its admissibility, the proper course to pursue was to discharge the jury and try the issues of fact himself. The learned judges of the Court of Appeal have said that it had not been shown that the trial judge exercised his discretion either improperly or upon any wrong principle.

The trial judge's jurisdiction being undoubted and as it is not shown that he proceeded upon a wrong principle, in my opinion no appeal lies to this Court from the order dealing with this aspect of the mater by reason of s. 44 of the *Supreme Court Act*.

There is a further and equally fatal objection to this aspect of the appellant's claim. As I have stated, the trial, from the early afternoon of the second day, proceeded before the learned judge, the plaintiffs proceeding to put in their further evidence and that for the defendants being

taken, apparently on the footing that there was no objection to what had been done. It was too late thereafter, in my opinion, for the present appellants to raise the objection that the order dispensing with the jury had been improperly made.

To permit such a course would be to allow these plaintiffs, having decided to take their chances of success before the trial judge sitting alone and having lost, to have thereafter a second opportunity to recover damages. In *Scott* v. *Fernie Lumber Company* (1), Duff J. (as he then was) delivering the judgment of the full Court of British Columbia, referred to:—

> the rule long established, which holds a litigant to a position deliberately assumed by his counsel at the trial, . . . The rule is no mere technicality of practice; but the particular application of a sound and all-important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

An illustration of the practical application of this salutary rule may be found in the judgment of the Court of Appeal for British Columbia in *Elk River Timber Co.* v. *Bloedel, Stewart and Welch* (2). I refer particularly to the judgments of Macdonald C.J.B.C. at pp. 496-7 and that of McDonald J.A. (as he then was) at pp. 524-5. The rule is, in my opinion, applicable and should be invoked in the present case.

As to the evidence which, it was claimed, was improperly admitted, no ruling as to its admissibility was made in the judgment delivered following the trial. Dealing with the matter, the learned judge said:—

> In arriving at my conclusion I have disregarded evidence of English's conviction on a charge of driving without due care and attention which was admitted subject to objection because counsel for English admitted in the course of his argument that his client had been guilty of some negligence.

It may be noted that the evidence tendered was not as to the conviction but rather that the charge under the *Highway Traffic Act* had been laid and that counsel for English had, in his presence and on his behalf, pleaded guilty.

In the Court of Appeal the learned judges were of the opinion that evidence as to the plea made was admissible.

(1) (1904) 11 B.C.R. 91 at 96. (2) (1941) 56 B.C.R. 484.

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In my opinion, since the learned judge did not consider the evidence in arriving at his conclusion, the question as to its admissibility is of academic interest only. As it was not considered, the situation does not differ from that which would have resulted had the evidence been tendered and rejected.

I think that the evidence was relevant and admissible as showing conduct of the appellant English which, on the face of it, was inconsistent with his evidence at the trial, directed to showing that he was not at fault. Its weight, however, was negligible in view of the evidence as to the circumstances in which the plea of guilty was made.

Had the evidence not been admissible, I cannot think that there should be a new trial in these circumstances. S. 28 of the *Judicature Act* provides that a new trial shall not be granted on the ground of the improper admission or rejection of evidence, unless some substantial wrong or miscarriage has been thereby occasioned. In my opinion, it would be impossible to find that either wrong or miscarriage resulted in the present matter.

Mr. Starr, who did not appear for the appellants at the trial, has in his able argument said everything that could properly be urged on behalf of the appellants against the concurrent findings that it was the negligent act of English alone which caused the accident. I am, however, of the opinion that no sufficient grounds have been shown for any interference with the judgment of the Court of Appeal.

I would dismiss the appeal, with costs if they are demanded.

CARTWRIGHT J. (dissenting):—The relevant facts out of which these appeals arise are sufficiently stated in the reasons of other members of the Court.

Two points were argued before us, but, because of the conclusion to which I have come on the second of these, it is unnecessary for me to deal with the first, which was that, on the evidence, the learned trial judge ought to have attributed part of the blame for the collision to the respondent Richmond.

The second point may be summarized as follows. It is said (i) that the learned judge erred in not rejecting evidence, sought to be brought out in cross-examination by

counsel for the respondents, that the appellant, English, had, through counsel, entered a plea of guilty to a charge of careless driving under the *Highway Traffic Act*, R.S.O. 1950 Ch. 167, (ii) that this error in law on the part of the learned trial judge was the sole reason for discharging the jury, and (iii) that we should therefore say that he was wrong in law in discharging the jury and should direct a new trial to be held before a jury.

The reasons of my brother Locke show that at the time when the learned judge decided to discharge the jury he had not yet decided the question of the admissibility of the evidence referred to, and that his only reason for discharging the jury was his decision to reserve this question. This is, I think, made clear by the passage quoted by my brother Locke and by what the learned trial judge said to the jury at the time of discharging them, as follows:—

> Members of the jury while you have been out I have been listening to some evidence and an argument on a difficult question of law. In the exercise of my discretion, and because the ruling which I shall have to give on an important point of law is one which I shall have to reserve for further consideration, I have come to the conclusion that I should finish this case without a jury being present. It is not possible to adjourn the trial until I should make up my mind with regard to what should be done with the matter I have been concerned with in your absence. The most practical, and in the long run I think the best interest of the litigants will be served by discharging you now and finishing this case myself.

With the greatest respect, I am of opinion that it was the duty of the learned trial judge to make his decision, as to whether the evidence should be admitted or rejected, at the conclusion of the evidence taken on the "voir dire" and the argument which followed. The law is, I think, correctly stated in Halsbury's Laws of England, 2nd Edition, Vol. 13 at page 530, where the learned author says:—

> . . . The admissibility of evidence must be decided, as a preliminary question, by the judge as such when it is tendered.

The rule that the trial judge must decide questions of the admissibility of evidence as they arise is, in my opinion, applicable to actions tried either with or without a jury. That it applies in criminal cases tried before a jury is put beyond question by the following passage from the unanimous decision of the Court delivered by Rinfret J., as he then was, in *Cloutier* v. *The King* (1):

> Nous n'ignorons pas combien il est difficile parfois de décider sur-le-champ certaines objections à l'enquête. D'autre part, il n'est pas néces-

(1) [1940] S.C.R. 131 at 133, 134.

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saire d'insister pour démontrer le préjudice qui peut être causé à un accusé dans l'esprit du jury par certaine preuve qu'on laisse faire devant lui, même si, plus tard, le juge déclare qu'elle doit être rejetée et que le jury ne doit pas en tenir compte. Nous sommes d'avis que, dans une cause criminelle devant un jury, les objections à l'enquête ne devraient jamais être prises sous réserve.

Cartwright J.

The reasoning of the Court in the *Cloutier* case applies with equal force to a civil action tried with a jury.

While the necessity of the rule may be more obvious in a case tried with a jury, there are reasons in addition to those given in the *Cloutier* case which make it difficult to see how in a case tried with or without a jury counsel on either side can satisfactorily conduct the remainder of the trial unless it is known whether a piece of evidence already tendered and actually heard has or has not been received by the Court. Let us suppose, for example, that the evidence in question has been tendered on behalf of the plaintiff and, if admitted and not contradicted, is sufficient to establish an essential ingredient of his cause of action. Is counsel for the plaintiff to call further evidence on the point? If the evidence in question is admitted this is unnecessary but if it is rejected it is essential. Is counsel for the defendant to cross-examine? Can he do so "without prejudice to his objection"? If so, what becomes of the evidence elicited during the cross-examination in the event of the trial judge ultimately deciding to reject the evidence in question; is it to be treated as expunged from the record? Is counsel for the defence to call evidence to contradict the evidence in question? Once again if the evidence is admitted it is essential that he do so but if it is rejected it is unnecessary. What of the argument at the conclusion of the trial? Are there to be two sets of argument, one on the basis that the evidence in question is admitted and the other on the basis that it is rejected? The foregoing is not, I think, an exhaustive list of the difficulties which may arise in any trial in which the question of admissibility of a piece of evidence is not decided by the trial judge when it is tendered.

With some hesitation, I find myself unable to agree with the conclusion of my brother Locke that counsel who appeared for the appellants at the trial acquiesced in the course taken by the learned trial judge so as to be precluded from objecting thereto on appeal. As is pointed out by my brother Abbott, counsel really had little opportunity to

object. At the conclusion of the argument as to the admissibility of the evidence the learned trial judge announced his decision to discharge the jury. I do not say that it would have been improper for counsel to have raised an objection at that point and to have asked the learned judge to reconsider the matter; but I do not think that counsel must necessarily be regarded as having acquiesced in a course of action taken at the trial because he does not attempt to argue against it after the judge has not merely stated that he proposes to follow such course but has announced his decision to do so. Counsel may have had in mind the words of Lord Verulam:—

> And let not counsel at the bar . . . wind himself into the handling of the cause anew after the judge hath declared his sentence.

I wish to make it clear that I do not question the accuracy of the rule quoted by my brother Locke from the judgment in *Scott* v. *Fernie Lumber Company* (1), but only its application to the facts of the case before us.

For the reasons given by my brother Abbott I incline to agree with his conclusion that in the particular circumstances of this case the evidence in question was inadmissible and ought to have been rejected; but the basis of my judgment is not that the learned trial judge ruled wrongly as to whether the evidence should be admitted but rather that he did not rule at the time when he was bound to do so.

In the result I am of opinion that the appellants were deprived of the right to have their action tried by a jury, which was described by Kellock J. giving the unanimous judgment of this Court in *Telford* v. *Secord* (2), as "a substantial right", not by an order made by the learned trial judge in the exercise of his discretion as to how the case could best be tried but solely as the result of his erroneous decision that it was open to him to reserve the question of the admissibility of the evidence.

For these reasons I would allow the appeals, set aside the judgments in the courts below and direct that a new trial be had before a jury. The appellants are entitled to their costs in the Court of Appeal and to such costs in this Court as are provided under rule 142. There should be no order as to the costs of the first trial.

(1) (1904) 11 B.C.R. 91 at 96. (2) [1947] S.C.R. 277 at 282.

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ABBOTT J. (dissenting):—The facts which gave rise to these appeals can be briefly stated.

The appellant Margaret Millicent Laing brought an action on behalf of herself and of her infant children for damages for the loss of her husband, Murray Laing, killed in a motor vehicle accident which occurred on July 26, 1952, when he was a passenger in a car driven by his brother-in-law, the appellant English, which car was struck by a car owned by the respondent Richmond and alleged to have been driven by the respondent Pulver.

The appellant English brought another action for damages for the loss of his motor vehicle and for personal injuries arising out of the said accident.

These actions were tried together by Wilson J., sitting with a jury.

At the trial, subject to objection, the learned trial judge heard evidence of the circumstances under which a plea of guilty was made in the Magistrate's Court by the appellant English through his counsel, on a charge of "Driving without due care and attention or without reasonable consideration for other persons using the highway", under the provisions of the *Highway Traffic Act* of the Province of Ontario.

Having decided to accept this evidence under reserve, after taking evidence on *voir dire* and after argument as to its admissibility in the absence of the jury, the learned trial judge, on his own motion but without hearing counsel as to whether the actions should proceed with or without a jury, dismissed the jury and proceeded to try the actions himself. In the result, he dismissed both actions, and these judgments were confirmed by the Court of Appeal for Ontario.

The appellants appealed on two grounds. First that on the evidence the learned trial judge should have found the respondent Richmond partly responsible for the accident. As to this first ground, I agree with other members of the Court that no sufficient grounds have been shown for any interference with the concurrent findings of negligence by the Courts below.

As their second ground appellants submitted (i) that the plea of guilty was made expressly by agreement and for the purpose of buying peace and was not a concession of

wrong done, (ii) that an admission made by counsel on behalf of an accused in a criminal proceeding is not evidence in a civil matter unless the authority to make the admission upon the criminal proceeding was authority to make the admission for the purposes of the civil proceeding, (iii) that evidence on such plea should have been rejected and (iv) that in discharging the jury the judge had exceeded his jurisdiction.

After ordering the jury to withdraw, the learned trial judge took evidence as to the circumstances under which the plea of guilty, on the charge of careless driving, was entered. From this evidence it appears that the appellant English had been arraigned on a charge of dangerous driving under the *Criminal Code,* and after the prosecution had completed its case and some evidence had been heard on behalf of the defence, Crown counsel suggested that the evidence might not be sufficient to support the charge.

A brief adjournment was taken and counsel appear to have discussed the matter in the magistrate's chambers, following which, on the Court resuming, the charge of dangerous driving was withdrawn and the respondent English, through his counsel, pleaded guilty to the charge of careless driving under the *Highway Traffic Act.*

Mr. W. M. Thompson, Q.C., Crown Attorney for the County of Simcoe, testified as to the circumstances under which this plea was taken. His evidence is important and I quote it in full. It is as follows:—

Q. You are the Crown Attorney for the County of Simcoe?

A. Yes.

Q. Did you prosecute a charge of dangerous driving against John English on the 3rd day of September, 1952?

A. May I see the transcript? Yes, from the transcript it appears on the 3rd of September, 1952, I appeared for the prosecution on that charge.

Q. I believe that evidence—You proceeded first with a dangerous driving charge. Is that not correct?

A. Yes.

Q. Was evidence adduced on the dangerous driving charge?

A. Yes.

Q. And was defence evidence adduced on the part of Mr. English?

A. It appears from the transcript that two witnesses gave evidence for the defence. The prosecution appears to have been completed.

Q. Yes. During the trial of the dangerous driving charge did you make this statement to the court:

> If I may interrupt, I feel that on the evidence, including the evidence of Mr. English who must impress one to some extent at least, that the Prosecution might not be justified in saying there is

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sufficient wantonness to support a charge of dangerous driving and the result of the accident is no concern of the court. I feel under the circumstances—my friend is prepared, I understand, to make a plea to the other charge and I think I would ask the court to have this charge withdrawn or dismissed, whichever the Court thinks appropriate.

A. That is in the transcript and I am quite satisfied that is what took place, although I cannot remember word for word.

Q. Before you made that statement did you have an arrangement with counsel that if the plea of guilty be put in on the careless driving charge the dangerous driving charge would be withdrawn?

A. I think that is obvious from the situation. It is obvious there was some discussion beforehand and it was indicated the plea of guilty would be entered.

HIS LORDSHIP: Q. Who took the initiative on that?

A. My recollection is that I did, my Lord. At a certain stage in the proceedings I informed Mr. Weekes that I did not think there was enough evidence to support a dangerous driving charge and he might consider pleading guilty to careless driving. I am sorry, my Lord, my memory is not better but it is a year ago.

Mr. WEEKES: Q. Yes, I understand that. And my understanding is that the dangerous driving charge would have been continued and been prosecuted had there not been a plea of guilty to the careless driving charge.

A. Yes.

Q. There was an adjournment to the Magistrate's Chambers?

A. I see there was an adjournment but I do not recall what happened in that adjournment.

By agreement of the parties, after the jury had been dismissed, the evidence taken on *voir dire* was considered a part of the evidence at the trial.

It seems clear that the plea of guilty by English to the complaint under the *Highway Traffic Act* was entered by his counsel following an arrangement with the Crown Attorney made at the latter's suggestion, and by virtue of which the charge laid under the Criminal Code was withdrawn.

In my opinion the plea of guilty made by counsel in these circumstances, in the presence of English and with his concurrence, implied no more than a desire for peace and not a concession of wrong done. See Wigmore, 3rd Edition, Vol. 4 at pp. 28 and 29.

As such, in my opinion the plea was not an admission at all, had no probative value in the subsequent civil action, and evidence that such a plea had been entered should have been rejected.

Even if I am mistaken in my view that evidence as to the plea in question was inadmissible in the circumstances of this case for the reasons which I have given, I am also of opinion that an admission made by counsel on behalf of an accused in a criminal proceeding is not evidence in a civil matter unless the authority to make the admission in the criminal proceedings was an authority to make it for the purposes of a civil action as well. In this connection the decision of the Ontario Court of Appeal in *Potter* v. *Swain and Swain* (1), is in point, and I am in respectful agreement with the view expressed by McRuer J.A., as he then was, at p. 516 when, speaking for the Court, he said:—

> While an admission by an agent will bind the principal, if made within the scope of the authority of the agent, counsel appearing on behalf of the accused at a criminal trial has no implied authority to make an admission that would bind his client in subsequent civil proceedings.

As I have said, the learned trial judge heard evidence of the plea of guilty, under reserve of the objection taken to it, and stated in his reasons for judgment that he had disregarded such evidence in arriving at the conclusion which he did. He made it quite clear however in taking the case from the jury that he did so solely because he had decided to postpone ruling upon the admissibility of the evidence objected to.

Since in my view that evidence was inadmissible and should have been rejected, there was in fact no reason for depriving plaintiffs of their *prima facie* right to a trial by jury, and in the circumstances of this case, in my opinion, its denial was not an exercise of discretion by the learned trial judge but the deprivation of a substantial right.

In a case such as this (which is clearly one to be tried by a jury so long as the jury system prevails), even if the evidence objected to had been admissible, it would seem to me, that on the authorities, counsel for the parties should have been given a full opportunity to be heard on the point as to whether the trial should proceed with or without a jury, or be traversed for trial by another jury. See *Filion* v. *O'Neill* (2) and *Craig et al.* v. *Milligan* (3). In the instant case the learned trial judge announced his

(1) [1945] O.W.N. 514. (2) [1934] O.R. 716.
(3) [1949] O.R. 806.

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decision to dismiss the jury without inviting the views of counsel, and in these circumstances there would seem to me little which counsel could do but accept such decision subject, of course, to a right to question it on appeal.

In the result, therefore, I would allow the appeal and direct a new trial.

Appeals dismissed with costs.

Solicitors for the appellants: *Allen, Weekes & Lawson.*

Solicitors for the respondents: *Fennell, McLean & Seed.*

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*Mar. 6
*Mar. 6

YVAN MONETTE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Rape—Declarations of accused made to police officers while under arrest—Introduced by Crown in rebuttal—No voir dire—Whether statements admissible.

The appellant was tried before a jury and convicted upon a charge of rape. His conviction was unanimously affirmed, without written reasons, by the Court of Appeal.

The Crown, to rebut the evidence given by the accused that he had never seen the victim, called a witness who, notwithstanding the objection of counsel for the accused, was allowed to introduce incriminatory answers and declarations allegedly made by the accused to police officers while under arrest. The Crown did not attempt to prove that these answers and declarations had been made freely and voluntarily.

Held: The appeal should be allowed, the conviction quashed and a new trial directed.

The burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. The phases of trial at which the Crown seeks to introduce such statements, whether it be part of its case in chief, or upon cross-examination of an accused heard in defence, or in rebuttal of evidence adduced by the defence, is foreign to and in no way affects the ratio of the principle confirmed under the authorities. In the absence of affirmative

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

proof of the free and voluntary character of the statements, the impeached evidence was illegally admitted before the jury, and it could not be said that the verdict would have been the same without such illegal evidence.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the appellant's conviction before a jury on a charge of rape.

A. Chevalier Q.C. for the appellant.

G. W. Hill, Q.C. for the respondent.

The judgment of the Court was delivered by:—

FAUTEUX J.:—By a unanimous judgment, the Court of Appeal for the Province of Quebec (1) maintained, without written reasons, the conviction of the appellant on a charge of rape.

The grounds upon which leave to appeal to this Court was granted involved, amongst others, the point whether answers given by the accused, while under arrest for the offence, to questions put to him by a detective in authority, were admissible to contradict his testimony at trial, in the absence of any *voir dire* as to the free and voluntary character of these answers.

Examined in chief, on his defence, the accused denied having ever seen the victim of the offence. In cross-examination, he admitted that the police had several conversations with him but, when referred to the substance of the latter, he testified having said nothing indicating any knowledge of the facts of the charge, declaring rather, in the occurrence, that he thought his failure to inform the authorities of a change of address, with respect to the registration of his automobile, was the reason for his arrest.

To contradict this testimony, the Crown, in rebuttal, called Detective Joyal who, notwithstanding the objection made by counsel for the defence, was allowed to refer to these conversations and give the following evidence, unpreceded by any examination on *voir-dire:*—

Q. Est-ce qu'il a dit qu'il la connaissait?
R. Non. Il n'a pas dit qu'il la connaissait non plus.
Q. Est-ce qu'il a dit qu'il avait été en automobile avec elle?

(1) Q.R. [1953] Q.B. 751.

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R. Non. Je peux rapporter les paroles: "Je peux pas reconter ce qui s'est passé, vous allez me donner dix ans de pénitencier".
Q. Il a dit simplement: "Je peux pas raconter ce qui s'est passé, vous allez me donner dix ans de pénitencier"?
R. C'est cela.
Q. Est-ce qu'il a dit qu'il était ailleurs ce soir-là?
R. Non plus.

In *Sankey* v. *The King* (1) and in *Thiffault* v. *The King* (2), this Court made it very clear that the burden of establishing to the satisfaction of the Court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown; and that such a burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily.

The phases of trial at which the Crown seeks to introduce such statements, whether it be as part of its case in chief, or upon cross-examination of an accused heard in defence, or in rebuttal of evidence adduced by the defence, is foreign to and in no way affects the ratio of the principle confirmed under these authorities. As stated by Humphreys J. delivering the judgment of the Court of Appeal in England, in *Rex* v. *Treacy* (3), a statement made by a prisoner under arrest is either admissible or not; if it is admissible, the proper course for the prosecution is to prove it, and, if it is not admissible, nothing more ought to be heard of it; and it is wrong to think that a document can be made admissible in evidence which is otherwise inadmissible simply because it is put to a person in cross-examination.

In *Hebert* v. *The Queen* (4), Cartwright J., at page 141, refers to the Canadian jurisprudence in the matter. In the latter case, the Crown, upon cross-examination of the accused, made use of such statements. Kellock, Locke, Cartwright and Fauteux JJ. decided that such evidence was inadmissible, and Estey J., without determining the matter, said that "a cross-examination upon such a statement, by the great weight of authority in our Provincial Courts as well as in the Court of Criminal Appeal in England has been condemned". The other Members of the Court, who

(1) [1927] S.C.R. 436.
(2) [1933] S.C.R. 509.
(3) (1934) 60 T.L.R. 544 at 545.
(4) [1955] S.C.R. 120.

refrained from expressing their views in the matter, did so because, being of the opinion that the application of the provisions of section 1014(2) was warranted on the evidence, it was unnecessary to determine the question.

In the present case, there was no serious attempt, on behalf of the Crown, at the hearing of this appeal, either to justify the admissibility of such evidence or an application of section 1014(2). The answers given to the police by the appellant were incriminatory and, had they been proved to have been freely and voluntarily given, would undoubtedly have been proper evidence as part of the case for the Crown; and while the propriety of introducing such evidence on rebuttal might be open to question, this particular aspect of the case was not raised by the appellant; counsel for the latter being content to rest the appeal on the major question flowing from the lack of affirmative proof of the free and voluntary character of these answers.

Under all the circumstances of this case, the Court being unanimously of opinion that, in the absence of such affirmative proof, the impeached evidence was illegally admitted before the jury and that it could not be said that the verdict would have been the same without such illegal evidence, the appeal was maintained and a new trial ordered.

Appeal allowed, conviction quashed and new trial ordered.

Solicitor for the appellant: *A. Chevalier.*

Solicitor for the respondent: *R. T. Hebert.*

RAPHAEL DANIS (*Plaintiff*) .....APPELLANT;

AND

HERMAS SAUMURE (*Defendant*) .....RESPONDENT.

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*Feb. 1, 2
*Mar. 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Automobile—Negligence—Pedestrian struck by car—Finding by jury exonerating driver—Whether perverse—Whether affidavits of jurors as to intention to give verdict in favour of pedestrian, receivable.

*PRESENT: Kerwin C.J., Rand, Kellock, Locke and Abbott JJ.

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While attempting to cross a road, the appellant was struck by a car owned and driven by the respondent. The appellant sued for damages for personal injuries and the action was tried before a judge and jury. In answer to questions, the jury found that the respondent had satisfied them that there had been no negligence or improper conduct on his part. They also assessed the damages suffered by the appellant. The trial judge dismissed the action in accordance with these findings.

Before the Court of Appeal and this Court, the appellant contended that the verdict was perverse, and also sought to file affidavits signed by nine members of the jury purporting to show that the findings made by the jury were not the findings intended to be made by them and that they had intended to give the appellant a verdict for the amount of the damages assessed.

Held (affirming the judgment appealed from): That the appeal should be dismissed.

The jury's finding exonerating the respondent was not perverse.

This was not a case where affidavits from jurors should be received. Under s. 63 of The Ontario Judicature Act the duty of the jury was to answer questions and after answering them it could not award the appellant damages.

APPEAL from the judgment of the Court of Appeal for Ontario, affirming the judgment at trial and refusing to receive affidavits of the jurors.

L. Choquette, Q.C. for the appellant.

A. T. Hewitt for the respondent.

The judgment of Kerwin C.J. and Abbott J. was delivered by:—

THE CHIEF JUSTICE:—This action was tried before Mr. Justice Wilson and a jury and after a charge that was not objected to at the trial, before the Court of Appeal or before this Court, six questions were submitted to the jury, of which they answered only three. These questions and answers are as follows:—

1. Was the plaintiff's loss or damage sustained by reason of the defendant's motor car on the highway?

   Answer: V
   Yes or ~~No.~~

2. Has the defendant satisfied you that the injuries sustained by the plaintiff did not arise from the negligence or improper conduct on the part of the defendant?

   Answer: V
   Yes or ~~No.~~
   ~~7~~ ~~5~~
   10 2

3. If your answer to Question 2 is "No" was there any fault or negligence on the part of the plaintiff which caused or contributed to the accident?
Answer: Yes or No.

4. If your answer to question 3 is "Yes" and your answer to question 2 is "No", state fully particulars of every act of such fault or negligence of the plaintiff.
Answer:

5. If your answer to question 2 is "No" and your answer to question 3 is "Yes", apportion the degree, of fault or negligence.

Plaintiff	%
Defendant	%
Total	100%

6. At what amount do you assess the total loss or damage sustained by the plaintiff?

Special	$ 6,702.68
General	$ 5,100.00
Total	$ 11,802.68

In accordance with these findings judgment was given dismissing the action with costs. The Court of Appeal for Ontario dismissed an appeal by the plaintiff and he then appealed to this Court.

The plaintiff seeks to file and use nine affidavits,—one from the foreman, and the others from eight members, of the jury. All of these are practically in the same form but the one by the foreman indicates that the sum of $11,802.68 was about one-half of what the jury thought was the total of the damages proved. It might be immediately pointed out that it is difficult to accept this suggestion in view of counsel's answer to a question from the Bench that the item of $6,702.68 would not be one-half of the special damages.

The instructions of the trial judge were clear and undoubtedly the jury intended to answer, and did answer, Question No. 2 affirmatively. Furthermore, if as was intimated, it was considered by the jury that both parties were equally to blame, there is no explanation why no answers were given to Question No. 5. If one is to judge from the marks made, presumably by the foreman, on the

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original list of questions handed the jury, there was considerable discussion among its members before the answers were arrived at. This is not a case where the written answers do not correspond to the actual decision arrived at by the jury, nor was there any slip, or error, in the answers given to any of the three questions.

Statements or affidavits by any member of a jury as to their deliberations or intentions on the matter to be adjudicated upon are never receivable. Halsbury (2nd ed.) Vol. 19, p. 317, note (i). The rule is set forth in the 9th edition of Phipson on Evidence, p. 199, Taylor on Evidence, 12th edition, Vol. 1, p. 599, and Wigmore on Evidence, 3rd edition, Vol. 8, s. 2352 et seq. As early as *Vaise* v. *Delaval* (1), an affidavit of a juror that the jury, having been divided, tossed up, and that the plaintiff had won, was rejected. Lord Mansfield said:—

> The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means.

In *Cogan* v. *Ebden* (2), it had already been held that a verdict wrongly delivered by the formean of a jury might be amended. In *Jackson* v. *Williamson* (3), the King's Bench would not allow, after a delay, the admission of an affidavit by all the jurymen stating that they intended to give £61 instead of £30, although the question of delay may have had some effect upon the matter. Even though the rule has been criticized in certain Courts in the United States, it has been followed consistently in England and here, including the Court of Appeal in the present case. In *Ellis* v. *Deheer* (4), to which Mr. Justice Kellock referred on the argument, the Court of Appeal decided that it was not precluded from granting a new trial on the ground that the verdict as delivered by the foreman was not the verdict of the whole jury, but Lord Justice Banks, at p. 117, and Lord Justice Atkin, at p. 121, stated as undoubted law that evidence could not be received as to what occurred in the

(1) (1785) 1 T.R. 11.
(2) (1757) 1 Burr. 383; 97 E.R. 361.
(3) (1788) 2 T.R. 281; 100 E.R. 153.
(4) [1922] 2 K.B. 113.

juryroom. *McCulloch* v. *Ottawa Transportation Commission* (1), was a case of the foreman of a jury inadvertently interchanging the degrees of fault on the part of the parties, and reference might be made to the decisions of single judges in *Fletcher* v. *Thomas* (2) and *Knowlton* v. *Hydro-Electric Power Commission* (3).

It should be emphasized that the jury's duty was to answer questions. S. 63 of *The Ontario Judicature Act*, R.S.O. 1950, c. 190, provides:—

> 63. (1) Upon a trial by jury, except in an action for libel, the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him; and the jury shall answer such questions, and shall not give any verdict.
>
> (2) Judgment may be directed to be entered on the answers to such questions.

Therefore, in the present case, even if the jury had wished the plaintiff to recover a sum of money, the answer to Question No. 3 and the absence of any answer to Question No. 5 show the serious effect if it were permitted for a juryman, or any number of jurymen, to come forward later and state such desire.

At the hearing we found it unnecessary to call upon Mr. Hewitt to answer the argument that the judgment was perverse, as we agreed with the Court of Appeal that this has not been shown.

The appeal should be dismissed with costs.

RAND J.:—For the reasons given by the Chief Justice and Kellock J., I would dismiss this appeal with costs.

The judgment of Kellock and Locke JJ. was delivered by:—

KELLOCK J.:—In my opinion, this appeal fails. The jury's duty under s. 63 of the *Judicature Act* was to answer questions and not to give a verdict. By their answer to question 2, the defendant was completely exonerated.

Even assuming we are entitled to look at the affidavits tendered, they do not suggest any error in the answer to question 2 but merely that the deponents were laboring

(1) [1954] O.W.N. 203. (2) [1931] O.R. 195 at 200.
(3) (1925) 58 O.L.R. 80.

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under the misapprehension that, notwithstanding the answer to that question, or any other question, they could give the appellant a verdict for the amount of the damages fixed.

This is not a case of error arising between the verdict which the jury had agreed upon and that which was actually rendered and formed the basis for the judgment delivered. The law is clearly laid down in *Ellis* v. *Deheer* (1), and prohibits what is here attempted. No case appears for the interference of the court on the ground that the verdict was perverse.

The appeal should be dismissed with costs if demanded.

Appeal dismissed with costs.

Solicitor for the appellant: *L. Choquette.*

Solicitors for the respondent: *Gowling, MacTavish, Osborne & Henderson.*

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*Nov. 7, 8

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NORTHLAND GREYHOUND LINES INC. (*Defendant*) ..... APPELLANT;

AND

WILLIAM BRYCE (*Plaintiff*) ..... RESPONDENT;

AND

ROYAL TRANSPORTATION LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Automobile—Negligence—Collision at night with rear of disabled truck—Flares put out by truck driver—Truck lights off—Whether lighting equipment disabled — Damages for loss of life — Trustee Act, R.S.M. 1940, c. 221—Highway Traffic Act, R.S.M. 1940, c. 93.

*PRESENT: Taschereau, Kellock, Estey, Locke and Abbott JJ. Estey J. died before the delivery of the judgment.

(1) [1922] 2 K.B. 113.

The respondent and his wife (plaintiffs) were killed when the bus in which they were passengers collided at night with the respondent company's disabled tractor and trailer, which was stopped on the right-hand side of the pavement with a clearance for traffic of sixteen and a half feet. The administrators of the respective estates sued the owners and drivers of both the truck and the bus for damages under the *Trustee Act*, R.S.M. 1940, c. 221.

The right rear wheels of the trailer had come off some hours before but the driver had been able to make the repairs and to continue his trip. Some forty miles further, the same wheels came off again and the driver pulled up on the side of the road. As the repairs could not be made at the time, the driver placed lighted flares as required by the *Highway Traffic Act*, turned off all the lights of both the tractor and the trailer and went to sleep in the cab of the tractor. The collision occurred some three hours later.

The driver of another truck of the respondent company, who had been following him and who stopped when the breakdown occurred, did not stay with him. He continued on his way, put his truck in the company's garage some fourteen miles away and went home without communicating with anyone.

The trial judge found that the sole cause of the accident had been the failure of the bus driver to keep a proper lookout, that the lighting equipment of the truck was disabled within s. 18(1) of the *Highway Traffic Act*, that the company had satisfied the onus under s. 82 of the Act with regard to its failure to have the lights of the truck burning and with regard to the moving of the truck, and awarded damages of $2,500 for each deceased. A majority in the Court of Appeal affirmed this judgment but increased the general damages to $5,000 for each deceased.

Held (Kellock J. dissenting in part): That the appeal should be dismissed other than as to the quantum of damages, and the award of general damages made at the trial restored.

Per Curiam: The trial judge had proceeded on the proper principles in assessing the damages under the *Trustee Act*.

Per Taschereau, Locke and Abbott JJ.: There were concurrent findings that the real and effective cause of the accident had been the failure of the bus driver to keep a proper lookout.

Although there had been a contravention of ss. 17 and 18 of the *Highway Traffic Act* on the part of the truck driver, in that the lights at the rear of the trailer were carried at the bottom instead of at the top of the box and in the failure to have the lights lit since the lighting equipment was not disabled as found by the trial judge, the concurrent finding that these defaults did not cause or contribute to the occurrence of the accident has not been shown to have been wrong.

Per Kellock J. (dissenting in part): The truck company has not proved that the lighting equipment on its truck was disabled and that the failure to have the lights lit and to move the vehicle did not contribute to the accident. The effect of the breach of duty on the part of both drivers continued up to the moment of impact and rendered them both equally responsible.

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APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming, Beaubien J. dissenting, the judgment at trial and increasing the award for damages.

A. A. Moffat, Q.C. and *P. S. Morse* for the appellant.

W. P. Fillmore, Q.C. for the respondent (defendant).

W. A. Molloy and *J. F. O'Sullivan* for the respondent (plaintiff).

The judgment of Taschereau, Locke and Abbott JJ. was delivered by:—

LOCKE J.:—The learned trial judge has found that the real and effective cause of the accident was the failure of the appellant Stavos to see the trailer in time to avoid it, which I interpret in the context simply as a finding that he did not keep a proper lookout. The majority of the learned judges of the Court of Appeal (1) have agreed with this, and there are thus concurrent findings upon this question of fact.

Other than the question as to the quantum of the damages allowed in respect to the claim under the *Trustee Act* (c. 221, R.S.M. 1940), the sole matter to be determined in this appeal, in my opinion, is as to whether there has been error in failing to give effect to the provisions of s. 82 of the *Highway Traffic Act* (c. 93, R.S.M. 1940), which declares that, when a motor vehicle is operated upon a highway in contravention of any provision of the Act and loss or damage is sustained by any person thereby, the onus of proving that it did not arise by reason of such contravention is upon the owner or driver thereof.

I am unable, with great respect, to agree with the learned trial judge that the lighting equipment of the truck and trailer of the respondent, Royal Transportation Limited, was disabled within the meaning of that expression in s. 18(1) of the Act. The provisions of para. (*c*) of s. 17(1) of the *Highway Traffic Act* applied to the truck with its attached trailer, so that, in addition to the head lamps required by s. 17(1)(*a*), it was required to exhibit at night four lighted clearance lamps in a conspicuous position as near the top as practicable, one on each side of the front

(1) [1955] 14 W.W.R. 258; 2 D.L.R. 251.

casting a green light only, and one on each side of the rear casting a red light only, the lights to be such as to be visible under normal atmospheric conditions for a distance of at least 500 feet. The lights at the rear of the trailer in question did not comply with the statute, in that they were carried one on each side at the bottom of the box of the trailer.

When Sopko had put out the flares on the highway, he turned off all of the lights, assigning as his reason for this that to leave them on would soon have exhausted the battery. Other than to say that the battery was a little weak, he did not amplify the matter or attempt to estimate how long it would have sustained the lights. He said, however, that when he stopped he thought he had only two or three gallons of gasoline left in the truck, and that this was insufficient to enable him to keep the engine running and thus charging the battery until daylight. It would have been unnecessary to have kept the head light burning and it was shown that the other lights could be left on independently, which would have materially reduced the drain on the battery. The evidence upon this aspect of the matter is indefinite and, in my opinion, unsatisfactory. Apart from this, it was shown that, at the time of the breakdown, another truck driver employed by the appellant, who had helped Sopko when the truck had broken down earlier that night, was at the scene after the breakdown south of St. Norbert and could readily have obtained an additional supply of gasoline, either at that village which was only some two or three miles distant, or from Winnipeg some fourteen miles away, so that any difficulty in keeping the lights burning until daylight could readily have been overcome. Had the lights been kept on for as long as the battery with the aid of the engine, and the limited supply of gasoline would have made this possible, any subsequent disablement would have been due to the failure to obtain the required fuel.

The learned trial judge found that all three flares were burning as the bus approached the respondent company's vehicle, and accepted the testimony of several witnesses who had theretofore driven north upon the highway that they were visible from one-half a mile to a mile to the

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Locke J.

south, and that while the night was dark the visibility was otherwise good. He considered that the flares, particularly the one placed alongside the stranded truck, must have lighted it up clearly. After finding that the lighting equipment was disabled, within the terms of s. 18(1) of the Act, and that this was not due to negligence on the part of Sopko or the respondent company, he said in part:—

> In order to make the defendant liable it must be shown that the failure to have the truck lights burning in some way caused the loss or damage, but the onus is on the defendant Sopko to prove that such loss or damage did not arise by reason thereof: sec. 82 of the *Highway Traffic Act, supra*. I have already found that the three flares were burning, one of which was alongside the Sopko truck and to the west of it and about 1½ feet from the centre line of the highway. The flare in this position could readily have been seen by Stavos, who was in the driver's seat on the left hand side of his bus. Several other parties had seen the Sopko truck immediately before Stavos approached. I accept the evidence of the witness Adams, a man of considerable experience, that flares constitute a better warning than vehicle lights. I am satisfied that the absence of such clearance lights on the truck made no difference so far as this accident is concerned and that the defendant Sopko has satisfied the onus upon him.

The point was not dealt with more explicitly in the reasons delivered by Adamson J.A. (now C.J.M.), other than to say that he agreed with the learned trial judge that Stavos:—

> "was negligent in not seeing this trailer in time to avoid the accident and that such negligence was the real cause of the accident", and with his finding that the bus company is wholly liable for the damage.

I think that, when the learned judge said that in order to make the defendant liable, it must be shown that the failure to have the truck lights burning in some way caused the loss, he intended that it should be construed as caused or contributed to the occurrence. Despite the fact that the language quoted might indicate that, in determining whether it had been shown that the absence of the red clearance lights and tail light had not caused or contributed to the accident the test was whether the flares that were set out gave a more effective warning of the presence of the stranded vehicle and that that was the decisive point, I do not think the learned judge's language should be so construed but rather as saying that the failure of Stavos to see the flares, which were so plainly visible, showed that he was not keeping any proper lookout and would not have seen the clearance lights or the tail light had they been lighted.

I can assign no other meaning to the words "the absence of such clearance lights on the truck made no difference so far as this action is concerned." I think that, had I been the judge of first instance, the evidence would not have satisfied me that this was so. But where, as here, a learned and experienced trial judge and a majority of the Court of Appeal have come to this conclusion, the former having had the benefit of observing the demeanour of the witnesses as they gave their evidence, that finding of fact should not, in my opinion, be disturbed in this Court unless we are satisfied that it is clearly wrong. In this case I think that has not been shown.

I have had the advantage of reading the reasons for judgment to be delivered by my brother Kellock in this matter and I agree, for the reasons stated by him, that the award of damages under the *Trustee Act* made at the trial should be restored.

I would dismiss this appeal other than upon the issue as to the quantum of damage. As between the appellants and the respondent Bryce, the success being divided, I would allow no costs either in this Court or in the Court of Appeal. I would allow the respondents, Royal Transportation Limited and Sopko, their costs of this appeal, and would make no change in the order as to costs contained in paragraph 4 of the formal judgment of the Court of Appeal.

KELLOCK J. (dissenting in part):—The tractor and trailer of the respondent company, driven by the respondent Sopko, first broke down about seven o'clock on the evening of July 2, 1952, while proceeding northerly on the highway from Emerson to Winnipeg. The tractor and trailer weighed between 12,000 and 13,500 pounds, while the load was 20,000 pounds. The breakdown was due to the shearing of the bolts holding the dual right rear wheels on the axle, which dropped to the pavement when the wheels came off.

Sopko and one Smith, driver of another truck of the respondent company, put the wheels back on after Sopko had obtained the necessary bolts and nuts from a village in the neighbourhood. He then, followed by Smith, proceeded toward Winnipeg. On reaching a spot approximately three miles south of the Village of St. Norbert, the same wheels

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came off again and the truck was brought to a stop on the right-hand side of the pavement, which was twenty-four feet in width. This left some sixteen and a half feet clear to the west.

Sopko place three lighted flares, one some seventy-five paces south of the truck and to the east of the centre line of the highway, one alongside the left rear wheels, and one to the north. He and Smith then went back along the highway where they found one of the wheels although not the other. As Sopko had a spare wheel, he was in a position, on obtaining the necessary bolts and nuts, to make the same repair as before. Smith then left for Winnipeg in his truck, while Sopko got into the cab of his tractor and went to sleep, first turning out all the lights on both tractor and trailer. On arriving in Winnipeg, Smith put his truck away in the respondent company's garage and went home to bed. He made no attempt to communicate with anyone.

At approximately 2.15 a.m. a passenger bus, belonging to the appellant company and driven by the appellant, Stavos, crashed into the rear of the Sopko truck, the respondent Miller, as well as other passengers, being killed. This occurred, as found by the learned trial judge, over three hours after the truck had stopped.

The learned judge found also that the flares Sopko had put out were burning at the time of the accident, accepting in that regard the evidence of witnesses who had driven past the standing truck on their way to Winnipeg within a comparatively short time earlier. I do not think this finding, affirmed as it was by the court below, has been successfully challenged.

Stavos did not see the flares nor did he see the standing truck until too late to avoid striking it. He said that he had seen the red tail lights of a car travelling about 1,000 feet in front of him as he was some distance from the place of the accident, and that as he approached closer he observed another bus of the appellant company approaching from the north which he had recognized from its lights. He also had seen the lights of another vehicle behind that bus. These last mentioned vehicles were observed by some of the witnesses who had seen the flares near the standing truck as they had passed on their way to Winnipeg. One

of these put the place of meeting of the southbound bus and truck about three miles north of the Sopko truck, while another in another car placed it some four or five miles to the north.

Stavos says that as he approached the southbound vehicles, he put the lights of his bus on low beam in order to pass. The southbound bus in fact came to a stop some seventy-five feet to the north of the place of accident.

The learned trial judge found that the negligence of the appellant Stavos in failing to keep a proper lookout was the sole cause of the accident. As to the contention that the respondents ought to have moved the standing truck off the pavement on to the shoulder, he considered the nature of the ground would have involved danger of overturning had that been attempted, and that it was not unreasonable for the respondents to have waited until the morning in order to have the vehicle unloaded, repaired and removed. In this view he considered that as far as concerned the moving of the tractor-trailer, the respondents had satisfied the onus placed on them by s. 82 of the *Highway Traffic Act*.

With regard to the conduct of Sopko in turning off the lights, the learned judge, in the view that Sopko had given evidence that the battery on the truck was not strong enough to have kept the lights burning all night, an erroneous view of the evidence as I shall point out, considered that the lighting equipment of the truck was "disabled" within the meaning of s. 18(1) of the statute, basing this finding also upon his view that Sopko had testified that he did not have sufficient gasoline to run the engine for more than an hour and that he would have to keep the engine going in order to maintain the battery. The learned trial judge made this finding "with some hesitation" but considered that it was not, in any event, material in view of his conclusion that it was the negligence of Stavos in failing to keep a proper lookout which was the effective cause of the accident. Further, the learned judge, basing his finding upon the evidence of one of the witnesses that, as the learned judge said, "flares constitute a better warning than vehicle lights", found that the onus under s. 82 arising from the failure to have burning the lights which the statute required, was satisfied.

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In the Court of Appeal, Adamson J.A., as he then was, with whom Coyne J.A., concurred, accepted the findings of the learned trial judge, as did Montague J.A., the latter with some reluctance as he "was not entirely satisfied with the conduct of the driver of the Royal Transportation truck". Beaubien J.A., however, did not agree that the lighting equipment of the standing truck was disabled within the meaning of the statute or that the respondents had satisfied the onus thrown upon them by s. 82. In his view, Smith was in a position to have secured any necessary gasoline in a very short time, either at St. Norbert or a very few miles farther north, and that on the admission of Sopko that the battery was charging all the way from Winnipeg to Emerson and return, he could not be heard to say there was any danger of it running down. The learned judge pointed out that, as Sopko had admitted, he could have turned off the headlights and left the clearance and rear lights on, thus using a negligible amount of current.

Beaubien J.A., was also of the view that, coupled with the lights of the southbound bus and truck, the gray colour of the canvas over the Sopko trailer must, to some extent, have made it difficult to see that vehicle. He considered that had Sopko kept lighted the rear clearance lights on the trailer as the statute required him to do, those lights would have been visible a considerable distance from the trailer and, being upon the side of the highway upon which the bus was proceeding, could have been seen in time to avoid the collision. He was therefore of opinion that the negligence of Sopko had contributed to the accident and would have assessed the degrees of negligence at twenty per cent and eighty per cent respectively as between the respondents and appellants.

S. 17(1)(*a*) of the statute requires every motor vehicle after sundown and before sunrise to carry a lamp at the back of the vehicle casting a red light only, clearly visible under normal atmospheric conditions from a distance of not less than five hundred feet to the rear of the vehicle, and in the case of vehicles such as the tractor trailer here in question, to carry, in addition, two lighted clearance lamps in a conspicuous position as near the top as practicable, one on each side of the rear, also casting a red light only. These

lights are similarly required, when lighted, to be visible under normal atmospheric conditions from a distance of at least five hundred feet.

It will be convenient to set out relevant part of s. 18(1):

(1) In any case where any public service vehicle, commercial truck, or motor truck, the registered gross weight of which is in excess of eight thousand pounds, is stopped on a highway during the period when lighted lamps are required to be displayed on vehicles, *and the lighting equipment required by this Act is disabled* and the vehicle or truck cannot immediately be removed from the travelled portion of a highway outside a city, town or village, the driver or other person in charge of the vehicle or truck shall cause to be placed on the highway in the manner hereinafter provided

two lighted flares, lamps or lanterns, one at a distance of at least two hundred feet in advance of the vehicle and the other at least two hundred feet to the rear.

S. 67(1) and s. 82 read:

67(1) No person shall park or leave standing any vehicle, whether attended or unattended,

(*a*) upon the travelled portion of a highway, outside of a city, town or village, when it is practicable to park or leave the vehicle off the travelled portion of the highway;

(*d*) in such a manner that it obstructs traffic on a highway.

(3) The provisions of this section shall not apply in the case of a vehicle so disabled while on a highway that it cannot be readily moved until a reasonable time has elapsed to permit its removal.

82. Where a motor vehicle is operated upon a highway in contravention of any provision of this Act and any person claims to have sustained loss or damage thereby the onus of proof that such loss or damage did not arise by reason of the contravention of the Act shall be upon the owner or driver thereof.

With regard to turning off his lights, Sopko's evidence is as follows:

Q. Why did you leave your electric lights off?

A. On account of my battery dying out.

Q. Your battery had been charging all the way to Emerson?

A. Yes.

Q. And on the way back to where you broke down south of St. Jean?

A. Yes.

Q. Wouldn't it be well charged up then?

A. Well, it would be.

Q. Your battery was not defective?

A. She was a little weak because starting up a truck from one place to another takes quite a bit of juice.

Q. You only started up two or three times from Emerson?

A. Yes.

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Sopko did not testify, as the learned trial judge seemed to think, that the battery was not strong enough to keep the lights burning all night. While he did testify that he had only enough gasoline to keep the engine operating about an hour, the battery was not dependent upon the operation of the engine, and, in any event, neither he nor Smith made any effort to obtain gasoline, which could no doubt have been readily obtained in the neighbourhood. If it was not, the onus of establishing that fact was upon the respondents. I agree, therefore, with Beaubien J.A., that it is impossible for the respondents to contend in these circumstances that the lighting equipment of the standing truck was "disabled" within the meaning of the statute. The onus of proof that the accident did not arise by reason of this contravention of the statute was upon the respondents.

The respondents contend that the onus is satisfied by the finding of the learned trial judge that the effective cause of the accident was the failure of the appellant Stavos to keep a proper lookout and to see the flares. In taking this view, the learned judge accepted, as already pointed out, the opinion of a witness that flares constitute a better warning than vehicle lights. The statute, however, does not enable the court to make any such substitution. It provides for flares *only* when the lighting equipment is disabled in the case of a truck with a registered gross weight in excess of eight thousand pounds. In the case at bar, neither condition was met. The statutory requirement was for three red lights showing to the rear of the vehicle.

The paramountcy of the requirement for red to be shown on the rear of a standing vehicle is further emphasized by s-s. (2) of s. 7, which permits a vehicle, when standing upon a highway at a time when lighted lamps are required to be displayed, to show *"in lieu of* the lights hereinbefore required", one light on the left side of the vehicle in such a manner as to be clearly visible both to the front and the back for a distance of at least two hundred feet in normal atmospheric conditions, such light to show white or green

to the front and "red only" to the rear. In the view of the legislature, flares are second best and are only authorized when the vehicle is disabled from showing red lights.

My brother Locke, in *Bruce* v. *McIntyre* (1), observed that

> . . . persons driving upon the highway at night are, I think, entitled to proceed on the assumption that the drivers of other vehicles will comply with the provisions of the Highway Act and that any vehicle, either parked or temporarily stopped on the highway, will exhibit a red light at the rear.

This was said with respect to the Ontario statute, which calls for red lights on the rear of standing vehicles. In that case the light shown was amber and the court considered that the background, including the moon then shining, made it more difficult to see the light actually burning than would otherwise have been the case.

Stavos, unlike the drivers of any other vehicles who approached from the south and passed the standing truck that night, was meeting the driving lights of southbound traffic. While he testified that the lights of those vehicles did not interfere with his vision, that does not eliminate the consideration that the flares would not be as readily picked out as they would have been had there been no other lights in the background. This was also the view of Beaubien J.A., as I have already pointed out. In fact, while Stavos did not see the flares, he did see the white lights of the southbound traffic, although it was farther away.

In my view, it is impossible for the respondents to "prove" (the statutory word) that had they had the three red lights on the back of the truck lit, these would not have been seen by Stavos at the statutory distance of at least five hundred feet, an ample distance within which he could have, if necessary, stopped his vehicle or at least passed to the left of the standing vehicle. Had the lighting equipment been in fact disabled, the situation would no doubt have been different. There would then have been no contravention of the statute as to lights to which s. 82 would have applied.

In my opinion, the same result obtains with respect to the failure of the respondents to move the standing vehicle prior to the accident. The breakdown occurred within nine miles of the City of Winnipeg and within fourteen miles

(1) [1955] S.C.R. 251 at 261.

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of the respondent company's garage there. In order to put the truck in condition to be moved, it was necessary to do only what Sopko and Smith had already done shortly before at St. Jean. All that were needed were a few bolts and nuts which Ramsay, the Superintendent of the respondent company's operations, testified were obtainable at the company's garage in Winnipeg.

This witness also said that most of their drivers had been with the company for a long time and understood that he was to be called in case of an emergency. Smith, who had been with the company approximately twenty-five years, had had these instructions and knew Ramsay's telephone number and also knew how to get the company's mechanic. Instead of making any attempt to follow these instructions and get in touch with Ramsay or the mechanic by telephone from St. Norbert or any place else, neither Sopko nor Smith did anything although they had over three hours between the breakdown and the accident.

Accepting, as I do, the impracticability of moving the standing truck off the concrete on to the soft shoulder without replacing the wheels, nevertheless, leaving the stalled vehicle on the highway beyond a reasonable time was a contravention of the statute, even although flares had been put out. It is significant that while s. 67 uses the words "a reasonable time", s. 18(1) uses the words "cannot *immediately* be removed." In requiring the removal of a stalled vehicle within a reasonable time for its removal, the statute recognizes that its presence on a highway is a hazard to other traffic, including even the unwary to whom its protection is also extended. The hazard which such an obstacle presents, even when lighted, has been proved over and over by the numerous cases which have reached the courts arising out of such collisions. I think it is impossible, therefore, for the respondents to "prove" that this further contravention of the statute did not contribute to the accident.

Mr. Fillmore relies upon certain decisions in other cases on facts having more or less resemblance to those here in question. Some of them should be referred to. In *Marsden Kooler Transport* v. *Pollock* (1), my brother Estey has distinguished the facts of *Jones* v. *Shafer* (2), from those in

(1) [1953] 1 S.C.R. 66 at 70. (2) [1948] S.C.R. 166.

the case then before the court. In both cases, flares had been placed on the highway to the north and south of the stalled truck. In the *Jones* case the flares were removed by a person unknown, and the learned trial judge found that the truck could not have been moved by the means at hand and the necessary equipment to move it could not have been obtained at least until the next morning. Moreover, after the flares had been removed and before the accident, the police had turned on the lights on the truck.

In *Marsden's* case, the flares had not been placed as required by the relevant statute and they had gone out. Although the truck driver had communicated with another of the appellant's drivers, who came out with his truck, no effort had been made to move the stalled vehicle, the trial judge finding that that could have been done had the two tractors been used for the purpose. Moreover, the truck driver left the trailer, went to Edmonton and, on finding the appellant company's warehouse closed, went home to bed, making no other effort to get in touch with his employer until the next morning. Nor did he notify the police or anyone else of the presence of the trailer on the highway.

It may also be remarked that in neither of the above cases was any statutory provision similar to s. 82 of the statute here in question invoked.

In *McKee and Taylor* v. *Malenfant* (1), the learned trial judge found that had the respondent been keeping a proper lookout, he would have observed two vehicles preceding him travelling in the same direction, pass the standing truck. It was also found that after he did see the standing truck in fact, he had plenty of opportunity to avoid hitting it. In this court the case was disposed of by the majority upon this second ground.

The decision of the Judicial Committee in *Marvin Sigurdson* v. *British Columbia Electric Railway Company* (2), is a reaffirmation of the decision in *Admiralty Commissioners* v. *S. S. Volute* (3), and points out that the language of Viscount Birkenhead, at p. 144, is to be preferred to attempts to classify acts in relation to one another with reference to time or with regard to the knowledge of one

(1) [1954] S.C.R. 651. (2) [1953] A.C. 291.
(3) [1922] 1 A.C. 129.

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party at a particular moment of the negligence of the other party and his appreciation of the resulting danger, and by such tests to create categories in some of which one party is solely liable and others in which both parties are liable. Their Lordships said at p. 299:

> Time and knowledge may often be decisive factors, but it is for the jury or other tribunal of fact to decide whether in any particular case the existence of one of these factors results or does not result in the ascertainment of that clear line to which Viscount Birkenhead referred—moreover, their Lordships do not read him as intending to lay down that the existence of "subsequent" negligence will alone enable that clear line to be found.

Their Lordships disposed of the criticism with respect to the facts of the case there in question on the ground that the jury were entitled to come to the conclusion, "taking a broad view of the case as a whole", that the negligence of the motorman was in the circumstances the sole cause of the accident irrespective of the precise moment at which he became aware of the danger. After referring to the provisions of the *Contributory Negligence Act* and other similar enactments, their Lordships stated, at p. 304:

> . . . it may well be that in practice this legislation may have tended to encourage the application of those broad principles of common sense in the apportionment of blame unless the dividing line is clearly visible. Whether or not it emerges with clarity or is so blurred as to be barely distinguishable from the surrounding mass is a question of fact in each case for the tribunal charged with the duty of determining such questions.

In the case at bar, I do not think a clear line can be drawn in the apportionment of blame as contributing causes of the accident between the failure on the part of Stavos to keep a proper lookout and the contravention of the statute by the respondents in the respects mentioned. The effect of the breach of duty on the part of both appellants and respondents continued up to the moment of impact and both are, in my opinion, equally responsible. Reference may usefully be made to the decision of the House of Lords in *Stapley* v. *Gypsum Mines Limited* (1), and particularly to the judgment of Lord Reid at p 486. The judgments of the members of the Court of Appeal in *Williams* v. *Sykes and Harrison Limited* (2), afford an illustration of the application in other circumstances, of course, of the principle which, in my judgment, is to be applied in the case at bar.

(1) [1953] 2 A.E. 478. (2) [1955] 3 A.E. 225.

Miller, the deceased, was fifty-six years of age and in normal health except that he was, as found by the learned trial judge, "hard of hearing". The learned trial judge found upon the evidence that it was to be inferred he was reasonably happy. Basing himself upon the decisions of the House of Lords in *Benham* v. *Gambling* (1), and of this court in *Bechthold* v. *Osbaldeston* (2), he assessed the damages under the *Trustee Act* at $2,500, taking into consideration the depreciation in the value of money.

In the Court of Appeal, Adamson J.A., with the concurrence of Coyne and Montague JJ.A., after pointing out that "each case must be decided on its own facts", went on to say:

> Where, however, there is no substantial difference in the quality, usefulness, or the happiness of the lives which are lost, to allow $7,500 for the loss of one life (as was done in the Bechtold case, supra), and only $2,500 as was done in this case is not equitable.
>
> The right to damages under this head is given by sec. 49(1) of the Trustee Act, R.S.M. 1940, c. 221, "as if such representative were the deceased in life." For total and permanent disablement (and that is what loss of life amounts to, at least) a person is usually allowed a very substantial sum.

In this view, he fixed the general damages at $5,000. The item of $440 special damages was not in question.

In *Benham's* case, Viscount Simon points out more than once that while the thing to be valued is the "prospect of a predominantly happy life", attention is to be directed in every case to the life of the individual in question. He also said at p. 168 :

> Damages which would be proper for a disabling injury may well be much greater than for deprivation of life.

This is counter to the basis upon which the judgment below proceeds, as set out above. It should be said that while s. 49(1) of the *Trustee Act,* R.S.M. 1940, c. 221, is not *ipsissima verba* with 24 & 25 Geo. V, c. 41, s. 1 (Imperial), the effect for present purposes is the same.

I agree, therefore, with Beaubien J.A., that the judgment at trial, proceeding, as it did, upon proper principles, ought not to have been disturbed.

(1) [1941] A.C. 157. (2) [1953] 2 S.C.R. 177.

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The appeal should therefore be allowed the order of the Court of Appeal of the 17th of January, 1955, be set aside, and the judgment at trial be amended by striking out para. 1 thereof and amending para. 2 by providing for judgment against the respondents Royal Transportation Limited and Joseph Sopko as well as the appellants. The appellants should have their costs in the Court of Appeal against the respondents Royal Transportation and Sopko, the latter to have their costs of the cross-appeal of the respondent Bryce to that court. The appellants should have one-half of their costs in this court against the respondents Royal Transportation Limited and Sopko and one-half against the respondent Bryce. There should be no costs in this court as between the respondents Royal Transportation Limited and Sopko and the respondent Bryce.

Appeal allowed in part.

Solicitors for the appellant: *Aikins, MacAulay & Company.*

Solicitors for the respondent (plaintiff): *McMurray, Walsh & Company.*

Solicitors for the respondent (defendant): *Fillmore, Riley & Fillmore.*

HER MAJESTY THE QUEEN .....APPELLANT;

AND

KENNETH SUCHARD .....RESPONDENT.

1955
*Nov. 28
1956
*Mar. 28

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Theft—Receiving—Retaining—Whether doctrine of recent possession of stolen goods applies to offence of retaining.

The respondent was tried on three charges, (1) theft of goods, (2) receiving the goods knowing them to have been stolen and (3) retaining the same knowing them to have been stolen. The trial judge acquitted him on the charges of theft and receiving and convicted him of retaining. The Court of Appeal quashed the conviction and ordered an acquittal.

Held: The appeal should be dismissed.

The presumption of recent possession does not apply to the offence of retaining. Guilty knowledge must be acquired subsequent to the original obtaining of possession. In the present case, there was no evidence that the respondent had acquired, after the goods had come into his possession, knowledge that they had been stolen.

APPEAL by the Crown from the judgment of the Court of Appeal for Ontario (1), quashing the respondent's conviction on a charge of retaining and ordering his acquittal.

C. P. Hope, Q.C. for the appellant.

A. Cooper for the respondent.

THE CHIEF JUSTICE:—A majority of the Members of the Court which heard this appeal are of the view that the offence of retaining stolen goods knowing them to have been stolen is a separate and distinct offence from that of receiving. In *Clay* v. *The King* (1), I adopted as correct the statement of Roach J.A., when that matter was before the Court of Appeal, that on a charge of retaining goods which had been stolen knowing them to have been stolen, the presumption in the case of recent possession arose if at the time of receiving the accused knew that the goods had been stolen; that that presumption of knowledge continued down through the period in relation to which the accused was charged with retaining. In the *Clay* case that was also the view of Chief Justice Rinfret, Taschereau J. and

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

(1) 111 C.C.C. 151. (1) [1952] 1 S.C.R. 170.

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Fauteux J. A careful examination of the reasons of Estey J. leads me to the conclusion that he considered that guilty knowledge must be acquired subsequent to the original obtaining of possession.

There was, therefore, no majority as to the basis for the application of the presumption. In view of the fact that four of the Members of the Court hearing this appeal held and hold the view indicated above, it should now be laid down that the presumption does not apply at all to the offence of retaining.

As to this particular case, there is a right of appeal as ground number two, upon which leave to appeal was granted, is a question of law, i.e., as to whether there was any evidence of subsequently acquired knowledge on the part of the respondent that the goods in his possession were stolen goods. In my view there was no evidence upon which the Magistrate could find that Suchard acquired, after the goods had come into his possession, knowledge that they had been stolen, and the appeal should be dismissed.

The judgment of Taschereau and Fauteux JJ was delivered by:—

FAUTEUX J.:—The first ground upon which leave to appeal was granted is whether:

> The Court of Appeal for Ontario erred in law in failing properly to apply the principle enunciated by the Supreme Court of Canada in the case of *Clay* v. *The King*.

Holding that receiving and retaining constitute two distinct criminal offences, Members of this Court divided in the *Clay* case (1), as to the feature of the distinction between the two.

On the view of a majority, the time at which the knowledge, that the property is stolen property, is acquired differentiates one offence from the other. If this guilty knowledge is coincident with the initial possession of the stolen property, the offence is receiving; if only subsequent thereto, it is retaining.

On the view of a minority, inception of the possession, in the case of receiving, and retention of the possession, in the case of retaining, manifest the only distinction between

(1) [1952] 1 S.C.R. 170.

the two offences. It matters not *since when,* in retaining, or *how long after,* in receiving, the guilty knowledge co-exists with the possession, provided it does so at the time of reception with respect to the latter offence, or at any time with respect to the former.

Since and by this decision, the opinion of the majority has become the judgment of the Court on the matter.

On the basis of this now settled definition of retaining, no longer can the presumption of recent possession be effective to support a conviction of retaining. For, in its very nature, the presumption, resulting from the mere circumstance of recent possession of stolen goods, is that the initial possession was *gained* with the knowledge that the goods were stolen. The fact thus presumed—i.e. a guilty knowledge coincidental with initial possession—negatives the existence of an honest initial possession which is part of the essence of retaining and, hence, necessarily precludes a conviction for the latter offence. Furthermore, as under the definition of retaining, an honest initial possession is postulated, the presumption is also ineffective—as was held, in the *Clay* case, by those who expressed the view that the doctrine of recent possession was applicable to the offence of retaining as they then conceived it—to change it into a dishonest one.

In brief, and once the fact of recent possession of stolen goods is established, the fact that they were gained with the knowledge that they were stolen is immediately presumed; and while a conviction for theft or receiving may then be supported by this presumption, a conviction of retaining cannot. In the latter case, other evidence must be adduced and be, on the whole, more consistent with a guilty knowledge subsequent to the inception of the possession than, as presumed to be, in view of the fact of recent possession, coincident thereto.

The first ground of appeal is then well taken.

The second ground, upon which leave to appeal was granted, was whether:

> The Court of Appeal for Ontario erred in finding that there was no evidence of subsequent acquired knowledge on the part of the respondent that the goods in his possession were stolen goods.

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That question implies, as it should, that the distinction, between the offence of receiving and the offence of retaining, made by the majority in the *Clay* case, is the proper one.

In the present case, and as against the respondent, there was evidence of recent possession and, hence, of dishonest initial possession; there was also evidence of conduct indicating that, since some time, he had a guilty knowledge that the rings were stolen property.

The conviction, however, was for retaining. On a careful consideration, it cannot be said that the whole of the evidence is more consistent with a guilty knowledge subsequent to initial possession than, as flowing from the presumption, coincident thereto.

On this second ground, I am in respectful agreement with the unanimous view of the Court of Appeal and would, therefore, dismiss the appeal.

The judgment of Rand, Kellock and Cartwright JJ. was delivered by:—

KELLOCK J.:—The respondent was charged, together with Joyce Hickey, Arthur Scott and John Jones, on three counts, (1) theft of certain rings, (2) receiving, and (3) retaining the same rings. The charges were tried in Magistrate's Court and were dismissed against Scott and Hickey, no evidence being offered as against the latter. The respondent and Jones were convicted of retaining and found not guilty of theft and receiving. On appeal by the respondent to the Court of Appeal (1), the conviction was quashed and a verdict of acquittal directed to be entered. The appeal to this court is by leave pursuant to the provisions of s. 1025 (2) of the *Criminal Code*.

The rings in question were proved to have been stolen from a retail store in Hamilton on the afternoon of Friday, August 6, 1954. On the evening of that day, the respondent, together with Jones, was in Windsor, where they met Hickey and one Reid, with whom she was living in Windsor. The four were together at times over the ensuing week-end.

On Monday, August 9, the four met by arrangement in a hotel at 2 p.m. Hickey testified that on this occasion

(1) 111 C.C.C. 151.

Jones asked her if she had any idea where "they" could sell "some rings they brought up from Toronto". On Hickey stating that she might know some people she could introduce them to, "they" asked Reid if "they" could borrow the car and take her with them. The three then went to a club where Hickey introduced Jones and the respondent to some people who weren't interested. They then met Scott, who was told by Hickey that the two men were interested in selling rings and he was asked if he knew anyone who might want them. In the upshot, following a telephone call made by Scott, the four drove to a parking lot, where Jones handed the rings to Scott for the purpose of showing them presumably to the person to whom he had spoken. Ultimately, he returned and said that he was to telephone at six p.m.

The party got back into the car and started back for the hotel, Scott giving the rings back to Jones. During this drive, Scott was in the back seat, Jones drove the car with Hickey beside him, and Suchard was on the right-hand side of the front seat. During this drive they were intercepted by the police. When this occurred Jones handed the rings to Hickey, instructing her to hide them. She slipped them inside her blouse and later produced them to the police. When the car was stopped the respondent was asked to get out, and upon being searched, two ring boxes were found in his pocket. The rings themselves were identified by the Hamilton retailer, who also deposed that the boxes were of the type containing the rings at the time of the theft but it was not possible to identify them absolutely as the ribbon bearing the name of the retailer had been torn out in each case.

On the occasion when the theft occurred, a man had entered the store and handed the jeweller a bracelet type watch, asking him to tighten the clips. The jeweller had to go to his work bench at the back of the store for the necessary tools and he was followed there by the owner of the watch. Just as the jeweller got into the workshop, two more men entered the store. The jeweller tightened the clips as quickly as he could and handed the watch back to the owner, having to push him out of the way in order to get back into the store to attend to the other two.

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Immediately upon the three leaving the store, the jeweller noticed that two clocks had been taken from a shelf. He therefore checked his stock in a safe which had been open. This took some four or five hours. As a result of this checking, the rings were found to be missing and the police were notified. At the time of Jones' arrest, he was wearing a wrist-watch and bracelet of the type worn by the first man who had entered the store. On this evidence the magistrate disposed of the charges as above mentioned. In his view, the evidence established joint possession of the rings on the part of Jones and the respondent.

The judgment of the Court of Appeal was founded upon the view that there was no evidence pointing to guilty knowledge having been acquired by the respondent after he had received the goods. The court considered that while it has been established by the judgment of this court in *Clay* v. *The King* (1), that where the only evidence of guilty knowledge, including the inference arising from the fact of recent possession of stolen goods relates to the inception of the possession, an accused person cannot be convicted on a charge of retaining but only of receiving, the court considered that all of the evidence in the case at bar pointed only to knowledge at the time of receiving. The conviction was accordingly set aside.

In *Clay* v. *The King*, ubi cit, it was held by Rand, Kellock, Locke and Cartwright JJ., that the offences of receiving and retaining are separate and distinct and mutually exclusive, the difference between the two being that (p. 190) "in the case of the offence of retaining, there is an interval of time, however short, between the actual receipt of the goods and receipt of knowledge of their stolen character, during which interval the possession is either an honest possession or the character of this interval is not in question."

Estey J. was of the same opinion. At p. 208 he said:

> Receiving and retaining, as already stated, . . . are separate and distinct offences and an accused, even when the evidence of guilty knowledge can be found only in the presumption, can only be found guilty of either theft or receiving, but not both. Upon the same basis an accused cannot be found guilty of receiving and retaining. If an accused party receives the guilty knowledge coincident with possession of the stolen property, he is guilty of the offence of receiving and not of retaining. If, however,

(1) [1952] 1 S.C.R. 170.

he receives the property and subsequently acquires knowledge that the property was stolen, and thereafter continues to retain same, he is guilty of the offence of retaining.

With regard to the doctrine of recent possession, it was held by Rand, Kellock, Locke and Cartwright JJ. that it did not apply to the offence of retaining. The judgment of Taschereau and Fauteux JJ., *contra,* was founded on the view that the offence of retaining was to be defined as being in possession of goods having acquired knowledge of their stolen character at any time during the possession, including the time of the actual receipt of the goods.

While at one point in his reasons Estey J. said, at p. 208, that "the presumption of recent possession applies to all three of these offences", the learned judge, in dealing with the facts before the court, said, at p. 209:

> The explanation here given related to the initial reception of the stolen property and was disbelieved by the learned trial judge . . . *There was no evidence* that justified the conclusion that he received the goods without knowledge of their having been stolen and subsequently acquired such knowledge and thereafter continued to retain the same.

If the earlier statement of the learned judge that the presumption of recent possession really applied to the offence of retaining, then the explanation of possession given by the accused having related only to the initial reception, the presumption still applied to the offence of retaining, as to which no explanation had been given. Estey J. found, however, that there "was *no evidence* that justified the conclusion that he received the goods without knowledge of their having been stolen and subsequently acquired such knowledge and thereafter continued to retain same," a finding which he could not have made if the presumption applied to the charge of retaining.

That this is the true view of the ground upon which the learned judge proceeded is confirmed by the last sentence of his reasons at p. 210:

> The evidence does not support a conviction of retaining, as that offence is constituted under s. 399.

This is in accord with the actual judgment of the court in the case of *Clay* as it set aside the conviction on the charge of retaining.

In the case at bar, therefore, the appellant, having been acquitted of the offences of theft and receiving, the only

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question is whether there was any evidence upon which the magistrate was justified in finding knowledge subsequently acquired. In the opinion of the court appealed from, all of the evidence was consistent only with guilty knowledge at the inception of possession.

Where the evidence indicating knowledge other than that afforded by the presumption is not sufficient to show knowledge at all, the Crown is confined to the presumption which relates only to the charge of receiving. In reaching the conclusion that there is knowledge where there is evidence apart from the presumption, the tribunal is not bound to act upon the presumption. The time when such knowledge came to the accused may be uncertain, and then it is a matter for the first tribunal to decide the greater probability of its having been acquired when receiving the property or later. There may be doubt of the former, and in that case the tribunal may find that it was subsequent, and convict on the count of retaining. If it is once shown that knowledge has co-existed with possession, then obviously that coincidence must have arisen either at the moment of receiving the goods or thereafter; it is necessarily the one or the other; and its attribution to one period automatically concludes the charge based on the other.

The presumption is merely an inference of fact which has become crystallized into a rule of law. The doctrine arose out of the practical necessities of the enforcement of the law against theft and the allied offence of receiving and other offences which are incident or connected. It is a device available to the Crown, and by means of it, the burden of furnishing an explanation for the possession is cast upon the accused.

This being the nature of the presumption, it is obviously not open to the accused in any case to demand its application formally to one or other count against him; *Reg.* v. *Langmead* (1), per Blackburn J. The prosecution may or may not rely upon it. All that is open to the accused is to meet it with an explanation or resist its application, not require it to be applied for his own purposes.

In *Clay's* case, the evidence, apart from the presumption, from which a conclusion of knowledge could have been drawn was of such facts as necessarily involved knowledge,

(1) 1 Le. & Ca. 427 at 437.

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if at all, at the time of receiving the goods. Accordingly, the acquittal upon the charge of receiving necessarily entailed a finding that those facts did not give rise to a conclusion of knowledge. In that event they could not thereafter be made use of for the purposes of a conviction for retaining.

In the case at bar I am not prepared to differ from the view of the Court of Appeal as to the import of the evidence.

I would dismiss the appeal.

LOCKE J.:—I have had the advantage of reading the reasons for judgment to be delivered in this matter by my brother Kellock and I agree with his statement as to the matter decided by the judgment of this Court in *Clay* v. *The King* (1).

The learned Chief Justice of Ontario, in delivering the unanimous judgment of the Court of Appeal, has found that there was no evidence adduced at the hearing pointing to guilty knowledge being acquired by the respondent after the time of receiving. With this I respectfully agree and would accordingly dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: *W. C. Bowman.*

Solicitor for the respondent: *A. M. Cooper.*

SINNOTT NEWS COMPANY LIMITED ..APPELLANT;

1955

*Dec. 1

AND

1956

*Mar. 28

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Wholesale news distributor—Whether reserve for loss on returns of periodicals deductible—Income War Tax Act, s. 6(1)(d).

*PRESENT: Kerwin C.J., Kellock, Locke, Cartwright and Fauteux JJ.

(1) [1952] 1 S.C.R. 170.

1956

SINNOTT NEWS CO. LTD. v. MINISTER OF NATIONAL REVENUE

The appellant, a wholesaler, distributed magazines, periodicals and books to retailers of the same on the basis that the latter were entitled to full credit for the return of unsold goods within a specified time. On its books, it treated the deliveries as outright sales. For income tax purposes, it set up a "reserve" for loss on returns which represented the profit element in the sale value of goods delivered during the year which it estimated would be returned to it during the three months following the end of its fiscal year. The Minister disallowed the deduction of this "reserve" as prohibited under s. 6(1)(*d*) of the *Income War Tax Act*. It was allowed by the Income Tax Appeal Board and this decision was reversed by the Exchequer Court.

Held (Kerwin C.J. dissenting): That the appeal should be allowed.

Per Kellock J.: The deliveries made by the appellant were not "on consignment" nor were they on the basis of "sale or return". The property passed to the retailers upon delivery. But since there was a right of return, the sales were therefore subject to a condition subsequent with the result that the property would re-vest in the appellant. Accordingly, the appellant was not entitled to set up any reserve of profits, but should be entitled to deduct the estimated sales value itself, subject, when the actual figure is ascertained, to adjustment when the returns are actually made.

Per Locke, Cartwright and Fauteux JJ.: The transactions were not outright sales or deliveries "on consignment" but were deliveries on a "sale or return basis". The property in the goods did not pass to the retailers nor were they liable for the amounts covering the deliveries other than for the goods sold or not returned within the agreed period. The claim for deduction has been established although the true nature of the transactions was not shown by the appellant's books. In computing the appellant's income, there should be excluded from the total of the sales any amount in respect of goods delivered and in the hands of retailers at the end of the fiscal year, for the purchase price of which the retailers were not then liable and, from the total of purchases, any amounts as the purchase price of such goods and the amounts set up in the accounts of the appellant for the year as a reserve for loss on returns should be deleted.

Per Kerwin C.J. (dissenting): The appeal should be dismissed for the reasons given by Cameron J.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J. (1), reversing the decision of the Income Tax Appeal Board.

Mannie Brown for the appellant.

J. Singer, Q.C. and *J. D. C. Boland* for the respondent.

THE CHIEF JUSTICE (dissenting):—These are two appeals from judgments of the Exchequer Court. For the reasons given by Mr. Justice Cameron in disposing of these matters, both appeals should be dismissed with costs.

(1) [1952] Ex. C.R. 508.

KELLOCK J.:—In these appeals the appellant claims to deduct, for the purpose of computing its taxable income for the fiscal years ending January 31, 1945 and 1946, respectively, a "reserve" for loss on returns representing the profit element in the sale price, as distinct from the sale price itself, of periodicals in the hands of dealers on the above dates unsold and expected to be returned to the appellant. In its profit and loss accounts for each of the years in question, the appellant has arrived at gross profit by taking the amount of the sale price of all periodicals delivered to dealers during the fiscal year, less the amount of the "reserve" above referred to, and deducting therefrom its own cost. It is the contention of the Minister that the deduction of this reserve is prohibited by the terms of s. 6(1)(*d*) of *The Income Tax Act*.

The appellant has throughout rested its claim for the deduction of this reserve exclusively upon the footing that all of its deliveries to dealers were "on consignment". This was specifically pleaded below in connection with the 1946 assessment. There were no pleadings with respect to the year 1945. In his opening to the Income Tax Appeal Board, counsel for the appellant stated that "it is made clear to each dealer before he commences business with the wholesaler that he obtains his merchandise on consignment and subject to the right of the Sinnott News to repossess the magazines whenever it pleases." This is again the position exclusively taken in the appellant's factum in this court.

I find myself in agreement with the learned trial judge that, in fact, the conduct of the appellant's business was not in accord with the position thus taken by the appellant. The only thing that was in accord was that the statements which accompanied shipments of magazines to dealers bore the words "on consignment", although even these words were missing in the case of repeat orders.

Thereafter, however, the appellant treated the deliveries as actual sales. The deliveries were made three times a week and on the following Wednesday of each week, a statement of account was sent to each dealer particularizing the deliveries of the preceding week and notifying the dealers that such amounts were "now due". Again, all deliveries were immediately charged in the books of the

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appellant to each dealer and included in the appellant's accounts receivable. Moreover, when magazines were returned, a credit note was issued by the appellant to the dealers. Apart from the undoubted right on the part of the dealers to return the magazines, with which I shall subsequently deal, there was really nothing in the method of carrying on the appellant's business which supports the position they now take, apart from the use of the word "consignment" on the invoices to which I have referred. I am accordingly of opinion that there was ample evidence for the finding of the learned trial judge and that the appellant cannot succeed on this ground.

While the learned trial judge in the course of his judgment states that it was understood between the appellant and its dealers that the goods were delivered on the basis of "fully on sale or return", this statement is amplified in the following sentence of his judgment, which states that "the retailer is notified by the respondent as to the date by which unsold goods are to be returned, and upon their return by that date full credit is given to the retailer for the amount he has paid or been charged." It would be inconsistent with the conclusion to which the learned judge ultimately came that the goods were sold by the appellant to its dealers on delivery that he should be taken in his reference to the understanding that the goods were "delivered on the basis of fully on sale or return" to be making a finding that the parties were dealing on the basis of "sale or return" as that phrase is understood in law. The learned judge appears rather, in using this language, to have had in mind the evidence given by the witness Sinnott before the Income Tax Appeal Board namely:

> We sell everything to the retailer on the sale or return. Our invoices that we deliver with the goods are marked "on consignment".

This witness drew no distinction between deliveries on consignment and deliveries "on the sale or return". It is in this sense he was understood by the learned trial judge, who, on this footing, puts the issue as follows:

> . . . the sole question to be determined is whether or not there was a sale of the goods by the company to the retailers.

This is followed almost immediately by the statement that:

> Now, the only suggestion that the goods were delivered "on consignment" is the use of those words on the delivery slips.

It was not argued on behalf of the appellant that the deliveries here in question were on "sale or return". His contention, as already mentioned, was that all deliveries were on consignment.

I would, in any event, be of opinion that the same considerations which negative a consignment basis, equally negative "sale or return". S. 19 of *The Sale of Goods Act,* R.S.O., 1950, c. 345, rule 4, which deals with the passing of the property in the case of goods delivered on sale or return, is prefaced by the words "unless a different intention appears." For the reasons already given, I think it clearly appears that the property passed to the dealers upon delivery of the magazines.

This, however, does not end the matter, as the parties were at one that there was a right on the part of the dealers to return the magazines at any time. The witness Parke, called on behalf of the Minister, testified:

Q. In any event, you exercise the right to return anything and everything you desire?

A. That is right.

The witness made it clear that this right was exercisable at any time and the evidence on behalf of the appellant is to the same effect. This being so, while the transactions between the appellant and its dealers were sales and not deliveries on consignment, they were nevertheless sales subject to a condition subsequent, the result being that, in the case of magazines actually returned, the property re-vested in the appellant; *Head* v. *Tattersall* (1), per Cleasby B.; *May* v. *Conn* (2); *Benjamin,* 8th ed. 415. The situation would be otherwise where there is a sale but the vendor has bound himself to repurchase in certain events, such as was considered to be the situation in *The Vesta* (3).

Accordingly, the appellant is not entitled to set up, as it has done, any reserve of profits. The reserve sought to be set up is made up of the profit element in the sale value of goods delivered to dealers during each of the years in question which the appellant estimated would be returned to it during the three months following. This estimate, to quote the appellant's factum, "was practical, reasonably accurate,

(1) 7 Ex. D. 7 at 14. (2) 23 O.L.R. 102.
(3) [1921] 1 A.C. 774 at 782-3.

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and arrived at on the basis of the *actual experience* of the company with each magazine for a reasonable time prior to the end of the year."

As deposed to by the witness Sinnott, at the end of the three month period, the appellant would "know exactly" the value of goods actually returned. Accordingly, instead of deducting the above mentioned reserve from the sales figure in respect of each of the years in question, the appellant should be entitled, in its income tax returns, to deduct the estimated sales value itself, subject, however, when the actual figure is ascertained at the end of the three months' period, to adjustment in the year in which such returns are actually made.

Although the appellant fails with respect to the basis upon which it contested this litigation, the practical result is the same. I would therefore allow the appeals with costs here and below.

The judgment of Locke, Cartwright and Fauteux JJ. was delivered by:—

LOCKE J.:—This appeal concerns the appellant's liability for income and excess profits taxes in respect of its fiscal years terminating on January 31, 1945 and 1946. The facts which affect the question are the same in each of these years and the matter may be conveniently dealt with by considering the relevant evidence as to the former only.

The appellant distributes magazines and other periodicals to some 2,500 retail dealers in Toronto and elsewhere in the Province of Ontario. It receives its supplies of these publications either from the publishers or from the distributors representing them, accounting for them under agreements a typical specimen of which is in evidence, being an agreement between the Curtis Publishing Company and the appellant dated August 1, 1942. Under that agreement, deliveries of the publications of that company are made to the appellant on consignment for the purpose of enabling their distribution to retailers, the price received from these dealers, less specified deductions, being remitted to the publisher and the cover pages of unsold copies returned. The status of the appellant under this and other

similar agreements with publishers or wholesale distributors appears to be that of a mercantile agent to which the *Factors Act* (c. 125, R.S.O. 1950) would apply.

The arrangements made between the appellant and the retailers to whom it delivers the publications for sale have been found by the learned trial judge to constitute deliveries on sale or return and, accordingly, Rule 4 of s. 19 of the *Sale of Goods Act* (R.S.O. 1950, c. 345) applies.

S. 19, Rule 4, of the *Sale of Goods Act of Ontario* was taken verbatim from Rule 4 of s. 18 of the *Sale of Goods Act 1893 (Imp.)*. The expression delivery "on sale or return" had a well known meaning under the law merchant prior to being incorporated in that statute. That meaning was stated by Sir George Jessel M.R. in *Ex parte Wingfield* (1), as follows:—

> Let us consider, then, what is the position of a man who has goods sent to him on sale or return. He receives the goods from the true owner with an option of becoming the owner, which can be exercised in one of three ways—by buying the goods at the price named by the vendor; by selling the goods to some one else, which is taken to be a declaration of his option; or by keeping them so long that it would be unreasonable that he should return them.

This definition was adopted by the Court of Appeal four years after the passing of the statute in *Kirkham* v. *Attenborough* (2).

For the fiscal year ending January 31, 1944 and for at least some years previously, the appellant, in preparing its annual balance sheet and profit and loss account for income tax purposes, included as accounts receivable the amounts which would become owing by the retail dealers in respect of publications delivered to them on sale or return in the same manner as would have been done had the goods been sold outright. In preparing the profit and loss account, the price payable, if they were sold or retained, for the goods in the hands of the dealers on these terms was included in the total of the sales. In this manner, the company was assessed to income tax for amounts which included the profit upon goods delivered on sale or return, in respect of which the dealers might or might not exercise their right to purchase or which they might otherwise elect not to return.

(1) (1879) L.R. 10 Ch. D. 591 at 593.
(2) (1897) 1 Q.B.D. 201.

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Up to and including January 31, 1944, the appellant claimed as a business expense for the year following the termination of its fiscal year the amounts refunded by it for publications delivered during the previous year and, during the war years when paper supplies were short and the numbers of the various publications consequently limited, the returns from retail dealers in respect of which it was necessary to give credits were comparatively small in number and the appellant was apparently content to be taxed on this footing.

During the fiscal year ending January 31, 1945, there were larger supplies of available paper, with the result that most of the publishers increased considerably the number of their publications printed and more ample supplies were available for the retail dealers. Apparently as a result of this, much greater numbers of publications were returned by the retailers for which they became entitled to credit, these returns running as high as 30 to 35% of the goods delivered. In spite of the fact that the practice of delivering the publications on sale or return had continued throughout the year, the appellant continued to show the amounts which might become payable by the retailers if they elected to purchase the publications or retain them beyond the time limited for their return as if they were sales outright. At the end of this fiscal year, the balance sheet showed accounts receivable of $64,256.83, representing the amounts which would become payable by the retailers if all merchandise then in their hands on sale or return was retained. Similarly, in the profit and loss account the gross figure for sales included this merchandise and the net profit was computed as if all of the deliveries had been sales. Since this would, as it had in previous years, result in the company being taxed upon an amount for income which would, of necessity, be excessive if any such proportion of the publications so delivered were returned, the accountants for the company set up a reserve for loss on returns of $11,574.69. This was the taxpayer's estimate of the credits which, in the ordinary course of business, it would be necessary to give to the retailers for publications returned after January 31, 1945, which had been in their hands on sale or return on that date.

S. 6(1)(*d*) of the *Income War Tax Act* (R.S.C. 1927, c. 97 as amended) provided that, in computing the amount of the profits or gains to be assessed, no deduction shall be allowed for amounts credited as a reserve, except such an amount for bad debts as the Minister may allow and except as otherwise provided in the Act. The Minister disallowed the amount so set up as a reserve and assessed the appellant as if the deliveries included in the accounts receivable for the year in question had all been sales.

No question of credibility arises in considering the evidence of the witnesses, there being no conflict on any material point. It is true that the witness Sinnott, the President of the appellant company, said that they "sold" on consignment, meaning presumably that the goods were delivered on consignment, but his description of the arrangements and that of the accountant Willcock and of the witness Parke show clearly that this was inaccurate and that the deliveries were on sale or return, as found by the learned trial judge.

Under the verbal agreements made between the appellant and the various retailers, the publications were delivered thrice weekly. With each delivery an account, which showed the amount which would be payable if all the goods then and theretofore delivered were retained by the dealer, accompanied the goods. The retailer was required to pay a stipulated price for each of the publications sold by him or retained beyond dates specified from time to time by the appellant. The amounts payable, which would rarely be the amount of the balance shown on the account, were to be paid either weekly or, in the case of some large dealers such as the United Cigar Stores, monthly. For publications returned within the required times, credit was given in the running account kept by the appellant and payments made since the delivery of the last account were shown as credits. The retailer might return at any time publications which, for any reason, he did not wish to retain further other than those in respect of which he had become liable and, on its part, the appellant might require the return of any of them at its option.

Keeping the accounts in this manner, it is true, did not show the true nature of the transactions since the property in the goods did not pass to the retailer, nor was he liable

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for the amounts shown except to the extent that he had sold the goods or failed to return them within the agreed period, or otherwise exercised what Jessel M.R. in *Wingfield's case* referred to as his option to become the owner of them. Keeping an inventory of the goods remaining in the dealers' hands from time to time which were the property of the appellant and charging the dealer only with the price of those in respect of which the property had passed to him and for which he had become liable would, no doubt, have been a more accurate way of recording the transactions. But as to this, the appellant contends that the cost of maintaining a staff sufficient to keep such a running inventory on its behalf would be prohibitive and impractical.

While the learned trial judge found as a fact that the deliveries made to the retailers were on sale or return, he concluded that they were thereafter treated by the parties as outright sales and that, accordingly, the amounts which would become payable by the dealers if the goods in their hands were all sold or retained should be treated as accounts payable.

At the hearing it was contended on behalf of the appellant that the publications in the hands of the dealers were delivered on consignment and the learned trial judge rejected this contention, properly in my opinion. There is a clear distinction to be made between goods held on consignment which a mercantile agent may sell on behalf of his principal *qua* agent, to which the provisions of the *Factors Act* apply, and deliveries made on sale or return, to which the *Sale of Goods Act* applies. In the latter case, the person in possession of the goods exercising his option to purchase them sells them *qua* principal.

I am unable, with respect, to agree with the finding that in the present matter these transactions became outright sales. In coming to this conclusion, the learned trial judge emphasized the fact that in the case of the United Cigar Stores, the accounts of which concern with the appellant were paid monthly, they admittedly paid the amount shown by the appellant's accounts for publications delivered to its stores, less the amounts credited for publications returned during the month in question. When the transaction is examined, however, it does not support the conclusion. The

United Cigar Stores operate a great many business places in Toronto and the vicinity which are supplied by the appellant. As publications are delivered to the individual stores, accounts are delivered showing the amount payable up to the date of the delivery if all the publications then and theretofore delivered were sold or retained. The witness Parke, the secretary-treasurer of the company, said that weekly statements of the publications delivered to the various stores were sent to his office and that, at the end of the month, a further statement, which was a recapitulation of the accounts of all of the stores showing the amounts which would be payable upon the above basis and giving credit for returns made during the period, was sent. The amount so shown was paid by the company on the 20th of the following month and, no doubt, would include payment for some publications on hand at the end of the previous month for which the company was not liable on the sale or return basis. Since no running inventory was kept of the publications in the individual stores, either by the appellant or by United Cigar Stores, the exact amount payable at the time of the delivery of the monthly statement was not ascertainable. There was no business risk to the company, however, in paying on this basis since, in the interval between the end of the month and the 20th of the month following, large quantities of publications would be sold in the company's stores for which it was liable to make payment.

The learned trial judge referred in particular to an account marked Exhibit B delivered by the appellant to United Cigar Store No. 31 on March 15, 1952, which included a charge for goods delivered on the day previous which, he considered, indicated that the transactions were treated as sales and not as if the goods were held on consignment. This, however, overlooks the evidence as to the reason why these running accounts were delivered with the merchandise, and also the evidence of the witness Parke who described the manner in which the accounts of that company with the appellant were handled. Exhibit B was on a printed form which contained a statement that the "last amount in this column is now due." But this was inaccurate and was disregarded not only by the United Cigar Stores but all other dealers in settling for goods for

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which they had become liable. It may also be pointed out that the real question was not whether the transactions were outright sales or sales of goods held on consignment, but rather as to whether they were outright sales or sales of goods held on sale or return.

Other circumstances considered by the learned judge to be relevant in determining the true nature of the transaction were that no running inventory was kept by the appellant of the goods held by the dealers, that the accounts were carried as accounts receivable and treated as such in the annual balance sheet, and the further fact that the appellant carried no insurance on the goods in the hands of the retailers. The reason that such inventories were not kept by the appellant was explained. The manner in which the amounts which would have been payable by the dealers at the end of the fiscal year, had they then elected to purchase all of the goods in their possession or otherwise had become liable for them, were included in the accounts receivable, is as above stated. The fact that no insurance was carried by the appellant on these stocks is, in my opinion, altogether insufficient to justify a finding that the deliveries made on sale or return had been, by the conduct of the parties, transformed into something completely different.

The accuracy of the conclusion reached at the trial may be tested, in my opinion, by considering whether, in view of the uncontradicted evidence as to the nature of the agreements made by the appellant with the retailers, the appellant could have brought actions against them on January 31, 1945, to recover the balances shown in their respective accounts in its books before they had elected to exercise or reject their option to purchase the merchandise or to return it within the time limited. Such an action would inevitably fail, in my opinion.

The argument that the goods were delivered on consignment failed. From an income tax standpoint, I think the position of a person holding goods on sale or return who has not exercised his option to purchase or otherwise become liable to the owner would be the same as if they were held on consignment. In the case of the bankruptcy of the

dealer, the property would not pass to the trustee in either case. (*Ex parte Wingfield* above referred to: *In Re Ford* (1): *Williams on Bankruptcy,* 16th Ed. 316).

While I think the manner in which the appellant conducted its business and carried its accounts and designated the amount estimated as that which would, in the ordinary course of business, be refunded to the dealers for goods returned out of the stocks in their hands as a reserve for loss on returns, really invited the assessment made by the Minister, this should not affect the proper determination of this matter. When the true nature of these transactions is determined, in my opinion, the claim of the appellant on this appeal is established.

I would allow both appeals and refer the matter back to the Minister with a direction that, in computing the income of the appellant for its fiscal years ending January 31, 1945 and January 31, 1946, there shall be excluded from the total of the sales any amount in respect of periodicals, books or other publications theretofore delivered and in the hands of retail dealers on the said dates respectively, for the purchase price of which such dealers were not then liable to the appellant and, from the total of purchases, any amounts as the purchase price of such goods and the amounts set up in the accounts of the appellant for the said years as a reserve for loss on returns shall be deleted. I would allow the appellant its costs in this Court and in the Exchequer Court.

Appeal allowed with costs.

Solicitor for the appellant: *Mannie Brown.*

Solicitor for the respondent: *A. A. McGrory.*

(1) (1929) 1 Ch. 134.

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*Feb. 1
*Mar. 28

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

JOHN JAMES ARMSTRONG ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Alimony—Maintenance of child—Monthly payments ordered by decree—Whether lump sum paid by arrangement between parties in full settlement deductible—Income Tax Act, 1948, s. 11(1)(j).

Under a divorce decree, the respondent was ordered to pay to his wife $100 a month for the maintenance of their daughter. Subsequently, the wife accepted a lump sum of $4,000 in full settlement of all future payments. The Minister disallowed the deduction of this lump sum from the respondent's income. Both the Income Tax Appeal Board and the Exchequer Court held the amount to be deductible.

Held: The appeal should be allowed.

Since the $4,000 was not an amount paid "pursuant" to the divorce decree but was paid by arrangement between the respondent and his wife, it was not deductible under s. 11(1)(*j*) of *The Income Tax Act*.

APPEAL from the judgment of the Exchequer Court of Canada, Potter J. (1), affirming the decision of the Income Tax Appeal Board.

D. W. Mundell, Q.C. and *J. D. C. Boland* for the appellant.

J. W. Swackhamer for the respondent.

The judgment of Kerwin C.J., Taschereau and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—The Income Tax Appeal Board and the Exchequer Court have found that the sum of $4,000 was properly deductible by the respondent from his income tax for the taxation year 1950, within the provisions of section 11(1)(*j*) of *The Income Tax Act*. I am unable to agree as, in my opinion, the sum was not "an amount paid by the taxpayer in the year pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation or pursuant to a written separation agreement as alimony or other allowance

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

(1) [1954] Ex. C.R. 529.

payable on a periodic basis . . .". Nor if one refers to the French version was it "un montant payé par le contribuable pendant l'année, conformément à un décret, ordonnance ou jugement rendu par un tribunal compétent dans une action ou instance en divorce ou en séparation judiciaire, ou en conformité d'une convention écrite de séparation, à titre de pension alimentaire ou autre allocation payable périodiquement . . .". The test is whether it was paid in pursuance of a decree, order or judgment and not whether it was paid by reason of a legal obligation imposed or undertaken. There was no obligation on the part of the respondent to pay, under the decree, a lump sum in lieu of the monthly sums directed thereby to be paid.

The respondent urges that there is an ambiguity in the section. In my view there is not, and in that connection it is useful to refer to the statement of Viscount Simonds in *Kirkness* v. *John Hudson & Co. Ltd.* (1):

> That means that each one of us has the task of deciding what the relevant words mean. In coming to that decision he will necessarily give weight to the opinion of others, but if at the end of the day he forms his own clear judgment and does not think that the words are "fairly and equally open to divers meanings" he is not entitled to say that there is an ambiguity. For him at least there is no ambiguity and on that basis he must decide the case.

The appeal should be allowed, the judgments below set aside, with costs in this Court and in the Exchequer Court, and the assessment of the Minister, as amended by his notification of April 29, 1952, restored.

KELLOCK J.:—In this case the sum of $4,000 was paid by the respondent "in full settlement" of all payments due or to become due under a decree nisi which obligated him to pay to his former wife the sum of $100 a month for maintenance of the infant child of the parties until the latter should attain the age of sixteen years. In consideration of this payment the respondent was released by the wife "from any further liability" under the said judgment.

S. 11, s-s. (1)(*j*) of *The Income Tax Act* permits deduction in the computation of taxable income of

> an amount paid by the taxpayer . . . pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce or judicial separation . . . as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage . . .

(1) [1955] A.C. 696 at 712.

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In my opinion, the payment here in question is not within the statute. It was not an amount payable "pursuant to" or "conformément à" (to refer to the French text) the decree but rather an amount paid to obtain a release from the liability thereby imposed.

If, for example, the respondent had agreed with his wife that he should purchase for her a house in return for a release of all further liability under the decree, the purchase price could not, by any stretch of language, be brought within the section. The same principle must equally apply to a lump sum paid directly to the wife to purchase the release. Such an outlay made in commutation of the periodic sums payable under the decree is in the nature of a capital payment to which the statute does not extend.

I am therefore of opinion that the appeal must be allowed and the judgment below set aside with costs throughout.

LOCKE J.:—By the decree nisi made on September 21, 1948 in the action for divorce brought by the appellant's wife Jean Isobel Armstrong, the latter was granted the sole custody and control of the child born of the marriage on October 12, 1939, and the appellant was ordered to pay to the plaintiff in the action the sum of $100 a month for the maintenance of the child until she should attain the age of sixteen years or "until this court doth otherwise order." No order was made for the wife's maintenance.

The decree, by its terms, became absolute six months from its date, unless sufficient cause should be shown to the court to the contrary, and the marriage was dissolved at the expiration of that period.

On June 30, 1950, when the child born of the marriage was less than eleven years old, the appellant made an arrangement with his wife whereby, in consideration of a sum of $4,000, she purported to release him of any further liability under the judgment.

The question as to whether this purported release relieved the appellant of the obligation imposed by the decree to maintain the child, or which might thereafter be imposed upon him under the provisions of the *Matrimonial Causes Act* (c. 226, R.S.O. 1950), was not argued before us

and I mention the matter only to say that I express no opinion as to its legal effect as between the appellant and the child.

The appellant claims to be entitled to deduct the amount so paid from his income for the year 1950 under the terms of s. 11(1)(*j*) of *The Income Tax Act,* which permits the deduction of an amount paid by the taxpayer "pursuant to a decree, order or judgment of a competent tribunal in an action or proceeding for divorce . . . payable on a periodic basis for the maintenance of . . . children of the marriage."

The liability of the appellant to make these monthly payments until the child attained the age of sixteen years was not absolute under the terms of the decree but remained subject to the further order of the court. Had the child died before attaining that age, no doubt, on his application, the court would have ordered the suspension of the payments. Equally, it may be said, in view of changed circumstances, the court might have increased or diminished the amount of the payments. The jurisdiction of the court under the Act to make orders respecting the custody, maintenance and education of children continues during the whole period of their infancy, that is, until they attain the age of twenty-one years (*Thomasset* v. *Thomasset* (1): *Eversley on Domestic Relations,* 6th Ed. p. 134).

It was for the purpose of obtaining what purported to be a release of the appellant's liability to maintain his infant child to the extent that it was imposed by the decree nisi that the $4,000 was paid. It cannot, in my opinion, be properly said that this lump sum was paid, in the words of the section, *pursuant* to the divorce decree. It was, it is true, paid *in consequence* of the liability imposed by the decree for the maintenance of the infant, but that does not fall within the terms of the section.

It is only payments made for the purposes and in the manner specified in s. 11(1)(*j*) which may be deducted in computing the income of the taxpayer. There was no means of determining on June 30, 1950, the amount which the appellant would be required to pay under the terms of the decree up to the date of the child's sixteenth birthday, for the reasons above stated. The amount might have

(1) [1894] P. 295.

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been much less or much more than $4,000. The appellant was prepared to pay that amount to compound his liability, for the reasons explained by him in his evidence, and the mother was prepared to accept it. The amount was paid under the terms of the agreement made between the parties and not pursuant to the decree of the court.

With the greatest respect for the opinion of the late Mr. Justice Potter in this matter, I am unable to agree with his conclusion and would allow this appeal with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *A. A. McGrory.*

Solicitors for the respondent: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

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*Feb. 14, 15
*Mar. 28

THE CORPORATION OF THE TOWNSHIP OF SCARBOROUGH — APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO ..... — RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Annexation—Municipal Board—Power of Board—Failure to deal with conditions existing at time of adjudication—Municipal Act, R.S.O. 1950, c. 262—Municipality of Metropolitan Toronto Act, 1953, c. 73—Public Utilities Act, R.S.O. 1950, c. 320—Power Commission Act, R.S.O. 1950, 281.

In 1927, the City of Toronto expropriated certain lands in the Township of Scarborough on which it built a waterworks plant. Under legislation then in force, the City was exempt from taxation by the Township in respect of these lands, but in 1952, the exemption was removed by an amendment to the *Assessment Act*. Thereupon, the City applied to the Municipal Board for annexation of these lands under s. 20 of the *Municipal Act*. While the decision of the Board on this application was pending, the Metropolitan Corporation was created. The Corporation became vested with the water plant and liable to the payment of local taxes. The Municipal Board ordered the annexation and this order was affirmed by the Court of Appeal.

Held (Kerwin C.J. and Locke J. dissenting): That the appeal should be allowed and the matter remitted to the Board for further consideration.

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*PRESENT: Kerwin C.J., Rand, Kellock, Locke and Cartwright JJ.

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TOWNSHIP OF SCARBOROUGH v. CITY OF TORONTO

Per Rand, Kellock and Cartwright JJ.: The Municipal Board failed to deal with the circumstances and conditions existing at the time of its adjudication as it disregarded completely the new situation which was created when both the municipal function of water supply and the physical assets were transferred to the Metropolitan Corporation. This was a serious error in law.

Per Kerwin C.J. and Locke J. (dissenting): It cannot be said that the Board proceeded on a wrong principle of law. There is no warrant for the assumption that the Board did not consider and deal with the application on the footing that it should be determined upon the facts as they existed at the time of the making of the order.

The power of the Board given by s. 20 of the *Municipal Act* and preserved by s. 214(2) of the *Municipality of Metropolitan Toronto Act*, is not affected by ss. 117(1), 221(1) and 225(1) of the latter Act or by any of the provisions of the *Public Utilities Act* or the *Power Commission Act*. These provisions have not the effect of unalterably fixing the boundaries of the Township of Scarborough as of January 1, 1954.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming an order for annexation made by the Ontario Municipal Board.

H. E. Manning, Q.C. for the appellant.

F. A. A. Campbell, Q.C. and *W. R. Callow* for the respondent.

THE CHIEF JUSTICE (dissenting):—The Corporation of the Township of Scarborough applied to this Court for leave to appeal from the judgment of the Court of Appeal for Ontario dismissing its appeal from the Ontario Municipal Board and the following order was thereupon made:—

Assuming the appellant requires leave to bring to this Court for consideration the order of the Court of Appeal, the Court is unanimously of opinion that leave should be and it is hereby granted. The costs will be in the cause.

Mr. Manning's main argument was that the Board had proceeded upon a wrong principle of law,—referring especially to the following words in the Board's reasons for allowing the application to it by the Corporation of the City of Toronto for the annexation to the City of certain lands in the Township:—

Where, as in the present case, all the lands in question are owned and used for public purposes by the applicant municipality and the property is located immediately adjacent to one of its boundaries, annexation should not be refused unless there are exceptional circumstances.

(1) [1955] O.R. 281.

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Kerwin C.J.

He pointed out that by virtue of the combined operation of s. 37 of *The Municipality of Metropolitan Toronto Act,* 1953, and a by-law of The Metropolitan Council the lands in question are vested in the Metropolitan Corporation. This, of course, was well-known to the Board, as appears from a reading of all of its reasons. In my opinion, the extract quoted, and all others mentioned by Mr. Manning, when read in their context, and in view of all else that was said, means that the Board was taking into consideration the fact that before *The Municipality of Metropolitan Toronto Act,* 1953, came into force the lands had been owned by the City. It is also clear to me from a reading of the entire reasons that the Board was considering the circumstances as they existed at the time it gave its decision and not as of the time when the application by the City was first made.

This being so, I am unable to give effect to any of Mr. Manning's other arguments dealing with ss. 117 (1), 221 (1) and 225 (1) of *The Municipality of Metropolitan Toronto Act,* 1953, or with any of the provisions of *The Public Utilities Act,* R.S.O. 1950, c. 320, or of *The Power Commission Act,* R.S.O. 1950, c. 281. None of these provisions affects the proper construction of s-s. (2) of s. 214 of *The Municipality of Metropolitan Toronto Act,* 1953:—

> 214. (2) Nothing in this Act alters or affects the powers of the Municipal Board under, and the application of, section 20 of *The Municipal Act.*

Section 20 of *The Municipal Act* referred to, R.S.O. 1950, c. 243, empowers the Board by order, on such terms as it may deem expedient, to

> (*c*) annex the whole or any part or parts of any other municipality or municipalities to the municipality.

This power of the Board, preserved by s-s. (2) of s. 214 of *The Municipality of Metropolitan Toronto Act,* 1953, is not restricted by s-s. (1) of s. 221:—

> 221. (1) Except as provided in this Act, the Municipal Board, upon the application of any area municipality, The Corporation of the County of York of the Metropolitan Corporation, may exercise any of the powers conferred on it by clauses (*a*) and (*d*) of subsection 9 of section 20 of *The Municipal Act.*

Instead of restricting the powers of the Board, this enactment widens and extends them.

Sections 117 (1) and 225 (1) of *The Municipality of Metropolitan Toronto Act*, 1953, read as follows:—

117. (1) On and after the 1st day of January, 1954,

(*a*) the present high school district in the Township of Scarborough is enlarged to include the whole of the Township of Scarborough;

(*b*) the continuation school district of School Section No. 14 of the Township of Scarborough is dissolved;

(*c*) the whole of the Township of Scarborough is created a township school area;

(*d*) Union School Section No. 9 and 17 of the Townships of Markham and Scarborough and Union School Section No. 11 and 4 of the Townships of Scarborough and Pickering are dissolved, subject to the adjustment by arbitration of all rights and claims pursuant to section 32 of *The Public Schools Act*.

* * *

225. (1) Notwithstanding anything in *The Power Commission Act* or in *The Public Utilities Act* or in any other special or general Act, the whole of the Township of Scarborough, the whole of the Township of North York and the whole of the Township of Etobicoke shall each be deemed to be an area established under subsection 1 of section 66 of *The Power Commission Act*, and The Public Utilities Commission of the Township of Scarborough, The Hydro-Electric Commission of the Township of North York and The Hydro-Electric Commission of the Township of Etobicoke shall each be deemed to have been established for the whole of the said respective areas and the members duly elected.

By s. 227 it is provided that s. 225 comes into force on January 1, 1954.

In view of the express terms of s-s. (2) of s. 214, the argument cannot prevail that these have the effect of unalterably fixing the boundaries of the Township as of January 1, 1954. The provisions of s-s. (2) of s. 214 must be given their plain and ordinary meaning and effect.

The appeal should be dismissed with costs.

The judgment of Rand, Kellock and Cartwright JJ. was delivered by:—

RAND J.:—The issue in this appeal will be more clearly appreciated if a brief statement of the facts be given.

In 1927 the City of Toronto expropriated a parcel of land approximately 19 acres in extent lying in the southwest corner of the Municipality of Scarborough, including certain water lots running into Lake Ontario. At this point the westerly boundary of Scarborough coincides with the easterly boundary of the City. By reason of statutory provisions, the land as owned by the City was exempt from

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taxation by the Municipality. Later a large waterworks plant was built at a substantial cost to furnish the City with a water supply, and the plant was likewise tax exempt.

In April, 1952, legislation was passed which removed the exemption. Thereupon under s. 20 of *The Municipal Act* an application was made on August 7 to the Municipal Board for an order annexing the land to the City. Two other applications were at that time pending before the Board, one by the City and the other by the Town of Mimico, each looking to an amalgamation of a number of adjacent municipalities into a larger unit. S. 20(1) reads:

> 20. (1) Upon the application of any municipality authorized by by-law of the council thereof, or upon the application of the Minister of Municipal Affairs authorized by the Lieutenant-Governor in Council, or in respect of clause *d* upon the application of at least 25 male inhabitants, being British subjects of the full age of 21 years, the Municipal Board may by order on such terms as it may deem expedient,
>
> (*a*) amalgamate the municipality with any other municipality or municipalities;
>
> (*b*) annex the whole or any part or parts of the municipality to any other municipality or municipalities;
>
> (*c*) annex the whole or any part or parts of any other municipality or municipalities to the municipality; or
>
> (*d*) annex the whole or any part or parts of any unorganized township or townships to the municipality.
>
> and any such order may amalgamate or annex a greater or smaller area or areas than the area or areas specified in the application, whether or not the municipality, municipalities, unorganized township or unorganized townships in which the area or areas is or are located is or are specified in the application.

On the application here in question, a hearing was held on October 20 before two members of the Board, but in June, 1953 it was intimated that they were unable to agree and that there would be a rehearing.

In the meantime the prior applications of the City and of Mimico had on January 20, 1953 been dismissed. This was followed on February 25 by the introduction into the legislature of a bill for the creation of a comprehensive metropolitan district which became law on April 2 as *The Municipality of Metropolitan Toronto Act,* 1953. By this enactment a metropolitan municipal corporation was set up in which, among other things, were vested certain municipal utilities including their assets, powers and duties. Among them was that of the water supply for the metropolitan area; and as of January 1, 1954, the water plant in

question became the property of the Corporation. No compensation was payable to the City, but the Corporation assumed liability for all outstanding obligations related to the property.

As a further result, from and after that date the Corporation, as owner of all waterworks within the metropolitan area and charged with the duty of administering that municipal service, became liable to pay to the Municipality within which each such plant or property was situated sums of money equivalent to local taxes appropriate to it. This meant that those moneys referable to the land and works in Scarborough would, in the then existing situation, be payable by the Corporation to that municipality.

A rehearing of the application of August 7, 1952 took place on September 4, 1953. Judgment was reserved until June 22, 1954 when the Board handed down its decision by which it ordered the area of the land and works to be annexed to the City. That the Board, as of that date, had jurisdiction, on proper grounds, to make such an order under s. 20 does not admit of any doubt. But Mr. Manning's contention is that in coming to its conclusion the Board considered the matter from an improper point of view and disregarded material circumstances which were highly pertinent.

The reasons of the Board were set out in detail and from them it appears that, for the purpose of adjudication, it founded itself on the situation existing on August 7, 1952. That this is so is seen from the following excerpt of the language used:

> Where, as in the present case, all the lands in question are owned and used for public purposes by the applicant municipality and the property is located immediately adjacent to one of its boundaries, annexation should not be refused unless there are exceptional circumstances.

Other passages in the reasons confirm this interpretation. It is said:

> Under such circumstances the Board is quite satisfied that, had the present application been made at any time prior to the enactment of the 1952 legislation previously referred to, annexation would have been ordered almost as a matter of course and it is unlikely that the township would have raised any objection.

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The legislation of 1952 was that which restored in effect the liability of the property to taxation. Then the following:

> In the opinion of the Board, quite apart from any question of liabiilty for annual payments in lieu of taxation, any municipality which has acquired or built a valuable municipally-owned asset outside its boundaries pursuant to special or general legislation has a prima facie right to expect a favourable reception of a subsequent annexation application for the purpose of bringing the property in question within its own boundaries if there is no physical obstacle to such a change.

I am unable to agree that these clear and precise indications of the perspective in which the Board examined the matter are qualified by the general statement that

> in the opinion of the Board, the reasonable and natural desire of any municipality to adjust its boundaries so as to include not only the homes of its workers and the commercial and industrial areas where they obtain employment, but also the schools, public buildings, public works and parks which the municipality has supplied to serve them, should be given effect to by suitable boundary adjustments wherever reasonably possible, notwithstanding the incidental transfer of the benefits arising from the new and somewhat unexpected revenues made available by the legislation referred to.

The reference to legislation seems obviously to be to that in effect restoring taxability, and the passage clinches the meaning of what has been previously quoted.

The Board thus disregarded completely the new situation of January 1, 1954 in which both the municipal function of water supply and the physical plant and other assets associated with it had become transferred to a new municipal body, the Corporation. That these factors might very easily have led the Board to a different decision on the application is indisputable. The significance of the circumstance that the funds required for the purchase of land and the construction of plant had been furnished by a municipality was discussed by the Board in its reasons accompanying the dismissal in January, 1953 of the earlier applications made by the City and Mimico, and its possible effect upon a decision of the Board given in the light of the new situation is put beyond controversy in the following passage:

> Turning to the larger question of a general adjustment of assets and liabilities with respect to the assets to be taken over by the Metropolitan Council in the foregoing proposals, it is the considered opinion of the board, as previously stated in the specific proposals, that these assets should be taken over and operated for the benefit of the entire area without adjustment except for the assumption of outstanding indebtedness.

In the board's opinion, the true nature of these assets is often misunderstood. Although they have been built and financed by the various individual municipalities and their local boards, they are not in a legal sense the property of the residents or ratepayers for the time being resident within the municipality where the assets are located. They are, in every sense of the word, public property and are held in trust for the use and benefit of the present and future residents of the area within the jurisdiction of the local authority. But that area has no fixed and predetermined limits and it may be indefinitely enlarged or included with other areas for the purposes of local government at the will of the legislature. The municipal government is, after all, a government and not a commercial corporation which can wind up its affairs, sell its assets and distribute the proceeds among its shareholders. For this reason it seems to the board that so long as the residents of the particular area are not deprived of the beneficial use of the assets built or maintained for them by their local government, the management and operation of the asset by a new type of local government which will be, in effect, a new trustee, deprives them of no rights whatever, and entitles them to no individual or collective compensation.

That the Board as an administrative body, in such a case as the present, must deal with the circumstances and conditions as, at the time of its adjudication, they may be, is axiomatic: there is no question of determining rights as of the time of commencement of proceedings: there are no rights or obligations except those arising from the order made. The analogy of the enforcement of common law rights is wholly inappropriate.

What faced the Board after January 1, 1954 was then extremely simple. The City had ceased to be the owner of the property in Scarborough; it was no longer concerned with liability for the obligations of the water system; the complete control of the water supply throughout the metropolitan area had become the duty of the Corporation to be exercised and operated in such a manner whether as an entirety or in local units as the Corporation might decide. The property lay within the area of Scarborough; as between the City and Scarborough, the only substantial interest involved was the benefit of the tax equivalent payments for which the Corporation had become liable: would they be paid to Scarborough or to the City? This benefit the latter sought through an extension of its boundaries. In these circumstances, to make what was in substance an adjudication *nunc pro tunc* and to disregard the radical change of conditions that had since the prior time been brought about was a serious error in law; and the error was

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accentuated by drawing from those previous but then non-existent circumstances a presumption, conceivably appropriate in past or other circumstances, to which the subsequent and transformed situation could furnish no answer. But it was on such a basis that the Board acted.

As Mr. Manning succeeds on this ground, it is neither necessary nor desirable to consider any of the other points raised by him.

I would allow the appeal, set aside the judgment of the Court of Appeal and remit the matter to the Board for further consideration. In accordance with s. 98(3) of the *Ontario Municipal Board Act*, the judgment will certify the opinion of the Court to be that in acting in the light only of the situation as it existed on August 7, 1952 the Board erred in law: and that on the reconsideration of the application it should take into account circumstances and conditions then existing as well as any other circumstances pertinent to the issue raised. The appellant is entitled to its costs in this Court and in the Court of Appeal.

LOCKE J. (dissenting):—This is an appeal pursuant to leave granted by this Court from a judgment of the Court of Appeal dismissing the present appellant's appeal from an order of the Ontario Municipal Board dated June 22 1954. The appeal from that order to the Court of Appeal was taken pursuant to leave granted under the provisions of s. 98 of the *Ontario Municipal Board Act* (c. 262 R.S.O. 1950).

The appeal to the Court of Appeal permitted by that section is limited to questions of law including that of jurisdiction and s-s. 3 provides that that Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board and are necessary in determining the question of jurisdiction or law, as the case may be.

The facts necessary to be considered in determining this appeal are stated in the decision of the Board and in the reasons for the unanimous judgment of the Court of Appeal delivered by the learned Chief Justice of Ontario.

The application for the order annexing the property in question to the City of Toronto was authorized by a by-law passed by the City Council on June 24, 1952, and the first

hearing of the application which was concluded on October 20, 1952 proved abortive, owing to the failure of the two members of the Board, by whom the matter was heard, to agree. That application was renewed on September 4, 1953 and judgment was reserved and it was during the time that the matter was under consideration by the Chairman and the two other members by whom it had been heard that the *Municipality of Metropolitan Toronto Act* (c. 73, S.O. 1953) came into force.

The main objection by the appellant to the order made is that the Board allegedly erred in law in determining that the application should be disposed of by considering matters as they stood as of the date the application was first heard, rather than as of the date the order was made and without regard to the changes authorized and brought about under the 1953 legislation.

The only support that I am able to find in this record for that contention is a passage from the reasons for judgment delivered by the Board which reads:—

> Where, as in the present case, all the lands in question are owned and used for public purposes by the applicant municipality and the property is located immediately adjacent to one of its boundaries, annexation should not be refused unless there are exceptional circumstances.

Standing by itself, this might appear to indicate that the Board had completely overlooked the fact that theretofore, by the steps authorized by the *Municipality of Metropolitan Toronto Act,* the title of the property in question had vested in the Metropolitan Corporation thereby constituted.

The passage quoted appeared, however, as the concluding sentence of a paragraph dealing solely with an argument advanced on behalf of the Township that the amendment made in 1952 (c. 3) to the *Assessment Act* (c. 24, R.S.O. 1950), which in effect removed the exemption theretofore enjoyed by municipalities in respect to public utility properties owned by them and not located within their own boundaries, should by implication be construed as having prohibited subsequent annexations of such properties. As to this, the Board, rejecting the argument, said in part:—

> On the contrary, it seems to the Board that nothing in the 1952 legislation can be found which restricts the discretionary power of the Board to order an annexation whenever it appears to the Board that the

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objectives of the applicant municipality and its reasons for seeking an adjudgment of its boundaries are sound and are supported by the evidence adduced.

The passage first quoted referred only to the contention that, from the date the amendment of 1952 became effective, there could be no annexation by a municipality of property of the nature referred to in the amendment under s. 20 (now s. 14(2)) of the *Municipal Act* (c. 243, R.S.O. 1950). As of that date the respondent had owned the property in question and the Board was speaking of its rights at that time and thereafter which, in its opinion, had not been affected by that legislation. While it would have been conducive to clarity if the Board had said simply that the power to order such an annexation was unaffected by the 1952 amendment to the *Assessment Act,* that this is what was intended appears to me to be made clear by what followed when the effect of the 1953 legislation was considered independently.

To treat that portion of the reasons as relating to the situation created by the subsequent legislation would be to assume that the members of the Municipal Board had ignored the fact that the effect of steps taken authorized by that legislation had been to vest title to the water works property in the Metropolitan Board. I see no warrant for any such assumption. That the Board considered and dealt with the application on the footing that it should be determined upon the facts as they existed as at the time of the making of the order appears to me to be clear from the following passage in their reasons, which includes and supplements that portion quoted by the learned Chief Justice in his judgment and which should, I think, be read together with it:—

> It is clear, therefore, that the real basis of the township's objection to the present application is the loss of the very substantial annual revenues which it hopes to receive at the expense of either the city or the Metropolitan Corporation as a result of the 1952 legislation if the present application is dismissed and the property remains within the township. It was argued that the Board, as an administrative tribunal, would be justified in considering the relative impact of the loss of this annual revenue upon the economy of the township as compared with that of the city. It was pointed out that the amount, although large, was only a fraction of one percent of the total tax revenue of the city while it amounted to about four percent of that of the township. Although this argument is persuasive, the Board, after full consideration, prefers to base its decision upon principles which are capable of general application in

similar cases. In the opinion of the Board, the reasonable and natural desire of any municipality to adjust its boundaries so as to include not only the homes of its workers and the commercial and industrial areas where they obtain employment, but also the schools, public buildings, public works and parks which the municipality has supplied to serve them, should be given effect to by suitable boundary adjustments wherever reasonably possible, notwithstanding the incidental transfer of the benefits arising from the new and somewhat unexpected revenues made available by the legislation referred to. For the above reasons the application will be granted and an order will be issued providing for the annexation to the City of Toronto of the lands in the Township of Scarborough occupied by the R. C. Harris Water Purification and Pumping Plant, more particularly described in By-law 18664 of the city and in Schedule "A" to this order.

It was further urged that the powers of the Board under s. 20 of the *Municipal Act,* expressly reserved to it by s. 214(2) of the *Municipality of Metropolitan Toronto Act,* might not be invoked to alter the boundaries of the appellant as they existed as of the date that Act came into force. This is based upon the fact that by s. 117(*a*) and (*c*) of the Act it is provided that, on and after the 1st day of January 1954, the present high school district in the Township of Scarborough is enlarged to include the whole of the township and the whole of the township is created a township school area, and further, that by s. 225(1) it is provided, *inter alia,* that the whole of the township shall be deemed an area established under s-s. 1 of s. 66 of the *Power Commission Act.* From this, it is argued that the Legislature has thus indicated that the boundaries of the township as of the date mentioned were to remain fixed as they then were. It is quite impossible to reconcile this argument with the express provisions of s. 214(2). Construed, as it must be, as a whole, the powers of the Board extend in this respect, in my opinion, to the respondent township in the same manner as they do to the other municipalities referred to in, and affected by, the legislation.

The contention that in some manner s. 214(2) is restricted by the terms of s-s. 1 of s. 221 should also, in my opinion, be rejected. The latter subsection appears to me to be intended to extend the powers of the Board under s. 20 of the *Municipal Act* rather than to restrict them.

In my opinion, the jurisdiction of the Board to make the order is undoubted and I respectfully agree with the learned Chief Justice of Ontario that it has not been shown that there has been any error in law on its part in dealing

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with the matter. This being so, the question as to whether the powers given to it by s. 20 of the *Municipal Act* and by the *Ontario Municipal Board Act* (c. 262, R.S.O. 1950) should be exercised in the circumstances as they existed in June of 1954 was one for the Board and for the Board alone. I would dismiss this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Manning, Mortimer & Mundell.*

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

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*Jan. 30, 31
*Mar. 28

JOHN FREI (*Defendant*) .....APPELLANT;

AND

HER MAJESTY THE QUEEN (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Whether proper principle applied.

In 1952, the Crown expropriated certain lands comprising 14·5 acres which the appellant had acquired by bequest in 1942. A large brick house, a barn and a garage had been erected thereon in 1910. The appellant, an experienced gardener, had used the property for raising produce and fruit, and had cleared up and improved it as well as the buildings. Much of the evidence on behalf of the appellant was directed to showing the replacement value of the house and the value of the fruit trees and other improvements on the property rather than estimating the value of the property as a whole. The trial judge found that the fair value of the property to the appellant was $18,250, to which he added ten per cent for compulsory taking and $2,500 for disturbance.

Held (Rand and Cartwright JJ. dissenting): That the appeal should be dismissed.

Per Taschereau, Locke and Abbott JJ.: The trial judge properly applied the principle stated and applied in *Woods Manufacturing Co.* v. *The King* [1951] S.C.R. 504. No material fact was overlooked or misapprehended by him and no ground has been shown for any interference with his judgment.

Per Rand and Cartwright J.J. (dissenting): Applying the rule stated in *Diggon-Hibben Ltd.* v. *The King* [1949] S.C.R. 712 and referred to in *Woods Manufacturing Co.* v. *The King* (*supra*) and which the trial judge does not appear to have followed, it is impossible to say that

*PRESENT: Taschereau, Rand, Locke, Cartwright and Abbott JJ.

a prudent man in the position of the appellant would not have paid a sum substantially larger than that fixed by the trial judge rather than be ejected from his property.

APPEAL from the judgment of the Exchequer Court of Canada, Archibald J., in an expropriation action.

S. Ryan Q.C. for the appellant.

K. E. Eaton and *P. M. Troop* for the respondent.

The judgment of Taschereau, Locke and Abbott JJ. was delivered by:—

LOCKE J.:—This is an appeal from a judgment delivered in the Exchequer Court determining the amount of the compensation to be paid to the appellant for certain lands expropriated for the use of the Crown on February 7, 1952.

The lands taken were 14·5 acres in extent situate within the limits of the Town of Cobourg. The appellant had acquired the property by bequest in the year 1942. In the year 1910 there had been erected on it a large brick house, a barn and a garage by the then owner, a medical doctor.

The appellant is an experienced market gardener and decided to use the property for raising produce and fruit. Between the years 1942 and 1948 he cleared up the property, removing a considerable number of fruit trees which were no longer of value and planting others and preparing the land for the raising of small fruit and garden produce. In addition, he spent some $1,700 for improvements on the house, $600 on the barn and $750 on the garage. He took his first crop off the property in 1948 and, between that time and the date of the expropriation, he actively carried on the business of a market gardener. Of the crops produced, a comparatively small portion was sold by him in Cobourg, much the greater part being sold on the market at Peterborough, some 38 miles distant. The result of these operations for the year 1951, which the appellant described as a good year, was a profit of slightly less than $500 after deducting operating expenses, including an allowance for the time he estimated he had spent in the operations during the year at $1 an hour, and that of his wife who assisted in the work calculated at the same rate.

It was shown that, when the will of the testator by whom the land was bequeathed to the appellant was probated, the

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property, which had been valued by the executors at $2,400 for purposes of succession duty, was valued at $4,000 by the succession duty authorities. Lands in the neighbourhood had, however, substantially increased in value since the year 1942, in common with other agricultural lands in the province. Under the provisions of s. 33 of the *Assessment Act* (c. 24, R.S.O. 1950) lands are required, subject to its provisions, to be assessed at their actual value and, in assessing lands having buildings thereon, the value of the buildings shall be the amount by which the value of the land is increased by them. As of the date of the expropriation, this property was assessed by the Town of Cobourg at $3,320, being $800 for the land and the balance for the buildings. The evidence showed, however, that the assessed values in the town had not kept pace with the increase in the value of lands and, while the figures above stated afford some evidence as to values several years ago, it is quite clear that they are very much below the value of this land to the appellant as of the date of the expropriation.

Evidence of experienced land valuators was given both on behalf of the appellant and of the Crown. Much of the evidence tendered on behalf of the appellant unfortunately was directed to showing the replacement value of the house which, while no doubt suitable at the time of construction for the use of a medical doctor, was much larger than was required upon the property when used as a market garden, and the value of the fruit trees and other improvements on the property rather than estimating the value of the property as a whole. Two of the witnesses called by the appellant expressed their opinion as to the amount which might have been obtained for the property on the market as of the date of the expropriation. The witness Lister, an experienced land valuator, was of the opinion that $25,000 could have been obtained, and the witness Parnell $27,000. The witness J. R. Cooper, called by the Crown and who is a real estate broker in Cobourg, considered that, prior to the announcement of the establishment of the Ordnance Depot for which the property was taken by the Crown, the property could have been sold for $12,000 on the market and, after the announcement had been made, for $15,000. The witness W. H. Bosley, a valuator of very long experience, was of the opinion that between $15,000 and $16,000

could have been obtained on the market. Market value is a factor to be considered in determining the value of the land to the owner, though it is not, of course, decisive.

The trial judge, the late Mr. Justice Archibald, in a carefully considered judgment, found that the fair value of the property to the owner as of the date of the expropriation was $18,250, to which he added ten per cent for compulsory taking and an allowance for disturbance of $2,500, making the total compensation $22,575. The learned judge, in arriving at his conclusion, properly applied, in my opinion, the principle stated and applied in the judgment of this Court in *Woods Manufacturing Co. Ltd.* v. *The King* (1). I have examined the evidence with care and I do not find that the learned judge has either overlooked or misapprehended any material fact and I think no ground has been shown for any interference with his judgment (*Vézina* v. *The Queen* (2); *The King* v. *Elgin Realty Company* (3)).

I would dismiss this appeal with costs.

The dissenting judgment of Rand and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the late Mr. Justice Archibald pronounced on the 21st of May, 1953, fixing the compensation to which the appellant is entitled for his lands at $22,575 together with interest from May 1, 1953, the date on which he gave up possession. The lands were expropriated on the 7th of February, 1952 and it is as of that date that the compensation was fixed.

The facts, as found by the learned trial judge or established by uncontradicted evidence, may be summarized as follows. The land expropriated is on the east side of D'Arcy street in the town of Cobourg approximately one half mile north of the main public highway from Cobourg to Toronto, and comprises 14·5 acres on which are located a large house, a barn and a garage. The appellant is a native of Switzerland. At the date of the trial, in March 1953, he was 44 years old. He is married and has two children. Before coming to Canada he had been engaged in market gardening and, after coming to this country, spent some time farming in western Canada. In 1935 he

(1) [1951] S.C.R. 504. (2) (1889) 17 Can. S.C.R. 1 at 16.
(3) [1943] S.C.R. 51.

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came to Cobourg and resided at the expropriated property, then owned by Miss Jones who devised it to him in 1942. He served with the Armed Forces of Canada from 1943 to 1946. On his discharge from the army he returned to Cobourg and engaged in the business of a market gardener on the property. At that time there were on the property a large number of fruit trees of which all but 60 had outlived their usefulness. With the exception of these 60 trees he cut down all the fruit trees and cleared up the land, taking out the roots and prepared the land for cultivation of a variety of vegetables, berries, small fruits and other crops. He also planted a number of young fruit trees.

At the date of expropriation the appellant had repaired the barn and garage, making them suitable for his business as a market gardener and had improved the condition of the soil. The witnesses are unanimous in saying that the appellant is a good market gardener and in the short time he was on the property, he had brought it to a high state of cultivation. The land is particularly well suited for market gardening purposes. It is level, the soil is rich and easily worked and is free from weeds and pests and is not subject to erosion. Prior to the date of expropriation, the highest and best use to which the property could be put was that of a market garden. The appellant is an industrious and capable man and worked the land carefully and to excellent advantage.

The house on the expropriated property is large, of solid brick construction, with ten rooms, high quality trim, well maintained and in good repair, but the learned trial judge was of opinion that "it is not at all suitable for a man operating a small market gardening business." The house was built in 1910. At the date of the trial it still had a remaining useful life of about 60 years. Its reconstruction cost was estimated at about $27,000.

It is clear from all the evidence that the appellant planned to continue to reside on the property and work it as a market garden and that it was yielding him and his family a modest but comfortable living.

It appears from his reasons for judgment that the learned trial judge, after careful consideration of the evidence of all the witnesses, arrived at the opinion that the market

value of the land and buildings at the date of expropriation was $18,250. To this he added an allowance of 10% for compulsory taking, $1,825, and an allowance of $2,500 for disturbance.

While the learned trial judge referred to the recent decisions of this Court dealing with the principles applicable to a case of this sort it does not appear to me that he has followed the rule stated by Rand J. in *Diggon-Hibben Limited* v. *The King* (1), as to which Rinfret C.J. giving the unanimous judgment of the Court in *Woods Manufacturing Company Limited* v. *The King* (2), said at page 508:—

> The proper manner of the application of the principle so clearly stated cannot, in our opinion, be more accurately stated than in the judgment of Rand J. in the last-mentioned case at p. 715:
>
> " . . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it."

In applying the principle so stated to the facts of the present case it must be borne in mind that the appellant was anxious to continue to make a living for himself and his family as a market gardener, the occupation that he had followed for some years and in which he was highly skilled, and that he wished to continue to live in the vicinity of Cobourg. It cannot be said that these desires were not those of a prudent man. The test to be applied then is, what would the appellant in these circumstances reasonably pay for the property rather than be ejected from it.

It seems to me that the answer to this question is that he would pay such amount as he would have to pay to obtain a comparable property in the same locality and in addition thereto such amount as would cover the loss which he would inevitably suffer during the period necessary to bring the new property into a state of productivity equal to that of the old.

Between the date of the expropriation and the date of the trial the appellant purchased the Johnson property on Ontario Street at the price of $25,000. On the uncontradicted evidence he did this after a search which took up some months during which he was not able to find any other suitable property in the locality.

(1) [1949] S.C.R. 712. (2) [1951] S.C.R. 504.

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The evidence establishes that the new property is not as suitable for the appellant's purposes as was his former property. The house is older and smaller and had, at one time, settled and sagged badly although the effects of this had, at some unstated time prior to the purchase, been remedied by inserting a steel beam and some additional posts. The house on the new property has six rooms, two bathrooms and an air-conditioning unit. The barn and garage are not so convenient for the appellant's purposes as were those on the old property. The only advantage, for the purposes of the appellant, which the new property was suggested to have over the old is that the roadway on Ontario Street is better surfaced than the one on D'Arcy Street. The area of the new property is 11 acres, 2 of which are not suitable for planting.

There is no evidence to suggest that the appellant could have obtained a suitable property in the vicinity of Cobourg for less money and all the witnesses who were asked about the matter made it clear that in their opinion the old property was more suitable for the appellant's purposes than the new. On the uncontradicted evidence it would require a period of 3 years to bring the new property into a state of productivity comparable to that of the old.

With these circumstances in mind it is, I think, impossible to say that a prudent man in the position of the appellant would not have paid a sum substantially larger than that fixed by the learned trial judge rather than be ejected from his old property.

In my view the learned trial judge erred in the following respects: (i) in accepting and acting upon the evidence that the house on the old land was "a misfit"; this would have been right enough if all that had to be considered was the market value in the sense of what the appellant could hope to realize if he offered the property for sale; but I do not think it can properly be said that the house was a misfit for the purposes of the appellant who wished to continue to live on the property with his family; (ii) in directing his mind mainly, if not exclusively, to ascertaining the market value of the property and failing to apply the principle stated in the passage quoted above from the *Woods Manufacturing Company case;* (iii) in failing to appreciate the extent of the loss by disturbance; in this connection it

should be mentioned that his reasons would indicate that the learned trial judge was under some misunderstanding when he says "counsel for the defendant estimates the loss in dollars suffered by the defendant due to disturbance at $1,920;" it is conceded that no such estimate was made by counsel in the course of the trial or in argument.

That the figure reached by the learned trial judge is inadequate seems to me to be demonstrated by the following considerations. As a result of the expropriation the appellant has been forced to move from a property in excellent condition to another smaller in size and less suitable for a market garden for which he has had to pay $25,000. There is no evidence that he has acted imprudently or without adequate search in acquiring the new property or that he could have made any better bargain. It will require three years to bring the new property into a state of productivity comparable to that of the old; and yet the total award to the appellant is $2,425 less than the bare purchase price of the new property. Such a result cannot in my opinion be reconciled with the evidence of Rand J. in *Diggon-Hibben Limited* v. *The King* (*supra*) at page 715:—

> A compensation statute should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbour's should be required for public purposes; . . .

After a careful consideration of all the evidence it is my view that the appeal should be allowed and for the amount awarded by the learned trial judge there should be substituted the sum of $30,000 with interest from the first of May, 1953. The appellant should have the costs of the appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *Stuart Ryan.*

Solicitor for the respondent: *F. P. Varcoe.*

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*Mar. 16
*Mar. 28

PAUL RACINE (*Defendant*) .....APPELLANT;

AND

DAME ELIETTE ROUSSEAU (*Plaintiff*) RESPONDENT;

AND

EQUIPEMENT MODERNE LIMITEE MIS EN CAUSE.

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

Wife—Separate as to property—Transfer of immoveable as security for husband's debt—Art. 1301 C.C.

To help her husband whose financial situation was bad and from whom the appellant was pressing the payment of a debt of $4,500, the respondent, separate as to property, signed a contract of sale of her immoveable property in favour of the appellant for $6,027, of which $4,500 was payable to her and the remainder to another creditor. She did not receive the money but gave receipt for it. The appellant signed a cheque for $4,500 to the order of the respondent which she endorsed and gave to her husband's solicitor who, in turn, made out a cheque of $4,500 payable to the appellant. The evidence showed that the respondent believed that the transfer of property was not in payment of her husband's debt but as security for it.

Held (affirming the judgment appealed from): That the appeal should be dismissed.

The Courts below were right in maintaining the action taken by the respondent to annul the transfer as what was attempted to be done was prohibited by Art. 1301 C.C. (*Larocque* v. *Equitable Life Assurance* [1942] S.C.R. 205 and *Kelly* v. *C.P.R.* [1952] 1 S.C.R. 521 referred to).

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the judgment at trial.

I. Sabourin, Q.C. for the appellant.

J. P. Gravel for the respondent.

The judgment of Taschereau, Rand, Fauteux and Abbott JJ. was delievered by:—

TASCHEREAU J.:—La demanderesse-intimée Eliette Rousseau est mariée à Henri Boulianne sous la régime de la séparation de biens. Dans le contrat de mariage intervenu

*PRESENT: Taschereau, Rand, Kellock, Fauteux and Abbott JJ.

(1) Q.R. [1953] Q.B. 748.

entre les parties, l'époux a fait donation à son épouse d'un immeuble situé à Arvida, dans le district de Chicoutimi, et dont il était propriétaire avant la signature du contrat.

Boulianne, le mari de l'intimée et plombier de son métier, avait contracté plusieurs dettes dont l'une de $4,500 vis-à-vis Equipement Moderne Ltée, une compagnie à fonds social dont Racine était le président. Menacé de poursuites judiciaires, Boulianne rencontra l'appelant, et tous deux cherchèrent à trouver une solution à ce problème financier que Boulianne ne pouvait pas résoudre de ses propres deniers.

Les parties se sont alors rendues à Arvida, et devant notaire, l'on suggéra de transporter à Racine la propriété d'Arvida qui avait auparavant fait l'objet de la donation en vertu du contrat de mariage intervenu entre l'intimée et son époux. Comme par ce contrat, l'immeuble était la propriété de l'intimée, le notaire et l'avocat consultés par les parties ont évidemment émis des doutes sur la légalité de leur transaction. Quoi qu'il en soit, le 8 avril 1949, un acte de vente a été passé, cédant à Racine l'immeuble en question, pour le prix de $6,027.56, dont $4,500 comptant, soit le montant de la dette due par Boulianne à Equipement Moderne Ltée, et la balance devant être payée à un créancier hypothécaire.

Il appert que le même jour, un transfert de chèques eut lieu dans le bureau de Mtre Simard, avocat. Un chèque au montant de $4,500 signé par Paul Racine, à l'ordre de l'intimée, fut endossé par elle, non encaissé, et fut remis à Paul Racine. Mtre Simard émit lui-même un chèque de $4,500, toujours à l'ordre de Paul Racine, que ce dernier a endossé mais n'a pas encaissé et a remis à Mtre Simard. Toujours le même jour, soit le 8 avril 1949, l'appelant Racine, supposé acquéreur de la propriété de l'intimée, s'engagea par écrit à donner à Boulianne la préférence de racheter l'immeuble, qui cependant était la propriété de son épouse. Il fut stipulé à l'acte que si l'appelant vendait la propriété à un prix plus élevé que $6,000, l'excédent dans le prix de la vente sera versé à la compagnie Northern Electric de Montréal à l'acquit de la compagnie Henri Boulianne Ltée, représentée par Henri Boulianne personnellement.

La preuve révèle hors de tout doute que l'intimée n'a su que le 8 avril 1949 que son mari était endetté vis-à-vis

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Equipement Moderne Ltée, qu'il a été compris par elle et convenu qu'il ne s'agissait que d'une garantie qui devait être donnée à l'appelant, que la propriété serait rétrocédée quand Boulianne aurait payé sa dette tel que promis, et que le transport de cette propriété ne constituait nullement un paiement de la dette de Boulianne à Equipement Moderne Ltée.

Il est certain qu'une femme peut légalement payer la dette de son mari, mais l'article 1301 C.C. lui défend de s'obliger pour ou avec lui. (Vide *Larocque* v. *Equitable Life Assurance* (1); *Kelly* v. *C.P.R.* (2)).

Il est aussi élémentaire qu'il ne faut pas seulement examiner la forme des actes qu'on a donnée à une transaction, mais qu'il est permis d'examiner la véritable nature du contrat intervenu. L'article 1301 C.C. comporte une nullité d'ordre public, que rien ne peut couvrir, et quand la preuve révèle une dissimulation ou une obligation autre que celle qui apparaît à l'acte, et qu'il s'agit d'une violation de l'article 1301, celui-ci trouve son application dans toute sa rigueur.

Dans le cas qui nous occupe, il n'y a pas eu de paiement au sens de la loi. Si véritablement l'on avait entendu faire un paiement, il était facile de consentir purement et simplement une dation de l'immeuble. Mais, ce n'est pas ce qui a été fait, et la demanderesse-intimée n'a que garanti avec espoir de retour de l'immeuble, la dette de son mari. Ceci constitue une illégalité et la loi frappe un acte semblable de nullité absolue. C'est donc avec raison que la Cour Supérieure et la Cour du Banc de la Reine ont maintenu l'action de la demanderesse-intimée qui a voulu faire prononcer la nullité des contrats, et qui a demandé la revendication de la propriété qu'elle n'avait pas le droit de céder ainsi en garantie.

Je ne crois pas qu'il soit nécessaire dans le présent jugement de déterminer les droits de l'appelant de réclamer de l'intimée ou de son époux les paiements qu'il aurait pu faire au créancier hypothécaire.

L'appel doit donc être rejeté avec dépens.

(1) [1942] S.C.R. 205. (2) [1952] 1 S.C.R. 521.

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KELLOCK J.:—This case involves a pure question of fact. The trial judge and the Court of Appeal held that the transaction, while in the form of a sale from the respondent to the appellant, was, in fact, a transaction of guarantee under which the respondent conveyed the property to the appellant as security for her husband's debt, to be re-conveyed upon payment of that debt, which it was expected would be within two or three months. What was thus attempted to be done was prohibited by the terms of 1301 C.C. Accordingly, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Ivan Sabourin.*

Solicitor for the respondent: *Jean Paul Gravel.*

CANADIAN PACIFIC RAILWAY COMPANY (*Defendant*) ..... APPELLANT;

AND

VERA McCRINDLE (*Plaintiff*) ..... RESPONDENT.

1956

*Feb. 15, 16
*Mar. 28

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Whether licensee or trespasser—Seaman lost way while returning to ship in dense fog.

The respondent's husband, a seaman returning after shore leave to his ship moored at the appellant's pier, lost his way in the dense fog in the area and drove in the wrong direction off the end of a pier and was drowned. The jury found for the respondent and that the deceased had been guilty of contributory negligence. The Court of Appeal, considering the deceased a licensee, affirmed the verdict.

Held: The appeal should be allowed.

There was no evidence upon which it was open to the jury to find that the deceased was a licensee in the locality where he met his death. His licence extended only to such reasonable area of the appellant's property as was necessary for him to reach his ship. Being outside that area, he was therefore a trespasser and no evidence can be found of any breach of duty toward him on the part of the appellant.

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*PRESENT: Taschereau, Kellock, Locke, Cartwright and Fauteux JJ.

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C.P.R. v. McCRINDLE

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment at trial.

H. A. V. Green, Q.C. and *H. M. Pickart* for the appellant.

H. Ray for the respondent.

The judgment of Taschereau, Kellock, Locke and Fauteux JJ. was delivered by:—

KELLOCK J.:—The material facts out of which this appeal has arisen are as follows. The deceased was a member of the crew of H.M.C.S. *Sioux*, which was moored on the easterly side of the appellant's Pier "A" in Vancouver Harbour, gratuitous permission having been given to the Canadian Naval authorities to so moor the ship.

On October 11, 1952, the deceased had left his ship about 3 p.m. and spent the following hours until about midnight in the city, from which he was driven back to the harbour area by one Stewart in the latter's car. Access to the ship from the city was gained by proceeding over a viaduct running westerly from the northern end of Granville Street, and then turning to the north out on to the pier at the westerly end of the ramp of the viaduct.

When Stewart and the deceased returned there was a fog, described by all the witnesses as very dense, one of them stating that he could not see his feet even with a flashlight. Instead of turning off the ramp immediately to his right on to Pier "A", Stewart missed the turn and drove westerly along a hard top road on the appellant's property which bordered to the south a number of docks. After proceeding some 1,500 feet, Stewart realized he was lost and turned around and began to retrace his journey. While proceeding westerly, he had crossed a number of railway tracks, in order to do so having to turn slightly to the north and again to the south. On the return journey, after retracing the road for about 500 feet, he missed the first turn in the fog and instead of turning slightly to the south, drove some 300 feet out on to a pier where the car went over the end of the pier into the water.

At the point where the railway tracks crossed the road the hard top was replaced by planking which followed the

(1) [1955] 5 D.L.R. 195.

railway tracks to the north and south. On his return journey, Stewart had, as already mentioned, not only failed to turn to his right but followed the planking and the tracks, straddling one of the rails as he did so.

The trial took place before Whittaker J. and a jury, the latter returning a verdict in favour of the respondent but finding the deceased guilty of contributory negligence. Judgment was entered accordingly and was upheld in the Court of Appeal, which considered the deceased a licensee. The court considered it was immaterial under the circumstances whether the jury's verdict should be regarded "as defining by implication the area covered by the licence or as extending the duty owed by the occupier to the licensee beyond the actual area covered by the licence", and that the ferry dock constituted a danger of which the deceased was entitled to have warning.

In my opinion there was no evidence upon which it was open to the jury to find that the deceased was a licensee in the locality where he met his death. No doubt the licence extended to such reasonable area of the appellant's property as was necessary for the deceased to reach his ship from the end of the city street. It is quite irrelevant, in my opinion, that other persons having business from time to time with the appellant might be invitees in using the road leading along the docks farther to the west. So far as the deceased was concerned, he was, in my opinion, a trespasser once he got beyond any point over which he was reasonably entitled to pass in going to or from his ship.

In my opinion, the principle of the decision in *Mersey Docks and Harbour Board* v. *Procter* (1) applies. In that case, Viscount Cave L.C., at p. 261, referred to *Hardcastle* v. *South Yorkshire Railway Co.* (2), in which a man had wandered from a highway and had fallen into a reservoir on land at some little distance from the highway, the court holding the owner of the land not liable. Pollock C.B., said, at p. 74:

> . . . but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury no one could tell whether he was liable for the consequences of his act upon his own land or not.

(1) [1923] A.C. 253.
(2) 4 H. & N. 67.

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After citing this judgment, Viscount Cave continued at p. 262:

> It is true that these observations had reference to a public way, but the reasoning appears to me to apply equally to a way which a person is invited or permitted to use.

In *Procter's* case, the deceased had been working on a ship in a floating dock lying to the east of a piece of ground which separated that dock from another floating dock on its westerly side. On leaving the ship on which he was working, the deceased had proceeded southerly over this piece of ground and over a bridge at the southern end, called the Duke Street Bridge. The piece of ground was traversed from north to south by two double lines of rails leading to and over the bridge, the site of the railway being used as a public highway. The deceased apparently lost his life while endeavouring to proceed south but had wandered to the west and fallen into the water. An action brought by his widow under the *Fatal Accidents Act* failed.

In the course of his judgment, Lord Sumner, with whom Lord Carson agreed, said, at p. 272:

> A free range over the whole estate is not given to every invited workman. The respondent, recognizing this, suggested two forms of limitation . . . the second, that the limit varied according as the day was clear or foggy . . . As to the second, it amounts to this, that a man, who can see where he is going, enjoys the rights of an invitee within modest boundaries; but a man, who cannot carries them with him as far as the limits of his actual error. Both suggestions are ingenious, but they are suggestions ad hoc. There is no decision to support them.

Lord Sumner continued at p. 273:

> He was actually going where he had no business to go at the time of the accident, though his mistake was alike innocent and accidental. How can a workman extend the Board's liabilities, indicated by this term "invitation," by making a mistake of his own and getting lost in a fog? What legal reason can there be for the Board's "inviting" him to go somewhere in a fog, where he does not want to go at all and would certainly not be invited to go in clear weather, and where, moreover, the Board has no interest or desire to invite him at any time? There is none: the suggestion is a mere impulse of compassion.

In my opinion, this is the law and applies in the case at bar. Reference may also be made to *Caseley* v. *Bristol Corporation* (1).

The deceased, in the case at bar, being a trespasser in the place where he met his death, I can find no evidence of any

(1) [1944] 1 All E.R. 14.

breach of duty toward him on the part of the railway company. The appeal should therefore be allowed, the judgments below set aside and judgment entered for the appellant with costs if demanded.

CARTWRIGHT J.:—I have had the advantage of reading the reasons of my brother Kellock and I agree with his conclusion that there was no evidence on which the jury could find that the late Kenneth McCrindle was other than a trespasser at the place where he met his death. This being so, the action cannot succeed although the mistake made by Stewart and the deceased was, in the words of Lord Sumner quoted by my brother Kellock, "alike innocent and accidental."

I would dispose of the appeal as proposed by my brother Kellock.

Appeal allowed, with costs if demanded.

Solicitor for the appellant: *F. H. Britton.*

Solicitors for the respondent: *Haldane & Campbell.*

DAME MARIE-JEANNE MATHIEU (*Defendant*) ..... APPELLANT;

AND

AMEDEE SAINT-MICHEL (*Plaintiff*) ..RESPONDENT;

AND

TELESPHORE BRASSARD .....MIS EN CAUSE.

1956
*Mar. 12
*Apr. 24

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

Wills—Donation—Validity—Mental incapacity—Raising of prima facie presumption of—Burden of proof required by Art. 986 C.C.

This was an action to annul a deed of donation inter vivos and a will taken by the respondent on the ground that the deceased had been of unsound mind when she executed them. The trial judge dismissed the action and this judgment was reversed by a majority in the Court of Appeal.

*PRESENT: Taschereau, Rand, Locke, Fauteux and Abbott JJ.

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Held: The appeal should be dismissed.

The medical evidence to the effect that the deceased was in a state of extreme mental senility was sufficient to raise a prima facie presumption of mental incapacity and to cast upon those supporting the donation and the will the burden of displacing it by convincing proof that the deceased at the time was able to give the valid consent required by Art. 986 C.C. The presumption has not been displaced by the appellant.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing, Rinfret J.A. dissenting, the judgment at trial.

L. Dussault, Q.C. and *G. Filion* for the appellant.

E. Leithman for the respondent.

The judgment of Taschereau, Rand and Locke JJ. was delivered by:—

RAND J.:—In this appeal the validity of a donation *inter vivos* and of a will is challenged on the ground of mental incompetency. The donatrice and testatrix, born in 1888, then living in Farnham, Quebec, had in 1907 obtained a judicial separation from her husband and from then until 1928 had supported herself and only child by her earnings. In that year she inherited premises in Montreal which contained ten apartments, and there with her son made her home until his death in 1939. Shortly thereafter she asked her brother, the respondent, in Farnham, to move to Montreal for companionship and to assist her in managing her property, which he was unable to do until 1943. In the meantime, in 1940, she had made a will in which he was made universal legatee of which he learned soon after settling in Montreal in one of the apartments.

His sister was then suffering from arteriosclerosis, rheumatism, high blood pressure and nephritis which in 1945 was in an advanced and progressive stage. From 1943 until October, 1947 the brother and his wife gave her their friendly services in general oversight of the property and in attentions to her personal needs and conditions.

These good relations continued until September, 1947, when near the end of that month a "chicane" took place between the sisters-in-law which ended in each declaring that she would not again enter the door of the other. But

(1) Q.R. [1953] Q.B. 590.

this threat did not affect the daily attendance by the respondent and his wife on the deceased which continued as before at least until the events took place which give rise to this litigation; nor, as will appear, did it prevent the sister from visiting in the apartment of the brother thereafter.

On October 25 the deceased, with notary Gaudet, the appellant Bousquet, age 35, and his wife, attended the office of notary Poirier in Montreal where, in the presence of all five, instructions for a deed of donation of the property were given. That Bousquet was the spokesman appears from the cross-examination of the notary:

> Les instructions m'ont été données quand madame Bail, monsieur et madame Bousquet, monsieur Gaudet étaient à mon bureau. Cela a été discuté tout ensemble.
>
> Qui a donné les instructions? . . .
>
> On m'a donné le principe général.
>
> Qui?
>
> Monsieur Bousquet, cela a été incorporé.
>
> C'est monsieur Bousquet le dernier qui vous a donné le plan de votre document, les conditions que vous avez incorporées dans l'acte?
>
> Oui, avec toute l'approbation de madame Bail, elle a dit la même chose elle-même.

The "general scheme" was a simple gift reserving the usufruct for life with obligations on Bousquet which can be summarized by saying that he would see to the maintenance of the property for which he would furnish the labour, and to the personal requirements of the donor, for all of which, except the labour, she would bear the cost. There was a résolutoire condition in case the donee predeceased her. At her request he was to take up living in her apartment without rent but otherwise occupying a lodging would be at the usual rent. According to Mme. Bousquet it was arranged that her family would move to one of the apartments in 1949, two years later, "pour rester à côté d'elle". The notary appreciated nothing of the serious physical condition of the deceased; he says he saw no change from her appearance seven years before which would seem to rule out any reliance on his powers of observation; and her "approval", however indicated, could not have been more than mere assent to questions put that called for "yes" or "no"; there is no suggestion that she played any greater part in the discussion. The document was drawn up and executed at her home on October 30.

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Rand J.

On the 30th of December, Bousquet and his wife, along with the deceased, again attended at the office of Poirier where the latter is said to have instructed him to draw a new will giving all of her property to Bousquet, which was executed in the presence of another notary. What property, if any, she possessed in addition to the apartment house, does not appear. According to the witnessing notary, while he was present she said nothing. Poirier produced in court a memorandum made by himself and annexed to the will of 1940 to the effect that on September 30 the deceased had revoked the will of 1940, and the later one includes an express revocation of all previous testamentary instruments.

About April 20, 1948 while spending the afternoon at the Bousquet's she suffered a paralytic seizure which culminated in her death on June 16. From the making of the donation until June 2 she lived alone in her apartment as before but on that day she was taken to the Bousquet home where she died.

Medical evidence was given by physicians who had attended her in 1945, 1946 and 1947 and they agree that she was then in the grip of the deterioration mentioned. Dr. Tremblay, aged 56, to whom she was taken by Mme. Saint-Michel, wife of the respondent, found her in 1945 to be a very sick person, suffering from a chronic and progressive disorder which had produced a "ramollissement cérébral", a "grand déséquilibre, une grande déficience" of mind,

> Bien, elle souffrait (in 1945), c'était une grande malade, elle avait peine à se conduire, c'est-à-dire elle ne pouvait pas venir au bureau seule, elle était toujours accompagnée.
>
> * * *
>
> Même au point de vue mental, je crois qu'elle était encore dans un degré plus avancé, une diminution des facultés, une grande diminution.
>
> * * *
>
> C'était la mémoire qui faisait défaut et toutes ses idées c'était plutôt lent, . . .
>
> * * *
>
> Dans ses idées il n'y avait pas de collaboration et en la questionnant, les réponses qu'elle nous donnait, c'était plutôt vague.
>
> Par les réponses qu'elle vous donnait, pouvez-vous dire si elle comprenait les questions que vous lui posiez?
>
> Oui, elle comprenait, mais il y avait une diminution, je pourrais dire une diminution de 50% peut-être avec une personne normale.

He saw her again around Christmas, 1947:

Je l'ai vue une fois, j'ai été voir son frère et elle était là, un soir. M. Saint- Michel faisait une crise d'asthme et elle était dans la cuisine à causer, et elle n'a pas semblé me reconnaître. Je l'ai trouvée dans un état très pitoyable.

* * *

Oui, bien pitoyable. Je lui ai demandé comment elle allait et je pense qu'elle ne m'a pas répondu et je pense qu'elle n'a pas semblé me reconnaître du tout.

* * *

Elle ne disait pas grand'chose. C'était moi qui étais obligé de la questionner pour savoir de quoi elle se plaignait, de quoi elle souffrait. Elle était pas mal perdue.

* * *

Je suis certain qu'elle ne faisait pas ce que je lui disais parce qu'elle avait l'air d'oublier bien vite ce qu'on pouvait lui dire. Elle se rappelait pratiquement de pas grand'chose.

In 1946 Dr. Forbes, age 69, called by Mrs. Saint-Michel, attended her on three occasions at intervals of from seven to ten days. He found her suffering as already described, and asked whether in his opinion that condition had existed for some time said,

I think so because her behaviour plainly indicated an intellectual deficiency which I attributed to a chronic trouble . . . softening of the brain.

To this he adds,

Was there any doubt in your mind, when you saw her the first time, that she was suffering from what you call "softening of the brain"?

I had no doubt at all. My first impression was: she appeared dull and stupid like—inattentive to the questions I was putting to her.

Could you, from her answers, gather whether she understood the questions you were putting to her?

She appeared indifferent and this struck me especially—I mean in the condition she was and suffering from what she did.

* * *

Well, my foregone conclusion was that I could not expect any cooperation from her.

* * *

She was indifferent and inattentive to the interest I was taking in her case. (Resulting from her mental condition.)

What would you expect in time, in so far as the softening of the brain is concerned?

That progressively she would get worse and that she would end most likely—eventually—by having a stroke.

But she could have better periods if she were taken care of, and followed a diet?

Well, I was not under that impression. It was a foregone conclusion in my mind, that there would never be any improvement. It was impossible due to the damaged condition of the brain at that time, and due to the arteriopathic condition of the brain.

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His prognosis was given remarkable confirmation by the event.

Then Dr. Senecal, 45 years of age, called in to see her in July, 1947 for some skin trouble, who found her mentally feeble, summed up his impression as follows:

Lors de votre examen, naturellement, vous avez posé des questions, vous avez remarqué des faits; dans quelle condition mentale, d'après vous, se trouvait la patiente?

Bien, évidemment, elle m'a fait l'impression d'être affaiblie au point de vue mental, comme elle l'était d'ailleurs au point de vue physique.

Sur quoi vous basez-vous pour dire qu'elle était mentalement affaiblie? C'est une impression, son comportement général.

Le fait qu'on la conduisait par la main et aux questions demandées elle répondait plutôt vaguement. "Depuis combien de temps cela dure?" "Je ne sais pas". "Une semaine?" "Peut-être." Ce ne sont pas des choses concluantes, mais tout de même. . . .

The appellants called Dr. Girard, 79 years of age, who had attended her for the first time on April 20, 1948, when the seizure occurred. The paralysis had affected her tongue and she had difficulty in speaking:

Elle répondait difficilement un petit peu, elle avait une température assez élevée, pression artérielle de 180, les jonctives un petit peu hypertrophiées, les conjunctives un petit peu tuméfiées, la figure un peu rouge. Elle ne disait pas grand chose. J'ai pris son poulx qui était passablement rapide. Je n'ai pas marqué la vitesse, sa pression était de 180 sur 75, la pression artérielle.

* * *

Voyant qu'elle avait de la difficulté à parler, je lui ai posé le moins de questions possibles.

Malgré tout, est-ce qu'elle a répondu à vos questions?

Très bien, autant par des signes que par la voix.

Est-ce qu'elle semblait avoir de la difficulté à comprendre vos questions?

Non, parce qu'elle souriait, elle me répondait; quand elle ne répondait pas de la voix elle répondait par des signes.

On April 30 at her home:

Est-ce qu'elle vous a reconnu comme étant le médecin qui l'avait soignée il y avait dix jours?

Je ne peux pas affirmer, cela a paru comme si elle me reconnaissait parce qu'avant d'engager une certaine conversation, elle m'a répondu très bien, elle était beaucoup améliorée.

Subsequent visits were made:

On May 9:

Qu'est-ce que vous avez constaté, cette fois-là, chez madame Bail?

Il y avait encore un peu de paralysie, cependant il y avait un peu d'amélioration. La paralysie existait surtout dans sa langue.

* * *

Est-ce qu'elle vous a répondu facilement ou difficilement?

Assez difficilement.

May 20 and June 2:

. . . on voyait que la paralysie se faisait progressivement, mais bien lentement; sa circulation était méchante; l'expression était diminuée, sa figure était tombée.

* * *

Qu'est-ce que vous avez constaté à ce moment-la?
La paralysie était presque complète du côté droit.
Au point de vue intellectuel?
Elle n'avait pas connaissance.
Le deux (2) juin?
Oui, monsieur.
L'avez-vous revue avant son décès?
Oui, le quatre juin, les sept, neuf, onze juin.

As to blood pressure and senility:

Grosse hypertension?
Oui, monsieur.
Pouvez-vous nous dire si, d'après vous, cette hypertension existait depuis longtemps?
C'est difficile à répondre parce qu'on voit des cas qui vont avoir une pression normale et il va arriver certaines circonstances et que le lendemain ils vont faire une pression très haute.
Quant à madame Bail, vous ne pouvez pas dire si elle avait cette hypertension depuis deux ou trois ans avant?
Je ne crois pas, cela aurait pu exister depuis quelques mois.
Mais pas deux ou trois ans?
Je ne crois pas.

* * *

Comment décrivez-vous la sénilité?
C'est un ramollissement du cerveau.

* * *

N'avez-vous pas ajouté "grosse hypertension cardiaque et rénale"?
Oui, cela c'est bien cela.

In view of the unchallenged facts of her condition from 1945 through to the stroke on April 20, the opinions expressed by Dr. Girard furnish us with no assistance.

In addition to this testimony, that of neighbours and acquaintances of both the deceased and the Bousquet's was presented of small items of behaviour which presented the usual conflict. What seems to be placed beyond doubt was the decay of memory and the childishness of mind into which she had sunk. Quite apart from the testimony of her brother and sister-in-law, it is evident that, emotionally as well as mentally enfeebled, she talked and acted like a child, and presented a mind of the most limited scope of understanding. Mme. Sylvestre who occupied an apartment on the third floor says:

On lui racontait des choses et cinq minutes après elle disait le contraire. Ce n'était pas toujours la même chose qu'elle racontait.

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Elle pleurait beaucoup, dans cet été-là, elle a beaucoup pleuré, surtout les derniers temps, elle pleurait beaucoup, en septembre, (1947) quand je suis revenue.

* * *

Les Saint-Michel s'étaient acheté un propriété et elle avait peur de rester toute seule?

Oui, elle avait peur qu'ils partent sans lui dire.

The witness Dubé:

Normale, comment, physiquement ou mentalement?

Physiquement oui, et mentalement, oui, parce qu'elle disait des choses, vous savez, qui n'étaient pas . . . C'était un discours qui n'était pas tout à fait . . . C'était comme un enfant dirais-je.

She had difficulty in appreciating simple distinctions as, for example, between a 1¢ piece and a 10¢ piece, and common matters told in the plainest language which, after much repetition, she would seem to understand, would be obliterated from memory minutes afterwards. In September and October, 1947 she is said to have proposed to several persons, bare acquaintances, "se donner" along with her property. M. Sylvestre consulted notary Poirier whether he should take over the property and on the advice given him he declined, but he adds significantly:

En premier, je ne la prenais pas au sérieux, ensuite de cela, je m'en suis fait un scrupule.

* * *

Je trouvais que ça n'avait pas de bon sens qu'elle enlève cela à son frère pour me donner cela à moi, qui étais un étranger.

* * *

C'était une femme qui me paraissait malade et elle n'avait pas de discours, une journée elle nous disait noir et cinq minutes après elle disait blanc. On ne pouvait pas parler avec elle.

* * *

Elle agissait comme une personne qui ne se rend pas absolument compte de ce qu'elle faisait.

* * *

C'est-à-dire elle ne donnait pas de reçu, elle présentait le carnet de reçus et ils étaient tous préparés, et elle nous disait de choisir le reçu à notre nom.

* * *

Est-ce qu'elle pouvait se rendre compte que le montant d'argent qui lui était dû lui était payé exactement?

Non, parce qu'elle me demandait: "Est-ce que j'ai le montant, est-ce que j'ai du change à vous remettre?"

Later on Mme. Sylvestre spoke to Bousquet:

J'ai dit à M. Bousquet: "Vous prenez une grosse chance, parce que . . . ". Il a dit: "Cela ne fait rien, je prends la chance".

Il prenait la chance de quoi, madame?

C'est tout ce qu'il m'a répondu.

Mme. Lachance:

Elle agissait comme une personne qui retourne en enfance, d'après moi.

* * *

Est-ce que madame Bail vous a parlé au sujet de sa propriété?

Bien, elle avait déjà voulu se donner à nous autres.

Quand cela, madame?

Ca fait à peu près trois ou quatre ans, c'est les premiers à qui elle en a parlé.

Trois ou quatre ans avant sa mort?

Oui.

* * *

Qu'est-ce que vous voulez dire quand vous dites qu'elle ne répondait pas normalement? Quand vous lui avez parlé? Pouvez-vous donner des examples?

Elle ne comprenait pas. Cela prenait une heure avant de lui faire comprendre.

* * *

Est-ce que cela vous a pris une heure pour la convaincre que la pièce d'un sou était un sou et non pas un dix sous?

Cela a pris une dizaine de minutes, pas plus.

* * *

C'a pris du temps, il fallait lui expliquer et c'était long quand on lui expliquait quelque chose.

Information reached her brother that she was intending to give her property to the Bousquet's and he seems to have asked for remuneration for what had been done for her by a return of the rent paid and a gratuitous lease for a future period. There is in evidence a document dated October 29, 1947, bearing her signature, almost undecipherable, by which she agreed to reimburse him and to permit him to hold his apartment without charge for two years from that date. Notwithstanding this document, in November, on alleged instruction from her, Bousquet had a saisie-gagerie issued against the goods of the brother, which, when the document was produced to the attorneys, was at once abandoned. Assuming that she had assented to Bousquet's action, the necessary inference is that she had completely forgotten the document, but it furnishes no evidence that she was capable of appreciating what she was doing in signing it: it would evidence rather her yielding to whatever was indicated or pressed upon her by others. It is of some interest also that the proceedings alleged a lease under seal dated October 20, 1947 for a term of two years at the rent of $19 a month. No such instrument was produced at the trial. The claim was for a resiliation of the lease and for the further sum of $57 covering an additional three months' rent. Admittedly Bousquet was the inter-

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mediary representing the deceased and if there was such an instrument, taken with the other document of October 29, it supplies whatever further evidence of confusion on her part might be asked for.

The medical testimony mentioned and that of the other witnesses was either heard or read by Dr. Fontaine, 53 years of age, a graduate of the University of Paris in medical jurisprudence and psychiatry, the medico-legal expert of the provincial government, and his opinion, was unqualified that the deceased was in a state of extreme mental senility, "l'affaiblissement intellectuel", manifesting a regress into infancy. After reviewing the medical testimony he says:

> De ce témoignage, il résulte que Madame Bail souffrait de déficience mentale qui se traduisait par de la lenteur dans les idées, par des troubles de mémoire, une diminution de la compréhension, de l'inattention, une attitude hébêtée et une indifférence et une insouciance qui se manifestent par un certain état de malpropreté, constaté par le docteur Forbes; et ces troubles, tels que relatés par le médecin, sont confirmés par les témoins de la demande:
>
> "Elle racontait des choses et cinq minutes après nous disait le contraire."
>
> "Elle pleurait sans savoir pourquoi et comprenait toujours à côté," nous dit Madame Sylvestre.
>
> "Il n'y avait pas beaucoup moyen de se faire comprendre de Madame Bail; elle agissait comme une personne qui retourne en enfance"—nous dit Madame Lachance.
>
> "Elle répète toujours la même chose, disait quelque chose et deux minutes après le redisait et ce n'était plus la même chose"—nous dit sa belle-sœur, Madame Saint-Michel.
>
> * * *
>
> Ils s'amusent avec les enfants, se chicanent avec eux, les boudent; c'est ce qu'on appelle le retour à l'enfance.

Speaking of the evidence of Dr. Girard he comments:

> Le docteur Girard nous a dit que lorsqu'il vit la patiente Madame Bail pour la première fois, elle était paralysée de la langue et qu'elle avait toutes les difficultés du monde à entendre et à parler. Et il a conclu que Madame Bail était parfaitement lucide parce que—nous dit-il—"Elle m'a souri et semblait me reconnaître."
>
> Et aux questions qu'il lui posait, elle répondait surtout par des gestes plutôt qu'au moyen de la parole.
>
> J'ai trouvé étranges ces conclusions: parce que si Madame Bail ne peuvait pas s'exprimer, si elle ne parlait pas, comment a-t-il pu faire pour se rendre compte qu'elle était saine d'esprit?
>
> C'est par interrogatoire et par les réponses au questions que l'on pose aux malades qu'on peut se rendre compte surtout de l'état mental du patient.

On these facts the trial judge found against the respondent, but on appeal this was reversed by a court of five members, Rinfret J.A. dissenting.

Among the persons declared by the Civil Code to be incapable of contracting are those who "by reason of weakness of understanding are unable to give a valid consent": Art. 986. The evidence both of fact and of opinion given by Drs. Tremblay, Forbes and Senecal, supported by the opinion of Dr. Fontaine, was sufficient to raise a prima facie presumption of that degree of mental weakness or unsoundness and to cast upon those supporting the instrument of donation the burden of displacing it by convincing proof that the deceased at the time was able to give such a consent: *Russell* v. *Lefrancois* (1); *Phelan* v. *Murphy* (2). This would mean that she was of an understanding adequate to the act done, that she was able to grasp its character and effect in the setting of her circumstances, that she appreciated the value of the property, about $20,000, her own physical condition, her future, that she was disposing of her property to a virtual stranger whom she would not have as a neighbour for at least two years, and that the donation was irrevocable: that she had, in short, the intellectual capacity in some degree to view these matters in their entirety in the perspective of her present and possible future life and her family relationships.

So formulated and in the circumstances of the particular case, the test of competency in making the agreement is substantially the same as that of the will. Testamentary capacity was before this Court in *Leger* v. *Poirier* (3), in which the leading cases were examined. What they indicated was that it was not sufficient that a testator be able to answer familiar and usual questions, but to use the language of Sir John Nicholl quoted at p. 162,

> he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.

And as it was put in the majority judgment of this Court,

> a mind capable of comprehending, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions, and the like.
>
> * * *
>
> There must have been a power to hold the essential field of the mind in some degree of appreciation as a whole.

This follows *Banks* v. *Goodfellow* (4), in which Cockburn C.J., giving an authoritative pronouncement on the general

(1) (1884) 8 Can. S.C.R. 335 at 372.
(2) Q.R. (1938) 76 S.C. 464 at 467.
(3) [1944] S.C.R. 152.
(4) (1870) L.R. 5 Q.B. 549.

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subject, reviews the treatment accorded it by the foremost commentators in the Civil Law and that of France, and remarks upon the absence in both of the formulation of any specific juridical test of unsoundness.

Attributing to her a vague seeking for some symbol of protection or security, evidenced by the adventitious, hasty and indifferent commitment of herself and property to an unknown young man, a childishly irrational act since she continued to live alone, as she had from 1939, until struck down, and considering, along with the other evidence before us, the inconsequent attitude towards her brother, although their relations remained much as before, the presumption has not, in my opinion, been displaced; I find myself quite unable to say that she was capable of giving an intelligent consent to the deed or that she possessed a "disposing mind and memory".

In this Court the appeal is against the judgment of the Court of Queen's Bench, and unless we are satisfied that that judgment is wrong, it should not be disturbed. While the question at issue is not free from difficulty, I am far from being satisfied that the court below was wrong, and I would therefore dismiss the appeal with costs.

The judgment of Fauteux and Abbott JJ. was delivered by:—

ABBOTT J.:—I am in substantial agreement with the reasons given by Mr. Justice McDougall in the Court below. In my opinion the medical evidence was sufficient to raise a *prima facie* presumption of mental incapacity. On the principle enunciated in *Russell* v. *Lefrancois* (1), the burden of establishing capacity to have made the donation and the will was therefore shifted to the propounding party and in my view the appellants failed to discharge that burden. I am unable to say that the Court below was wrong in reaching the conclusion which it did and I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Monette, Filion & Lachapelle.*

Solicitors for the respondent: *Cohen & Leithman.*

(1) (1884) 8 Can. S.C.R. 335 at 372.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

KENNETH HARDER .....RESPONDENT.

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*Feb. 24
*Apr. 24

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Rape—Aiding and abetting—Crown's case, that accused assisted another—Indictment charging him with carnal knowledge—Whether indictment valid—Criminal Code, ss. 69, 852.

The respondent was convicted of rape on a charge that "he did have carnal knowledge of V.B., a woman who was not his wife, without her consent". The Crown's case was that while he did not in fact have sexual intercourse with the woman he had aided others to do so. The Crown sought a conviction under s. 69(1) of the *Code* as an "aider and abettor". By a majority judgment, the Court of Appeal quashed the conviction and ordered an acquittal on the ground that the indictment failed to allege the facts in support of the Crown's case.

Held (Cartwright J. dissenting): That the appeal should be allowed and the conviction restored.

Per Kerwin C.J., Taschereau and Fauteux JJ.: Since an aider and abettor may be indicted as principal simpliciter, it follows that an indictment so charging an aider, being valid in law, must therefore be construed not as exclusively charging the accused as having in fact actually committed the offence, but as having in the eyes of the law committed it. It also follows, since the reason for such construction being that all participants are by law principals, that the same construction obtains whether the indictment charges them jointly or each of them alone of the offence in the ordinary form, as if they had actually committed it, or whether the offence is stated "in popular language" or "in words of the enactment describing the offence" as authorized by s-s. 2 and 3 of s. 852 of the *Criminal Code*.

While it was open to the respondent, before or during the trial, to move for the different reliefs he might then have considered desirable for his defence, he, admittedly being at all times fully informed of the case against him, elected not to do so; he cannot now complain in appeal of matters which, subject to their merits, could have been corrected at trial.

Per Rand J.: The charge as laid included the offence in law attributable to the respondent through his act of aiding and abetting. The evidence of assistance only was, after verdict, sufficient to convict (*Rex* v. *Folkes and Ludds* 168 E.R. 1301 followed).

Per Kellock J.: The indictment complied with s. 852(3) of the *Code* and was a valid and appropriate indictment.

Per Locke J.: When a person has abetted another to commit the offence of rape, it is a literal compliance with the requirements of s. 852(3) of the *Code* to charge him of the offence as a principal.

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Locke, Cartwright and Fauteux JJ.

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Per Cartwright J. (dissenting): The wording of the charge not only failed to inform the respondent of the case against him but was actually misleading. The charge should have contained at least a statement that someone had raped the complainant and that the respondent had done an act for the purpose of aiding him to do so. The rape with which he was charged was not one committed by someone else but by himself personally and there was no evidence of any such rape. Where the criminality of an act depends on the existence or non-existence of a particular relationship between the individual personally committing the act and another person, it is essential that the charge should specify whether the accused did the alleged act personally or merely aided another to commit it.

Furthermore, since there was evidence by the complainant of two separate rapes, the charge was bad either for uncertainty or for charging two separate crimes in one count.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), setting aside, Robertson and Bird JJ.A. dissenting, the respondent's conviction on a charge of rape.

Lee A. Kelley, Q.C. and *J. J. Urie* for the appellant.

T. P. O'Grady for the respondent.

The judgment of Kerwin C.J., Taschereau and Fauteux JJ. was delivered by:—

FAUTEUX J.:—The material facts giving rise to this case are related by the complainant; they may be summarized as follows: At 9 o'clock p.m., on the 23rd day of May, 1954, the respondent, Kie Singh, Pew Singh and Jumbo Singh invited the complainant to board the automobile in which they were and eventually abducted her to a secluded place where each of the three Singhs raped her; respondent himself had no carnal knowledge of the girl but, by use of force, assisted in subduing her; immediately after the occurrence, the latter was driven back to a short distance from her home and upon entering her residence, complained to her mother of the assault and the police were notified.

The accused was arrested and upon evidence of these facts related by the complainant at the preliminary inquiry, was committed for trial and tried upon an indictment charging him in the very words of the enactment describing the offence of rape (s. 298), to wit:—

That at or near Newton, in the Municipality of Surrey, in the County and Province aforesaid, on the 23rd day of May in the year of Our Lord 1954, he, the said Kenneth Harder, a man, did have carnal knowledge of

(1) 112 C.C.C. 277.

(Christian name and surname mentioned in the indictment are here omitted), a woman, who was not his wife, without her consent, against the form of the statute in such case made and provided and against the peace of Our Lady the Queen, her Crown and dignity.

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The issue at trial was whether, during the whole of the transaction, rape had been committed by a person or persons other than the accused and whether the accused aided in its commission. The latter, assisted by counsel, did not testify and was found guilty by the jury.

This conviction was appealed and quashed by a majority judgment of the Court of Appeal for British Columbia.

The point upon which the appeal turned is centred upon the indictment and, as indicated by Davey, J.A., had never been raised at trial. The majority (O'Halloran, Smith and Davey, JJ.A.), relying primarily on the decision of this Court in *Brodie* v. *The King* (1), expressed the view that the indictment, containing no averment that Harder had assisted Jumbo Singh or any one else to have carnal knowledge of the girl, must on a proper construction, be held to charge respondent as having himself physically raped the complainant; and there being admittedly no evidence to support the indictment as thus construed, the Court maintained the appeal and directed an acquittal to be entered. Robertson and Bird JJ.A. dissenting, held:—

That the indictment charging the accused as principal was sufficient notwithstanding that it did not aver that the accused aided and abetted Kie Singh to assault the woman criminally.

With deference, I cannot agree with the views held by the majority. Admitting that the construction they placed upon the indictment is justified, on the restrictive basis upon which it was made i.e. the literal wording of the document, it cannot be supported, on the entirely different legal basis upon which indictments can be framed and must therefore be construed, according to law. And while it was open to the accused, before or at any stage during the trial, to move for the different reliefs he might then have considered desirable for his defence, he, admittedly being from the moment of his committal for trial to the end of the trial fully informed of the case against him, elected not to do so; he cannot now complain in appeal of matters which, subject to their merits, could have been corrected at trial, had he then chosen to so move.

(1) [1936] S.C.R. 188.

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The indictment. An indictment cannot properly be construed without regard to the substantive and procedural provisions of the criminal law related to its substance and its form. As stated by Willes J., with the concurrence of all the Judges who advised the House of Lords, and with the approval of the latter, in the case of *Mulcahey* v. *The Queen* (1):

> . . . an indictment only states *the legal character of the offence* and does not profess to furnish the details and particulars. These are supplied by the depositions, and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions, which it may be intended to produce at the trial. To make the indictment more particular would only encourage formal objections upon the ground of variance, which have of late been justly discouraged by the Legislature.

This statement was acted upon by Sir William Ritchie C.J. and Strong J. in *Downie* v. *The Queen* (2).

At common law, the actor or actual perpetrator of the fact and those who are, actually or constructively, present at the commission of the offence and aid and abet its commission, are distinguished as being respectively principal in the first degree and principals in the second degree; yet, in all felonies in which the punishment of the principal in the first degree and of the principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree. (Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 1499). In Hawkins's Pleas of the Crown, Vol. II, p. 316, s. 64, it is stated:—

> That where several are present and one only actually does it, an indictment may in the same manner as in appeal, either lay it generally as done by them all or specially as done only by the one and abetted by the rest.

The reason for the rule is evident. It is stated as follows in East's Pleas of the Crown, Vol. I, at page 350:—

> For in these cases all the parties are principals, and the blow of one is, in law, the blow of all. For which reason an indictment that A. gave the mortal blow and B., C. and D. were present and abetting, is sustained by evidence, that B. gave the blow and A., C. and D. were present and abetting. Upon the like indictment, evidence that E., though not named therein, gave the blow, and that A., B., C. and D. were present and abetting, would be sufficient; or even that a person unknown gave the blow.

(1) (1868) L.R. 3 H.L. 306 at 321. (2) (1889) 15 Can. S.C.R. 358 at 375.

In *The Queen* v. *James* (1), the indictment charged the accused with the larceny of a letter; the question raised in that case was whether he was a joint thief with the postman whom he had induced to intercept and hand him over the letter, or whether he was an accessory before the fact to the larceny committed by the servant of the Post Office. Lord Coleridge, C.J., with the concurrence of Pollock, B., Hawkins, Grantham and Charles, JJ., stated at page 440:—

> I can entertain no doubt in this case. Either the prisoner was a joint thief with the postman from whom he obtained the letter, or he was an accessory before the fact, in which case, by 24 & 25 Vict. c. 94, s. 1, he was liable to be convicted in all respects as if he were a principal felon. In either case, therefore, he was rightly convicted.

Section 1 of c. 94, therein referred to, reads:—

> 1. Whosoever shall become an Accessory before the Fact to any Felony, whether the same be a Felony at Common Law or by virtue of any Act passed or to be passed, may be *indicted, tried, convicted* and punished in all respects as if he were a principal Felon.

This Imperial statute, later adopted into Canadian law (R.S.C. 1886, c. 145) practically brought to an end the distinctions between accessories before the fact and principals in the second degree.

By the enactment of section 61, the predecessor to section 69, these distinctions in the substantive law entirely disappeared from our criminal laws when codified in 1892. With them, of course, also disappeared, because being made no longer necessary, the relevant adjective rules related to the framing of the indictment of such persons who, not actually committing the offence charged, were then made, by statute, principals and equally party to, guilty of and punishable for the offence as if actually committed by them. It is unthinkable that, getting rid of the difficulties arising out of these prior distinctions, Parliament would, in the same breath, have created new ones by refusing to the Crown the right to indict—which right it had before, under common and statutory law—as principal simpliciter, either a principal in the second degree or an accessory before the fact, and this, under the regime of this new law holding each and all *particeps criminis* as being nothing less than principals.

(1) (1890) L.R. 24 Q.B.D. 439.

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Sir Elzéar Taschereau, in his *Criminal Code*, deals with the matter and, indicating how an abettor may be indicted, says at page 29:—

> For instance: A. abetted in the commission of a theft by B. The indictment may charge A. and B. jointly or A. and B. alone as guilty of the offence in the ordinary form, as if they had actually stolen by one and the same act.

In *Rémillard* v. *The King* (1), is evidenced the practice more generally followed since this change of the law. The facts in that case were that, on the counsel of his father, a son killed another person. Father and son were separately indicted; the indictment against the father, as appears in the file of this case in this Court, was for murder simpliciter, there being no averment, either of the fact that he counselled the commission of the crime or of the fact that another person was involved therein. The son was found guilty of manslaughter but the father, guilty of murder. The conviction of the latter was upheld by this Court.

Relying on the decision of this Court in *Rémillard* v. *The King* (*supra*), Chief Justice Robertson, in *Rex* v. *Halmo* (2), dealing with the same matter though arising in a different way, expressed the following views, at p. 118:—

> Appellant was charged in express terms with an offence against s. 285(6), and if he did aid, abet, counsel or procure Mayville to drive his motor-car in the manner in which it was in fact driven, he was guilty of a breach of that subsection, and s. 69, beyond question, warrants his prosecution for an offence under s. 285(6); *Remillard* v. *The King* (1921), 59 D.L.R. 340, 35 Can. C.C. 227, 62 S.C.R. 21. It was unnecessary to allege in the charge that appellant "did aid, abet, counsel or procure Wilfred Mayville," for by force of s. 69 it would have been sufficient, and perhaps, better pleading, to charge him simply with the offence that Mayville in fact committed. The insertion of the unnecessary words did not, in my opinion, invalidate the charge, nor prevent its being a good and sufficient charge under s. 285(6). Appellant was assisted rather than injured by the more specific statement of his relation to the offence with which he was charged.

In this state of the law, an aider and abettor may be indicted as principal simpliciter. It follows that such an indictment, valid in law, must therefore be construed, not —as was done in the Court below—as exclusively charging an accused as having in fact actually committed the offence charged, but as having in the eyes of the law committed it.

(1) (1921) 62 Can. S.C.R. 21. (2) 76 C.C.C. 116.

And, the reason for the construction being that all *particeps criminis* are by law principals, it also follows that the same construction obtains whether, as stated in Taschereau's Criminal Code, the indictment charges them jointly or each of them alone of the offence in the ordinary form, as if they had actually committed it, or whether the offence is stated "in popular language" or "in the words of the enactment describing the offence" as Parliament authorized it to be done at the option of the prosecution, under sub-sections 2 and 3, respectively, of s. 852.

It is said that charging a man with rape or to have had carnal knowledge of a woman when he only aided another to do the act is repugnant and, therefore, misleading. This is so if the indictment is literally construed but not so if legally construed. Countenance must be given to the law as laid down and not to arguments prompted by logic without regard to what the law is. In *Simcovitch et al.* v. *The King* (1), the argument was that, neither of the appellants falling within the description of the classes of persons to whom indictable offences of which they were charged are imputed by statute, they could not physically for that reason commit, and therefore be convicted of, such offences. This argument was not accepted to defeat the law as interpreted by the Court.

The *Brodie* case (*supra*), relied on by the majority in the Court below, has, with respect, no application in the matter. The question in the case was whether the indictment did specify the offence. The point raised in the present appeal is an entirely different one and one which was not in issue in the *Brodie* case. While, in the latter, this Court dealt with sections 852, 853 and 855, it clearly did so exclusively in relation to the matters under consideration in that case, carefully adding, indeed, at the end of the judgment:—

> We do not want to part with this appeal, however, without saying that our decision is strictly limited to the points in issue.

And contrary to what is the situation here, the Court treated the indictment as being invalid on its face, quashed it as well as the conviction, and added that the Crown was at liberty to prefer a fresh indictment if so advised.

(1) [1935] S.C.R. 26.

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The course of conduct at trial. As already indicated, respondent was admittedly fully aware of the case for the prosecution and of the position taken by the latter on the indictment. This knowledge he gained respectively from the depositions at the preliminary inquiry and from the opening address of the Crown to the jury at the very end of which the prosecutor said:—

> Now, in that regard, I think I should at this point advise you that the Crown will not attempt to prove that this accused actually had sexual intercourse with the complainant (name being now omitted). The Crown, however, will bring evidence to show that he in concert with another man, held the accused, the girl, while others had sexual intercourse with her.
>
> THE COURT: You said the accused.
>
> MR. FRASER: Oh, I beg your pardon, held the complainant, while others had sexual intercourse with her.

Thus openly and at the very beginning of the trial the Crown, on the one hand, stated its intention to treat—as it was entitled to on the facts of the case and on the indictment as preferred (see *The King* v. *Michaud* (1); *Regina* v. *Giddins and two others* (2))—the whole conduct of the accused during the event as being, so far as the accused was concerned, one entire transaction, rather than to deal separately with his participation in each of the rapes committed in separate counts, a process much less favourable to the accused than the one adopted. With all this information and with this statement of the Crown, the accused, on the other hand, was content to undergo trial on the indictment as laid. No attempts were made by the defence either before, or at any stage of, the trial to have this substantially valid indictment quashed for matters of form, particularized, amended or divided. From this course of conduct in which both the Crown and the defence joined, the trial Judge was entitled to conclude that the accused had neither doubts as to what the case was nor embarrassment with respect to his defence to the charge as laid. In this situation, the defence was precluded, after the verdict, from complaining as to the indictment and the Crown was foreclosed from thereafter laying an indictment charging the accused with respect to any of the rapes actually committed during the events forming the basis of the charge.

(1) 17 C.C.C. 86. (2) (1842) Car. & M. 634.

In brief, the indictment was valid, the evidence of the complainant was accepted by the jury; and no substantial wrong or miscarriage of justice occurred in the case.

The appeal should be maintained and the conviction restored.

RAND J.:—The question raised in this appeal is that of the language in which the offence of rape is to be stated against an accused. S. 69 of the former *Code* declared that accessories before the fact and principals in the second degree, as these were known at common law, were parties to and guilty of an offence as if principals in the first degree. By s. 852(1) a count was sufficient if it contained in substance a statement that the accused "has committed some indictable offence therein specified"; s-s. (2) permitted the statement to be made in popular language, and s-s. (3) that "it may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence". This latter general provision might, obviously, require to be accommodated to the special nature of the offence when accessories before the fact or principals in the second degree were charged. For example, a husband who aids the ravishment of his wife by a third person is guilty of the crime of rape upon her; but could the charge follow the description of the offence as given by s. 298 of the *Code* which requires a statement that the woman is not his wife? In such a case it is necessary to include an allegation of the actual ravishment by another and a further allegation of the participation by way of assistance of the husband. The same conflict exists in the case of a woman charged with rape: it would be an absurdity to state the charge in the language of the *Code,* yet she is declared to be a party to the offence and may be found guilty of it.

The permitted description in the language of the statute is not, then, absolute. In the case before us I would, in the absence of direct authority, have been disposed to agree with the Court of Appeal that, owing to the nature of the crime and the connotation of the language by which it is directly described, the charge states only the personal act of ravishment by the accused and excludes the offence in law attributable to him through his act of aiding and abetting.

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In *Regina* v. *Crisham* (1) the count set forth the actual facts of aiding and abetting a rape by another and it was argued that the accused should have been indicted as principal at common law, with the count stating that the accused "as well as M'Donough" had ravished the prosecutor, which so far supports the view I take of the matter.

But I am precluded from following it by *Rex* v. *Folkes and Ludds* (2). There the indictment in the first count charged Folkes with having feloniously ravished the named woman and in the second that Ludds was there and then present, aiding and abetting him. The third and fourth counts were similar except that Ludds was charged as principal and Folkes as aider. The fifth and sixth, and the seventh and eighth counts, in each couplet, charged a person unknown to have been principal with Folkes and Ludds aiders. Ludds was acquitted on an alibi and a general verdict of guilty found against Folkes. The statute, 9 Geo. IV, c. 31 made no provision against aiders and abettors in rape and the question was whether, upon the indictment, the verdict could be sustained against Folkes. As the statute dealt with accessories before and after the fact to felonies and for aiders in cases of misdemeanour, it seems to have been accepted or it was at least assumed that the fourth, sixth and eighth counts did not state an offence against Folkes. There was evidence both of the personal ravishment by him and his aiding and abetting the ravishment by others. At a meeting of all the judges except four, the conviction was upheld on the first count. What this means is that on that count there could be a conviction upon the finding by the jury based either on the evidence going to the ravishment or that going to his secondary role as abettor. From this it follows that if there had been no other than the first count the evidence of assistance only would, after verdict, have been sufficient. That is the case before us.

I would, therefore, allow the appeal and restore the conviction.

KELLOCK J.:—The indictment upon which the respondent was tried and convicted contained the following charge:

THAT at or near Newton, in the Municipality of Surrey, in the County and Province aforesaid, on the twenty-third day of May, in the

(1) 174 E.R. 466. (2) 168 E.R. 1301.

year of Our Lord one thousand nine hundred and fifty-four, he the said KENNETH HARDER, a man, did have carnal knowledge of Vera Borushko, a woman who was not his wife, without her consent, against the form of the Statute in such case made and provided, and against the peace of our Lady the Queen her Crown and Dignity.

This conviction was set aside by the Court of Appeal, Robertson and Bird JJ.A., dissenting. The appeal comes to this court under s. 1023 of the *Criminal Code* upon the following dissent:

That the indictment charging the accused as a principal was sufficient notwithstanding that it did not aver that the accused aided and abetted Kie Singh to assault the woman criminally.

It is provided by s. 852(1) of the *Criminal Code* that every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed "some indictable offence therein specified". By s-s. (2) it is provided that such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved, while s-s. (3) provides that

Such statement may be in the words of the enactment describing the offence . . .

The particular offence here in question is described by s. 298 as follows:

298. Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, . . .

By s. 299, it is provided that "every one" who commits rape is guilty of an indictable offence and liable to suffer death or to imprisonment for life, and to be whipped.

It is further provided by s. 69 that

69. Everyone 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.

The view which commended itself to the majority below is sufficiently expressed in the language of Davey J., who, after referring to s. 69(1), clauses (*b*) and (*c*), said:

The accessory is guilty of the offence committed by the principal, in this case carnal knowledge had unlawfully by Kie Singh. But that was not the crime charged against the appellant. It was his own unlawful carnal knowledge that was alleged.

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In my respectful view, the error into which the learned judges constituting the majority have fallen is in reading the charge as though it had been framed "in popular language" as permitted by s-s. (2) of s. 852, substituting for the words "did have carnal knowledge of Vera Borushko" in the indictment, the words "did have sexual intercourse" with the named woman without her consent. The indictment was not, however, so framed but employs "the words of the enactment describing the offence" in accordance with s-s. (3) of s. 852. Accordingly, the indictment complying, as it does, with the statute, the only question is as to whether in a case such as the present, where the respondent did not himself have sexual intercourse with the woman but aided and abetted Kie Singh to do so, the indictment is a valid indictment.

At the time of the enactment of the *Code* in 1892, it had already been provided by R.S.C., 1886, c. 145, s. 2, that an aider or abettor

> may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted.

and might be punished in the same manner as an accessory before the fact, who, by s. 1 of the statute, might be *indicted,* tried, convicted and punished *in all respects* as if he were *a principal.*

Sir Henri Elzéar Taschereau, in his work on the *Criminal Code,* at p. 28, says in relation to s. 61 (now s. 69) that the section was so framed by the Imperial Commissioners as to put an end to the nice distinctions between accessories before the fact and principals in the second degree "already practically superseded by chapter 145 Revised Statutes". The learned author goes on to state that all are now principals in any offence, and punishable as the actual perpetrator of the offence, as it always has been in treason and misdemeanour. He continues:

> The prosecutor may, *at his option,* prefer an indictment against the accessories before the fact, and aiders and abettors as principal offenders, whether the party who actually committed the offence is indicted with them or not; *R.* v. *Tracey,* 6 Mod. 30. For instance: A. abetted in the commission of a theft by B. The indictment may charge A. and B. jointly or A. or B. *alone* as guilty of the offence, *in the ordinary form,* as if they had actually stolen by one and the same act. . . .
>
> In every case where there may be a doubt whether a person be a principal or accessory before the fact, it may be advisable to prefer the

indictment against him as a principal, as such an indictment will be sufficient whether it turn out on the evidence that such person was a principal or accessory before the fact, as well as where it is clear that he was either the one or the other but it is uncertain which he was.

In Russell on Crime, Tenth Edition, p. 811, the learned author says:

> The indictment against aiders and abettors may lay the fact to have been done by all, or may charge it as having been done by one and abetted by the rest. Thus where, upon an appeal against several persons for ravishing the appellant's wife, an objection was taken that only one should have been charged as ravishing and the others as accessories, or that there should have been several appeals as the ravishing of one would not be the ravishing of the others, it was answered that if two come to ravish and one by comport of the other does the act, both are principals, and the case proceeded; *R.* v. *Vide,* Fitz. Corone, pl. 86.

In *Archbold's Criminal Pleading,* 33rd Ed., p. 1089, the following appears:

> 1938. Indictment
> Statement of Offence
> Rape
> Particulars of Offence
> A B, on the day of , in the county of , had carnal knowledge of J N, without her consent.
> .....
> .....
>
> The offence is a felony at common law, but the punishment is statutory. An indictment is good which charges that A committed a rape, and that B was present aiding and abetting him in the commission of the felony; for the party aiding may be charged *either* as, as he was *in law,* a principal in the first degree or, as he was *in fact,* a principal in the second degree; *R.* v. *Crisham,* C. & Mar. 187.

In the case cited, the indictment stated that

> one Peter M'Donough upon one Bridget Lamb did make an assault, and her the said Bridget Lamb violently, feloniously, and against her will did ravish, etc.; and went on to state that the prisoner was present, and feloniously aided and assisted the said Peter M'Donough in the commission of the said felony, contrary to the statute, etc.

After a verdict of guilty on a motion in arrest of judgment it was argued for the prisoner that there being no statutory provisions applicable to persons aiding and abetting in cases of this nature, the indictment was wrongly framed, that he should have been indicted as at common law and the indictment

> should have charged him as a principal, and stated that he, as well as M'Donough, ravished the prosecutor.

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It was pointed out that the statute of 9 Geo. 4, c. 31, which declares that every person convicted of the crime of rape should suffer death, made no specific provision as to aiders and abettors, to which Maule J., said:

> Then your objection is, that the offence which has been committed is not stated in the indictment.
>
> Payne:
>
> My objection is, that the person is not charged, as he ought to have been, *as a principal.*
>
> Maule J.:
>
> There does not appear to me to be any ground for the objection. It has been already decided that, in a case of this description, the party may be charged according to the fact, *or* indicted as a principal in the *first* degree.

In my opinion, therefore, the English authorities are in accord with the construction which appears to me to be the proper construction of the *Code* itself.

For present purposes I see no difference in principle between the crime of rape and the crime of driving dangerously contrary to s. 285, s-s. (6) of the *Criminal Code,* where the accused did not personally drive, the actual driving having been done by another. This was the situation in *Rex.* v. *Halmo* (1).

In that case the accused was charged with aiding and abetting one Mayville to drive contrary to the statute and it was contended (conversely to the contention in the case at bar) that he

> should have been charged *directly* with reckless or dangerous driving, even if his part in it was only to aid, abet, counsel or procure another . . .

Robertson C.J.O., in refusing to give effect to the objection, said, at p. 101:

> It was unnecessary to allege in the charge that appellant "did aid, abet, counsel or procure Wilfrid Mayville", for by force of sec. 69 it would have been sufficient, and perhaps, better pleading, to charge him simply with the offence that Mayville in fact committed.

In my opinion this is a correct statement of the law. Whether an indictment framed as in the case at bar would be appropriate in a case where a husband has assisted another in ravishing the wife of the former need not, in my opinion, be considered. There is nothing inappropriate in the indictment in the case at bar. In my opinion also, as

(1) [1941] O.R. 99.

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the present charge was fully authorized by the *Code*, the decision of this court in *Brodie* v. *The King* (1), where it was considered that the indictment there in question was unauthorized, has no application.

No argument was advanced by the respondent based in any way upon evidence given as to the latter having assisted any other or others than Kie Singh in ravishing the woman named in the indictment. I decline, therefore, to consider whether the conviction was open to objection on such a ground, without any argument as to the applicability of such decisions as *Reg.* v. *Giddins* (2) and *The King* v. *Michaud* (3), as well as our jurisdiction under s. 1014 of the *Code*.

I would allow the appeal and restore the conviction.

LOCKE J.:—In my opinion, the law in England and in Canada, as of the time at which the *Criminal Code* came into force on July 1, 1893, is correctly stated in the 31st Edition of *Archbold's Criminal Pleading and Practice* at p. 1499, where it is said that in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree, provided the offence permits of a participation. The decision in *Mackalley's Case* (4), the reference in *Hawkins' Pleas of the Crown*, Vol. 2, p. 316, s. 64, and the decision of Blackburn L.J. in *Reg.* v. *Ram* (5), appear to me to support the author's statement.

The question to be determined in this appeal is whether this was changed by the provisions of s. 611 of the *Code* (55-56 Vict., c. 29) which appeared as s. 852 of the *Code* prior to its repeal and reenactment in 1955.

It is to be noted that in *Brodie's Case* (1), the concluding paragraph of the reasons of the Court delivered by Rinfret J. (as he then was) made it clear that the decision was "strictly limited to the points in issue" in that matter and that, on the face of it, the indictment considered was defective in that it charged that the accused were parties to "a seditious conspiracy in conspiring together", without

(1) [1936] S.C.R. 188.
(2) (1842) Car. & M. 634.
(3) 17 C.C.C. 86.
(4) 9 Co. Rep. 67b.
(5) (1893) 17 Cox C.C. 609.

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saying what they conspired to do. The head note correctly states the only point decided in these terms: "Although conspiracy to commit a crime, being in itself an indictable offence, may be charged alone in an indictment and independently of the crime conspired to be committed, it is nevertheless necessary that a count charging conspiracy alone, without the setting out of any overt act, should describe it in such a way as to contain in substance the fundamental ingredients of the particular agreement which is charged." Once it is appreciated that this was the point for decision, it appears to me to be clear that the reasons delivered do not touch the present matter.

With great respect, the judgments of the majority in the Court of Appeal appear to me to overlook the fact that s-ss. (2) and (3) of s. 852 are to be considered separately since they state alternative methods in which an indictment may be phrased. It appears to me to be error to graft on to the provisions of s-s. 3 the concluding words of s-s. 2. Once this is appreciated, I think that the proper conclusion in the present matter is made clear. The indictment against Harder was in the language of s. 298. The offence there described might, indeed, be committed in more than one manner, by virtue of the provisions of s. 69 of the *Code*. Ignorance of this, if he was indeed ignorant, would not assist the accused. The fact would be immediately made known to him, in any event, when, as in the present matter, he retained counsel. In my opinion, when a person has abetted another to commit the offence of rape, it is a literal compliance with the requirements of s-s. 3 to charge him of the offence as a principal, just as it was prior to the first enactment of the *Criminal Code*. If, as I think it must be conceded, the three Indians and Harder had been charged together in one indictment of the offence of rape, as was done in the case of Ram, the indictment could not have been impeached by Harder, I am unable, with respect for differing opinions, to appreciate why he may do so when he is charged alone.

The question is not whether, in fact, the form of the indictment misled the accused as to the offence with which he was charged, since there was a preliminary hearing and a statement made by Crown counsel at the commencement of the trial in the Assizes as to the nature of the case of the

Crown which precluded the possibility of his being misled. I merely mention the matter to say that it cannot be suggested that, in this respect, the accused did not have a fair trial. The question as to whether the indictment was misleading in this sense is quite aside from the point, which is limited to the question as to whether the indictment complied in strictness with the requirements of s. 852(3), read in conjunction with s. 855(*f*).

As to the point that the indictment should be held bad for uncertainty since it did not specify whether it was the rape committed by Kie Singh or that by Jumbo Singh with which he was charged, no such objection was raised at the trial nor presumably argued before the Court of Appeal since no mention is made of it in any of the judgments delivered. Nor was the matter mentioned in the factum of the respondent or in the argument in this Court. If the point had been argued in the Court of Appeal or in this Court, it would have been necessary to consider the application of s. 1014(2). In the circumstances, I express no opinion upon the point.

I would allow the appeal and restore the conviction.

CARTWRIGHT J. (dissenting):—The respondent was tried before Wilson J. and a jury and, on December 5, 1954, was convicted on the following charge:—

> THAT at or near Newton, in the Municipality of Surrey, in the County and Province aforesaid, on the twenty-third day of May, in the year of our Lord one thousand nine hundred and fifty-four, he the said KENNETH HARDER, a man, did have carnal knowledge of Vera Borushko, a woman who was not his wife, without her consent, against the form of the Statute in such case made and provided, and against the peace of our Lady the Queen her Crown and Dignity.

The Court of Appeal for British Columbia by the judgment of the majority (O'Halloran, Sidney Smith and Davey JJ.A.) allowed the respondent's appeal, quashed the conviction and directed a verdict of acquittal to be entered. The Attorney General now appeals to this Court on the question of law on which Robertson and Bird JJ.A. dissented which is stated in the following words in the formal judgment of the Court:—

> That the indictment charging the accused as a principal was sufficient notwithstanding that it did not aver that the accused aided and abetted Kie Singh to assault the woman criminally.

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We were informed by counsel that the appeal was argued in the Court of Appeal without a transcription of the evidence, the record before that Court consisting of the formal charge against the respondent, quoted above, and the charge of the learned trial judge to the jury. The complete record of the proceedings at the trial was however placed before us.

In opening the case to the jury counsel for the Crown said in part:—

> His Lordship will direct you insofar as the law is concerned, but I think his Lordship might forgive me at this time if I point out to you that it is necessary for the Crown to prove, firstly, that this offence took place within the Municipality of Surrey, or in any event within the jurisdiction of this court; secondly, that this man who stands before you in the prisoner's dock is not the husband of the complainant Vera Borushko; and, thirdly, that the circumstances under which this offence is alleged to have taken place constitute in law the offence of rape.
>
> Now, in that regard, I think I should at this point advise you that the Crown will not attempt to prove that this accused actually had sexual intercourse with the complainant Vera Borushko. The Crown, however, will bring evidence to show that he in concert with another man held the complainant, the girl, while others had sexual intercourse with her . . . In that regard, his Lordship will instruct you on the law applicable to those particular circumstances.

It is not necessary to refer to the evidence in any detail. It is sufficient to say that the complainant deposed that the respondent did not himself have sexual intercourse with her or make any attempt to do so but that on the day stated in the charge he, Jumbo Singh and Puga Singh held her by force while Kie Singh had intercourse with her without her consent and that shortly thereafter the respondent, Kie Singh and Puga Singh held her by force while Jumbo Singh had intercourse with her without her consent.

It is obvious that if the facts were as testified by the complainant each of the four named men could on proper charges have been found guilty of the rape which was committed personally by Kie Singh and also of the rape committed personally by Jumbo Singh. The question before us is whether on this evidence the respondent could lawfully be convicted on the charge as laid.

I do not find it necessary to review the numerous authorities cited to us in which ss. 852 and 853 and the related sections of the *Criminal Code* have been discussed as it is my opinion that the majority of the Court of Appeal were

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right in holding that the charge in the case at bar did not fulfil the minimum requirements of those sections as to what a count in an indictment must contain.

In speaking of s. 852 and of the manner in which an offence must be specified in a count, Rinfret J., as he then was, giving the unanimous judgment of the Court in *Brodie* v. *The King* (1), said:

> The statement must contain the allegations of matter "essential to be proved," and must be in "words sufficient to give the accused notice of the offence with which he is charged." Those are the very words of the section; and they were put there to embody the spirit of the legislation, one of its main objects being that the accused may have a fair trial and consequently that the indictment shall, in itself, identify with reasonable precision the act or acts with which he is charged, in order that he may be advised of the particular offence alleged against him and prepare his defence accordingly.

In *Rex* v. *Bainbridge* (2), the judgments stress the necessity that the indictment "shall in itself reasonably identify not only the nature of the crime charged, but the act or transaction forming the basis of the crime named" and assign as the two main reasons for this requirement, (i) that the accused may properly prepare for his trial and (ii) that he shall be able to plead *autrefois acquit* or *autrefois convict*, as the case may be, if he is again charged. The *Bainbridge* case was approved by this Court in *Brodie* v. *The King* (*supra*).

In my opinion the wording of the charge in the case at bar not only failed to inform the accused of the case which the Crown proposed to prove against him but was actually misleading. As it was put by Sidney Smith J.A., "no accused man on reading its language charging him with having carnal knowledge of a woman could possibly know that it did not mean that at all—that what it meant to charge against him was assisting another man so that such other man could have such carnal knowledge."

It may be mentioned in passing, as was pointed out by counsel for the respondent, that if the charge was intended to be directed to the fact that the accused had assisted another to rape the complainant the allegation that the accused was a man was irrelevant (see *R.* v. *Ram and Ram* (3)) as was also the allegation that the complainant was not his wife (see *Rex* v. *Audley* (4)).

(1) [1936] S.C.R. 188 at 194.
(2) (1918) 42 O.L.R. 203.
(3) (1893) 17 Cox C.C. 609.
(4) 3 St. Tr. 402.

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The bare minimum of information which the charge should have contained to enable the accused to know what he had to meet was a statement that Kie Singh (or Jumbo Singh) had raped the complainant and that the accused had done an act for the purpose of aiding him to do so. The language actually used to describe the offence imports personal commission by the appellant of the physical act of intercourse and it is impossible to read it as referring to a rape committed by some other individual with the assistance of the appellant. Adopting the words of Davey J.A., "because it charged an offence consisting of a single, specific and personal act of intercourse by the appellant on the woman, it excluded by such specification an act of intercourse had by another person which would also have constituted the crime of rape by the appellant if he had assisted in it within the meaning of Sec. 69."

The rapes of which the complainant's evidence, if believed, shewed the respondent to be guilty were (*a*) that committed by Kie Singh, and (*b*) that committed by Jumbo Singh. The rape with which he was charged was neither of these; it was one committed by himself personally and there was no evidence of any such rape.

It is suggested that the reasoning set out above fails to give effect to the provision in s. 852 (3) of the *Criminal Code* that "such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence"; but the answer to this suggestion is that the offence of which the evidence of the complainant indicated that the appellant was guilty is one created not by sections 298 and 299 simpliciter but by the combined effect of those sections and s. 69 (1) (*b*)—"Everyone is a party to and guilty of an offence who . . . does an act for the purpose of aiding any person to commit the offence." The words of s. 298 used alone, as they were in the charge in the case at bar, are inapt to describe the offence disclosed in the evidence.

However it may be in other cases, I am of opinion that where, as for example in incest or rape, the criminality of an act depends on the existence or non-existence of a particular relationship between the individual personally committing the act and another person it is essential that the charge should specify whether the accused did the alleged

act personally (in which case it is necessary to prove whether such relationship existed between the accused and the person with or upon whom the offence was committed) or merely aided another to commit it (in which case it is necessary to prove whether such relationship existed between the person aided and the person with or upon whom the offence was committed).

We were referred to no reported case and I have found none, in which the charge against an accused who had not personally ravished a woman but had assisted another to do so did not contain a statement that one other than the accused had done the act and the accused had assisted in it.

I am unable to regard the case of *R.* v. *Folkes and Ludds* (1), referred to by my brother Rand as requiring a decision contrary to that of the majority of the Court of Appeal in the case at bar. The report, which is very brief, shews that in the first count Folkes was charged with having personally ravished the complainant and that there was ample evidence that he had done so. The report does not contain any statement of the reasons given by the Judges but simply states their conclusion that the conviction was good on the first count. It may well be that the Judges treated the general verdict of guilty against Folkes as a verdict of guilty against him on each count. As was said by Lord Halsbury in *Quinn* v. *Leathem* (2):

> . . . a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

While what I have said above is, in my opinion, sufficient to dispose of the appeal I wish to deal with another point which, for the obvious reason that the evidence was not before them, was not referred to in the reasons of the Court of Appeal. In charging the jury the learned trial judge put the case to them as if the charge were that the accused had assisted Kie Singh to rape the complainant. In fact, as is set out above, the complainant had deposed to the commission of two separate crimes of both of which, on her evidence, the accused was guilty (i) the rape by Kie Singh and (ii) the rape by Jumbo Singh. If it was intended to charge him with one only of these crimes, then it is not

(1) 1 Mood. 354.

(2) [1901] A.C. 495 at 506.

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possible to say with which of the two he was charged and the charge is bad for uncertainty. If it was intended to charge him with both of these crimes then the charge is bad, for these two separate and distinct crimes could not both be charged in one count, although they might have been charged in separate counts in the same indictment. If it was intended to charge the accused not with both but only with one or the other of these two crimes the charge is bad, for it is an elementary principle that two separate and distinct offences must not be charged in the alternative in one count as the accused cannot then know with certainty with what he is charged or of what he is convicted or acquitted, as the case may be, and may be prevented on a future occasion from pleading *autrefois convict* or *autrefois acquit*.

It is impossible to regard the two rapes above referred to as other than separate and distinct offences. If the accused had been charged with the rape committed by Kie Singh in words making it clear that what was alleged against him was that he had assisted Kie Singh who personally committed the offence and been convicted on such charge, it could not be suggested that if he was thereafter charged in proper words with the rape committed by Jumbo Singh he could successfully plead *autrefois convict*.

For the above reasons I am of opinion that the disposition of the appeal made by the majority in the Court of Appeal was right and I would dismiss the appeal.

Appeal allowed; conviction restored.

Solicitor for the appellant: *G. W. Bruce Fraser.*

Solicitor for the respondent: *Terence P. O'Grady.*

MARSHALL-WELLS COMPANY LIMITED ..... APPELLANT;

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*Feb. 24, 27
*Mar. 28

AND

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL NO. 454;

AND

THE LABOUR RELATIONS BOARD ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Labour—Whether union bargaining committee can include employees of competitor—Whether employer need open books—Trade Union Act, R.S.S. 1953, c. 259, s. 8(1)(c).

The framework of the *Trade Union Act*, R.S.S. 1953, c. 259, shows that the representatives elected or appointed by a trade union to bargain with an employer can be employees of a competitor. It is, therefore, an unfair labour practice under s. 8(1)(c) of the Act for an employer to refuse to bargain with a committee merely because some members thereof are employees of a competitor. There is no compulsion upon an employer to open its books at a bargaining meeting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), refusing to quash an order declaring the appellant guilty of unfair labour practice.

J. L. McDougall, Q.C. for the appellant.

R. C. Carter for the Labour Board.

G. J. D. Taylor for the Trade Union.

The judgment of the Court was delivered by:—

THE CHIEF JUSTICE:—It is sufficient for the disposition of this appeal to state that, in my opinion, the Labour Relations Board did not misconstrue the relevant provisions of *The Trade Union Act* and, therefore, nothing is said as to any other point argued. Sub-section (1)(c) of s. (8), by which it is an unfair labour practice for any employer, or employer's agent,

> (c) to fail or refuse to bargain collectively with representatives elected or appointed (not necessarily being the employees of the employer) by a trade union representing the majority of the employees in an appropriate unit;

*PRESENT: Kerwin C.J., Rand, Locke, Cartwright and Fauteux JJ.

(1) [1955] 4 D.L.R. 591.

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MARSHALL-WELLS CO. LTD. v. RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL No. 454 AND OTHER

Kerwin C.J.

is quite clear. The framework of the Act shows that it is anticipated that the representatives elected, or appointed, by a trade union need not be employees of the particular employer and the mere fact that they work for a competitor of the latter does not disqualify them from acting. While difficulties may arise if that situation exists, there is nothing in the Act prohibiting it, and there is no compulsion upon the employer to open its books to a meeting of its representatives with those of the union.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Thom, Bastedo, McDougall & Ready.*

Solicitor for the Labour Board: *R. C. Carter.*

Solicitors for the Trade Union: *Goldenberg, Taylor & Tallis.*

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*Mar. 26
*Apr. 24

JOHN SCULLION .....APPELLANT;

AND

CANADIAN BREWERIES TRANSPORT LIMITED ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Whether informant entitled to appeal to Court of Appeal on stated case in summary proceedings—Public Commercial Vehicles Act, R.S.O. 1950, c. 304—Summary Convictions Act, R.S.C. 1950, c. 379, s. 3—Criminal Code, s. 769A.

An informant has the right under s. 769A of the *Criminal Code*, (R.S.C. 1927, c. 36 as enacted by S. of C. 1947-48, c. 39, s. 34), to appeal to the Court of Appeal for Ontario from the judgment of a Justice of the Supreme Court of Ontario hearing an appeal by way of a stated case in proceedings under the *Summary Convictions Act*, R.S.C. 1950, c. 379, on grounds involving a question of law alone.

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

APPEAL from the judgment of the Court of Appeal for Ontario (1), quashing an appeal by an informant from the judgment of the Supreme Court of Ontario in a stated case.

W. C. Bowman, Q.C. for the appellant.

J. Sedgwick, Q.C. for the respondent.

The judgment of Kerwin C.J., Taschereau, Fauteux and Abbott JJ. was delivered by:—

FAUTEUX J.:—The respondent company was, in February 1954, convicted by a magistrate of an offence under the *Public Commercial Vehicles Act,* R.S.O. 1950, c. 304; and this conviction, having been questioned on a stated case, was quashed by Stewart J. in chambers. Thereupon, the informant obtained leave to appeal to the Court of Appeal for Ontario which followed its recent decisions in *Regina ex rel. Morrison* v. *Canadian Acme Screw and Gear Limited* (2), and *Regina ex rel. Irwin* v. *Duesling* (3), and dismissed the appeal (1). Hence the appeal to this Court, leave being granted under s. 41 of the *Supreme Court Act,* on the following question of law:—

> Did the Court of Appeal for Ontario err in law in holding that it had no jurisdiction to entertain an appeal by an informant from the judgment of a Justice of the Supreme Court hearing an appeal by way of stated case in a summary conviction matter?

The prosecution was taken under the provisions of the *Ontario Summary Convictions Act,* R.S.O. 1950, c. 379, s. 3(1) of which enacts:—

> Except where inconsistent with this Act, Part XV and sections 1028, 1029, 1035A, 1054, 1055, 1121, 1124, 1125, 1131 and 1142 of the *Criminal Code* (Canada) as amended or re-enacted from time to time, shall apply *mutatis mutandis* to every case to which this Act applies as if the provisions thereof were enacted in and formed part of this Act.

Under Part XV of the *Criminal Code,* a decision rendered in first instance may be questioned by means of a trial *de novo* (s. 749 to s. 761), as was the situation in the cases above referred to, or by means of a stated case (s. 761 to s. 769A), as in the present instance; and the decision

(1) 112 C.C.C. 274. (2) [1955] O.R. 513.
(3) [1955] O.W.N. 588.

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rendered, upon either one of such modes of appeal may itself be brought for revision under section 769A(1) providing:—

(1) An appeal to the Court of Appeal, as defined in s. 1012 against any decision of the Court under the provisions of s. 752 or s. 765 with leave of the Court of Appeal or a Judge thereof, may be taken on any ground which involves a question of law alone. (1948, ch. 39, s. 34).

(2) The provisions of sections 1012 to 1021, inclusive, shall *mutatis mutandis* insofar as the same are applicable, apply to an appeal under this section. (1948, ch. 39, s. 34).

(3) The decision of the Court of Appeal shall have the same effect and may be enforced in the same manner as if it had been made by a Justice at the hearing. (1948, ch. 39, s. 34).

No one disputes that a right of appeal, particularly against an acquittal, must be given in clear, express and unambiguous language. The only issue, in the premises, is whether, contrary to what was decided in the Court below, the provisions of s. 769A meet with this requirement.

Sub-section (1). As is the case under s. 41(1) of the *Supreme Court Act*, and as was also the case in the much more general terms of the enactment considered, in the House of Lords, in *Cox* v. *Hakes* (1), the formula, here adopted by Parliament to give a right to appeal against any of the decisions of the nature therein specified, says nothing in terms as to whom this new right is given. Such general language is not apt, *per se*, to justify the inference of any limitation such as the one contended for by respondent. On the contrary and evidently because no limitation was intended, nothing was said. Nothing more needed to be said to vest the "prosecutor or complainant as well as the defendant" with this new right of appeal when, under the then state of the law, they were equally entitled by s. 749 or s. 761 to seek, in an appeal against the judgment of a magistrate, a decision under s. 752 or s. 765, henceforth made appealable under sub-section (1) of section 769A. The appeal is clearly against the decision, whatever it may be and whoever in the case may have cause to complain.

Sub-section (2). To give effect to, but not to affect, this new right of appeal, comprehensively stated in (1), Parliament adopted by reference the procedure already established under sections 1012 to 1021 inclusive, "*mutatis mutandis* insofar as applicable". The latter expressions are not in any way related to the right of appeal fully

(1) [1890] A.C. 506.

stated in (1), but only to the method by which such right may be perfected. They imply an obligation to make, to such of the provisions of sections 1012 to 1021 inclusive as may be apt to effectuate the true purpose of the section, such changes—material as they may be—not inconsistent with the provisions of the section. It appears that in considering this particular sub-section, the Court below formed the view that section 769A, read together with s. 1013(4), does not provide for an appeal by the informant against an acquittal. Section 1013(4) gives to the Attorney-General—and not to "the prosecutor or complainant", whose status as party to the case has long been lost at that stage of the procedure by indictment—a right to appeal against any judgment or verdict of acquittal in respect of an indictable offence. With deference, I cannot agree with these views. In reaching them, no sufficient account appears to have been taken of the fact that the right of appeal under s. 769A is fully stated under sub-section (1) and unqualified by sub-section (2); and, in the result, proper and full effect was not given to the expressions "*mutatis mutandis* and insofar as applicable". Properly and fully implemented, these expressions are as apt to justify, in s. 1013(4), a substitution of the words "the prosecutor or complainant" to the words "the Attorney-General" as they are recognized to be, for the substitution of the word "offence" simpliciter to the words "indictable offence" appearing in the same provision. As stated, in part, by Roach J.A. when granting leave to appeal in *Regina ex rel. Morrison* v. *Canadian Acme Screw and Gear Limited* (1):

> . . . where the parties to the appeal . . . are the complainant and the accused, the complainant, as well as the accused, has a further right of appeal, by leave, to the Court of Appeal, and subs. 2 of s. 769A has not the effect of preserving that right of the accused and destroying the otherwise equal right of the complainant.

Sub-section (3). The sub-section states the effect of the decision rendered in an appeal under s. 769A and provides for the method of its enforcement. Its language has no bearing upon the construction of sub-section (1) wherein the right of appeal is comprehensively established. For this reason, the decision in *Cox* v. *Hakes* (*supra*), while of assistance insofar as general principles are concerned, has no application here.

(1) [1955] O.W.N. 153 at 157.

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The only question of law upon which leave was granted to this Court must be affirmatively answered. The appeal should be allowed and the case returned for consideration to the Court of Appeal for Ontario.

The judgment of Rand and Kellock JJ. was delivered by:—

KELLOCK J.:—The respondent was convicted of operating a public commercial vehicle without a licence contrary to the *Public Commercial Vehicles Act*, R.S.O. 1950, c. 304, s. 2(1). This conviction was made in summary proceedings under the provisions of the *Summary Convictions Act*, R.S.O. 1950, c. 379. Section 3, s-s. (1) of this statute provides that, except where inconsistent with the statute, Part XV and certain named sections of the *Criminal Code* shall apply *mutatis mutandis*. S-s. (2) provides that where a case is stated under Part XV of the *Criminal Code*, it shall be heard and determined by a judge of the Supreme Court in chambers.

Stewart J., who heard the appeal by way of stated case, allowed the appeal and quashed the conviction. The appellant, having obtained leave, launched an appeal to the Court of Appeal (1) under s. 769A of the *Criminal Code* enacted by 1948, c. 39, s. 34, Canada. That court, however, quashed the appeal upon the ground that the section did not give any right of appeal to a private prosecutor such as the appellant.

In this decision the court followed its earlier decisions in *Regina ex rel. Morrison* v. *Canadian Acme Screw and Gear, Limited* (2) and *Regina ex rel. Irwin* v. *Duesling* (3), the latter having been based upon the former. The present appeal is in reality, therefore, an appeal from the decision in *Morrison's* case. Before considering that decision, it will be convenient to consider the relevant provisions of Part XV of the *Criminal Code* before the new *Code* of 1955.

Upon its conviction two remedies by way of appeal were open to the respondent, one under s. 749 to the County Court Judge, and the other, which was in fact followed, by

(1) 112 C.C.C. 274.
(2) [1955] O.W.N. 479.
(3) [1955] O.W.N. 588.

way of stated case to a judge of the Supreme Court under s. 761. The right of appeal given by s. 749 is expressly conferred upon

> any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant.

Again, in the case of s. 761, "any person aggrieved, the prosecutor or complainant as well as the defendant" may appeal.

In the case of an appeal under s. 749, it is provided by s. 754 that the judge "may confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just." In the case of an appeal by way of stated case under s. 761, it is provided by s. 765 that the court appealed to "shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of which the case has been stated." The section also provided that any order so made "shall be final and conclusive upon all parties."

By sections 31 and 32 of the amending statute of 1948, s-s. (1) of s. 752 and s-s. (1) of s. 765 were amended to bring them into accord with the new s. 769A, which was enacted by s. 34, s-s. (1) reading as follows:

> 769A. (1) An appeal to the Court of Appeal, as defined in section one thousand and twelve, against *any* decision of the court under the provisions of section seven hundred and fifty-two or section seven hundred and sixty-five with leave of the Court of Appeal or a judge thereof may be taken on any ground which involves a question of law alone.

As the right of appeal thus given is against *any* decision made under s. 752 or s. 765, such right is plainly conferred upon the person who was unsuccessful below, whether he was a person convicted or the complainant.

In *Morrison's* case, Schroeder J.A., who delivered the judgment on behalf of the court, would appear to have based his decision upon what he considered to be the effect of s-s. (2) of s. 769A, which reads as follows:

> (2) The provisions of sections one thousand and twelve to one thousand and twenty-one, inclusive, shall *mutatis mutandis* in so far as the same are applicable, apply to an appeal under this section.

After pointing out that, historically, appeals in criminal cases had long been confined to convicted persons and to the well settled principle of statutory construction that in

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order to establish any other right of appeal it is necessary to find clear and unambiguous language to that effect, the learned judge considered that, as s. 1013 (1) is expressly limited to an appeal by a convicted person and that the only right of appeal against an acquittal given by s-s. (4) is limited to a provincial Attorney-General, the learned judge concluded that he must construe s. 769A as providing no appeal in favour of a private prosecutor.

The view of the learned judge sufficiently appears from the following extract from his judgment, where, at p. 521, he deals with the contrary view:

> To give effect to this contention would be to ignore the fact that s. 1013 is incorporated by reference into s. 769A, and although other sections so incorporated are procedural, s. 1013 is clearly substantive in character. It provides who shall have a right of appeal in the case of an indictable offence, and by incorporating it into s. 769A it provides who shall have the right of appeal by leave conferred by s. 769A. The last mentioned section does not.

While no doubt the provisions of s. 1013 are *mutatis mutandis* incorporated into s. 769A, such incorporation is to be, however, only "in so far as the same are applicable" and it cannot be said that any provisions of ss. 1012 to 1021 can be considered "applicable" if to apply them would contradict the right of appeal expressly given by s-s. (1).

In my opinion, therefore, the Court of Appeal is clothed with jurisdiction to entertain an appeal of the character of that here in question. This accords with the view expressed by Roach J. on the application for leave to appeal in *Morrison's* case (1).

I would allow the appeal and remit the matter to the Court of Appeal for a decision upon the merits.

LOCKE J.:—The respondent was convicted by a magistrate at Chatham, Ont. of a charge of operating a public commercial vehicle without a licence, contrary to the provisions of the *Public Commercial Vehicles Act* (R.S.O. 1950, c. 304, s. 2(1)).

The *Summary Convictions Act* (R.S.O. 1950, c. 379) provides by s. 3 that, except where inconsistent with that Act, Part XV of the *Criminal Code,* as amended or reenacted

(1) [1955] O.W.N. 153.

from time to time, shall apply *mutatis mutandis* to every case to which the Act applies as if the provisions thereof were enacted in and formed part of it.

Upon the application of the respondent, the magistrate, after reciting the terms of the conviction, stated the following question for the opinion of a judge of the Supreme Court:—

> On the facts as stated, was I right in holding that the defendant was not, as a matter of law, exempted from the provisions of *The Public Commercial Vehicles Act* by reason of the fact that it, being a wholly owned subsidiary of Canadian Breweries Ltd., carried goods only for other wholly owned subsidiaries of Canadian Breweries Ltd.?

The stated case was heard by Stewart J. who answered the question propounded in the negative and quashed the conviction, acquitted the respondent of the charge and directed that the fine imposed be remitted.

From this decision the present appellant appealed to the Court of Appeal, relying upon the provisions of s. 769A of the *Criminal Code*. I refer throughout to the sections of the Code in force prior to April 1, 1955. That appeal was quashed by a judgment of the Court of Appeal delivered by the Chief Justice of Ontario on the ground that the court was without jurisdiction to entertain it.

By special leave of this court, the present appeal was brought to determine the following question:—

> Did the Court of Appeal for Ontario err in law in holding that it had no jurisdiction to entertain an appeal by an informant from the judgment of a Justice of the Supreme Court hearing an appeal by way of stated case in a summary conviction matter?

In *Reg. ex rel Morrison* v. *Canadian Acme Screw and Gear Ltd.* (1), the Court of Appeal of Ontario quashed an appeal taken to that court from the judgment of a county court judge on an appeal from a magistrate under Part XV of the *Code* which resulted in the acquittal of the accused. That decision was followed by the same court in *Reg. ex rel Irwin* v. *Duesling* (2). While the appeal in the present matter was taken from a judgment of a judge of the Supreme Court upon a stated case, the learned Chief Justice of Ontario was of the opinion that there was no distinction in the principles to be applied.

(1) [1955] O.R. 513. (2) [1955] O.W.N. 588.

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Locke J.

The *Criminal Code* provides alternative means whereby a conviction such as this under the *Summary Convictions Act* may be questioned. S. 749 provides in the Province of Ontario for an appeal to the County Court from a conviction or an order dismissing an information or complaint by:—

> any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant as well as the defendant.

S. 761 under which the case was stated in the present matter provides that:—

> any person aggrieved, the prosecutor or complainant as well as the defendant who desires to question a conviction, order, determination or other proceeding of a justice under this Part on the ground that it is erroneous in point of law

may apply to such justice to state a case, setting forth the facts and the grounds on which the proceeding is questioned.

S. 769A, so far as it need be considered, reads:—

> (1) An appeal to the Court of Appeal, as defined in section one thousand and twelve, against any decision of the court under the provisions of section seven hundred and fifty-two or section seven hundred and sixty-five with leave of the Court of Appeal or a judge thereof may be taken on any ground which involves a question of law alone.
>
> (2) The provisions of sections one thousand and twelve to one thousand and twenty-one, inclusive, shall *mutatis mutandis* in so far as the same are applicable, apply to an appeal under this section.

This section, enacted in 1948 (c. 39, s. 34), replaced s. 752A, enacted in 1947, which permitted a further appeal in appeals arising under ss. 749 et seq. but did not deal with decisions upon stated cases.

Unlike s. 749, which permits in terms an appeal either from a conviction or an order dismissing an information, and s. 761, which permits either the prosecutor or complainant as well as the defendant who desire to question a conviction, order, determination or other proceeding under Part XV, to apply to the Justice to state a case, s. 769A merely says that an appeal to the Court of Appeal against *any decision of the court* may be taken.

It is an elementary principle of the law that an acquittal by a court of competent jurisdiction, acting within its jurisdiction, cannot as a rule be questioned and brought before any other court. In *Benson* v. *Northern Ireland Road Transport Board* (1), Lord Simon said that very

(1) [1942] A.C. 520.

clear statutory language by way of exception to the general rule would be required to establish a right of appeal from a decision dismissing a criminal charge. The question to be determined is whether s. 769A fulfils these requirements.

When the *Criminal Code* was first enacted in 1892, it provided certain exceptions to the general rule above referred to. Ss. 879 and 900 of the *Code,* as then enacted, permitted the propriety of an acquittal to be questioned, either by an appeal or by a stated case. With amendments which do not affect the present consideration, these sections were enacted as ss. 749 and 761 in the revisions of the statutes of 1906 and 1927. No further appeal lay until the amendments of 1947 and 1948 above referred to.

It is not my opinion that the decisions in *Benson's Case* or in *Cox* v. *Hakes* (1), referred to by Lord Simon, are decisive of the question. If the point was, as in *Benson's Case,* whether an appeal lay under a section worded as is the first subsection of s. 759A from a court of first instance such as a magistrate's court, I think that, on the authority of that case, there could be no appeal from an acquittal. The situation here, however, seems to me to be essentially different. Parliament has, in clear and unmistakable terms, provided for an appeal from an acquittal by s. 749 and for what is in essence an appeal by the provisions of s. 761. The common law rule is abrogated by these sections. The decision of the court whether proceedings are taken under s. 749 or s. 761 may be, *inter alia,* either to affirm a conviction or to acquit the accused. The appeal provided by s-s. 1 of s. 769A is against any decision of the court: that this includes a decision acquitting the accused appears to me to be perfectly clear. This is, in my view, statutory language which complies with the requirements stated by Lord Simon. It is not the language of s-s. 1 which establishes the exception to the general rule that a man shall not be vexed twice for the same wrong: the exceptions to that rule were already provided for in ss. 749 and 761.

As to s-s. 2 of s. 769A, counsel for the Crown contends that this neither adds to or limits the meaning to be assigned to s-s. 1. In *Reg. ex rel. Irwin* v. *Duesling* (2), Pickup C.J.O., referring to this subsection, said that he did

(1) [1890] A.C. 507.
(2) [1955] O.W.N. 588.

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Locke J.

not consider that s-s. 4 of s. 1013 could be said to be applicable to a summary conviction proceeding at the instance of a private prosecutor. With this I respectfully agree. None of the other sections of the *Code* referred to in s-s. 2 can affect the matter to be decided here.

I would allow this appeal.

Appeal allowed.

Solicitor for the appellant: *C. P. Hope.*

Solicitor for the respondent: *J. Sedgwick.*

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*Mar. 1
*Apr. 24

M. GORDON & SON LIMITED (*Defendant*) ..... APPELLANT;

AND

LOUIS DEBLY (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Judgment—Right of County Court Clerk to enter judgment—Liquidated demand—Clerk was solicitor for plaintiff—County Courts Act, R.S.N.B. 1952, c. 45.

The Clerk of the County Court of New Brunswick, who was solicitor for the plaintiff-respondent, entered judgment in default of appearance and defence in his own action for a liquidated demand. The application of the appellant to set aside the judgment was dismissed by a judge of the County Court and by a majority in the Supreme Court of New Brunswick, Appeal Division.

Held: The appeal should be dismissed.

The signing of judgments by the Clerk on liquidated demands authorized by Order 13 rule 3 of the rules of the Supreme Court, which provides that in default of appearance "the plaintiff may enter final judgment" for the amount claimed, has been for at least since 1915 the procedure of the County Court. With these judgments the judge has nothing to do. That practice has been followed throughout the province and it cannot be seriously questioned.

S. 25 of the *County Courts Act*, R.S.N.B. 1952, c. 45, implies that the Clerk, although interested in the action, can sign judgment for the amount claimed on a liquidated demand. There is in the statute a deliberate abstention from affecting liquidated demands with the restriction imposed in the case of unliquidated damages. Whatever objection there may be in principle to permitting a solicitor to do such

*PRESENT: Rand, Kellock, Locke, Cartwright and Abbott JJ.

a ministerial act as clerk in his own cause must be taken to have been overridden by other considerations. Furthermore, the views of the provincial courts which should be treated with the utmost respect on such a question was well founded in the case at bar: being compatible with a reasonable interpretation of the statutory language given in the light of the principle involved.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), affirming, Hughes J.A. dissenting, the dismissal by the County Court of an application to set aside a default judgment.

I. Mackin for the appellant.

J. F. H. Teed, Q.C. for the respondent.

The judgment of the Court was delivered by:—

RAND J.:—This appeal arises out of an application to set aside a judgment entered in the County Court of Saint John, New Brunswick, in default of appearance and defence in an action brought on a liquidated demand. Two grounds are raised: that the clerk of a county court in New Brunswick has no authority to enter a default judgment, and that in the particular case he was disqualified as being solicitor for the plaintiff.

The judgments in the County Court and the Appeal Division present the legislative history of the County courts. Prior to 1867 their jurisdiction was, in a measure, exercised by the Inferior Courts of Common Pleas held by the justices of the peace of each county in general sessions; but, in anticipation of the Confederation Act, these courts were, by c. 10 of the statutes of that year, abolished and the present organization established. The act provided for a court in each county to be presided over by a judge having the qualification of barrister of the Supreme Court of not less than seven years' standing, who should hold office during good behaviour. Although each county had its court, the same person might be judge of one or more of them. For each court a clerk was provided who must be an attorney of the Supreme Court and would hold office during pleasure. The sittings were to be held at or near the county court house in the shiretown, at which place, also, the clerk was to maintain an office. There was no residence requirement of the judge.

(1) [1955] 4 D.L.R. 636.

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Rand J.

In 1867 the clerical officer of the Supreme Court was the Clerk of the Pleas, an office that goes back into the early days of the Common Law courts. In Tidd's Practice and Chitty's Archbold's Practice there is an account of the internal practice of those courts down to the present time, which shows the evolution of ministerial functions, in some cases originally performed by or under the direction of the judges but now by officers of the court. In the light of the practice in the Supreme Court of 1867 and the enactment by c. 10, s. 18, that

> Every Act of Assembly relating to . . . practice, proceedings and evidence or any other matter or thing whatever connected with the administration of justice in the Supreme Court shall apply to each County Court when not inconsistent with the provisions of this Act.

language in substance continued down to s. 62 of the present Act, the assumption that the office work of the county court should in general be carried on by its officers correspondingly to that in the Supreme Court was inevitable and warranted; and it has been in the presence of this uniform understanding and practice that the county court legislation has been confirmed ever since.

This originating statute, with various modifications, appears now as c. 45, R.S.N.B. 1952. From the beginning it was obvious that the work of the clerk would require only part of his time and the statute recognizes his right to practice in his own as well as in any other court. In the former he is, ordinarily, the prosecutor in criminal matters, although he may defend, and he may act for either party in civil matters.

Certain of his duties are mentioned: he is to provide a seal and necessary books for the records of the court; to sign and seal all writs; to file all writs and papers; to enter in the books of record all causes, rules and orders, and a minute of every judgment rendered in the court, a copy of the latter certified by him being admissible as evidence in all courts of the province. He is to tax costs, but when *solicitor or party,* the bill is to be taxed by the judge. By s. 25, *if not interested in the action,* he may make orders perfecting the service of a writ of summons, and may "assess damages in all personal actions of debt, covenant or assumpsit where there is judgment by default", and make and sign in such cases the assessment docket.

Default judgments in the Inferior Courts of Common Pleas were to be entered at the next succeeding terms and the court was to "assess the damages as has been heretofore accustomed": 35 Geo. III, c. 2, s. 6. Judgments given in all causes determined in a summary way were to be entered in the minutes of the court by the presiding justice. By s. 15 of the act of 1867 where the defendant failed to enter an appearance and plea within the time prescribed, the judgment could be entered against him and twenty days thereafter the judge was to assess the damages and the clerk sign final judgment for the sum assessed and costs. This provision was continued, with the time reduced to ten days, until 1915. By c. 25 of the statutes of that year, s. 41 of c. 116, C.S.N.B. 1903 was amended to the following form:

41. In all actions in the said Court, the statement of claim, conforming in substance to that in use in the Supreme Court in like cases, shall be inserted in, or endorsed upon, the writ, and a copy thereof with a copy of the particulars of the plaintiff's demand in cases where, by the practice of the Supreme Court, the defendant would be entitled thereto, shall be served on him, and he shall, within ten days thereafter enter an appearance in the said action and file a statement of defence conforming in substance to that in use in the Supreme Court in like cases, and give a copy thereof to the plaintiff or his solicitor. The rules of pleading of the Supreme Court shall apply to County Courts, but there shall be no summons or order for directions in any action. Demurrer is hereby abolished and the rules for proceedings in lieu of demurrer shall apply. Each party shall be entitled to ten days for each step in pleading, but the Judge may enlarge the time.

This language omits the following words contained in c. 116,

and in case the defendant shall fail to enter his appearance and plead within the time aforesaid, then judgment by default may be entered against him in the said cause, and in ten days thereafter the Judge may assess the damages and the Clerk sign final judgment for the sum assessed and costs to be taxed.

The Judicature Act with its rules had been adopted in 1909 following closely the law and practice in England, and its application to the county courts is seen in the new nomenclature of pleading. By the same act, s. 78 R.S. 1903 was amended to read:

78. All laws of this Province relating to the examination or depositions of witnesses before trial, to proceedings in replevin, to actions by or against executors or administrators, to evidence, to the service of processes, to tenders, to judgments, to interest on judgments, to set off and to counter claims, and for the amendment of the law, in any way as to practice, proceedings, or evidence, or any other matter or thing whatever connected with the administration of justice in the Supreme Court, when applicable and not inconsistent with the provisions of this Chapter, shall

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apply to each County Court; and the mode of proceeding in all cases not herein provided for shall be according to the present practice of the Supreme Court. The decisions of the Supreme Court shall be binding on the County Courts.

The duties and authority of a clerk are to be determined, then, in the light of this legislation, the inherent relation of the office to the inside work of the court, and the special conditions and exigencies of the administration of justice in the province. I think it incontestable that, whatever may have been the law prior to 1915, the signing of judgments on liquidated demands authorized by Order 13 rule 3 of the rules of the Supreme Court, which provides that in default of appearance "the plaintiff may enter final judgment" for the amount claimed, is and has since that time been the procedure of the County Court. These judgments are entered by the clerk of the court and with them the judge has nothing to do. This is the practice that has been followed for at least 40 years throughout the province and it cannot, in my opinion, be seriously questioned.

But when the clerk is solicitor for the plaintiff, what is the position? The answer is I think given by the implication of s. 25 of the present statute already in part quoted: the clerk, *if not interested in the action,* is authorized to "assess damages" and make and sign the assessment docket. That can only mean, unliquidated damages; there is no assessment on a liquidated demand: the right given the plaintiff in that case is to sign judgment for the amount claimed. If "assessment" included a direction of the amount in all cases, the controversy would disappear, but its restriction to unliquidated damages has been assumed by the courts below as well as by counsel on both sides. Dealing as it does with default judgments, those for liquidated demands, probably the greater in number, could not have been overlooked. Yet they are omitted and the restriction confined to unliquidated claims. I can only take this to be a deliberate abstention from affecting them by the qualification mentioned. Were it not so, other language must have been used. The matter of the interested solicitor as clerk is expressly evidenced as being before the mind of the draftsman from the original to the present statute, and the situations dealt with imply that the disabilities of the clerk as solicitor which are declared were intended to be exclusive.

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Rand J.

Whatever objection there may be in principle to permitting a solicitor to do a ministerial act as clerk in his own cause must be taken to have been overridden by other considerations.

That the act is ministerial is I think equally clear. Summarizing the practice in the Supreme Court, the solicitor presents to the clerk of the court two copies of the form of judgment made out as prescribed, accompanied by the writ and affidavit of service. The clerk files one copy properly stamped and returns the other, marked, to the solicitor. No judgment or discretion of any sort is called for. In the assessment of damages judicial power is exercised and the contrast in character between that and the filing and entering of what the rule declares the plaintiff entitled to is patent.

On such a question the utmost respect should be paid to the views of the provincial courts; they know the local conditions and how the actual practice has worked out; and only when it is clear that those views are incompatible with any reasonable interpretation of the statutory language given in the light of the principle involved, should they be rejected. So far from that, they appear to me to be well founded and should be maintained.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Ian P. Mackin.*

Solicitors for the respondent: *Teed & Teed.*

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*May 1, 2
*May 24

RANDOLPH J. KING (*Plaintiff*) .....APPELLANT;

AND

COLONIAL HOMES LIMITED, ROBERT RENDALL, WESLEY OBEN, CHRISTOPHER O'DWYER (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Automobiles—Collision—Driver not owner—Company's truck driven without permission—Jury trial.

A truck owned by the respondent company and driven by its employee, O'D., damaged the appellant's parked car. It is not disputed that the driver was negligent. The respondent R. was an employee of the company and authorized to drive the truck, to keep it at his house overnight and there was no objection to his using it for purposes of his own in the evenings. On the night of the accident, at the conclusion of a party held at R.'s home, R. permitted O., another employee, to use the truck to drive home. O. gave O'D. a lift to O.'s house, where they parted company. O. went into his house, leaving the truck outside with the keys either on the seat or above the sun-visor. He gave no permission to O'D. to take the truck and had no intimation that he would do so. R. at no time gave O'D. any permission to drive the truck.

In the course of the trial, the fact of insurance was voluntarily disclosed by a witness for the respondent company. The trial judge discharged the jury and gave judgment against O'D. and dismissed the action as against the other respondents. The Court of Appeal dismissed the appeal but granted special leave to appeal to this Court for a decision as to whether in the circumstances it had been a proper exercise of the trial judge's discretion to try the issues without a jury against the will of the appellant.

Held: The appeal should be dismissed.

Not only was the decision of the trial judge on the question of liability right, but it would have been impossible for any properly instructed jury acting reasonably to have come to a different conclusion.

The right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons. But a new trial should not be directed by reason of a trial judge deciding to discharge the jury and complete the trial himself, even if the appeal court were satisfied that the trial judge was wrong in law, if the court were also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge.

APPEAL from the judgment of the Court of Appeal for Ontario affirming the judgment at trial.

H. G. Steen, Q.C. for the appellant.

W. B. Williston, Q.C. and *K. H. MacDiarmid* for the respondent.

*PRESENT: Kerwin C.J., Rand, Locke, Cartwright and Nolan JJ.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—This is an appeal, brought by special leave granted by the Court of Appeal for Ontario, from a judgment of that Court dismissing an appeal from a judgment of His Honour Judge Forsyth, who had awarded the appellant judgment for $656.73 against the defendant O'Dwyer and dismissed the action as against the other respondents. O'Dwyer did not defend the action and did not appeal from the judgment given against him.

There is little, if any, conflict in the evidence and the relevant facts may be briefly stated. About 9 p.m. on November 30, 1951, the appellant's automobile was parked on a street in Toronto when a truck, hereinafter referred to as "the truck", driven by the defendant O'Dwyer ran into it. It is not disputed that the damages suffered by the appellant amounted to $656.73 or that they were caused by the negligence of O'Dwyer. The issue at the trial was as to the liability of the other defendants. While it was questioned in the pleadings, it was admitted at the trial that the truck was owned by the respondent, Colonial Homes Limited, which was apparently a subsidiary of Lin-Wood Manufacturing Limited; the two companies were under the same management and the witness Lindal was president of both.

The respondent Rendall was employed by Lin-Wood; one of his duties was to drive the truck to carry employees of that company from the end of the street-car line to the company's plant in the morning and to take them back to the street-car line in the afternoon. The appeal was argued on the basis that, in respect of the truck, Rendall was the chauffeur of Colonial Homes Limited within the meaning of s. 50(1) of the *Highway Traffic Act*.

The defendant Oben was employed by Colonial Homes Limited as a salesman. He owned an automobile which he drove from time to time on the company's business. The defendant O'Dwyer was also employed by Lin-Wood as a nailer; there is no suggestion that he was ever employed as a chauffeur by either company and in fact he had no licence to drive a motor vehicle.

The arrangement between Rendall and his employer was that the former should keep the truck at his house over night. On the view of the evidence most favourable to

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the appellant, no objection was raised to Rendall using the truck for purposes of his own in the evenings, but he had no express authority to loan it to anyone, and he had been warned, as had all other drivers employed by Colonial or Lin-Wood, never to allow anyone but a chauffeur to drive a company vehicle.

On the night of the accident the respondent Oben went to Rendall's home where there was a small social gathering at which those present were drinking beer. The guests included the defendant O'Dwyer. Oben, who had driven to Rendall's house in his own car, agreed to lend his car for the night to Jack Guest, one of those present; and Rendall, in turn, agreed to loan the truck to Oben for the purpose of driving home, on the understanding that it would be brought back to Rendall's house early the following morning.

When Oben decided to leave Rendall's house he offered to give O'Dwyer a lift and drove him to Oben's house. On arrival at Oben's house, O'Dwyer said, "I better take a bus home"; he then said good-night and Oben last saw him "saying good-bye and walking away from the truck." Oben went into his house leaving the truck outside with the keys either on the seat or above the sun-visor. He gave no permission to O'Dwyer to take the truck and had no intimation that he would do so. Rendall at no time gave O'Dwyer any permission to drive the truck.

The plaintiff had served a jury notice and the trial of the action commenced before His Honour Judge Forsyth and a jury. In the course of the examination in chief of Lindal by counsel for the defendants the following appears:—

Q. And what were his (Rendall's) instructions as far as loaning the truck was concerned?

A. He could not loan it, and he was very definitely instructed on that, *because of our insurance situation.* He could not loan the truck unless he loaned it to another chauffeur, with permission to do so, and he was impressed with that fact, and he was aware of the fact that it had to be another chauffeur.

* * *

Q. And what if any instructions were given, by yourself, or to your knowledge were given to Mr. Rendall about the use of the truck after he had delivered the passengers, and picked them up at the end of the car line, if any?

A. The instructions were that the car was to go into the garage and stay there over night. And I admit I was aware that he probably took it out, and maybe took it along to the grocery store or something, but I did not worry too much about that, *if it was not used for anything that the insurance did not cover.*

It will be observed that the words which I have italicized in the above answers would indicate to the jury that insurance was carried on the truck. At the conclusion of the evidence the court adjourned for an intermission at 11.35 a.m. and there was a discussion in the judge's room between him and counsel. On the court resuming the record reads as follows:—

COURT RESUMED at 12.05 p.m.

THE COURT: Gentlemen of the Jury, during recess I have determined, with the consent of Counsel to take this matter away from you.

MR. HOLLAND: I would not consent to that, Your Honour.

THE COURT: You still think I should proceed, with the Jury?

MR. MACDAIRMID: I do not think there is any doubt about it.

THE COURT: Gentlemen of the Jury, there was some discussion with Counsel on this matter, and there has been some reference to matters in this case that should not have been made to you. Also I think the case is one which should not be left to the Jury to determine. I think it is entirely a matter of law, and a matter which should not be left in your hands. I am therefore taking it away from you, and I will handle the case by myself, and you can go now. You have nothing further to do with the case. You are dismissed till to-morrow morning. (The Jury retires.)

THE COURT: Do you wish to proceed now with argument?

MR. HOLLAND: I understand that my friend is admitting that the truck in question was owned by Colonial Homes Limited, and I ask that my friend acknowledge that for the purposes of the record.

MR. MACDAIRMID: It is true, Your Honour.

MR. HOLLAND: Presents argument.

MR. MACDAIRMID: Presents argument.

MR. HOLLAND: Presents argument in reply.

The learned judge gave judgment at the conclusion of the argument in the manner mentioned in the opening paragraph of these reasons. In the course of his reasons the learned judge says:—

There is considerable dispute as to the chain of responsibility in this matter. In fact that is the only question in dispute. Any questions to be decided involve matters of fact and law. Moreover there was some reference to insurance, which might have prejudiced the jury. I therefore took the case from the jury.

The question of responsibility in this matter is not so easy to determine. However, I think the facts were that when Oben and O'Dwyer left Rendall's house, the truck was being driven by Oben, with the consent of Rendall. I think when the truck left Oben's house the truck was being driven by O'Dwyer, without the consent of Oben. O'Dwyer was intoxicated

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at the time, and he had no driver's license, and I do not think that he had any permission to drive the truck at the time of the accident. I think the defendants Colonial Homes Limited, Rendall and Oben, have satisfied the Court that O'Dwyer was driving the truck without their knowledge or consent.

The plaintiff appealed to the Court of Appeal for Ontario, the main grounds of appeal being, (i) that the trial judge should have held that the defendants had failed to satisfy the onus cast upon them by s. 50(1) of the *Highway Traffic Act;* and (ii) that the learned trial judge erred in law in taking the case from the jury. The appeal was dismissed, the unanimous judgment of the Court being delivered by Laidlaw J.A. at the conclusion of the argument.

In giving the reasons of the Court for granting special leave to appeal Pickup C.J.O. says in part:—

> Among the questions which counsel for the plaintiff desires to be submitted to the Supreme Court of Canada is the question as to whether in the facts of this case, where one of the defendants voluntarily disclosed the fact that he was insured, it was a proper exercise of the judicial discretion vested in the trial Judge to proceed to try the issues involved without a jury against the will of the plaintiff. This Court is of the opinion that this question is one that ought to be submitted to the Supreme Court for decision and leave to appeal is therefore granted.

In the view that I take of the whole case it becomes unnecessary to decide the question whether the learned trial judge erred in dispensing with the jury and whether, if he did so err, the circumstances are such as to warrant interference by an appellate court. The reason for this is that, in my opinion, not only is the decision of the learned trial judge on the question of liability right, but it would have been impossible for any properly instructed jury acting reasonably to have come to a different conclusion.

Counsel for the appellant argues that under s. 50(1) of the *Highway Traffic Act* the onus of proving that at the moment of the collision the truck was in the possession of someone other than the owner or its chauffeur, was upon the respondent Colonial Homes Limited, that the jury would have been free to disbelieve all the evidence in the record, although uncontradicted, bearing on that question and to find that this onus had not been satisfied and could therefore have held that O'Dwyer, at the time of the accident, had possession of the truck with the consent of the respondent Colonial Homes Limited.

It appears to me that such a finding would be contrary to all the direct evidence particularly that of Lindal, Rendall and Oben none of which was shaken on cross-examination; and that it would be inconsistent with all the circumstances disclosed in the evidence.

As an alternative, counsel for the appellant submits that the jury might have found that at the moment of the accident the truck was in the possession of Rendall, the chauffeur of the owner. The evidence makes it clear, however, not only that Rendall had not consented to O'Dwyer driving the truck but that he had no knowledge or reason to suppose that O'Dwyer would do so. A finding that the truck was at the moment of the collision in the possession of anyone other than O'Dwyer would be in direct conflict with the judgment of this Court in *Marsh* v. *Kulchar* (1).

This Court has more than once affirmed that the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons; but I cannot think that a new trial should be directed by reason of a trial judge deciding to discharge the jury and complete the trial himself, even if the appellate court was satisfied that the course followed by the trial judge was wrong in law, if the court were also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge.

Since, in my view, if the jury had found for the appellant the Court of Appeal must have set aside their verdict it is unnecessary to express an opinion as to whether the learned trial judge was right in discharging the jury.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hughes, Agar, Amys, Steen & Bassel.*

Solicitors for the respondents: *Timmins & MacDiarmid.*

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(1) [1952] 1 S.C.R. 330.

1956

*Mar. 14
*Apr. 24

ALBERT LAMARRE AND DAVID GROBSTEIN ..... APPELLANTS;

AND

DAME ODILE PERRAULT ..... RESPONDENT.

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

Bankruptcy—Legal services to bankrupt company after petition in bankruptcy—Continuation of services authorized by trustees after receiving order made—Adoption of services previously rendered—Preference in payment—Bankruptcy Act, R.S.C. 1952, s. 14, ss. 41(4), 95, 155(4, 6).

A claim for legal fees for services rendered by the late P. was made for the period from Nov. 1948 to Feb. 1953 in connection with 30 actions taken against various insurance companies by a company, now in bankruptcy. A petition for a receiving order against the company was filed on Nov. 17, 1948, but the proceedings on it were suspended while the litigation which was started some two weeks later was proceeded with. The actions were allowed and the insurance companies paid $360,000 to the trustees who had been authorized to continue the litigation, the petition for a receiving order having been proceeded with and a receiving order made on Aug. 14, 1951. The inspectors of the bankrupt authorized the continuation of the services of P. at their first meeting in Sept. 1951.

The bill of $22,300 for counsel fees submitted by P. was allowed by the taxing officer, but the judge in bankruptcy taxed it at $8,000 of which $1,875 was declared to be payable by preference as a debt of the estate. The Court of Appeal held that P. was entitled to the full amount claimed and to be paid by preference.

Held: The appeal should be dismissed.

Since under s. 41(4) of the *Bankruptcy Act,* the bankruptcy is deemed to have commenced on Nov. 17, 1948, the time of the filing of the petition, the services were rendered to the estate of the bankrupt. P. was a person "whose services have been authorized by the trustee in writing" as provided by s. 155(4) of the Act. A trustee may in the exercise of his discretion adopt and pay for services rendered to a bankrupt after the filing of a petition when such services have clearly resulted, as in this case, in a benefit to the bankrupt's estate commensurate with the services rendered. In acting upon the inspectors' resolution of Sept. 1951, the trustees adopted the services already performed by P., and that was eminently fair. P. was therefore entitled to be collocated and paid by preference his proper charges.

The taxing officer, the judge in bankruptcy and each member of the Court of Appeal are free to exercise their own discretion in fixing an amount fair and reasonable to the party whose bill is being taxed and to the client. The amount allowed by the judge in bankruptcy was too low, and it cannot be said that the Court of Appeal erred in fixing the value of the services at $22,300.

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

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec, reversing the decision of the judge in bankruptcy.

B. Bernstein, Q.C. and *J. Shapiro* for the appellants.

J. Perrault for the respondent.

The judgment of the Court was delivered by:—

ABBOTT J.:—This appeal arises out of a claim for legal fees for services rendered by the late Antonio Perrault, Q.C. These services, which covered a period from November, 1948, to February, 1953, were rendered in connection with thirty actions taken against various insurance companies, to recover moneys payable under fire insurance policies, as indemnity for the loss of property owned by Laurentian Colonies and Hotels Limited, now in bankruptcy.

The facts are fully set out in the judgments in the Courts below and I shall refer to them very briefly.

A petition for a receiving order against the hotel Company was filed on November 17, 1948. The actions against the various insurance companies were taken some two weeks later on December 4, 1948, and with the approval of the petitioning creditor, proceedings on the petition in bankruptcy were suspended while the litigation was proceeded with, it being the view of all concerned apparently, that the claims could be prosecuted more effectively by the hotel company than by a trustee in bankruptcy.

The actions, all of which were contested, were joined for hearing, and judgments were ultimately rendered on February 16, 1951, condemning the insurance companies concerned to pay to the hotel company amounts totalling $313,292.71 with interest. The insurance companies inscribed in appeal against these judgments, and while the appeals were pending but before they had been heard, the petition for receiving order was proceeded with and a receiving order made on August 14, 1951. In due course the appellants as trustees of the bankrupt were authorized to continue the litigation.

It was conceded at the hearing before this Court that at the first meeting of inspectors of the bankrupt company, which took place on September 21, 1951, Mr. Ernest

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Lafontaine was retained as attorney of record and Mr. Antonio Perrault, Q.C., as counsel "to continue the suits on behalf of the trustees."

Judgment was rendered by the Court of Appeal on December 22, 1952, confirming the judgments in the trial court, and the insurance companies eventually paid to the trustees a total of some $360,000.

Both Mr. Lafontaine and the late Mr. Perrault submitted bills for their legal services to the trustees, the bill of the late Mr. Perrault for counsel fees being in the amount of $22,300 after giving credit for a payment of $500. It is his bill that is at issue in the present appeal.

It is unnecessary to discuss what occurred following the initiation of proceedings to tax this bill other than to state that the allowance of the bill by the taxing officer cannot be dignified by the name of taxation. From that determination the appellants as trustees appealed to the Court. The appeal was heard by Chief Justice Scott, sitting as Judge in Bankruptcy, and in the result he taxed the bill at $8,000, of which he held the claimant was entitled to be paid $1,875 by preference. On appeal to the Court of Queen's Bench, this judgment was reversed, the respondent held entitled to the full amount claimed and to be paid by preference.

As Mr. Justice McDougall, who wrote the principal judgment in the Court of Appeal, has pointed out, the real issues on the appeal are limited to two, namely, (1) the amount of the respondent's account and (2) whether it is to be treated in whole or in part as part of the costs of administration and thus payable in priority as provided by s. 95 of the *Bankruptcy Act*.

The services rendered by the late Mr. Perrault unquestionably benefited the estate of the bankrupt company. Virtually the only assets of that company were its claims against the insurance companies and these were only recoverable as a result of court action. Legal services were necessary and enured to the benefit of the company and its creditors. Under the terms of s. 41, subs. 4, of the *Bankruptcy Act*, the bankruptcy is deemed to have commenced on November 18, 1948, the time of the filing of the petition.

As Mr. Justice McDougall has pointed out, the Court of Appeal for Ontario held in *The King* v. *Louis Minden* (1), that the bankruptcy begins at the time of the presentation of the petition for all purposes. This indeed would seem to be clear from the terms of the subsection itself. I think it can be said, therefore, that the services in question were rendered to the estate of the bankrupt.

The respondents are clearly entitled to be paid by preference for services rendered subsequent to September 21, 1951, date of the resolution of the inspectors, which I have referred to. Whether the claim for services prior to that date should be collocated and paid by preference, depends upon the effect to be given to the said resolution and to the relevant sections of the *Bankruptcy Act*. These sections are s. 155(4) and (6) and read as follows:—

155(4) No costs shall be paid out of the estate of the bankrupt, excepting the costs of persons whose services have been authorized by the trustee in writing and such costs as have been awarded against the trustee or the estate of the bankrupt by the court.

* * *

(6) Legal costs shall be payable according to the following priorities:

(*a*) commissions on collections, which shall be a first charge on any sums collected;

(*b*) when duly authorized by the court or approved by the creditors or the inspectors, costs incurred by the trustee after the bankruptcy and prior to the first meeting of creditors;

(*c*) the costs on an assignment or costs incurred by a petitioning creditor up to the issue of a receiving order;

(*d*) costs awarded against the trustee or the estate of the bankrupt;

(*e*) costs for legal services otherwise rendered to the trustee or the estate.

The late Mr. Perrault was clearly a person "whose services have been authorized by the trustee in writing" as provided by s. 155(4) and there remains for consideration the effect to be given to the resolution of September 21, 1951, which reads as follows:—

Mr. Lafontaine, Solicitor, who handled the insurance claim before the Court explained to the meeting, the facts of the case and, after hearing the explanations of Mr. Lafontaine, it was moved by Mr. Parsons, seconded by Mr. Wilkinson and unanimously carried that the trustees continue the proceedings against the 30 insurance companies which have been condemned by Mr. Justice Collins to pay this sum of $313,292.71 to the bankrupt company with interest and costs and that Mr. Ernest Lafontaine be retained by the estate to continue the suits on behalf of the trustees and he is hereby authorized to retain the services of Mr. Antonio Perrault, K.C. as counsel.

(1) 64 C.C.C. 309.

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A trustee in bankruptcy may in the exercise of his discretion adopt and pay for services rendered to a bankrupt after the filing of a petition in bankruptcy when such services have clearly resulted in a benefit or profit to the bankrupt's estate commensurate with the service rendered. See *in re Simonson ex parte Ball* (1) and *in re Geen ex parte Parker* (2).

There can be no question but that the legal services rendered by Mr. Perrault benefited the estate. In my opinion, in acting upon the resolution of September 21, 1951, the trustees adopted the services which Mr. Perrault had already performed, and it was eminently fair that they should do so.

I am therefore of the opinion that the late Mr. Perrault was entitled to be collocated and paid by preference his proper charges for all the services rendered by him to the estate of the bankrupt company.

As to amount, the Court below has held that he was entitled to be paid the full amount of his bill, namely, $22,300. The detailed account which he submitted for taxation was supported by the affidavit of the late Mr. Perrault, in accordance with s. 10 of the *Bar Act*, on which he was not cross-examined, and the appellants offered no expert testimony in connection with this account. A lengthy hearing did take place on the contestation of the Lafontaine account, and a good deal of expert evidence was adduced as to the character of the litigation and the value of legal services rendered by Mr. Lafontaine.

With respect, I am unable to agree with the view which appears to have been held in the Court below that this evidence should not have been considered at all in the present case, since evidence as to the character of the litigation was clearly relevant, but in my opinion it could be of little help in assessing the value of Mr. Perrault's services.

The late Mr. Perrault, a former batonnier general of the Quebec bar, had been for many years a leader in his profession and his learning and experience, more particularly in the field of commercial law were no doubt well known to the Courts below and indeed recognized by the appellants at

(1) [1894] 1 Q.B. 433. (2) [1917] 1 K.B. 183.

the hearing before this Court. The litigation in which he acted as senior counsel was important, the amount involved was large and the result successful. A careful reading of the reasons of Mr. Justice McDougall convinces me that the Court below did not proceed upon the mere fact that Mr. Perrault had pledged his oath as to the value of his services. That by itself is not conclusive since the taxing officer, the judge in bankruptcy and each member of the Court of Appeal is free to exercise his own discretion under all the relevant circumstances in fixing an amount fair and reasonable to the party whose bill is being taxed and to the client. The amount allowed by the judge in bankruptcy, however, in my opinion was too low and I cannot say that the Court of Appeal has erred in fixing the value of the services in question at $22,800.

In the result, in my opinion, the respondents are entitled to be collocated and paid by preference in the distribution of the assets of the bankrupt estate, the sum of $22,300, and I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *B.. Bernstein, J. Shapiro, C. Coderre.*

Solicitor for the respondent: *J. Perrault.*

THE BOARD OF EDUCATION FOR THE TOWNSHIP OF NORTH YORK ..... APPELLANT;

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*Jan. 31
*Feb. 1
*Apr. 24

AND

VILLAGE DEVELOPMENTS LIMITED RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Determination of value—Land suitable for subdivision—Uncertainty of statutory approval—Other uncertainties.

Land comprising 10·4 acres and forming part of a larger tract purchased by the respondent in 1952, were expropriated by the appellant. A plan for subdivision by the former owner submitted in 1951 was not approved by the Minister of Planning and Development. A new plan submitted by the respondent in 1953 was approved by the Planning Board upon certain conditions. In the interval, negotiations were carried on between the parties for the purchase of the required lands for a school

*PRESENT: Taschereau, Rand, Locke, Cartwright and Abbott JJ.

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site. The appellant offered $100,000 in Feb. 1954 upon certain conditions and while this amount was acceptable to the respondent, one of the conditions was not and the negotiations collapsed. The expropriation was made on March 22, 1954. A new subdivision plan was approved by the Minister on May 13, 1954.

Proceeding upon the basis that the respondent was entitled to receive the amount he would have realized if the property had been sold in building lots, the trial judge made an award of $129,708. This judgment was affirmed by the Court of Appeal.

Held (Abbott J. dissenting): That the appeal should be allowed and the compensation reduced to $110,000.

Per Taschereau and Cartwright JJ.: The land should be valued on the basis that the most advantageous use to which it could be put was subdivision and sale, but the trial judge appears to have erroneously calculated as a mere matter of arithmetic the total probable net realization from the sale of the land in this manner and to have awarded this sum instead of the present value of the anticipation that in the not far distant, but still not in the immediate, future such sum would be realized.

Per Rand J.: The arbitrator failed to give effect to the fact that while what was in prospect for the owner here was a land subdivision development, the subdivision had not yet been approved and was subject to the contingencies that might affect approval or might be annexed as conditions. It was therefore facing that uncertainty in realization of the possibilities of its land that the owner must have estimated its value, a value which in the circumstances would not seem to differ from market value with the same object in view. The amount allowed by the arbitrator disregarded in toto all the eventualities foreseeable or only vaguely foreshadowable by which a prudent person, looking forward immediately before the expropriation, would be influenced.

Per Locke J.: There was error in the principle applied by the trial judge. He appears to have assumed in making the award that the respondent was entitled as of right to register the plan prepared and to sell the lots shown upon it as building lots. There was no basis for any such assumption. It was wrong to ignore the statutory requirement of approval to any subdivision plan under the Planning Act and to fix the compensation as if the owner were entitled to proceed to an immediate sale of the land as building lots.

Per Abbott J. (dissenting): There is no reason to assume that an appropriate subdivision plan would not have been approved since it is clear that the land was admirably suited for that purpose. The value of the land to the respondent at the time of the taking was the amount for which it could be disposed of for residential purposes, making allowance for any expenses which might have been incurred, carrying charges and such risk as might be involved pending sale. The trial judge followed the proper principles and the appellant has failed to show that the unanimous judgment of the court below on a question which is essentially one of fact, was wrong.

APPEAL from the judgment of the Court of Appeal for Ontario affirming the judgment at trial.

J. T. Weir, Q.C. and *S. Webb* for the appellant.

J. J. Robinette, Q.C. and *E. A. Goodman, Q.C.* for the respondent.

The judgment of Taschereau and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—I agree with the conclusion of my brothers Rand and Locke that this appeal should be allowed and that the compensation awarded to the respondent should be reduced to $110,000.

In my view the learned Judge of the County Court erred in principle in that in determining the present value of the future advantages possessed by the expropriated land he acted on the assumption that the respondent was entitled as of right to proceed to the immediate sale of such land as building lots, and gave no effect to the circumstance that it could not lawfully sell the land in this way until a plan had been approved pursuant to the statutory provisions set out in the reasons of my brother Locke. There was no certainty that a plan would be approved in the immediate future. It is also my opinion that the learned Judge failed to give any effect to the uncertainties mentioned in the reasons of my brother Rand.

I do not question the view of the learned Judge that the most advantageous use to which the land could be put was subdivision and sale and that it should be valued on that basis; but, with respect, he appears to me to have calculated as a mere matter of arithmetic the total probable net realization from the sale of the land in this manner and to have awarded this sum instead of the present value of the anticipation that in the not far distant, but still not in the immediate, future such sum would be realized.

I would allow the appeal and reduce the amount of compensation to $110,000. I would dispose of the costs as proposed by my brother Locke.

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RAND J.:—The general principle for estimating compensation for land taken enunciated by the Judicial Committee in *Cedar Rapids* v. *Lacoste* (1), is thus stated by Lord Dunedin at p. 576:

> (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.
>
> (2) The value to the 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.

What was in prospect for the owner here was a land sub-division development. But the sub-division had not yet been approved and was subject to the contingencies that might affect approval or might be annexed as conditions. It was therefore facing that uncertainty in realization of the possibilities of its land that the owner must have estimated its value, a value which in the circumstances would not seem to differ from market value with the same object in view. But that was not the perspective in which the matter was approached by the arbitrator.

The land taken was part of a larger parcel bought by the respondent in 1952. A plan of the entirety had been prepared by the former owner and submitted for approval in 1951, but because of certain difficulties in the way of furnishing water and other facilities as well as possible school plans, the application was refused. In February, 1953, a new plan showing a large lot of the original block as reserved for school purposes, but otherwise divided into lots as in the previous plan, was submitted for and given provisional approval by the Minister, subject, however, to the consent of local authorities. The provisional approval remained in abeyance until the following year. In the spring of 1954 the Board had settled upon acquisition of what had been set aside on the plan with the addition of a few lots and a roadway adjoining it, and in February negotiations took place between the parties looking to the compensation. This was agreed upon at $100,000 and the only reason why the transaction was not then concluded was the insistence by the Board on retaining $10,000 as security for the installation by the respondent of the several services, in which the respondent declined to acquiesce. On

(1) [1914] A.C. 569.

March 22 the Board filed the expropriation plan and within two months the final approval of the sub-division for the remaining land was given.

When the case came on before the arbitrator the respondent submitted its case on the basis of the plan of lots as proposed in 1951. It gave evidence of certain sales made prior to approval; it was not disputed that there was a live market for lots generally in that section of the Township; and the average price of $3,300 was not seriously contested before us. On this material the gross selling price became a matter of mere mathematical calculation; from this were deducted the estimated expenses of installing the services and an amount equal to 10% of the gross price for incidental costs; the balance remaining was the amount allowed, $129,708. It is reasonable to take this as the foreseeable maximum.

That this mode of computation was, formally at least, a departure from the principle of Cedar Rapids was not challenged; but Mr. Robinette argued, and before the Court of Appeal successfully, that the elements of risk which lay between the time of the expropriation and the final approval of the plan by the Minister and thereafter, were so attenuated that they could be disregarded and, without violating the principle, the estimation could properly be made on the footing that the land at the moment of expropriation had become a sub-division on the market. The question is whether or not the contention is sound, and I am unable to agree that it is. To countenance that basis, not as an evidentiary circumstance but, as the arbitrator used it, as an absolute formula, would introduce such a corroding qualification of the principle as would expose it in every case to a contest over the number of such risks and the strength of their probability. The evidence in my opinion should have been rejected; but whether that is so or not, the basis cannot be applied as it was.

It is easy, of course, to be wise after the event; but when the question is put as it should be put, which is, what would a prudent business man in the position of the respondent be willing to accept in the light of all of the future possibilities as they appear immediately before the expropriation as the fair amount to compensate him for his loss, the determining considerations appear in a somewhat different and

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Rand J.

more uncertain aspect. We know what in fact the respondent did agree to, $100,000. Mr. Robinette properly submits that in assenting to that amount the respondent had in mind the avoidance of the risks of the estimation by the arbitrator as well as the trouble and expense of the arbitration. The amount agreed to by the parties would, of course, work both ways. But conceding a reasonable amount for that risk, it will represent what, in the opinion of the respondent, would have been reasonable compensation. That amount is, of course, uncertain as all of these estimates are, but I should say that 10% added to the amount agreed to can fairly be said to cover the item.

On the other hand, the amount of $129,708 disregards in toto all of the eventualities foreseeable or only vaguely foreshadowable by which a prudent person, looking forward immediately before the expropriation, would be influenced. We are all too familiar with this sense of vague mistrust to have any doubt about the wisdom of caution in such judgments. We have only to recall the confidence, particularly among the sanguine financial leaders in 1929, in the assumption of the permanence of values then reached, to appreciate the fallibilities of such opinions. What confuses the issue here is the introduction of post facto actualities which were hidden from the minds of men on March 22, 1954.

From the amount allowed by the arbitrator there would of necessity be deducted a percentage to represent those uncertainties which are somewhat broader than those of an arbitration. Taking it at 15% of the maximum computation, the result would leave approximately the same as by the other method, that is, $110,000.

I would, therefore, allow the appeal and reduce the amount of compensation from the amount awarded to that sum. The costs of the arbitration will remain as directed, but the appellant will have its costs in the Court of Appeal and in this Court.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario which dismissed the appeal of the present appellant from an award made by His Honour Judge Forsyth as compensation for certain lands expropriated by the appellant under the provisions of the *School Sites Act* (c. 348, R.S.O. 1950).

The lands taken, 10·4 acres in extent, formed part of a larger tract of 18·4 acres purchased by the respondent from one Harry Mendel in September, 1952. In July 1951 Mendel had had prepared a plan of a subdivision of the property, dividing the portions not required for streets into 94 lots designed for use as residential property. In September of that year, this plan was submitted to the Department of Planning and Development for approval, as required by s. 26 of the *Planning Act* (c. 277, R.S.O. 1950). The Minister had referred this plan to the Planning Board of the Township for its consideration. That board decided that it should not recommend the approval of the plan for two principal reasons, namely, the Township's inability to supply the property with water and because of the school problem in the area. These recommendations were forwarded to the Minister on May 13, 1952 and the plan was not approved.

The respondent is engaged in the business of dealing in subdivisions and in general construction work. After purchasing the tract, on its instructions the town planning consultant who had prepared the plan for Mendel prepared a new plan showing what was substantially the east half of the property as a high school site, the balance being divided into building lots and streets upon which the lots fronted. In March of 1953 this plan was submitted to the Planning Board and on April 30, 1953, the Board decided that it would recommend its approval upon certain conditions. The principal of these was that the respondent should enter into an agreement with the council of the Township regarding the installation of services such as the supply of water and for the disposal of sewage, payment of taxes and other related matters. For reasons which are not explained in the evidence, the agreement, the making of which was made a condition precedent to obtaining the recommendation of the Planning Board for the plan, was not settled until March 24, 1954. While so dated, a by-law authorising its execution by the Township was not passed until May 10, 1954.

In the interval, negotiations had been carried on for the purchase of the required lands, the appellant by an offer in writing dated February 26, 1954, offering the sum of $100,000 upon conditions stated in a schedule to the offer.

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One of these specified that the appellant should have the right to retain $10,000 of the purchase price to insure completion by the respondent of certain specified works by May 1, 1955. While the amount offered was acceptable to the respondent, the condition mentioned was not and the negotiations collapsed.

On March 22, 1954, the appellant passed a resolution expropriating the lands in question, describing them by metes and bounds. The area taken included 9 building lots shown on the prepared plan along the west side of the school site, which the respondent had theretofore assumed to sell, and an area shown as Block A lying along the south border of the part there designated as a high school site. The resolution did not in terms require immediate possession of the lands taken and on May 17, 1954, a second resolution was adopted that immediate possession be required and taken. The respondent, apparently following the settlement of the terms of its agreement with the Township dated March 25, 1954, had a new plan prepared giving effect to the changes agreed to, and this was approved by the Planning Board and thereafter by the Minister on May 13, 1954, and registered.

The learned judge, in determining the amount of the compensation, proceeded upon the basis that the owner was entitled to receive the amount he would have realized from the expropriated property if it had been sold in building lots, as contemplated by the proposed plan rejected by the Minister in 1952, less the amount it would have been necessary to expend upon the property for the provision of the services called for by the agreement of March 25, 1954, and a further deduction for the carrying charges, for interest, legal fees, taxes, selling commissions and other related expenditures. Estimating that there would have been realized from the sale of the lots, less these deductions, an amount of $129,708, he allowed the owner this amount, with interest from March 22, 1954. He further found that the property was excellently situated for subdivision purposes and that that was the most advantageous purpose to which the land could be put and that the lots could have readily been sold after the registration of the plan. While these

findings are clearly supported by the evidence, I think, with respect, there was error in the principle applied in determining the question to be decided.

It appears to have been assumed in making the award that the respondent was entitled as of right to register the plan prepared in 1951 and to sell the lots shown upon it as building lots. With respect, there is no basis for any such assumption. The Legislature of Ontario has by the *Planning Act* made provision whereby the council of a municipality (an expression defined to include a township) may define and name a planning area and, when defined, the council may appoint a Planning Board which, by virtue of s. 4, is declared to be a body corporate. The Board so constituted is by s. 8 charged with the duty of investigating and surveying the physical, social and economic conditions in relation to the development of the planning area and, inter alia, after holding public meetings for the purpose of obtaining the participation and co-operation of the inhabitants of the area in determining the solution of problems or matters affecting the development of it, recommend a plan to the council: if approved, the plan is submitted to the Minister for approval. Other provisions of the statute provide that where land is to be subdivided for the purpose of being sold in lots by reference to a registered plan of subdivision, the person desiring to register the plan shall forward it to the Minister for approval. It was under this provision that the plans to which I have referred were submitted to the Minister of Planning and Development. S-s. 4 of s. 26 provides that, in considering a draft plan of subdivision, regard shall be had, *inter alia,* to the health, safety, convenience and welfare of the future inhabitants. S. 27 declares that every person who subdivides and offers for sale or agrees to sell land by a description in accordance with an unregistered plan of subdivision shall be guilty of an offence and, on summary conviction, liable to a specified penalty.

The Legislature has further, by the *Board of Education Act* c. 38, R.S.O. (1950), the *Department of Education Act* (c. 94), the *Public Schools Act* (c. 316) and the *High Schools Act* (c. 165) made provision for the establishment, maintenance and control of public and high schools in the province and provided for the establishment of municipal

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Locke J.

Boards of Education. One of the duties imposed upon such Boards is to provide adequate accommodation, according to the regulations, for all pupils.

As far back as 1951, the Planning Board of the Township of North York had, as above pointed out, considered the necessity of providing, by any plan to be recommended to the Minister, for further schools in the area. In addition to the subdivision proposed by Mendel, two other subdivisions lying to the north and west of the area in question had been approved and plans registered. By March of 1953 it is clear that the Board, in the discharge of its statutory duties, had determined to recommend that the area in question should not be approved for subdivision but, to the extent then indicated to the respondent, set aside as a high school site. While the record contains no evidence upon the point, it is proper, in my opinion, to assume that the appellant Board in the discharge of its functions had decided that, in the interests of the community as a whole, a high school should be established on the site indicated on the second plan. As the earlier plan prepared indicates, there was a public school lying immediately to the north and west of the limits of the proposed subdivision.

The risk that the Planning Board of the Township, and the Minister of Planning Development on its recommendation, would decline to approve a plan of subdivision of the property in question into building lots, was one to which the area of 18·4 acres purchased by the respondent in 1952 was subject, in common with all other vacant lands in the Township. Before the passing of the expropriation resolution on March 24, 1954, it had been made clear to the respondent that the plan of subdivision as originally proposed in 1952 would not be recommended by the Planning Board to the Minister or approved by him, and it was in consequence of this that the second plan setting aside the area as a high school site was prepared. It cannot, therefore, be said that, as of the date of the expropriation and by reason of it, the respondent was deprived of its right to sell the property as building lots. There was no such market then available or in prospect since the land could not be sold in lots without the approval and registration of the plan. It was not the action of the appellant which deprived the respondent of such a market but the

inability of the latter to obtain the recommendation of the Planning Board and the approval of the Minister of the plan of subdivision. It is not, of course, suggested that either that Board or the Minister acted otherwise than in the manner they considered to be in the public interest in discharging their statutory duties.

The owner of property subject to zoning restrictions is not, if the land be expropriated, entitled to compensation on the basis of its value to him if used for some purpose forbidden by the regulations. The contrary of this proposition was asserted and rejected as long ago as 1870 in *Stebbing* v. *The Metropolitan Board of Works* (1). The owner of property suitable for use as licensed premises situate in a place where Part 2 of the *Canada Temperance Act* (c. 30, R.S.C. 1952) is in force cannot, if it be compulsorily taken, assert a value based on the profits which he would derive from the sale of liquor.

The fact that there was but one available purchaser for the property does not, of course, affect the right of the respondent to be compensated to the full extent of the value of the property to him as of the date of the expropriation, in accordance with the principle so often stated in this Court and restated in *Woods* v. *Manufacturing Co.* v. *The King* (2).

The evidence directed to establishing this, while considerable in extent, is not, in my opinion, entirely satisfactory. For the owner it was directed to showing what sum of money could have been realized had he been able to get the original plan, or something closely approximating it, registered, whereas it had become apparent to the respondent early in 1953 that this was impossible. Various valuations of the property as acreage was given on behalf of the appellant, these varying from $63,500 to $74,400. These valuations were, however, based on what the property would realize on the market and did not attempt to assess its value to the owner. In addition, evidence was given of a number of sales of land as acreage in the vicinity in the years 1951, 1952 and 1953, for prices varying from $2,700 to $4,725 per acre. The evidence, however, established that the land had materially appreciated in value between the year 1952 and the time of expropriation.

(1) (1870) L.R. 6 Q.B. 37 (2) [1951] S.C.R. 504.

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There is, however, concrete evidence as to an amount which the present respondent apparently considered to be the value to it immediately preceding the expropriation and that this amount of $100,000 was an amount which the appellant was prepared to pay, subject to conditions which need no longer be considered.

I have come to the conclusion that the proper course to be followed is to settle the amount of remuneration in this Court rather than to refer the matter back.

While it is to be presumed that the respondent offered to accept this amount at a time when it was fully informed as to its legal rights, it should be borne in mind that, being aware that the property was subject to expropriation at a price to be fixed by arbitration, it might well, in order to escape the delays, costs and uncertainty of arbitration and perhaps thereafter litigation, accept less than the full value of the property to it. In the circumstances, I think it proper to add ten per cent to the above mentioned figure for the compulsory taking. I would accordingly allow this appeal and fix the amount of the compensation at $110,000, with interest at the legal rate from March 22, 1954.

I would allow the appellant its costs in this Court and in the Court of Appeal. I would not interfere with the order made as to the costs of the hearing before His Honour Judge Forsyth.

ABBOTT J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for Ontario which dismissed an appeal of the appellant from an award made by His Honour Judge Forsyth fixing the compensation for certain lands belonging to respondent and expropriated by the appellant for school purposes.

The property expropriated formed part of a larger tract of land acquired by the respondent in 1952 for the purpose of subdivision and sale as residential building lots, a purpose for which, it is clear from the record, the property was admirably suited. Approval of a subdivision plan by the appropriate public authorities was withheld for some time, apparently because of a shortage in the water supply and of possible requirements for school purposes.

In the spring of 1954 the water situation appears to have been improved and appellant had also by that time taken a definite decision to acquire a part of respondent's property for school purposes. Discussions took place between appellant and respondent with a view to the former acquiring the property without the necessity of expropriation proceedings but these proved abortive for reasons which I do not find it necessary to discuss.

Notice of expropriation was given by appellant on March 22, 1954, and a short time later a plan of subdivision for the remainder of the respondent's property was approved.

Approval of a subdivision plan, by various public authorities, is required to protect the public interest, not to arbitrarily prevent the economic development of real property by its owner, and had the appellant decided to acquire some other property for school purposes, there is no reason to assume that an appropriate subdivision plan would not have been approved for the property expropriated, since, as I have said, it is clear from the record that it was admirably suited for that purpose.

The general principle to be followed in establishing compensation for compulsory taking of land, has been long since settled and consistently followed in the decisions of this Court, one of the most recent of which is *Woods Manufacturing Company* v. *The King* (1). The value to be paid is the value to the holder, not to the taker, and consists in all the advantages which the land possesses, present and future, although it is the present value alone that falls to be determined.

As Rand J. said in *Diggon-Hibben Ltd.* v. *The King* (2): "A compensation statute should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbours' should be required for public purposes:" and in my opinion the value of the land to respondent at the time of taking was the amount for which it could be disposed of for residential purposes, appropriate allowance being made for (i) any expenses which might have to be incurred, (ii) carrying charges and (iii) such risk

(1) [1951] S.C.R. 504. (2) [1949] S.C.R. 712 at 715.

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Abbott J.

as might be involved pending sale. In arriving at such value, on the principles laid down in *Irving Oil Company Limited* v. *The King* (1), I am also of opinion that the usual ten per cent allowance for compulsory taking could properly have been included in the circumstances of this case.

It was established in evidence that fully serviced building lots, having a 50 ft. frontage, in the general area of the property expropriated, were selling, at the time of the expropriation, for from $3,200 to $3,700 each. In arriving at a valuation of the property expropriated, the arbitrator used as a basis of his estimate a figure of $3,300 per serviced lot. From a total potential value thus arrived at, he deducted an amount of $42,000 to cover the estimated cost of services which would not be required since the property was sold *en bloc,* and a sum of $14,412 (being ten per cent of the estimated value) as an allowance for carrying charges, interest, legal fees, commissions and the like. In his award, the arbitrator made no specific reference to having made any allowance for risk pending development and sale, and he made no allowance for compulsory taking.

Except to the extent the arbitrator may have failed to allow for risk involved pending sale, I do not think that in arriving at the value which he did, he failed to follow proper principles. The evidence would indicate that at the time of the expropriation, the risk of loss pending sale was slight and in my opinion, in terms of money, could not in any event have exceeded a sum equivalent to ten per cent for compulsory taking.

The appellant has failed to satisfy me that the unanimous judgment of the Court below, which confirmed the finding of the arbitrator on a question which is essentially one of fact, is wrong. In my opinion, therefore, it should not be disturbed.

At the hearing before this Court it was realized for the first time that in fixing the compensation at $129,708, an error had been made in the method of applying the 10% allowance for carrying charges, which had escaped the attention of all concerned. It was conceded that on a proper application of the 10% deduction the amount

(1) [1946] S.C.R. 551.

awarded should have been $125,508. The judgment below should be modified accordingly but otherwise the appeal should be dismissed; this should not affect the question of costs, and the respondent should have its costs of the appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Armstrong, Kemp, Young & Burrows.*

Solicitors for the respondent: *Goodman & Goodman.*

LOUIS M. BENJAMIN .....APPELLANT;

AND

S. W. WEINBERG .....RESPONDENT.

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*Mar. 22
*Apr. 24

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

Bills of Exchange—Fraud shown—Onus on holder in due course—Bills of Exchange Act, R.S.C. 1952, c. 15.

The appellant sued as the holder in due course of a cheque which the respondent had signed in blank and delivered to one H. There were concurrent findings that at the time, if the appellant did not have actual knowledge of the circumstances under which the cheque was being negotiated by H., he showed a wilful disregard of the facts and must have had a suspicion that there was something wrong and refrained from investigating.

Held (affirming the judgment appealed from): That, fraud having been shown regarding the manner in which the respondent was induced to sign and deliver the cheque to H., the appellant has not discharged the onus placed upon him to show that he had taken the bill in good faith and without notice of any defect in the title of the person negotiating it.

APPEAL from the judgment of the Court of Queen's Bench, appeal side (1), affirming the judgment at trial.

C. R. Gross for the appellant.

L. Fitch,, Q.C. and *R. L. Bercovitch* for the respondent.

The judgment of the Court was delivered by:—

LOCKE J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) (1), by which the

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

(1) Q.R. [1954] Q.B. 582.

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Locke J.

appeal of the present appellant from the judgment of McKinnon J. dismissing the action was dismissed.

The relevant facts are stated at length in the judgment of the learned trial judge and reviewed in the reasons for judgment delivered by Gagné J. and it is unnecessary to repeat them.

The question to be determined is whether the appellant became the holder in due course of the cheque signed in blank by the respondent and delivered to Hershunov in the circumstances described. It was found as a fact at the trial that at the time, if the appellant did not have actual knowledge of the circumstances under which Hershunov was negotiating the respondent's cheque, he showed a wilful disregard of the facts and must have had a suspicion that there was something wrong and refrained from asking questions or making further enquiries. These findings have been unanimously confirmed by the court to which the appeal was taken.

My consideration of the lengthy evidence in this matter discloses no ground upon which we may properly interfere with these concurrent findings.

I respectfully agree with McKinnon J. that, in circumstances such as are disclosed by the evidence in this case, the test to be applied is that stated by Lord Blackburn in *Jones* v. *Gordon* (1), and by Lord Herschell in *London Joint Stock Bank* v. *Simmons* (2). Fraud having been shown regarding the manner in which the respondent was induced to sign and deliver the cheque to Hershunov, the onus was upon the appellant to show that he had taken the bill in good faith and without notice of any defect in the title of the person negotiating it (s. 58(2) *Bills of Exchange Act; Tatam* v. *Haslar* (3). Upon the facts as found in this case, that onus has not been discharged.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Rudenko & Gross.*

Solicitor for the respondent: *R. L. Bercovitch.*

(1) [1877] 2 A.C. 616 at 629. (2) [1892] A.C. 201 at 221.
(3) (1889) 23 Q.B.D. 345.

JAMES BURNS CAIRNEY, AN INFANT (*Plaintiff*) ..... APPELLANT;

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*Feb. 22, 23
*May 24

AND

ROBERTA BURRELLS MacQUEEN (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Aeronautics—Crash of airplane—Death of passenger and pilot—Whether action lies against estate of tortfeasor—Limitation period—Families Compensation Act, R.S.B.C. 1948, c. 116—Administration Act, R.S.B.C. 1948, c. 6—Interpretation Act, R.S.B.C. 1948, c. 1.

The pilot of a plane and his passenger were both killed when the plane crashed. It was not known which of the two died first or if they both died at the same moment. The appellant, a dependant of the passenger, sued under the *Families Compensation Act* (R.S.B.C. 1948, c. 116) the administratrix of the estate of the pilot pursuant to s. 71 of the *Administration Act* (R.S.B.C. 1948, c. 6). The action was brought after the six months after the death of the pilot (the period limited by s. 71 of the *Administration Act*) but within the twelve months from the death of the passenger (the period limited by s. 5 of the *Compensation Act*).

The trial judge held that the appellant had a cause of action against the administratrix and that the action was not statute-barred. This judgment was reversed by a majority judgment in the Court of Appeal.

Held (Locke and Cartwright JJ. dissenting): That the appeal should be dismissed.

Per Kerwin C.J.: The definition of "person" in s. 3 of the *Families Compensation Act* as "the person who would have been liable if death had not ensued" does not apply to the personal representative of the deceased tortfeasor notwithstanding s. 24 of the *Interpretation Act*.

Per Rand J.: If the pilot's death had occurred first, then by force of s. 71(3) of the *Administration Act*, there accrued at that moment to the then living passenger a right of action against the legal representative of the deceased pilot and that representative would, upon the death of the passenger, become liable to the beneficiaries of the passenger under s. 4 of the *Compensation Act*. On the other hand, if the pilot survived the passenger it would be against him that the passenger, at the moment of his death, had the right of action and it would also be against the pilot only that the right of the beneficiary would lie: on the death of the pilot the right would, under the well-established rule of the common law, come to an end and there is nothing in s. 71 which affects that result. The governing point of time in each case is that of the passenger's death. If both had died at the same moment there is no presumption of law either as to survival of the one or other or as to death of both at the same moment. As the pilot may have

*PRESENT: Kerwin C.J., Rand, Kellock, Locke and Cartwright JJ.

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survived the passenger, the presumption of either of the other two possibilities is excluded and with it the possibility of finding that the person liable was the legal representative of the pilot.

Per Kellock J.: The new right of action, created by the *Families Compensation Act*, abates upon the death of the tortfeasor where the latter survives the victim and there is nothing in the Act which prevents that result or allows a person suing under that statute to invoke the provisions of the *Administration Act* although the victim himself might have done so. The law does not permit the context of s. 3 of the *Families Compensation Act* to apply so as to permit action to be taken against the personal representative of the tortfeasor.

Per Locke J. (dissenting): In applying s. 3 of the *Families Compensation Act*, the question is who the person wronged could have sued in respect of his injuries had he lived. Against such person, whether the wrongdoer or his personal representative, the action lies at the suit of the personal representative of the one who was wrong on behalf of the dependents, or by the dependents on their own behalf. Consequently, the passenger, if alive, might by virtue of s. 71(3) of the *Administration Act* have sued the pilot if he were alive and, if dead, his personal representative, and accordingly this action lies. The fact that there is no evidence to prove when in relation to the death of the passenger the death of the pilot occurred does not affect the matter.

S-s. 6 of s. 71 of the *Administration Act* excludes the limitation of six months of s-s. 3, and accordingly the action was not barred (*B.C. Electric* v. *Gentile* [1914] A.C. 1034 referred to).

Per Cartwright J. (dissenting): The word "person" in s. 3 of the *Families Compensation Act* is to be extended by virtue of s. 24(31) of the *Interpretation Act* to read "the heirs, executors, administrators or other legal representatives of such person". It follows that the limitation of six months imposed by s. 71(3) of the *Administration Act* has no application to the present action.

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

W. S. L. Young for the appellant.

C. W. Tysoe, Q.C. and *Mrs. W. A. Tysoe* for the respondents.

THE CHIEF JUSTICE:—The plaintiff in these proceedings is James Burns Cairney, an infant, sueing by Jeanette Cairney, his mother and next friend, and by special leave of the Court of Appeal for British Columbia he appeals from a judgment of that Court dismissing his action. It was originally brought against Queen Charlotte Airlines Ltd. and Roberta Burrells MacQueen, Administratrix of the estate of Douglas Duncan MacQueen. According to

(1) [1955] 1 D.L.R. 762; 14 W.W.R. 301.

the Statement of Claim the Plaintiff's father, Henry Michael Cairney, was being carried as a passenger for compensation on October 17, 1951, in an aircraft owned by the Company and piloted by its employee, Douglas Duncan MacQueen, on a flight in the Province of British Columbia, when the aircraft crashed, as a result of which all aboard including the pilot were killed. It is alleged that the crash was caused and occasioned by the negligence of MacQueen and the Company. The Provincial Workmen's Compensation Board determined that the right to bring the action against the Company was taken away by Part I of *The Workmen's Compensation Act* and the action as against it was therefore forever stayed.

After the Statement of Defence of the Administratrix had been delivered a case was stated on behalf of her and the plaintiff which, after pointing out that the Writ of Summons had been issued on May 2, 1952, that is, after the expiration of six months from the death of Douglas Duncan MacQueen, although within twelve months after his death, posed the question for the opinion of the Court as to whether the action was maintainable against the Administratrix. Wilson J. before whom the matter came in the first instance decided that the period of limitation applicable was the twelve months mentioned in *The Families' Compensation Act,* R.S.B.C. 1948, c. 116, and not the six months mentioned in *The Administration Act,* R.S.B.C. 1948, c. 6. Upon the argument of an appeal to the Court of Appeal for British Columbia it appeared that a wider point of law was involved and at the Court's suggestion and by consent of counsel for both parties the appeal was adjourned so that a supplemental special case might be submitted to Wilson J. This was done, the question for the opinion of the Court being

> . . . whether, apart altogether from the fact that this action was not brought until after the expiration of six months from the death of Douglas Duncan MacQueen, this action is maintainable against the Defendant Roberta Burrells MacQueen, Administratix of the Estate of Douglas Duncan MacQueen, deceased, it having been brought by the Plaintiff in his individual capacity and against the personal representative of the alleged tortfeasor.

Wilson J. considering himself bound by a previous decision of Fisher J. in *Bowcott* v. *Westwood* (1), answered the

(1) [1937] 1 W.W.R. 657; 51 B.C.R. 441.

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question in the affirmative and ordered the action to proceed to trial against the Administratrix. The appeals from the two Orders of Wilson J. then came on for argument before the Court of Appeal at the same time and by a majority that Court allowed the appeals and dismissed the action.

Section 3 of *The Families' Compensation Act* reads:—

> 3. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to an indictable offence.

This Act is based on Lord Campbell's Act, 9-10 Victoria, c. 93, which was in force in British Columbia in the early days (English Law Act, c. 69, C.S.B.C. 1888). Section 5 of Lord Campbell's Act provided that "the word 'person' shall apply to bodies politic and corporate", so that there was no difficulty in sueing a corporation, and in the case of *Vose* v. *Lancashire and Yorkshire Railway Co* (1), referred to by Robertson JA., the point was not mentioned. There was no provision that "person" should include an executor or administrator. Section (1) which contains the recital, together with the other provisions of the Act, seem to make it clear that, while giving an action on behalf of the dependents of the person wronged, no action was given against the personal representatives of an individual wrongdoer in case of the latter's death. It is true that s. 24 of *The Interpretation Act,* R.S.B.C. 1948, c. 1, enacts:—

> (31). "Person" includes any corporation, partnership, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law.

but by the opening sentence of the section this is so "unless the context otherwise requires". Bearing in mind the history of *The Families' Compensation Act* and its prototype, the context is such, in my opinion, that the definition cannot apply.

It is under *The Families' Compensation Act* that the present action is brought and the plaintiff is the infant son of Henry Michael Cairney. The action is, therefore, not one covered by s-s. (2) of s. 71 of *The Administration Act*

(1) (1858) 2 H. & N. 728.

since it deals only with actions by an executor or administrator and because "the damages recovered in the action shall form part of the personal estate of the deceased", which is never the case in actions under Lord Campbell's Act and similar enactments such as *The Families' Compensation Act*. On this ground alone the plaintiff is unable to secure any assistance from the provisions of *The Administration Act*.

The decision in *Bowcott* v. *Westwood* was that of a single judge and Counsel agreed that it stands alone. Under those circumstances I am unable to agree that it can be brought within the authorities of which *Barras* v. *Aberdeen Steam Trawling and Fishing Company, Limited* (1) and *MacMillan* v. *Brownlee* (2), are examples. It cannot be said that one decision of a single judge is a clear judicial interpretation and certainly there is no course of judicial decision.

The appeal should be dismissed, but, in accordance with the written consent filed on behalf of both parties, not only is the dismissal to be without costs, but the judgments below should be varied so as to provide that there shall be no costs of the action or any of the proceedings, including the applications to the judge of first instance and the appeals to the Court of Appeal.

RAND J.:—This is an action for compensation brought under *The Families' Compensation Act* of British Columbia arising from the death of a passenger in a plane crash which took the lives of all persons aboard. The respondent is the administratrix of the estate of the pilot whose negligence is alleged to have been responsible for the accident. There is admittedly no evidence available to enable a finding that as between the passenger and pilot the one survived the other or that both died at the same moment. In the view I take of the law, the narrow question is this: who was the person who would have been liable to the passenger if death had not ensued within the meaning of s. 3 of that Act, the material portion of which reads:

> Whenever the death of a person shall be caused by wrongful act . . . and the act . . . is such as would (if death had not ensued) have entitled

(1) [1933] A.C. 402.

(2) [1937] S.C.R. 318; [1940] A.C. 802.

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the party injured to maintain an action and recover damages in respect thereof, then and in every such case the *person who would have been liable* if death had not ensued shall be liable to an action for damages, . . .

If the pilot's death had occurred first, then by force of s. 71(3) of the *Administration Act,* R.S.B.C. (1936) c. 5 there accrued at that moment to the then living passenger a right of action against the legal representative of the deceased pilot and that representative would, upon the death of the passenger, become liable to the beneficiaries under s. 4 of the *Compensation Act.* On the other hand, if the pilot survived the passenger, it would be against him that the passenger, at the moment of his death, had the right of action and it would also be against the pilot only that the right of the beneficiary would lie: on the death of the pilot the right would, under the well established rule of the common law, come to an end and there is nothing in s. 71 which affects that result. The governing point of time in each case is that of the passenger's death: I cannot agree that the words "if death had not ensued" can be interpreted to extend indefinitely the time within which the person liable is determinable. This was the view taken by the Judicial Committee in *B.C. Electric Railway* v. *Gentile* (1) in which Lord Dunedin used this language:

> Their Lordships are of opinion that the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, maintained, i.e. successfully maintained, his action, then the action under the Act does not arise.

If the two had died at the same moment, since for the purpose of s. 3 the person wronged is momentarily conceived to be alive, I should be inclined to hold that at that moment the wrongdoer then being dead s. 71(3) came into effect and the right given by s. 3 to beneficiaries would be against the legal representative of the wrongdoer. But it has long since been laid down by the House of Lords as the law of England that in the case of such a casualty there is no presumption of law either as to survival of the one or other or as to death of both at the same moment: *Wing* v. *Anfranc* (2). As the pilot may have survived the passenger,

(1) [1914] A.C. 1034. (2) 11 E.R. 407.

the presumption of either of the other two possibilities is excluded and with it the possibility of finding that the person liable was the legal representative of the pilot.

In *Wing* the wills of husband and wife, lost at sea together, were involved and the condition of the will of each was that the other should survive. The result of the decision was to distribute the estates of both as if they had died at the same moment and that seems to have led some American authorities, in such cases, to adopt the presumption that the deaths were simultaneous: Cyc. of L. & P. v. 13, a,309 p. (*b*). What brought about the result in *Wing* was the prima facie presumption that the next of kin are entitled to the personal property of a deceased, and as neither side could show that the condition of the will under which he claimed was fulfilled both were out of court and that presumption carried. But there is no analogous resort available to the circumstances here. This may seem to be unfortunate, but where, as here, the language of the statute is, as I read it, clear no other result is open.

Robertson J.A. in the Court of Appeal took the word "person" in s. 3, by force of the *Interpretation Act,* to include executors and administrators, but I am unable to agree that such a modification in the law as would follow from that view could have been contemplated. Moreover, as my brother Locke points out, that inclusion is to be ascribed only to the representatives of the person "to whom the context can apply according to law", a qualification which is fatal here.

I would, therefore, dismiss the appeal on the terms mentioned in the reasons of the Chief Justice.

KELLOCK J.:—In determining the question as to whether or not this action is properly constituted, it would be necessary to conclude that the action would be so constituted irrespective of whether the deceased passenger, Henry Michael Cairney, survived or predeceased the pilot, Douglas Duncan MacQueen, as it is admitted that it is not possible to determine that fact. The question thus raised depends upon the proper construction of the *Families' Compensation Act,* which statute creates the cause of action here asserted, a cause of action which is an entirely new

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right and quite distinct from any right of action vested either in the deceased passenger himself, had he survived, or his personal representative.

S. 3 of the statute provides that in the case of the death of a person caused by wrongful act, neglect or default which would, if death had not ensued, have entitled the party injured (that is, the person whose death was thus wrongfully caused) to maintain an action and recover damages in respect thereof, then "the person who would have been liable if death had not ensued" to such an action is to be liable to the action for which the statute provides in favour of the class of persons therein limited.

Where the tortfeasor predeceases the victim of the wrong, the latter, "the party injured", could not, at common law, maintain any action against the personal representative of the tortfeasor. By reason, however, of s. 71, s-s. (3) of the *Administration of Estates Act,* the victim became enabled to sue the executor or administrator of the tortfeasor and there would in such case be a "person who would have been liable if death (i.e., the death of the victim) had not ensued."

Where, however, the tortfeasor survives the latter, the victim, at the moment of his death (on the fictional assumption required by the statute that his death did not ensue) would, at common law, be entitled to maintain action against the tortfeasor. Accordingly, as this is the condition which the statute lays down, a member of the class under the *Compensation Act* would, by virtue of that Act, also be entitled to sue the tortfeasor.

The important consideration for present purposes at this point, however, is that, while the right of action of the victim himself against the tortfeasor would not, because of the express provisions of s-s. (3) of s. 71 of the *Administration of Estates Act,* be affected by the death of the latter, the right of action under the *Compensation Act* is not preserved in such case. As pointed out by Lord Dunedin in *B.C. Electric Railway* v. *Gentile* (1), employing the language of Coleridge J. in *Blake* v. *Midland Railway* (2):

> . . . "it will be evident that this Act does not transfer this right of action" (of the deceased) "to his representative, but gives to the representative a totally new right of action, on different principles."

(1) [1914] A.C. 1034 at 1040. (2) 18 Q.B. 93 at 110.

It is well settled that this new right of action abates on the death of the tortfeasor and there is nothing in the *Compensation Act* which prevents that result or allows a person suing under that statute to invoke the provisions of the *Administration Act* although the victim himself might have done so. In speaking of the conditions precedent to action under the *Compensation Act,* Lord Dunedin stated at p. 1041:

> The second is that the default is such "as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof."
>
> Their Lordships are of opinion that the punctum temporis at which the test is to be taken *is at the moment of death,* with the idea fictionally that death has not taken place. At that moment, however, *the test is absolute.*

In *Haley* v. *Brown* (1), Smith J.A., says at p. 10 that

> sec. 3 of the *Compensation Act* makes *any one* liable whom the injured person could have sued if alive.

On this footing the learned judge, as did Davey J.A., held that a plaintiff under the *Compensation Act* could sue the personal representatives of the tortfeasor, who died after surviving the victim. In my opinion, the *Compensation Act* permits action "against the person who would have been liable if death (i.e., the victim's death) had not ensued," that is, in the circumstances under consideration, the tortfeasor himself. The statute does not authorize an action against anyone else.

Accordingly, as in the present case it cannot be shown that MacQueen did not survive Cairney, the action is not properly constituted.

It has, however, been contended that the provisions of s. 24 of the *Interpretation Act are* pertinent in a case such as the present. That section reads as follows:

> In every Act of the legislature, unless the context otherwise requires:—
>
> (31) "Person" includes any corporation, partnership, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law.

As, however, as already pointed out, an action under legislation of the character of the *Families' Compensation Act* abates upon the death of the tortfeasor where the latter survives the victim, the law does not permit the context of s. 3 to apply so as to permit action to be taken against the

(1) [1955] 15 W.W.R. 1.

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personal representative of the tortfeasor. It would require, in my opinion, an express provision to extend the right of action under the *Families' Compensation Act* to such a situation.

The appeal should be dismissed but in accordance with the consent filed; the order as to costs should be that proposed by the Chief Justice.

LOCKE J. (dissenting):—This is an appeal by special leave granted by the Court of Appeal for British Columbia from a judgment of that court which allowed the appeal of the respondent MacQueen from two orders made by Wilson J. pronounced on March 24 and May 17, 1954, and directed the dismissal of the action. Robertson J. A. dissented and would have dismissed the appeal.

The plaintiff is an infant, the son of Henry Michael Cairney, deceased, and brought the action by Jeanette Cairney, his mother, as next friend. The claim advanced is for damages in respect of the death of Cairney in an accident which occurred on October 17, 1951, when an aeroplane, the property of the defendant, Queen Charlotte Air Lines Ltd., and piloted by Douglas Duncan MacQueen, the husband of the respondent MacQueen, crashed. Both Cairney and MacQueen and all other persons aboard the plane were killed. The right of action asserted was for damages occasioned by the negligence of the defendant company and of MacQueen under the provisions of *The Families' Compensation Act* (c. 116, R.S.B.C. 1948) and was brought on behalf of the infant plaintiff only.

Both of the named defendants defended the action. Upon the application of the defendant company under the provisions of *The Workmen's Compensation Act* (c. 312, R.S.B.C. 1948), the Workmen's Compensation Board determined that the right of action asserted against the company was taken away by Part 1 of that Act and the action proceeded against the respondent MacQueen alone, as administratrix of the estate of her deceased husband.

The matter came before Wilson J. upon a special case for the opinion of the court under the provisions of Marginal Rule 389 of the Supreme Court of British Columbia. The special case, as first stated for the opinion of the court, recited the fact of the death of both Cairney

and MacQueen in the accident on October 17, 1951, the issue of the writ in the action on May 2, 1952, the nature of the cause of action asserted, that letters of administration of the estate of MacQueen had been issued to his widow on November 20, 1951, and continued:—

> The question for the opinion of the Court is whether this action having been brought after the expiration of six months from the death of the said Douglas Duncan MacQueen this action is maintainable against the defendant Roberta Burrells MacQueen, administratrix of the estate of Douglas Duncan MacQueen, deceased.
>
> If the Court shall be of opinion in the negative of the said question, then judgment shall be entered for both defendants with their costs of defence.
>
> If the Court shall be of opinion in the affirmative of the said question, then this action shall proceed to trial against the Defendant Roberta Burrells MacQueen, Administratrix of the estate of Douglas Duncan MacQueen, deceased.

By an order of Wilson J. dated March 24, 1954, the question submitted was answered in the affirmative and it was ordered that the action proceed against the defendant MacQueen.

The special case dated February 26, 1954 was thereafter, by agreement between the parties, supplemented by propounding a further question, namely:—

> The question for the opinion of the Court is whether, apart altogether from the fact that this action was not brought until after the expiration of six months from the death of Douglas Duncan MacQueen, this action is maintainable against the Defendant Roberta Burrells MacQueen, Administratrix of the Estate of Douglas Duncan MacQueen, deceased, it having been brought by the Plaintiff in his individual capacity and against the personal representative of the alleged tortfeasor.

The supplementary special case said further that if the Court should be of the opinion in the negative of the said question, judgment should be entered for both defendants with costs but, if in the affirmative and if the Court should also be of opinion in the affirmative of the first question propounded, the action should proceed to trial against the defendant administratrix.

On May 17, 1954, Wilson J. ordered that the question submitted be answered in the affirmative and directed that the action proceed to trial.

The formal order of the Court of Appeal allowing the appeal of the present respondent directed that the action be dismissed with costs.

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S. 3 of *The Families' Compensation Act* reads:—

> Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to an indictable offence.

S. 4 declares that every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been caused and shall be brought in the name of the executor or administrator of the deceased, but that if there be none such or no such action having been brought within six months after the death of the deceased person, then the action may be brought in the name of the person or persons for whose benefit the action would have been if brought in the name of such executor or administrator. Any such action must under the terms of s. 5 be brought within twelve months after the death.

The Act is, with an exception later referred to, for all practical purposes the same as *Lord Campbell's Act* (9-10 Vict. c. 93 Imp.) and came into force in British Columbia prior to 1871. The history of the statute in British Columbia is to be found in the reasons for judgment delivered in this matter by Mr. Justice Robertson.

The rule of the common law expressed in the maxim *actio personalis moritur cum persona* as it applied to liability for tort, was that if injury were done either to the person or property of another for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done (*Wheatley v. Lane* (1); *Broom,* 10th Ed. 611).

The statute provided an exception to that rule. As pointed out in *Seward v. Vera Cruz* (2), it gave a new cause of action not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which would survive, but to his wife and children. As the Earle of Selborne L.C. there said, death is essentially the cause of action. This view was adopted by the Judicial Committtee in *British Columbia Electric v. Gentile* (3).

(1) (1669) 1 Wms. Saund. 216. (2) (1884) 10 A.C. 59 at 67.
(3) [1914] A.C. 1034.

In 1934, s. 71 of *The Administration Act* (c. 5, R.S.B.C. 1924) was repealed and reenacted in terms which, together with amendments made later, raise the question to be determined on this appeal. S. 71(2) provides that the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or property of the deceased, in the same manner and with the same remedies as the deceased would, if living, be entitled to, with certain specified exceptions. These exceptions in the amendment of 1934 did not include damages for loss of expectation of life but, by an amendment (c. 2 of the Statutes of 1941-42), this was added and, in addition, a further exception, "if death results from such injuries, to damages for the death." Since the rights of the personal representatives were only those which the deceased would have had if living, the last mentioned exception would appear to have been superfluous. It may perhaps have been added, together with the further words added to the subsection "provided that nothing herein contained shall be in derogation of any rights conferred by *The Families' Compensation Act*", to make it clear beyond question, that claims asserted by reason of the death could be made only under the last mentioned statute.

S-s. 3, so far as it need be considered, reads:—

> In the case of any tort or injury to person or property, if the person who committed the wrong dies, the person wronged or, in the case of his death, his executor or administrator, may bring and maintain an action against the executor or administrator of the deceased person who committed the wrong, and the damages and costs recovered in the action shall be payable out of the estate of the deceased in like order of administration as the simple contract debts of the deceased.

A further provision of the subsection is that, with an exception which is irrelevant here, no action shall be brought under its provisions after the expiration of six months from the death of the deceased person who committed the wrong.

S-s. 4 provides that, in the case of the death of the person wronged or the person who committed the wrong during the pendency of an action concerning the matter, it may be continued in the name of or against the personal representative and, if both parties die, between their respective personal representatives.

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S-s. 6 declares, *inter alia,* that nothing in the section shall prejudice or affect any right of action under the provisions of *The Families' Compensation Act.*

The question as to whether this section applies to, or affects, claims which may be asserted under *The Families' Compensation Act* is one as to which there has not been unanimity in the courts of British Columbia. In *Bowcott v. Westwood* (1), Fisher J., (as he then was), decided that the rights conferred by s. 71 extend the rights conferred on the dependents of deceased persons by *The Families' Compensation Act* and that, accordingly, so much of the amendment as relates to causes of action against the estates of deceased persons should apply to causes of action under the former Act. Being of this opinion, he held that an action by the administratrix of a deceased person lay against the executrix of a person by whose negligence it was said the death had been caused.

When the present matter was considered by Wilson J., that learned judge considered that he should follow the decision of Fisher J., leaving to the Court of Appeal the responsibility of overruling it, if it was wrong. It should be said that no question as to the application of the limitation section of *The Administration Act* arose in *Bowcott's* case.

In the Court of Appeal the Chief Justice of British Columbia, after pointing out that, as the matter came before the court, it was not known whether Cairney and MacQueen had died together at the moment of impact or if one survived the other, considered that, in view of the lack of evidence of survivorship, *The Administration Act* could not be invoked either in relation to its limitation provisions or to interpret the status of the plaintiff suing under *The Families' Compensation Act.* As to a contention advanced on behalf of the present appellant that the word "person", where it appears for the second time in s. 3 of *The Families' Compensation Act,* should be construed as including the personal representative of the deceased tortfeasor, that learned Chief Justice said that, in his view, if the Legislature had intended to abrogate the maxim *actio personalis moritur cum persona* in this type of action, it would have plainly said so.

(1) (1937) 51 B.C.R. 441.

Sidney Smith J. A. decided that, as *The Families' Compensation Act* did not give any right of action against the personal representatives and since an action based upon the provisions of *The Administration Act* must be brought within six months after the death of the tortfeasor, the claim could not succeed, the action not having been brought within that time.

Robertson J. A. who dissented, came to his conclusion on different grounds.

S. 3 of *The Families' Compensation Act,* as above pointed out, says that the person who would have been liable if death had not ensued shall be liable to an action. The word "person" is not defined in the Act. *The Interpretation Act* (R.S.B.C. 1948, c. 1) declares that each provision thereof shall extend and apply to the Revised Statutes and to all Statutes of the Legislature, except in so far as any provision thereof is inconsistent with the intention and object of any Act or the interpretation that the provision would give to any word, expression or clause is inconsistent with the context. S. 23(31) provides that in every Act of the Legislature, unless the context otherwise requires, the word "person"

> includes any corporation, partnership or party and the heirs, executors, administrators or other legal representatives of such person to whom the context can apply according to law.

That learned judge considered that the effect of this was to abrogate entirely the *actio personalis* rule in the cases mentioned in s. 3 and that, accordingly, the action could be maintained under the provisions of that Act and that it had been brought in time. Being of this opinion, he did not consider it necessary to consider the point as to the application of s. 71 of *The Administration Act.*

It is pointed out by Robertson J. A. that *Lord Campbell's Act* was in force in British Columbia up to the year 1897. In the revision of the statutes of that year, most of the provisions of that Act were reenacted in c. 58 and the Imperial Statute repealed to the extent that it was so incorporated in the Revised Statutes or was repugnant thereto by virtue of s-s. 2 of s. 6 of *An Act respecting the Revised Statutes of British Columbia* passed on May 8, 1897. *The Interpretation Act of British Columbia* did not apply to the Imperial Statute. As enacted c. 55 did not

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include s. 5 of c. 93 which, *inter alia,* declared that the word "person" should apply to bodies politic and corporate. Robertson J. A. was of the opinion that the reason for the omission of this part of s. 5 was that, from the date of its enactment, the Act of the Legislature would be construed in accordance with the provisions of *The Interpretation Act,* and thus that to assign by its terms any extended meaning to the word "person" was unnecessary.

In *Haley v. Brown* (1), the application of s. 71 of *The Administration Act* to actions brought under *The Families' Compensation Act* was further considered by a court consisting of Robertson, Sidney Smith and Davey JJ. A.

The action was brought by the executrix of Haley's estate against the executor of Brown's estate, the cause of action being damages in respect of his death. In this case there was evidence that Haley and Brown had been killed in the same accident but that the latter had survived Haley by a few minutes. No question of limitation arose in the matter. At the trial, Wood J. followed the decision of Fisher J. in *Bowcott* v. *Westwood* and awarded damages and this judgment was upheld by the unanimous judgment of the Court of Appeal.

Robertson J. A. adhered to the view that he had expressed in Cairney's case and added, as a further reason for holding that the action lay against Brown's executor, that after the decision in *Bowcott's* case s. 71 of *The Administration Act* had been reenacted without change in the Revised Statutes of 1948. Since it was to be assumed that the Legislature knew the existing state of the law and the interpretation given to the statute by Fisher J., he considered that the statute should be construed in accordance with the meaning that he had there assigned to it.

Sidney Smith and Davey JJ. A. were both of the opinion that s-s. 3 of s. 71 might properly be invoked to support the claim against the personal representative.

The decisive question in the matter is, in my opinion, as it is stated by Sidney Smith J. A. in *Haley's* case at pp. 10 and 11 of the report. In applying s. 3 of *The Families' Compensation Act,* the question is who the person wronged could have sued in respect of his injuries

(1) [1955] 15 W.W.R. 1.

had he lived. Against such person, whether the wrongdoer or his personal representative, the action lies at the suit of the personal representative of the one who was wronged on behalf of the dependents, or, in the circumstances mentioned, by the dependents on their own behalf. In the present case, Cairney, if alive, might by virtue of s-s. 3 of s. 71 of *The Administration Act* have sued MacQueen if he were alive and, if dead, his personal representative, and accordingly this action lies.

It is the law as it was at the date of the fatal accident and not as it was at the date of the enactment of *The Families' Compensation Act* that is to be considered *(Littley v. Brooks* (1) *Robin v. Union Steamship Co.* (2)*)*. Since the question is as to whom Cairney, if living, might at the date of the issue of the writ have sued, the fact that there is no evidence to prove when in relation to the death of Cairney the death of MacQueen occurred does not, in my opinion, affect the matter.

Since this is decisive of this aspect of the matter, I refrain from expressing any opinion upon the grounds relied upon by Robertson J. A. for his conclusion in this and in *Haley's* case.

There remains the question of the limitation imposed by s-s. 3(*b*) of s. 1 providing that:—

> No action shall be brought under the provisions of this subsection after the expiration of six months from the death of the deceased person who committed the wrong.

More than six months elapsed between the death of MacQueen and the issue of the writ.

In the Court of Appeal neither the Chief Justice or Robertson J. A. expressed any opinion on the point, they having reached their conclusions as to the proper disposition of the matter on other grounds. Sidney Smith J. A. was, however, of the opinion that the six months limitation applied and, accordingly, the action failed.

S-s. 6 of s. 71 reads:—

> This section shall be subject to the provisions of s. 12 of *The Workmen's Compensation Act* and nothing in this section shall prejudice or affect any right of action under the provisions of s. 80 of that Act or the provisions of the *Families' Compensation Act*.

(1) [1932] S.C.R. 462.
(2) [1920] A.C. 654.

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The reference was to s. 80 pf *The Workmen's Compensation Act*, c. 278 R.S.B.C. 1924, which is now s. 82 of c. 370 R.S.B.C. 1948 and deals with the liability of employers to their workmen in industries not within the scope of Part 1 of the Act, for injuries caused by defective plant or premises or the negligence of other servants of the employer.

Wilson J. was of the opinion that s-s. 6 excluded the limitation provision in s-s. 3 and that, accordingly, the action which was brought within one year from the death of Cairney was not barred. With this conclusion I respectfully agree.

It is, in my opinion, inaccurate to say that this action is brought under the provisions of s. 71 of *The Administration Act* and, indeed, no such action could be brought under those provisions. The action is under *The Families' Compensation Act* and the only resort to *The Administration Act* is to ascertain who was the person who would have been liable, if Cairney had not died, for damages in respect to his injuries. The cause of action, as has been pointed out, is not in respect of those injuries but arises solely by reason of his death. In my opinion, while the language of the statute to be construed differs, the principle applied by the Judicial Committee in *Gentile's* case applies here.

I also consider that, if it could be invoked, s-s. 6 of s. 71 precludes the application of the limitation provision to this action. I think it cannot be said that a statutory provision which declares that no action shall be brought after the expiration of a period of six months does not affect the right of action under *The Families' Compensation Act* which, by the terms of that Act, may be brought within a more extended period.

For these reasons, I would allow this appeal and restore the order of Wilson J. We were informed at the hearing that, irrespective of the results of this appeal, the parties did not wish us to make any order as to costs.

CARTWRIGHT J. (dissenting): The relevant facts, the history of the legislation and the course of this litigation are set out in the reasons of my brother Locke.

In approaching the question before us, it is, I think, helpful to consider what the position of the parties would have been at common law and the manner in which their

rights have been altered by statute. In the view which I take of the whole case, it is immaterial whether the passenger, Cairney, died before or after the pilot, MacQueen, or whether they died simultaneously.

At common law it is clear that the appellant would have had no remedy for two reasons, first, the rule stated by Lord Ellenborough in *Baker v. Bolten* (1) and affirmed by the House of Lords in *Admiralty Commissioners v. S.S. Amerika* (2), that in a civil court the death of a human being cannot be complained of as an injury, and, second, that any right of action arising *ex delicto* came to an end with the death of the tortfeasor under the maxim, *actio personalis moritur cum persona.* The question is whether the relevant statutory provisions in force in British Columbia at the date of the passenger's death have removed both of these obstacles from the appellant's path.

It is conceded that the first obstacle was removed by Lord Campbell's Act; but, as originally enacted by the Imperial Parliament in 9 and 10 Victoria c. 93, that statute gave the appellant no assistance in regard to the second as the word "person" while extended to include bodies politic and corporate was not extended to include the personal representatives of the wrongdoer.

Section 3 of the *Families' Compensation Act,* R.S.B.C. 1948 c. 116, which was in force at the date of the passenger's death and has been in its present form for many years, reads as follows:—

> 3. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to an indictable offence.

The interpretation section of this Act (s. 2) contains no definition of the word "person", although, as has already been pointed out, that word was declared in Lord Campbell's Act to apply to bodies corporate. I agree with the view of Robertson J. A. that the reason for this omission was that the legislature regarded the matter as covered

(1) 1 Camp. 493. (2) [1917] A.C. 38.

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by the definition of the word "person" in the *Interpretation Act*. Any other view would bring about the result that in British Columbia a corporation would not be liable to an action under the *Families' Compensation Act*. Such a result would be inconsistent with the decision in *British Electric Railway Company Limited v. Gentile* (1) and, so far as I am aware, has never been suggested.

The relevant provisions of the Interpretation Act, R.S.B.C., c. 1, appear to me to be the following:—

> 2(1) This Act, and each provision thereof, shall extend and apply to these Revised Statutes, and to every Act passed after these Revised Statutes take effect, and to all Statutes of the Legislature, except in so far as any provision thereof is inconsistent with the intention and object of any Act, or the interpretation that the provision would give to any word, expression, or clause is inconsistent with the context, and except in so far as any provision thereof is in any Act declared not applicable thereto.
>
> * * *
>
> 24. In every Act of the Legislature, unless the context otherwise requires:—
>
> * * *
>
> (31) "Person" includes any corporation, partnership, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law:

The question is whether the word "person" in the fifth line of s. 3 of *The Families' Compensation Act* is to be extended by s. 24 (31) of the *Interpretation Act* to read "person and the heirs, executors, administrators or other legal representatives of such person". I agree with Robertson J. A. that it should be so extended. I can find nothing in the result brought about by so reading it which is inconsistent with the intention and object of the *Families' Compensation Act* or would give to the word "person" an interpretation inconsistent with the context, to use the words of s. 2, nor does it appear that the context otherwise requires to use the opening words of s. 24. I am unable to accept the view that the concluding words of clause 31 of s. 24, "to whom the context can apply according to law" prevent the application of the clause. As to this Robertson J. A. says:—

> Then as to the objection based upon the expression "according to law", I am of the opinion that in passing the Provincial Act the legislature was changing the law, and in so doing was making use of its own Interpretation Act as to the meaning of words used in the Provincial Act so as to shorten the terms of that Act.

(1) [1914] A.C. 1034.

The learned Chief Justice of British Columbia, in rejecting the argument that clause 31 of s. 24 of the *Interpretation Act* applies, says:—

> Assuming that the Families' Compensation Act permits this action to be maintainable, it is my view that the phraseology defining "person" as the "person who would have been liable if death had not ensued" must be construed in this context as excluding the personal representative of the deceased tortfeasor. It seems to me if the legislation intended to abrogate the maxim *actio personalis moritur cum persona* in this type of action it would have plainly said so. The indirect method of abrogating such a common law principle by engrafting an artificial meaning onto the Section by the Interpretation Act, R.S.B.C. 1948, Ch. 1, is one, with deference, I am unable to accept.

With the greatest respect, the last quoted passage appears to me to give insufficient weight to the fact that the passing of the *Administration Act Amendment Act, 1934,* Statutes of British Columbia, 1934, c. 2 s. 2, brought about, except in cases of defamation, the virtual abolition in British Columbia, of the maxim *actio personalis moritur cum persona.* Applying the words of the *Families' Compensation Act* and of the *Interpretation Act* to the circumstances of the accident of October 17, 1591, it appears to me that the extended interpretation of the word "person" should be adopted, that so doing, far from effecting an abrupt change in the law, brings the Act into harmony with the general law, avoids the creation of anomalies which the Legislature can hardly be supposed to have intended and gives effect to the *Families' Compensation Act* according to its true intent and meaning. An example of an anomaly which would result from rejecting the view of Robertson J. A. is as follows: Suppose A by one act of negligence causes (i) the death of B who leaves a widow and child, (ii) the destruction of B's motor car, and (iii) personal injuries to C, and that A survives B but dies before action taken; the causes of action under (ii) and (iii) could be pursued against A's personal representatives while that under (i) would perish with him.

I have not overlooked the difficulty that this reasoning, as to the effect of the *Administration Act Amendment Act of 1934* on the construction of the *Families' Compensation* Act, is subject to the objection that, although there has been no change in the relevant wording of the *Families' Compensation Act* or the *Interpretation Act,* it envisages the possibility of those acts being construed after 1934 in

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a manner different from that in which they would have been construed before that date; but this difficulty is, I think, apparent rather than real. The question being whether the extended meaning attributed to the word "person" can apply according to law to the personal representatives of such person after his decease I find no inconsistency in deciding that they can so apply after the abolition of the maxim *actio personalis moritur cum persona* as part of the general law of British Columbia even if (a matter which I find it unnecessary to decide) they could not have so applied while that maxim formed part of such general law.

Once it has been decided that on its proper construction s. 3 of the *Families' Compensation Act* gives a right of action not only against "the person who would have been liable if death had not ensued" but also against the administrator of such person, it follows that the limitation of six months imposed by s. 71 (3) (b) of the *Administration Act* has no application to the action before us The rights of the parties fall to be determined under the *Families' Compensation Act,* construed as above, and the only relevance of the *Administration Act* is the assistance which, by reason of the change which is brought about in the general law by the virtual abolition of the maxim *actio personalis moritur cum persona,* it affords in the task of construing s. 3 of the *Families' Compensation Act*

For the above reasons I would allow the appeal, restore the order of Wilson J. and direct, in accordance with the consent of the parties, that there should be no order as to costs in this Court or in the courts below.

Appeal dismissed; no costs.

Solicitor for the appellant: *W. S. L. Young.*

Solicitors for the respondent: *Tysoe, Harper, Gilmour & Grey.*

RALPH D. NODDIN (*Defendant*) .....APPELLANT;

AND

WILLIAM W. LASKEY (*Plaintiff*) .....RESPONDENT.

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*Mar. 2, 5
*May 24

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Negligence—Propane gas heater explosion in rented cabin—Absence of pilot light—Duty of cabin operator—Safety of premises.

The respondent brought this action for damages for personal injuries resulting from an explosion which occurred while he was attempting to light a propane gas heater in a cabin rented from the appellant. The cabin was rented at about 8.00 p.m., and the respondent remained in it only a few minutes after being assigned to it. He left and did not return until about 11.00 p.m., whereupon he locked the door and retired for the night. The following morning, he awoke at 6.00 a.m., closed the windows and went back to sleep. When he awoke again at 8.00 a.m., he went to the heater, struck a match to light it and there was an immediate explosion. There was no pilot installed on the heater. The trial judge gave judgment in favour of the respondent and a majority in the Appeal Division found contributory negligence.

Held (Locke and Abbott JJ. dissenting): That the appeal should be dismissed and the cross-appeal allowed.

Per Rand J.: In the circumstances, it is impossible to draw the inference, as was done by the Appeal Division, that the respondent opened the valve without lighting the gas when he first got up at 6.00 a.m. The omission in duty on the part of the appellant to furnish a reasonably safe heating apparatus by failing to provide a pilot light was a failure in reasonable precaution which drew down liability. That was the initial negligence, and it has not been superseded by any proven act on the part of the respondent or other third person.

Per Kellock J.: The Appeal Division was not justified in drawing the inference that the respondent probably opened the valve at 6.00 a.m. and did not light the heater. Consequently, since explosive gas was present in the premises, they were not reasonably fit for occupancy, and this was caused by the negligence of the appellant, as the preponderance of probability on all the evidence is to the effect that after demonstrating the heater to the respondent the previous evening he did not leave the valve completely shut off.

Although a person in the position of the appellant is not bound to install the most modern equipment, nevertheless when experience had taught what was demanded for the protection of the public using his cabins, he was bound to adopt those means in order to make his accommodations reasonably safe. There was evidence upon which the finding of both courts below that the appellant failed in the duty incumbent upon him to install pilots, could be founded.

*PRESENT: Rand, Kellock, Locke, Cartwright and Abbott JJ.

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Per Cartwright J.: The evidence supported the finding of the Appeal Division that the failure to install a pilot light, which was a cause of the explosion, was a breach of the appellant's duty to make the premises as safe as reasonable care and skill could make them.

The other cause was the unexplained escape of gas, a cause for which neither party has been proved to be responsible. The onus of proving contributory negligence rested upon the appellant, and the evidence does not warrant any interference with the finding of the trial judge that this onus was not discharged. Liability, therefore, for the damage caused rested upon the appellant.

Per Locke J. (dissenting): It was not the absence of the pilot light that was the proximate cause of the respondent's injuries but his own act in turning on the gas and failing to light it when he got up at 6.00 a.m.

Per Abbott J. (dissenting): The escape of gas was due to the respondent himself turning on the valve between the time it was closed at 8.00 p.m. the previous night and 6.00 a.m. the following morning when he got up for the first time. The courts below were not right in holding that the appellant failed in his duty to respondent in not having the heater equipped with a pilot light as a safety measure. An occupier is not bound to adopt the most recent inventions and devices provided he has done what is ordinarily and reasonably done to ensure safety. The appellant carried out his contractual obligation to take due care that the premises would be reasonably safe for persons using them in the customary manner and with reasonable care.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), reversing, Hughes J.A. dissenting, the judgment at trial.

N. Carter for the appellant.

C. J. A. Hughes, Q.C. for the respondent.

RAND J.:—This is an action for damages suffered by the respondent Laskey through an explosion which occurred while he was attempting to light a propane gas stove.

With five other persons he had reached the summer cabin property or motel of the appellant Noddin, some five or six miles to the west of Moncton, at about 8.30 on the evening of September 25, 1953. To him was assigned the westerly unit of a duplex cabin, the other unit to a Mr. and Mrs. Fraser and their daughter, and a third cabin to the remaining two ladies of the party. Some minutes after arrival Laskey and the Frasers repaired to the ladies' cabin where they had a lunch and spent the evening until about 10.30 when the four returned to their own quarters and shortly thereafter retired for the night.

(1) (1956) 38 M.P.R. 138.

The Laskey cabin was entered by a door close to the partition wall between the two units. The door swung to the left and just beyond it was a small propane stove approximately 15″ in height; this was fed by a pipe running along the bottom of the division wall from the rear. About in line with the side of the stove the pipe divided by means of a T-joint, one short branch going to the stove and the other passing through the partition wall to be connected with a similar stove in the adjoining unit. The distance from the T-joint to the burner was in the vicinity of 10″. At the end was a valve or cock; at right angles to the pipe horizontally and connected with the valve was what is called an orifice leading into the entrance of the burner a few inches outside the stove. The function of the orifice was not clearly explained, but as Mitton the service manager of the company supplying the stove conceded that if a match was placed at the orifice, some degree of explosion would follow, necessarily at that point there is access from the air to the flow of gas; and it may be that at that point air is drawn in to produce, in part at least, the mixture with gas required for combustion. In lighting the gas the lighted match should be placed inside the stove through an opening just above the end of the burner and before the valve is opened.

The propane, in liquid form under pressure in metal cylinders, reaches the valve as gas. It is of the same family as gasoline with the vapour of which, in its combustion characteristics, it is very similar if not identical. It is, in the words of Dr. Toole, professor of chemistry at the University of New Brunswick, a "dangerous agency".

Laskey says that before going to bed he opened the window in the front wall of the cabin and that of the opposite or rear wall in the bathroom which is slightly to the right of being opposite the entrance door. At 6.00 o'clock next morning he awoke, used the toilet in the bathroom, shut both windows, returned to bed and slept until about 8.00 o'clock. Arising, he drew on his dressing gown, walked around the foot of the bed to a small table beyond the stove, picked up a match and, stooping down toward the valve, lighted it and opened the valve. Exactly where or on what the match was struck is not clear as appears from the following answers:

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Where did you put that match when you lit it?
Right down where you are supposed to light one of those stoves.
Where are you supposed to light it?
I assumed down where the pet cock is—where the gas comes in.
You didn't know where to light it?
No I never lit one before; but that's where you usually do in a gas jet, do you not—apply to the nozzle of the gas jet.

* * *

Mr. Laskey, if you were wide awake at that time and you lit that stove, you must recall where you put the match?
I'm telling you I put the match right down that spot where the valve was.
Did you put it inside the stove or outside?
I stuck it inside of course.

But the "spot where the valve was" was not exactly the opening in the side of the stove through which the match should have gone, and there is no nozzle, and it may be that he placed the lighted match at the orifice and not through the small aperture above the burner. Considering what at that moment happened the blurring of this detail in recollection is not to be wondered at.

The striking of the match was followed by an explosion which, in a moment, enveloped him in flames. The combustion evidently found its way to different parts of the room in streams, scorching the tops of the curtains on the two windows in the front and side wall respectively and the shower curtain in the bathroom; but, from pictures of the room taken between 11.00 and 12.00 o'clock that morning, the bed clothes and furniture do not appear to have been damaged. The bottom of the wall opposite that of the partition, made of gyprock or like material and of light construction, was blown out some eight or ten inches. The noise was heard by the Frasers who were already up and around and the husband hurriedly breaking open the door of Laskey's cabin found him a mass of burning clothes. These were extinguished and within minutes the injured man was taken to hospital.

The combustion of the gas depends upon a minimum degree of temperature and a mixture with air within the limits of approximately 2·4 and 8% of gas. This may be affected by extremes of air pressure or temperature. The gas is heavier than air and slow in diffusion, the direction and extent of which depend largely upon air currents.

Along with evidence tending to show that the stove and the piping connection were in proper condition, the case for

the defence was that the gas had been turned on unlighted by the respondent when he was up at 6.00 o'clock and that the quantity of gas needed to produce such an explosion could have entered the room between two and three hours with the valve fully open.

In describing what had happened at 8.00 o'clock Laskey said:

I stooped down and I reached in, struck the match and reached in and this explosion took place.

As you struck the match?

Yes.

* * *

I reached in to touch the pet cock, stuck the match in. That is the nearest recollection I have of it. I can't describe the stove definitely.

* * *

Was there any space of time between the lighting of the match and the explosion?

No.

* * *

Now what did you see take place as the explosion occurred?

There was this rush and roar and explosion and flash of flame and I was trying to beat the flames out.

* * *

Yes, hair was burning, my shoulders burning, my hands burning.

* * *

Had you ever had any experience with a propane gas heater before that occasion?

No.

* * *

I went over and picked up a match, put it in this hand, reached down like that and turned the pet cock, and lit the match at the same time. That is all.

* * *

Did you have to turn that little valve all the way around to get the gas?

I gave it a turn.

How much of a turn did you give it?

I can't tell you.

Did you smell any gas?

No.

And all you recall was a sudden flash?

And a noise.

On that contention Michaud C.J. at the trial said:

Of course, I find that there is no evidence that Laskey did tamper with or try to light the stove, except at 8.00 o'clock in the morning when he got up, and I find that the explosion was caused by an accumulation of gas in the room before Laskey attempted to light the stove. Whatever caused the accumulation is not determined, and I cannot speculate as to how it came about. However, I am certain that had the defendant equipped his stoves with the proper safety gadgets, there would not have been an accumulation of gas in that room nor the explosion.

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In the Appeal Division Bridges J., with whom Richards C.J. concurred, although holding that Noddin was negligent in not warning Laskey of the danger of the gas and in not explaining the odor given it to enable detection, found that there was evidence from which the inference could be drawn that Laskey "probably opened the valve without lighting the gas" and that in his opinion he had done so. Hughes J. does not mention this issue but his reasons are inconsistent with that finding. In these circumstances, that question of fact must be faced by this Court.

That Laskey, when fully awake, knew the stove was heated by gas that had to be lighted is indisputable; his action at 8.00 o'clock puts this beyond question. The conclusion of Bridges J. necessarily implies that at 6.00 o'clock either he was so drowsy that, although in the somewhat chilly room he was able to go to the bathroom and to close the two windows by different means, both of which he correctly recalled at the trial over one year later, he was not alive to the fact that the stove burned gas that had to be lighted with a match and acted on a hazy notion of turning on heat as on an electric stove, or that having turned on the gas he forgot to light it or that he did not realize the gas for some reason had not caught fire. It means also that two hours later he had no recollection of having been or done anything at or to the stove.

His evidence shows that for many years he had worked as a certified drug clerk in the course of which he had used Swedish burners which are primed by spirits and burn paraffin oil; he had, in earlier years, been an active athlete; that, as the window opening indicates, he was accustomed to sleep in fresh air; and that at 72 years of age he was a fairly vigorous and mentally alert person, his answers being short and directly to the point of the questions. In these circumstances, and with Michaud C.J., I cannot draw such a violent inference as we are asked to draw. He categorically denies that he had then touched the stove and to have been sufficiently awakened and alive in the cool air to have done what he did, excludes for me what is conjectured. His evidence that he opened the valve at 8.00 o'clock, if true, is conclusive against it, and I am unable to infer that, clear enough in mind to apprehend the operation of the valve, he was not clear enough to appreciate the requirement of

the match. That he would at 6.00 a.m. turn on the heat in the small room, 10′ x 10′ x 8′, with windows closed, when he had still two hours for sleeping, is in the highest degree unlikely.

The further question remains whether there was a negligent omission in duty to furnish a reasonably safe heating apparatus by failing to provide a pilot light, a device that would have cost between $10 and $15. By its small continuing flame, it would have made such an explosion impossible. The use of the device in these stoves has become general; they had been installed by Noddin in 1952 in another set of cabins east of Moncton owned by him. Fourteen months after the mishap he said "Well, they are now installing these pilots in practically all stoves, I guess, that are being sold" and by then he had added pilots to the cabins in question. These facts put their desirability and practicability beyond controversy. They furnish both convenience and protection to guests. Protection is particularly needed and effective in rooms used by the travelling public, many, if not the majority, of whom have never before used a gas stove. Mrs. Fraser was so much afraid of it that the stove in her cabin remained untouched. Noddin testified that he had lighted the stoves and explained the mode of lighting to both the respondent and the Frasers and had called their attention to the pungent and distinctive odor of the gas and the necessity of not turning it on before applying the match. The gas is naturally odorless and odorization is for the purpose of arousing notice of its presence. Laskey denied that he saw Noddin light the stove or do anything at it; he says he remained in the cabin only a minute or two, long enough to get his things off and his baggage set down. The instructions and warnings also he denied. The Frasers denied that the stove was lighted and that any instruction or warnings were given; and it is significant that neither of them was cross-examined on either point. I entertain no doubt that the stove in neither cabin was lighted by the occupant during the evening and the remark of Noddin that "they all, I think, had their stove on that particular night" indicates irresponsibility in statement. He added that as a rule he told guests that there was no pilot light for the burner, advice which indicates recognition of the practical need of

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that safeguard. Mitton admitted that in all cases he would warn purchasers of lurking danger, of the distinctive odor by which the gas could be detected, and would show them how to light the burner. The gas has been used in the Moncton area for about six years and when the stoves were to be used in public places he recommended pilot lights. He stressed the danger of lighting the gas at the orifice but it is not claimed by Noddin that warning against this was given Laskey or that he was specifically shown just where the lighted match should be placed.

The acknowledgment by both Noddin and Mitton of the inherent and invisible dangers associated with this gas, as with gasoline vapour, is confirmation, if any is required, of the necessity to surround such a heater with every practicable security. That need is particularly indicated here. Excluding Laskey's opening the valve at 6.00 o'clock, the cause is a mystery. Assuming, as Noddin claims, that he lighted the stove or went near it with that in mind in Laskey's presence in the evening, did he then close the valve tight when shutting the stove off? or was it inadvertently left slightly open or was the closing made in such a manner as to put out the flame but still allow a small stream to run all night? Or if he had turned on but not lighted the burner and in the hurry had not fully closed it? If the machine test was absolute, why the soap and water test? He was in the cabins only briefly as all the occupants were going out immediately, and these questions point to situations of possible and puzzling accumulations of gas from which the necessity for pilot lights in large part arises. The trial judge expressed himself as finding that the plaintiff "had failed to satisfy him" that the propane gas heater was defective or not reasonably safe "to the knowledge of the defendant" or that Noddin was "negligent in assigning" the premises to the plaintiff. He added:

> If the heater and pipe connections were in good order immediately after the incident, it is a fair inference that they were before the explosion in good condition, in the absence of evidence to the contrary.

But this, apart from the limitation to "the knowledge of the defendant", does not touch the possibilities suggested, as to the realities of any of which Noddin might have been quite unaware and quite honest in his testimony.

The rule governing acts of omission of this sort was laid down by Lord Dunedin in *Morton* v. *William Dixon, Ltd.* (1) thus:

> "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it".

which was paraphrased by Lord Normand in *Paris* v. *Stepney Borough Council* (2) in these words:

> If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.

This, in substance, was approved in *Morris* v. *West Hartlepool Steam Navigation Company* (3).

Both the trial court and the Appeal Division have held that the omission was a failure in reasonable precaution which drew down liability and with that I agree. The case is thus similar to *Dominion Natural Gas Company Limited* v. *Collins et al.* (4). Here there was negligence on the part of the gas company in installing a safety valve with an emission direct into the shop instead of into the open air. The company had contended that the cause of the accident had been a tampering with the machine by other workmen; but on the evidence the Judicial Committee held the true cause of the escape of the gas to be left in doubt. All that could be said was that the escape had taken place at the safety valve which, in turn, could have been caused through at least two possible conditions. In the language of Lord Dunedin the Committee held that

> The gas company have failed to show that the proximate cause of the accident was the act of a subsequent conscious volition and that, there being initial negligence found against them, the plaintiffs are entitled to recover.

In this case it is assumed that the gas escaped through the pipe leading to the burner and that the explosion would have been prevented by a pilot light; and the purpose of the latter is to meet generally the danger of escape. That

(1) [1909] S.C. 807.
(2) [1951] 1 All E.R. 42.
(3) [1956] 1 All E.R. 385.
(4) [1909] A.C. 640.

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being the initial negligence, it has not been superseded by any proven act on the part of the respondent or other third person.

It was on the assumption that Laskey had carelessly opened the valve that he was charged in Appeal with 30% of responsibility; but, rejecting that, the consequences to which the omission led must be charged against Noddin alone.

I would, therefore, dismiss the appeal, allow the cross-appeal and restore the judgment at trial with costs both in the Appeal Division and in this Court.

KELLOCK J.:—As the learned trial judge found that the escape of gas into the room occupied by the respondent was not due to any defect in the stove or its connections (a situation which was at least tacitly accepted at the trial by the respondent), and as it is not suggested by either party that the stove was interfered with by any third person, the issue was accurately stated by the learned judge as follows:

> Who did open the gas jet and leave it open without producing a flame?

After stating that the respondent had "failed to satisfy" him that the appellant had negligently left the valve open or been guilty of any positive act of negligence causing the escape of the gas, he went on to find that

> *Of course,* I find that there is no evidence that Laskey did tamper with or try to light the stove, *except at 8.00 o'clock in the morning* when he got up, and I find that the explosion was caused by an accumulation of gas in the room before Laskey attempted to light the stove.

The learned judge then said:

> Whatever caused the explosion is not determined, and I cannot speculate as to how it came about.

The learned judge considered that there was a duty on the part of the appellant toward persons such as the respondent to have the premises "absolutely safe" and that he had failed in that duty by reason of the fact that the stove was not equipped with a pilot light. In the result, judgment was given against the appellant for the full amount of the respondent's damages.

As a pilot light would have furnished no protection except in the case of gas escaping through the burner itself (it would merely have brought about an explosion if gas were elsewhere escaping into the room once an explosive mixture

came in contact with its flame), the judgment pronounced involves a finding that the escape of gas was due to the valve having been left open but that this was not imputable to either party. The judgment is therefore contradictory.

The majority in the Court of Appeal concurred in the view that the appellant had been guilty of negligence in failing to have the stove equipped with a pilot light. Upon the footing that there was no defect in the stove or its fittings and that the appellant had not left the valve open the previous evening, they, however, drew the inference that the respondent "probably" had opened the valve when he got up at 6.00 a.m. but did not light the stove. They were also of opinion that the appellant had failed to explain to the respondent the operation of the heater as well as the danger of propane gas and its odour. In this court, however, it was admitted by counsel for the respondent that the appellant had, as he testified, instructed the respondent the previous evening both how to operate and to light the stove. It was also admitted that the respondent knew how to do this although he had never actually lit such a stove before. This, however, leaves the finding that the appellant failed to warn the respondent with respect to the odour of the gas and the significance of the presence of such odour. The Court of Appeal considered that the learned trial judge had been of the same opinion.

The vital question in the appeal is, therefore, as to whether or not the court below was justified in drawing any inference against the respondent. In determining this issue, the appellant takes the position that this court is in as good a position as was the trial judge.

With respect to the inference drawn below against the respondent, I confess to having been attracted by it but further consideration has caused me to change my mind for the reasons which follow. It is first to be observed that no such allegation was put forward in the statement of defence. While the statement of claim specifically pleads that "the defendant negligently left open the valve in the propane gas heater and allowed the gas to escape into the cabin", the appellant merely denies that the respondent's injury was occasioned "by any act or negligence" on the part of the appellant. The sole allegation of negligence made against the respondent is that he did not exercise

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sufficient care "in turning on" the valve on the propane gas heater. This allegation, in its context, can relate only to the allegation in the statement of claim that the explosion had occurred when the respondent had "turned on a valve in a propane gas heater kept for the purpose of heating the cabin assigned to the Plaintiff, and forthwith struck a match." This, of course, was at 8.00 a.m. Had it been intended to allege that the respondent had turned on the valve at an earlier hour but failed to light the burner, there is no question but that such conduct would, as it should, have been expressly alleged.

Not until the appellant was in the witness-box was this theory put forward, and then only in answer to a question in cross-examination. At that stage the respondent was deprived of all opportunity of dealing with such an allegation by adducing evidence with regard to it. As will appear, such an allegation could only be effectively dealt with by evidence, including expert evidence. It is noteworthy that at this stage of the trial the only remaining witness was the appellant's expert. He, however, was not examined with regard to this matter, as I shall point out.

As to his conduct on getting up at 6.00 a.m., the respondent testified in chief:

Q. Now were you up in the night?
A. Not until I got—I imagine somewhere around 6.00 o'clock.
Q. You got up at that time?
A. Yes.
Q. And what did you do?
A. I went to the toilet and I closed the windows.
Q. Both windows?
A. Both windows.
Q. Yes. Touch the stove at that time?
A. No, didn't look at it. Went back to bed.

In cross-examination:

Q. You told us this morning you got up around 6.00 o'clock in the morning?
A. Yes.
Q. Did you smell anything in the cabin at that time?
A. No.
Q. And did you have any cigarettes?
A. Some in my pocket, or some on the table.
Q. Did you smoke any?
A. No.
Q. Are you sure?
A. Positive, because I had no occasion to. I simply went to the toilet and went back to bed, closed the windows—went right back to bed.
Q. Why did you get up, was it you had to go to the bathroom?
A. Yes.

Q. Is that what caused you to get up?
A. Yes.
Q. And it was then you discovered that you might be chilly, and you closed the windows; is that it?
A. I closed the windows, yes.
Q. But it wasn't the cold—
A. It wasn't so cold I had to close them, no.
Q. But you did get up and close the windows. Did you go near the stove?
A. Not then, no.
Q. When you got up at 6.00 o'clock in the morning?
A. No.

The learned trial judge appears, from the way in which he expressed himself on the point as already quoted, to have had no doubt whatever with respect to the acceptance of this evidence.

In the inquiry as to whether upon all the evidence an inference sufficiently strong arises to displace the denial of the respondent thus accepted by the tribunal of fact, it is to be observed in the first place that the appellant did not produce evidence as to whether, after the explosion, the valve was wholly or partly open, nor did he give any explanation of the absence of such evidence although he testified that he had arrived at the cabin about 8.30 a.m., which would be within a half hour of the explosion. At that time he found a Mr. Sullivan outside the cabin. The two entered and, according to the appellant, found the stove turned off. Sullivan was not called nor did the appellant give any evidence as to any attempt made to ascertain if anyone had previously entered the cabin or interfered with the valve. The respondent was unable to say what was the position of the valve at the time he attempted to light the stove at 8.00 a.m., nor how much of a turn he had given it. In view of his experience of that morning, this is not surprising.

In the second place there is a consideration which, in my view, renders the theory upon which the court below proceeded extremely unlikely. The appellant's witness, Mitton, whose qualification to give opinion evidence was based solely on his being the "service manager" of the company which had supplied the appellant with cylinders of the propane gas in question, testified as follows:

Q. And isn't it true that persons have been suffocated in bedrooms in the presence of propane gas?
A. For the lack of oxygen, yes.

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Q. If the air in the room were displaced to a sufficient extent by propane gas, suffocation might result?

A. Mmmm.

Q. And I take from what you say that the odor of propane gas would not be sufficiently pungent to bring about the awakening of a sleeping person in a room such as that?

A. Go over that one again please.

(Reporter read the question aloud)

WITNESS: No. The odor in the gas is definitely not an alarm clock —wouldn't wake him up.

No other evidence was adduced on this aspect. In my opinion, before any such inference as has been drawn by the court below could properly be drawn, there should have been further evidence. As already pointed out, the respondent had no opportunity of adducing it and in the present state of the record I find it difficult to believe that the respondent would not, sleeping in the room for two hours with the windows closed and the jet open, have felt some effects of the gas, if he were not asphyxiated. It was for the appellant to adduce evidence to remove this difficulty. Any inference which, in my opinion, is to be drawn as the case was left, supports the evidence of the respondent that he did not touch the stove until 8.00 o'clock.

That being so, there appears to be no answer to the action in the circumstances. Unquestionably, explosive gas was present. The premises were, therefore, not reasonably fit for occupancy, which is the test rather than any absolute duty as was the view of the learned trial judge. Moreover, the last person to handle the valve was the appellant the previous evening when he introduced the respondent into the premises. The question arises, therefore, as to whether there was any negligence on his part.

In reaching the conclusion that the appellant had left the valve completely closed, the learned judge would appear to have proceeded upon the inference which he considered was to be drawn from the evidence and he relied heavily upon his view of certain evidence given by Mitton. His reasoning sufficiently appears from the following:

Mitton testified that in order to fill with gas that cabin occupied by the plaintiff, the jet must have been open 2 to 3 hours. The plaintiff says that his sense of smell is and was good. Mitton says that if the gas jet had been left open at 8.00 o'clock in the evening by the defendant, Laskey would have sensed the odor of gas when he came in at 11.00 o'clock, even if the room was not completely filled with gas. Mitton further states that had gas been escaping from the jet from between the hours of 8.00

and 11.00, when Laskey came back, the spark caused by the turning on the electric switch would likely have lighted the gas if it had been present.

Mitton testified that all gas sold commercially by his company and supplied to the defendant's cabins contained a mixture which developed a strong odor of rotten vegetables and was purposely added to the liquid gas in order to enable people to detect it when present in the air and not burning. On the other hand, had Laskey turned on the gas at 6.00 o'clock in the morning, if the odor of escaped gas had not suffocated him during the two hours that he went back to sleep, he most certainly would have sensed the presence of gas when he got up at 8.00 o'clock.

Laskey, although he claims that his sense of smell was good, says that he never smelled any abnormal odor at any time while he was in the cabin.

According to Mitton, there is no possibility that sufficient gas would have escaped within the few seconds that elapsed between the time that Laskey turned on the gas, lighted the match and put it into the orifice of the stove, to cause an explosion with such force that would cause the damage that was occasioned.

There is no indication that when Laskey and Noddin entered the cabin for the first time at 8.00 o'clock in the evening on September 25 that either smelled or sensed any gas escaping or being in the cabin.

The Plaintiff has failed to satisfy me by evidence that the propane gas heater in the cabin was defective or was not reasonably safe, to the knowledge of the defendant, at the time that he assigned the cabin to the plaintiff, and that the defendant was negligent in assigning such premises to the plaintiff. If the heater and the pipe connections were in good order immediately after the incident, it is a fair inference that they were before the explosion in good condition, in the absence of any evidence to the contrary.

The plaintiff has also failed to satisfy me that the defendant negligently left open the valve in the propane gas heater and thus allowed the gas to escape into the cabin. The defendant is positive that he closed the valve when he turned the heat off. The plaintiff did not sense any gas odor in the cabin at any time after the defendant had left, nor was there any explosion when he turned on the light switch, nor at any time during the night until 8.00 o'clock in the morning.

I fail to find any positive act of negligence on the part of the defendant Noddin which would have caused the gas to escape and the consequent explosion and damage to the plaintiff. Neither can I find that the defendant was negligent in not detecting any defect that there might have been in the gas stove fixtures or the stove itself. There is no evidence that there were any.

There is, in a number of respects, in my opinion, misconception on the part of the learned judge of Mitton's evidence. In the first place, the witness did not at all deal with "that cabin occupied by the plaintiff" under the conditions existing during the night in question. He did not know its size, and knowledge of its *exact* size was, on his own evidence, a prerequisite to the formation of any opinion as to the amount of gas which would gather during any

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given period. Nor did the witness know, nor was any evidence given, as to the conditions prevailing during the night in question, nor as to the tightness of the windows and door, nor as to the materials or method of construction of the cabin. The following evidence given by the witness in chief is illustrative and clearly indicates that he had not taken any measurements:

Q. How much gas would there have to be in the room to create a serious explosion?

A. In a room, let me see, 8 by 10—say a room with 1,200 cubic feet, you would have to have—let's see—if you take a room 1,200 cubic feet—take *somewhere around 3½ hours* to get enough for an explosive mixture.

Q. That is, *any* explosive mixture?

A. Yes. To get an explosive mixture to cause serious damage, yes. How did you word that again?

Q. What quantity of gas would be required to cause a minor explosion? And you might tell us from there the various amounts and the seriousness of the explosion that could occur?

A. Naturally, the more gas let out in a room, the larger your explosion is going to be because your gas-air ratio—that is, the mixture of air required with the gas is 24 to 1. So *it all depends on the size of your room and how much gas is being let in that room* governs the time that it would take to get an explosive mixture.

The appellant gave evidence as to the size of the cabin as follows:

A. Could be 10 by 12.

Q. 8 feet in height?

A. 8 feet in height, yes. I imagine 10 by 10 would be handier probably.

Notwithstanding his lack of knowledge of measurements and other essential facts, Mitton further testified in chief as follows:

Q. Now Mr. Mitton, in a room the size of that cabin with the burner or the valve turned on, how long would it take for sufficient gas to escape which would cause an explosion?

A. That is if the valve was *wide open?*

Q. Wide open first.

A. In a cabin that size, would take anywhere from *2½ to 3 hours. 2½ to 3½ hours.*

Q. To obtain an explosion?

A. Mmmm.

Q. And if the valve was only turned partly opened, then I presume it would take a considerably longer period of time?

A. Right.

Shortly after, he amplified this evidence as follows:

Q. And an explosion of this type, how long would the valve have to be opened?

A. Well until the room *was filled up* with an explosive mixture. That would take anywhere from *2½* to *3½ hours. It all would depend on the ventilation of the cabin, how tight the cabin was, how tight around the windows, how well—how tight it was around the door.*

Q. Now you heard Mr. Laskey state that he had arisen at 6.00 o'clock or approximately 6.00 o'clock in the morning, closed his windows in the cabin. Therefore the cabin was closed. How long would it take in a cabin that size for that explosive mixture to be created?

A. If the valve was *wide opened,* it would take from *2½ to 3 hours* to get an explosive mixture. That would *have to be figured out on the exact size of the cabin and the leakage around the doors and windows to put the exact time on it.*

Q. And if there was leakage around the doors and the windows, then it would take longer?

A. That's right. It would take longer.

Q. And the 2½ hour period approximately that you were referring to would be *under ideal conditions?*

A. Mmmm.

Q. That is no leaks?

A. No air movement at all.

The learned trial judge was therefore completely in error in proceeding upon the footing that "Mitton testified that in order to fill with gas that cabin occupied by the plaintiff, the jet must have been open 2 to 3 hours."

The evidence of Mitton in which he reduced the period to 2 to 3 hours rather than the 2½ to 3 or 3½ already given by him more than once, is contained in a later portion of his evidence in chief as follows:

Q. *And under ideal conditions, with no escape* of gas in the room that size, how long would it take for sufficient gas to escape to create an explosion of that import?

A. Roughly 2½ to 3 hours ½. Yes, you could pin that down in the vicinity of 2 to 3 hours.

As already mentioned, the actual conditions prevailing in the cabin, including the tightness or otherwise of the door and window openings, the type of walls or the weather on the night in question were not gone into. The above evidence, on its face, cannot be relied upon for the purpose for which the learned judge at trial used it.

It is clear, moreover, that the witness's knowledge as to the proportions of air and gas required to give an explosive mixture to which he testified above is not accurate. Dr. Toole, head of the Chemistry Department of the University of New Brunswick, testified that the limits within which propane gas and air will explode are from a low of 2·4% by volume of propane gas in a mixture the balance of which is air, to an upper limit of 7% or 8%. If there be any excess beyond this, the mixture will not explode.

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In an attempt to negative a finding that the appellant had left the valve open the previous evening, counsel for the latter put the following to the witness:

Q. Now Mr. Mitton, if the—this is a hypothetical question. If the gas in that particular cabin had been turned *on full—opened wide* at 8.00 o'clock in the evening and left on until 6.00 o'clock in the morning, what quantity of gas would be in that room?

A. There would be enough gas in that room, and you would have to go back to the doors and windows, *if the room being airtight*—if the gas had been left on that length of time, you would not have had an explosive mixture. You would be on your high limit of explodability.

If, as the witness had previously said, it would have taken from $2\frac{1}{2}$ to $3\frac{1}{2}$ hours or even 2 to 3 hours to produce "any" explosive mixture in the room, that is 2·47% of gas, it is difficult to credit the statement that in a period of 10 hours with the valve "opened wide" the concentration of gas in the room would not have reached a point beyond 7 or 8%. To my mind, this evidence indicates that the witness was purporting to speak about matters in which he was not in fact skilled. Mitton testified further:

Q. Now Mr. Mitton, if the gas had been *turned on full* at 8.00 o'clock in the evening and was left on, that is in an enclosed room—left on until approximately 10.30 or 11.00 in the evening, and then the windows were opened, would that gas escape?

A. A good deal of it would eventually when the room got filled up to your window level—it definitely would go out. There is no doubt about that; but if that gas was left on from 8.00 o'clock until 11.00—

Q. From 8.00 o'clock until approximately 11.00 with the windows closed?

A. If there had been any fire or spark in that room in that length of time, you would have had your explosion then, such as a light switch or cigarette being smoked; you would have your explosion then, because in that length of time you would have an explosive mixture in the room with the windows closed.

Q. Would there be enough in there in that period of time to create an explosion of the same force as created the damage in this instance?

A. Yes, because—yes, there would be. It would cause damage of that —just about the same as that.

Q. And an electric switch turned on in that period of time around 10.30 to 11.00 o'clock would cause the same effect?

A. Unless it was an explosive-proof switch, yes, in the cabins; and as a rule they don't use explosive-proof switches unless it is around gas premises.

Counsel, and no doubt the witness, had in view the fact that the respondent had returned to the room between

10.00 and 11.00 p.m., put on the light, opened the windows and smoked. The above evidence may be usefully compared with evidence given by Dr. Toole:

Q. One other thing, Doctor, in order to cause combustion with a gas such as propane in mixture, is it necessary that the gas come in contact with an open flame or something of that nature?

A. At least part of it must be heated to a sufficiently high temperature to ignite. For each set of conditions, there is a temperature of ignition which is necessary to raise part of the mixture to in order that ignition may take place.

Q. And I take it this is true, that the gas—the mere fact that the propane gas is present in a room under any circumstances other than at the proper temperature could not produce either fire or explosion?

A. No. That is correct.

Again:

Q. . . . Now Doctor, you have stated that in order for there to be an explosion, this gas must be ignited by a flame.

A. No, I didn't say it must be ignited. It must be raised to a certain temperature. In other words, the temperature of ignition. It could be done by a hot wire or by an electric spark.

Q. That is precisely the question I wish to ask you, Doctor. In the event that an explosive mixture was within the confined space that I have already mentioned, and an electric light switch is turned on, it is possible that the spark from that switch could ignite the mixture and cause an explosion?

A. If the switch was defective, you mean?

Q. If the switch was defective.

A. Oh yes.

Q. Because ordinarily there is a slight spark in most switches at the time they're depressed or pushed in. There is a sparak. That spark within that confined area—that simple little spark would be sufficient to cause an explosion?

A. If it were—*if the gas surrounding it had the correct mixture.*

Thus, unless the right mixture happened to be at the point of the spark or flame, there would be no explosion. He also said:

If you were to fill the whole room with a mixture of say 10% propane and 90% air, it would not explode.

Unless, therefore, the proper condition had been present in the right place when the respondent returned to his room on the evening previous to the explosion, his putting on of the light or his smoking would not have produced an explosion. Again, it is to be remembered that the situation put to the witness Mitton as to the quantity of gas present at that time was on the footing that the valve was fully open, as to which there was no evidence.

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Mitton was also asked his opinion as to the situation which would have existed if, with the valve *fully open* from 8.00 to 11.00 p.m., and the windows closed, the windows were then opened and left open until 6.00 a.m. In answer he testified as follows:

Q. Now with the windows opened—or shall we say with the windows closed at 8.00 o'clock in the evening, the gas valve open, and left opened until approximately 11.00 o'clock at night, and then at 11.00 o'clock at night the windows are opened and left open until 6.00 o'clock, what would be the condition of the room at 6.00 o'clock in the morning?

A. That is with the gas valve opened?

Q. With the gas valve opened—the windows opened.

A. You would have had an explosive mixture below your window level, yes, below your window levels, you would have definitely had an explosive mixture. The rest would pretty well clear itself out, but propane —being heavier than air, it has a tendency to hang towards the floor or the ground.

Q. And then at 6.00 o'clock in the morning if the windows are closed and the valve is still left opened?

A. *The rest of your room fills up with gas.*

Q. And would there still be an explosive mixture at 8.00 o'clock in the morning.

A. Definitely explosive mixture at 8.00 o'clock in the morning.

Again, it is incomprehensible to my mind why, if an explosive mixture would, in the opinion of the witness, be produced in the room with the valve open from 2 to 3 hours, the limits of explodability would not have been exceeded in an additional 9 hours.

In cross-examination Mitton was asked to deal with the situation where the valve was only partially open. He testified:

Q. Now if that heater had been turned on at 8.00 or half-past 8.00 in the evening, closed off at half-past 10.00 with the valve only partially open, I take it it is quite possible that an explosive mixture had not been reached?

A. *It would all depend on how far open the valve was.*

And again:

Q. And taking the same conditions with the burner partially opened at say 8.00 or 8.30 o'clock in the evening, the burner not being again touched until a quarter to 8.00 the following morning, and the windows—front and back opened up for a period from half-past 10.00 until 6.00 o'clock in the morning, is it quite possible that there is a certain position at which that valve could be set which would not reach an explosive mixture until it had been—until the windows had been closed up for an hour and one-half?

A. You would have to know the position of that valve before you could make any statement to that effect.

Q. Yes; but of course I take it that that is possible, there is a position in which it could have been left where the explosive mixture would have been created by closing the windows say an hour and one-half to an hour three-quarters before the explosion occurred?

A. The time limit would be lengthened, would be all.

For my part, I am unable to rely on the evidence of this witness as justifying the view that the cabin was free of gas before the morning when the explosion occurred. There is therefore not the same difficulty in drawing the inference that the appellant did not leave the valve completely shut off after demonstrating the stove to the respondent the previous evening as there is in accepting the respondent's evidence that he did not open it in the morning until 8.00 a.m. It is quite true that Mitton testified that the stove would have continued to burn if the valve had not been turned completely off but I cannot place the same confidence in this evidence as I would have otherwise been able to do had not his evidence on other points to which I have referred, been unsatisfactory. Moreover, no evidence was given as to whether the valve turned easily or not and it is quite possible that although the appellant may have shut it off, he had opened it partially in removing his hand. It was possible in the very act of withdrawing his hand to have opened it to some extent if the valve were not firmly seated. Undoubtedly there was gas in explosive quantity present at 8.00 a.m. Any other explanation for its presence having been negatived, the only conclusion to which I can come on the evidence is that in some such way the valve had been left open to some degree by the appellant. The preponderance of probability on all the evidence is to this effect rather than to support the appellant's theory that the valve had been opened wide at 6.00 a.m. and so left until 8.00 a.m., thus furnishing the *minimum* period for "any" explosion to take place even if one were to overlook the absence of the "ideal" conditions which the evidence called by the appellant stipulated.

The fact that the respondent at no time smelled gas is, at first blush, surprising, but that aspect of the case is not left completely without explanation. In the course of his

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evidence as to the situation existing in the room in his view the previous evening with the valve wide open, Mitton had testified:

A. But you would definitely get the smell of propane there.

Q. If you knew the smell of propane.

A. You would definitely get a peculiar smell there then.

Q. But of course that would mean something to one who was familiar with the smell of propane; that would be part of your premise, I assume?

A. Possibly, yes.

Q. But for one who did not, it wouldn't necessarily be a warning, would it?

A. I would think the curiosity of the party smelling something like that would be investigated.

It may very well be that if, with a slow leak, the respondent had been smoking when he returned to his room in the evening and opened the windows as he did, he might not have noticed a smell as to which he had not been put on notice. His failure to smell the odour in the morning may be due to the fact that his olfactory sense had been dulled by reason of having slept in the fouled atmosphere. There is evidence of Mitton which has a bearing on this. He testified:

Q. You told my learned friend that it would be impossible not to smell propane gas under the circumstances which were necessary, I take it, to bring about an explosion. Is that correct?

A. If your sense of smell is acute.

Q. Are you suggesting that Mr. Laskey perceived the smell of gas in that stove and went out and lit a match?

A. It would be impossible to be in that room with a keen sense of smell and that amount of gas—an explosive mixture in the room—and not smell. It would be impossible, if you were awake.

Q. Now what factors do you suggest must have been present in this case which resulted in Mr. Laskey lighting a match in the presence of an explosive mixture of propane gas?

A. Possibility of not being too wide awake, and not investigating peculiar smells.

It is, moreover, the fact that the respondent struck a match at 8.00 a.m. to light the stove which he would hardly have done had he appreciated any danger. As Mitton said:

Q. And for a person who failed to perceive the presence of gas through the odour, he might well make the mistake and strike a match within that explosive mixture.

A. Mmmm. Certainly, anyone would.

As to the absence of a pilot light, it is clear that had the stove been so equipped, the explosion could not have taken place. As to whether or not there was a duty resting upon

the appellant to have had the heater in the cabin so equipped, the appellant's own evidence is relevant. In cross-examination, he testified as follows:

Q. Now you were aware, I assume, that propane gas is an inflammable and explosive substance?

A. Yes.

Q. And I suppose you also knew as a proprietor of overnight accommodation that all persons did not know the characteristics of propane gas?

A. Well I suppose there would be a lot that didn't know.

Q. There wouldn't be any question about that, would there?

A. No. That's right.

Q. And I assume *that you felt there was some duty on your part to warn your customers of what you had in those cabins for heating?*

A. *After dealing with the public, I would say yes.*

* * *

Q. Do you tell them anything about the nature of the protection on the valve?

A. I tell them it must be on—lighted when they turn it on, and each time they turn it on, they must light the stove.

Q. Why do you tell them that?

A. Well some people are awful stupid. You would have to—I don't know why I tell them that. I really don't know. I know the nature of propane gas, of any gas. We have handled natural gas in our home for years and years and years, and naturally we have to light it every time we put it on and so on; and I took it for granted I tell people these stoves must be lighted when they are turned on, and each time they turn them off they must light them again if they turn them on.

Q. Why do you tell them that?

A. I suppose it is for their protection.

Q. Protection from what?

A. In case it had been turned on and not lighted, which would be a simple thing for anyone to do, but they might do it.

* * *

Q. What is the purpose of the pilot?

A. The purpose of the pilot, well it is a convenience to the public. They don't have to bother lighting them any more, and the stove remains lit at all times—turn them on and turn them off.

Q. Does it serve any other purpose?

A. Well it is a—yes, it is a protection.

Although a person in the position of the appellant is not bound to install the most modern equipment, nevertheless when experience had taught what was demanded for the protection of the public using his cabins, the appellant was bound to adopt those means in order to make his accommodations reasonably safe. There was, therefore, in my opinion, evidence upon which the finding of both courts below that the appellant failed in a duty incumbent upon him, namely, to install pilots, could be founded.

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I would therefore dismiss the appeal and allow the cross-appeal, both with costs here and in the Court of Appeal. The judgment pronounced by the learned trial judge should be restored.

LOCKE J. (dissenting): The evidence given at the trial has been reviewed in other reasons to be delivered in this matter.

The appellant swore that when he took the respondent to the cabin he explained to him the operation of the gas stove and, at the latter's request, turned it on and lit it and then, on his direction, turned it off, the respondent saying that he was going out. The respondent, giving evidence in chief, directly contradicted this, saying that nothing was said at the time about the stove and that he had not seen the appellant light it. Cross-examined as to a statement made on his examination for discovery where he had said that the appellant could have lit the stove, he said:—

> He could have lit it and he could not have (sic). I couldn't swear to it. I couldn't say he did light it; I did not see him.

Upon this issue, it would appear that the learned trial judge believed the evidence of the appellant that he had lighted the stove, a passage from his reasons reading:—

> The plaintiff has also failed to satisfy me that the defendant negligently left open the valve in the propane gas heater and thus allowed the gas to escape into the cabin. The defendant is positive that he closed the valve when he turned the heat off. The plaintiff did not sense any gas odour in the cabin at any time after the defendant had left, nor was there any explosion when he turned on the light switch, nor at any time during the night until 8.00 o'clock in the morning.
>
> I fail to find any positive act of negligence on the part of the defendant Noddin which would have caused the gas to escape and the consequent explosion and damage to the plaintiff.

The only time that the parties were together in the cabin was the occasion above referred to.

There was uncontradicted evidence given by the witness Mitton, the representative of the company which supplied the stove and attachments to the appellant, that some two hours after the explosion he tested the stove and the fittings and those in the adjoining room, including the connections leading to the pressure tank outside the building, applying what was described as the pressure test and the soap and

water test, and found there were no leaks of any kind, the witness saying also that, with the valve closed, it would not be possible for any gas to escape.

The learned trial judge appears to have accepted this evidence without question, saying as to this:—

> The plaintiff has failed to satisfy me by evidence that the propane gas heater in the cabin was defective or was not reasonably safe, to the knowledge of the defendant, at the time that he assigned the cabin to the plaintiff, and that the defendant was negligent in assigning such premises to the plaintiff. If the heater and the pipe connections were in good order immediately after the incident, it is a fair inference that they were before the explosion in good condition, in the absence of any evidence to the contrary.

Following this, he added that he could not find the defendant negligent in not foreseeing what caused the explosion and the damage.

In view of these findings, it necessarily follows that some one turned on the gas between the time that the appellant left the cabin at about 8 o'clock in the evening and 8 o'clock the following morning when, according to the respondent, he lit a match near the burner of the stove and the explosion occurred. The cabin was locked by the respondent when he left the evening before, and again when after returning he retired about 11 o'clock, and no one suggests that any one else entered the cabin during this twelve hour interval. The respondent got up at 6 o'clock in the morning and closed the two windows in his part of the cabin and says that, at that time, he did not touch the stove. Dealing with this aspect of the matter, the learned trial judge said:—

> Of course, I find that there is no evidence that Laskey did tamper with or try to light the stove, except at 8.00 o'clock in the morning when he got up, and I find that the explosion was caused by an accumulation of gas in the room before Laskey attempted to light the stove. Whatever caused the accumulation is not determined, and I cannot speculate as to how it came about.

With due respect, I think it was the duty of the learned judge to decide what inference was to be drawn from the facts above stated. This would not be to speculate, as suggested in the reasons given. This issue not having been decided, the appellant was none the less held liable on the footing that there was an implied warranty that the cabin would be *absolutely safe* for occupancy and that had there been a pilot light on the stove the accident would not have occurred.

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The only evidence as to the function of the pilot light was that given by the witness Mitton. A stove not equipped with such a device, which is attached to the burner, must be lighted with a match: with the device, when the gas is turned on it is ignited by the pilot light. Apart from the evidence, these devices are in such common use and have been for so long that judicial notice may properly be taken of their function and purpose. Mitton further gave evidence of a fact that appears to be obvious, that if gas were escaping in the vicinity of the light, whether at the burner or close to it, it would be ignited. No doubt also, if there was an explosive accumulation of gas in the room the source of which was elsewhere than in the burner or the connections, it would be ignited by the pilot light, as it would be, of course, by a match. These matters are self evident.

To say, however, that the absence of the pilot light, which would undoubtedly have kindled the gas which, upon the evidence, must have escaped through the burner, was the cause of the accident is, in my opinion, quite unwarranted. It is, indeed, to put the cart before the horse. If, as the majority of the Appellate Division concluded and as appears to me to be the only inference to be drawn from the evidence, the presence of the gas in the room resulted from the action of the respondent in turning it on when he got up at 6 o'clock, it was that act which was the proximate cause of the accident.

Under Order 58, Rule 1 of the Rules of the Supreme Court of New Brunswick, all appeals to the Court of Appeal shall be by way of rehearing and, by Rule 4 of that Order, the Court is given power to draw inferences of fact and to give any judgment and make any order which ought to have been made.

Bridges J., with whom Richards C.J. agreed, after referring to the finding at the trial that the stove and the connections were in good condition immediately before the explosion, and saying that the trial judge was apparently satisfied that the defendant, when in the cabin with the plaintiff, lit the heater and then closed the valve shutting off the gas, apparently concurring in those findings, said in part:—

> the only conclusion one can I think reach is that the valve must have been wholly or partially opened by some person between shortly after 8.00 o'clock in the evening and 6.00 a.m. the following morning.

Continuing, he said that the judge had not dealt with this aspect of the case but that there was evidence from which the inference could be drawn that the plaintiff probably opened the valve without lighting the gas, and that it was his opinion that he did so. These learned judges were, however, of the opinion that, if the appellant had properly instructed the respondent in the operation of the stove, it was "difficult to believe that he would have turned on the gas without lighting it." Bridges J. further considered that the appellant was negligent in not explaining the dangers of propane gas and the facts as to its odour which was designed to give warning of its presence. Upon these findings he held that both parties were to blame and the loss was apportioned.

There is thus a finding of the court appealed from that the presence of the inflammable mixture of gas in the room at 8 o'clock a.m. was caused by the respondent turning on the gas and, upon the respondent's own evidence, the only time that this could have occurred was when he got up to close the windows at 6 o'clock. If the respondent had said that he had turned on the gas, thinking that there was a pilot light on the stove which would have at once ignited it, the absence of the pilot light might have afforded some arguable ground for imposing liability. The respondent, however, says nothing of the kind, his evidence being a flat denial that he did turn on the gas at all. If there is any authority for the proposition that there is a duty imposed upon persons renting accommodation of this kind to others, in this day and age, to explain that gas used for illumination or cooking, if left turned on without lighting it, constitutes a danger either of asphyxiation or explosion, I am unaware of it. There was nothing to differentiate the propane gas from other gas in this respect that, if allowed unchecked to escape into the air in a room, a dangerous inflammable mixture would result.

The duty of the present appellant to the respondent was not that of an insurer and, as pointed out by the judgment of the majority in the Court of Appeal, was not absolute. In *Cox* v. *Coulson* (1), Swinfen Eady L.J., referring to the liability of a theatre owner to a person purchasing a ticket to see a performance, said that the defendant must be taken

(1) [1916] 2 K.B. 177 at 181.

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to have contracted to take due care that the premises should be reasonably safe *for persons using them in the customary manner and with reasonable care,* referring as authority to what had been said in *Francis* v. *Cockrell* (1), and in *Norman* v. *Great West Railway Co.* (2). This statement of the law was approved in *Hall* v. *Brooklands Auto Racing Club* (3), by Scrutton L.J.

Upon the finding made in the Court of Appeal which, with respect, appears to me to be an inevitable conclusion from the evidence, it was not the absence of the pilot light that was the proximate cause of the respondent's injury but his own act in turning on the gas and failing to light it. A pilot light, no doubt, would have at once ignited the gas preventing any damage, but then leaving the window or the door open would have been equally effective for that purpose. But the failure to take any of these precautions that might be suggested was not the proximate cause of the injury and have, in my opinion, no bearing on the question of liability.

It has been pointed out many times in this Court that, as the appeal is from a court of appeal, the judgment should not be reversed unless we are of opinion that it is clearly wrong. Particularly is this so when the decisive finding, as in this case, is upon a question of fact. I am quite unable to say that the judgment of the Court of Appeal in this case is wrong: on the contrary, with respect, I think that upon the issue as to what caused the accumulation of gas in the room it was clearly right.

I would allow this appeal and dismiss this action with costs throughout.

CARTWRIGHT J.:—The facts out of which this appeal arises are sufficiently set out in the reasons of other members of the Court.

For the reasons given by my brother Rand on this branch of the matter, I am of opinion that the finding of the Appeal Division, that the failure of the appellant to install a pilot light was a breach of his duty to make the premises as safe as reasonable care and skill could make them, was supported by the evidence and should not be disturbed. This failure was a cause of the explosion.

(1) (1870) L.R. 5 Q.B. 184. (2) (1869) L.R. 5 Q.B. 385.
(3) [1933] 1 K.B. 205 at 215.

The other cause was the escape of gas. It was conceded that the evidence established that there was no leak in the piping leading from the cylinders containing the gas to the heater and that the escape must have occurred through the valve at the heater having been left wholly or partly open for a considerable period of time prior to the explosion. Three theories as to how this happened were put forward: (i) that after the appellant had lighted the heater he either failed to turn it off completely or, having turned it off, inadvertently turned it on; (ii) that between 8.00 and 11.00 o'clock in the evening preceding the accident someone unknown entered the cabin (which was then empty and, so far the respondent recollected, unlocked) and inadvertently or mischievously opened the valve; (iii) that the respondent opened the valve when he got up at 6.00 a.m.

The learned trial judge found that none of these theories were established. The majority in the Appeal Division were of opinion that there was evidence from which the inference could and should be drawn that the respondent opened the valve at 6.00 a.m. without lighting the gas and that this was negligence on his part contributing to the accident.

It is clear that the onus of proving contributory negligence on the part of the respondent rested upon the appellant, and, in my opinion, the evidence does not warrant any interference with the finding of the learned trial judge that this onus was not discharged. It must be remembered that the learned trial judge, who had the advantage of seeing and hearing the witnesses, has apparently credited the explicit statement of the respondent, made during his examination in chief and repeated during his cross-examination, that he did not touch or go near the heater when he got up at 6.00 a.m. Of the three theories mentioned none may appear to be probable but, in my opinion, on all the evidence the third is at least as improbable as either of the others, and I agree with the view of the learned trial judge that the contributory negligence alleged against the respondent was not proved.

It therefore appears that it has been proved that the explosion by which the respondent was injured resulted from (i) the failure to install a pilot light, a cause for which the appellant is responsible, and (ii) an unexplained escape

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of gas, a cause for which neither party has been proved to be responsible; and it follows that liability for the damage caused rests upon the appellant.

For these reasons I would dismiss the appeal, allow the cross-appeal and restore the judgment of the learned trial judge with costs throughout.

ABBOTT J. (dissenting):—This action arises out of injuries sustained by respondent following an explosion which took place in an over-night cabin, one of a group operated by the appellant, near Moncton, New Brunswick.

The respondent and a group of friends arrived at these overnight cabins at about 8 p.m. on September 25, 1953, and rented three cabins, one of which was occupied by the respondent, being one side of a double cabin, the other side being occupied by a Mr. and Mrs. Fraser, the two sides separated by a partition. Each of these cabins was equipped with a propane gas heater. The evidence established that the appellant personally showed the cabins to the party, and appellant testified that when he took respondent to his cabin at about eight o'clock, he turned on and lit the propane gas heater in the presence of the defendant. His evidence on this point is not contradicted by respondent. Respondent told him he did not need the heat on as he was going to visit a cabin occupied by two of his friends. Appellant testified he then turned off the gas heater.

Respondent did leave the cabin and spent most of the evening at another cabin with other members of his party, returning to his own cabin at about 11 p.m. He stated that after he had undressed, he opened the windows, turned off the light, and went to bed. He said he slept until about 6 a.m., when he got up, went to the bathroom, closed two of the windows of the cabin, one of which was in the bathroom, the other in the front of the cabin near the door, and then went back to bed. He stated that he did not again rise until about 8 a.m. when he turned on the gas heater, lit a match, put it towards the burner, when an explosion took place which severely injured him, blew out one side of the cabin wall and scorched furniture and fittings in the cabin.

The learned trial judge found that the gas heater was not defective, that the defendant did not leave the valve open when he demonstrated the apparatus at 8 p.m. and that the defendant was not negligent in assigning the premises to the plaintiff. There was ample evidence to support these findings. He also found no positive act of negligence on the part of either the appellant or the respondent which would cause the gas to escape.

On these findings of fact the learned trial judge gave judgment for the respondent on the ground that the appellant had not made the premises absolutely safe for occupancy by providing the propane heater with a pilot light.

In the Court of Appeal, Bridges J., with whom Richards C.J. concurred, appears to agree with the findings of the learned trial judge that appellant did light the stove at about 8 p.m. when in the cabin with respondent and then turned off the gas. He then went on to say:—

> There was no direct evidence that the plaintiff turned on the gas during the night or early morning but if the gas was completely turned off by the defendant at 8.00 p.m. in the evening prior to the explosion, with the heater and pipe connections in good working order, the only conclusion one can I think reach is that the valve must have been wholly or partially opened by some person between shortly after 8.00 o'clock in the evening and 6.00 a.m. the following morning. The learned trial judge did not deal with this aspect of the case. There is no evidence or suggestion of any person being in the cabin between those hours except the plaintiff. He stated that he locked the door of the cabin when he went to bed at 11.00 p.m. but did not remember if he locked it when he went to the other cabin shortly after 8.00 p.m. It is highly improbable that a person would enter the cabin for the sole purpose of opening the valve if the cabin were unlocked. There is in my opinion with all deference evidence from which the inference can be drawn that the plaintiff probably opened the valve without lighting the gas and it is my opinion that he did so.

In holding the appellant liable, Bridges J. agreed with the learned trial judge that there was a duty imposed upon the appellant to equip the stove with a pilot light as a safety measure but differed with his view that there was an implied warranty that the cabin must be made absolutely safe for occupancy. He considered moreover that the appellant had failed in his duty in that "he did not explain to the plaintiff the operation of the heater and warn him of the danger from the use of propane gas . . ."

With respect, I am unable to agree with this latter finding. In my opinion the evidence established that the appellant did show the respondent how the heater operated and

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I cannot believe that the plaintiff, an educated man, 72 years of age, who had been a druggist for over thirty years, needed to be warned that any gas stove or heater carelessly handled could be dangerous.

There is uncontradicted evidence that the gas heater was a type of heater in common use, and as it was installed in the cabin operated properly, was in good condition and could not of itself have caused an explosion, and the Courts below appear to have so found.

I am satisfied on the evidence that the escape of gas, which resulted in the explosion, must have been caused by some human intervention. It seems to me that this could only have happened in one of three ways:—

(1) that the appellant after opening the valve and lighting the stove at about 8 p.m. failed to turn it off. He states positively that he did turn it off and this is not contradicted although respondent was present at the time. The appellant did not re-enter the cabin until after the explosion had taken place the following morning;

(2) that some third person entered the cabin between the time appellant and respondent left it about 8 p m. and the time respondent returned at about 11 p.m., and at that time turned on the valve. There is no evidence to support this alternative, the cabin door appears to have been locked at all relevant times, certainly from 11 p.m. on, and I think it must be rejected and

(3) that the respondent himself turned on the valve between the time it was closed at 8 p.m. the previous night and 6 a.m. when he says he got up for the first time. That this is what happened is the view held by Richards C.J. and Bridges J., as appears from the quotation which I have given from the latter's reasons. I share that view.

There remains for consideration therefore the question as to whether the Courts below were right in holding that appellant failed in his duty to respondent in not having the propane gas heater equipped with a pilot light as a safety measure. With respect, I am of opinion that they were not.

The legal principle upon which appellant's responsibility to respondent rests has been accurately and succinctly stated by my brother Rand in *Brown* v. *B. & F. Theatres Limited* (1), where he says:—

> There was a contractual relation between her and the theatre management that exercising prudence herself she might enjoy those privileges without risk of danger so far as reasonable care could make the premises safe.

An occupier is not bound to adopt the most recent inventions and devices provided he has done what is ordinarily and reasonably done to ensure safety. See Halsbury, 2nd Ed. Vol. 23 at p. 605, and the authorities there cited.

As Du Parc L.J. said in *Gilmore* v. *London County Council* (2), "in considering what is reasonable you must not ask for perfection" and this test was cited with approval by the Court of Appeal in *Bell* v. *Travco Hotels, Ltd.* (3).

No doubt the installation of a pilot light on the gas heater in question would have constituted an additional safeguard against an explosion resulting from careless operation of the heater. As I have said, however, there is uncontradicted evidence in this case that the heater in question was of a type in common use, was in good condition and if operated properly could not have caused an explosion.

In the circumstances I am of opinion that the appellant carried out his contractual obligation "to take due care that the premises would be reasonably safe for persons using them in the customary manner and with reasonable care." See *Cox* v. *Coulson* (4).

I would therefore allow the appeal and dismiss the plaintiff's action with costs throughout.

Appeal dismissed; Cross-appeal allowed; both with costs.

Solicitor for the appellant: *C. F. Inches.*

Solicitor for the respondent: *C. J. A. Hughes.*

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(1) [1947] S.C.R. 486 at 490.
(2) [1938] 4 All E.R. 333.
(3) [1953] 1 All E.R. 638.
(4) [1916] 2 K.B. 177 at 181.

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*May 3, 4
*June 11.

THE GOODYEAR TIRE AND RUBBER COMPANY OF CANADA LIMITED, FIRESTONE TIRE AND RUBBER COMPANY OF CANADA LIMITED, B. F. GOODRICH COMPANY OF CANADA LIMITED ..... APPELLANTS;

AND

THE T. EATON COMPANY LIMITED AND OTHERS ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales and Excise taxes—Whether retailer of "special brand" tires made by another company is a manufacturer—Jurisdiction of the Tariff Board—Excise Tax Act, R.S.C. 1952, c. 100, s. 57.

On a reference to the Tariff Board by the Deputy Minister of National Revenue (Customs and Excise) pursuant to s. 57 of the *Excise Tax Act*, R.S.C. 1952, c. 100, the Board declared that the T. Eaton Co. Ltd. was not the "producer or manufacturer" of two "special brand" automobile tires sold by it and manufactured exclusively for it by a rubber company, and was not therefore liable for excise or sales tax on the sale of such tires. The Exchequer Court affirmed the declaration as well as the authority of the Board to hear the reference.

Held: The appeal should be allowed and the judgment of the Exchequer Court and the declaration of the Tariff Board set aside.

The Board had no jurisdiction to make the declaration, and the Board, as well as the Exchequer Court and this Court, was precluded from considering the merits of the issue. S. 57 of the *Excise Tax Act*, which gives the Board power to decide whether any tax is payable on an article and, if so, what rate of tax is payable, does not give the Board power to decide whether a particular person is a person upon whom a tax is imposed in respect of an article. That question is an issue between that person and the Crown. To permit third parties to intervene in such an issue would be a departure from the general system of the law.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), affirming the declaration of the Tariff Board.

J. J. Robinette, Q.C. and *J. B. Lawson* for the appellants.

J. D. Arnup, Q.C. and *G. F. Henderson, Q.C.* for T. Eaton Co.

Stuart Thom, Q.C. for General Tire & Rubber Co.

R. M. Sedgewick and *C. W. Lewis* for Simpsons-Sears Ltd.

K. E. Eaton for Minister of National Revenue.

*PRESENT: Kerwin C.J., Rand, Fauteux, Abbott and Nolan JJ.

(1) [1955] Ex. C.R. 229.

The judgment of Kerwin C.J., Fauteux, Abbott and Nolan JJ. was delivered by:—

FAUTEUX J.:—For some years, certain Canadian rubber companies have been manufacturing "special brand" automobile tires for sale to various retail corporations as well as to other rubber companies. These tires bear the names of the purchasers and the treads are molded with special markings which are not sold to others. The first mentioned companies have been regarded by the Department as the manufacturers or producers of the tires for the purposes of the *Excise Tax Act* (R.S.C. 1952, c. 100). The appellants, competing manufacturers of automobile tires, objected to this ruling and contended that the "special brand" customers should be treated as the manufacturers or producers of the tires within the meaning of section 2(*a*)(ii) of the *Excise Tax Act* and subjected to sales and excise taxes on their sales. In a letter dated August 19, 1954, wherein these facts are recited, the Deputy Minister of National Revenue referred the matter to the Tariff Board for a declaration as to the correctness or otherwise of the Department's ruling; this reference purports to be made in accordance with section 57 of the Act, the relevant subsections of which provide that:—

(1) Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the *Tariff Board Act* may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act.

(2) Before making a declaration under subsection (1) the Tariff Board shall provide for a hearing and shall publish a notice thereof in the *Canada Gazette* at least twenty-one days prior to the day of the hearing; and any person who, on or before that day, enters an appearance with the Secretary of the Tariff Board may be heard at the hearing.

(3) A declaration by the Tariff Board under this section is final and conclusive, subject to appeal as provided in section 58.

(4) .....

(5) .....

During the hearing of this reference, members of the Board raised the question of jurisdiction. In the views they then expressed, the difference arising in the matter is not, as contemplated in subsection (1) of section 57 "whether any or what rate of tax is payable" on these articles, under the Act—a question as to which, admittedly,

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no difference or doubt existed in the premises—, but whether the Canadian rubber companies manufacturing "special brand" automobile tires for sale to various retail corporations or the retail corporations, should be regarded by the Department as the manufacturers or producers, within the meaning of the section 2(*a*)(ii) and should therefore pay the tax—a question scarcely within the terms of a reference authorized under section 57. The point was argued but not determined. The Board, acting upon the suggestion of counsel for the Minister, continued the hearing, "leaving the question of jurisdiction open to be settled elsewhere" and, on the merits of the question referred to, approved the ruling of the Department. This decision as well as the authority of the Board to entertain the reference, were subsequently affirmed by the Exchequer Court on an appeal by the present appellants who, continuing to assert the jurisdiction of the Board, now attack the judgment rendered on the merits of the question.

The jurisdiction of the Board in the matter must first be ascertained for, if there is no such jurisdiction, this Court, as well as the Board and the Exchequer Court, is precluded from entering upon a consideration of the merits of the issue. *Okalta Oils Limited* v. *Minister of National Revenue* (1).

The contention that the question propounded to the Board in the present case is one contemplated by the terms of section 57, is predicated on the argument of counsel for the Minister that the words "by any persons" must be understood to follow the word "payable" twice appearing in the first paragraph of the section; and the reasons upon which rests the decision of the Court below are expressed as follows:—

> That the tax is imposed on a person in respect of an article and not on the article itself, notwithstanding the wording of section 57, seems clear: *vide* such cases as *Provincial Treasurer of Alberta* v. *Kerr* (1933) A.C. 710; *Kerr* v. *Superintendent of Income Tax and Attorney-General for Alberta* (1942) S.C.R. 435; *Smith* v. *Vermillion Hills Rural Council* (1916) 2 A.C. 569. The articles that were the subject of the reference were "special brand" automobile tires. As the hearing developed the specific articles before the Board were the special brand "Bulldog" and "Trojan" tires sold by Eaton's. Since there was difference or doubt whether Eaton's was the manufacturer or producer of the tires there was difference or doubt whether tax was payable on them on their sale by Eaton's. The Board

(1) [1955] S.C.R. 824.

could not determine such difference or doubt and decide whether tax was payable on the tires or whether they were exempt from tax on their sale by Eaton's without deciding whether Eaton's was the manufacturer or producer of them. Failure to recognize this basic fact was the fallacy in the submission of lack of jurisdiction. Since there was difference or doubt whether any tax was payable on the "Bulldog" and "Trojan" tires on their sale by Eaton's the Board had jurisdiction to resolve such doubt or difference. And since the Board could not resolve such doubt or difference without deciding whether Eaton's was the manufacturer or producer of the tires it follows, as a matter of course, that it had jurisdiction to decide that question.

With deference, I fail to see how this line of reasoning is of any assistance in determining the specific jurisdiction of the Tariff Board under section 57 of the Act. Whether a *particular person* is a person upon whom a tax is imposed in respect of an article or whether a *particular article* is one in respect of which a tax is imposed upon a person are two separate questions;—indeed the whole argument at the hearing was centred exclusively upon the former, nothing being said as to the latter, as to which there was admittedly no point of difference. While these two questions, as well as a variety of others, are proper ones in an action for the recovery of taxes, it does not follow that they are all equally so in a reference to the Tariff Board under section 57 if, on a proper construction of the whole section, the question as worded in paragraph (1) "whether any or what rate of tax is payable on any article" means only whether any article is one in respect of which any and, if so, what rate of tax is imposed.

The declaration of the Board as to the question within its jurisdiction to entertain is, subject to appeal by leave on a question of law only, final and conclusive as against any of the parties to the proceedings, and perhaps as against anyone in Canada who, after publication in the *Canada Gazette* of a notice of a hearing, has failed to avail himself of the right to appear before and to be heard by the Board. In the result, one at least of the many issues, which ordinarily it would be for the Exchequer Court or some other competent tribunal to determine, either in an action for recovery of taxes or penal proceedings, is finally and conclusively decided by the Board. That section 57 thus affords a substantial alteration of the general system of the law and particularly of the provisions of the Act dealing

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with the recovery of taxes, is manifest. In like circumstances, the construction of this subsequent enactment, section 57, is subject to the rule that a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed. (Maxwell *On Interpretation of Statutes*, 9th edition, page 84). There being a presumption against the implicit alteration of the law, effect cannot be given to the suggestion of counsel for the Department to read after the word "payable" twice appearing in the first paragraph of the section, the words "by any persons". To do so would not only extend the scope of the question but stretch it to a point creating clear conflict between the English and the French texts of paragraph (1). Indeed if one refers, as one may under the authorities (*Composers, Authors and Publishers Association Limited* v. *Western Fair Association* (1)), to the French version, the latter makes it abundantly clear that the real question is "whether any particular article is one in respect of which any or what rate of tax is imposed":—

> 57. (1) Lorsqu'il se produit un différend ou qu'un doute existe sur la question de savoir si, aux termes de la présente loi, *un article est assujéti à la taxe ou sur le taux applicable à l'article* et qu'aucun tribunal compétent n'a jusque-là rendu, en l'espèce, une décision visant tout le Canada, la Commission du tarif, instituée par la *Loi sur la Commission du tarif*, peut déclarer quel montant de taxe est exigible sur l'article ou déclarer que l'article est exempt de la taxe en vertu de la présente loi.

In the context, the word "payable" does not appear; and the context does not either lend itself to the inclusion of the words "payable par quiconque". While, on these views, it must be held that there was no jurisdiction for the Board to entertain the question propounded in the letter of the Deputy Minister, this conclusion, if the examination of the section is pursued, finds, I think, further support.

As is manifested by the reasons for the declaration of the Board and for the judgment of the Court below upon the merits of the question referred to the Board, the declaration as well as the judgment rest on findings of facts as to the relationship between the T. Eaton Company Limited and the Dominion Rubber Company Limited.

(1) [1951] S.C.R. 596.

Under paragraph (1) of section 57, a condition precedent to the jurisdiction of the Board to entertain a reference upon the question stated in the section is that there be "no previous decision upon the question by a competent tribunal *binding throughout Canada*". The section, therefore, contemplates that the question to be propounded to the Board is, of its nature, susceptible to be one upon which a previous decision binding throughout Canada might have been rendered. Of its nature, the question here arising can hardly give rise to a decision having such an effect.

Under paragraph (2), the Board is precluded from deciding the question, which under paragraph (1) is within its jurisdiction to entertain, unless a hearing be provided for and notice thereof published in the *Canada Gazette,* so that anyone,—other than the person who applies for the declaration, the Deputy-Minister of National Revenue for Customs or Excise,—may be given an opportunity to enter an appearance and be heard in the matter. Whether or not a particular article is one in respect of which a tax is imposed raises a question of general concern throughout Canada and is a matter justifying notice being given to third parties so that they may be heard if they so elect. But whether a particular person is the person liable for the payment of a tax imposed in respect of an article is an issue between that person and the Crown. To permit third parties to intervene in such an issue would be a departure from the general system of the law. The intention of Parliament to do so would have to be indicated in explicit terms, which, in my view, has not been done under the section.

Paragraph (3) provides that "a declaration by the Tariff Board under this section is final and conclusive, subject to appeal as provided in section 58". Prior to 15 Geo. VI, c. 28, s. 7, enacted in 1951, what is now paragraph (3) read as follows:—

> A declaration by the Tariff Board, under this section, shall have the same force and effect as if it had been sanctioned by statute.

The question which could then be referred to the Board was exactly the same as it is to-day. If the question contemplated by section 57 is whether a *particular article* is

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one in respect of which any and what rate of tax is imposed, it is not difficult to understand why Parliament wanted to give to the determination of this question the same force and effect as if it had been sanctioned by statute, but there would appear to be no reason for the attribution of such an effect to the determination of tax liability of a person arising out of the relationship existing between that person and another.

Upon the ground that the Tariff Board had no jurisdiction to make its declaration of December 7, 1954, I would allow the appeal and set aside the judgment of the Exchequer Court and the Tariff Board's declaration. There should be no costs in this Court or in the Exchequer Court.

RAND J.:—I agree with the conclusion and with the reasons generally of my brother Fauteux, but I desire to state shortly my own view of s. 57 of the *Excise Tax Act*. S-s. (1) declares:

> Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the Tariff Board Act may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act.

The language "whether any or what rate of tax is payable on any article" raises a question that, in effect, asks for a decision in rem, a decision determining the rate as applied to the article regardless of personal liability for the tax. It is only for that reason that a general hearing is required and that the declaration is to be, by s-s. (3), "final and conclusive". That is the only question authorized by the section to be put by the Deputy Minister to the Board.

It is argued that the language "may declare what amount of tax is payable thereon" evidences an intention to have such a question as that submitted passed upon. The point is, no doubt, arguable, but what is to be resolved, is a doubt or difference as to the rate; the price is assumed; and once the rate is ascertained the amount of the tax mathematically

follows. Even considering s-s. (1) alone, I think the jurisdiction is clearly confined to the question specified in two lines, "any or what rate of tax", and the use of the word "amount" cannot, in the context, affect it. Confirmed, however, as that interpretation is by the subsequent subsections, I entertain no doubt of the limit of jurisdiction.

What is sought here is something quite different: it is, who, as the "manufacturer or producer" of the goods, is, as between two parties, liable for the tax? The article and the rate are admitted. S. 23(2) and s. 30(1)(*a*)(i) provide for the payment of the excess and consumption taxes respectively by the "manufacturer or producer". S. 2(1)(*a*)(ii) defines "manufacturer or producer" to include:

> any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not,

The question is, therefore, one of fact and law whether the respondent retail dealers, by reason of their partial participation in the processes that end in the ultimate product, bring themselves within that description. The interest of a taxpayer in that question is not the general interest in a definitive determination which s. 57, s-s. (1) contemplates. Each instance depends on its own particulars; they may be changed in any case tomorrow by adding, subtracting or combining old or new items; and the declaration would be only upon the particulars then existing of the party immediately concerned. That is here an issue between the retailer and the Crown with which ordinarily other parties have nothing directly to do. They may be interested in the language of the statute and might seek its change; they have an interest in the uniform and proper administration of the Act as of taxing law generally; but as between the taxing authorities and the "manufacturer or producer" that is not the interest for which the section provides a general hearing.

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I would, therefore, allow the appeal, set aside the judgment below and declare the Tariff Board to have had no jurisdiction to make the declaration. There will be no costs in this Court or in the Exchequer Court.

Appeal allowed; no costs.

Solicitors for the appellants: *McCarthy & McCarthy.*

Solicitors for T. Eaton Co.: *Gowling, MacTavish, Osborne & Henderson.*

Solicitors for Simpsons-Sears Ltd.: *Tory, Miller, Thomson, Hicks, Arnold & Sedgewick.*

Solicitor for Atlas Supply Co.: *J. F. Barrett.*

Solicitors for General Tire & Rubber Co.: *Osler, Hoskin & Harcourt.*

Solicitor for Minister of National Revenue: *K. E. Eaton.*

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*Feb. 2, 3, 6, 7, 8

*Jun. 11

LOUIS FRANCIS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of right—Goods imported into Canada from U.S.A. by Indian—Whether subject to duties of customs and sales tax—Exemption claimed under the Jay Treaty—An Act to amend the Income Tax Act and the Income War Tax Act, S. of C. 1949, 2nd Session, c. 25, s. 49—The Indian Act, R.S.C. 1952, c. 149, ss. 2(1)(g), 86(1)(b), 87, 88, 89.

Article III of the treaty commonly known as the Jay Treaty reads in part as follows:

"No duty on entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales or other large packages unusual among Indians shall not be considered as goods belonging bona fide to Indians".

The appellant, an Indian within the terms of s. 2(1)(*g*) of the *Indian Act*, S. of C. 1951, c. 29, resided on an Indian reserve in the Province of Quebec adjoining an Indian reserve in the State of New York, U.S.A.

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*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Cartwright, Fauteux and Abbott JJ.

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In 1948, 1950 and 1951, he brought from the United States into Canada certain articles acquired by him in the U.S.A. No duties were paid in respect thereto. The articles were subsequently seized by the Crown and the appellant, under protest, paid the sum demanded. By his petition of right, he claimed the return of this money and a declaration that no duties or taxes were payable by him with respect to these goods by reason of the above part of Article III of the Jay Treaty. The claim was rejected by the Exchequer Court of Canada.

Held: The appeal should be dismissed.

Per Kerwin C.J., Taschereau and Fauteux JJ.: The Jay Treaty was not a Treaty of Peace and it is clear that in Canada such rights and privileges as were here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation. There is no such legislation here.

S. 86(*b*) of the *Indian Act* does not apply because customs duties are not taxes upon the personal property of an Indian situated on a Reserve but are imposed upon the importation of goods into Canada.

S. 49 of S. of C. 1949, c. 25 is a complete bar in so far as the articles imported in 1950 and 1951 are concerned.

Per Rand and Cartwright JJ.: To the enactment of fiscal provisions, certainly in the case of a treaty not a peace treaty such as the Jay Treaty, the prerogative that it need not be supplement by statutory action does not extend and only by legislation can customs duties be imposed. Legislation was therefore necessary to bring within municipal law the exemption claimed here, and for over a century there has been no statutory provision in this country giving effect to it.

There is nothing in s. 102 of the *Indian Act,* R.S.C. 1927, c. 98 nor in s. 86(1) of the *Indian Act,* R.S.C. 1952, c. 149, that can assist the appellant.

Per Kellock and Abbott JJ.: The provisions of the *Indian Act* constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the *Customs Act* or the *Customs Tariff Act* is to be found in the *Indian Act,* the terms of such general legislation apply to Indians equally with other citizens of Canada. No such immunity is to be found in s. 86(1) of the *Indian Act.*

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J. (1), dismissing a petition of right.

G. F. Henderson, Q.C. and *A. T. Hewitt* for the appellant.

D. H. W. Henry, Q.C. and *E. R. Olson* for the respondent.

The judgment of Kerwin C.J., Taschereau and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—This is an appeal against a decision of the Exchequer Court dismissing the Petition of Right of the suppliant (an Indian resident in a reserve in

(1) [1954] Ex. C.R. 590.

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Canada) and the question is whether three articles, a washing machine, a refrigerator and an oil heater, brought by him into Canada from the United States of America are subject to duties of customs and sales tax under the relevant statutes of Canada. None was paid and in fact the articles were not brought into this country at a port of entry; they were subsequently placed under customs detention or seizure and in order to obtain their release, the appellant, under protest, paid the sum demanded by the Crown. The Petition of Right claims the return of this money and a declaration that no duties or taxes were payable by the appellant with respect to the goods.

The date of importation of the washing machine is December, 1948; of the refrigerator April 24. 1950, and of the oil heater September 7, 1951. The relevancy of the dates is that s. 49 of The Statutes of Canada, 1949, 2nd session, c. 25, relied upon by the respondent, was assented to on September 10, 1949, and was, therefore, in effect at the time the suppliant brought into Canada the refrigerator and oil heater, but was not in force when the washing machine was imported. Furthermore s. 87 of *The Indian Act,* R.S.C. 1951, c. 29, also referred to on behalf of the respondent, was first enacted in the revision of *The Indian Act* in 1949 by s. 87 of c. 29 of the statutes of that year, which chapter was brought into force on September 4, 1951, so that even if applicable, its provisions would affect only the importation of the oil heater and I find it unnecessary to express any opinion upon the matter.

The appellant falls within the definition of "Indian" in s. 2(1)(*g*) of R.S.C. 1951, c. 29 and at all relevant times he resided on the St. Regis Indian Reserve in St. Regis village in the westerly part of the Province of Quebec, which adjoins an Indian reserve in the State of New York in the United States of America,—the residents of both reserves belonging to the St. Regis Tribe of Indians. The articles were brought into Canada in the manner already described in order to lay the foundation for the present proceeding as a test case.

The first claim advanced on behalf of the appellant is that these imposts need not be paid because of the following provisions of Article III of the Treaty of Amity, Com-

merce and Navigation, between His Britannic Majesty and the United States of America, signed on November 19, 1794, and generally known as the *Jay Treaty*:—

> No Duty on Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

In view of the conclusion at which I have arrived, it is unnecessary to deal with the question raised by the respondent that the articles imported by the appellant were not his "own proper goods and effects".

The *Jay Treaty* was not a Treaty of Peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation. This is an adaptation of the language of Lamont J., speaking for himself and Cannon J. in *Arrow River & Tributaries Slide & Boom Co. Ltd.* v. *Pigeon Timber Co. Ltd.* (1), and is justified by a continuous line of authority in England. Although it may be necessary in connection with other matters to consider in the future the judgment of the Judicial Committee in *The Labour Conventions Case* (2), so far as the point under discussion is concerned it is there put in the same sense by Lord Atkin. It has been held that no rights under a treaty of cession can be enforced in the Courts except in so far as they have been incorporated in municipal law: *Vajesingji Joravarsingji* v. *Secretary of State for India* (3); *Hoani Te Heuheu Tukino* v. *Aotea District Maoria Land Board* (4). The case of *Sutton* v. *Sutton* (5), relied upon by the appellant, dealt with the construction of another provision of the *Jay Treaty* and of the statute of 37 Geo. III, c. 97, which was passed for the purpose of carrying certain terms of the Treaty into execution. This is not a case where vested rights of property are concerned and it is unnecessary to consider the question whether the terms of the *Jay Treaty* were abrogated by the war of 1812.

(1) [1932] S.C.R. 495.
(2) [1937] A.C. 326.
(3) (1924) L.R. 51 Ind. App. 357.
(4) [1941] A.C. 308.
(5) (1830) 1 Russ. & M. 664.

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I agree with Mr. Justice Cameron that clause (*b*) of s. 86 of *The Indian Act* does not apply, because customs duties are not taxes upon the personal property of an Indian situated on a Reserve but are imposed upon the importation of goods into Canada. I also agree that, so far as the refrigerator and the oil heater are concerned, s. 49 of c. 25 of the 1949 statutes is a complete bar. This is "An Act to amend the *Income Tax Act* and the *Income War Tax Act*". While it is true that in s. 48 there are references to residents in Newfoundland and in ss. 49 and 50 to Newfoundland, most of the sections deal with income tax throughout all of Canada. The words are clear that no one is entitled to any deduction, exemption or immunity from, or any privilege in respect of any duty or tax imposed by an Act of the Parliament of Canada; and the *Customs Act of Canada* certainly provides for a duty on all the goods brought into the country by the appellant. Counsel for the appellant points to the words "notwithstanding any other law heretofore enacted" and argues that the rights upon which the appellant bases his claim under the *Jay Treaty* do not arise under any enactment. For the reasons already given, I cannot agree that any relevant rights of the appellant within that Treaty are judiciable in the Courts of this country.

The appeal should be dismissed with costs.

The judgment of Rand and Cartwright JJ. was delivered by:—

RAND J.:—The appellant, Louis Francis, is an Indian within the definition of that word in the *Indian Act,* R.S.C. 1952, c. 149, s. 2(1)(*g*) and resides on the St. Regis Indian Reserve in Quebec. The latter is part of a larger settlement of the St. Regis tribe extending into the United States and is bounded on the south by the international boundary between the two countries. Between 1948 and 1951 Francis purchased an electrical washing machine, a second-hand oil burner or heater and an electric refrigerator in the United States; two of these were brought over or from the international boundary to his home in the reserve by Francis and the other delivered by the seller. They were not reported at the customs office for the district and some time

later were seized and held until the duty amounting to $123.66 was paid. The petition of right was thereupon brought for the return of these moneys.

The claim is based first on that clause of art. 3 of the *Jay Treaty* between Great Britain and the United States of 1794 which stipulates:

> No Duty on Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

and on the 9th article of the Treaty of Ghent, 1815, between the same states which, as regards Great Britain, reads:

> And His Britannic Majesty engages, on his part, to put an end, immediately after the Ratification of the present Treaty to hostilities with all the Tribes or Nations of Indians with whom he may be at War at the time of such Ratification; and forthwith to restore to such Tribes or Nations, respectively, all the Possessions, Rights and Privileges, which they may have enjoyed or been entitled to in 1811, previous to such hostilities: Provided always, that such Tribes or Nations shall agree to desist from all hostilities against His Britannic Majesty, and his Subjects, upon the Ratification of the present Treaty being notified to such Tribes or Nations, and shall so desist accordingly.

The contention is put as follows: art. 3 effects the enactment of substantive law not requiring statutory confirmation as being a provision in a treaty of peace, the making of which is in the exercise of the prerogative including, here, a legislative function; on the true interpretation of the treaty the article was intended to be perpetual and was not affected by the war of 1812; in any event it was restored by the 9th article of 1815.

A second ground is that the appellant is exempted from liability for the duties of s. 102 of the *Indian Act*, R.S.C. 1927, c. 98 and by s. 86(1) of c. 149, R.S.C. 1952. These read:

> 102. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.
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> * * *

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Rand J.

86. (1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to Section 82, the following property is exempt from taxation, namely,

(*a*) the interest of an Indian or a band in reserve or surrendered lands, and

(*b*) the personal property of an Indian or band situated on a reserve, and no Indian or band is subject to taxtion in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property . . .

Cameron J., dismissing the petition, held that art. 3 required statutory confirmation to become effective as law, of which there was none; that the article was abrogated by the war of 1812; that the exemption was negatived by s. 49 of the statutes of Canada, 1949, 2nd Session; and that the sections of the *Indian Acts* quoted did not extend to customs duties. Art. 9 of the Treaty of Ghent was not, evidently, brought to his attention nor apparently the distinction in respect of the scope and power of the prerogative urged before us between a treaty of peace and other treaties.

A peace treaty in its primary and legitimate meaning is a treaty concluding a war, "an agreement"—in the words of Sir William Scott in the *Eliza Ann and others* (1)—"to waive all discussion concerning the respective rights to the parties and to bury in oblivion all the original causes of the war." The Treaty of Paris, 1783 was of that nature; it recognized the independence of the United States, fixed boundaries, secured the property of former and continuing subjects and citizens in both countries against prosecution and against confiscation of their property, provided for the withdrawal of British troops from the lands of and border points in the United States and for other matters not germane here.

The question of the Indians, however, was left untouched, and during the years that followed they presented both governments with problems of reconciliation. Generally speaking, the tribes in the east between New York state and the Ohio river, and in particular those belonging to the confederation known as the Six Nations had tended to support the British, and the bitterness then aroused continued after the peace. No clear political conception had been formulated of the relationship of the Indians either to the

(1) (1873) 1 Dods. 244, 248.

old or the new government especially in respect of rights in the lands over which the natives had formerly roamed at will; and their protest was that the British had purported to transfer to the United States, a title which they did not possess. As a measure of mitigation, the British conceived the idea of setting apart a neutral zone between the two countries for Indian settlement, but this did not, apparently, develop to the point of definite proposal. In addition to this, charges and countercharges were made by both countries of failure to carry out the terms of the treaty in such matters as the return of slaves, the confiscation of properties, the prosecution of individuals and the withdrawal of British troops from fortified border points. These, with the events developing in Europe and the need of both for the restoration of trade, induced a common desire to remove these frictions, which eventuated in the treaty of 1794: (Jay's Treaty, A Study in Commerce and Diplomacy, Bemis, pp. 109 et seq.)

Assuming, then, a broader authority under the prerogative in negotiating a peace treaty, neither the causes nor the purposes of the treaty of 1794 bring it within that category.

A treaty is primarily an executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities; but as will be seen, its implementation may call for both legislative and judicial action. Speaking generally, provisions that give recognition to incidents of sovereignty or deal with matters in exclusively sovereign aspects, do not require legislative confirmation: for example, the recognition of independence, the establishment of boundaries and, in a treaty of peace, the transfer of sovereignty over property, are deemed executed and the treaty becomes the muniment or evidence of the political or proprietary title. Stipulations for future social or commercial relations assume a state of peace: when peace is broken by war, by reason of the impossibility of their exercise, they are deemed to be abrogated as upon a failure of the condition on which they depend. But provisions may expressly or impliedly break in upon these general considerations; the terms may contemplate continuance or suspension during a state of war. The interpretation is according to the rules that govern

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that of instruments generally; from the entire circumstantial background, the nature of the matters dealt with and the objects in view, we gather the intention of the parties as expressed in the language used. When such matters touch individuals, the judicial organ must act but a result that brought about non-concurrence between the judicial and the executive branches, say as to abrogation, and apart from any question of an international adjudication, would, to say the least, be undesirable.

Except as to diplomatic status and certain immunities and to belligerent rights, treaty provisions affecting matters within the scope of municipal law, that is, which purport to change existing law or restrict the future action of the legislature, including, under our constitution, the participation of the Crown, and in the absence of a constitutional provision declaring the treaty itself to be law of the state, as in the United States, must be supplemented by statutory action. An instance of the joint involvement of executive, legislative and judicial organs is shown by the provisions of the treaty of 1783 respecting the holding of lands in the United States by subjects of Great Britain, including their heirs and assigns, and vice versa. These were supplemented by 37 Geo. III, c. 97 which was declared to continue so long as the treaty should do so and no longer. In *Sutton* v. *Sutton* (1), the Master of the Rolls, Sir John Leach, held that this provision was not annulled by the war of 1812, that so far the statute remained in force and that "the heirs and assigns of every American who held lands in Great Britain at the time mentioned in the Act of 37 Geo. III are, so far as regards these lands, to be treated not as aliens but as native subjects."

To the enactment of fiscal provisions, certainly in the case of a treaty not a peace treaty, the prerogative does not extend, and only by legislation can customs duties be imposed or removed or can the condition under which goods may be brought into this country be affected. I agree, therefore, with Cameron J. in holding that legislation was necessary to bring within municipal law the exemption of the clause in question. Legislation to that effect was enacted, in Upper Canada by 41 Geo. III, c. 5, s. 6, repealed by 4 Geo. IV, c. 11; in Lower Canada by the enabling

(1) 39 E.R. 255.

statute, 36 Geo. III, c. 7 and the ordinance of 1796 made thereunder, the former having been continued by annual renewals up to January 1, 1813 when it lapsed. No legislation is suggested to have been passed by any other province. For over a century, then, there has been no statutory provision in this country giving effect to that clause of the article.

The particular privilege lay within a structure of settled international relations between sovereign states and from its nature was not viewed as intended to be perpetual. Following the treaty of 1783 large scale transfers of Indians belonging to the Six Nations and more western tribes took place from the United States to lands north of Lake Erie. This was a major step which was bound to affect materially the circumstances instigating the clause.

But the Indians north of the boundary were not confined to the district between Montreal and Detroit: they inhabited also the eastern maritime provinces and the territories to the west of central Canada; these were within the general language but there has been no suggestion that the treaty was significant to them, much less that they have ever claimed its privilege.

In 1794 European settlement of North America was in its early stages. In 1768 a treaty had been made with the Indians that had placed the western boundary of the advance south of the Great Lakes at the Ohio river. The lands to the north and west of those lakes were within the charter granted to the Hudson's Bay Company. The section of the international boundary from the Lake of the Woods to the Rocky Mountains was not fixed until 1818 and that beyond to the Pacific ocean until 1846. Confederation succeeded in 1867 and a few years later drew within its orbit all the territory reaching to the Pacific and the far north. Government in relation to the Indians was thus greatly extended. Continuing the administration inaugurated by Sir William Johnson in 1744 and extended to Quebec in 1763, (Canada and Its Provinces, Vol. IV, p. 695 et seq.) ordinances for the welfare of the Indians and the protection of their lands were passed in Lower Canada as early as 1777 and a partial consolidation was

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made in 1840 by 3-4 Vict., c. 44. In Upper Canada, 5 William IV, c. 9 and 2 Vict., c. 15 provided similar safeguards. Legislation of the province of Canada, 13-14 Vict., c. 42, 14-15 Vict., c. 106 and 20 Vict., c. 26 had in view the preservation of their settlements and their gradual introduction to the customs and mode of life of western civilization. Then 31 Vict., c. 42 committed the management of their lands to the Department of the Secretary of State and by 32-33 Vict., c. 6 comprehensive provision was made for their gradual enfranchisement and the management of their affairs. These enactments were consolidated by 43 Vict., 28 and this with modifications has now become the present *Indian Act*.

Indian affairs generally, therefore, have for over a century been the subject of expanding administration throughout what is now the Dominion, superseding the local enactments following the treaty designed to meet an immediate urgency. In the United States the last statutory provision dealing with duties on goods brought in by Indians was repealed in 1897. This appears from the case of *United States* v. *Garrow* (1). In that case, also, it was pointed out that under the Ghent treaty the contracting parties merely "engaged" themselves to restore by legislation the "possessions, rights and priveleges" of the Indians enjoyed in 1811 but that no such enactment had been passed. The article itself was held to have been abrogated by the war of 1812: *Karnuth* v. *United States* (2). In the last decade of the 18th century peace had been reached between the United States and the tribes living generally between Lake Champlain and the Mississippi river. There followed the slow but inevitable march of events paralleled by that in this country; and today there remain along the border only fragmentary reminders of that past. The strife has waged over the free and ancient hunting grounds and their fruits, lands which were divided between two powers, but that life in its original mode and scope has long since disappeared.

These considerations seem to justify the conclusion that both the Crown and Parliament of this country have treated the provisional accommodation as having been replaced by an exclusive code of new and special rights and privileges.

(1) 88 Fed. R. (2nd) 318 at 321. (2) 279 U.S. 231.

Appreciating fully the obligation of good faith toward these wards of the state, there can be no doubt that the conditions constituting the raison d'être of the clause were and have been considered such as would in foreseeable time disappear. That a radical change of this nature brings about a cesser of such a treaty provision appears to be supported by the authorities available: McNair, The Law of Treaties, 378-381. Assuming that art. 9 of the Treaty of Ghent extended to the exemption, it was only an "engagement" to restore which, by itself, could do no more than to revive the clause in its original treaty effect, and supplementary action was clearly envisaged. Whether, then, the time of its expiration has been reached or not it is not here necessary to decide; it is sufficient to say that there is no legislation now in force implementing the stipulation.

There remains the question of exemption under s. 102 of c. 98, (1927) and s. 86(1) of c. 149, R.S.C. 1952, the former of which was repealed as of June 20, 1951. I can find nothing in these provisions that assists the appellant. To be taxed as by s. 102 "at the same rate as other persons in the locality" refers obviously and only to personal or real property under local taxation; it cannot be construed to extend to customs duties imposed on importation.

Similarly in 86(1), property "situated on a reserve" is unequivocal and does not mean property entering this country or passing an international boundary. On the argument made, the exemption would be limited to situations in which that boundary bounded also the reserve and would be a special indulgence to the small fraction of Indians living on such a reserve, a consequence which itself appears to me to be a sufficient answer.

The appeal must therefore be dismissed and with costs if demanded.

The judgment of Kellock and Abbott JJ. was delivered by:—

KELLOCK J.:—The appellant, who is described in the petition herein as "an Indian subject to the provisions of the *Indian Act*, Statutes of Canada 1951 Chapter 29", at all material times resided at the St. Regis Indian Reserve,

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Cornwall Island. It is contended on his behalf that contrary to Art. 3 of the *Jay Treaty* of the 19th November, 1794, between His Britannic Majesty and the United States of America, he was improperly charged customs duty on certain articles brought into Canada on or subsequent to the 19th of October, 1951. Art. 3 of the treaty reads in part as follows:

> No Duty on Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

The appellant contends (1) that this article became part of the municipal law in Canada without the necessity of any legislation either authorizing it or confirmatory thereof, and (2) that there is no legislation subsequently enacted which affects the right claimed.

In view of the conclusion to which I have come with respect to the second point, I do not find it necessary to consider the first. The appellant admits that at least since the Statute of Westminster 1931, it was competent to Parliament to legislate with respect to the right claimed.

S. 86(1) of the *Indian Act*, R.S.C. 1952, c. 149, reads as follows:

> 86(1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 82, the following property is exempt from taxation, namely,
>
> * * *
>
> (*b*) the personal property of an Indian or band *situated on a reserve*, and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (*a*) or (*b*) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act* on or in respect of other property passing to an Indian.

Before the property here in question could become situated on a reserve, it had become liable to customs duty at the border. There has been no attempt to impose any other tax.

Section 89(1) and (2) reads as follows:

89(1) For the purposes of sections 86 and 88, personal property that was

(*a*) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(*b*) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

(2) Every transaction purporting to pass title to any property that is by this section *deemed to be situated on a reserve,* or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

It is quite plain from this section that the actual situation of the personal property on a reserve is contemplated by s. 86 and that any argument suggesting a notional situation is not within the intendment of that section.

It is, moreover, provided by s. 87 that

87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

I think it is quite clear that "treaty" in this section does not extend to an international treaty such as the *Jay Treaty* but only to treaties with Indians which are mentioned throughout the statute.

In my opinion the provisions of the *Indian Act* constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the *Customs Act* or the *Customs Tariff Act* is to be found in the *Indian Act,* the terms of such general legislation apply to Indians equally with other citizens of Canada.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gowling, MacTavish, Osborne & Henderson.*

Solicitor for the respondent: *F. P. Varcoe.*

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*Apr. 30
*Jun. 11

UNIVERSAL FUR DRESSERS AND DYERS LIMITED ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Excise tax—Sheepskin processed into "mouton"—Whether fur or not—Excise Tax Act, R.S.C. 1927, c. 179, s. 80A.

The appellant purchased the raw skins of mature shearlings (a sheep that has been shorn once) of the merino type and processed them into "mouton". The Crown claimed that "mouton" was a fur and therefore subject to excise tax under s. 80A of the *Excise Tax Act*, R.S.C. 1927, c. 179. This claim was allowed by the Exchequer Court.

Held: The appeal should be allowed.

A consideration of all the evidence and of the authorities and dictionary definitions brings one to the conclusion that neither in technical terms nor in common speech nor in that of those who deal in such products would the skin of a mature merino sheep with the wool or hair attached to it be described as a fur. It does not appear to be possible to take an article or substance which is not fur and by dressing and dyeing it to produce a dressed or dyed fur. The merino sheep is a wool-bearing animal and not a fur bearing one.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J. (1), in an action to recover excise tax.

J. J. Spector, Q.C. and *H. Plaxton* for the appellant.

W. R. Jackett, Q.C. and *K. E. Eaton* for the respondent.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of Cameron J. dated March 17, 1954 declaring that the respondent is entitled to recover $573.08 Excise Tax together with certain penalties and costs.

The action was brought for the purpose of determining whether the product sold by the appellant and described as "mouton" was subject to tax under s. 80A of the *Excise Tax Act* which, so far as relevant, reads as follows:—

80A 1. There shall be imposed, levied and collected, an excise tax equal to fifteen per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—

(i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or

(ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.

*PRESENT: Kerwin C.J., Taschereau, Cartwright, Fauteux and Nolan JJ.

(1) [1954] Ex. C.R. 247.

The product in question and the methods used in preparing it for sale are described in detail in the evidence. The appellant purchases the raw skins of shearlings of the merino type usually from abattoirs but sometimes from wool pullers. A shearling is a sheep that has been shorn once. Most of the skins used by the appellant are purchased in car-load lots from the United States. After being subjected to processes which are described in detail in the reasons of the learned trial judge and being dyed the end product closely resembles certain types of fur such as beaver, nutria or seal.

It should be mentioned that, while the learned trial judge refers in his reasons to the skins purchased by the appellant as coming from a young lamb of the merino type, both counsel agreed that in fact the skins are those of mature sheep.

The main contest at the trial was as to whether "mouton" was fur or was a product other than fur which had been prepared to simulate fur. The learned judge found that it was a fur, that it was unnecessary to decide whether it had been dressed as it had admittedly been dyed, and that, consequently, it was subject to tax.

The learned judge states that he had no reason to question the honesty or sincerity of any of the witnesses and his findings do not turn on any question of credibility.

In the course of his reasons the learned trial judge says:—

> Counsel for the defendant submits that in order to bring his client within the liability imposed by s. 80A, the Crown must establish that what it did was to dress, or dye, or dress and dye, a fur, and he argues, therefore, that the first and main question for determination is this—Is a sheepskin (or the Merino type shearling which his client bought) a fur? He contends, of course, that no one would consider what he calls "a barnyard sheepskin" to be a fur.
>
> In my view, however, that is not the question to be answered. It is rather this. Was that which the defendant delivered ("mouton")—a dyed fur or a dressed and dyed fur?"

With the greatest respect, it seems to me that the form in which the learned judge states the question tends to becloud the issue. It does not appear to me to be possible to take an article or substance which is not fur and by dressing and

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dyeing it to produce a dressed or dyed fur. Its appearance may be changed so that no-one but an expert can say that it is not a fur but its substance remains unaltered.

The evidence relied upon by the respondent relates almost entirely to the end product rather than the original skin. A consideration of all the evidence and of the authorities and dictionary definitions to which we were referred, brings me to the conclusion that neither in technical terms nor in common speech nor in that of those who deal in such products would the skin of a mature merino sheep with the wool or hair attached to it be described as a fur.

The evidence shews that while "persian lamb" has long been described as a fur, it is distinguished from the pelts of other types of lamb or sheep. In the Encyclopaedia Britannica (1952) Vol. 20 at page 475, domestic sheep are grouped into six types. The Merino sheep is placed in the "Fine-wool type", while the only breeds placed in the "Fur type" are Karakul and Romanov, the former including "persian lamb".

While the regulations to be mentioned have an object different from that of the Excise Act, it is of some assistance in deciding the meaning commonly attributed to the words "fur" or "fur-bearing" to observe that in the regulations made by P.C. 2336 (1951) fur-bearing and wool-bearing animals are contrasted with each other. Clause 1(*d*) reads as follows:—

> (*d*) "fur" means the skin of any animal, whether fur-bearing, hair-bearing, or wool-bearing, that is not in the unhaired condition;

No such definition is contained in the *Excise Act*.

In my opinion the merino sheep is a wool-bearing animal and not a fur-bearing one, its skin although with the wool attached is not a fur, and it is not, and could not be, transmuted into a fur by the processes to which it is subjected.

It follows that I would allow the appeal and dismiss the information with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Plaxton & Company.*

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

HER MAJESTY THE QUEEN .....APPELLANT;

AND

GERARD GAGNON .....RESPONDENT.

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*Mar. 19, 20
*Jun. 11

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

Criminal law — Conspiracy to commit offence — Method of proof — Ss. 471(b)(c)(e) and 573 of the Criminal Code.

The respondent was convicted of having conspired with others to commit the offences covered by s. 471(*b*)(*c*) and (*e*) of the *Criminal Code*. The conviction was quashed by a majority in the Court of Appeal on the ground that there was no evidence to support it.

Held: The appeal should be allowed.

In law, it is not a valid objection to a conviction for conspiracy to contend that the accused was obliged to meet the proof of the substantive offence of which, however, he was not charged. Likewise, it matters little that in the description of the substantive offence, as is the case for the offences created by s. 471, the accused has the burden of justifying certain acts which, without that justification, are deemed criminal. Those who conspire to commit these acts and commit them are liable to be prosecuted for conspiracy, and the theory of the law on conspiracy, as well as on the methods of proof, is the same.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, Province of Quebec (1), quashing, Rinfret J.A. dissenting, the respondent's conviction on a charge of conspiracy to commit an offence under s. 471 of the *Criminal Code*.

P. Miquelon, Q.C. and *A. Dumontier, Q.C.* for the appellant.

R. Cannon, Q.C. and *L. Corriveau* for the respondent.

The judgment of the Court was delivered by:—

FAUTEUX J.:—A l'issue d'un procès expéditif, l'intimé fut déclaré coupable sur un acte d'accusation libellé comme suit:—

1° Entre le premier novembre 1952 et 4 mars 1953, à Québec, à St-Gabriel de Valcartier, dans le district de Québec et ailleurs dans la Province de Québec, GERARD GAGNON, de la cité de Québec, a comploté avec André de Lachevrotière alias André de Chavigny et Paul de Lachevrotière alias Paul de Chavigny et autres personnes à être identifiées ultérieurement pour commettre un acte criminel, à savoir: pour employer

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

(1) Q.R. [1953] Q.B. 820.

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des plaques ou matière quelconque sur lesquelles est gravé ou tracé quelque chose qui est supposé la totalité ou quelque partie d'un billet de banque ou qui paraît destiné à y ressembler dans le but d'imprimer quelque partie d'un billet de banque, C. Cr. 471(*b*)(*c*)—573; et

2° entre le premier novembre 1952 et le 4 mars 1953, à Québec, à St-Gabriel de Valcartier, dans le district de Québec et ailleurs dans la Province de Québec, GERARD GAGNON, de la cité de Québec, a comploté avec André de Lachevrotière alias André de Chavigny et Paul de Lachevrotière alias Paul de Chavigny et autres personnes à être identifiées ultérieurement pour commettre un acte criminel, à savoir: utiliser du papier destiné à imiter le papier à billets d'une corporation poursuivant les opérations de banque, à savoir: la Banque du Canada, C. Cr. 471(*e*)—573.

Par jugement formel, déclarant "qu'il n'y a aucune preuve de nature suffisante pour justifier le jugement de culpabilité", la Cour d'Appel, par une majorité, a acquitté l'intimé et cassé la sentence prononcée contre lui.

De ce jugement, la Couronne se pourvoit devant cette Cour, ayant préalablement obtenu permission de soumettre que la Cour d'Appel avait erré sur les points suivants:—

(*a*) In interpreting the charges as alleging a conspiracy to issue counterfeit money, and in dealing with the issue from that point of view;

(*b*) In disregarding certain evidence of acts of the accused and the named co-conspirators constituting elements of the offence alleged to be the objects of the conspiracy, as being in the circumstances inadmissible to either charge of conspiracy;

(*c*) In holding that through the admission of evidence of the acts mentioned in (*b*), the accused was denied a trial according to law by being forced in effect to defend himself against both the charges of conspiracy and of the substantive offence;

(*d*) In acquitting the accused on the ground that after excluding the evidence of the acts mentioned in (*b*) there was then before the Court no evidence of any agreement between the alleged conspirators either to effect an illegal object or by means of illegal means to accomplish a legal object;

(*e*) In holding or assuming that the alleged purpose of printing in whole or part the bank note or notes, i.e. to demonstrate the effectiveness of the subject-matter of the Serre patent either to the alleged co-conspirators or to trust or other companies or persons interested in the issue of securities, was a defence;

(*f*) In holding, on the assumption stated in (*e*), that after excluding the evidence of the acts mentioned in (*b*), the proof was equally consistent with the innocence of the accused;

(*g*) In holding on the evidence, after excluding that on the whole of the evidence adduced the proof was equally consistent with the innocence of the accused;

(*i*) In holding that the trial judge improperly refused to allow the defence to introduce certain evidence offered to establish legal justification or excuse for making the plate.

Pour déterminer cette cause, il n'est pas nécessaire d'entrer dans le détail de chacun de ces points. Il suffit des considérations suivantes.

Aux raisons de jugement de la majorité, on reconnaît que l'intimé a commis l'offense substantive faisant l'objet du complot dont il a été accusé. C'est ainsi qu'on dit:—

> Le juge (au procès), comme l'avocat de la Couronne d'ailleurs, s'est attardé à exposer, à déduire et à conclure que l'appelant avait, sans autorisation ni excuse légitime, imprimé le verso d'un billet de banque. Il n'y a aucun doute que l'appelant l'a fait, en partie.

Et plus loin:—

> Sans doute qu'elle (la Couronne) a prouvé que l'appelant, à la connaissance des deux Chavigny, a imprimé le verso d'un billet de banque de dix dollars.

On reconnaît également l'existence d'une entente, entre Gagnon et les frères Chavigny, n'ayant d'autre objet que l'acte ci-dessus imputé à Gagnon, même si, par ailleurs, on prête, en fait, à cette entente, un motif qui, en droit, soumet-on, la rendrait non criminelle.

> Jamais, dit-on, n'ont-ils (les Chavigny) admis une entente quelconque pour imprimer de la fausse monnaie. Bien au contraire, ils ont compris que l'appelant tentait de se servir de son brevet comme moyen de déceler les faux billets de banque et—ajoutent-ils—on espérait pouvoir le céder contre considération avantageuse, l'un des Chavigny participant au profit anticipé en donnant à l'appelant une part substantielle d'actions d'une exploitation minière.
>
> A aucun moment, en aucune occasion, les frères Chavigny ont-ils admis avoir formé une entente avec l'appelant pour l'impression de papier monnaie.
>
> * * *
>
> Le brevet que possédait l'appelant avait pour but de déceler la fausse monnaie. Ce brevet n'est pas fallacieux car il est exploité dans certains pays européens. C'est sur cette base et avec l'espoir raisonnable qu'on pouvait en attendre que les frères Chavigny furent convenus d'échange matériel réciproque avec l'appelant.
>
> * * *
>
> Dans l'espèce, on ne peut hésiter un moment à conclure que les frères Chavigny n'ont conclu avec l'appelant qu'une entente se rapportant à l'exploitation de son brevet, lequel avait précisément pour but d'intégrer dans les billets de banque un dessin particulier et exclusif.

La preuve révèle que pour l'obtention du matériel requis à l'exécution de leur entente, l'intimé et les Chavigny ont eu recours à la supercherie, à de fausses représentations et à l'emploi de noms fictifs. A cette preuve, on ne trouve aux raisons de la majorité, aucune référence. Pour sa part, le Juge au procès en a déduit que l'intimé et ses complices

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étaient conscients qu'aucune autorité ou excuse légitime ne couvrait ni leurs agissements ni l'entente y présidant. Concluant qu'il y avait eu complot pour mettre en circulation de faux billets de banque, il a trouvé l'intimé coupable de l'accusation telle que portée, soit de complot avec d'autres personnes pour faire certains de ces actes qui conduisent à la mise en circulation de faux billets de banque et que, pour cette raison, la loi défend spécifiquement, à l'article 471 du *Code Criminel*.

La majorité en Cour d'Appel aurait, aux vues de l'appelante, erronément interprété l'acte d'accusation comme comportant une accusation de complot pour mettre en circulation de faux billets de banque. Certes, certains passages des raisons de jugement supportent cette prétention; mais il n'est pas nécessaire de s'y arrêter. Dans les vues de la majorité, "l'erreur fondamentale de jugement de première instance" résiderait dans les faits suivants:—

> Dans l'espèce, dit-on, l'appelant fut cité en justice pour avoir conspiré avec d'autres personnes dans le but d'imprimer, en totalité ou en partie, de faux billets de banque sans autorisation légale et sans excuse légitime. On saisit immédiatement que si la poursuite, loin de se restreindre à la preuve d'une entente, entre dans le champ de la preuve du délit même, l'accusé est acculé à se défendre à la fois de deux délits: le premier, susceptible de s'établir sans qu'il ait à offrir une défense (la conspiration), et l'autre qui peut être prouvé (le délit même), s'il n'offre pas une défense pour le repousser, c'est-à-dire s'il ne tente la justification de son acte.

Comme le signale Kenny, dans *Outlines of Criminal Law*, 13e éd. page 294, il est rare que l'on puisse établir par des preuves directes le fait même du complot; car, en raison de leur nature même, ces accords sont généralement conclus d'une manière aussi sommaire que secrète. Aussi ne peut-on, le plus souvent, les établir, qu'en les déduisant de la conduite des parties. Parfois un acte manifeste de celles-ci tend incontestablement à la réalisation du but allégué, au point de faire supposer que cet acte est la conséquence d'un accord conclu en vue dudit but. De plus, en contractant l'accord, chaque partie adopte tous ses complices en qualité d'agents chargés de l'aider à en assurer la réalisation. Aussi en vertu des principes relatifs au principal et à l'agent, tout acte accompli dans ce but par l'un des agents peut-il être invoqué comme preuve contre l'auteur principal. Cette théorie s'applique naturellement, dit l'auteur, à tous les délits dans lesquels plusieurs personnes sont mises en cause.

et non aux seuls procès pour complot. Cette dernière proposition a été particulièrement approuvée par cette Cour dans *Koufis* v. *His Majesty the King* (1). Aussi bien, en droit, on ne peut reconnaître comme grief valide le fait que dans un procès pour complot, un accusé soit dans l'obligation de faire face à la preuve de l'offense substantive dont, cependant, il n'est pas accusé. Il importe peu également que dans la description de l'offense substantive, comme c'est le cas pour les offenses créées par l'article 471, soit imposé à l'accusé le fardeau de se justifier d'avoir commis des actes qui, sans cette justification, sont tenus comme criminels. Ceux qui s'entendent pour commettre ces actes et les commettent sont passibles d'être poursuivis pour complot et la théorie de la loi sur le complot, aussi bien que sur les méthodes de preuve, demeure la même. D'ailleurs, en l'espèce, il apparaît clairement du jugement de première instance, que si le Juge a conclu à la culpabilité de l'accusé, ce n'est pas en raison d'une simple absence de preuve de justification, mais en raison de la présence au dossier d'une preuve positive qu'aucune autorité ou excuse légitime ne couvrait les agissements de l'intimé et de ses complices, ou l'entente y présidant. "Il n'y a aucun doute", dit le Juge en conclusion, "que le 3 mars 1953, lorsque la police faisait irruption à Valcartier, elle découvrait un repaire de faussaires."

En présence de cette preuve de supercherie, d'emploi de noms fictifs, de fausses représentations, pour voiler leur participation dans l'obtention des matériaux requis à l'exécution de leur entente, le Juge de première instance n'a pas ajouté foi aux motifs par eux invoqués pour tenter de justifier cette entente et les actes en découlant. Le Juge n'était pas lié, comme on semble vouloir l'impliquer au jugement *a quo,* par les affirmations des Chavigny ou de l'intimé sur le point. Qu'un témoin soit produit par la Couronne ou par l'accusé, peu importe, son témoignage peut être accepté ou rejeté, en totalité ou en partie; et si, particulièrement, certaines affirmations sont contredites ou sont suspectes au regard de toute la preuve, on ne peut reprocher au Juge du procès de les avoir écartées.

(1) [1941] S.C.R. 481 at 488.

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Au jugement de la majorité, on reproche aussi au Juge de première instance et à la Couronne d'avoir refusé à l'accusé la faculté de soumettre certains éléments de preuve. On admet, cependant, qu'on "ne connaît ni l'étendue ni la valeur de ces preuves". Sur le point, l'intimé n'a pu nous éclairer et a éventuellement abandonné ce grief. Enfin, s'il faut dire que c'est à bon droit que la Cour d'Appel a déclaré inadmissible au dossier une certaine preuve apportée par Suzanne Perrault, il ne fait aucun doute, aux raisons de jugement du Juge de première instance, que sans cette preuve, ses conclusions eussent été les mêmes.

Je maintiendrais l'appel.

Appeal allowed.

Solicitors for the appellant: *P. Miquelon* and *A. Dumontier.*

Solicitors for the respondent: *R. Cannon* and *L. Corriveau.*

1955

*May 11

1956

**May 9, 10

*Jun. 11

HER MAJESTY THE QUEEN .....Appellant;

AND

CHARLES MARMADUKE REES .....Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—"Knowingly or Wilfully" contributing to juvenile delinquency—Mens rea—Whether honest belief that child was not a juvenile a defence—Juvenile Delinquents Act, R.S.C. 1952, c. 160.

Under s. 33(1)(*b*) of the *Juvenile Delinquents Act* (R.S.C. 1952, c. 160), the fact that an accused does not know that the girl is a juvenile and honestly and reasonably believes that she is over the age limit, constitutes a good defence.

The respondent was convicted under s. 33 of "knowingly or wilfully" contributing to juvenile delinquency. He had had sexual intercourse with a girl under 18 years of age with her consent. The girl had told him that she was 18 although she was only a few months over 16 and therefore a juvenile under the law of British Columbia.

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*PRESENT: Kerwin C.J., Taschereau, Rand, Locke, Cartwright, Fauteux and Nolan JJ.

***Reporter's Note:* The appeal was first argued on May 11, 1955 before Taschereau, Rand, Estey, Locke and Fauteux JJ. By order of the Court it was re-argued on May 9 and 10, 1956.

The juvenile court judge, stating that he was bound by the decision in *Regina* v. *Paris* (105 C.C.C. 62), held that, as a matter of law, the fact that the respondent honestly believed that the girl was 18 could afford no defence to the charge and made no finding as to whether the respondent did in fact so believe. An appeal to a judge of the Supreme Court of British Columbia was dismissed. But the Court of Appeal for British Columbia allowed a further appeal and ordered that the case be remitted to the judge of the Supreme Court.

This Court granted leave to appeal on two questions of law: (i) Whether the Court of Appeal erred in holding that the respondent could not be convicted unless he knew or was wilfully blind to the fact that the girl was under 18; and (ii) whether it erred in law or exceeded its jurisdiction in remitting the case to the judge of the Supreme Court.

Held (Fauteux J. dissenting): That the appeal should be dismissed, the order referring the case back struck out, the conviction quashed and an acquittal directed.

Per Kerwin, C.J.: The words "knowingly or wilfully" in s. 33(1)(*b*) permitted the respondent to raise the issue of mens rea. There can be no doubt as to the general rule and that where it applies it covers every element of an offence. Consequently, it applied not only to the act which it was alleged contributed to the delinquency, but also to the accused's state of mind as to the girl's age. It was open to the trial judge to register a conviction if he concluded on the evidence, either that the accused knew the girl was under the age fixed by law, or that, notwithstanding his pro forma question to her, he proceeded without a real belief in her answer that she was above the age. The trial judge found neither of these facts.

This Court is in a position to make the order that the Court of Appeal should have made under s. 1014(3) of the old *Criminal Code*.

Per Taschereau J.: There is no valid reason why the word "knowingly" in s. 33 should be interpreted as relating only to the quality of the act, and not to the age of the child. Unless the contrary appears in the statute, that word applies to all the elements of the actus reus.

In view of s. 2 of the *Act* which defines the word "child", and in view of the conclusive evidence heard at the trial, it is impossible to reasonably hold that the girl was not apparently of the age of 18, or that the respondent did not have an honest belief that she had reached that age.

Per Rand and Locke JJ.: The general principle of criminal law is that accompanying a prohibited act there must be an intent in respect of every element of the act, and that is ordinarily conveyed in statutory offences by the word "knowingly". As is seen in s. 33(1) (*a*) and (*b*), the offending act embraces the elements of something done of a certain quality and by or in relation to a "child". The principle would thus extend the word "knowingly" to the age as well as to the conduct. The language of the statute contemplates the application of the principle of mens rea.

It was not shown that the respondent either knew the age of the girl to be under 18 or was otherwise chargeable with that knowledge.

Per Cartwright and Nolan JJ.: The words "knowingly or wilfully" govern the whole of s. 33. Therefore honest ignorance on the part of the accused of the one fact which alone renders his action criminal (in this instance the age of the girl) affords an answer to the charge.

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The jurisdiction of the Court of Appeal under the *Act* being the same as under s. 1014 of the *Criminal Code*, it had no jurisdiction to refer the matter back to the judge of the Supreme Court. Proceeding to give the judgment which the Court of Appeal ought to have given, the appeal should be dismissed as no tribunal acting reasonably could have found it to be established beyond a reasonable doubt that the respondent knew, or was wilfully blind to, the fact that the girl was under age of 18 at the time.

Per Fauteux J. (dissenting): The words "knowingly or wilfully" in the section do not relate to all the constituent elements of the offence which are (1) the doing of an act; (2) contributing to the delinquency; (3) of a child. They relate only to the first. To apply them to the other two elements would permit the accused to substitute his own opinions and have them prevail over the opinion of the court as to whether the act complained of would contribute to delinquency or as to whether the person involved was "apparently" over the age of 18. The accused assumes the risk that the opinion he forms from appearance as to the age of the girl will be the same as the court's opinion.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing the appeal from a conviction under the *Juvenile Delinquents Act*.

L. A. Kelley, Q.C. and *J. J. Urie* for the appellant.

H. A. D. Oliver for the respondent.

THE CHIEF JUSTICE:—It should be held, in accordance with the settled course of judicial decision, that the words "knowingly or wilfully" in s. 33(1)(*b*) of *The Juvenile Delinquents Act*, R.S.C. 1952, c. 160, permitted the respondent to raise the issue of *mens rea*. There can be no doubt as to the general rule and that where it applies it covers every element of an offence. In the present instance it applies not only to the act which it is alleged contributed to the delinquency, but also to the accused's state of mind as to the girl's age. It would be open to the Judge trying the accused to register a conviction if he concluded on the evidence, either that the accused knew the girl was under the age fixed by law, or that, notwithstanding his *pro forma* question to her, he proceeded without a real belief in her answer that she was above that age. Here the trial Judge found neither of these facts as he felt himself bound by *Rex* v. *Paris* (2). On an appeal by the present respondent to Wood J. the latter followed his

(1) 109 C.C.C. 266. (2) [1952] 7 W.W.R. 707; 105 C.C.C. 62.

own judgment in the Paris case. I agree with the Court of Appeal (1) that that decision cannot be supported. *Rex* v. *Prince* (2), does not apply as the statute there in question did not contain the word "knowingly". More to the point are *Emary* v. *Nolloth* (3) and *Groom* v. *Grimes* (4). The Court of Appeal therefore correctly set aside the conviction.

It was suggested that, in view of the holding of this Court in *Welch* v. *The King* (5), the judgment before us was a nullity, (and therefore the order of Wood J. should stand), because it not only allowed the appeal from the judgment of Wood J. but remitted the case to that learned judge. In the *Welch* case, however, the accused had been found guilty on his first trial and, while that conviction had been set aside by the Court of Appeal for Ontario, we held on an appeal from that Court's order affirming a subsequent conviction that the Court of Appeal on the first occasion had not directed an acquittal, or directed a new trial, or made such other order as justice requires as specified in s. 1014(3) of the old *Criminal Code*. Here the respondent had not been tried before and on this appeal we are in a position to make the order that the Court of Appeal should have made.

The respondent has served his sentence and this was a test case in which the Attorney General of British Columbia desired the opinion of this Court on the two points mentioned. Under these circumstances the Order appealed from should be varied by striking out the reference back and by quashing the conviction and directing an acquittal.

TASCHEREAU J.:—The facts in the present case have been fully exposed in the judgments of my colleagues, and it is therefore useless to deal with them once more.

The respondent was charged under s. 33(1)(*b*) of the "Act respecting Juvenile Delinquents". This section reads as follows:—

33. (1) Any person, whether the parent or guardian of the child or not, who, *knowingly or wilfully,*

(1) 109 C.C.C. 266.
(2) (1875) L.R. 2 C.C.R. 154.
(3) (1903) 20 Cox C.C. 507.
(4) (1903) 20 Cox C.C. 515.
(5) [1950] S.C.R. 412.

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(*b*) does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent,

is liable on summary conviction before a juvenile Court or a magistrate to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

He was found guilty by a judge of the Juvenile Court in and for the City of Vancouver, and sentenced to be imprisoned at Oakalla for a term of six months. The magistrate thought that he was bound by the decision of Mr. Justice Wood of the Supreme Court of British Columbia in *Regina* v. *Paris* (1), where it was held:—

> In view of the fact that juvenile court judges in Vancouver have held throughout the past 28 years that, despite the inclusion of the words "knowingly or wilfully" in the Juvenile Delinquents Act, 1929, ch. 46 (Dom.) and in the informations thereunder, the fact that an accused thereunder did not know that the girl in question was a juvenile, i.e., under 18 years of age, and honestly and reasonably believed that she was over 18, does not constitute a good defence, Wood, J. was of the opinion that the contrary should not be held by a single judge of the Supreme Court and, therefore, dismissed an appeal based on said ground, where the girl was in fact 16 years old but told the accused that she was 19, and looked even older.

Appeal in the present case was brought again before Mr. Justice Wood, who still held that the section applied, and that in such circumstances, it was not a valid defence for the accused to say that he believed honestly and reasonably that the girl was over 18, while in fact she had not reached yet that age. He therefore followed his previous decision in *Regina* v. *Paris* (*supra*).

The Court of Appeal reversed that decision and held that upon the express language of the statute which uses the words *"knowingly or wilfully"*, it is a valid defence for an accused to show that he acted upon the honest belief that the girl was 18 years of age. It was therefore ruled that *Regina* v. *Paris* (*supra*) had been wrongfully decided, and could not be considered as a correct exposition of the law.

It has been submitted on behalf of the appellant that the judgment of the Court of Appeal of British Columbia conflicts with a judgment of the Court of Criminal Appeal of England, in the case of *Regina* v. *Prince* (2). In that case, the accused was charged with having *unlawfully* taken

(1) [1952] 7 W.W.R. 707; 105 C.C.C. 62. (2) (1875) 13 Cox C.C. 138.

one Annie Phillips, an unmarried girl being under the age of sixteen, out of the possession and against the will of her father.

Section 55 of the *Offences Against the Persons Act* provided that:—

> Whoever shall *unlawfully* take any unmarried girl under the age of sixteen years of age, out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her shall be guilty of a misdemeanour.

The Court of Criminal Appeal held that it was no defence to an indictment under s. 55 that the defendant bona fide and reasonably believed that the girl was older than sixteen. Baron Bramwell who delivered the judgment of the Court which was assented to by Lord Chief Baron Kelly, Cleasby, B., Grove, J., Pollock, B., Amphlett, B., said at page 142:—

> In addition to these considerations one may add that the Statute does use the word *"unlawfully"* and does not use the words *"knowingly* or not believing to the contrary".

And at page 144:—

> The question, therefore, is reduced to this, whether the words in 24 & 25 Vict. c. 100, s. 55, that whosoever shall unlawfully take "any unmarried girl being under the age of sixteen, out of the possession of her father" are to be read as if they were "being under the age of sixteen, and he knowing she was under that age." No such words are contained in the statute, nor is the word "maliciously", "knowingly", or any other word used that can be said to involve a similar meaning.

It is clear to my mind that the Court implied that if the word *"knowingly"* had been used instead of the word *"unlawfully"*, the decision of the Court would have been different.

It is further submitted that the word *"knowingly"* has reference only to the quality of the act charged and not to the knowledge that the juvenile was in fact a juvenile. I do not believe that this contention can be upheld. A meaning must be given to the word *"knowingly"* in the statute, and it cannot be disregarded. I see no valid reason why it should be interpreted as relating only to the quality of the act, and not to the age of the child. The law makes no such distinction, and I would invade the legislative field if I did attempt to make any.

Since the *Prince* case (*supra*), this word *"knowingly"* has been considered by the courts, and it has been rightly held that when it is found in a statute, full effect must be

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given to it. Unless the contrary appears, it applies to all the elements of the *actus reus*. For instance, the offence of *"knowingly"* selling intoxicants to a person under age is not committed, if the vendor honestly believes the child to be over the required age. (*Groom* v. *Grimes* (1)). In that case, the Court of Appeal of England held:—

> A licence-holder cannot be convicted under sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, for *"knowingly selling"* intoxicating liquor to a person under the age of fourteen years, when he himself has no knowledge of the sale and when the barman who sells the liquor has no knowledge that the person to whom he sells is under the age of fourteen years, but honestly believes that he has attained that age.

If any additional and more recent authorities are needed, vide: (*Rex* v. *Cohen* (2)); (*Gaumont* v. *Henry* (3)).

Professor Glanville Williams in his treatise on "Criminal Law" sums up the jurisprudence on the matter as follows:—

> (*c*) We now see the influence of the word "knowingly", used in a statute, upon the rules relating to ignorance and mistake. On principle the word "knowingly" has no extra effect where the crime requires intention, for intention itself presupposes knowledge of the circumstances. The word "knowingly" does, however, affect the position where the crime can be committed recklessly. If the word is not included in the statute, the party will be deemed to act recklessly unless he mistakes a relevant fact; simple ignorance is not enough. But if the word is inserted, simple ignorance becomes a defence, and it is only knowledge (or its equivalent wilful blindness) that convicts.

Where Parliament in similar offences wishes to eliminate "knowledge" as an essential element, it says so in unmistakable terms. For instance, s. 138(1) of the *Criminal Code* reads:—

> Every male person who has sexual intercourse with a female person who
>
> (*a*) is not his wife, and
>
> (*b*) is under the age of fourteen years, *whether or not he believes that she is fourteen years of age or more,* is guilty of an indictable offence and is liable to imprisonment for life and to be whipped.

Such language is not used in s. 33(1) of the *Juvenile Delinquents Act,* and such a wide difference in the phraseology clearly reveals the intention of the legislator. In the first case "knowledge" is immaterial, but it is essential in the second.

I have therefore reached the conclusion that the interpretation of s. 33 of the *Juvenile Delinquents Act,* as given by the Court of Appeal of British Columbia is right.

(1) (1903) 20 Cox C.C. 515.
(2) [1951] 1 K.B. 505.
(3) [1939] 2 K.B. 711.

Although I would dismiss the appeal, I do not think that any useful purpose can be served in remitting the matter to the lower court, as ordered by the Court of Appeal. In view of s. 2 of the *Act* which defines the word "child", and in view of the conclusive evidence heard at the trial, I am of opinion that it is impossible to reasonably hold that the girl was not apparently of the age of eighteen, or that the respondent did not have an honest belief that she had reached that age.

Subject to the above modification, I would dismiss the appeal and direct the acquittal of the respondent.

The judgment of Rand and Locke JJ. was delivered by

RAND J.:—This appeal involves the interpretation of certain provisions of the *Juvenile Delinquents Act, 1929.* The respondent was convicted of having "knowingly or wilfully" committed an act or acts

producing, promoting, or contributing to Lorraine Brander, a child, being or becoming a juvenile delinquent or likely to make the said child a delinquent. . . .

The girl had told the respondent that she was 18 years old although she was in fact under that age. The question is whether the principle of mens rea applies to the element of the offence as to her age.

"Child" is defined by s. 2(1)(*a*) as

any boy or girl apparently or actually under the age of sixteen years, or such other age as may be directed in any province pursuant to subsection (2);

The age, for the purposes of the prosecution here, was 18 years.

The culpable act is declared in s. 33::—

(1) Any person, whether the parent or guardian of the child or not, who knowingly or wilfully

(*a*) aids, causes, abets or connives at the commission by a child of a delinquency, or

(*b*) does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent,

is liable on summary conviction before a Juvenile Court or a magistrate to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or to both fine and imprisonment.

In the definition of "child", the essential words are "apparently or actually" under the age specified. This expression must necessarily mean "apparently and

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actually" for otherwise an offence could be committed with a person over 21 years who was "apparently" under 18. That is obviously not the intention of the statute.

So read it might be suggested that the apparency is a fact to be found by the magistrate. But to what mind should it be apparent? to the magistrate, to the accused, to the average person of his age, or of any age? Whatever it may be, other language of the statute relieves me from exploring the question further and this is found in s. 33.

Mr. Kelley, on behalf of the Attorney General of British Columbia, argues that the words "knowingly or wilfully" in that section qualify only part of the offence described: the act which contributes to the delinquency. This seems to omit both the appreciation of its relation to the delinquency and the age of the child. But the former is not of materiality here, and it is on the latter that the issue hinges.

The general principle of criminal law is that accompanying a prohibited act there must be an intent in respect of every element of the act, and that is ordinarily conveyed in statutory offences by the word "knowingly". As stated by Professor Glanville Williams in his Criminal Law at p. 131:—

> It is a general rule of construction of the word "knowingly" in a statute that it applies to all the elements of the actus reus.

As is seen in s-s. (1)(*a*) and (*b*) of s. 33, the offending act embraces both the elements of something done of a certain quality and by or in relation to a "child". The principle would thus extend the word "knowingly" to the age as well as the conduct. Is there anything in the statute to exclude its application?

To this the word "wilfully" is significant. Whatever it may mean in other contexts, I think the intention of s. 33 is this that either the offender knows the child to be under the age fixed or that he is indifferent as to age. In this, "wilfully" and as well, "knowingly", hark back to "apparently or actually" and in the combined conception the mind of the accused in relation to the child's age is an essential of the offending act. Where, therefore, there is belief that the child is 18 years or over, the offence is not committed: *Groom* v. *Grimes* (1), where it was held that

(1) (1903) 20 Cox C.C. 515.

the offence of "knowingly" selling intoxicants to a person under 14 is not committed if the barman is not chargeable with knowledge that the child is under 14.

It is said that this *Act*, being intended for the protection of young persons, places the entire risk of age upon the accused; and that was the argument in *Groom* (*supra*). But whatever the policy of Parliament, its intention must be gathered from the language it has used; and on that of the provisions of the *Act* before us, I am in agreement with the Court of Appeal that so far from excluding the principle of mens rea, it contemplates it.

The appeal should, therefore, be dismissed; but as the matter has been fully opened before us, another circumstance must be considered. The accused has already served the sentence of six months imposed upon him. I am inclined to gather from the remarks of the judge of the Juvenile Court that if he had not felt himself bound by the case of *Regina* v. *Paris* (1), he would have dismissed the charge: but in any event it was not shown that the accused either knew the age of the young woman to be under 18 years or was otherwise chargeable with that knowledge. In this situation, the judgment of this Court should be that the order of Wood J. affirming the conviction be vacated and that judgment be entered setting aside the conviction of the Judge of the Juvenile Court and dismissing the charge.

The judgment of Cartwright and Nolan JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (2) whereby the appeal of the respondent from a judgment of Wood J. was allowed and it was ordered, in the words of the formal judgment of the Court of Appeal, "that the case be remitted to the Honourable Mr. Justice Wood in the Supreme Court of British Columbia".

The respondent was convicted on November 23, 1953 before the Judge of the Juvenile Court on the charge that he:—

at the said City of Vancouver, between the 24th and 27th days of October, A.D. 1953, knowingly or wilfully, did unlawfully commit an act or acts producing, promoting or contributing to Lorraine Brander, a child, being or becoming a juvenile delinquent or likely to make the said child a

(1) [1952] 7 W.W.R. 707. (2) 109 C.C.C. 266.

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juvenile delinquent, to wit, by occupying the same bed and by having sexual intercourse with the said Lorraine Brander, contrary to the form of the Statute in such case made and provided.

The effect of the evidence at the trial may be briefly stated. The respondent had sexual intercourse with Lorraine Brander with her consent. The uncontradicted evidence of Lorraine Brander and of the respondent is that prior to the act of intercourse she had told him that she was 18 years of age; he deposed that he would have taken her to be 18 years or older. In fact her age was 16 years and 5 months. In the province of British Columbia a boy or girl under the age of 18 years is a "child" within the terms of the Juvenile Delinquents Act.

The learned Juvenile Court Judge held that, as a matter of law, the fact that the respondent honestly believed that the girl was over the age of 18 could afford no defence to the charge and made no finding as to whether the respondent did in fact so believe.

Pursuant to s. 37(1) of the *Juvenile Delinquents Act* the respondent applied to Wood J. for special leave to appeal; that learned judge granted leave to appeal and having heard the appeal dismissed it. Special leave to appeal to the Court of Appeal was granted by that court and it disposed of the appeal as set out above.

On October 5, 1954, this Court granted leave to appeal from the judgment of the Court of Appeal. This leave having been granted pursuant to s. 41 of the *Supreme Court Act*, the appeal lies only "in respect of a question of law or jurisdiction" (s. 41(3)). Two such questions were argued before us: (i) Whether the Court of Appeal erred in law in holding that the respondent could not be convicted on the charge above set out unless he knew or was wilfully blind to the fact that Lorraine Brander was under the age of 18 years; and (ii) whether the Court of Appeal erred in law or exceeded its jurisdiction in remitting the case to Wood J..

As to the first point, I agree with the reasons and the conclusion of the learned Chief Justice of British Columbia, but wish to add a few observations of a general nature.

Section 7(2) of the *Criminal Code* provides as follows:—

> 7 (2) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

In the case at bar we are concerned with the application of the rule of the common law summed up in the first sentence of the maxim—*Ignorantia facti excusat; ignorantia juris non excusat.* The rule has been stated and applied in countless cases. In *The Queen* v. *Tolson* (1), Stephen J. says at page 188:—

> I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. I am unable to suggest any real exception to this rule, nor has one ever been suggested to me.

and adds at page 189:—

> Of course, it would be competent to the legislature to define a crime in such a way as to make the existence of any state of mind immaterial. The question is solely whether it has actually done so in this case.

The first of the statements of Stephen J. quoted above should now be read in the light of the judgment of Lord Goddard C.J., concurred in by Lynskey and Devlin JJ. in *Wilson* v. *Inyang* (2), which, in my opinion, rightly decides that the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining such essential question.

The question then is as to the true construction of the following words of s. 33(1) of the *Juvenile Delinquents Act,* read in the context of the whole *Act*:—

> Any person . . . who, knowingly or wilfully, . . . does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent, is liable on summary conviction to a fine . . . or imprisonment. . . .

(1) (1889) 23 Q.B.D. 168 at 188.

(2) [1951] 2 All E.R. 237.

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In approaching this question the following rules of construction should be borne in mind. In *Watts and Gount* v. *The Queen* (1), Estey J. says:—

> While an offence of which *mens rea* is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention.

In his book on Criminal Law (1953) at pages 131 and 133, Mr. Glanville Williams says:—

> It is a general rule of construction of the word "knowingly" in a Statute that it applies to all the elements of the *actus reus* . . .
>
> The sound principle of construction is to say that the requirement of knowledge, once introduced into the offence, governs the whole, unless Parliament has expressly provided to the contrary.

In my opinion these passages are supported by the authorities collected by the learned author at the pages mentioned and correctly state the general rule.

In argument counsel for the appellant stressed the case of *R.* v. *Prince* (2); but I agree with Mr. Oliver's submission that it is implicit in the reasons of both Blackburn J. and Bramwell B. that they would have decided that case differently if the section which they were called upon to construe had contained the word "knowingly".

Were the matter doubtful, it would be of assistance to consider the provisions of the Criminal Code which is a statute of the same legislature *in pari materia*. Subsections (1) and (2) of s. 138 of the *Criminal Code* and their predecessors subsections (1) and (2) of s. 301 of the former code, illustrate the type of language employed by Parliament when it is intended to provide that the belief of an accused as to a matter of fact is irrelevant.

> 138 (1) Every male person who has sexual intercourse with a female person who . . . is under the age of fourteen years, *whether or not he believes that she is fourteen years of age or more, is guilty* . . .
>
> 138 (2) Every male person who has sexual intercourse with a female person who . . . is fourteen years of age or more and is under the age of sixteen years, *whether or not he believes that she is sixteen years of age or more,* is guilty . . .

The contrast between the wording of these sub-sections, particularly those portions which I have italicized, and that of s. 33 of the *Juvenile Delinquents Act* is too sharp to be disregarded.

(1) [1953] 1 S.C.R. 505 at 511. (2) (1875) L.R. 2 C.C.R. 154.

While I have already expressed my agreement with the reasons of the learned Chief Justice of British Columbia on this point, I wish to expressly adopt the following passage:—

> In my view of the matter we must start out with the proposition that sexual intercourse with a woman, not under the age of 18 years and with her consent, is not a crime, except under exceptional and irrelevant circumstances. It follows that if the appellant had sexual intercourse with a girl not under 18 years of age he could not be convicted of contributing to her becoming a juvenile delinquent for the simple reason she is not a child within the meaning of the Act.
>
> It is the age factor alone that, in these circumstances, moves the act from a non-criminal to a criminal category.
>
> It follows, it seems to me, that when a man is charged with knowingly and wilfully doing an act that is unlawful only if some factor exists which makes it unlawful (in this instance the age of the girl) he cannot be convicted unless he knows of, or is wilfully blind to, the existence of that factor, and then with that knowledge commits the act intentionally and without any justifiable excuse.

It would indeed be a startling result if it should be held that in a case in which Parliament has seen fit to use the word "knowingly" in describing an offence honest ignorance on the part of the accused of the one fact which alone renders the action criminal affords no answer to the charge.

Turning now to the question whether the Court of Appeal erred in remitting the case to Wood J., it will be observed that the jurisdiction of the Court of Appeal is found in s. 37(1) of the *Juvenile Delinquents Act,* reading as follows:—

> 37 (1) A Supreme Court judge may, in his discretion, on special grounds, grant special leave to appeal from any decision of the Juvenile Court or a magistrate; in any case where such leave is granted the procedure upon appeal shall be such as is provided in the case of a conviction on indictment, and the provisions of the *Criminal Code* relating to appeals from conviction on indictment *mutatis mutandis* apply to such appeal, save that the appeal shall be to a Supreme Court judge instead of to the Court of Appeal, with a further right of appeal to the Court of Appeal by special leave of that Court.

Having granted leave to appeal, the jurisdiction of the Court of Appeal, would appear to be the same as that exercised by it in an appeal from a conviction for an indictable offence, which, at the date of the hearing and determination of the appeal, was to be found in s. 1014 of the *Criminal Code,* the relevant words being:—

> 1014 (1) On the hearing of any such appeal against conviction the court of appeal shall allow the appeal if it is of opinion

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(b) that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law;

(3) Subject to the special provisions contained in the following sections of this Part, when the court of appeal allows an appeal against conviction it may

(a) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

(b) direct a new trial;

and in either case may make such other order as justice requires

I have already indicated my view that the Court of Appeal was right in allowing the appeal on the ground of a wrong decision of a question of law by Wood J.. The judgment of my brother Fauteux in *Welch* v. *The King* (1), concurred in by the majority of the Court, makes it clear that, having decided to allow the appeal, it became the duty of the Court of Appeal (i) to quash the conviction, and (ii) either to direct that a judgment of acquittal be entered, or to direct a new trial. I am unable to find that there was jurisdiction to refer the matter back to Wood J. in the manner set out in the opening paragraph of these reasons. The power "to make such other order as justice requires" is, I think, merely supplemental to the provisions of clauses (*a*) and (*b*) of sub-section (3) of s. 1014.

It remains to consider what order we should make. In my view our duty is to give the judgment which the Court of Appeal ought to have given. I have examined all the evidence with care and have reached the conclusion that it is in the last degree improbable that the learned Juvenile Court Judge would have convicted the respondent if he had instructed himself correctly on the law. Indeed I do not think that any tribunal acting reasonably could have found it to be established beyond a reasonable doubt that the respondent knew, or was wilfully blind to, the fact that Lorraine Brander was under the age of 18 years at the relevant time.

It follows that, in my opinion, the Court of Appeal should have allowed the appeal, quashed the conviction and directed a judgment of acquittal to be entered and I would direct that the judgment of the Court of Appeal should be amended to so provide.

(1) [1950] S.C.R. 412.

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FAUTEUX J. (dissenting):—The respondent was charged before a Judge of the Juvenile Court in and for the city of Vancouver, under s. 33(1)(*b*) of the *Juvenile Delinquents' Act* (1929) c. 46, enacting that:—

> Any person, whether a parent or guardian of a child or not, who knowingly or wilfully
>
> (*a*) . . .
>
> (*b*) does any act producing, promoting or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent, shall be liable on summary conviction before a Juvenile Court . . .

Under the *Act*, a "child" means a boy or a girl under the age of sixteen years or such other age as may be directed in any province, which, in the province of British Columbia, is eighteen. According to the evidence, the female, in relation to whom the offence was alleged to have been committed, was, at the time of its commission, sixteen and therefore a child under and for all the purposes of the *Act*. The accused testified that from her appearance as well as from her own declaration to him, he believed that she was over eighteen. Relying, in fact, on such evidence and submitting, in law, that *mens rea* with respect to the age is of the essence of the offence, counsel for the accused asked for the dismissal of the charge. The merit of this evidence did not have to be considered by the trial Judge as he felt bound by *Regina* v. *Paris* (1), where a same contention as to the law was ruled out. The accused was convicted and his conviction was subsequently maintained by the Hon. Mr. Justice Wood of the Supreme Court of British Columbia, who had decided *Regina* v. *Paris*. The Court of Appeal of British Columbia (2) reached the view that knowledge of the age was of the essence of the offence, allowed the appeal and ordered the case to "be remitted to Mr. Justice Wood for re-consideration upon the issue of *mens rea*." The Crown now brings the latter judgment for review.

The ancient maxim that in every criminal offence there must be a guilty mind cannot now, as illustrated by the cases of *Rex* v. *Prince* (3) and *Rex* v. *Bishop* (4), apply generally to all statutes. It is necessary to look at the object and the provisions of each Act to see whether and how far knowledge is of the essence of the offence created.

(1) [1952] 7 W.W.R. 707.
(2) 109 C.C.C. 266.
(3) (1875) L.R. 2 C.C.R. 154.
(4) (1880) 5 Q.B.D. 259.

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There can be no doubt as to the object of the *Juvenile Delinquents' Act*. Manifested throughout its provisions, and particularly in those of sub-section 2 of section 3, section 38 and section 33, the object is to care, aid, encourage, help and assist misdirected or misguided juveniles and, under section 33, protect them from becoming or being the victims of social or moral degradation in punishing these actions or omissions, of even their own parents or guardians, which, of their nature, are "likely to make *any* child a juvenile delinquent". With respect to the interpretation of the *Act*, reference must be made to section 38 thereof reading:—

> 38. This Act shall be liberally construed to the end that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

In addition to this specific provision, one must also refer to section 15 of the *Interpretation Act* R.S.C. (1952) c. 158, providing that:—

> 15. Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of any thing that Parliament deems to be for the public good, or to prevent or punish the doing of any thing that it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

Under section 33(1)(*b*), the constituent elements of the offence mentioned are (i) the doing of an act; (ii) which, of its nature, does or is likely to produce, promote or contribute to the delinquency; (iii) of a child. What amounts to delinquency is defined in section 2(1)(*h*) and, under section 3(1), delinquency does constitute an offence. It is contended that either of the words "knowingly or wilfully", appearing in the opening phrase of section 33(1)(*b*), are related to all the constituent elements therein mentioned. Undoubtedly, they are related to the first; but the question is whether they are related to all. In my respectful view, it cannot have been the intention of Parliament to leave it to the arbitrary judgment of those very persons mentioned in the opening phrase of section 33—against the

action or omission of whom it was intended to protect juveniles from becoming delinquents—to successfully oppose their views to those of the Court or Judge entrusted with the operation of the *Act*, on the point whether, of its nature, a particular act is one "producing, promoting or contributing to a child's being or becoming a juvenile delinquent or likely to make *any* child a juvenile delinquent." Any person, whether a parent or a guardian, giving to a child a book containing the crudest obscenities, would admittedly do an act forbidden under the section; however, should the evidence of the Crown fail to show that he had knowledge of the contents of the book, the prosecution would fail. But if knowledge is shown, his own views as to whether such book might or might not produce, promote or contribute to a child's delinquency or be likely to make *any* child a juvenile delinquent, would afford no defence, since the act done is precisely the one against which Parliament intended to protect juveniles. If this is so, it cannot be said therefore that the words "knowingly or wilfully" are related to all the constituent elements of the offence. I cannot think either that the same words are related to the age of the juveniles. Again, a child, under the definition enacted for all the purposes of the Act, means any boy or girl "*apparently* or actually" under the age mentioned. Comprehensively, the word "actually" does not include the concepts of uncertainty or of mistake, but the word "apparently" does not exclude them. The belief which a person, contributing to the delinquency of a juvenile the age of whom could not "actually" be determined, might then form from appearance only cannot, at his trial, prevail over the opinion which the Judge must, of necessity, form himself to assert his jurisdiction over the matter, which he only has if a child is involved. Under the Act, a juvenile cannot be, at the same time, a child for purposes of jurisdiction and not a child for other purposes; the definition of a child applies to every provision of the Act where the word is found. Evidence may show that, from appearance, the accused could have mistakenly, but reasonably, formed and did, in fact, form an honest belief that the juvenile was not a child. While such evidence could support a defence based on a mistake of fact in cases where the actual age must definitely be established, it does not follow that such

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a defence obtains in cases, as in the present, where appearance, involving the possibility of mistake, is sufficient. A person contributing to the delinquency of a juvenile assumes the risk that the opinion he forms from appearance as to the age be not the one taken by the trial Judge. Under the Act, knowledge of the actual age is not of the essence of the offence; appearance is sufficient, failing the best evidence as to the age. In my respectful view, Parliament did not intend that the operation of the section be dependent upon the views an accused might form from appearance. What Parliament clearly intended is the protection of children. In none of the cases to which we were referred by respondent, the statutory provisions alleged to have been violated included such a definition of "child" as under the *Act* here considered. I would maintain the appeal and restore the conviction.

Appeal dismissed; conviction quashed; acquittal directed.

Solicitor for the appellant: *H. A. Maclean.*

Solicitor for the respondent: *H. A. D. Oliver.*

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*May 2.
*Jun. 11.

NORTHERN ASSURANCE COMPANY LIMITED (*Defendant*) ..... } APPELLANT;

AND

LILLIE BROWN (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile liability policy—Car driven by third person with insured owner's consent—Unsatisfied judgment against driver—Whether action lies against insurer—Whether prescription—Meaning of "insured"—Insurance Act, R.S.O. 1950, c. 183, ss. 197, 211, 214—Statutory Condition 9(3).

An automobile, insured by the appellant under a motor vehicle liability policy and driven by C. with the owner's consent, struck and injured the respondent. The latter obtained judgment against the driver C. but was unable to collect it.

The respondent then brought this action for indemnity against the appellant as insurer. The action was maintained and the appeal by the insurer dismissed by the Court of Appeal. The appellant contended that a judgment against the owner was a condition precedent to any action against the insurer and that the driver C. was not

*PRESENT: Kerwin C.J., Taschereau, Rand, Locke and Cartwright JJ.

"the insured" under s. 214 of the *Insurance Act*, R.S.O. 1950, c. 183; and furthermore, that the action was barred by statutory condition 9(3) since it had not been started within one year after the cause of action arose.

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

Per curiam: A judgment in favour of the respondent against the owner to whom the policy was issued was not a condition precedent to the bringing of this action by the respondent against the appellant.

C., the driver of the automobile at the time of the accident, was an "insured" under s. 214 of the *Insurance Act*.

Per Kerwin C.J., Taschereau, Rand and Locke JJ.: Statutory condition 9(3) did not apply to the claim of the respondent which was a substantive right given by statute and did not arise under the contract of insurance.

Per Locke J.: Statutory condition 9(3) applied only to actions brought to enforce the insurance contract by the persons insured by it, whether named or not, and by persons claiming under them by assignment.

Bourgeois v. *Prudential Assurance Co.* (1945), 18 M.P.R. 334 not followed.

Per Cartwright J. (*dissenting*): Statutory condition 9(3) barred the action of the respondent. The right of action conferred on the injured party in s. 214(1) of the *Insurance Act* is a right of action under the contract. Assuming that the condition applies only in the case of actions or proceedings under the contract, the respondent's action was under the contract of insurance issued by the appellant to the owner of the automobile.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the judgment at trial.

F. J. Greenwood for the appellant.

J. D. Arnup, Q.C. for the respondent.

The judgment of Kerwin C.J. and Taschereau J. was delivered by

THE CHIEF JUSTICE:—We are all of opinion that for the reasons stated by the learned Chief Justice of Ontario (1) a judgment by the respondent against William J. Schnurr, who had applied to the appellant for an insurance policy and to whom the policy was issued by it, was not a condition precedent to the bringing of this action by the respondent against the appellant; and that Corbett, the driver of the automobile at the time of the accident, was an "insured" under s. 214 of *The Insurance Act*, R.S.O. 1950, c. 183.

(1) [1955] O.R. 373.

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Kerwin C.J.

There is more difficulty in the remaining ground of appeal that the respondent's action was barred by statutory condition 9(3) since it was not brought until after the expiration of one year after her cause of action arose. Bearing in mind the history of *The Insurance Act,* I am of opinion that condition 9(3) does not apply to the claim of the respondent. That claim is a substantive right given by statute and does not arise under the contract. It was suggested that if this be so there is either no period of limitation applicable, or one of twenty years. Even if that be so, I can see no reason to bar the respondent's claim, unless the legislature has seen fit to do so.

The appeal should be dismissed with costs.

RAND J.:—The first ground of appeal is that a judgment against the owner of the car, the person in whose name the policy was issued, was a condition precedent to the right of the respondent to bring action against the company under the provisions of s. 214 of the *Insurance Act,* R.S.O. 1950, c. 183. For the reasons given by the Chief Justice of Ontario, I agree that this ground is not tenable. Mr. Greenwood emphasizes the use of the words "the insured" in the section as meaning the person named in the policy; but the opening line speaks of a person having a claim against "an insured", and he concedes that a person in the position of the respondent driving the car with the permission of the owner would properly be referred to as "an insured". The subsequent references in the section to "the insured" are obviously to the "insured" first mentioned.

Then it is said that the limitation condition 9(3) applies to the respondent. It reads:—

> Every action or proceeding against an insurer under a contract in respect of loss or damage to the automobile shall be commenced within one year next after the happening of the loss and not afterwards, and in respect of loss or damage to persons or property shall be commenced within one year next after the cause of action arose, and not afterwards.

I think an analysis of s. 214 furnishes the answer to this contention. Subsections (1), (4) and (6) are as follows:—

> (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other

judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

(4) It shall not be a defence to an action under this section that an instrument issued as a motor vehicle liability policy by a person engaged in the business of an insurer, and alleged by a party to the action to be such a policy, is not a motor vehicle liability policy, and this section shall apply, *mutatis mutandis*, to the instrument.

(6) Subject to subsection 7, where a policy provides, or if more than one policy, the policies provide for coverage in excess of the limits mentioned in section 211 or for extended coverage in pursuance of subsections 1, 2 and 4 of section 212, nothing in this section shall, with respect to such excess coverage or extended coverage, prevent any insurer from availing itself, as against a claimant, of any defence that the insurer is entitled to set up against the insured.

Section 211 referred to in the last subsection reads:—

Every owner's policy and driver's policy shall insure, in case of bodily injury or death, to the limit of at least $5,000 (exclusive of interest and costs) against loss or damage resulting from bodily injury to or the death of any one person, and, subject to such limit, for any one person so injured or killed, of at least $10,000 (exclusive of interest and costs) against loss or damage resulting from bodily injury to or death of two or more persons in any one accident, or, in case of property damage, to the limit of at least $1,000 (exclusive of interest and costs) for damage to property resulting from any one accident.

Is the action in this case brought "under the contract" as the language of the condition puts it? "Under" means "arising out of", and the phrase, that the contract furnishes the substantive title to the action. On the face of the section, that is not the case here: the statute not only gives a right to sue but it creates its substantive basis, a right against the contractual liability as an asset available, in effect, for execution purposes. Subsection (4) speaks of "an action under this section". The right given is a charge upon the insurance money. But the statutory provisions contemplate insurance with a limit of liability in respect of injury to one person and a limit of total liability arising out of one accident. The judgment against the insurer is that the money be applied for the benefit "of all persons having such judgments or claims". The total claims in one accident, apart from successive accidents, may easily exceed the total amount of the insurance or the limits furnished by s. 211 and this fact excludes, except conceivably where there is only one claimant, an ordinary money judgment.

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Rand J.

That total and its distribution cannot be ascertained until all claims have been determined. I do not attempt to define the status of "claims" there intended, the creditors holding which are to be represented in such an action; but by express words judgment for the application of the money applies to all judgments against the insured regardless of when they were recovered.

The liability toward the insured arising out of one accident is single and is fixed only when all the claims have been adjudicated or reduced to a liquidated sum: condition 9(2) requires either a judgment against an insured or an agreement with the written consent of the insurer as to the amount before action can be brought by the insured on the contract. In *Barrett* v. *Indemnity Insurance Company of North America* (1), it was held by the Court of Appeal that only one representative action can be brought, that is, that no action lies by one of several such creditors on his own behalf only. In many cases the proration of the total or limited insurance among the claimants might be suspended for several years pending final adjudications. In the meantime small claims might not have been appealed with the amount to be apportioned to them meanwhile undeterminable. The practical effect of Mr. Greenwood's argument would be that the representative action must be commenced by the person recovering the first judgment against the insured if security to all is to be achieved. These possibilities, in addition to the creation of the cause of action by the section, going to the several rights of the claimants, the time for bringing the representative action, and the amount to which each may ultimately become entitled in a distribution are incompatible with the conception that applies to each creditor the limitation of condition 9(3).

We have been referred to the case of *Bourgeois* v. *Prudential Assurance Company Limited* (2), in which Harrison J., speaking for a majority of the court, held a similar condition of limitation to apply; but in my opinion, the view expressed by Baxter C.J., dissenting, is the sounder.

I would, therefore, dismiss the appeal with costs.

(1) [1935] O.W.N. 321. (2) (1945), 18 M.P.R. 334.

LOCKE J.:—For the reasons stated by the learned Chief Justice of Ontario in delivering the judgment of the Court of Appeal (1), it is my opinion that Corbett was an insured within the meaning of s. 214(1) of the *Insurance Act*, R.S.O. 1950, c. 183.

It is said for the appellant that the claim is barred by statutory condition 9(3) which provides that every action or proceeding against an insurer under a contract in respect of damage to persons or property shall be commenced within one year next after the cause of action arose. This contention was rejected in the Court of Appeal upon the short ground that the respondent's action is not of the nature referred to in the condition, but one to enforce a statutory cause of action arising under and vested in the respondent by s. 214(1).

In *Bourgeois* v. *Prudential Assurance Company* (2), this question was considered by the Appeal Division of the Supreme Court of New Brunswick. In that case, where the section of the *Insurance Act* and the statutory condition were in the same terms as those in question here, Harrison J. (with whom Grimmer J. agreed) was of the opinion that the right given by the *Insurance Act* was "to sue upon an insurance contract" and that, therefore, the limitation under statutory condition 9(3) applied. It should be said that the learned judge had before dealing with this aspect of the case expressed the view, with which the other members of the court agreed, that as the policy itself had been induced by misrepresentation it was void. Baxter C. J. agreed with Harrison J. upon this issue, while expressing his dissent from the opinion that the action was barred by statute.

Upon this aspect of the matter, I respectfully agree with the opinion of the learned Chief Justice of Ontario. I do not consider that the cause of action vested in the respondent was a right to sue upon the insurance contract issued by the appellant to Schnurr.

In my opinion, some assistance in interpreting the language of statutory condition 9(3) is to be obtained by considering its history and that of s. 214(1) of the *Insurance Act*. Statutory conditions, deemed to be part of every

(1) [1955] O.R. 373. (2) (1945), 18 M.P.R. 334.

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Locke J.

contract of automobile insurance in force in Ontario, were first made part of the *Insurance Act* of that province by the *Ontario Insurance Amendment Act, 1922,* c. 61, s. 14. The condition which, in so far as we are concerned with the matter, corresponded with the present condition 9(3) was condition 8(3) and read:—

> No action to recover the amount of a claim under this policy shall lie against the insurer unless the foregoing requirements are complied with and such action is brought after the amount of the loss has been ascertained either by a judgment against the insured after trial of the issue or by agreement between the parties with the written consent of the insurer and no such action shall lie in either event unless brought within one year thereafter.

It was in this form that the condition appeared as part of s. 175 in the revision of the statutes of 1927.

There was nothing in the *Insurance Act* of Ontario, enabling a person injured through the negligent operation of an automobile to bring an action against an insurance company insuring the owner or the driver against such liability, until the year 1932. The limitation prescribed by statutory condition 8(3), therefore, obviously applied only to actions brought upon the policy by the named insured.

In 1932, extensive amendments were made to the *Insurance Acts* of Ontario, British Columbia and some other provinces of Canada which, in addition to recasting the statutory conditions made part of every automobile insurance policy, gave to a person insured by such a policy, though not named therein, direct resort to the insuring company to recover indemnity in respect of an accident and gave to persons injured by the negligence of an insured person the right to proceed, after recovering a judgment against the insured which could not be realized upon, directly against the company insuring the risk. This is now incorporated in s. 214(1) of the *Insurance Act* of Ontario.

In the 1932 amendment of the Ontario Act (c. 25), statutory condition 8(3) was recast and appeared as statutory condition 9(3) in the following terms:—

> Every action or proceeding against an insurer under a contract in respect of loss or damage to the automobile shall be commenced within one year next after the happening of the loss and not afterwards, and in respect of loss or damage to persons or property shall be commenced within one year next after the cause of action arose, and not afterwards.

It is to be noted that the right of action of the person having the claim against an insured which was given by s. 183*h*(1) of the amendment to the Act of 1932 and which is reproduced in s. 214(1) is

> to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity.

This is to be compared with the right of action given to a person, insured by, but not named in the policy, in the 1932 amendment by s. 183*a*(2), reproduced as s. 207(3) in the present Act, which in terms says that such person

> for that purpose shall be deemed to be a a party to the contract and to have given consideration therefor.

While the decision of the Judicial Committee in *Vandepitte* v. *Preferred Accident Insurance Company* (1) does not affect the question of limitation, the history of that action may be of some assistance in construing the section under consideration. In British Columbia, where statutory conditions in the same terms as those adopted in Ontario in 1922 had been made part of every such insurance contract in the same year by the *Automobile Insurance Policy Act* (c. 35), when the *Insurance Act* of that province was repealed and re-enacted by c. 20 of the statutes of 1925 it contained as s. 24 a provision that where a person incurs liability for injury or damage to the person or property of another and is insured against such liability and fails to satisfy a judgment awarding damages against him, the person entitled to the damages might recover by action against the insurer the amount of the judgment up to the face value of the policy but subject to the same equities as the insurer would have if the judgment had been satisfied.

It was upon this section that the cause of action asserted in *Vandepitte's Case* was based. One Berry was insured against liability in respect of the operation of his automobile by a policy in the form then currently in use in British Columbia which, by its terms, agreed to extend the indemnity to any person driving the car with his permission. Berry's daughter was, by his leave, driving the car when Vandepitte was injured and, when the latter recovered judgment against her and was unable to realize upon it,

(1) [1933] A.C. 70.

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the action was brought against the insuring company. Gregory J., who tried the case, held the plaintiff entitled to recover (1) and this decision was upheld in the Court of Appeal (2). The defendant's appeal to this Court was allowed (3) and the appeal taken to the Judicial Committee was dismissed (4).

The action failed on the ground that Jean Berry, the daughter of the insured named in the policy, was not insured against the liability within the meaning of s. 24, she having no enforceable right against the insuring company, there being no privity of contract between them.

It is a matter of common knowledge among those familiar with insurance matters of this nature at the time that the 1932 legislation was adopted in British Columbia, and it may properly be inferred in Ontario, to remedy the defect in the position of third persons driving with the owner's permission as against the insuring company which had been exposed by the judgment of this Court delivered in October 1931 and to enable persons recovering judgments for damages for negligence against insured persons, named or unnamed, to resort to the insurance moneys to the extent provided. It had been said in this Court, and it was later said in the Judicial Committee, that no person other than the named insured had any right to compel the insuring company to indemnify him, and the 1932 amendment made in the same year, both in British Columbia and Ontario, remedied this situation by the amendment which is now s-s. 3 of s. 207 of the Ontario Act. Having thus provided that the unnamed insured should be deemed to be a party to the contract for the purpose of enforcing its terms, the legislature gave to the person having the claim against the insured, whether named or not, the right not to enforce the contract as if such person were a party to it but to have the insurance money payable under it applied towards satisfaction of his judgment. In addition, the legislation, both in British Columbia and Ontario, provided that no act or default of the insured, before or after the event, in violation of the provisions of the terms of the contract or the provisions of the part of the Act containing these amendments, should prejudice the rights

(1) (1929), 42 B.C.R. 255.
(2) (1930), 43 B.C.R. 161.
(3) [1932] S.C.R. 22.
(4) [1933] A.C. 70.

of the person having the claim against the insured. This, it may be noted, differed from the concluding portion of s. 24 of the British Columbia Act of 1925 which made the rights of such a person subject to the same equities as the insurer would have if the judgment had been satisfied.

The language of the amending section, 183*h*(1), of the 1932 amendment defining the nature of the right given to a person obtaining a judgment against either the named or the unnamed insured was essentially different from that given to an unnamed insured: as to the latter, he might sue upon the contract as a party to it; as to the former, the right given was to resort to the money which would be payable to the insured under the policy in satisfaction of the judgment.

In my opinion, the change in the wording of the former statutory condition 8(3) made by the amendment of 1932 did not affect the matter. The former condition applied to an action "to recover the amount of a claim under this policy": the new condition was made to apply to "every action or proceeding against an insurer under a contract" of the same nature. The former condition, as I have pointed out, applied only to actions by the named insured against the insurer. In my opinion, statutory condition 9(3) applies only to actions brought to enforce the insurance contract by the persons insured by it, whether named or not, and by persons claiming under them by assignment. Had it been intended to extend its application to new causes of action such as that given by s. 183*h*(1), I think the legislation would have said so in terms.

In the *Prudential Assurance Company* case above referred to, Baxter C. J. dissented from the judgment of the majority of the court, his opinion being that the limitation section did not apply, for substantially the same reasons as those which have commended themselves to the Court of Appeal in the present matter. I respectfully agree with these learned judges and would dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—This is an appeal, brought by special leave granted by the Court of Appeal for Ontario, from a judgment of that Court dismissing an appeal from a judgment of Danis J. in favour of the respondent for $1,561.71, with interest and costs.

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On April 4, 1949, the respondent, a pedestrian on a highway was struck and injured by an automobile owned by William J. Schnurr and driven by Louis Corbett with Schnurr's consent. The respondent brought action in the Supreme Court of Ontario against Corbett who defended the action. On November 15, 1951, Wells J. awarded the respondent $1,087.25 damages and costs which were taxed on February 21, 1952, at $474.46, making up the total of $1,561.71 mentioned above. The respondent issued execution but was unable to collect anything on account of her judgment.

The appellant had insured Schnurr under an "owner's policy", as defined in s. 192(*g*) of the *Insurance Act,* R.S.O. 1950 c. 183, in respect of the automobile and such policy was in force at the time the respondent was injured. The policy provided in part:—

> The Insurer agrees to indemnify the Insured, his executors or administrators, and, in the same manner and to the same extent as if named herein as the Insured, every other person who with the Insured's consent uses the automombile, against the liability imposed by law upon the Insured or upon any such other person for loss or damage arising from the ownership, use or operation of the automobile within Canada . . . and resulting from . . . bodily injury to . . . any person.

The limit of the insurer's liability was stated in the policy to be $200,000.

On March 3, 1953, the respondent commenced this action against the appellant pursuant to s. 214 of the *Insurance Act.*

The appeal is based on the following two grounds:—

> (i) that a judgment in favour of the respondent against Schnurr, the insured named in the policy, was a condition precedent to any action by the respondent against the appellant; and that Corbett was not "the insured" under s. 214 of the Insurance Act.
>
> (ii) that the respondent's action was in any event, barred by Statutory Condition 9(3) as such action was not begun against the appellant until 3rd March, 1953, which was more than one year after the respondent's cause of action, if any, arose.

For the reasons given by the learned Chief Justice of Ontario I agree with his conclusion that the first of these grounds should be rejected.

In rejecting the second ground, Danis J. followed the decision of LeBel J. in *Harrison* v. *The Ocean Accident and Guarantee Corporation Ltd.* (1) (reversed on other grounds (2)). In the reasons of the Court of Appeal in the case at bar the matter was dealt with as follows (3):—

> The second ground of appeal is that statutory condition 9(3) bars the respondent's claim in this action because the action by the respondent against the insurer was not brought within one year after the cause of action arose. I agree with counsel for the appellant that the cause of action arose, so far as the insurance of the driver was concerned, when the liability of the driver was established and that the action was not brought within one year thereafter, but, in my opinion, statutory condition 9(3) applies only to an action brought *by a person insured against the insurer,* being a cause of action under the policy of insurance. It does not apply to a cause of action arising under s. 214 (1), which cause of action is statutory and is not a cause of action arising under the contract.

Section 197 of the *Insurance Act* provides that, subject to certain exceptions none of which is applicable in the case at bar,

> (*a*) the conditions set forth in this section shall be statutory conditions and deemed to be part of every contract of automobile insurance and shall be printed on every policy with the heading "Statutory Conditions";
>
> (*b*) no variation or omission of a statutory condition shall be valid nor shall anything contained in any addition to a statutory condition or in the description of the subject matter of the insurance be effective in so far as it is inconsistent with, varies or avoids any such condition.

The statutory conditions were printed in the policy issued to Schnurr. Condition 9(3) is as follows:—

> (3) Every action or proceeding against an insurer under a contract in respect of loss or damage to the automobile shall be commenced within one year next after the happening of the loss and not afterwards, and in respect of loss or damage to persons or property shall be commenced within one year next after the cause of action arose, and not afterwards.

The provisions of s. 214 of the *Insurance Act,* so far as relevant to the question under consideration, are as follows:—

> 214 (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his

(1) [1947] O.R. 889 at 906. (2) [1948] O.R. 499.
(3) [1955] O.R. at 379.

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judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

(2) No creditor of the insured shall be entitled to share in the insurance money payable under any such policy in respect of any claim for which indemnity is not provided by the policy.

(3) (i) No assignment, waiver, surrender, cancellation or discharge of the policy, or of any interest therein or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the policy, and

(ii) no act or default of the insured before or after such event in violation of the provisions of this Part or of the terms of the contract, and

(iii) no violation of the *Criminal Code* (Canada) or of any law or statute of any province, state or country, by the owner or driver of the automobile,

shall prejudice the right of any person, entitled under subsection 1, to have the insurance money applied upon his judgment or claim, or be available to the insurer as a defence to such action.

* * *

(6) . . . where a policy provides . . . for coverage in excess of the limits mentioned in section 211 . . . nothing in this section shall, with respect to such excess coverage . . . prevent any insurer from availing itself, as against a claimant, of any defence that the insurer is entitled to set up against the insured.

Section 211, referred to in s. 214(6), reads as follows:—

Every owner's policy and driver's policy shall insure, in case of bodily injury or death, to the limit of at least $5,000 (exclusive of interest and costs) against loss or damage resulting from bodily injury to or the death of any one person, and, subject to such limit, for any one person so injured or killed, of at least $10,000 (exclusive of interest and costs) against loss or damage resulting from bodily injury to or death of two or more persons in any one accident, or, in case of property damage, to the limit of at least $1,000 (exclusive of interest and costs) for damage to property resulting from any one accident.

Counsel were able to refer us to only two reported cases in which the question under consideration has come up for decision. These are the judgment of LeBel J. in *Harrison* v. *Ocean Accident and Guarantee Corporation Ltd., supra,* and that of the Appeal Division of the Supreme Court of New Brunswick in *Bourgeois et al.* v. *Prudential Assurance Company Limited* (1).

In the *Harrison* case, LeBel J. in dealing with statutory condition 9(3) says at pages 906 and 907:—

The limitation of action therein imposed is confined to an action brought against an insurer "under a contract in respect of loss or damage to the automobile . . . and in respect of loss or damage to persons or property . . .", that is to say, the limitation is with respect to an action

(1) (1945), 18 M.P.R. 334.

brought against an insurer in the assertion of some contractual right. In my view, statutory condition 9(3) is of no application in a case of this kind, where the plaintiff sues in the assertion of a substantive right created by s. 205(1) [now 214(1)] of The Insurance Act: see *The Continental Casualty Company* v. *Yorke*, [1930] S.C.R. 180 at 184, [1930] 1 D.L.R. 609, and *Dokuchia* v. *St. Paul Fire & Marine Insurance Company* (2), at p. 423.

I am unable to find support for the view expressed in this passage in the judgment of this Court in *Continental Casualty Company* v. *Yorke* (1). In that case the right asserted by the respondent arose under s. 85(1) of *The Insurance Act*, R.S.O. 1927, c. 222, reading as follows:—

85 (1) In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for such injury or damage and an execution against the insured in respect thereof is returned unsatisfied, such execution creditor shall have a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied.

At pages 184 and 185 Lamont J., delivering the unanimous judgment of the Court, said:—

Section 85 gives the respondent a right of action against the appellant in the same manner and subject to the same equities as the insured would have if she herself had satisfied the judgment. What is the "right of action" here given? In my opinion it is simply a right to sue. The statute gives the respondent a right to sue the appellant on its policy in the place and stead of the insured, which right she would not have had but for the statute. The right to sue may be exercised by the respondent in the same manner as if the insured had paid the judgment and brought the action. This, I take it, refers to procedure. It is also to be exercised subject to equities which would prevail between the appellant and the insured. This, in my opinion, means that the respondent must establish liability on the policy against the appellant to the same extent as if the action had been brought by the insured, and that whatever defences the appellant would have been entitled to raise against the insured it may raise against the respondent.

In *Dokuchia* v. *St. Paul Fire & Marine Insurance Company* (2), Roach J.A., commenting on the judgment in *Continental Casualty* v. *Yorke*, said at page 423:—

In my opinion, the effect of the present section is to give a claimant, who has recovered a judgment for damages, more than a mere "right to sue". That is to say, the present statute does more than merely authorize procedure. It creates a substantive right in such judgment creditor enforceable by action against the insurer, all, of course, depending upon the claim, which becomes merged in the judgment, being one for which indemnity is provided by the policy.

(1) [1930] S.C.R. 180. (2) [1947] O.R. 417.

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I do not find anything in this passage which is necessarily inconsistent with the view that, under the legislation in its present form, what is given to the injured person is "a right to sue the appellant on its policy".

In *Trans-Canada Insurance Company* v. *Winter* (1), the insurer pleaded statutory condition 9(3) but in that case the action by the injured party against the insurance company had been commenced within less than one year from the date on which he had obtained judgment against the insured so that the statutory condition did not afford a defence. In his reasons Hughes J., who gave the judgment of the majority of the Court, seems to have assumed the applicability of condition 9(3) and discusses only the question as to when the cause of action arose; but this is not determinative of the matter as the question whether the condition applied to such an action was not raised in the factums and does not appear to have been argued.

In the *Bourgeois* case the trial judge, Richards J., and the majority of the Appeal Division, Harrison and Grimmer JJ., held, in circumstances indistinguishable from those in the case at bar, that statutory condition 9(3) in the *Insurance Act* of New Brunswick barred the right of action of the plaintiff. That condition and the relevant sections of the New Brunswick Act are identically worded with those of the Ontario Act which I have quoted above. Baxter C.J., while he agreed on another ground with the disposition of the appeal made by the majority, took an opposite view as to the applicability of the limitation. I find the reasons of Harrison J. on this point convincing and I agree with his conclusion. It should be mentioned that the judgment in the *Bourgeois* case was not referred to by LeBel J. in his reasons in the *Harrison* case, nor is it referred to in those of the courts below in the case at bar.

It is a possible view that the words in condition 9(3), "under a contract" qualify the word "insurer" rather than the words "action or proceeding"; but, assuming that the condition applies only in the case of actions or proceedings under a contract, it is my opinion that the respondent's action is under the contract of insurance issued by the appellant to Schnurr.

(1) [1935] S.C.R. 184.

Section 214(1) gives the respondent the right to maintain an action against the insurer to have the insurance money applied in satisfaction of his judgment. As is pointed out by Harrison J., unless the right so given is a right to sue under the contract the words in the subsection "notwithstanding that such person is not a party to the contract" would appear to be unnecessary. Subsections (3) and (6) of s. 214 read together appear to me to make it clear that the right of action is on the contract. In so far as the injured person's claim against the insured does not exceed $5,000 most of the defences available to the insurer under the terms of the contract as against the insured are taken away as against the injured person; but, wide though the words of s-s. (3) are, they do not touch the provisions of statutory condition 9(3). It is only on the basis that the action of the injured party is under the contract that it can be necessary to provide that contractual defences set out in the policy are not to avail against him. Turning to s-s. (6) it is found that where the injured party's claim exceeds $5,000 nothing in the section shall with respect to such excess coverage prevent the insurer from availing itself of any defence that the insurer is entitled to set up against the insured. The form of wording used is significant. The Legislature does not say that the insurer shall be given the right to set up such contractual defences; it assumes the continuing existence of such right except in so far as, elsewhere in the section, it is expressly taken away. This appears to me to be consistent only with the view that the right of action conferred on the injured party in s. 214(1) is a right of action under the contract.

Were the proper construction doubtful, I would have thought that the doubt should be resolved against the view that, while throughout the *Insurance Act* the Legislature has consistently prescribed periods of limitation as to actions brought against insurers which are much shorter than that applicable to actions on simple contracts, it should in this isolated case permit an action to be brought against an insurer within twenty years after the cause of action arose.

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For the reasons given by Harrison J. in the *Bourgeois* case, and for those set out above, I am of opinion that effect must be given to the second ground of appeal. I would allow the appeal and dismiss the action with costs throughout, if demanded.

Appeal dismissed with costs.

Solicitors for the appellant: *Erichsen-Brown & Leal.*

Solicitors for the respondent: *Dufresne & Dufresne.*

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*May 7, 23.
*Jun. 11.

ALVA GEORGE RINTOUL (*Plaintiff*) .....APPELLANT

AND

X-RAY AND RADIUM INDUSTRIES LIMITED AND ALBERT OUELLETTE (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Automobiles—Collision with stationary car —Sudden failure of brakes—Defence of inevitable accident.

While driving a car owned by his employer, the respondent company, O. stopped at an intersection for a traffic-light. His service brakes worked properly. The traffic-light having changed, he proceeded and saw that the line of traffic ahead of him was at a standstill. The appellant's car was at the rear of this line of traffic. At about 150 feet away from the appellant's car, O. applied his service brakes and found that they did not work. When his car was 50 to 75 feet from that of the appellant, he applied his hand brakes. This reduced his speed from 12 m.p.h. to 6 m.p.h. but did not stop his car which struck the rear of the appellant's car. The trial judge accepted the defence of inevitable accident and dismissed the action. This judgment was affirmed by the Court of Appeal without written reasons.

Held: The appeal should be allowed.

The respondents have failed to prove two matters essential to the establishment of the defence of inevitable accident: (1) that the alleged failure of the service brakes could not have been prevented by the exercise of reasonable care on their part and (2) that, assuming that such failure occurred without negligence on their part, O. could not, by the exercise of reasonable care, have avoided the collision which he claimed was the effect of such failure.

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*PRESENT: Rand, Locke, Cartwright, Fauteux and Abbott JJ.

On the first matter, the respondents have made no attempt to prove that the sudden failure could not have been prevented by reasonable care on their part and particularly by adequate inspection. They called no witness to explain why the service brakes which were working properly immediately before and immediately after the accident and passed satisfactorily the test prescribed by the regulations, failed momentarily at the time of the accident. Furthermore, they have made no attempt to show that the defect could not reasonably have been discovered.

As to the second matter, they have failed to show that O. could not have avoided the accident by the exercise of reasonable care. If the hand brakes had been in the state of efficiency prescribed by the regulations, O. could have stopped his car before the collision occurred. At the least, the unexplained failure to comply with the regulations was evidence of a breach of the common law duty to take reasonable care to have the car fit for the road.

APPEAL from the judgment of the Court of Appeal for Ontario, affirming the judgment at trial.

O. F. Howe, Q.C. for the appellant.

W. G. Gray for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario dismissing, without written reasons, an appeal from a judgment of Barlow J. whereby the plaintiff's action was dismissed with costs and the third party proceedings were also dismissed with costs. The learned trial judge assessed the plaintiff's damages at $2,885.50.

It is apparent from the reasons of the learned trial judge that he accepted the evidence of the respondent Ouellette as to the facts leading up to the collision and the appeal was argued on that basis.

The facts as deposed to by Ouellette were as follows. On April 13, 1954, at about 8.50 a.m. Ouellette was driving a 1952 Dodge motor vehicle owned by his employer, the respondent X-Ray and Radium Industries Limited, easterly on Wellington Street in the city of Ottawa. He stopped at the intersection of Bayview Avenue for a traffic-light and his service brakes worked properly. From the time that he had left his home up to this point he had applied his service brakes five times and on each occasion they had worked properly. The traffic-light having changed he proceeded across Bayview Avenue and saw that the line

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of traffic ahead of him was at a standstill. The appellant's car was at the rear of this line of traffic. When Ouellette was about 150 feet away from the appellant's car he took his foot off the accelerator and applied his service brakes, at this moment he was proceeding uphill at a speed of not more than twelve miles per hour; he found that the brakes did not work; the brake pedal went down to the floor of the car without his feeling any braking action; he allowed the pedal to rise and pressed it down again, still without getting any braking action. Thinking that the service brakes had become useless, he applied his hand brakes; at the moment of this application his car was between 50 and 75 feet from that of the appellant. The application of the hand brakes reduced the speed of his car but did not stop it and it was still moving at about 6 miles per hour when it struck the rear of the appellant's vehicle.

Police Constable Brennan, called as a witness by the defendants, had made an investigation a few minutes after the accident. His evidence as to the service brakes is as follows:—

HIS LORDSHIP: Now witness, tell us what did you do and where did you do it?

A. I checked the brake pedal by pressing on it, and I found that the pedal went to the floorboards.

Q. Where did you do this?

A. At the scene.

Q. Right on the road there?

A. Yes.

Q. What did you do?

A. I drove the car to the station, and I found on driving it in that the brakes worked. They would stop the car at any time. The brakes were tested on Fairmount Avenue by the Tapely Brake Tester.

Q. Were you there?

A. Yes. Three successive tests were taken. The first two tests, at 20 miles an hour, registered 14 feet to stop, or 95 per cent, and the third test—I don't recall what the third test was.

MR. GRAY: Q. Can you recall on approximately how many occasions you found it necessary to use the brakes as you were driving from the scene of the accident to the police station?

A. Possibly about three times.

Q. And the brakes worked on those occasions?

A. They did.

Brennan testified that he is experienced in testing brakes and that brakes are considered good if they will stop a car going at 20 miles per hour in forty feet. Following the test made by Brennan, Ouellette drove the car away from the Police Station.

Ouellette testified that on the day prior to the accident he had "work done on the brakes" of the motor vehicle at the garage of the third party.

In the Statement of Claim, the appellant, after stating that the respondents' car had run into his car while stationary on the highway, alleged that Ouellette was negligent in the following respects amongst others:—

(*a*) He failed to keep a proper lookout;

(*b*) He failed to bring his vehicle to a stop when he saw or should have seen that the traffic ahead of him, going in the same direction, had come to a complete stop;

(*c*) His brakes were not in good repair;

(*d*) He failed to apply his brakes in time, or at all, to avoid an accident which he knew, or should have known, was likely to occur;

The defence relied on at the trial and before us was pleaded in the Statement of Defence as follows:—

(4) The Defendants allege and the fact is that at the time and place referred to in the Statement of Claim the brakes of the Defendant motor vehicle suddenly and without warning failed and it was in the circumstances impossible for the Defendant driver to avoid the collision.

(5) The Defendants allege and the fact is that they had taken all reasonable and proper precaution in the care of the brakes on the said motor vehicle and plead that the said collision was an inevitable or an unavoidable accident.

There can be no doubt that, generally speaking, when a car, in broad daylight, runs into the rear of another which is stationary on the highway and which has not come to a sudden stop, the fault is in the driving of the moving car, and the driver of such car must satisfy the Court that the collision did not occur as a result of his negligence. The learned trial judge regarded this principle as applicable to the case at bar but was of the view that the unexpected failure of the service brakes placed Ouellette in a situation of emergency in which he acted without negligence and that the collision was the result of an inevitable accident.

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The defence of inevitable accident has been discussed in many decisions. A leading case in Ontario is *McIntosh* v. *Bell* (1), which was approved by this Court in *Clexton* v. *Grandy* (2). At page 187 of the report of *McIntosh* v. *Bell*, Hodgins J.A. adopts the words of Lord Esher M.R. in *The Schwan* (3), as follows:—

> . . . In my opinion, a person relying on inevitable accident must shew that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill.

In my view, in the case at bar the respondents have failed to prove two matters both of which were essential to the establishment of the defence of inevitable accident. These matters are (i) that the alleged failure of the service brakes could not have been prevented by the exercise of reasonable care on their part, and (ii) that, assuming that such failure occurred without negligence on the part of the respondents, Ouellette could not, by the exercise of reasonable care, have avoided the collision which he claims was the effect of such failure.

As to the first matter, assuming that the service brakes failed suddenly, the onus resting on the respondents was to show that such failure could not have been prevented by the exercise of reasonable care. In Halsbury, 2nd Edition, Volume 23, page 640, section 901, the learned author says:—

> Driving with defective apparatus if the defect might reasonably have been discovered . . . (and other matters) . . . are negligent acts which render a defendant liable for injuries of which they are the effective cause.

This passage has been approved by McCardie J. in *Phillips* v. *Brittania Hygienic Laundry Co.* (4) and by Hogg J.A. in *Grise* v. *Rankin et al.* (5), and, in my opinion, correctly states the law.

In the case at bar the respondents have made no attempt to prove that the sudden failure could not have been prevented by reasonable care on their part and particularly by adequate inspection. They called no witness to explain the extraordinary fact that the service brakes which were working properly immediately before and immediately

(1) [1932] O.R. 179.
(2) [1934] 4 D.L.R. 257 at 263.
(3) [1892] P. 419 at 429.
(4) [1923] 1 K.B. 539 at 551 and 552.
(5) [1951] O.W.N. 21 at 22.

after the accident and passed satisfactorily the test prescribed in the regulations failed momentarily at the time of the accident. Without going so far as to say that such a story appears to be intrinsically impossible, it is clear that its nature was such as to cast upon the defendants the burden of furnishing a clear and satisfactory explanation of so unusual an occurrence.

Furthermore, the respondents have made no attempt to shew that the defect, whatever it was, could not reasonably have been discovered. The evidence is that the respondents' car was a 1952 Dodge. There is no evidence: (*a*) as to when it was purchased, or (*b*) whether it was purchased new or second-hand, or (*c*) how far it had been driven, or (*d*) how often, if ever, the service brakes had been inspected, or (*e*) how often, if ever, the hand brakes had been inspected. The only evidence touching the point at all is Ouellette's statement quoted above that there "was work done on the brakes" the day before the accident. There is nothing to indicate whether the brakes referred to in this statement were the service brakes or the hand brakes although in argument it seemed to be assumed that the reference was to the service brakes. No evidence was given as to what instructions were given to the third party, or as to what work was done by him, or as to what report, if any, was made by the third party when the car was delivered, or as to whether the third party was competent to inspect or repair brakes. The onus resting on the respondents in this regard is not discharged by the bald statement that on the day before the accident there was work (unspecified) done on the brakes.

Passing to the second matter mentioned above, i.e., that even assuming that the failure of the service brakes occurred without negligence on the part of the respondents, they have failed to show that Ouellette could not have avoided the collision by the exercise of reasonable care, it may first be observed that the relevant statutory provisions in force in Ontario are as follows. *The Highway Traffic Act* R.S.O. 1950, C. 167 provides:—

> 12 (1) Every motor vehicle other than a motorcycle, when operated upon a highway shall be equipped with brakes adequate to stop and to hold such vehicle, having two separate means of application, each of which means shall apply a brake or brakes effective on at least two wheels and each of which shall suffice to stop the vehicle within a

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proper distance, and each means of application shall be so constructed that the cutting in two of any one element of the operating mechanism shall not leave the motor vehicle without brakes effective on at least two wheels.

* * *

(4) All such brakes shall be maintained in good working order and shall conform to regulations not inconsistent with this section to be made by the Department.

The regulations made pursuant to the *Act* provide in part as follows:—

1. In making a brake test a Bear Hydraulic Brake Tester, Cowdrey Dynamic Brake Tester, James Decelerometer, Muether Stopmeter, Tapley Brake Testing Meter, or such other instrument as may be approved by the Minister, shall be used.

* * *

4 (1) The service brakes of a motor vehicle or motor vehicle and trailer shall be adequate to stop the vehicle or vehicles within forty feet when travelling at the rate of twenty miles an hour on a dry asphalt or concrete pavement free from loose material and having not more than one per cent grade.

(2) The hand brakes of a motor vehicle or motor vehicle and trailer shall be adequate to stop the vehicle or vehicles within sixty feet when travelling at the rate of twenty miles per hour, on a dry asphalt or concrete pavement free from loose material and having not more than a one per cent grade and to hold the vehicle or vehicles stationary at any place on any highway.

Accepting the evidence of Ouellette as to the speed and position of his car at the instant he actually applied the hand brakes, it is obvious that if they had been in the state of efficiency prescribed by the regulations he could have stopped his car before the collision occurred, even if the car had not been, as it was, proceeding uphill. It is unnecessary to consider whether the effect of the statute and regulations was to cast an absolute duty on the respondents to have the hand brakes in the prescribed condition, for, at the least, the unexplained failure to comply with the regulation was evidence of a breach of the common law duty to take reasonable care to have the motor vehicle fit for the road. Apart from statute there must obviously be a common law duty on anyone who drives a motor vehicle on a highway to have it equipped with brakes, and the regulations may well be taken as the expression of the Legislature's view as to what constitutes a reasonable braking system.

In my opinion, on the evidence the respondents have not only failed to show that the alleged failure of the service brakes was inevitable, they have also failed to show that after such failure occurred Ouellette could not by the exercise of reasonable care have avoided the collision. It follows that the appeal of the plaintiff should be allowed.

It remains to consider what order should be made in the third party proceedings. Following the issue of the third party notice the local Master of the Supreme Court of Ontario at Ottawa made an order on the defendants' application for directions providing in part as follows:—

> AND IT IS FURTHER ORDERED that upon the Third Party issue being entered for Trial it shall be placed on the Trial list next following the action between the Plaintiff and the Defendants and shall be tried at or after the Trial of the action between the Plaintiff and the Defendants as the Trial Judge may direct.

At the trial the third party was represented by counsel who took part in the trial of the issues between the plaintiff and the defendants; but it was made clear by the learned trial judge that he would first dispose of the action between the plaintiff and the defendants and, in the event of the plaintiff succeeding, he would then proceed with the trial of the third party issue.

The learned trial judge having dismissed the plaintiff's action at the conclusion of the hearing it followed that the third party proceedings should also be dismissed and he so directed. The plaintiff having appealed to the Court of Appeal for Ontario the defendants served a notice of appeal as against the third party. The Court of Appeal dismissed the plaintiff's appeal at the conclusion of the argument and, accordingly, also dismissed the defendants' appeal in the third party proceedings.

The plaintiff having appealed to this Court, the defendants did not appeal in the third party proceedings. At the conclusion of the argument of the plaintiff's appeal in this Court on May 7, 1956, the defendants' counsel asked that the appeal be adjourned to give him an opportunity of appealing from the dismissal of the defendants' claim against the third party. The hearing of the appeal was adjourned, accordingly, and came on again for hearing on

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May 23 when the argument was concluded. In the meantime the defendants had obtained an extension of time for appealing in the third party proceedings and had perfected their appeal.

As has already been pointed out the issue between the defendants and the third party has not yet been tried and, in my opinion, it should be ordered that the judgment of the learned trial judge and that of the Court of Appeal so far as they deal with that issue be set aside and that the third party proceedings proceed to trial in accordance with the practice of the Court.

In the result the appeal of the plaintiff is allowed and judgment is directed to be entered in his favour against both defendants for $2,885.50 with costs throughout including any costs incurred by the plaintiff in the third party proceedings. The judgment of the learned trial judge and that of the Court of Appeal dealing with the third party proceedings are set aside and it is ordered that the issues raised in those proceedings be tried in accordance with the practice of the Court. The costs, as between the defendants and the third party, of the former trial and of the appeal to the Court of Appeal are to be disposed of by the judge presiding at the trial of the third party proceedings. There should be no order as to the costs of the appeal to this Court insofar as it relates to the third party proceedings.

Appeal allowed with costs.

Solicitors for the appellant: *Howe, Howe & Rowe.*

Solicitors for the respondents: *Borden, Elliot, Kelley, Palmer & Sankey.*

ROY BROOKS (*Third Party*) .....APPELLANT;

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*May 1
*Jun. 11

AND

CYRIL WARD (*Suppliant*);

AND

HER MAJESTY THE QUEEN (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Automobiles—Petition of right—Third party proceedings—Collision between two cars—Third party's car improperly parked on road—Whether contributory negligence of third party—Apportionment of liability—Highway Traffic Act, R.S.O. 1950, c. 167, s. 43(1).

While attempting to pass a truck, belonging to the appellant third party, and parked on the travelled portion of its right-hand side of the road, one evening, a Crown car, driven by an employee acting within the scope of his duties, collided with an oncoming car, belonging to the suppliant and driven at a very high speed. The driver of the oncoming car did not dim his lights until about to pass the parked truck, or reduce his speed. The driver of the Crown car, although so "blinded" by the lights of the oncoming car as to be unable to see the parked truck until too late, continued on without reducing his speed. In the action taken by the owner of the oncoming car, the trial judge apportioned liability at 20, 30 and 50 per cent. respectively against the driver of the Crown car, the driver of the oncoming car and the driver of the parked truck.

Held (Rand J. *dissenting in part*): The appeal of the driver of the parked truck should be allowed.

Per Taschereau, Fauteux, Abbott and Nolan JJ.: The driver of the Crown car was clearly negligent. He could and should have seen the tail-lights of the parked truck, which were plainly visible from a distance of 900 feet. When a driver sees a car in his path and has plenty of opportunity to avoid it but fails to do so, or if, by his own negligence, he disables himself from becoming aware of a danger and cannot therefore avoid the accident, he is the only party to blame. There was a clear line that could be drawn between the negligence of the appellant, if any, and that of the respondent, and therefore there could be no contributory negligence.

Per Rand J. (*dissenting in part*): There was no excuse for the driver of the parked truck for not placing his truck to a substantial extent off the pavement, and against that failure should be charged part of the responsibility for the accident. Such a violation of the law is not to be superseded by the contemporaneous negligence of an oncoming driver in failing at night to see the parked car. Otherwise, the regulations would be virtually nullified and their purpose defeated.

*PRESENT: Taschereau, Rand, Fauteux, Abbott and Nolan JJ.

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BROOKS v. WARD AND THE QUEEN

APPEAL from the judgment of Potter J. in the Exchequer Court of Canada (1), on a petition of right to recover damages resulting from a motor vehicle accident.

M. Robb, Q.C., for the appellant.

W. R. Jackett, Q.C., and *D. S. Maxwell,* for the respondent.

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

TASCHEREAU J.:—This is an appeal from the judgment of the Honourable Mr. Justice Potter of the Exchequer Court of Canada (1).

On the 13th day of October, 1952, the suppliant, owner of a Plymouth Sedan, was driving in a southerly direction upon a public highway, known as the Scoharie Road, in Prince Edward County, Ontario. On the opposite side of the highway, which was twenty-four feet wide, a truck belonging to the appellant (third party in the case) was stationed on the road, facing north, while the driver had gone on business for a few moments to a nearby school. The engine was still running. The highway was dry, and although it was dark, visibility was good.

The respondent's vehicle, which had excellent headlights showing two hundred feet away, was also proceeding in a northerly direction. The driver attempted to pass the appellant's truck, but in so doing, collided with the suppliant's car coming in the opposite direction.

The learned trial judge found that the loss suffered by the suppliant amounted to $860, but apportioned the damages between the three parties. He came to the conclusion that 30% should be borne by the suppliant; 50% by the third party, appellant in the present case, and 20% by the respondent. The formal judgment of the Exchequer Court was therefore, that the suppliant was entitled to recover from the respondent the sum of $602 being part of the relief sought by the petition of right together with costs, and that the third party should contribute to the respondent the sum of $430 *and 50% of the costs taxed as between the suppliant and the respondent,* which made an amount over and above the sum of $500 necessary to give

(1) [1954] Ex. C.R. 185.

(1) [1954] Ex. C.R. 185.

jurisdiction to this Court: *Caron* v. *Forgues et al.* (1). The third party was ordered to pay to the respondent five-sevenths of the costs of the third party proceedings.

The third party now appeals to this Court, but there is no appeal between the suppliant and the respondent. The third party contends that even if his car was stationed on the highway, this statutory breach of the law does not constitute effective negligence, and was not the *causa causans* of the accident.

It is in evidence that respondent's car was driven at a speed of 30 to 35 miles an hour, and that after having passed an elevation at a distance of 900 feet from the parked car, he saw the bright headlights of suppliant's car coming in the opposite direction. He immediately dimmed his lights, and raised them and dimmed them again, and the suppliant also dimmed his own. The respondent's driver says that after, he saw ahead of him for the first time, on his right hand side of the road, a motor vehicle, which was the parked truck. He had not noticed before the tail-lights of this truck which were lit, and in order to avoid hitting it, he swerved to the left, and collided with the oncoming car.

I think that the driver of the respondent's car was clearly negligent, and cannot escape liability. *He could and should have seen the tail-lights* of the truck, which according to the evidence were plainly visible from a distance of 900 feet. If he had noticed these tail-lights before, he could have stopped or reduced his speed in order to avoid the accident. But having failed to see these lights, he maintained his speed at 30 to 35 miles, and was compelled to take the wrong side of the highway, where the accident happened.

The learned trial judge says that the driver of respondent's car did not have time to form a judgment, because the elevation was only at a distance of *300 feet* from the place of the accident, and that at a speed of 30 to 35 miles an hour, he had only five or seven seconds to make a decision. The trial judge made an obvious error. The evidence is clear that the distance was 900 feet, and this was conceded by counsel at the hearing. It is very probable that if this error had not been committed, and if the learned trial

(1) [1944] S.C.R. 145.

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judge had thought that respondent's driver could have seen the tail-lights at a distance of 900 feet, he would have reached an entirely different conclusion.

I do not believe that the appellant can be charged with negligence which contributed to the accident. In a case of *McKee et al.* v. *Malenfant* (1), it was held by the majority of the Court that where a clear line can be drawn between the negligence of plaintiff and defendant, it is not a case of contributory negligence at all. When a driver sees a car in his path, and has plenty of opportunity to avoid it but fails to do so, there is no contributory negligence and he must bear the full responsibility. Or if, by his own negligence, he disables himself from becoming aware of a danger and cannot therefore avoid the accident, he is the only party to blame: *Sigurdson* v. *B.C. Electric Co.* (2). The same principles were applied by this Court in *Bruce* v. *McIntyre* (3). It is because the facts were unidentical that a different conclusion was reached.

In the present instance, the respondent had sufficient time to prevent this accident. Through his negligence he did not see the tail-lights of the parked car, which other witnesses could see; not having exercised a proper look-out, he continued at a speed of 30 to 35 miles an hour, and he placed himself in a situation where an accident was inevitable. There is, I think, a clear line that can be drawn between the negligence of the appellant, if any, and of the respondent, and there can be no contributory negligence.

I would allow the appeal. As the suppliant did not appeal, he will still bear 30% of his damages, but, the appellant (third party), will not as directed by the judgment of the trial judge, be called upon to contribute to the respondent the sum of $430 plus 50% of the costs taxed, between the suppliant and the respondent. The respondent will pay the costs of the appellant throughout.

RAND J. (*dissenting in part*):—Admittedly the judge at trial misapprehended an important fact of distance going to the determination of the degree of responsibility of the respondent and as between the latter and the appellant that matter is now open.

(1) [1954] S.C.R. 655. (2) [1953] A.C. 302.
(3) [1955] S.C.R. 251.

The negligence of the truck driver, the servant of the respondent, cannot be seriously disputed, but the question remains of the liability for the car left parked wholly on the pavement.

The law of the province, s. 43(1) of the *Highway Traffic Act*, R.S.O. 1950, c. 167, forbids a person to

> park or leave standing any vehicle whether attended or unattended upon the travelled portion of a highway outside of a city, town or village, when it is practicable to park or leave such vehicle off the travelled portion of such highway . . . .

In this case it was practicable to have placed the car, in large part at least, off the paved portion and if that had been done to the extent of three feet the accident would have been avoided. Is such a violation of the law to be superseded by a contemporaneous negligence of an oncoming driver in failing at night to see the parked car? I am unable to agree that that result follows. Such a ruling would virtually nullify the regulation whenever there was negligence on the moving vehicle. It would defeat the very purpose of these detailed regulations which have as their object to rid the highways of unnecessary hazards. Together they constitute an organic body of reciprocal safety measures and in the frightening multiplication of highway tragedies if their deliberate infringement does not call down accountability the regulation might almost as well be abolished.

It is not a question merely of causation in the rather simplified idea of that concept as it is so frequently expressed; causation must be associated with responsibility and the latter here issues from the mode of dealing with this evil adopted by the legislature: *Bruce* v. *MacIntyre* (1). There was no excuse whatever for not placing the car to a substantial extent off the pavement and against that failure should be charged part of the responsibility for the resulting consequences.

But I agree that the share in that of the respondent for the collision is greater than that of the appellant. As the petitioner has not appealed from the degree found against him of 30%, the remaining 70% is to be apportioned between the parties to this appeal. That I would make 50% against the respondent and 20% against the appellant.

(1) [1955] S.C.R. 251.

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Rand J.

The appeal should be allowed and the judgment below modified by reducing the proportion against the appellant of 50% to 20% and increasing the liability of the respondent from 20% to 50%. The appellant will be entitled to five-sevenths of his costs in this Court and he will pay to the respondent two-sevenths of the costs of the suppliant payable by the respondent and two-sevenths of the third party costs, in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: *Slaght, Robb & Hayes.*

Solicitor for the respondent: *F. P. Varcoe.*

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* May 22, 23
* Jun. 11

THE MUNICIPAL DISTRICT OF SERVICEBERRY NO. 43 (*Defendant*) } APPELLANT;

AND

CARL LUND (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobiles—Municipal corporations—Negligence—Hole in road—Tractor overturned—Road condition known to driver—Duty of municipality—Whether breached—Municipal Districts Act, R.S.A. 1942, c. 151.

While driving a farm tractor on a road within the appellant municipality, the respondent, in order to avoid a large hole in the centre of the road, swung to his left and ran into loose sand at the shoulder of the road. The tractor slid into a ditch, overturned and injured him. He knew there was a hole there and had been warned by his employer to be careful. The road was a dirt road, lightly travelled, with a little natural gravel, and had been gravelled a year and one-half prior to the accident.

His action for damages for injuries, alleging negligence of the municipality in failing to keep the road in repair, was dismissed by the trial judge who found that the respondent might have been driving too fast and too close to the edge of the road; that the hole was not much of a hazard and that he was the author of his own misfortune. This judgment was reversed by a majority in the Appellate Division on the ground that the municipality should have known of the condition of the road and defaulted in the performance of the duty imposed upon it by s. 189 of the *Municipal Districts Act*, R.S.A. 1942, c. 151.

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*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Nolan JJ.

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DISTRICT OF SERVICEBERRY No. 43 v. LUND

Held: The appeal should be allowed.

Per curiam: The Appellate Division was wrong in holding that the municipality defaulted in its statutory duty to repair the hole. That duty can only arise if it is justified on the evidence as to the character of the road and the locality in which it is situated, and if it should have known of the hole in the road. Under the circumstances here, the failure of the municipality to repair the hole did not constitute a breach of its statutory duty. Moreover, the facts do not support the finding of the Appellate Division that the municipality should have known of the disrepair of the road.

Per Taschereau, Locke, Fauteux and Nolan JJ.: The accident was caused by the negligence of the respondent in the operation of the tractor; he did not have it under proper control.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, reversing, O'Connor C.J.A. dissenting, the judgment at trial which had dismissed the action.

H. W. Riley, Q.C., for the appellant.

J. J. Urie, for the respondent.

The judgment of Taschereau, Locke, Fauteux and Nolan JJ. was delivered by

NOLAN J.:—This is an appeal from the majority judgment of the Appellate Division of the Supreme Court of Alberta reversing the judgment of McLaurin C.J.T.D. of Alberta dismissing the action of the respondent to recover damages for personal injuries suffered in an accident.

On May 24, 1951, at approximately 1.30 p.m., the respondent was operating a farm tractor on a road running from east to west between Rockyford and Keoma within the appellant municipality. At a point on this road about five miles west and one mile south of the village of Rockyford the respondent, who was proceeding in a westerly direction, in order to avoid driving through a depression or hole about the centre of the road, swung to his left and ran into two feet of loose sand at the extreme south edge, or shoulder, of the road. The respondent endeavoured to get the tractor back on the road, trying to put it into reverse, but it slid into a five-foot ditch on the south side of the road and overturned, pinning the respondent underneath and causing him to sustain serious injuries.

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Nolan J.

The road at the point of the accident was twenty-four feet wide and had been given a light coat of gravel about a year and a half before the accident. The depression or hole where the accident occurred was, according to the estimate of the witness Deitrich, a municipal employee, approximately four feet wide, six feet long and eight inches deep. The witness Dyer, the employer of the respondent, estimated the depression or hole to be two to three feet across. The respondent estimated it to be two to two and one-half feet wide, three to three and one-half feet long and twelve inches deep.

At trial the respondent stated that the accident occurred at a hole in a culvert on the road, but his evidence on that point was contradicted by the witness Deitrich, who stated that the depression was seventy to ninety feet west of the culvert. The learned Chief Justice held that the accident occurred seventy-five feet west of the culvert.

The respondent was employed by a farmer in the vicinity to work on the land. He had previously passed the place on the road where the accident occurred approximately twenty times and had also passed it earlier on the day of the accident.

The respondent knew that there was a hole in the road and had been warned by his employer, Dyer, to be careful when driving past it and he admits that on previous occasions he had been able to pass safely on the south side of the road. He felt that there was room to get past if he drove with caution.

On the morning of May 24, 1951, prior to the accident, the road foreman, Geeraert, was driving a municipal employee, Deitrich, in a half-ton delivery truck to his equipment and, at twenty-five miles per hour, passed over the place where the accident occurred. The depression gave the Geeraert vehicle a sort of jolt, but he retained control of it without difficulty. Deitrich says a person going over the depression, which had sloping sides, would get a bump, but could pass over it without difficulty

The depression itself was the result of a frost boil, which was brought about by the freezing of sub-surface water which caused a sinking of the road. Deitrich says that eight yards of dirt were dumped into the depression when he repaired it shortly after the accident.

The learned Chief Justice of the Trial Division found that the respondent might have been driving too fast and might have got too close to the edge of the road because of the hole or depression. The learned Chief Justice also found that the hole or depression was not much of a hazard and that the respondent was the author of his own misfortune.

The Appellate Division, in a majority judgment, allowed an appeal from the judgment of the learned Chief Justice and directed that judgment for $6,800, including special damages, be entered for the respondent, on the ground that the appellant should have known of the condition of the road and defaulted in the performance of the duty imposed upon it by s. 189 of *The Municipal Districts Act,* R.S.A. 1942, c. 151. That section provides as follows:—

189. (1) Every council shall keep all roads, bridges, culverts and ferries, and the approaches thereto, which have been constructed or provided by the municipal district or by any person with the permission of the council, or which, if constructed or provided by the Province, have been transferred to the control of the council by written notice thereof, in a reasonable state of repair, having regard to the character of the road or other thing hereinbefore mentioned, and the locality in which it is situated, or through which it passes, and in default of the council so to keep it in repair, the municipal district shall be liable for all damages sustained by any person by reason of its default.

(2) Default under this section shall not be imputed to a municipal district in any action without proof by the plaintiff that the municipal district knew or should have known of the disrepair of the road or other thing hereinbefore mentioned.

Subsection (2) is not found in a similar Act in any other province.

The liability of the appellant municipality depends, in the first place, upon whether the road in question was kept in a reasonable state of repair, regard being had to the character of the road and the locality through which it passed.

The road in question is between Keoma, consisting of two houses and two elevators, and Rockyford. It is a dirt road, lightly travelled, with a little natural gravel, and had been gravelled a year and one-half prior to the accident.

The liability of the appellant municipality depends, in the second place, upon whether it should have known of the depression in the road.

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DISTRICT OF SERVICEBERRY No. 43 v. LUND

Nolan J.

I am of the opinion, with respect, that the Appellate Division was wrong in holding that the appellant municipality defaulted in its statutory duty to repair the depression in the road where the accident occurred. In my view that duty can only arise if it is justified on the evidence as to the character of the road and the locality in which it is situated.

There is evidence in the case that there are road bans every year in the appellant municipality because of the frost leaving the ground and that depressions in the roads are caused by frost boils.

There is also evidence that the road had been gravelled one and one-half years prior to the accident. It is situate between two small communities and the traffic upon it is light. There had been excessive moisture in the fall of 1950, heavy snow during the winter of 1950-51 and a heavy snowfall in April, 1951. In addition, at the time of the accident, a late wet spring had added to the difficulty of keeping the 1,100 or 1,200 miles of road in the municipality under repair.

In my opinion, taking all these facts into consideration, the failure of the appellant municipality to repair the depression did not constitute a breach of its statutory duty and the learned Chief Justice of the Trial Division was right in holding it to be free from negligence. Moreover, I think that these facts, accompanied by the difficulty of frequent inspection, do not support the finding of the Appellate Division that the municipality should have known of the disrepair of the road.

The Appellate Division was of the opinion that the dimensions of the depression were in excess of those given by any witness and in support of this view made mention of the fact that eight yards of dirt were hauled to make the necessary repairs. While it is true that the witness Deitrich says that this amount of material was dumped in the depression, which would suggest that it was larger than the evidence indicated, I agree with the learned Chief Justice of Alberta in his dissenting judgment that it is reasonable to assume that some portion of this fill was spread over the road in order to level off any unevenness caused by the fill in the depression.

The respondent was proceeding in daylight along a road twenty-four feet wide in a tractor six feet four inches wide. He approached a depression in the road which was well known to him, having passed over it a number of times, the danger of which had been brought to his notice by his employer and which was not a trap. In attempting to go around the depression—and there was plenty of room for him to do so—he drove too close to the loose sand on the extreme south edge, or shoulder, of the road and, in trying to get the tractor back on the road, it slid into a five-foot ditch, overturned and injured the respondent. I do not think that the respondent had the tractor under proper control and if the instability of tractors is notorious, as is indicated in the judgment of the Appellate Division, I think a greater degree of care is required in their management. In my view the accident was caused by the negligence of the respondent in the operation of the tractor.

I would allow the appeal with costs.

CARTWRIGHT J.:—For the reasons given by my brother Nolan I agree with his conclusion that no breach of the statutory duty resting upon the appellant was established and consequently do not find it necessary to consider whether the conduct of the respondent amounted to negligence.

I would dispose of the appeal as proposed by my brother Nolan.

Appeal allowed with costs.

Solicitors for the appellant: *Macleod, Riley, McDermid, Dixon & Burns.*

Solicitors for the respondent: *Fitch & Lindsay.*

1956
*May 23
*Jun. 27

TRADERS FINANCE CORPORATION LIMITED (*Claimant*) ..... } APPELLANT;

AND

WILLIAM H. WILLIAMS (*Applicant*);

AND

WILFRED LANGE (*Claimant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Conditional sale—Automobile—Agreement of sale not registered—Vendor's name affixed to cowl under engine hood—Whether "plainly attached" within s. 12 of the Conditional Sales Act, R.S.S. 1953, c. 358.

S. 12 of *The Conditional Sales Act* (R.S.S. 1953, c. 358) is sufficiently complied with if, at the time of the conditional sale of an automobile, there is affixed to the automobile, on the cowl under the engine hood, a decal or sticker, oval in shape, about four inches long by one and one-half inches wide, bearing the words "Sold by Canadian Motors Limited, Ford and Monarch Dealers, Regina". The name of the vendor is thus "plainly attached" to the automobile within the meaning of the section.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), dismissing, Gordon and McNiven JJ.A. dissenting, an appeal from a judgment affirming an order dismissing a claim made in interpleader proceedings. Appeal allowed.

J. L. McDougall, Q.C., for the appellant.

J. C. Osborne, Q.C., for the respondent.

THE CHIEF JUSTICE:—This is an appeal by Traders Finance Corporation, Limited, against the judgment of the Court of Appeal for Saskatchewan (1) dismissing an appeal from the judgment of Graham J., which in turn had dismissed an appeal from the order of Judge Hogarth of the Judicial District of Regina. That order was made upon the application of the Sheriff of the District by way of interpleader. At the instance of the respondent Wilfred Lange, who had secured judgment against Gus Kruger, the Sheriff had seized a 1952 Ford Coach. This automobile had been sold to Kruger by Canadian Motors, Limited, under

*PRESENT: Kerwin C.J., Rand, Cartwright, Abbott and Nolan JJ.

(1) (1955), 16 W.W.R. 506.

a conditional sale agreement, dated November 3, 1953, and on the same day the latter assigned the agreement to the present appellant. At the time of the seizure by the Sheriff a substantial sum remained unpaid.

At the argument reference was made to *The Conditional Sales Act*, R.S.S. 1940, c. 291 and also R.S.S. 1953, c. 358 and I will refer to the latter. The right of the execution creditor to seize and sell the automobile was disputed by the appellant on the ground that although a copy of the conditional sale agreement had not been filed as specified in s. 4(1) of R.S.S. 1953, c. 358, the provisions of s. 12 of that Act had been complied with. That section reads as follows:—

> 12. Registration shall not be required in the case of a sale or bailment of manufactured goods, of the value of $15 or over, which, at the time of the actual delivery thereof to the buyer or bailee, have the manufacturer's or vendor's name painted, printed or stamped thereon or plainly attached thereto by a plate or similar device; provided that the manufacturer or vendor, being the seller or bailor of the goods, keeps an office in Saskatchewan where inquiry may be made and information procured concerning the sale or bailment of the goods; and provided further that the manufacturer or vendor or his agent does, within five days after receiving a request to do so made to him either in person or by registered letter, furnish to any applicant therefor a statement of the amounts, if any, paid thereon and the balance remaining unpaid. The person so inquiring shall if such inquiry is by letter give a name and post office address to which a reply may be sent; and it shall be sufficient if the required information is given by registered letter deposited in the post office within the said five days addressed to the person inquiring at his proper post office address, or where a name and address is given, addressed to such person by the name and at the post office so given.

It is not disputed that Canadian Motors, Limited, kept an office in Regina where inquiry might be made and information procured concerning the sale or bailment by it of automobiles, and the only problem is whether the name of Canadian Motors, Limited, was painted, printed or stamped on the automobile or plainly attached thereto by a plate or similar device.

At the hearing the Court suggested that if there was any question as to the facts a statement could be agreed upon by counsel and filed. No such statement has been sent but having had an opportunity of considering the evidence we are all satisfied that there is really no difficulty. At the time of the sale by Canadian Motors, Limited, to Kruger

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there was affixed to the automobile, on the cowl under the engine hood, a decal or sticker, oval in shape, about four inches long by one and one-half inches wide, bearing the following words "Sold by Canadian Motors, Limited, Ford and Monarch Dealers, Regina". The decal would be in full view of anyone lifting the hood and, therefore, the name of the vendor was plainly attached to the automobile whether as against a subsequent purchaser or an execution creditor. Clearly it does not have to be affixed to the outside of the car and, on the other hand, this is not to say that it would be sufficient to put it in the trunk or glove compartment of the car.

The appeal should be allowed and, in view of the fact that the automobile has been sold and the proceeds deposited in Court, or with the Sheriff, there should be a declaration that the appellant is entitled thereto. Leave was given by the Court of Appeal for Saskatchewan to appeal to this Court on terms that the appellant would not ask for or be entitled to its costs of that appeal and the allowance is, therefore, without costs. At the argument it was agreed by counsel for the appellant that if the appeal succeeded any costs ordered to be paid in any of the Courts below by the appellant to the respondent would be paid and any costs already paid should be retained by the respondent.

RAND J.:—The question in this appeal is the narrow one whether an automobile seized on behalf of the respondent Lange as execution creditor and claimed to be subject to a conditional sale agreement held by the appellant as assignee is within s. 12 of *The Conditional Sales Act,* R.S.S. 1940, c. 291:—

> 12. Registration shall not be required in the case of a sale or bailment of manufactured goods, of the value of $15 or over, which, at the time of the actual delivery thereof to the buyer or bailee, have the manufacturer's or vendor's name painted, printed or stamped thereon or plainly attached thereto by a plate or similar device; provided that the manufacturer or vendor, being the seller or bailor of such goods, keeps an office in Saskatchewan where inquiry may be made and information procured concerning the sale or bailment of such goods; and provided further that the manufacturer or vendor or his agent does, within five days after receiving a request so to do made to him either in person or by registered letter, furnish to any applicant therefor a statement of the amounts, if any, paid thereon and the balance remaining unpaid. The person so inquiring shall if such inquiry is by letter give a name and post office

address to which a reply may be sent; and it shall be sufficient if the required information is given by registered letter deposited in the post office within the said five days addressed to the person inquiring at his proper post office address, or where a name and address is given, addressed to such person by the name and at the post office so given.

On what has been called the "cowl", the vertical sheet metal partition between the seating portion of the automobile and the front containing the cylinder block, etc., the name of the vendor and its address in Saskatchewan, printed on a sticker or what is called a "decal" was affixed in such a position as to be readily seen on lifting the hood. Was that a compliance with the section as having been "plainly attached" to the automobile?

I must confess to a difficulty in appreciating how it could be taken otherwise. The car, in the possession of the buyer or bailee, is, towards a purchaser, mortgagee or execution creditor, mentioned in s. 2(1) of the statute, open to the fullest inspection for any relevant information. The object of the provision is not to enable the public on an outside view to obtain the information intended to be given by the plate or device. This is a requirement that appertains only to persons interested to ascertain whether there is a title to ownership or security of a certain character outstanding. Even when the name of the seller is ascertained, further particulars would be required to describe the property such as the licence plate number, the serial number, the make, year and model of the car. In possession of these data, the items of which may call for inquiry from the possessor or the examination of the engine block, the sheriff or proposing purchaser or mortgagee is then in a position to seek out the particular interests protected by the section by making the request for information which the section authorizes.

I should say that the attachment here was in a most suitable place to serve that purpose. Since it is to safeguard the conditional sale security, it should be in a spot permitting as much permanence as possible. On the outside of the car it would run the risk of being knocked or deliberately taken off. Whether or not the seller assumes the risk of its removal by the purchaser from him, there is no reason why further and unnecessary risks should be added.

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To sum this up, I should say that the object is to furnish the interested third person with the means of searching the title to see whether a specific form of property interest in another than the possessor exists. But just as he must write to the seller for that information so must he make a reasonable examination to discover who the seller is. For that purpose the "plate or similar device" here was "plainly attached".

I would allow the appeal, set aside the judgments below, and declare the appellant to possess a valid title under the conditional sale agreement in the case mentioned. There will be no order as to costs in any court.

The judgment of Cartwright, Abbott and Nolan JJ. was delivered by

NOLAN J.:—This is an appeal, by special leave of the Court of Appeal for Saskatchewan, from a judgment of that Court (1), dismissing an appeal (Gordon and McNiven JJ.A. dissenting) from a judgment of Graham J., which, in turn, affirmed the judgment of Hogarth D.C.J., in which it was held that the claim of the appellant Traders Finance Corporation, Limited, made in interpleader proceedings, should be dismissed.

On November 3, 1953, Canadian Motors, Limited sold a 1952 Ford coach to one Kruger under a conditional sale agreement. On the same day Canadian Motors, Limited assigned its interest in the conditional sale agreement to the appellant Traders Finance Corporation, Limited. On February 9, 1954, the Sheriff of the Judicial District of Regina seized the car under a writ of execution obtained in an action brought against Kruger by the respondent Lange.

On September 14, 1954, the appellant, by letter, advised the sheriff that it had a lien on the vehicle under the conditional sale agreement dated November 3, 1953, and on October 6, 1954, the solicitors for the appellant wrote to the sheriff claiming ownership of the vehicle on behalf of their client. On October 20, 1954, the solicitor for the respondent Lange notified the sheriff that the claim of the appellant was disputed.

(1) (1955), 16 W.W.R. 506.

The issue was tried summarily by Hogarth D.C.J. on affidavit evidence and the following facts were agreed upon by counsel for the appellant and for the respondent:—

(1) Neither Canadian Motors Limited nor Traders Finance Corporation Limited registered at any time, the Conditional Sale Agreement dated November 3rd, 1953 between Canadian Motors Limited and Gus Kruger, and covering the sale of one used 1952 Ford Coach, Model 0570 bearing serial No. 0570H52-50828.

(2) At the time of actual delivery of the said automobile by Canadian Motors Limited to the said Gus Kruger the name of Canadian Motors Limited was attached or stamped to said automobile by a plate or similar device.

Neither Canadian Motors, Limited nor the appellant registered the conditional sale agreement, but relied on s. 12 of *The Conditional Sales Act*, R.S.S. 1953, c. 358, which, in part, provides:—

12. Registration shall not be required in the case of a sale or bailment of manufactured goods, of the value of $15 or over, which, at the time of the actual delivery thereof to the buyer or bailee, have the manufacturer's or vendor's name painted, printed or stamped thereon or plainly attached thereto by a plate or similar device; provided that the manufacturer or vendor, being the seller or bailor of the goods, keeps an office in Saskatchewan where inquiry may be made and information procured concerning the sale or bailment of the goods; . . .

The point for determination is whether the vendor's name was "plainly attached" to the vehicle, within the meaning of s. 12.

On the hearing before Hogarth D.C.J. it was stated, in the affidavit of James F. Betteridge, that he was employed by the appellant as used car shop foreman and that as soon as a used vehicle was acquired by Canadian Motors, Limited it was turned over to him for service and repair prior to resale; that before being removed to the sale lot it was customary for him, or someone under his direction, to affix to the vehicle, in one or more places, a decal, or sticker, which was usually placed on the engine cowl under the hood, or under the dash, or on the steering column, or on the outside of the trunk of each vehicle. The affidavit of Arthur R. Nichols stated that he had had twenty years' experience in the garage and automotive sales business and that all motor vehicles manufactured during the past twenty years, which had come to his premises for repair, or sale, have had placed upon them, or in them, normally under the hood of the vehicle, a plate upon which the name of the manufacturer clearly appears.

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Hogarth D.C.J. held that the Legislature, in employing the word "plainly", intended that the name of the vendor should be attached to some part of the exterior surface of the vehicle where it could be readily found and plainly seen, and not in some concealed part, or hidden recess, such as the under-side, or glove compartment of the vehicle.

Graham J., in dismissing the appeal, pointed out that the purpose of the plate, or decal, is to give notice of the name of the vendor to the world, so that inquiry may be made, and consequently reasonable visibility is required.

In the Court of Appeal the majority judgment construed the words "plainly attached" as meaning "attached so as to be plainly visible". Gordon and McNiven JJ.A., dissenting, were of the opinion that the decal was "plainly attached" within the meaning of s. 12, *supra,* and that it should be attached near the serial number of the vehicle.

In the Court of Appeal the decisions of Meredith C.J. in *Mason* v. *Lindsay* (1), and of Lamont J. in *Cockshutt Plow Co.* v. *Cowan* (2), were relied upon as indicating the strictness with which similar legislation has been construed.

In *Mason* v. *Lindsay, supra,* the words "Mason & Risch, Toronto", painted upon a piano by a company whose corporate name was "The Mason & Risch Piano Company, Limited", were held not to be a compliance with the provisions of s. 1 of *An Act respecting Conditional Sales of Chattels* (R.S.O. 1897, c. 149), which required that the name and address of the manufacturer or vendor of the article be painted, printed, stamped or engraved thereon, or otherwise plainly attached thereto.

In *Cockshutt Plow Co.* v. *Cowan, supra,* the company stamped on a plough manufactured and sold by it the word "Cockshutt", while the corporate name of the company was "The Cockshutt Plow Co. Ltd.", and it was held that this was not a sufficient compliance with s. 11 of the Saskatchewan *Ordinance respecting Hire, Receipts and Conditional Sale of Goods* (1907, c. 17), which required that the name of the manufacturer, or vendor's name, be painted, printed, or stamped thereon, or plainly attached thereto by a plate or similar device.

(1) (1902) 4 O.L.R. 365 at 369. (2) (1910) 3 Sask. L.R. 47.

Neither of these cases is of assistance. They are authority only for the proposition that, where a statute requires that the name of a manufacturer be painted, printed, stamped, engraved or plainly attached to an article, and a name is used that is not the corporate name of the manufacturer, there has not been a compliance with the statute. In the present case, there is no dispute as to the correctness of the name of the vendor. The complaint is that the name has been put in a place where it is not plainly visible, which was not the question in issue in *Mason* v. *Lindsay, supra,* or *Cockshutt Plow Co.* v. *Cowan, supra.*

In the judgment of the Court of Appeal it is said that, if the requirement of s. 12 can be satisfied by placing the decal on the cowl under the hood of a motor vehicle, then the provision of the section can be satisfied by attaching it in other places so hidden from view that intending purchasers would be required, in order to find the plate, to perform more complicated operations than merely lifting an engine hood, and such a placing would be in compliance with the requirements of this section. I am, with respect, unable to agree, because, if the place where the decal is attached is a place of concealment, then, in my view, it would follow that it was not plainly attached and the statute was not satisfied.

It is common ground that there was, at the time of the sale, attached to the cowl of the vehicle, underneath the hood, a decal, or sticker, of oval shape, approximately four inches long and one and one-half inches wide, with the words "Sold by Canadian Motors, Limited, Ford and Monarch Dealers, Regina" printed thereon. Also there is no dispute as to the sufficiency of the wording on the decal, but only as to the visibility of the place of attachment. This decal cannot, of course, be seen unless the hood cover over the engine is raised so as to make the cowl visible.

Attaching the name is intended to serve the same purpose as registration under the Act; that is, to give to subsequent purchasers, mortgagees, execution creditors and attachment creditors notice of the prior interest claimed by vendors in articles in the possession of others having a limited interest therein. Vendors must keep an office in Saskatchewan, where, upon inquiry, information concerning the sale may be obtained.

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It should be pointed out that the requirements of s. 12, *supra,* are not confined to motor vehicles, but apply to all kinds of manufactured goods of the value of $15. It follows that no rule of general application can be laid down for the attachment of the names of manufacturers to their articles of manufacture, because of their great variety. We are here dealing only with a motor vehicle and what might be suitable in the case under discussion might be unsuitable in the case of other manufactured articles.

With respect, I am unable to agree with the view of the majority of the Court of Appeal that it is not a compliance with the requirement of the statute to attach the decal on the cowl of the engine, where it cannot be seen until the hood is raised, or removed. There is nothing in the statute to suggest that it must be attached to the exterior of the vehicle, where it would be exposed to the hazards of traffic and weather. In my view there was, in this case, a sufficient compliance with the statute.

I would allow the appeal and would make no order as to costs.

Appeal allowed; no costs.

Solicitors for the appellant: *Thom, Bastedo, McDougall & Ready.*

Solicitor for the respondent: *J. Glass.*

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*May 28
*Jun. 27

THE MONTREAL TRUST COMPANY ..APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Succession duty—Will—Bequest of life income—Power to request payment of capital—Power never exercised—Whether competent to dispose of capital—General power to appoint or dispose of property—The Dominion Succession Duty Act, 1940-41 (Can.), c. 14 as amended, ss. 3(1)(i), 3(4), 4(1) and 6(1).

*PRESENT: Kerwin C.J., Taschereau, Rand, Cartwright and Fauteux JJ.

By his will the husband of the deceased left the residue of his estate to his trustees to pay the net income thereof to his wife during her lifetime and "to pay to my wife . . . the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire". Upon the death of the wife the residuary estate was to be divided equally between his children. The wife never made any request or expressed any desire to be paid any of the corpus nor did she ever receive any portion of it. Following her death on March 8, 1953, the Minister, in computing the value of her estate, included therein the amount then comprising the residue of her husband's estate on the ground that by virtue of s. 3(4) of the *Dominion Succession Duty Act*, since the wife had at the time of her death a general power to appoint or dispose of the corpus, there was deemed to be a succession in respect of such corpus. The appellant contended that the wife did not have a general power of appointment but only a special restricted power to require the residue to be paid to her. The Exchequer Court held that she had a general power of appointment.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau and Fauteux JJ.: The wife was "competent to dispose" of the residue of her husband's estate within s. 3(1)(i) of the Act, because she had a general power to dispose of it, since "general power" includes under s. 4(1) of the Act "every power or authority enabling the donee . . . to appoint or dispose of the property as he thinks fit". By virtue of s. 3(4) there was deemed to be a succession when a deceased held such a power. (*In re Penrose*, [1933] Ch. 793, referred to).

Per Rand J.: When a donee can require the whole of the residue to be paid to him and thereupon dispose of it as he sees fit, he has power or authority to dispose of the property as he thinks fit within the meaning of s. 4(1) of the Act.

Per Cartwright J.: *Semble*, the power given to the wife was not strictly speaking a general power of appointment but she was "competent to dispose" of the residue of her husband's estate.

APPEAL from the judgment of the Exchequer Court of Canada (1), Ritchie J., affirming the assessment made by the Minister.

A. E. Johnston, Q.C., and *D. L. Swancar*, for the appellant.

J. A. MacAulay, Q.C., D. C. McGarvin and *A. L. De Wolfe*, for the respondent.

The judgment of Kerwin C.J. and Taschereau and Fauteux JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal from a decision of the Exchequer Court (1) dismissing an appeal from an assessment by the Minister of National Revenue of succession duty in respect of alleged successions arising on the death of Mrs. Emily Rhoda Bathgate. As she died March 8, 1953, the applicable statutory provisions are those of the

(1) [1955] Ex. C.R. 312.

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Dominion Succession Duty Act, 1940-41, c. 14, as amended down to that date. The question to be determined is whether, under the terms of her husband's will, Mrs. Bathgate had a general power of appointment or disposition. The appellants admit that if this point is decided adversely to them there were successions and that the assessment made by the Minister was proper.

By paragraph (i) of subs. (1) of s. 3 of the Act of 1940 Parliament enacted that a "succession" shall be deemed to include:—

> (i) property of which the person dying was at the time of his death competent to dispose.

Subsection (1) of s. 4 provides:—

> 4. (1) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition but made by himself, or exercisable as mortgagee.

Subsection (4) of s. 3 was added in 1944-45 but was repealed in 1952 by c. 24, s. 2 and the following substituted therefor:—

> (4) Where a deceased person had at the time of death a general power to appoint or dispose of property, there shall be deemed to be a succession in respect of such property and the person entitled thereto and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

These statutory conditions are to be applied in the following circumstances. Mrs. Bathgate's husband died before there was any *Dominion Succession Duty Act* and by his will left the residue of his estate to his executors and trustees "upon trust . . . to pay the net income thereof to my wife". There was a further trust "to pay to my wife . . . the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire". Upon the death of his wife his residuary estate was to be "divided equally between my children".

His will provided for the vesting of the shares of his estate given to his children in the following words:—

> I further declare that although the time at which a child of mine shall be entitled to receive a share in my estate may be deferred until he or she has attained a stated age or that the amount thereof may not be deter-

minable until the death of my wife as herein declared, yet any share to which a child of mine is entitled in my estate under the terms of this my Will shall be deemed to vest and shall vest in him or her immediately at my death.

Mrs. Bathgate never had any control or possession of any of the assets of her husband's estate and, under the terms of his will, she acted as an executrix in an advisory capacity only. She never made any request or expressed any desire to her husband's executors to be paid any of the corpus of his estate and did not receive any portion of the corpus.

Notwithstanding the matters mentioned in the preceding paragraph which were relied on by the appellants, Mrs. Bathgate was "competent to dispose" of the residue of her husband's estate (subs. 1 (i) of s. 3), because she had a general power to dispose of it since "general power" includes "every power or authority enabling the donee . . . to appoint or dispose of property as he thinks fit" (subs. 1 of s. 4). By subs. 4 of s. 3 there was deemed to be a succession in respect of property where the deceased person had at the time of death not merely the general power or authority to "appoint", but also to "dispose of" property. Although this subs. 4 of s. 3 was added only in 1952, the provisions of subs. 1 of s. 4, stating who is to be deemed "competent to dispose" apply to it. By the terms of the trust the executors and trustees of the husband were to pay Mrs. Bathgate "the whole or such part of the corpus thereof as she may from time to time and at any time during her lifetime request or desire". This power or authority to "request or desire" is sufficient to bring her within the terms of the statute.

In *In re Penrose* (1), a wife gave a power of appointment to her husband in favour of a limited class which, on construction, was held to include the husband. He purported to exercise the power in favour of himself with respect only to part of the property and died without any general exercise of the power. Luxmoore J. held that there was nothing to prevent the husband as donee of the power from also being an object and appointing the whole property to himself. It is unnecessary to consider all the implications of that decision, but, so far as the point under consideration is concerned, I agree so unreservedly with the

(1) [1933] Ch. 793.

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reasoning of Luxmoore J. where he is dealing with comparable provisions of the Imperial Finance Act, 1894, that I transcribe the relevant paragraph which appears at pp. 807-8 of the report:—

> It is argued that the power in the present case is a limited power and does not authorize the donee to appoint or dispose of the property subject to it as he thinks fit. It is said that if he appoints to himself he only acquires the property but does not dispose of it, and that his power to dispose of it as he thinks fit does not arise under the power but after he has exercised it in his own favour. In my judgment this is too narrow a construction to place on the words of the definition. A donee of a power who can freely appoint the whole of the fund to himself and so acquire the right to dispose of the fund in accordance with his own volition, is, in my judgment, competent to dispose of that fund as he thinks fit, and it can make no difference that this can only be done by two steps instead of by one—namely, by an appointment to himself, followed by a subsequent gift or disposition, instead of by a direct appointment to the object or objects of his bounty. If under a power the donee can make the whole of the property subject to it his own, he can by exercising the power in his own favour place himself in the position to dispose of it as he thinks fit. The power to dispose is a necessary incident of the power to acquire the property in question. In my judgment, the word "power" in the phrase "a power to appoint or dispose of as he thinks fit," is not used in the definition section in the strict legal sense attaching to it when used with reference to a power of appointment, but in the sense of capacity; and I think this is made clear by the use of the words "or dispose of" in addition to the words "to appoint," because otherwise the words "or dispose of" would be mere surplusage.

The decision in *Wanklyn* v. *The Minister of National Revenue* (1), is not in conflict with this conclusion: There the majority of the Court expressed doubts as to whether, on the proper construction of the will of Mrs. Chipman, a general power of appointment had been conferred on her husband, but arrived at their conclusion on another basis. What was sought to be assessed to succession duty was the property over which the Minister had argued the husband had a general power of appointment, although he had not exercised it except with respect to a small portion. The Minister sought to make his estate liable as if the power had been completely exercised.

The appeal should be dismissed with costs.

(1) [1953] 2 S.C.R. 58.

RAND J.:—The issue in this appeal is whether the following clause of a will creates a general power of appointment within the meaning of the *Dominion Succession Duty Act*, statutes of 1940-41, c. 14:—

> Sixthly: UPON TRUST as to all of my residuary estate including lapsed legacies, should my wife, Emily Rhoda Bathgate, survive me, to pay the net income thereof to my wife, Emily Rhoda Bathgate, for the term of her natural life, and to pay to my wife, Emily Rhoda Bathgate, the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire; . . . .

This was followed by a provision declaring that the remainder interests of the residue given to the children should be deemed to vest immediately on the testator's death.

Sections 3(4) and 4(1) of the Act read:—

> 3. (4) Where a deceased person had at the time of death a general power to appoint or dispose of property, there shall be deemed to be a succession in respect of such property and the person entitled thereto and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.
>
> 4. (1) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee.

Mr. Johnston's argument is that in the ordinary definition of the expression "general power of appointment" there must be an unlimited discretion as to appointees, including the donee of the power, either by instrument *inter vivos* or by will or both and that as the donee here could appropriate only to herself, that is, that on her request the money would be paid to her, the definition is not satisfied. What the clause does, the contention goes, is to give a power to appropriate the corpus as distinguished from the power to appoint.

I will assume that the definition so stated is right but I think the question is disposed of by s. 4(1). By that language the expression used in s. 3(4) includes "every power or authority enabling the donee or other holder to appoint or dispose of the property as he thinks fit". If the language were "to appoint as he thinks fit" that would, no doubt, express the general understanding of such a power

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but the "authority to dispose of property as he thinks fit" must obviously be given independent meaning and if it is then it necessarily effects an enlargement of the ordinary scope of the expression. "Authority to dispose of" contemplates ultimate alienation. The technical conception of an appointment is that the property is deemed to pass from the donor of the power to the appointee, but with authority to dispose there is added the case such as is before us where the donee can admittedly require the whole of the residue to be paid to her and thereupon dispose of it as she sees fit. That was the view of similar language taken by Luxmoore J. in *In re Penrose* (1), and I think it is the right view.

I would, therefore, dismiss the appeal with costs.

CARTWRIGHT J.:—The facts, the provisions of the will of the late James Loghrin Bathgate and the statutory provisions relevant to the determination of the question raised in this appeal are set out in the reasons of the Chief Justice.

The question to be determined is whether the corpus of the residue of the estate of James Loghrin Bathgate forms part of the estate of Emily Rhoda Bathgate for purposes of succession duty.

Ritchie J. was of opinion that the will of James Loghrin Bathgate conferred on Mrs. Bathgate a general power of appointment in respect of the residue of his estate. The clause of Mr. Bathgate's will which the learned judge construed as giving this power is as follows:—

> Sixthly: UPON TRUST as to all of my residuary estate including lapsed legacies, should my wife, Emily Rhoda Bathgate, survive me, to pay the net income thereof to my wife, Emily Rhoda Bathgate, for the term of her natural life, and to pay to my wife, Emily Rhoda Bathgate, the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire; and I further direct that upon the death of my said wife, Emily Rhoda Bathgate, my said residuary estate (including undistributed income) or so much thereof as shall not have been paid to my wife during her lifetime shall be divided equally between my children Mary Loghrin Calder and William Campbell Bathgate, or the same shall go wholly to one if only one of such children shall survive me, subject to the provision that if either of my said children shall have predeceased me leaving issue who shall be living at my death, such issue shall take, and if more than one equally among them, the share which such deceased child would have taken had such deceased child been living at my death.

(1) [1933] Ch. 793.

While it is not necessary to express a final opinion on the point, it is my present view that the power given to Mrs. Bathgate to obtain payment to herself at any time during her life of the whole or such portion of the corpus of the residuary estate as she might desire was not, strictly speaking, a general power of appointment. However, for the reasons given by the Chief Justice I agree with his conclusion that under s. 4(1) of the *Dominion Succession Duty Act* Mrs. Bathgate must be deemed to have been competent to dispose of the fund in question, which, accordingly, became subject to duty by the combined effect of ss. 3(1)(i) and 6(1) of the Act.

I would dispose of the appeal as proposed by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Johnston, Jessiman, Gardner and Swancar.*

Solicitor for the respondent: *A. A. McGrory.*

PETER WHITE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1956
*Jun. 7, 8
*Jun. 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Sexual offence against child—Evidence—Corroboration—Impotency and lack of opportunity pleaded but found not true by trial judge—Whether corroboration of evidence of child.

The appellant was convicted of unlawful sexual intercourse with his niece, a girl under 14 years of age. In his defence, he alleged lack of opportunity and the fact that he was impotent. In rebuttal, the girl's older sister testified that the appellant had had sexual intercourse with her a number of times, and the mother of the girls testified that the appellant had admitted to her acts of intercourse with the older girl. The trial judge held that the appellant's statements as to opportunity and impotence were false. The Court of Appeal for Ontario affirmed the conviction.

Held (Cartwright and Nolan JJ. *dissenting*): The appeal should be dismissed.

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*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Nolan JJ.

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Per curiam: There was evidence upon which it was open to the trial judge to find that the child understood the nature and consequences of an oath and could therefore be sworn in as a witness.

Per Taschereau, Fauteux and Abbott JJ.: There was evidence from which the trial judge could infer corroboration in law. Whether a false statement is or is not corroboration must depend upon all the circumstances in a particular case. In the present case, both the lack of opportunity and the physical incapacity to commit the offence were material facts, either of which, if true, afforded a complete defence to the charge. The nature of the false statements and the circumstances in which they were made were such as could lead to an inference in support of the evidence of the child.

Per Cartwright and Nolan JJ. (*dissenting*): In all the circumstances of the case at bar, the false statements could not in law be regarded as corroboration of the evidence of the child. Evidence in corroboration must at the least be independent evidence from which it results as a matter of inference that it is more probable that the offence was committed by the accused than not. The false statements were not evidence of that nature.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the conviction of the appellant.

J. M. Reycraft, for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of Taschereau, Fauteux and Abbott JJ. was delivered by:—

ABBOTT J.:—The relevant facts in this appeal are fully set forth in the reasons of my brother Cartwright, which I have had the advantage of considering.

Leave to appeal to this Court was granted on the following questions of law:—

(1) Was there evidence on which it was open to the trial judge to find that the child, Pearl Miller, understood the nature and consequences of an oath and should be sworn as a witness?

(2) Was there any evidence to corroborate the evidence of the child, Pearl Miller, in any material particular implicating the accused?

(3) Did the trial judge admit inadmissible evidence of the witness, John Miller, as to statements made to him by Helen Miller in the absence of the appellant?

As to the first of these questions, I am satisfied that there was evidence upon which it was open to the trial judge to find as he did and this was the position taken by this Court

(1) [1956] O.W.N. 197.

at the hearing when it was indicated to counsel for the respondent that he need not pursue his argument on this point.

The argument before us was directed principally to the second question, that is to say, as to whether two false statements made by the accused at the trial were, in the circumstances of this case, evidence which in law could be corroborative. These two statements were (1) that the accused had no opportunity to commit the offence because the complainant's brother slept with him, and (2) that for several years he had been impotent and therefore physically incapable of committing the offence. The Court below (1) held that these false statements were evidence from which corroboration could be inferred, relying upon the dictum of Lord Dunedin in *Dawson* v. *McKenzie* (2), which has been quoted by my brother Cartwright and which has been discussed and applied in a number of subsequent cases, the most recent of which is *Credland* v. *Knowler* (3).

Much could be said for the view that upon a proper construction of the reasons given by the trial judge, he would have been prepared to convict without corroborative evidence. Be that as it may I share his view and that of the Court below that there was in law evidence from which the trial judge could infer corroboration.

Whether a false statement is or is not corroboration must, of course, depend upon all the circumstances in a particular case. In the present case both lack of opportunity and physical incapacity to commit the offence were material facts, either of which, if true, afforded a complete defence to the charge laid. In my opinion the nature of the false statements made by the accused and the circumstances in which they were made were such as could lead to an inference in support of the evidence of the child. As Taschereau J., speaking for the majority of the Court, said in *Macdonald* v. *The King* (4):

> The behaviour of a witness as well as his contradictory or untrue statements are questions of fact from which a jury may properly infer corroboration.

(1) [1956] O.W.N. 197.
(2) [1908] S.C. 648.
(3) (1951), 35 Cr. App. R. 48.
(4) [1947] S.C.R. 90 at 99.

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As to the third ground of appeal, I am satisfied that the learned trial judge specifically rejected the evidence complained of.

Since in my opinion there is no error in the judgment of the Court below, I would dismiss the appeal.

The dissenting judgment of Cartwright and Nolan JJ. was delivered by:—

CARTWRIGHT J.:—On December 9, 1955, the appellant was convicted before His Honour Judge Legris in the County Court Judges' Criminal Court of the County of Essex on the charge:—

> That he on or about the 11th day of July, in the year of our Lord one thousand nine hundred and fifty-five, at the Township of Sandwich West, in the said County, did unlawfully have sexual intercourse with Pearl Miller, a female person not his wife and under the age of Fourteen years, contrary to the Criminal Code.

His appeal to the Court of Appeal for Ontario (1) was dismissed by a unanimous judgment delivered on February 14, 1956.

The appellant was granted leave to appeal to this Court on the following questions of law:—

> (1) Was there evidence on which it was open to the trial judge to find that the child, Pearl Miller, understood the nature and consequences of an oath and should be sworn as a witness?
>
> (2) Was there any evidence to corroborate the evidence of the child, Pearl Miller, in any material particular implicating the accused?
>
> (3) Did the trial judge admit inadmissible evidence of the witness, John Miller, as to statements made to him by Helen Miller in the absence of the appellant?

As to the first point, while the answers of the witness Pearl Miller in the course of her examination by the learned trial judge for the purpose of determining whether she should be sworn seem to me to leave room for doubt as to whether she did in fact understand the nature and consequences of an oath, some of her answers appear to indicate that she had the necessary understanding; and I am unable to say that, as a matter of law, there was no evidence on which it was open to the learned trial judge to find as he did on this point.

In dealing with the second point it is first necessary to refer briefly to the facts. Pearl Miller, with whom the offence was alleged to have been committed, was born on

(1) [1956] O.W.N. 197.

February 2, 1943, and so was 12 years and 5 months old at the date of the offence charged. She is a daughter of the appellant's wife's sister. Her father died in 1948 and from then until some time in 1955 the appellant made a home for her and her two brothers and three sisters. She testified that she slept in one bedroom with her two younger sisters and the appellant slept in another room, but that he would from time to time get her to come into his bed. Her evidence, if accepted, indicates that the offence had been committed; but when the Crown closed its case there was no corroboration of her testimony.

The appellant gave evidence in defence. He denied the charge explicitly and also testified (i) that he had for some years been physically incapable of having sexual intercourse and (ii) that at the relevant times John Miller, an elder brother of Pearl, had been sleeping in the same bedroom as the appellant. He was asked in cross-examination if he had had sexual intercourse with Helen, a sister of Pearl, who was born on April 2, 1938, and said he had never done so.

The defence then called John Miller who testified that he slept in the appellant's bedroom except during the summer when he slept with his brother in the playhouse. In cross-examination he said that the appellant had told him that he had had intercourse with Helen frequently prior to her leaving his house, which she did in February 1955.

In reply the Crown called Helen Miller who testified that the appellant had had sexual intercourse with her a number of times, particularly in December 1954 and January 1955. The Crown then recalled Pearl's mother, Mrs. Santarossa, who testified that in August 1955, after the preliminary inquiry, she had had a conversation with the appellant. She was asked what the conversation was and answered:—

> Well, he told me about the Children's Aid taking the children and he told me that he did touch Helen and he said he was sorry, but he said he didn't touch Pearl.

In delivering judgment the learned trial judge says in part:—

> It is true the accused is not in good health, but the several statements made by the accused and amongst others that he was not able to have an erection is certainly not correct. It is not a true statement. And again the statement that the playroom was only being used accidentally, so to

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speak, is also not correct; it was used through the summer months. Those are straight denials and clearly point to the unreliability of the accused in respect of several statements. The further admission which the accused made to Mrs. Santarossa at the time of the police court hearing leaves no doubt that he has undoubtedly lied as to his potency.

Taken as a whole, I believe that the facts as they came out this morning are more than sufficient to give substantial corroboration to the story given by Pearl, and so much so on the weakness of the contradiction in the evidence of the accused and the impression that the evidence of Pearl gave me, I would strongly feel justified in finding the accused guilty without corroboration. In this case I am satisfied that there is more than sufficient corroboration in the statements made by the witnesses Helen and Mrs. Santarossa, and the contradiction by the accused himself in his own evidence. Therefore, the only conclusion to which I can arrive is that the accused is guilty as charged.

Counsel for the respondent argues that, in the circumstances of this case, the learned trial judge having held on sufficient evidence that the statements made by the appellant, (i) that he was impotent, and (ii) that John Miller was sleeping in his bedroom at the relevant times, were false, it was open to him to find corroboration in the fact of the appellant having made such false statements.

Reliance is placed on the statement of Lord Dunedin in *Dawson* v. *McKenzie* (1), which was quoted by the learned Chief Justice of Ontario:—

Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that the false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made.

Counsel for the respondent argues that, while the facts, (i) that the appellant occupied a bedroom alone in the vicinity of the room occupied by Pearl, and (ii) that the accused was proved to have been potent six months prior to the date of the offence charged, would not in themselves have amounted to any corroboration of Pearl's story, the false denials by the appellant of both of these facts could be regarded as corroboration.

(1) [1908] S.C. 648 at 649.

In *Credland* v. *Knowler* (1), Lord Goddard L.C.J. discusses the case of *Dawson* v. *McKenzie, supra,* and says in part at pages 54 and 55:—

> I should be very sorry to lay down, and I have no intention of laying down and I do not think any case has gone the length of laying down, that the mere fact that an accused person has told a lie can in itself amount to corroboration. It may, but it does not follow that it must. If a man tells a lie when he is spoken to about an alleged offence, the fact that he tells a lie at once throws great doubt upon his evidence, if he afterwards gives evidence, and it may be very good ground for rejecting his evidence, but the fact that his evidence ought to be rejected does not of itself amount to there being corroboration.
>
> * * *
>
> In other words, one has to look at the whole circumstances of the case. What may afford corroboration in one case may not in another. It depends on the nature of the rest of the evidence and the nature of the lie that was told.

The question we have to decide is whether, in all the circumstances of the case at bar, the two false statements, set out above, made at the trial by the appellant could in law be regarded as corroboration of the evidence of Pearl Miller. After an anxious consideration of all the evidence I have reached the conclusion that they could not. Evidence in corroboration must at the least be independent evidence from which it results as a matter of inference that it is more probable that the offence charged was committed by the accused than not. It is obvious from reading the record that the accused was a man of little education and limited understanding who protested his innocence and asserted that a false charge had been concocted against him. His false statements at the trial could justify the learned judge in refusing to believe his testimony but they do not, in my view, afford corroboration. They do not, I think, give a different complexion to the opportunity which was afforded by the fact of the appellant's residence in the same house as Pearl Miller. They are consistent with the panic of a man of limited mental powers faced with so serious a charge and do not in themselves warrant an affirmative inference of his guilt. In their nature the false statements do not appear to me to differ from those in the case, put by my brother Nolan during the argument, of an accused who sets up an alibi which is proved to be false, a course which would seem to me to impeach the accused's veracity but not to strengthen the case of the prosecution.

(1) (1951), 35 Cr. App. R. 48.

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In *Macdonald* v. *The King* (1), the false statement of the accused, referred to in the judgments, was made in connection with a meeting with a number of other persons proved to be participants in the crime with which he was charged; the fact of such meeting having taken place was in itself capable of being regarded as corroborative of the evidence of the accomplices apart from the making of the false statement.

I do not read the reasons of the learned trial judge in the case at bar as asserting that he would, although fully conscious of the danger of so doing, have convicted if he had concluded that there was no corroboration; it was not necessary for him to direct his mind to that question since in his opinion there was "more than sufficient corroboration". In my respectful view, the learned trial judge erred in law in holding that there was corroboration in the evidence of Helen Miller and of Mrs. Santarossa and consequently the conviction cannot be upheld.

This renders it unnecessary for me to deal with the third point on which leave to appeal was granted.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed.

Solicitor for the appellant: *J. M. Reycraft.*

Solicitor for the respondent: *C. P. Hope.*

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(1) [1947] S.C.R. 90.

ST. LAWRENCE METAL AND MARINE WORKS INC. (*Defendant*) ..... APPELLANT;

1956

*Mar. 13, 14
*Jun. 27

AND

THE CANADIAN FAIRBANKS-MORSE COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT;

AND

SOCIEDADE GERAL DE COMMERCIO, INDUSTRIA E TRANSPORTES LDA. ..... MISE-EN-CAUSE.

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

Shipping—Privilege—Materials furnished for construction of four ships—Conservatory attachment—Privilege claimed on two ships—Arts. 1983, 2383 C.C.

By a contract of sale, the respondent sold to the appellant certain equipment to be installed in four ships being constructed by the appellant, for a price of $415,276.49 payable in five instalments. Prior to the institution of this action brought by the respondent to recover a balance of $48,611.18, now reduced to $44,832.16, owing under the contract, two of the ships had been completed and delivered to the mise-en-cause. The action was accompanied by a conservatory attachment on the two remaining ships to protect the privilege claimed under art. 2383 C.C. The privilege was maintained by the trial judge and by a majority in the Court of Appeal.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Abbott J.: There was one contract of sale for a single price and not four separate sales for four separate prices. Therefore, no question of the apportionment or imputation of payments could arise.

A privilege is indivisible in its nature. The last paragraph of art. 2383 C.C. refers in terms to a single ship, and where, as here, materials are sold for a single price and used in the construction of more than one ship, it may well be that the privilege can only be exercised upon each ship to the extent of that portion of the price assignable to the materials used in that ship. In the present case, it was established that the portion of the price represented by the equipment installed in each ship was $103,819.12. The claim for the much smaller amount is secured by privilege upon each of the remaining ships.

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

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Per Taschereau and Locke JJ.: There was but one contract of sale affecting the four ships, there was but one debt, and there was no imputation of payments.

Since the privilege is indivisible in its nature, if the privileged object is fractioned, each part of the object guarantees the whole debt. Consequently the privilege covered the four ships. Since the debt is only $44,832.16, it follows that it is guaranteed by privilege on the two remaining ships and the question does not arise as to whether one or two ships could guarantee by privilege the totality of the debt of $415,276.49, if it had remained unpaid.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming, Rinfret J. dissenting, the judgment at trial maintaining a privilege under art. 2383 C.C.

A. Geoffrion, for the appellant.

Y. Pratte, for the respondent.

The judgment of Kerwin C.J. and Abbott J. was delivered by

ABBOTT J.:—The contract upon which the respondent's claim is founded provided for the sale by respondent to appellant of the propulsive equipment to be installed in four ships constructed by appellant, the various items of equipment for each ship being described in the contract as a "ship set". The sale price of all the machinery and equipment, at various unit prices specified in the contract, was $415,276.49 payable in five instalments of 20% each. In its action respondent claimed $48,611.18 as the balance owing under the contract. Prior to the institution of the action, two of the ships constructed by appellant had been completed and delivered to the mise-en-cause, and the claim for $48,611.18 was accompanied by a conservatory attachment on the two remaining ships to protect the privilege claimed by respondent. This claim was maintained to the extent of $44,832.16.

While the amount of appellant's claim and certain other questions were in issue in the Courts below I understand that there is now no controversy except as to whether, and to what extent, respondent's claim for $44,832.16 is privileged and as such entitled to be paid out of moneys set

(1) [1955] Que. Q.B. 438.

aside for that purpose. In the event that I am mistaken as to the appellant's concurrence in the views of the Court of Appeal upon the other matters, I should say that I am in agreement with those views.

The determination of this question involves the consideration of two points, (1) whether the contract referred to provided for a single sale with one sale price, or for four separate sales, one for each ship set, at four separate prices and (2) to what extent, if any, the respondent is entitled to be paid its claim by privilege.

As to the first of these points, I am satisfied there was no error in the decision of the Court below that there was one contract of sale for a single price, not four separate sales for four separate prices. This being so, no question of the apportionment or imputation of payments can arise.

Respondent's claim to be paid by privilege is based upon the provisions of the last paragraph of article 2383 of the Quebec *Civil Code*, which reads as follows:—

> 2383. There is a privilege upon vessels for the payment of the following debts:
>
> * * *
>
> If the ship sold have not yet made a voyage, the seller, the workmen employed in building and completing her, and the persons by whom the materials have been furnished, are paid by preference to all creditors, except those for debts enumerated in paragraphs 1 and 2.

The privilege provided for under this article, in common with other privileges created under the *Code*, gives to the creditor a right to be preferred to other creditors according to the origin of his claim and is indivisible of its nature (C.C. 1983).

Article 2383 of the *Civil Code* is similar to article 191 of the *Code de Commerce* as that article stood prior to the substantial amendments made in 1949 and both articles had their source to a very large extent in the provisions of *l'Ordonnance de la Marine* of 1681. Each of these provided, among other things, for a privilege to secure payment of the price of materials furnished for the construction of a ship and to secure payment of insurance upon the ship for the last voyage. Moreover, the civil law of France concerning privileges upon moveable property was substantially the same as that of the Province of Quebec.

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Abbott J.

Decisions of the French Courts and the works of the French commentators may therefore usefully be considered in determining the effect of article 2383 of the Quebec *Code*. In France, where insurance on a ship had been effected for a single premium but for a fixed period of time during which the ship made more than one voyage, the Cour de Cassation has held that the insurer's privilege must be limited to that portion of the premium assignable to the period covered by the last voyage, his claim for the balance of the premium being an unsecured one. Civ. rej. 20 juillet 1898, et le rapport de M. le Conseiller Durand: Dalloz, Jurisprudence Générale, 1900, 1. 231. See also Baudry-Lacantinerie, Privilèges, Vol. 1. No. 696.

The last paragraph of article 2383 refers in terms to a single ship, and where, as in the case at bar, materials are sold for a single price and used by the purchaser in the construction of more than one ship, it may well be, as suggested by the learned Chief Justice of Quebec in the Court below, that the privilege of the seller can only be exercised upon each ship to the extent of that portion of the price assignable to the materials used in that ship. Under certain circumstances this might present some difficulty as to proof but this does not arise in the present case as it was established that the portion of the price represented by machinery and equipment installed in each ship was $103,819.12. It is clear therefore that the respondent's claim for the much smaller amount of $44,832.16 is secured by privilege upon each of the ships seized under the conservatory attachment.

The appeal should be dismissed with costs.

The judgment of Taschereau and Locke JJ. was delivered by

TASCHEREAU J.:—J'ai eu l'avantage de lire le jugement de mon collègue M. le Juge Abbott, et je m'accorde avec sa décision. Je ne veux ajouter que quelques notes pour appuyer la conclusion à laquelle je suis arrivé.

Il est évidemment inutile de réciter de nouveau les faits qui ont donné naissance à ce litige. Il me sera suffisant de rappeler que l'intimée réclame $48,611.18, étant la balance due en vertu d'un *unique contrat de vente* au montant de

$415,276.49, pour marchandises vendues et livrées à l'appelante, payable en cinq versements égaux de 20% chacun. Ce montant représente le prix de quatre machines à propulsion et accessoires, à être installées à bord de quatre navires qui ont été baptisés sous les noms de "CARTAXO", "COLARES", "COVILHA" et "CORUCHE".

Deux navires complétés ont quitté le port de Québec, alors qu'il restait dû le montant réclamé dans l'action, qui était accompagnée d'une saisie-conservatoire pour garantir par privilège le paiement de la balance impayée. C'est la prétention de l'appelante que cette dette n'est pas entièrement privilégiée, car deux navires avaient déjà quitté le port et entrepris leur premier voyage. L'intimée se base sur les dispositions suivantes du *Code Civil* de Québec (article 2383):—

> Il y a privilège sur les bâtiments pour le paiement des créances ci-après:—
>
> * * *
>
> Si le bâtiment n'a pas encore fait de voyage, le vendeur, les ouvriers employés à la construction *et ceux qui ont fourni les matériaux pour le compléter,* sont payés par préférence à tous les créanciers autres que ceux portés aux paragraphes 1 et 2.

Les paragraphes 1 et 2 sont à l'effet que les frais de saisie et de vente, les droits de pilotage, de quaiage et de havre, et les pénalités encourues pour infractions aux règlements légaux du havre, ont préférence sur la créance de ceux qui ont fourni les matériaux pour compléter les navires.

Il est certain que l'article 2383 (C.C.) ne semble couvrir que le cas d'un seul navire, et que lorsqu'il n'y a qu'une seule créance due à un fournisseur de matériaux, employés à la construction de ce navire, elle ne peut être garantie par privilège sur un navire différent. L'intimée admet ce principe, qu'il serait d'ailleurs oiseux de contester sérieusement.

Mais dans le cas qui nous est soumis, la créance de l'intimée révèle en effet un caractère qui doit la soustraire à la rigidité de cette règle. Car le contrat est en effet rédigé dans les termes qui suivent et qui veulent que les "shipsets" devaient être livrés "le premier, le ou avant le 2 février 1948, et les trois autres, à raison d'un par mois pour chaque mois subséquent".

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Taschereau J.

Les paiements devaient s'effectuer de la façon suivante:—

20% sur acceptation de la réquisition par le vendeur;
20% le 1er décembre 1947;
20% le 1er février 1948;
20% le 1er avril 1948;
20% soixante jours après la livraison du dernier "shipset of equipment".

On voit donc qu'il n'y a *qu'un seul contrat affectant les quatre navires, une seule créance comme une seule dette,* et qu'il n'y a aucune imputation faite quant à ces paiements.

Le privilège de sa nature est indivisible. On sait que c'est le droit qu'a un créancier d'être préféré à d'autres créanciers suivant la cause de sa créance (1983 C.C.). Cet article correspond à l'article 2095 du Code Français, sauf qu'en France on n'a pas jugé nécessaire de proclamer cette indivisibilité, vu l'évidence de ce caractère qui s'applique au privilège. (Planiol et Ripert "Droit Civil" vol. 12, 2e éd. p. 276) (Rodière "Solidarité et Indivisibilité" p. 379) (Beudant "Droit Civil Français" vol. 13, p. 318).

Il en résulte donc que si la chose que le privilège frappe vient à être fractionnée, chacune des parties de cette même chose répond de la dette, et le détenteur peut être poursuivi pour le recouvrement.

Dans le cas qui nous est soumis, il n'y a eu aucune précision quant aux fournitures faites respectivement à chacun des navires composant cette flotte. Il n'y a qu'un seul contrat, qu'une seule créance, qu'une seule dette, et en conséquence, le privilège à cause de son caractère d'indivisibilité, porte sur l'ensemble de la flotte. (Cour de Cassation, Dalloz "Jurisprudence Générale" 1913, p. 302.). Comme dans le cas qui se présente, la réclamation a été réduite à $44,832.16, il s'ensuit donc qu'elle est couverte par privilège sur les deux navires saisis, et qu'il n'est pas nécessaire, vu que la question ne se présente pas, de déterminer si un seul ou deux navires pourraient garantir par privilège, la totalité de la dette de $415,276.49, si elle était demeurée impayée.

L'appel doit être rejeté avec dépens.

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FAUTEUX J.:—I agree with my brother Taschereau and my brother Abbott that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Bouffard, Larochelle, Duchesne & Amyot.*

Solicitors for the respondent: *Morin, Boivin & Verge.*

1956

*May 29
*Jun. 27

ROBERT ALFRED BRADLEY .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Murder—Plea of self-defence and drunkenness—Fist fight—Criminal Code, s. 201(a)(i) and (ii).

The appellant was convicted of murder. His main defences had been self-defence, drunkenness and lack of intention to kill.

The evidence was that the appellant and the victim had, in a deserted lane at about 2 a.m. on a very cold night, engaged in a drunken fist fight; that the victim fell to the ground and was kicked by the appellant; that while the victim was lying bleeding and unconscious, in below zero weather, the appellant removed the victim's coat, placed a leather belt around his head, running it through the mouth and knotting it tightly behind the left ear, and then abandoned him. The autopsy revealed numerous cuts on the head and a depressed fracture of the skull. The lungs contained an abnormal amount of blood.

The conviction was affirmed by the Court of Appeal, without written reasons.

Held (Rand, Cartwright and Nolan JJ. dissenting), the appeal should be dismissed.

Per Kerwin C.J. and Taschereau and Fauteux JJ.: On the uncontradicted evidence of medical and law enforcement officials and the admittedly free and voluntary statements made by the appellant, the conclusion is irresistible that, failing any defence that could arise from the evidence, the appellant's conduct throughout the entire transaction could only manifest an intention either to cause the death of the victim or to cause the victim bodily injury known to him to be likely to cause or accelerate death and being reckless whether death ensued

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Nolan JJ.

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or not. It is impossible to say with any degree of certainty to which one of the various injuries death could ultimately be attributed. Whether the fracture of the skull was caused by the appellant, intentionally or accidentally, what he did, once his victim had become unconscious, on the medical evidence, accelerated death and there is no place for any speculation as to what his intentions then were if they are to be measured by his actions. Therefore, subject to the consideration of possible defences and assuming particularly that the appellant was sane and sober, as the law presumes, there could be no doubt that what he then did is only reasonably consistent with either an intention to kill or to cause such bodily injury known to him to be likely, in the circumstances, to cause or accelerate death, being reckless whether death ensued or not. Subject to the consideration of possible defences, whether such a killing by acceleration amounts to murder or manslaughter depends whether, on the evidence, the case is one within s. 201(*a*)(i) or (ii) of the *Code*.

The trial judge charged the jury as to insanity, provocation, self-defence and drunkenness. These directions are unimpeached by the appellant. Obviously, the jury reached the view that none of the defences was made out. Having particularly failed to find that the appellant was drunk to the extent required to support a defence of drunkenness, which was the main defence here, there was no other verdict possible but the one rendered. There was no substantial wrong or miscarriage of justice.

Per Locke J.: All the acts of the appellant must be considered together and the matter cannot be limited to the blows which presumably felled the victim.

There is no substance to the objection that the trial judge made a finding in law that the appellant's participation in the fight was an unlawful act and a crime when the facts were in dispute. The facts were not in dispute and assaulting another person is a criminal offence subject to the exceptions explained in the charge.

Reading the charge as a whole, there was no misdirection for the trial judge to say that the appellant was presumed to intend all the consequences which might flow from the fight, even though he may not have known that the victim received a fractured skull, and that he was thus presumed to be guilty of murder, subject to possible defences. The necessity for proof of the intent required by s. 201(*a*) of the *Code* was impressed on the jury.

The contention that the trial judge should have instructed the jury that if the victim fell during the fight and fractured his skull on some object it could amount to no more than manslaughter, cannot be entertained. If the appellant struck the victim with his fists intending to kill him or cause bodily harm that he knew was likely to cause death and being reckless whether death ensued or not, it would be murder and not manslaughter.

The reading by the trial judge of s. 196 of the *Code*, coupled with the reference to the condition in which the victim was left and the instructions in the charge as a whole, was sufficient to dispose of the ground that the trial judge failed to tell the jury under what circumstances it would have been manslaughter under that section.

The objection that the trial judge failed to instruct the jury, that if they found that the appellant accelerated the death, under what circumstances it would amount to manslaughter, ignores the instructions as to whether the appellant had caused the death and as to his intent in assaulting and leaving the victim gagged and unconscious in the snow.

The jury, finding that the appellant was capable of forming the intent necessary to constitute the offence of murder, has by its verdict found that he had formed that intent. No other finding was open to them upon the evidence. No substantial wrong or miscarriage of justice occurred.

Per Rand J. (dissenting): The brain contusion was the vital physical fact and therefore the question of actual intent was of the first importance. The charge confused the question of causing a homicide with that of attributing to the appellant an intent or state of mind. If the appellant knew nothing of the skull fracture or existing conditions that coupled with a knockdown could cause it, it is impossible to see how anything flowing from it could be considered to be within any legal presumption of intention related to consequences, natural or unnatural. It was fatal to the charge to omit the vital link of knowledge actual or imputed that could produce such a natural consequence, as well as the intent to bring such an injury about.

As to the supplementary cause of tying the belt and abandoning the victim, which it was contended accelerated the death, the general verdict makes it impossible to say whether the jury proceeded upon the one cause or the other; and any finding by a court of appeal that the jury must have found guilt on the one or the other might be based on the one that the jury rejected. Furthermore, it cannot be seriously contested that the jury could have found in favour of the appellant that this supplementary conduct had not been carried out with the intent of s. 259 of the old *Code* and that the passion of the fight had not cooled. Nothing of this was contained in the charge and no Court can usurp the function of the jury and make such a finding under s. 1014(2) of the old *Code*.

Per Cartwright J. (dissenting): It was misdirection, fatal to the conviction, to tell the jury not that they might but that they must find that the appellant had the intent required by s. 201(*a*)(i) or (ii) of the *Code* unless they found that he was through drunkenness incapable of forming the intent to cause death or to cause bodily injury that he knew was likely to cause death and was reckless whether death ensued or not. It was for the jury, giving due weight to the rebuttable presumption which imputes to a man an intention to produce those consequences which are the natural result of his acts, to decide as a fact whether the appellant had the guilty intent necessary to make him guilty of murder; and, in particular, it was for them to say whether the fracture of the skull was a natural consequence of any blow struck by the appellant.

n the circumstances of this case, it is impossible to say that a jury properly instructed and acting reasonably must necessarily have convicted the appellant of murder. It was open to them on the evidence to find a verdict of manslaughter. On the other hand, it is not possible to say that there was no evidence on which the jury might find a verdict of murder, and, therefore, there should be a new trial.

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Per Nolan J. (dissenting): It was a fatal defect in the charge of the trial judge to instruct the jury, as he did, that the appellant was presumed to have intended the consequences which flowed from the fight, even though he might not have known that the victim suffered a fractured skull, and that an intent, as required by s. 201(*a*)(i) or (ii) of the *Code*, must be attributed to him. It was for the jury to say whether the intent of s. 201 was to be attributed to the appellant so as to justify a verdict of murder; also to say whether the fracture of the skull was caused by a blow of the appellant or by the victim falling on a pile of scrap iron nearby.

It was for the jury to determine whether, on the facts, manslaughter or murder was the appropriate verdict and there is a doubt, which must be resolved in favour of the appellant, that the verdict would necessarily have been the same had no irregularity occurred.

APPEAL from the judgment of the Court of Appeal for Manitoba, affirming the conviction of the appellant for murder.

J. L. Crawford for the appellant.

A. S. Dewar for the respondent.

The judgment of Kerwin C.J. and Taschereau and Fauteux JJ. was delivered by

FAUTEUX J.:—This is an appeal from a unanimous judgment, delivered without written reasons by the Court of Appeal for Manitoba, affirming a verdict of murder rendered against the appellant. The grounds of law, upon which leave to appeal to this Court was granted, are all exclusively related to the address of the trial judge to the jury. These grounds and all the material facts leading to the conviction of the appellant, are set out in detail by other members of the Court and need not therefore be recited here.

On a consideration of the uncontradicted evidence of medical and law enforcement officials, who took charge of the case when the body of the victim was found lying in a lane on the morning of January 6, 1955, and of the admittedly free and voluntary statements made by the appellant, one is irresistibly forced to the conclusion that, failing any defence susceptible to flow from the evidence, the conduct of the appellant throughout the entire transaction can only manifest an intention either to cause the death of the person he killed or to cause to that person bodily injury known to him to be likely to cause or accelerate death and being reckless whether death ensued or not.

In the course of the fight in which both were engaged in the lane, around two o'clock of the night, the appellant gave a blow with his fist to the deceased and the latter fell to the ground; the appellant then kicked him; and knowing that the victim was lying unconscious, in that deserted lane, at that hour of a very cold night—it being four degrees below zero—the appellant removed the coat of his victim, placed a leather belt around his head, running it through his mouth and knotting it tightly behind his left ear; and he then abandoned his unconscious victim, who was profusely bleeding, with part of his body exposed.

No one suggests that without these and all the other injuries inflicted on him by the appellant, Flatfoot would have died that day from any other cause; indeed, the case was pleaded throughout on the basis that the appellant himself caused the death of the victim. It is impossible to say with any degree of certitude to which one of the various injuries then suffered by the deceased death could ultimately be attributed. It is clear, however, that even if the fracture of the skull was, as suggested by counsel for the appellant, the result of the fall to the frozen ground or on some iron junk and that this fracture was the primary cause of death, the victim did not die immediately. He was still alive when the accused proceeded thereafter to tie the belt around his head and through his mouth, to remove his coat and to abandon him in this critical condition of unconsciousness and haemorrhage, in the circumstances above described. In the opinion of Doctor Ross, "death was not instantaneous but more prolonged" and exposure was a contributing cause. The large quantity of blood found, in the morning, where the head of the body was resting and which, while the appellant was kneeling close to the victim, permeated parts of his clothes, does not suggest that the circulatory system had immediately ceased to function. Whether the fracture of the skull was caused by the appellant, intentionally or accidentally, what he actually did, once his victim had become unconscious, on the medical evidence accelerated death and there is no place for any speculation as to what his intentions then were if they are to be measured by his actions. This was not an abandonment devoid of significance nor the case of a hasty flight from the scene of the crime. Subject to the consideration of possible defences

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which might arise from the evidence and assuming, particularly, that the appellant was sane and sober, as he is presumed under the law to have been unless the contrary is shown, there can be no doubt that what he then did is only reasonably consistent with either an intention to kill or to cause to the person he killed such bodily injury known to him to be likely, in the circumstances, to cause or accelerate death, being reckless whether death ensued or not. In Archbold's Criminal Pleading, Evidence & Practice, 32nd ed., it is stated at page 893 that:—

> If a man is suffering from a disease, which in all likelihood would terminate his life in a short time, and another gives him a wound or hurt which hastens his death, this is such a killing as constitutes murder (1 Hale 427), or at the least manslaughter.

In the case of *Edmunds* (1), the Lord Chief Justice, speaking for the English Court of Criminal Appeal, said at p. 258:—

> It is clear that if the injuries accelerated the death, the question whether the deceased was in a weak state of health at the time they were inflicted is immaterial, and that the appellant would be guilty of murder.

Under s. 199 of the *Criminal Code*:—

> Where a person causes bodily injury to a human being that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

The fact that such other cause would be, as in the present case, attributable to the same person who accelerates the death does not, in the eyes of the law, improve the position of the appellant.

Subject to the consideration of possible defences, whether such a killing by acceleration amounts to murder rather than manslaughter depends upon whether, on the evidence, the case is one within the provisions of section 201(*a*)(i) or (ii).

With respect to possible defences, the trial judge charged the jury as to insanity, provocation, self-defence and drunkenness. These directions are unimpeached by the appellant. It is the defence of drunkenness, however, which in this case, was the defence of substance and indeed, on the evidence, drunkenness was the crucial issue. While it may be said that, when dealing generally with the presumption

(1) (1909), 2 Cr. App. R. 257.

that a man is presumed to intend the natural consequences of his act, certain statements of the charge could be objectionable, the same matter was dealt with again, as it had to be, when the specific instructions were given as to drunkenness and were then related to the provisions of section 201(*a*)(i) or (ii). In this regard, the following instructions may be quoted:—

> If you decide that the accused caused the death of the deceased, you must next decide, Did he mean to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not? That is, in either case you must consider the accused's capacity to form an intent, and in the second case, his ability to know that what he did was likely to cause death.
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> If you come to the conclusion that the accused was not insane at the time the offence was committed, the question of drunkenness is still a matter requiring careful consideration, because it affects the capacity to form an intent and to know the consequences of his act. This involves a careful consideration of all the evidence relating to drunkenness.
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> Then, if you decide he was drunk, you must decide if he was, firstly, so drunk as to be insane; secondly, drunk to a lesser degree, but so drunk as to be unable to form an intent about what he did or to appreciate the consequences of his act; and thirdly, drunk, but not so drunk as to be unable to form such an intent. Upon any of these points if you have a reasonable doubt, the accused must be given the benefit of that doubt.
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> Now if you come to the conclusion that the accused was not insane or so drunk as to be insane, then you must decide if he was so drunk as to be unable to form an intent to commit the crime with which he is charged. If on a full consideration of the evidence you conclude that he was in such a state of drunkenness as to be unable to form such an intent or if you have a reasonable doubt on the matter, then subject to the questions of self-defence and provocation, which counsel for the accused really left me to deal with and which I will have to deal with, you must find the accused not guilty of murder but guilty of manslaughter.

The judge then reviewed exhaustively all the evidence related to drunkenness and said:—

> If you come to the conclusion that the accused's condition of drunkenness did not render him incapable of forming the intent to do what he did, the intent to either cause the deceased's death, or alternatively, the intent to cause bodily harm and the inability to know the likely consequences, he being reckless whether death ensued or not, then the accused is guilty of murder. If you come to the conclusion that he was incapable of forming that intent, then he is guilty of manslaughter, unless he did what he did lawfully in self-defence.

And at the end:—

> I want to remind you again when the accused came before this Court he did so, as every accused does, with the presumption of innocence in his favour, and the burden of proving the guilt of the accused is upon the Crown from the beginning to the end of the case. There is never any

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burden on the accused to prove his innocence. It is not until the evidence is all in that a verdict can possibly be found. If the evidence raises a reasonable doubt as to the guilt of the accused, he is entitled to the benefit of that doubt on every point that has to be decided.

From the verdict rendered, it is evident that the jury reached the view that none of the defences upon which they were instructed was made out. Having particularly failed to find that the appellant was drunk to the extent required by law to support a defence of drunkenness, there was, in my view, no other verdict possible but the one rendered by the jury. Whatever may be the merits of all the points of law raised, there was, in view of the evidence before the jury, no substantial wrong or miscarriage of justice. I agree with the conclusion reached by the Court of Appeal for Manitoba. The appeal should be dismissed.

RAND J. (*dissenting*):—The controlling question in this appeal is whether the charge dealt properly with the matter of the intent of the accused.

The medical evidence presented by the Crown included that of Dr. Ross, a pathologist, who had performed the autopsy. Besides two cuts in the scalp to the bone each $1\frac{1}{4}''$ to $1\frac{1}{2}''$ long and one above each ear he found a star-shaped laceration $1\frac{1}{4}''$ in diameter $1\frac{1}{2}''$ behind the left ear which led to a fracture of the skull $2\frac{1}{4}''$ below. The fracture held four bone fragments covering an area of $1\frac{1}{4}''$ by $\frac{3}{4}''$. These were raised or extended $\frac{3}{4}''$ inside the skull and into the brain which was lacerated and covered with blood. In the doctor's opinion the fracture was caused by external violence applied from above downwards, a much greater force than would be required for the cuts above the ears. The latter could have been caused by the kick of a boot shown to have been worn by the accused, who admitted having kicked the deceased "a couple" of blows. The doctor did not, however, believe that the stellated wound and fracture had been caused by the toe of a boot. He described the kind of instrument indicated by the form and character of the wound and fracture as having a surface moderately sharp with a relatively blunt point like a small-headed hammer or a very sharp rock. A scarf had been tied about the deceased's neck, but no evidence of constriction of the neck or of any obstruction to the throat was found. A belt had been fastened around the head covering the mouth or

lips and its effect in relation to the death was speculative. The motive behind either the scarf or belt is not clear. An analysis of the blood showed 396 milligrams of alcohol concentrated in 100 milliliters of blood, indicating severe intoxication.

In his opinion several factors may have contributed to the death. An exposure to four degrees below zero of a person so intoxicated could itself have been fatal and that cause could have been accelerated by the brain injury. Conversely the contusion of the brain was equally sufficient, and probably aggravated by the alcoholic condition and the exposure:—

> . . . the skull injuries were such that they would render a person unconscious, and being exposed to cold in this manner would result in his death. A high blood level of that level would similarly render a person unconscious and in similar exposure would be expected to cause his death.

He could not say which of the two had rendered the deceased unconscious but Mr. Dewar agreed that it could be taken as the fracture. It is not suggested that the other two scalp wounds or the abrasions on the cheeks played any part in the death.

It can be seen, therefore, that the vital physical fact was the brain contusion. It follows from the doctor's description of the instrument which might have caused it that if the deceased had been struck in the face and had fallen backwards on a sharp stone or piece of metal, the fracture could have resulted; and this possibility is strengthened by the direction taken by the violence, downwards and inwards. There was, near the body, in a lane leading to the rear of buildings, a pile of miscellaneous pieces of iron. The accused with the deceased had walked from a restaurant to the lane; two others who had been with them and were called as witnesses, following after, had stopped in a vacant lot 40 or 50 yards from where the body was found and after remaining there ten minutes or so had returned to the cafe. The movements of the accused from midnight until 3.05 a.m. were fairly well covered by a number of witnesses and nothing indicates the possession of an instrument that fits the description given. There was snow on the ground covering the area. The time taken up by the drinking and

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leading up to the quarrel was not considerable and Mr. Dewar rather stressed the fact that the period between leaving the restaurant and reaching the railway where the accused entered a box car was within 45 minutes.

The charge did not deal with the iron pile as a condition within the area in which the fight had taken place or whether or not the accused was aware either of it or other objects scattered around that could have been the means of such a fracture: and there can be little doubt that he did not realize that such an injury had been suffered. The deceased was a well built man, evidently in good health, probably around thirty-five or forty years of age. The accused is thirty-seven and likewise seems well set up. Both had been drinking beer and alcohol. From an earlier incident the same night, the deceased seemed easily provoked although on that occasion easily mollified. What in fact took place between them was a brutal drunken brawl.

The question, then, of actual intent became of the first importance. In the course of the charge, the trial judge used the following language:—

> In considering whether an accused is capable of having the intent to cause death or of having the intent to cause bodily harm, and being reckless whether death ensues or not, and knowing that the bodily harm done is likely to cause death, we start with two presumptions of law. . . . The second presumption of law you have to consider is that every man is presumed to have intended the natural consequences of his acts, and therefore, for example, where one man deliberately shoots a gun at another, an intent to cause death, or at least to cause bodily harm likely to cause death, will be presumed.
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> The injury (the fracture) was sustained in the fighting; the accused is presumed to intend the consequences of his own act, subject to drunkenness or provocation, which I have to deal with later, so that if this deceased sustained that injury in the course of that fight, then the accused must be considered to have intended all the consequences of his acts on that occasion, subject to what I will say later about other possible defences.
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> If you decide that the accused caused the death of the deceased, you must next decide, Did he mean to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not? That is, in either case you must consider the accused's capacity to form an intent, and in the second case, his ability to know that what he did was likely to cause death.

Other passages emphasized "capacity" to the same effect. In none of them is any distinction made between what is meant by the "natural consequences" as related to the

direct or indirect cause of death in fact and as related to the intention made responsible for death. What the language used embraces is the consequence of death regardless of hidden and unappreciated causes. So stated it means that the legal presumption would hold the accused, because of the illegal fighting, to have intended to bring about the death by the fracture and the injury to the brain, an intention which, assuming him to be capable of forming it, the jury were told they must attribute to him.

This, with the greatest respect, confuses the question of causing a homicide with that of attributing to the accused an intent or state of mind. Under the *Code* as at common law the person whose act with its consequences operating directly or indirectly in fact do bring about a death is looked upon as the cause of it and in the earliest days that itself was sufficient to attract legal responsibility. In the course of years this was modified and under the *Code* the classification of the stages of homicide leading from the actual cause to the final liability for murder or manslaughter is clearly set out. Section 250 of the former *Code* defines "homicide" in the sense I have indicated. Next is a subdivision into "culpable" or "not culpable", with the latter of which we are not concerned. Culpable homicide is "the killing of any person either by an unlawful act or by an omission", s. 252(2), and is either murder or manslaughter. Section 259 proceeds to the definition of murder and in s. 260 it becomes associated as an incidental consequence with the commission of certain other crimes. By s. 252, culpable homicide, not, within those two sections, amounting to murder, is manslaughter, which is therefore the residual aggregate of acts of culpable homicide. The *Code* following the common law, does not expressly distribute *mens rea* to all cases of manslaughter; for example, "unlawful acts" still remain a not wholly determined area, the nearest pronouncement being that of the House of Lords in *Andrews* v. *Director of Public Prosecutions* (1).

Assuming that the death here was a culpable homicide, the first and essential inquiry is whether it comes within the two sections dealing with murder. Applicable to the facts, there is, by s. 259(*a*), the specific intent to cause the

(1) [1937] A.C. 576.

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death, and (*b*) that the offender "means to cause to the person killed any bodily injury *which is known* to the offender to be likely to cause death, and is reckless whether death ensues or not". If, in this case, the fracture was caused by the fall backwards on a sharp point of iron, it is not suggested by the Crown that the presence of such a means of injury was shown to be within the knowledge of the accused, much less that he intended to cause bodily injury by that means. Then in s. 260 the other crimes out of which murder may arise are specifically named but they do not include a mutual battery, to which the language, "means to inflict grievous bodily injury for the purpose of facilitating the commission of" an offence named or his flight thereafter, is inapplicable. Finally s. 261 reduces the act that would otherwise be murder to manslaughter if it is inflicted in the heat of passion aroused by provocation. But in the absence of knowledge of the iron or other object there was nothing to bring the case within the provisions of ss. 259 and 260 unless the intent was connected with the blow of the fist or the kicking and, apart from the fact that if these had been done in the passion of the fight an intent to kill would not have converted the offence into murder, that either could have caused the death, a view rejected by the medical evidence, is not contended.

The charge then never really put to the jury the substantial defence. If the accused knew nothing of the skull fracture nor existing conditions that coupled with a knockdown could cause it, I am quite unable to see how anything flowing from it could be considered to be within any legal presumption of intention related to consequences, natural or unnatural. As put to the jury, the only question to be considered was the mental capacity of the accused to appreciate such a sequence of events and such a result, a capacity which I will assume him to have had; but that omitted the vital link of knowledge actual or imputed that could produce such a "natural consequence", as well as the intent to bring such an injury about. This, in my opinion, was a fatal omission which vitiated the charge.

These considerations deal with what may be called the primary acts which brought about the death. A subsidiary or supplementary cause, distinct and separate from the former, is suggested in the tying of the belt around the head

of the deceased, the possible effect of which I have mentioned, and the flight of the accused, thereby abandoning the victim, drunk and unconscious, in a remote spot, in early morning and zero weather. These acts, it is said, "accelerated" the death, as on the evidence they might have been found to have done so, and are to be held themselves conclusively to constitute acts of murder.

Assuming that flight, after knocking down in a mutual fight a person who, through a hidden cause, is rendered unconscious, can be looked upon as a new and felonious act, and assuming also that the charge sufficiently differentiated between these two groups of facts as independent causes, it is obvious that from the general verdict found it is impossible to say whether the jury proceeded upon the one or the other; and any finding by a court in appeal that the jury must have found guilt on the one or the other might be on that which the jury rejected.

But there is still graver objection to such a step. This supplementary conduct to be brought within s. 259 must have been carried out with the intent of bringing about death or was such as to be known by the accused to be likely to cause death and was done recklessly as to its result. It must further be found that before being done there had been time for the passion of the fight to have cooled. That these facts could have been found in favour of the accused cannot, in my opinion, be seriously contested. Nothing of this was contained in the charge and it would be a usurpation of the function of the jury for any Court to make, as we are asked by the Crown under s. 1014(2) of the *Code* to make, such a finding on this part of the issue.

I would, therefore, allow the appeal and direct a new trial.

LOCKE J.:—This is an appeal brought pursuant to leave from a judgment of the Court of Appeal for Manitoba, dismissing the appeal of the present appellant from his conviction for murder, after a trial before the Chief Justice of Queen's Bench and a jury.

The five questions of law upon which leave to appeal was granted are stated in other reasons to be delivered in this matter and I do not repeat them.

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It is necessary for a proper consideration of this matter to consider in detail the facts which were proven in evidence at the trial. So far as they are relevant they were as follows:—

At about 2.15 of the morning of January 6, 1955, the appellant left the St. Louis Café, a small restaurant situated on Higgins Avenue in Winnipeg, a short distance east of Main Street, in company with an Indian, August Flatfoot, and two other men, by name Jorundson and Bard. The appellant and the Indian had been drinking intermittently during the previous evening and earlier that morning. Both had been drinking a mixture of rubbing alcohol and some soft drink and, to the restaurant keeper who saw them at the time, Flatfoot appeared drunk. The four men separated shortly after leaving the place, the appellant and Flatfoot announcing they were going to get some more alcohol and walked together east on Higgins Avenue. Jorundson and Bard said they would wait for them and, according to them, after waiting a few minutes, the other two not returning, they left to go to a place where they might spend the night.

At about 7 o'clock that morning the body of Flatfoot was found lying in a lane running east and west, south of and parallel to Higgins Avenue. Macdonald Avenue lies to the south of Higgins Avenue and runs parallel to it and the body was found lying face downward in the snow at the rear of 107 Macdonald Avenue, which is approximately opposite to the rear of 154½ Higgins Avenue. Later that day the appellant was apprehended at St. Malo, a village south of Winnipeg, and brought by an officer of the Royal Canadian Mounted Police to that city and lodged in the jail.

Early the following morning the appellant, after being properly warned, made a statement to the police which was admitted in evidence at the trial. When he was informed by Detective Hinton that he might be charged with the murder of Flatfoot, he said first that "It was self-defence" and then dictated a statement which was taken down by the detective and, after having been read over, signed by the

appellant. His statement, after reciting his movements up to the time he had gone to the restaurant and met Flatfoot and the other two, said:—

> Gus and me kidded each other along, and then we tossed up for the coffees and Gus lost, so he bought for the four of us. Then we went down Higgins Ave., you know that lot at the back of the terraces there. We started drinking there, then Gus started swearing at me. I guess I swore at him too, and then he pushed me. I got mad and we started to fight. The other two guys walked away. Gus hit me about three or four times. He gave me one right in the mouth. I got a couple of scratches. I hit him with my left. I got in a few, but I hurt my hand. You can see it's all swollen. Gus fell down and I kicked him a couple. I guess it was self-defence. Then I fell down, that's when I got the blood on my pants. I put his scarf around his neck because he was unconscious, and I thought he might get cold. I put the belt around his head loose. I guess I thought it would do some good.

Some two hours afterwards, Detective Hinton, with another officer, after again properly warning the appellant, asked him what had happened to the coat Flatfoot was wearing and he then said:—

> After the fight, Gus was lying on the ground, he had his coat half on, so I guess I took it off him. I put it under my arm. I had it with me in the gravel car. I was using it to sit on and that and I left it in the car when I got off the train.

When brought to the police station on the afternoon of the previous day, the condition of his clothing and of his body had been examined by Inspector Webster of the city police force. The left leg of his trousers was stained at the knee and the underwear worn by him was stained in the same place, and the stains were shown to have been caused by blood. The appellant's left hand was badly swollen from the base of his fingers to the wrist and there were three slight scratches on his face. There was no evidence of any other physical injury.

The body of Flatfoot was lying with the head to the north, the feet being 4 feet distant from the back of a shed at the rear of 107 Macdonald Avenue. The conditions existing at the place were observed by police officers Edwards, Booden and Scott and photographs were taken before the body was moved. The coroner, Dr. Fryer, was summoned, arriving at 7.40 a.m. and, after examining the body, pronounced life to be extinct. He gave in evidence some account of its condition and attempted to estimate the time of death which, he thought, had been some time

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between 1 and 3 o'clock that morning. The man was not wearing an overcoat, his trousers had been ripped down from the waist to the crotch, both back and front, and his buttocks were partly exposed. A leather belt obviously taken from the body of the victim ran through the man's mouth and was tightly knotted behind his left ear. The hands were bare and the arms and the eyelids were frozen. It was 4° below zero and there was no wind. To what extent the rest of the body was frozen was not stated by the coroner. He observed the wounds on the head which were more closely described by Dr. Ross, a pathologist, who later the same day conducted a *post mortem*.

A plan prepared by Constable Scott, from measurements made by him, before the body was moved, showed the width of the lane to be 18 feet. Its northern limit lay 82 feet to the south of the southerly limit of Higgins Avenue, the southerly limit being the same distance from Macdonald Avenue. Billboards erected opposite the place on the south side of Higgins Avenue obstructed the view from that street. The evidence of the constables and the photographs taken by the photographer Allison show that, a short distance to the east of the head and shoulders of the man as he lay on the snow and at a lesser distance to the east of his buttocks, there were large patches of what they assumed to be, and was proven to be, blood. Flatfoot's hair, which was long and thick, was matted with blood which had come from three cuts on his head, one over each of the ears and one at the back behind the left ear, and there was blood on the back of his clothing. Between the place where the body was lying and the rear of the shed above referred to, there was what was described and which appears from the photographs to have been a quantity of metal and other junk, including what appears to be an old carriage wheel, part of a metal bed and some other miscellaneous material. Snow had drifted over the lower part of this junk.

In the back yard of 154½ Higgins Avenue, a hat which proved to be that of Flatfoot was found at a distance of 30 feet from his body.

Around the place where the body was lying, the snow had been trampled. The photographs of the snow drifted against the pile of junk do not indicate that it had been

trampled or that there were any bloodstains on it, and there is no suggestion in the oral evidence that there was any blood found on this snow, or on the junk itself.

The nature of the injuries to the body of the deceased man was described by Dr. H. M. Ross, who performed the *post mortem*. Over the right ear there was a cut 1½ inches long, the edges of this were sharp and it had cut through the tissues right to the bone. A somewhat similar cut 1½ inches in length was found above the left ear, of the same nature as the one first described. An inch and a half behind the left ear there was what the witness described as "a similarly-sized laceration except that it was more star-shaped in that it had a number of other cuts coming from it". Altogether it was 1¼ inches across. The examination disclosed in the immediate neighbourhood of this last injury a fracture of the back part of the skull, the bone having been broken inwards. This the doctor described as a depressed fracture of the skull and the brain in that region was covered with blood and lacerated. Dr. Ross considered that this injury had been "caused by external violence applied at this point above—downwards". In addition to these very serious injuries, there were various minor abrasions on both cheeks but these were not through the skin and, some of them at least, he considered had been caused some days prior.

Since the appellant had admitted that he had kicked Flatfoot after the latter had fallen down, the doctor was asked whether, in his opinion, the serious injuries could have been caused in this way. As to this, he said, after being shown the shoes worn at the time by the appellant, that he considered they could have caused the cuts above the ears but, as to the injury behind the left ear where the fracture was, he said:—

> The toe of a boot I do not believe in one blow could make all the various branches that this particular wound had.

Later, on cross-examination, he said that he did not believe the skull fracture had been caused by the shoes. It was suggested to him that if a man hit in the face by another fell in a junk pile of iron of various sizes he might receive such an injury, and to this he said it was quite possible.

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The *post mortem* was conducted in the afternoon of January 6. Earlier that day, the belt fastened through the mouth and knotted at the back of the head had been removed and this had left what the doctor described as a white mark and a depression on either side of the mouth about three-quarters of an inch wide which, he considered, could have been caused by the belt. Further examination disclosed that the lungs were greatly congested and contained an abnormal amount of blood which suggested to him that death had not been instantaneous. The examination of the blood disclosed a very high level of alcohol and Dr. Ross said he would expect that the man had been suffering from "severe intoxication".

Whether the way in which the belt was in the man's mouth prevented him from breathing through it is not made clear, either by the evidence or the photographs. Dr. Ross was asked as to the effect it would have on causing or expediting death and he said:—

> I detected only the marks. I had no knowledge, other than a photograph I was shown, that there was a constriction about the mouth. In a person dying of asphyxiation, as occurs in a number of unconscious persons when their tongue and the soft tissues fall backwards and block the airway, it is entirely possible. . . . The more unconscious a person is, the more likely it is that it could be aggravated by pressure over the mouth. Similarly, if a person were depending on breathing, for some reason or other, by mouth breathing, then similarly that would obstruct it. The determinations [*sic*] of the tissues in this particular area were such and the number of effects were such that I cannot state that this patient [*sic*] died only of asphyxiation.
>
> Q. But it might interfere with him if he were in the depths of a coma? A. Yes.

And later he said:—

> In this precise case I believe that there was some evidence of asphyxial changes in the tissues, but I will not state as to the degree to which they influenced the death.

Asked for his conclusion as to the cause of death, Dr. Ross said:—

> I felt that there were a number of factors contributing to death in this case. The contusion of the brain as the result of the depressed fracture of the skull would be probably the most important, but I have seen people with such an injury survive for a considerable period of time. There was evidence of considerable loss of blood but I was unable to estimate how much or how severe that was, but the amount of blood in the scalp and the numerous injuries to the scalp would contribute, would be expected to cause the loss of considerable blood. There was the level of

blood alcohol, which is a very serious level of alcohol and would certainly aggravate other serious conditions. There was evidence that the breathing would be possibly obstructed to a certain extent and that the congestion of the lungs and the other observations I made in the internal organs would suggest that the subject wasn't getting all the air into his lungs that he should.

Asked again as to the effect of the belt on obstructing the passage of air, he said:—

> If he depends on air coming through his mouth it would interfere with it. If the belt so applied pressed the jaw upwards and caused the soft tissues of the back of the mouth, the palate, to close the airway, then it would, too, but it is difficult for me to state from a picture what would happen.

When asked if a person suffering from such a fracture of the skull and contusion of the brain were exposed to the elements in cold weather what effect it would have, he said that it would greatly accelerate the deleterious effect.

The clothing found on the appellant when he was arrested was examined by Dr. D. W. Penner, and the stains on the trousers and underwear were found to have been caused by human blood. As stated in the confession, Bradley had removed Flatfoot's overcoat and this he took with him on to the freight train which he boarded immediately afterwards, by which means he reached Dufrost, a place on the Winnipeg-Emerson line not far from St. Malo. For obvious reasons, he got rid of this coat *en route,* throwing it apparently on the railway right-of-way where it was found by the section foreman near Grande Pointe, a few stations north of the point where Bradley left the train. This was a brown tweed overcoat and there were a large number of reddish brown stains over most of the back and the lower half of the right arm as well as a number of stains over the front of the shoulder on the right side, all of which Dr. Penner found to have been caused by human blood.

It appears that Bradley had been arraigned for the offence at an earlier date and had been then found mentally unfit to stand trial. At the outset of the present trial the question of whether he was then so unfit was tried and evidence given by alienists and he was found fit. It was undoubtedly because of this and of the fact that the appellant had been drinking heavily that night that the learned Chief Justice felt it necessary to explain at some length in the charge to the jury the effect of s. 16 of the *Code* and

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instruct them that excessive drinking might produce a condition such as *delirium tremens* which, if it existed, might be a defence to the charge.

The argument addressed to us on this appeal has invited us, in effect, to consider the sufficiency of certain passages in the charge to the jury as if the affair which resulted in the death of Flatfoot had been limited to the blows which the appellant struck with his fist and which presumably felled the victim. The matter cannot be split up in this way but all of the acts of the appellant above recited must be considered together. A contention that a charge of homicide might be dealt with in the manner suggested to us was recently rejected by the Judicial Committee in *Meli* v. *The Queen* (1).

The first ground of appeal is a contention that the learned Chief Justice erred "in making a finding in law that the appellant's participation in the fight was an unlawful act and a crime when the facts were in dispute". The short answer to this is that the facts were not in dispute and that assaulting another person is a criminal offence subject to exceptions which were fully explained in later portions of the charge. I do not know what is meant by alleging error in treating the unlawful act as a felony. The distinction between felony and misdemeanour was abolished by s. 14 of the *Criminal Code* (R.S.C. 1927, c. 146). I find no substance in this objection.

The second ground is that the learned trial judge had erred in saying that the appellant was presumed to intend all the consequences which might flow from the fight, even though he may not have known that Flatfoot had suffered a fracture of the skull and that he was thus presumed to be guilty of murder, subject to possible defences. The contention is based upon the following portion of the charge:—

> The accused didn't have to know whether the injury was sustained in that way. The injury was sustained in the fighting; the accused is presumed to intend the consequences of his own act, subject to drunkenness or provocation, which I have to deal with later so that if this deceased sustained that injury in the course of that fight, then the accused must be considered to have intended all the consequences of his acts on that occasion, subject to what I will say later about other possible defences.

(1) [1954] 1 W.L.R. 228.

The charge is to be considered as a whole: the passage quoted is not to be divorced from the context. At the outset, after explaining in a manner to which no exception is or could properly be taken what constitutes homicide, culpable and non-culpable, and reading to the jury ss. 196, 199 and 201(*a*) of the *Code,* the learned judge, referring to the expressions "means to cause his death" and "means to cause him bodily harm that he knows is likely to cause his death" in the latter subsection, said:—

> By using this expression the *Code* makes it clear that the person charged must have intended to do the act complained of; that is, he must have intended to cause the death of the deceased or he must have intended to cause the bodily harm that he knows is likely to cause his death, at the same time being reckless whether death ensues or not.

And later said:—

> When we are considering intention, the intention that we are considering here is the intention to commit the crime with which the accused is charged.

In a following passage, which preceded the language complained of, the jury was informed that there was a presumption of law that every man is presumed to have intended the natural consequences of his acts and, by way of example, that when a man deliberately shoots a gun at another, an intent to cause death, or at least bodily harm likely to cause death, will be presumed, a statement which was followed by instructions that the presumption would not apply if on all the evidence there was a reasonable doubt that the accused was capable of having the intent either to cause death or to cause some bodily harm known to him to be likely to cause death in reckless disregard of the consequences.

Following that portion of the charge first above quoted, the evidence of Dr. Ross as to the factors which, in his opinion, contributed to the man's death, and the evidence as to the condition in which Flatfoot had been left by the appellant was reviewed and the jury were instructed that, if they decided that he had caused the death, they must then decide if he had meant to cause bodily harm that he knew was likely to cause death and was reckless as to whether death ensued or not. Thus the necessity of proof of the intent required by s. 201(*a*) was again impressed on the jury.

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Thereafter, the circumstances under which a person unlawfully assaulted may repel force by force, even though he causes death or grievous bodily harm, dealt with in s. 34 of the *Code* was explained and the nature of the provocation that may reduce what would otherwise be murder to manslaughter under s. 203.

The fight referred to in the passage complained of was not intended to refer merely to the blows struck while Flatfoot was still on his feet but everything that occurred up to the time that the appellant left him unconscious face down in the snow.

While the second ground of objection was based upon the passage from the charge to which I have referred, a further passage has been said to be open to a similar objection. The learned Chief Justice dealt at length with the evidence as to the condition of both the appellant and of Flatfoot as a result of their drinking, apparently considering that this raised the question as to whether the condition of the appellant was such as to render him unable to form the intent referred to in s. 201(*a*). Following this, the learned judge said:—

> If you come to the conclusion that the accused's condition of drunkenness did not render him incapable of forming the intent to do what he did, the intent to either cause the deceased's death, or alternatively, the intent to cause bodily harm and the inability to know the likely consequences, he being reckless whether death ensued or not, then the accused is guilty of murder. If you come to the conclusion that he was incapable of forming that intent, then he is guilty of manslaughter, unless he did what he did lawfully in self-defence.

This language must be read with the instructions twice repeated that they must find that in fact he had intended to cause the death or meant to cause bodily harm that he knew was likely to cause death and being reckless whether death ensued or not. It cannot be assumed, in my opinion, that the jury would disregard these specific instructions twice theretofore repeated.

Read in conjunction with other portions of the charge to which I have referred, there was, in my opinion, no misdirection.

The third question arises from a contention that there was error in failing to instruct the jury that if the deceased fell during the course of the fight and fractured his skull on some object "it would be unintentional and could amount

to no more than manslaughter". To so instruct the jury would clearly be misdirection since, if the appellant struck Flatfoot with his fists intending to kill him or cause bodily harm that he knew was likely to cause death and being reckless whether death ensued or not, it would be murder and not manslaughter. The point itself illustrates the manner in which this Court has been asked to deal with the appeal by considering only the offence of striking the blows which caused Flatfoot to fall and ignoring all the rest of the evidence. The jury were required to consider all of this evidence in coming to a conclusion on the question of intent.

As to the fourth question, the learned Chief Justice had, as stated, after referring to the condition in which Flatfoot had been left by the appellant, read s. 196 to the jury. With this I think no further instruction was needed than that given in the charge read as a whole to which I have already made reference.

The fifth ground asserts that there was error in failing to instruct the jury that, if they found the appellant accelerated the death of the deceased, under what circumstances it would amount to manslaughter and not to murder. The question ignores the instructions to which I have referred, which put the questions as to whether the appellant had caused the death of the deceased and as to his intent in assaulting the accused in the manner described and leaving him gagged and unconscious in the snow. There was no error, in my opinion.

The appeal to the Court of Appeal was heard by a court consisting of the Chief Justice of Manitoba, Coyne, Montague and Schultz JJ.A. and Tritschler J. (*ad hoc*) and dismissed, no written reasons being delivered. We are, therefore, not informed as to whether the Court acted on the ground that no error had been shown in the proceedings or under the powers vested in it by s. 592(1)(*b*)(iii) on the ground that no substantial wrong or miscarriage of justice had occurred.

If there was error in the charge on any question of law (and in my opinion there was none), the application of that section should be considered.

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The evidence before the jury may be summarized as follows: the accused had admitted striking Flatfoot with his fists, that the latter had fallen down and that he had then kicked him and "put the belt around his head loose" while the man was unconscious, and had thereafter removed his overcoat and taken it away. He said that he had also fallen down and that he had then got the blood on his pants. The deep cuts inflicted on both sides of the victim's head had obviously been caused by blows of some nature when the man was prostrate on the ground. The three police officers who described the manner in which the deceased was found lying prostrate, and the places where they observed the snow to be stained with blood, said nothing about finding any blood or any evidence of a struggle on any of the junk a few feet distant from the body or upon the snow with which it was partially covered. In cross-examination, they were not asked any question as to whether there were any traces of a struggle or any blood found on or around the pile of junk. The photographs taken by the photographer Allison, showing the man's body lying as it was found and and patches of blood already referred to, disclosed no blood-stains on the snow which partly banked the pile of junk or any of the miscellaneous material in the pile. The coroner who also attended before the body was moved said nothing about seeing any evidence of struggle on or close to the junk pile and it was not suggested to him in cross-examination that there was any.

The belt had apparently been forcibly removed from the man's body, one of the loops holding it in place on the trousers and some buttons torn off the buckle of the belt, and the clothing had been ripped in the manner described leaving his buttocks partially bare. The photographs showed that the belt, contrary to what the accused said in his statement to the police, was tightly tied about the head, knotted behind the left ear and passed between the man's lips holding them apart. Whether the belt completely stopped the passage of air through the mouth or only did so partially does not appear to be clear either in the oral evidence or in the photographs, but it would completely prevent him from crying out. The man had bled profusely from his head wounds and his hair was matted with blood. His hat had been thrown over the fence into the back yard

of 154½ Higgins Avenue, 30 feet from the place where he lay. The view from Higgins Avenue was shut off by the billboards to which reference has been made. It was 4° below zero when the body was found at 7 o'clock. No evidence was given as to the temperature around 2 o'clock but in cross-examination by counsel for the defence a question was directed to one of the medical witnesses which was based on the assumption that the temperature was the same at the earlier hour, and this appears to be common ground. The man's hands were bare and the body was at least partially frozen. Flatfoot had not apparently died at once after receiving the injuries to his head since, when his body was moved from the place where it lay face downward, the snow was glazed with ice to some extent, showing that the heat of his body had caused some melting.

That the deep cuts on either side of the victim's head had been caused by kicks delivered by the appellant was settled by the confession since there were no injuries to the man's body elsewhere than in the head. That a kick delivered by a powerful man to the side of the head, sufficient to cause the deep cuts, would render a man senseless, if he were not already in that condition, would be obvious. Whether these kicks were delivered before or after the wound to the back of the head was known only to the appellant and he elected not to give evidence. While Dr. Ross had at first said, as above pointed out, that he did not believe a blow of the toe of a boot could cause this latter wound and, later, that he did not believe it had been caused by the shoes, that was a matter upon which the jury were at complete liberty to form their own opinion. There was no evidence to suggest that it had been caused by the man falling backwards on the pile of junk and the only evidence available would seem to negative any such suggestion. In view of the profuse bleeding from the wound, it would inevitably have been the case that had Flatfoot fallen backward on the pile there would have been evidence of that fact to be found in the snow and on the junk itself. The jury might properly assume that if there had been any blood or other evidence of struggle on or around the pile, the police officers, in fulfilment of their duty, would have disclosed the fact and that the photographer would have

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been directed to take further photographs, and further, that the three police officers, the photographer and the coroner would have been cross-examined to establish the fact that there were such traces, if that were the fact or if that was even suggested on behalf of the accused person.

The photographs showed that the belt was fastened so tightly through the man's mouth and around his head that considerable force must have been exercised in tying the knots behind his ear. The belt could only have been tied tightly in this position while the man lay face downward in the snow. The blood which had saturated the appellant's trousers around his left knee, and the underwear at that place, was the blood of Flatfoot and it was an inference which the jury might properly draw that the appellant had knelt on the man's back while tying the knots in the belt and that the blood came from the wound at the back of the skull. The knots so firmly tied, as shown by the photographs, were only a few inches from the place where the skull was fractured. While, in my opinion, in view of the other injuries inflicted and the condition in which the man was left helpless in the snow, it is a matter of no consequence as to whether the appellant did or did not know the severity of this particular wound, the jury may well have considered that since in tying the knots he would be looking directly at the wound (unless, indeed, it was inflicted after the knots were tied) the severity of it would be obvious to him.

Had the jury concluded that that particular injury had been caused in fact in the manner suggested in argument, that would not of itself have reduced the offence to manslaughter. There was still the question as to the intent with which the blows with the fists had been struck and the intent with which thereafter the appellant had inflicted the cuts on either side of the man's head, torn his clothing leaving part of his body exposed, knotted the belt around his head, removed his overcoat and left him unconscious in an unfrequented place where it was improbable that he would be found until daylight. The jury, finding that the appellant was capable of forming the intent necessary to constitute the offence of murder, has by its verdict found that

he had formed that intent. In my opinion, no other finding was open to them upon the evidence. I find no evidence of any wrong or miscarriage of justice in this case.

I would dismiss this appeal.

CARTWRIGHT J. (*dissenting*):—On November 2, 1955, the appellant was convicted before Williams C.J.Q.B. and a jury of having, on January 6, 1955, murdered August Flatfoot. His appeal to the Court of Appeal for Manitoba was heard on February 8, 1956, and was dismissed, at the conclusion of the argument, by a unanimous judgment for which no written reasons were given.

On February 27, 1956, my brother Kellock made an order granting the appellant leave to appeal to this Court on the following grounds:—

1. That the learned Trial Judge erred in making a finding in law that the Appellant's participation in the fight was an unlawful act and a crime, when the facts were in dispute, and in treating the unlawful act as a felony.

2. That the learned Trial Judge erred in charging the jury to the effect that the Appellant was presumed to intend all the consequences which might flow from the fight even though he, the Appellant, may not have known that the deceased suffered a fracture to the skull in a fall during the course of the fight and was thus presumed to be guilty of murder, subject to other possible defences.

3. That the learned Trial Judge erred in failing to instruct the Jury that if the deceased fell during the course of the fight and fractured his skull on some object, it would be unintentional, and could amount to no more than manslaughter.

4. That the learned Trial Judge erred in failing to instruct the Jury that if they found, under Section 196 of the Criminal Code of Canada, that the Appellant caused the death of the deceased, either directly or indirectly, under what circumstances the Appellant would be guilty of manslaughter and not of murder.

5. That the learned Trial Judge erred in failing to instruct the Jury that if they found the Appellant accelerated the death of the deceased, under what circumstances it would amount to manslaughter and not to murder.

As, in my view, there should be a new trial I will refer to the evidence only so far as may be necessary to make clear the reasons for the conclusion at which I have arrived.

The appellant did not give evidence at the trial and no witnesses were called by the defence.

The body of August Flatfoot, hereinafter called "the deceased" was found at about 7 a.m. on January 6, 1955, in

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a lane in the City of Winnipeg. A *post mortem* examination, performed by Dr. Ross, shewed that in addition to some superficial injuries on the face the deceased had sustained, before death, (i) a laceration $1\frac{1}{2}$ inches in length on the head 2 inches above the right ear, (ii) a laceration $1\frac{1}{4}$ inches in length on the head $1\frac{1}{2}$ inches above the left ear, (iii) a stellate laceration $1\frac{1}{4}$ inches in diameter on the head $1\frac{1}{2}$ inches behind the left ear, and (iv) a depressed fracture of the skull on the left side which, in the opinion of Dr. Ross, had been caused by the same force which caused the stellate laceration; this fracture was $1\frac{1}{4}$ inches by $\frac{3}{4}$ of an inch in size and four fragments of bone were depressed inwards $\frac{3}{4}$ of an inch; it had caused contusion of the brain tissue and haemorrhage.

The *post mortem* also shewed that the blood of the deceased contained 396 milligrams of alcohol per 100 millilitres of blood, which, according to the evidence of Dr. Penner, indicates a degree of intoxication which would not infrequently cause a loss of consciousness.

A statement made by the appellant to the police was admitted in evidence. From this statement and the evidence of other witnesses it appears that the accused was drinking heavily with the deceased and some other companions up to about 2 a.m. on January 6 and that during this time a good deal of rubbing alcohol was consumed. At about 2 a.m. the appellant and the deceased decided to go to Higgins Avenue to get some more liquor. The statement of the appellant as to what happened from that point on is as follows:—

> Then we went down Higgins Ave., you know that lot at the back of the terraces there. We started drinking there, then Gus [*i.e.*, the deceased] started swearing at me. I guess I swore at him too, and then he pushed me. I got mad and we started to fight. The other two guys walked away. Gus hit me about three or four times. He gave me one right in the mouth. I got a couple of scratches. I hit him with my left. I got in a few, but I hurt my hand. You can see it's all swollen. Gus fell down and I kicked him a couple. I guess it was self-defence. Then I fell down, that's when I got the blood on my pants. I put his scarf around his neck because he was unconscious, and I thought he might get cold. I put the belt around his head loose. I guess I thought it would do some good. Then I walked over to the railroad tracks, and I climbed into a car and laid down to sleep. It was a half car, open like a gravel car. Then the train pulled out.

It should be mentioned that the men referred to as "the other two guys" were called as witnesses but deposed they had left the appellant and the deceased before any quarrel or fight started and, apart from the appellant's statement, there was no evidence of any eye-witness as to how the deceased received his injuries.

The train referred to in the statement pulled out at 3.05 a.m., so that the fight apparently occurred between 2 a.m. and 3 a.m. It was a cold night 4 degrees below zero Fahrenheit.

Dr. Ross testified that while the injuries described as (i) and (ii) above could have been caused by kicks delivered by someone wearing the shoes of the appellant, the depressed fracture of the skull could not have been so caused; that death was not instantaneous; that a number of factors contributed to cause death; that the depressed fracture of the skull was the most important cause and that it was quite possible that it might have been caused by the deceased falling backwards and striking his head on a metal object. There was evidence that there was a pile of junk metal in the lane in which the body of the deceased was found.

It was one of the theories of the defence that if the jury found that the effective cause of the death of the deceased was the depressed fracture of the skull and that this injury was sustained as the result of the deceased being knocked down by a blow from the appellant's fist during the fight and striking his head on the junk pile they should find the appellant guilty of manslaughter and not of murder unless they were satisfied beyond a reasonable doubt that the appellant either (a) meant to cause the death of the deceased, or (b) meant to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not (*vide* the *Criminal Code,* s. 201).

Instead of so charging the jury, the learned Chief Justice told them that the accused was presumed to intend the consequences of his own act and that if the death occurred in the manner suggested the appellant was guilty of murder

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subject only to the defences of drunkenness or provocation. This is made clear by the following extracts from the charge:—

> Then we come to the other injury, the depressed fracture of the skull, the back part, the left-hand side, 1¼ by ¾ inches, and the contusion of the brain beneath. The depressed fracture broken into four bone fragments raised three-quarters of an inch inside the skull, betokening external violence, from outside, either a blow from above down or the skull pushed back against something which it would hit. And it would require a considerable degree of force; that the instrument which would cause it must be moderately sharp to cause it, because it was only an inch and a quarter by three-quarters of an inch, and would have to have a blunted point. A small-headed hammer or a very sharp rock might do it. That an ordinary wood implement would not likely make such an injury, but that if the man fell backwards as a result of a blow, and hit his head against some of the metal shown in the junk pile, that might have caused it. We don't know just exactly what did cause it. Counsel for the accused suggests that in the course of this fight—and I think undoubtedly there was a fight; and equally undoubtedly, gentlemen of the jury, a fight is an unlawful act and a crime—and that in the course of this fight, I think the suggestion was, that the accused might have hit the deceased, that the deceased might have fallen back on the scrap pile, and that as it was done, if the deceased sustained his injury in that way, the accused might not have known that the deceased sustained such an injury. The accused didn't have to know whether the injury was sustained in that way. The injury was sustained in the fighting; the accused is presumed to intend the consequences of his own act, subject to drunkenness or provocation, which I have to deal with later, so that if this deceased sustained that injury in the course of that fight, then the accused must be considered to have intended all the consequences of his acts on that occasion, subject to what I will say later about other possible defences.
>
> * * *
>
> If you decide that the accused caused the death of the deceased, you must next decide, did he mean to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not? That is, in either case you must consider the accused's capacity to form an intent, and in the second case, his ability to know that what he did was likely to cause death.
>
> I still have one or two matters to deal with. If you come to the conclusion that the accused's condition of drunkenness did not render him incapable of forming the intent to do what he did, the intent to either cause the deceased's death, or alternatively, the intent to cause bodily harm and the inability to know the likely consequences, he being reckless whether death ensued or not, then the accused is guilty of murder. If you

come to the conclusion that he was incapable of forming that intent, then he is guilty of manslaughter, unless he did what he did lawfully in self-defence.

The meaning of these passages is not doubtful. The jury are told not that they may but that they must find that the accused had the intent required by s. 201(*a*)(i) or (ii) of the *Criminal Code* unless they find that he was through drunkenness incapable of forming the intent mentioned. In my view this was misdirection which is fatal to the validity of the conviction and there is nothing to be found in the remainder of the charge to correct this error. It was for the jury, giving due weight to the rebuttable presumption which imputes to a man an intention to produce those consequences which are the natural result of his acts, to decide as a fact whether the appellant had the guilty intent necessary to make him guilty of murder; and, in particular, it was for the jury to say whether the fracture of the deceased's skull was a natural consequence of any blow struck by the appellant.

The point with which I have just dealt is included in grounds 2, 3 and 4, on which leave to appeal was granted. I do not find it necessary to deal with any of the other questions argued before us except that as to the possible application of s. 592(1)(*b*)(iii) of the *Criminal Code* providing that the Court of Appeal may dismiss the appeal where

> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (ii) of paragraph (*a*) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

It is unnecessary to refer to the numerous authorities dealing with this subsection. Bearing in mind that it was open to the jury to find that the injuries from which the death of the deceased resulted were sustained in the course of a sudden fight between two drunken men in which no weapon was used and that there was no evidence of any previous ill-will between them, I find it impossible to affirm that a

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jury properly instructed and acting reasonably must necessarily have convicted the accused of murder. In my opinion it was open to the jury on the evidence to find a verdict of not guilty of murder but guilty of manslaughter. On the other hand, I am unable to agree with the submission of counsel for the appellant that there was no evidence on which a properly instructed jury could have found a verdict of guilty of murder, and, in my opinion, there should be a new trial.

I would allow the appeal, quash the conviction and order a new trial.

NOLAN J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Manitoba, dismissing the appeal of the appellant from his conviction for murder, after a trial before the Chief Justice of Queen's Bench and a jury.

Leave to appeal to this Court was granted on five questions of law, which are fully set out in the reasons for judgment of my brother Cartwright and need not be repeated here.

On January 6, 1955, at about 7 o'clock in the morning, the body of the deceased, August Flatfoot, was found lying face down in the snow in a lane in the vicinity of Higgins Avenue in the City of Winnipeg. The temperature was 4 degrees below zero Fahrenheit. The body was clothed in long combination underwear, a shirt, a sweater, trousers, socks, shoes and overshoes, and a woollen scarf was tied around the neck, the knot being under the left ear. The trouser belt had been removed and tied tightly around the head through the lips and knotted at the back of the head. The trousers were ripped down the back and a portion of the buttocks was exposed. The belt buckle was lying on the ground near the body, two of the belt loops of the trousers were torn loose and a third was torn off completely. The deceased's brown fedora hat was found in a back yard in the vicinity. His overcoat was missing.

Dr. H. M. Ross, a certified pathologist with the Winnipeg General Hospital, made a *post mortem* examination of the body. He found a cut laceration, one and one-half inches long, two inches above the right ear, which went through the tissues to the bone. Dr. Ross was of the opinion that this cut laceration could not have been caused by a fist, unless there was a ring or some object in the hand, but could have been caused by a kick from a shoe. He found another laceration, one and one-quarter inches long, one and one-half inches above the left ear, which was essentially the same as the first laceration and could have been caused, in his opinion, in the same way as the cut above the right ear. He also found a stellate, or star-shaped, laceration, about one and one-quarter inches in diameter, situate one and one-half inches behind the left ear. Dr. Ross's opinion as to the cause of this wound was the same as for the wounds on both sides of the head, except that he did not believe the toe of a boot could, in one blow, have made all the various branches that this wound had and doubted that simply the toe of a boot could have caused it. There were a number of superficial abrasions on the right cheek in front of the ear, on the left cheek in approximately the same place and on the nose. One incisor tooth was missing.

The examination of the head disclosed a depressed fracture of the skull on the left side at the back, one and one-quarter inches by three-quarters of an inch, and four fragments of bone were depressed inwards three-quarters of an inch. The depressed fracture had caused contusion of the brain and was almost below the star-shaped laceration. Dr. Ross was of the opinion that a considerable degree of force would be necessary to cause this fracture and felt that such force might have been applied from above downwards, or by the skull being pushed backwards against some point above. The skull fracture and brain contusion were of such a nature as to cause unconsciousness. An examination of

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the bones and cartilage of the throat disclosed no evidence of any obstruction or injury, nor was there any constriction mark upon the neck itself.

Dr. Ross stated that there were a number of factors contributing to the cause of death, the most important of which was the contusion of the brain resulting from the depressed fracture of the skull. A considerable amount of blood had been lost. There was a high blood alcohol level and evidence of some constriction in the air supply and exposure. He was of the opinion that the fracture of the skull had been caused by something with a blunt point, such as a very small-headed hammer or a very sharp rock, and that death had not been instantaneous. There were several possible causes of death—alcoholic poisoning, if the deceased were rendered unconscious by alcohol; unconsciousness caused by alcohol, coupled with exposure to four degrees below zero weather. In such circumstances death would be inevitable and would not be accelerated by the skull injury. Death could also have been caused by the depressed fracture of the skull, coupled with exposure. It was impossible to tell whether the fracture or the alcohol rendered the deceased unconscious, or which caused his death. The *post mortem* examination disclosed that the deceased, with the blood alcohol level of 396 milligrams per 100 milliliters of blood, would be strongly under the influence of alcohol and would only be able to move about with difficulty. There was evidence that a few feet from the body there were two frozen piles of scrap iron about three feet high, lying alongside some small, tumble-down sheds, and that, if the deceased fell backwards into the frozen iron, it would be quite possible that he would receive the fracture of the skull in the fall.

The evidence discloses that up to about 2 a.m. on January 6 the appellant was drinking heavily with the deceased and some other companions, during which time rubbing alcohol was consumed. The appellant, the deceased and two companions left the St. Louis Café shortly after 2 a.m. and proceeded east on Higgins Avenue The appellant and the deceased proceeded ahead to obtain more

alcohol and the two companions remained behind awaiting their return. After about fifteen minutes of waiting, when the appellant and the deceased failed to return, the two companions went back along Higgins Avenue to the St. Louis Café and, finding it closed, proceeded west upon Higgins Avenue to Main Street and left the vicinity. Later that day the appellant was apprehended at St. Malo, a village south of Winnipeg.

The appellant made a statement to the police early the following morning, which was admitted in evidence at the trial. Apart from that statement, there was no evidence of any eye-witness as to how the deceased had received his injuries, as the two companions swore that they had left the appellant and the deceased before any quarrel or fight started. The statement of the appellant recited his movements up until the time that he met the deceased and two other companions at the St. Louis Café sometime after 1 a.m.:—

> I met Gus and two other guys there. I don't know their names. Gus and me kidded each other along, and then we tossed up for the coffees and Gus lost, so he bought for the four of us. Then we went down Higgins Ave., you know that lot at the back of the terraces there. We started drinking there, then Gus started swearing at me. I guess I swore at him too, and then he pushed me. I got mad and we started to fight. The other two guys walked away. Gus hit me about three or four times. He gave me one right in the mouth. I got a couple of scratches. I hit him with my left. I got in a few, but I hurt my hand. You can see it's all swollen. Gus fell down and I kicked him a couple. I guess it was self-defence. Then I fell down, that's when I got the blood on my pants. I put his scarf around his neck because he was unconscious, and I thought he might get cold. I put the belt around his head loose. I guess I thought it would do some good. Then I walked over to the railroad tracks, and I climbed into a car and laid down to sleep. It was a half car, open like a gravel car. Then the train pulled out.

Some hours later, when asked what had happened to the coat that the deceased was wearing prior to the fight, the appellant, in a further statement, said:—

> After the fight, Gus was lying on the ground, he had his coat half on, so I guess I took it off him. I put it under my arm. I had it with me in the gravel car. I was using it to sit on and that and I left it in the car when I got off the train.

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The evidence discloses that the overcoat was found a number of miles away from Winnipeg along the railroad right-of-way and had considerable blood on the left side in the region of the shoulder and also on the right sleeve. When he was apprehended the appellant had a large blood-stain on his left trouser leg near the knee. His left hand was badly swollen from the base of his fingers to the wrist and there were three slight scratches on his face. There were no cuts, or lacerations, or marks on the rest of his body.

The following are extracts from the charge to the jury:—

Counsel for the accused suggests that in the course of this fight—and I think undoubtedly there was a fight; and equally undoubtedly, gentlemen of the jury, a fight is an unlawful act and a crime—and that in the course of this fight, I think the suggestion was, that the accused might have hit the deceased, that the deceased might have fallen back on the scrap pile, and that as it was done, if the deceased sustained his injury in that way, the accused might not have known that the deceased sustained such an injury. The accused didn't have to know whether the injury was sustained in that way. The injury was sustained in the fighting; the accused is presumed to intend the consequences of his own act, subject to drunkenness or provocation, which I have to deal with later, so that if this deceased sustained that injury in the course of that fight, then the accused must be considered to have intended all the consequences of his acts on that occasion, subject to what I will say later about other possible defences.

* * *

If you decide that the accused caused the death of the deceased, you must next decide, Did he mean to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not? That is, in either case you must consider the accused's capacity to form an intent, and in the second case, his ability to know that what he did was likely to cause death.

* * *

I still have one or two matters to deal with. If you come to the conclusion that the accused's condition of drunkenness did not render him incapable of forming the intent to do what he did, the intent to either cause the deceased's death, or alternatively, the intent to cause bodily harm and the inability to know the likely consequences, he being reckless whether death ensued or not, then the accused is guilty of murder. If you come to the conclusion that he was incapable of forming that intent, then he is guilty of manslaughter, unless he did what he did lawfully in self-defence.

The jury was instructed that the appellant was presumed to have intended the consequences which flowed from the fight, even though he may not have known that the deceased suffered a fracture of the skull, and was instructed that an intent, as required by s. 201(*a*)(i) or (ii) of the *Criminal Code* must be attributed to him. It follows that the only matter left for the consideration of the jury was whether or not the defences of drunkenness or provocation could make the crime less than murder.

This was, with great respect, a fatal defect in the charge, because it was for the jury to say whether the intent, as required by s. 201, *supra,* was to be attributed to the appellant so as to justify a verdict of guilty of murder; and it was also for the jury to say whether the fracture of the skull was caused by a blow of the appellant, or was caused by the deceased falling backward onto a sharp point of iron.

The appeal to the Court of Appeal was dismissed without written reasons and consequently there is no indication as to whether that Court decided the matter on the ground that there was no misdirection, or on the ground that there was no substantial wrong or miscarriage of justice (s. 592(1)(*b*)(iii) of the *Code*). Nevertheless, it was contended by counsel for the respondent, in argument, that the appeal should be dismissed, pursuant to the powers vested in the Court under that section. I am unable to agree with that contention.

It is well established that the burden of satisfying the Court that no substantial wrong or miscarriage of justice has occurred is upon the Crown. In *Northey* v. *The King* (1), where s. 1014 of the old *Code* (now s. 592) was being considered, it was held that, where the irregularities at the trial are of such a nature that there is doubt whether the verdict would necessarily have been the same if they had not occurred, then the doubt should be resolved in favour of the accused. In the present case, in my view, such a doubt exists.

(1) [1948] S.C.R. 135.

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The evidence establishes that the appellant and the deceased had, for some hours, been drinking rubbing alcohol and beer. There is no evidence of previous bad feeling between them. Swear-words were exchanged; a sudden fist fight took place, no weapon was used, and the deceased sustained injuries which caused his death. Section 203 of the *Code* provides that culpable homicide, that otherwise would be murder, may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation and before there was time for his passion to cool. In my view, it was for the jury to determine whether, on its view of the facts, manslaughter or murder was the appropriate verdict and there is a doubt, which must be resolved in favour of the appellant, whether the verdict would necessarily have been the same had no irregularity occurred.

I would allow the appeal, quash the conviction and order a new trial.

Appeal dismissed.

Solicitors for the appellant: *Munson & Crawford.*

Solicitor for the respondent: *Hon. M. N. Hryhorczuk.*

LEO FLEMING (*Defendant*) .....APPELLANT; 1956

*Nov. 12
*Nov. 14

AND

FLOYD ATKINSON (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Supreme Court—Jurisdiction—Amount or value of matter in controversy in appeal—The Supreme Court Act, R.S.C. 1952, c. 259, s. 36(a), as re-enacted by 1956, c. 48, s. 2.

The 1956 re-enactment of s. 36(*a*) of the *Supreme Court Act*, increasing to $10,000 the amount that must be in controversy to give a right of appeal without leave, does not apply to a case in which the action was pending when the amendment came into force on August 14, 1956, even though the judgment directly appealed from was not pronounced until after that date. *Hyde v. Lindsay* (1898), 29 S.C.R. 99, applied.

APPLICATION for leave to appeal from the judgment of the Court of Appeal for Ontario (1), varying a judgment of Moorhouse J. at trial (2).

C. F. MacMillan, for the defendant, appellant, applicant.

K. A. Murchison, for the plaintiff, respondent, *contra*.

The application was dismissed at the close of the argument. The reasons of the Court were subsequently delivered by

THE CHIEF JUSTICE:—This motion by the defendant for leave to appeal from a judgment of the Court of Appeal for Ontario (1) was dismissed at the hearing on the ground that the defendant was entitled to appeal as of right. On May 9, 1955, the plaintiff secured judgment against the defendant in the Supreme Court of Ontario in the sum of $5,608.40 and costs and a counterclaim was dismissed (2). On June 19, 1956, the Court of Appeal dismissed an appeal by the defendant in so far as the claim of the plaintiff was

*PRESENT: Kerwin C.J. and Cartwright and Nolan JJ.

(1) [1956] O.R. 801, 5 D.L.R. (2d) 309.

(2) [1955] O.R. 565, [1955] 4 D.L.R. 408.

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Kerwin C.J.

concerned, but allowed the counterclaim to the extent of $220, together with the costs of that counterclaim. The defendant was ordered to pay the plaintiff his costs of the action and of the appeal.

On August 14, 1956, an amendment to the *Supreme Court Act* was assented to (1) whereby an appeal to this Court lies from a final judgment pronounced in a judicial proceeding where the amount or value of the matter in controversy in the appeal exceeds $10,000, instead of $2,000 as formerly. It is clear that, as the judgment of the Court of Appeal was given before the coming into force of the amendment, the defendant's right to appeal has not been lost; but, as this is the first case in which the question has arisen, it should also be pointed out that the amendment does not apply to a case in which the action was pending when the amendment came into force, even though the judgment directly appealed from was not pronounced until afterwards: *Hyde v. Lindsay* (2).

Under the circumstances the costs of the motion were given to the respondent in the cause.

Motion dismissed.

Solicitors for the plaintiff, respondent: Pringle & Pringle, Belleville.

Solicitors for the defendant, appellant: Richardson & MacMillan, Toronto.

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(1) 1956 (Can.), c. 48, s. 2, repealing and re-enacting R.S.C. 1952, c. 259, s. 36(*a*).

(2) (1898), 29 S.C.R. 99.

THE RURAL MUNICIPALITY OF MONET NO. 257 (*Defendant*) ... APPELLANT;

1956

*May 23, 24
*Oct. 2

AND

GRAHAM CAMPBELL (*Plaintiff*) .....RESPONDENT;

AND

MARIAN McCALLUM (*Plaintiff*) .....RESPONDENT;

AND

JAMES FRANCIS WILLIAMS AND REGINALD JOHNSTON (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Municipal corporations—Construction of road—Diversion of surface water —Whether authority required under s. 8 of The Water Rights Act, R.S.S. 1940, c. 41—The Rural Municipality Act, 1946 (Sask.), c. 32; 1950 (Sask.), c. 37.

Section 8 of *The Water Rights Act,* R.S.S. 1940, c. 41, which provides that "no person shall divert or impound any surface water not flowing in a natural channel or contained in a natural bed . . . without having first obtained authority to do so under the provisions of this Act", applies to a rural municipality which constructs within its boundaries a road the effect of which is to turn the drainage water from its natural channel and bring about a diversion of that water onto adjacent lands, even if there was no intention on the part of the municipality to create such a diversion of water.

Judgment appealed from ((1955), 15 W.W.R. 442) affirmed.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment at the trial together of three actions.

G. H. Yule, Q.C., for the appellant.

E. M. Hall, Q.C., and *R. H. McKercher,* for the respondents.

The judgment of the Court was delivered by

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Nolan JJ.

(1) 15 W.W.R. 442, [1955] 3 D.L.R. 578.

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RURAL MUNICIPALITY OF MONET No. 257 v. CAMPBELL AND OTHERS

NOLAN J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of McKercher J., who, in three actions which were tried together, awarded damages against the appellant municipality for having constructed a road which interfered with the natural flow of water and diverted it onto the lands of the respondents.

All the lands in question are situated in township 27, range 14, west of the third meridian, and had been cropped without interruption from the time they were first cultivated until 1951 after the construction of the road. The respondent Campbell farms the north half of section 35, the respondent McCallum the south half of section 34 and the respondents Williams and Johnston the north half of section 27, all in the said township.

The road in question was graded by the appellant between the years 1948 and 1950. Prior to that time it was only a road allowance in which a few low areas had been filled in. The road runs north and south between sections 2 and 3 in the south and between sections 34 and 35 in the north. The grading covered up a culvert which ran under the old road allowance between section 15 and section 14. No provision was made for the installation of a new culvert. Neither were there any other culverts constructed throughout the four-mile portion of road lying east of sections 15, 22, 27 and 34 until the summer of 1952.

The road was built under the statutory authority of *The Rural Municipality Act,* now R.S.S. 1953, c. 140. In 1948 *The Rural Municipality Act,* 1946 (Sask.), c. 32, s. 196(1), cl. 9 provided:

196. (1) In addition to all other powers conferred on councils by this Act, the council of every municipality shall have power: .....

9. to lay out, construct, repair and maintain roads, lanes, bridges, culverts and any other necessary public work in the interests and for the use of the municipality.

(1) 15 W.W.R. 442, [1955] 3 D.L.R. 578.

A new Act was passed in 1950 (c. 37), which came into force July 1, 1950. The old s. 196(1), cl. 9 is, under that Act, s. 199(1), cl. 10. The wording is identical in the two sections.

The cause of action is based on s. 8 of *The Water Rights Act,* R.S.S. 1940, c. 41, which provides:—

8. (1) No person shall divert or impound any surface water not flowing in a natural channel or contained in a natural bed and no person shall construct or cause to be constructed any dam, dyke or other works for the diversion or impounding of such water, without having first obtained authority to do so under the provisions of this Act.

(2) If any person without having obtained such authority diverts or impounds surface water not flowing in a natural channel or contained in a natural bed or constructs or causes to be constructed any dam, dyke or other works for the diversion or impounding of such water, such person shall be liable to a civil action for damages at the instance of any person who is or may be damnified by reason of such diversion, impounding or construction.

It is common ground that the appellant did not apply for or receive any authorization to build the road in question under the authority of *The Water Rights Act, supra.*

The learned trial judge said:—

The defendant did not obtain the necessary authority mentioned in said sub-section one, required to construct the road in question. The water involved was surface water not flowing in a natural channel or contained in a natural bed, and the provisions of the aforesaid Act are applicable in these circumstances to Rural Municipalities in Saskatchewan.

The learned trial judge held that, not having obtained the necessary authorization to divert the water, the appellant was liable, and he awarded damages in an amount aggregating $13,100.

The judgment of the learned trial judge was unanimously affirmed by the Court of Appeal for Saskatchewan (1).

It was established by the evidence and not disputed that the natural drainage on the lands was in an easterly direction to the road and that water so draining was blocked by the road, turned north and eventually emptied onto the

(1) 15 W.W.R. 442, [1955] 3 D.L.R. 578.

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RURAL MUNICIPALITY OF MONET No. 257 v. CAMPBELL AND OTHERS

Nolan J.

lands of the respondents. The actual flooding in 1952 lasted for four days, from April 6 to April 9, and was more extensive than it had ever been before. Three hundred feet of highway were washed out between sections 34 and 35.

There was, however, a difference of opinion as to the amount of water which, originating on section 15, would flow onto township 27 in a spring run-off and would ultimately come to rest on the respondents' lands. The witness Webb, a surveyor called by the appellant, was of opinion, after examining the drainage channels and contours, that only about 15 per cent. of the water so originating would come to rest on the respondents' lands. The evidence of the witness Webb on this point was rejected by the learned trial judge. On the other hand, evidence adduced on behalf of the respondents, which was accepted by the learned trial judge, established that the flooding originated west of the road on section 15, where the appellant had blocked the natural channels for surface water by the construction of the road without culverts.

It was contended by counsel for the appellant in the Courts below that s. 8 of *The Water Rights Act* did not apply in the case of a municipality constructing roads within its boundaries and with no intention of diverting or impounding water. It is plain from s. 2(4) of *The Water Rights Act* that it applies to a municipality. That subsection reads as follows:—

> 4. "company" means any incorporated company, the object and powers of which extend to or include the construction or operation of any works under this Act, or the carrying on thereunder of the business of the supply, utilization or sale of water for any purpose, and includes any person who has been authorized or has applied for authority to construct or operate such works or carry on such business, or who has obtained a licence under this Act; and also includes a municipality and an irrigation district.

The appellant also contended that it is inconceivable that the Legislature intended that, after 1935 when s. 8 was enacted, all roads built after that date would have to have special authorization.

No question can arise as to the right of a municipality to build roads within its boundaries for the use of the municipality. It has complete authority so to do under the provisions of *The Rural Municipality Act, supra.* But the question for determination is whether authority is required under *The Water Rights Act.*

Counsel for the appellant referred in argument to a number of sections of the Act which obviously do not apply to the construction of a road by a municipality. But does s. 8 apply?

In *Baker v. The Rural Municipality of Lajord* (1), the municipality built a grade on the road allowance and constructed a bridge or culvert in the road. Subsequently the bridge was washed out by flood and on the authority of the council the gap in the road where the bridge had been was filled in with earth. In 1944 the road was graded and was raised another one and one-half feet, making it four feet above the level of the surrounding land. In 1947 the water rose on the east side of the road on Baker's lands and was prevented by the road from draining to the west. Baker's lands were flooded.

Under *The Rural Municipality Act* the municipality was required to keep roads in repair and it did so by filling in the gap. The municipality applied, under *The Water Rights Act,* for authorization to "repair and maintain the road as a dyke". The application was refused, but the municipality did fill in the gap. It was held by the Court of Appeal for Saskatchewan that s. 8 of *The Water Rights Act* applied and that the municipality was liable for the flooding because it had not obtained authority to build a dam or dyke for the diversion of surface water. Martin C.J.S. stated at p. 980:—

> The road then became a dyke or dam which prevented the natural flow of surface water from sec. 24 to other lands to the west.

Counsel for the appellant contended that "diversion", as used in *The Water Rights Act,* does not mean flooding, but a taking of water for the use or purpose of the municipality.

(1) [1950] 2 W.W.R. 978, [1950] 4 D.L.R. 750.

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RURAL MUNICIPALITY OF MONET No. 257 v. CAMPBELL AND OTHERS

Nolan J.

I am unable to agree with this contention. In my view the construction of the road, with no provision for a culvert, turned the drainage water from its natural channel and so brought about a diversion within the meaning of s. 8.

The appellant further contends that the road was not built "for the diversion or impounding of water" and that no municipality builds a road for that purpose. Nevertheless, if the building of the road results in, what I conceive to be, a diversion of the water, then I think that authorization must be obtained under s. 8 of *The Water Rights Act*. This is particularly true when it is remembered that the new grade did away with the existing culvert which had previously carried the water from west to east under the old road. In a word, the road became a dyke or dam, which prevented the flow of surface water to other lands to the east, and authorization was necessary.

The respondents contended, in this Court, that, although it had not been pleaded or raised in argument in the Courts below, it was open to the Court to give judgment on the common law right of action. Holding, as I do, that the municipality is liable for the flooding because it did not obtain authorization to build the road in the manner in which it was built, I find it unnecessary to consider the question of liability at common law.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: G. H. Yule, Saskatoon.

Solicitors for the respondents: Hall, Maguire & Wedge, Saskatoon.

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*Jun. 6, 7
*Oct. 2

JOSEPH WILFRED PARKES .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Habitual criminals—Procedure—Impropriety of judge hearing evidence as to previous record before commencing enquiry—The Criminal Code, 1953-54 (Can.), c. 51, ss. 660, 662.

*PRESENT: Taschereau, Rand, Locke, Fauteux and Abbott JJ.

The appellant was convicted by a jury of theft. Notice had been served on him, pursuant to s. 662(1) of the *Criminal Code,* that the prosecutor would ask to have him found to be an habitual criminal. Immediately after the jury's verdict the trial judge heard representations as to sentence, and had before him a probation officer's report setting out the appellant's previous history, including numerous convictions. Before actually sentencing the appellant on the theft charge, the trial judge held an enquiry in respect of the allegation that the appellant was an habitual criminal, and at the end of that enquiry, having found the allegation proved, he sentenced the appellant to preventive detention, as well as to two years' imprisonment on the conviction for theft. The accused appealed against the finding that he was an habitual criminal, and the sentence of preventive detention.

Held: The appeal should be allowed and the sentence of preventive detention should be quashed.

The provision in s. 662(2) that an application under Part XXI shall be heard and determined before sentence is passed for the primary offence, requires that that hearing be opened immediately after the accused is found guilty, which enables the trial judge to enter upon the enquiry without previous knowledge of the accused's past conduct. By considering the probation officer's report before commencing the enquiry, and then relying upon it in finding that the accused was an habitual criminal, although it was not proved on that hearing, the trial judge had acted contrary to the provisions of the *Code,* and the proceedings on the enquiry were a nullity. In the circumstances the appeal could not be dismissed under s. 592(1)(*b*)(iii) of the *Code.*

APPEAL from a judgment of the Court of Appeal for Ontario (1), dismissing an appeal against a sentence of preventive detention. Appeal allowed.

E. P. Hartt, for the appellant.

W. B. Common, Q.C., for the Attorney-General for Ontario, respondent.

TASCHEREAU J.:—The appellant was convicted on June 7, 1955, at St. Thomas, Ontario, by His Honour Judge Grosch and a jury, upon the following charge:—

That Joseph Wilfred Parkes, at the Township of Bayham, in the County of Elgin, on or about the 8th day of February in the year 1955, unlawfully did steal one automobile the property of Basil Nevill, contrary to the Criminal Code of Canada.

Previous to that conviction, an application, with the consent of the Attorney-General, had been made by the Crown prosecutor pursuant to s. 660 of the *Criminal Code,* to have the accused declared a habitual criminal. This section reads as follows:—

660. (1) Where an accused is convicted of an indictable offence the court may, upon application, impose a sentence of *preventive detention* in addition to any sentence that is imposed for the offence of which he is convicted if

(1) [1956] O.W.N. 10, 113 C.C.C. 283, 22 C.R. 393.

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PARKES v. THE QUEEN

Taschereau J.

(a) the accused is found to be an *habitual criminal*, and

(b) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(a) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(b) he has been previously sentenced to preventive detention.

Section 662 enacts certain provisions which apply to applications of this kind, and s-s. (2) says:—

(2) An application under this Part *shall be heard and determined before sentence is passed for* the offence of which the accused is convicted and shall be heard by the court without a jury.

(The italics are mine.)

It is clear from the record, that before hearing this application His Honour Judge Grosch, instead of hearing it *immediately* as required by law (*vide Rex v. Triffitt* (1)), considered a detailed probation report on the accused, obviously for the purpose of determining the sentence to be imposed on the theft charge. He then proceeded to hear the application under s. 660, found the accused to be a habitual criminal as defined by s-s. (2). He ordered him to be confined to a penitentiary for an indeterminate period and sentenced him to two years on the charge of theft. The Court of Appeal confirmed the order of preventive detention, and we are concerned only with that particular appeal.

I am of the opinion that the learned trial judge did not follow the proper procedure in considering the probation report before hearing and determining the application made under s. 660. I entertain no doubt that this report, covering a period of twenty-five years, influenced him considerably in reaching the conclusion that the appellant was a habitual criminal and was leading persistently a criminal life. The latter suffered a prejudice such that I cannot see the possibility of applying s. 592(1)(*b*)(iii) of the *Criminal Code*. I am not satisfied that the judgment on the application would have necessarily been the same if the provisions of the law had been followed.

(1) [1938] 2 All E.R. 818, 26 Cr. App. R. 169.

I would allow the appeal and quash the order for preventive detention.

RAND J.:—This is an appeal from the affirmance by the Court of Appeal for Ontario of a determination by a county court judge that the appellant was an habitual criminal.

The *Criminal Code* deals with this matter in s. 662, the relevant provisions of which are as follows:

662. (1) Notice of application. The following provisions apply with respect to applications under this Part, namely,

(*a*) an application under subsection (1) of section 660 shall not be heard unless

(i) the Attorney General of the province in which the accused is to be tried consents,

(ii) seven clear days' notice has been given to the accused by the prosecutor specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application, and

(iii) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be; and

(*b*) an application under subsection (1) of section 661 shall not be heard unless seven clear days' notice thereof has been given to the accused by the prosecutor and a copy of the notice has been filed with the clerk of the court or with the magistrate, where the magistrate is acting under Part XVI.

(2) An application under this Part shall be heard and determined before sentence is passed for the offence of which the accused is convicted and shall be heard by the court without a jury.

Several grounds were raised which were said to go to the invalidity of the conviction, among them the following: that the trial judge had heard evidence of a police record of the accused for the purposes of the sentence on the primary conviction before entering upon the subsidiary charge; that the proof of the prior convictions by way of certificate was defective because they had not been signed by the authorized officer of the court of conviction and that the description of the conviction was insufficient in omitting in each case the name of the court and the sentence given; that in the notice to the accused there was a similar failure to specify the court and the sentence imposed; that the notice failed to set forth the particulars of conduct to be adduced to show that the accused was "leading persistently a criminal life". The question also of the powers of the Court of Appeal in such an appeal was raised, that is

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whether the appeal given by s. 667 and the reference in s-s. (3) to the provisions of Part XVIII "with respect to procedure on appeals" enables the court to deal with the appeal as fully as in the case of an appeal from a conviction for an indictable offence.

I do not find it necessary to examine more than the first ground. Section 660(2) expressly requires that the application shall be heard and determined before sentence is passed for the main offence. The reference to sentence means before any step is taken toward the pronouncement of sentence and it embraces what has come to be a practice of submitting to the court a record or information showing the conduct, character, reputation, events, and circumstances of the life of the accused. What is the consideration behind this requirement of the subsection?

The question has been raised in England in a number of cases. In *Rex v. Turner* (1), Channell J., delivering the judgment of the court, at p. 363 says:—

> The facts which are to be proved on the charge of being a habitual criminal are the same as those with reference to which the Court at a trial always desires information before passing sentence, and it is therefore impossible that the Legislature could have intended that sentence must be passed before those facts are inquired into.

This was followed in *Rex v. Coney* (2). At p. 129 the Lord Chief Justice said:—

> Counsel for the prosecution then called witnesses with reference to appellant's previous convictions and character, and counsel for the appellant addressed the Court, putting forward reasons why he should not be sent to penal servitude. If that procedure is followed, the jury, and other jurors waiting in Court, may hear all that is relevant about a prisoner's antecedents given to enable the Court to decide whether a sentence of penal servitude should be imposed. All kinds of statements adverse to the prisoner and relevant to his punishment may be given in evidence in the presence of those who, on different and more limited grounds, may afterwards be called upon to decide whether he is a habitual criminal. . . . It was never intended that the persons who, upon the particular grounds set out in the statute, might have to decide whether a prisoner was a habitual criminal, should have in their minds all the material necessary to enable a Court to decide whether a sentence of penal servitude should be imposed.

(1) [1910] 1 K.B. 346, 3 Cr. App. R. 103.

(2) (1923), 17 Cr. App. R. 128.

In *Rex v. Triffitt* (1), in which the conviction and sentence on the main charge were made and pronounced by one court and the subsequent application dealt with by another, Humphreys J., speaking of the ground now being considered and referring to *Rex v. Jennings* (2), quotes the headnote of that case with approval:—

> An indictment for being a habitual criminal under the Prevention of Crime Act, 1908, must be tried immediately after the primary charge.

Finally, in *Rex v. Vale* (3), a case somewhat similar to *Triffitt* in which, however, only the plea of guilty had been received by the first court, Branson J. at p. 356, dealing with language of Humphreys J. in *Triffitt,* observes:—

> "Follow immediately" means dealing with the case without hearing the man's previous history and before sentencing him.

In the proceeding before us the police record of the accused was handed to the judge immediately after he had found the accused guilty of the principal offence, and the latter was questioned on it as a preliminary to the sentence. This brought into the mind of the judge the very information the subsection was aimed to keep out. It goes to the substance of the proceeding and is fatal to the subsequent determination.

On the other questions I should add generally that there is no reason why a complete description of each conviction with particulars should not be set forth both in the notice given to the accused and in the certificate which likewise should be signed by the appropriate officer of the court of conviction. The grounds of conduct, evidence of which it is intended to adduce to show the criminal life being persistently followed by the accused to the time of the notice, should be furnished by at least general description such as persistence in petty offences, association with disreputable characters and other characteristics of criminal habit, sufficient to enable the accused reasonably to know what he is to meet.

There seems to be a tendency to treat a proceeding under the section as one in which strict compliance with the express requirements of the Code is not to be insisted on. That is altogether a mistake. Under such a determination

(1) [1938] 2 All E.R. 818, 26 Cr. App. R. 169.

(2) (1910), 4 Cr. App. R. 120.

(3) [1938] 3 All E.R. 355, 26 Cr. App. R. 187.

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a person can be detained in prison for the rest of his life with his liberty dependent on the favourable discretion of a minister of the Crown. The adjudication is a most serious step in the administration of the criminal law in relation to which it is well to recall the words of the Lord Chief Justice of England in *Martin v. Mackonochie* (1), quoted by Meredith C.J.C.P. in *Rex v. Roach* (2):—

> It seems to me, I must say, a strange argument in a court of justice, to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceeding should be upheld. In a court of law such an argument à convenienti is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in pœnam are, it need scarcely be observed, strictissimi juris; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the legislature to amend. The judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself.

Mr. Common, with his customary fairness, conceded the importance of some of these omissions but took the position that, in view of all that had taken place before the judge, including admissions drawn out, some by the judge in questioning the accused on his police record for the purpose of the first sentence, there could not by any possibility be a miscarriage of justice, the ground on which the Court of Appeal acted. For the reasons given, that submission cannot be accepted. In such a case form is substance and if the loose practice followed in the present proceedings were tolerated, the clear intention of Parliament to surround this new and extreme power over the individual with specific safeguards would be nullified.

I would, therefore, allow the appeal and quash the conviction.

(1) (1878), 3 Q.B.D. 730 at 775-6.

(2) (1914), 6 O.W.N. 630 at 631-2, 26 O.W.R. 564, 23 C.C.C. 28 at 30, 19 D.L.R. 362.

LOCKE J.:—The appellant was on June 7, 1955 found guilty of stealing an automobile, by a jury in the Court of General Sessions at St. Thomas.

In advance of this hearing the Crown had caused a written notice to be served on the appellant, which appears to me to comply with the requirements of s. 662 of the *Criminal Code,* informing him that, if he should be convicted of the charge of theft referred to, an application would be made under s. 660(1) for a sentence of preventive detention, in addition to any sentence that should be imposed for the offence of which he was then convicted. The grounds for the proposed application as stated in the notice were that, since the age of eighteen years on at least three separate and independent occasions, the appellant had been convicted of an indictable offence for which he was liable to imprisonment for five years or more and that he was leading persistently a criminal life.

Section 662(2) of the *Code* requires that an application under Part XXI for preventive detention shall be heard and determined before sentence is passed for the offence of which the accused is convicted and shall be heard by the court without a jury.

Upon the jury returning its verdict, before proceeding with the Crown's application a discussion took place between the presiding judge and counsel for the Crown and for the prisoner, which was relevant only to the consideration of the sentence to be imposed for the theft, in the course of which a document entitled "Probation Office Pre-Sentence Report", signed by a probation officer, was handed to the judge by the Crown prosecutor. This report, apparently prepared under the provisions of s. 2 of *The Probation Act,* R.S.O. 1950, c. 291, contained an extensive review of the previous career of the convicted person including information as to the criminal record of one of his brothers, the fact that he had some 22 years earlier abandoned his wife and four children, information as to his general habits and a detailed history of his criminal record said to have been taken from reports of the Royal Canadian Mounted Police and covering a period from 1929 to 1954. In addition to convictions for some comparatively minor offences, this report showed that during the previous period

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of 25 years the appellant had been convicted and imprisoned for not less than 12 indictable offences for which he might have been imprisoned for periods of five years or more. During the discussion that took place, counsel acting for the appellant appears to have admitted three of the four convictions mentioned in the notice served upon the appellant in advance of his trial.

After the appellant's long and unfavourable criminal record had been discussed, the learned judge proceeded to hear the Crown's application under s. 660(1). Counsel for the prisoner was asked if he had admitted three of the four convictions mentioned in the notice given to the prisoner and, referring to what had taken place during the discussion regarding sentence on the theft charge, counsel said that he had. Proof which appears to me to be in satisfactory form was then given of the fourth of these convictions which had been made at St. Thomas on July 15, 1952, on a charge of theft preferred under s. 377 of the *Code*, for which a penalty of two years' imprisonment had been imposed. Other than the evidence afforded by these four convictions during the past ten years, the only evidence given on behalf of the Crown in support of the contention that the appellant was "leading persistently a criminal life" within the meaning of s. 660(2)(*a*) was that of a police constable who had first seen the accused when he was tried in 1952 on the offence above mentioned and who, when asked as to his general reputation in the community in which he lived, said that it was bad.

The appellant gave evidence on his own behalf, saying that he had been trying to straighten up but that whenever he got a job he lost it as soon as his criminal record became known. He was asked as to whether he was convicted of forgery at Whitby in 1929 but declined to admit the fact. He was not cross-examined as to the other convictions which had been referred to in the probation officer's report, other than in regard to the offence of breaking and entering for which he had been given five years' suspended sentence in January of 1955.

Part X(A) of the *Criminal Code*, R.S.C. 1927, c. 36, dealing with habitual criminals, was first enacted in 1947, by c. 55, s. 18. Sections 575A to 575D were taken almost *verbatim* from s. 10 of the *Prevention of Crime Act, 1908*,

8 Edw. VII (Imp.), c. 59. If the person sought to be declared an habitual criminal was first tried for an indictable offence and found guilty by a jury, the issue as to whether or not he was an habitual criminal was tried by a jury. When these subsections were re-enacted in the new *Code,* this procedure was changed. Section 662(2), in addition to requiring that the application should be heard before sentence was passed for the offence of which the accused had then been convicted, directed that it should be heard by the court without a jury. There was no change in the requirement that upon the application, unless the accused person had previously been sentenced to preventive detention, it was necessary to show that since attaining the age of eighteen years, on at least three separate and independent occasions he had been convicted of an indictable offence for which he was liable to imprisonment for five years or more and was leading persistently a criminal life.

As pointed out by Channell J. in delivering the judgment of the Court of Criminal Appeal in *Rex v. Turner* (1), dealing with the requirement of s. 10(2)(*a*) of the *Prevention of Crime Act, 1908,* that if it is to be found that he is "leading persistently a dishonest or criminal life":—

> . . . the evidence against him must be brought down to date—that is the important thing and that is necessary. . . .

This applies with equal force to the language of s. 660(2)(*a*).

In the case of *Brusch v. The Queen* (2), decided under the sections of the *Code* applicable at that time, it will be noted that the Crown did not content itself with proving the three convictions but asserted that the accused had been "leading a persistently criminal life in that you have been an associate of criminals, prostitutes, drug addicts and have had no regular employment or occupation", and called evidence in support of these statements. The sufficiency of the evidence in the present matter to justify a finding that

(1) (1910), 3 Cr. App. R. 103 at 160.
(2) [1953] 1 S.C.R. 373, 105 C.C.C. 340, 16 C.R. 316, [1953] 2 D.L.R. 707.

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the present appellant should be found to be an habitual criminal is, in my opinion, a matter of grave doubt. I however, do not consider that the present appeal should be disposed of on that ground.

The judgment delivered by the learned judge upon the application showed clearly that, in arriving at his conclusion that the appellant was an habitual criminal, he had considered the statements made in the probation officer's report purporting to cover a period of 25 years prior to the trial. None of this was evidence that was properly before him. Evidence of this long previous criminal record was doubtless admissible on the application but it was not given and, in basing his decision at least partly upon it, the learned judge acted upon matters outside the record.

In these circumstances there is, in my opinion, no justification for applying the provisions of s. 592(1)(*b*)(iii). As to this, I refer to what was said by Sir Charles Fitzpatrick C.J., with whom Duff J. (as he then was) agreed, in *Allen v. The King* (1):—

> It was argued that the section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitae*.

While the trial referred to in *Allen's Case* was before a jury, these remarks, in my opinion, apply with equal force to a hearing such as this before a single judge where the reasons delivered indicate that he relied, at least in part, upon evidence which was not properly before him.

Following the finding made, the learned judge sentenced the appellant to a term of imprisonment on the charge of theft and, accordingly, nothing further can be done under the application for preventive detention. I would quash the finding that the appellant was an habitual criminal and the direction that he be held in preventive detention.

The judgment of Fauteux and Nolan JJ. was delivered by

(1) (1911), 44 S.C.R. 331 at 339, 18 C.C.C. 1.

FAUTEUX J.:—Whether or not an accused is a habitual criminal and by reason of this fact should, for the protection of the public, be sentenced to detention in a penitentiary for an indeterminate period, involves an important issue of fact which must be heard and determined according to law. Under the imperative provisions of s. 662(2) of the *Criminal Code,* the hearing and determination of this issue must take place before sentence is passed for the offence of which the accused is convicted. The reason for this order of precedence established in the procedure is to assure the effective operation of all the safeguards which, both by the method of inquiry and by the rules of evidence, attend the trial of any issue and, more particularly, to exclude definitely any possibility that the judge entrusted with the matter be, until it is finally determined, adversely influenced in any degree by facts or representations of which, once an accused is convicted, he may, without the same safeguards, be apprised for passing a sentence.

In the present instance, the sentence for the offence of which the appellant was convicted was actually pronounced after the hearing and determination of the issue related to preventive detention. However, prior to such hearing, the judge, for the purpose of determining what sentence he should impose, received from the prosecution and exacted from the defence, in a most exhaustive manner, information of a character highly damaging to the accused. In the result, when the subsequent hearing of the issue related to preventive detention commenced, his mind was no longer free, in the measure it should have been, had the provisions of s. 662(2) been complied with, and the effective exercise of the right which the appellant had, on the hearing of such issue, to remain silent and hold the prosecution strictly to its obligation to prove its case according to rules of procedure and rules of evidence, was thenceforward jeopardized.

Counsel for the respondent admitted the violation of s. 662(2), attempting however, but in my view unsuccessfully, to show that "no substantial wrong or miscarriage of justice has occurred". The trial of the issue conducted in violation of the imperative provisions was wholly invalid and such defect is not one contemplated under the curative provisions of s. 592(1)(*b*)(iii).

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The appeal should be allowed; the finding that the appellant was a habitual criminal and the direction that he be held in preventive detention should be quashed.

Appeal allowed.

Solicitor for the appellant: E. P. Hartt, Toronto

Solicitor for the respondent: C. P. Hope, Toronto.

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*June 18, 19
*Oct. 2

IN THE MATTER OF the Estate of and the Settlement created by HARRY C. HATCH, deceased.

THE TREASURER OF ONTARIO (*Respondent*) ..... } APPELLANT;

AND

MILDRED HATCH DOYLE, CARR HATCH, NANCY HATCH, HENRY CLIFFORD HATCH, JOAN HATCH, WILLIAM DOUGLAS HATCH and IRENE FRANCES HATCH, and THE OFFICIAL GUARDIAN, on behalf of infants and any unborn grandchildren (*Appellants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Succession duties—Valuation of property—Creation of trust comprising shares in incorporated company—Subsequent redemption of shares and reinvestment of moneys by trustee—Increase in value of shares bought on reinvestment—The Succession Duty Act, 1939, 2nd sess. (Ont.), c. 1, ss. 1(f)(i), 2(1)(d)(i).

A settlor conveyed to a trustee a block of shares in B. Co., to be divided into equal parts for the four children of the settlor. In 1945 B. Co. redeemed the shares, and the trustee purchased shares in G.W. Co. in substitution for them. The settlor died in 1946, at which time the shares in G.W. Co. had greatly increased in value.

Held: The value of the "disposition" for succession duty purposes was the amount received by the trustee on the redemption of the shares in B. Co., rather than the value, as at the date of death, of the shares in G.W. Co. The execution of the trust agreement, coupled with the transfer of the shares, constituted a "disposition" within the meaning

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

of s. 1(*f*)(i) of *The Succession Duty Act*, and by s. 2(1)(*d*)(i) the value of that disposition was the amount of money into which the shares had been converted during the lifetime of the deceased. The subject-matter of the disposition, or the "property", within the meaning of the clauses referred to, was the shares in B. Co., and not a merely equitable interest in the shares or their proceeds.

Succession Duties—Settlement of personal property for benefit of life tenant and remaindermen—Whether life tenant has "the beneficial interest"—The Succession Duty Act, 1939, 2nd sess. (Ont.), c. 1, s. 1(f)(iv).

The trustee under the settlement above referred to was directed to pay the income on each share to the settlor's child for life, and upon the child's death to pay the capital as directed in the trust deed.

Held: Each child, during his life, had "the beneficial interest" in the shares (or their proceeds) within the meaning of s. 1(*f*)(iv), and hence payments of income to him were excluded from income by the clause, and were not dutiable. It could not be successfully argued that because of the interests of the persons (as yet unascertainable) who would become entitled on the death of the child, the latter had only "a" beneficial interest, rather than "the" beneficial interest.

APPEAL by the Treasurer of Ontario from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Stewart J. (2). Appeal dismissed.

J. D. Arnup, Q.C., for the appellant.

J. J. Robinette, Q.C., and *P. B. C. Pepper*, for the respondents Doyle *et al.*

F. T. Watson, Q.C., for the Official Guardian, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal by the Treasurer of Ontario from the judgment of Stewart J. (2) which allowed the appeals of the respondents from the statement of succession duty delivered by the Treasurer on October 15, 1952.

On December 27, 1941 the late Harry Clifford Hatch, hereinafter referred to as "the deceased", entered into an irrevocable trust agreement with The Toronto General Trusts Corporation, hereinafter referred to as "the trustee", establishing a trust with respect to 1,000 preference shares of T. G. Bright Co., Limited, hereinafter referred to as

(1) [1955] O.R. 752, [1955] C.T.C. 170, [1955] 4 D.L.R. 14 (*sub nom.* RE HATCH ESTATE).

(2) [1954] O.W.N. 797, [1955] C.T.C. 36, [1955] 1 D.L.R. 237.

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"Bright", "and such cash and/or other securities as may from time to time be paid, transferred to or purchased by the Trustee" on the instructions of the deceased. The trustee was directed to divide the trust property into four equal parts and to set aside one part for each of the four children of the deceased, the respondents Mildred Hatch Doyle, Carr Hatch, Clifford Hatch and Douglas Hatch, and to pay the net income from each part to the child in respect of whom that part was set aside. Upon the death of a child there was a gift to the issue of such child in equal shares *per stirpes* and if a child died leaving no issue, such child's part was directed to be added equally to the other parts. On January 2, 1942 an additional 1,000 shares of "Bright" were transferred to the trustee under the trust, and on January 2, 1943, a further 1,000 shares were so transferred.

In May and June, 1945, "Bright" redeemed the 3,000 preference shares at par and the trustee received $300,000 cash. There were other assets subject to the trust at this time. The trustee used the $300,000 to purchase 4,000 common shares of Hiram Walker, Gooderham & Worts Limited at $75 per share.

The deceased died on May 8, 1946, and at this date the 4,000 common shares of Hiram Walker, Gooderham & Worts Limited still formed part of the trust property and had increased in value to the sum of $558,000.

From the setting up of the trust until the date of the death of the deceased, his children received income from their respective parts of the trust estate, in the aggregate sum of $89,750. On these facts two questions arose.

On the first question, the Treasurer asserts that the creation of the trust respecting the shares of "Bright" was a "disposition" under *The Succession Duty Act, 1939,* with respect to each beneficiary; that succession duty was payable in respect thereof; and that the valuation of such disposition should be based on the value of the interest of a beneficiary in the trust property as of the date of the death of the deceased. The beneficiaries assert that the valuation of the disposition should be made by including, as to each

beneficiary, the proportionate part of $300,000 received upon the redemption of the shares of "Bright" and not the proportionate part of the value (at the date of the death of the deceased) of the shares of Hiram Walker, Gooderham & Worts Limited which had been purchased with such $300,000.

On the second question, the Treasurer asserts that succession duty was payable in respect of the income received in the lifetime of the deceased by the beneficiaries other than Mildred Doyle, who was at the deceased's death resident out of Ontario; as to the income received by Mrs. Doyle, the Treasurer asserts that it should be included in calculating the aggregate value of the estate of the deceased for the purpose of determining the rate of duty. The beneficiaries take the position that no duty was payable in respect of any of such income, and that it should be excluded in calculating the value of the estate of the deceased.

Stewart J. upheld the contention of the beneficiaries on all points (1) and the Court of Appeal unanimously affirmed his judgment (2).

The applicable statute, hereinafter referred to as "the Act", is *The Succession Duty Act*, 1939, 2nd sess. (Ont.), c. 1, as amended by 1940, c. 29; 1941, c. 55, s. 37; 1942, c. 34, s. 36; and 1946, c. 90*.

The answers to the questions raised do not appear to be affected by the facts that the shares of "Bright" were transferred to the trustee at different times, that other securities were also transferred to it from time to time or that the dispositions in favour of the four children of the deceased were made by means of a single trust document; and it will be convenient to consider, as was done by counsel on the argument before us, the effect of the statute in regard to the disposition made in favour of the respondent Carr Hatch, by the transfer to the trustee of the first 1,000 shares of "Bright".

(1) [1954] O.W.N. 797, [1955] 1 D.L.R. 237.

(2) [1955] O.R. 752, [1955] C.T.C. 170, [1955] 4 D.L.R. 14.

* Now R.S.O. 1950, c. 378.

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Under the terms of the trust agreement, upon the transfer of these shares to the trustee the deceased ceased to have any interest in them. The trustee became the legal owner of the shares and was obligated to set aside, immediately, 250 of them for Carr Hatch, to pay the net income derived from such shares (or from the proceeds thereof) to Carr Hatch during his lifetime, not to sell them except on the written direction of Carr Hatch, and, upon his death to divide them equally among his issue then living *per stirpes,* with special provisions as to issue under 21 years of age and a gift over to the brothers and sisters of Carr Hatch should he die without leaving issue him surviving.

It is common ground that the execution of the trust agreement coupled with the transfer of the shares constituted a "disposition" and that duty is payable with respect thereto. The first question is as to the dutiable value of such disposition and turns upon the construction of s. 2(1)(*d*)(i) of the Act, which reads as follows:—

> 2. (1) For the purposes of this Act, . . .
>
> (*d*) the value of a disposition shall be the value at the date of death of the deceased of the property in respect of which such disposition is made, provided that,—
>
> (i) if such property has been sold for or converted into money during the lifetime of the deceased, the amount of such money shall be the value of such disposition.

It is the contention of the appellant that the property in respect of which the disposition which we are considering was made was not the 250 shares of "Bright" but was the equitable interest in such shares (or the proceeds thereof) acquired by Carr Hatch for his lifetime and the equitable interests therein acquired by such of the other respondents as are contingently entitled upon his death; that none of these equitable interests had been sold for or converted into money during the lifetime of the deceased; and that the dutiable value to be determined is the value of these equitable interests at the date of the death of the deceased. The argument appeared to assume that the total value of these equitable interests would be equal to the total value at such date of the 333⅓ common shares of Hiram Walker, Gooderham & Worts Limited purchased by the trustee with the $25,000 resulting from the redemption of the 250 "Bright" shares. It is argued that, as generally speaking the scheme of the Act is to levy duty on the person receiv-

ing a benefit from the deceased, it is important to ascertain not what property the deceased gave but rather what property the beneficiary received, and that none of the respondent beneficiaries at any time received any of the 250 "Bright" shares.

In construing the words quoted above from s. 2 of the Act, it is first to be observed that these words contemplate that a disposition will be made in respect of property; it is next necessary to have regard to the definition of "disposition" in s. 1(*f*) and the words which are relevant to the question before us appear to me to be:—

> (*f*) "disposition" shall mean,—
>
> (i) any means whereby any property passes or is agreed to be passed, directly or indirectly, from the deceased during his lifetime to any person . . .
>
> without consideration in money or money's worth . . .
>
> and such means shall include . . .
>
> (*a*iii) any creation of trust . . .

Reading these portions of the Act together it appears to me that in the case of a disposition carried out by means of the creation of a trust the word "property" in s. 2(1)(*d*) was used by the Legislature as meaning the property made subject to the trust or, as it is usually called, "the trust property". As is said in 33 Halsbury, 2nd ed. 1939, s. 156, p. 95:—

> In order to create a trust there must be (1) a declaration which is or can be construed as imperative in its terms; (2) a designation of the subject-matter or property to be affected by it within the limits permitted by law; and (3) a designation of the object or the person or persons to be benefited by it within the limits permitted by law.

In the case of the trust deed executed by the deceased the property affected is the 250 "Bright" shares and in my opinion it is in this sense that the word "property" was used by the Legislature. I am accordingly in agreement with the conclusion reached by the Courts below on the first question.

The second question turns on the proper construction of s. 1(*f*)(iv) of the Act reading as follows:—

> (*f*) "disposition" shall mean, . . .
>
> (iv) any payment during the lifetime of the deceased to any person as a result of the creation of a trust by the deceased, exclusive of the payment of any income derived from any property in which such person had the beneficial interest.

The income received by Carr Hatch from the 250 "Bright" shares during the lifetime of the deceased was, of course, paid to him as a result of the creation of the trust by the

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deceased; and it is contended by the appellant that while Carr Hatch had "a" beneficial interest in the shares from which the income was derived he did not have "the" beneficial interest. It is argued that there are outstanding beneficial interests in the shares in the person or persons, as yet unascertainable, who will become entitled to the shares on the death of Carr Hatch. If this argument is accepted it would seem to follow that the exclusion in cl. (iv) of s. 1 (*f*) could operate only where the recipient of income under a trust was exclusively entitled to the whole of the corpus from which the income was derived, in which case he could demand the immediate transfer of the corpus, although he might as a matter of convenience leave it in the hands of the trustee. It is difficult to suppose that the Legislature intended to provide for so unusual a situation. In ordinary speech I think that where realty or personalty is settled on A for life with remainders over on his death it may be said that during his life A has the beneficial interest in the settled property. In the case at bar, so long as Carr Hatch lives no one else has any beneficial interest in possession in the shares nor has anyone else any vested beneficial interest in them. The exclusion is, in my opinion, intended to operate where the recipient of income derived from trust property has such beneficial interest in the property as to give him the absolute right to be paid the income. So long as he lives Carr Hatch has such absolute right.

It appears to me that to construe the exclusion as inapplicable to the facts of the case at bar would be virtually to deprive it of all meaning; and that to construe it as applicable will give effect to the apparent intention of the Legislature to avoid double taxation.

For these reasons I am in agreement with the conclusion reached by the Courts below on the second question also.

It follows that I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: W. D. Blair, Toronto.

Solicitors for the respondents other than the Official Guardian: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

DOUGLAS McELLISTRUM, both personally and as administrator of the estate of Douglas Craig McEllistrum, deceased (*Plaintiff*) ..... APPELLANT;

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*June 19, 20
*Oct. 2

AND

ARCHIE JAMES ETCHES (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Contributory negligence—Child of tender years—Rule to be applied.

It cannot be laid down as a general rule that a child of 6 years is never to be charged with contributory negligence. Dictum of Trueman J.A. in *Eyers v. Gillis & Warren Limited* (1940), 48 Man. R. 164, disapproved. The proper rule is that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience. *Mercer et al. v. Gray*, [1941] O.R. 127, approved.

Executors and administrators—Right to bring action in representative capacity—Action instituted before grant of administration—Other circumstances—The Trustee Act, R.S.O. 1950, c. 400, s. 37.

The plaintiff sued for damages arising out of the death of his infant son, claiming both personally, under *The Fatal Accidents Act*, and as administrator of his son's estate, under s. 37 of *The Trustee Act*. The action was commenced some two weeks before the grant of letters of administration to the plaintiff, and the Court of Appeal held that this fact was fatal to the claim under *The Trustee Act*, since an administrator had no status to sue until after his appointment.

Held: The judgment should be reversed in this respect. Assuming, but not deciding, that in Ontario an action under s. 37 of *The Trustee Act* could not be instituted by a person in the capacity of administrator before the grant of letters of administration to him, the writ in this action was nevertheless not void *in toto*, since the plaintiff admittedly asserted in it a valid claim under *The Fatal Accidents Act*. No period of limitation had expired when it came to the attention of the trial judge that letters of administration had not been granted until after the issue of the writ, and it would therefore have been open to him at that stage to order that the plaintiff, in his capacity of administrator, be added as a party plaintiff. The reason that no steps were taken at that time to regularize the matter was that counsel for the defendant made it plain that he was not raising the point that the action was improperly constituted. In these circumstances he should not now be heard to object on that ground, and the plaintiff should have judgment on this branch of the case.

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

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McELLISTRUM v. ETCHES

APPEAL from the judgment of the Court of Appeal for Ontario (1), varying the judgment at trial. Appeal allowed in part.

P. J. Bolsby, Q.C., for the plaintiff, appellant.

W. B. Williston, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—By leave of the Court of Appeal for Ontario the plaintiff in this action appeals from a judgment of that Court (1) which had varied the judgment at the trial held before a judge and jury. The plaintiff is Douglas McEllistrum in his personal capacity and as administrator of the estate of his infant son. It would appear that leave was given in order that this Court might pass upon the question as to whether an action for damages under s. 37 of *The Trustee Act*, R.S.O. 1950, c. 400, was properly brought by the father who, at the date of the issue of the writ, had not been appointed administrator. However, in order to appreciate various other questions raised by the appellant, it is necessary to set out in some detail the occurrence which gave rise to the action and some of the proceedings therein.

On March 3, 1953, the infant, who had just reached the age of 6 years, accompanied by a younger boy was walking westerly on the north side of McNaughton Avenue in the township of Chatham. Undoubtedly he moved from that position, which was a safe one, to the travelled portion of the highway and was struck by the defendant's motor vehicle which was also travelling westerly. His injuries consisted of a fractured or displaced nose, severe welts on his back, general bruises and internal injuries including a rupture of the spleen which was described as being an extremely painful injury. After removal to the hospital, he was kept under observation and about 10.30 on the next morning his condition began to worsen. About 1.30 p.m. the ruptured spleen was removed and from that time he remained unconscious except for response to deep or painful stimulus. He died on March 8, 1953.

(1) [1954] O.R. 814, [1954] 4 D.L.R. 350.

The writ was issued September 8, 1953; the statement of claim was delivered September 15, 1953, and in para. 1 thereof it was alleged that the plaintiff was the administrator of the estate and effects of the infant. In fact the plaintiff was not appointed administrator until September 25, 1953, but in its defence delivered September 26, 1953, the defendant admitted the allegation contained in the statement of claim. At the trial when the letters of administration were filed as an exhibit the following occurred:—

HIS LORDSHIP: What is the date of the letters of administration?

Mr. BOLSBY [counsel for the plaintiff]: The date of the granting of the letters of administration is the 28th [*sic*] of September, 1953.

Mr. THOMPSON [counsel for the defendant]: On that particular point, I do not know what significance it has but this action was started by the plaintiff who is the administrator some considerable time before and before letters of administration were obtained.

HIS LORDSHIP: The writ was issued the 8th of September?

Mr. BOLSBY: The date of death was the 8th of March, 1953, the granting of the letters of administration was the 25th of September, 1953.

HIS LORDSHIP: And the writ was issued on the 8th of September?

Mr. BOLSBY: That is correct, my Lord, the application was then before the Court. I will deal with any legal arguments in due course.

HIS LORDSHIP: There is nothing in the defence about it?

Mr. THOMPSON: No, I do not think it is significant anyway.

Mr. BOLSBY: Then why fight about it?

At the conclusion of the plaintiff's case which included the reading of extracts from the examination for discovery of the defendant, the latter called no evidence. Although the statement of defence contained no allegation of contributory negligence on the part of the infant, presumably counsel on each side dealt with the matter and undoubtedly the trial judge did so. The questions submitted to the jury and the answers are as follows:—

1. Has the defendant Etches satisfied you that the accident was not caused by any negligence or improper conduct on his part? Answer "Yes" or "No". Answer: No.

2. Was there any negligence on the part of the deceased Douglas Craig McEllistrum which caused or contributed to the accident? Answer "Yes" or "No". Answer: Yes.

3. If your answer to Question No. 2 is "Yes", then state fully of what the negligence of the deceased Douglas Craig McEllistrum consisted? Answer fully: The deceased Douglas Craig McEllistrum was negligent in that he darted into the path of the oncoming vehicle.

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4. If your answer to Question No. 1 is "No", and your answer to Question No. 2 is "Yes", state in percentages the degree of fault or negligence attributable to each.

Deceased Douglas Craig McEllistrum	70%
Defendant Etches	30%
Total	100%

5. Irrespective of how you answer the other questions, at what amount do you assess the total damages sustained by the plaintiff, Douglas McEllistrum?

(a) Out of pocket expenses	$ 720.69
(b) Under Trustee's Act for Pain and Suffering	3,000.00
(c) Under the Fatal Accident's Act	
(1) Funeral expenses	250.00
(2) General damages	NIL

Upon these answers, judgment was entered against the defendant for $1,191.21 made up as follows: For the plaintiff in his personal capacity, $216.21 (being 30 per cent. of the amount fixed by the jury for out-of-pocket expenses); for the plaintiff as administrator, $975. In view of the jury having assessed the total damages under *The Fatal Accidents Act*, R.S.O. 1950, c. 132, at $250 (the limit fixed by statute for funeral expenses) and in view of the finding of negligence on the part of the infant to the extent of 70 per cent., the trial judge directed that $75 be paid to the plaintiff in his personal capacity under that heading. The plaintiff was given his costs.

The defendant appealed to the Court of Appeal asking that the judgment be varied by re-assessing the quantum of the damages allowed the plaintiff under *The Trustee Act*, or that a new trial be ordered for the purpose of re-assessing such damages on the ground that the amount awarded was excessive and unreasonable and against the evidence and the weight of evidence. The plaintiff cross-appealed. By its first reasons the Court of Appeal directed that the judgment at the trial be varied and that the plaintiff personally recover from the defendant the sum of $216.21; that the claim of the plaintiff as administrator under *The Trustee Act* be dismissed without costs; that the plaintiff recover from the defendant $225 apportioned equally between him and his wife; and that the costs of the action in respect of the claim under *The Fatal Accidents Act* be paid by the defendant to the plaintiff on the scale of the County Court without a set-off. In his notice of cross-appeal the plaintiff

did not clearly say anything about the absence of any plea of contributory negligence but later he served a notice of motion for leave to amend his original notice by raising the point, whereupon the defendant moved that in the event of the Court granting that permission to the plaintiff, he, the defendant, should be given leave to amend his statement of defence by adding a paragraph alleging such contributory negligence. Both of these motions were granted by the Court of Appeal and objection is taken to the action of the Court in permitting the defendant to raise such a plea at that late date. In view of the course of the trial this Court will not interfere with the discretion of the Court of Appeal.

After the reasons for judgment of the Court of Appeal had been delivered the defendant moved to alter the minutes as settled by the Registrar on the ground that he had paid $1,000 into court in satisfaction of the plaintiff's claim at the time of the delivery of its defence, September 26, 1953. Upon that being brought to the attention of the Court of Appeal the direction as to costs was varied and the formal order provides that the costs of the action until payment into court should be paid on the scale of the County Court by the defendant to the plaintiff and that the costs after payment into court should be paid by the plaintiff to the defendant on the same scale. It was argued that the notice of payment into court did not comply with Rule 310 of the Ontario Rules of Practice and Procedure because, without any order of the Court, it did not specify the claim or cause or causes of action in respect of which payment was made and the sum paid in respect of each claim or cause of action. This question should have been raised at the time and it cannot now be said that the money was not properly paid into court.

There is no basis for the plaintiff's complaint of that part of the trial judge's charge to the jury where he instructed them that, if they considered the boy had "darted" into the path of the defendant's automobile, they might find that he had been guilty of contributory negligence, because whatever expressions were used in evidence, that was not an inappropriate manner of describing the infant's action. Extracts from the examination for discovery of the defendant having been put in as part of the plaintiff's case, there was no obligation on the trial judge to refer in detail to

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what there appeared. In his address to the jury counsel for the plaintiff had referred a number of times to the fact that the defendant had not gone into the witness-box or called any evidence. As to this, the trial judge directed the jury:—

> Do not infer anything from that one way or the other; do not infer any liability against him or give him the benefit of anything by reason of his failure to go into the witness-box. It is quite proper in the course of a trial and it is not unusual for a defendant not to put in evidence. There is nothing unusual about that. Very often they do but you should not let that influence you in any way any more than you will allow the fact that the plaintiff called a great number of witnesses to weigh in his favour or against him. If you just consider the evidence that was given by the witnesses as they gave their testimony and the exhibits then you will not go far wrong.

Bearing in mind that throughout his charge he made it abundantly clear that the onus throughout was on the defendant no fault may be found with the extract quoted.

It is agreed that the trial judge had before him the decision of the Ontario Court of Appeal in *Mercer et al. v. Gray* (1) that it is a question for the jury whether an infant such as the one here in question was guilty of contributory negligence. There is nothing inconsistent with that rule and the judgment of this Court in *T. Eaton Co. v. Sangster* (2) where the Court, without calling upon counsel for the other side, dismissed an appeal from the judgment of the Court of Appeal for Ontario (3) affirming a judgment at trial, from the report of which it appears that the child there in question was $2\frac{1}{2}$ years of age. Nor is it inconsistent with the decision in *Hudson's Bay Company v. Wyrzykowski* (4). According to the report in this Court the child was 4 years of age while in the Manitoba Reports the age is stated to be $3\frac{1}{2}$ years. In *Eyers v. Gillis & Warren Limited* (5), the Court of Appeal for Manitoba held that a girl of 6 years could not be guilty of contributory negligence. Whether the result arrived at in that case can be justified is not before us, but the statement of Trueman J.A., speak-

(1) [1941] O.R. 127, [1941] 3 D.L.R. 564.

(2) (1895), 24 S.C.R. 708.

(3) (1894), 21 O.A.R. 624, affirming 25 O.R. 78.

(4) [1938] S.C.R. 278, [1938] 3 D.L.R. 1, affirming 44 Man. R. 256, [1936] 2 W.W.R. 650, [1936] 4 D.L.R. 208.

(5) 48 Man. R. 164, [1940] 3 W.W.R. 390, [1940] 4 D.L.R. 747.

ing on behalf of the Court, at p. 168, that it was well established "that a person of her tender age and inexperience cannot be charged with contributory negligence" must be taken to be inaccurate. The judgment of Duff J. in *The Winnipeg Electric Railway Company v. Wald* (1), relied on by Trueman J.A., does not decide the question as to whether a child of 6 years of age is accountable for contributory negligence; in fact he left it open and Girouard and Davies JJ. agreed with him. Idington J. did so hold, but it should be noted that the judgment of Ferguson J. in *Ricketts et al. v. The Village of Markdale* (2), referred to by him, did not settle the point because, as appears at p. 623, Ferguson J. was of opinion that contributory negligence on the part of a boy under 7 years of age had not been made to appear. The matter is mentioned but not decided in *Joseph v. Swallow and Ariell Proprietary Limited* (3), where there is a reference to Beven on Negligence. The present view of the law is summarized by Glanville L. Williams in his work on Joint Torts and Contributory Negligence, 1951, s. 89, p. 355. It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience. In the present case the trial judge so charged the jury.

The Court of Appeal considered that under the circumstances the amount allowed under *The Trustee Act* was so grossly excessive that it should be set aside. Counsel for both parties had agreed that in that event that Court should fix the damages rather than have a new trial, although Mr. Bolsby stated that his consent had been given on the condition that the infant would not be charged with contributory negligence. The Court of Appeal would have awarded $500 under that heading if it had not concluded that the plaintiff was not entitled to anything because he was not administrator of the infant's estate at the date of the issue of the writ. We agree with the Court of Appeal that the jury's estimate was grossly excessive and counsel

(1) (1909), 41 S.C.R. 431 at 443. (2) (1900), 31 O.R. 610.
(3) (1933), 49 C.L.R. 578 at 585-6.

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for both parties agreed that we should fix the damages and we see no reason to disagree with the amount mentioned by the Court of Appeal.

In view of the course of the trial, it is not necessary to decide whether the writ of summons so far as it related to the cause of action under *The Trustee Act* asserted by the plaintiff in the character of administrator was a nullity. Assuming without deciding that, in Ontario, an action under s. 37 of *The Trustee Act* for damages for a tort for personal injury caused to a deceased cannot be instituted by a person in the capacity of administrator before the grant of letters of administration and that in an action so commenced where no other claim is asserted the writ would be a nullity, it will be observed that in the case at bar the writ admittedly asserted a valid claim by the plaintiff in his personal capacity for damages under *The Fatal Accidents Act*. The writ therefore was not null *in toto*. It follows that when it was brought to the attention of the learned trial judge, on October 26, 1953, that letters of administration had not been granted to the plaintiff until after the issue of the writ it would have been open to him, on the view that so far as the writ related to the claim made *qua* administrator it was void, to order that the appellant in his capacity of administrator be then added as a party plaintiff. At that time no period of limitation had intervened, and the reason that the necessary steps to regularize the matter were not taken was that counsel for the respondent made it plain that he was not raising the point that the action was improperly constituted. Under these circumstances the respondent ought not to be heard to object in an appellate Court, and judgment on the cause of action under *The Trustee Act* should be entered for $150, that is, 30 per cent. of $500. In fact counsel for the respondent did not seek to insist on the point and by letters written after the judgment in the Court of Appeal and again on the argument in this Court offered to submit to judgment for $150 on this cause of action.

The appeal should be allowed in part and para. 1 of the formal order of the Court of Appeal, dated November 26, 1954, which embodies the terms of the judgment at the

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trial as varied by the Court of Appeal, should be amended by striking out cl. (2) and inserting in lieu thereof the following:—

(2) This Court doth further order and adjudge that the plaintiff recover from the defendant as damages under The Trustee Act the sum of $150.00.

The costs before the Court of Appeal will be as directed by that Court. Under all the circumstances there should be no costs in this Court.

Appeal allowed in part.

Solicitor for the plaintiff, appellant: P. J. Bolsby, Toronto.

Solicitor for the defendant, respondent: Donald G. E. Thompson, London.

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*June 21
*Oct. 2

DAME WINIFRED BEAUVAIS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH (APPEAL SIDE) FOR THE PROVINCE OF QUEBEC

Criminal Law—Trials by magistrates for indictable offences—Sufficiency of information and complaint without formal indictment—The Criminal Code, 1953-54 (Can.), c. 51, ss. 467, 478.

Where an accused is brought before a magistrate charged with an indictable offence that is within the magistrate's absolute jurisdiction to try, there is no necessity for the preparation of an indictment. The magistrate's jurisdiction is absolute and does not depend upon the consent of the accused, under s. 467 of the *Criminal Code*, where the accused is "charged in an information", and s. 478, requiring the preparation of an indictment in Form 4, applies only where the accused has elected under s. 450, 468 or 475 to be tried by a judge without a jury. *Ship v. The King* (1949), 95 C.C.C. 143 at 150, approved.

While it is true that criminal prosecutions must be conducted in the name of the Crown, and not in that of the informant, this requirement is sufficiently satisfied if the information is headed "Au Nom de Sa Majesté la Reine".

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

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BEAUVAIS v. THE QUEEN

APPEAL from the judgment of the Court of Queen's Bench (Appeal Side) for the Province of Quebec, affirming, without written reasons, a conviction made by a judge of the Municipal Court of Montreal. Appeal dismissed.

Antonio Lamer, for the appellant.
André Tessier, for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—L'appelante a été poursuivie en vertu des dispositions de l'art. 182 du nouveau *Code Criminel* qui stipule que toute personne qui tient une maison de débauche, est coupable d'un acte criminel et passible d'un emprisonnement de deux ans.

Le 17 juin 1955, soit après l'entrée en vigueur du nouveau *Code Criminel,* un juge municipal de la ville de Montréal a émis un mandat de perquisition, à la demande du constable Louis Desjardins, l'autorisant à entrer et à perquisitionner les lieux occupés par l'appelante. Tel que la loi l'autorise (*C. Cr.,* art. 171), après s'être rendu compte que la maison en question était véritablement une maison de débauche, le constable procéda à l'arrestation de l'appelante. Le lendemain il logea une plainte formelle, et la dénonciation fut dûment signée par lui et assermentée devant M. le Juge Henri Monty de la Cour Municipale de Montréal. Après enquête, l'appelante fut trouvée coupable et condamnée à être détenue dans la prison commune du district de Montréal durant une période de six mois. L'appel à la Cour du Banc de la Reine fut rejeté.

L'appelante a obtenu la permission d'appeler à cette Cour pour le motif suivant:—

> Les tribunaux inférieurs ont-ils erré en décidant que la dénonciation de Louis Desjardins, constable de la Cité de Montréal, était suffisante sans qu'il y ait un acte d'accusation formel, au nom de Sa Majesté la Reine?

C'est la seule question que nous avons à décider pour déterminer le présent litige.

Il est certain qu'il n'y a pas eu d'acte formel d'accusation et que M. le Juge Monty a entendu la cause sur la seule dénonciation du constable Desjardins.

L'appelante soutient qu'il fallait de toute nécessité un acte d'accusation écrit en vertu des dispositions de l'art. 491 du *Code Criminel,* qui dit qu'un acte d'accusation est suffisant s'il est sur papier et rédigé d'après la formule 3 ou 4 suivant le cas.

Les formules 3 et 4 exigent évidemment que l'acte d'accusation soit au nom de Sa Majesté la Reine. En outre, l'art. 478 édicte que lorsqu'un prévenu choisit, en vertu des arts. 450, 468 ou 475, d'être jugé par un juge sans jury, *un acte d'accusation* selon la formule 4 doit être présenté par le procureur général ou son représentant.

En premier lieu, on peut disposer de ce grief de l'appelante qui prétend que la dénonciation a été faite au nom du constable lui-même, et non pas au nom de Sa Majesté la Reine. La lecture de la dénonciation établit clairement le contraire, car elle porte comme titre "Au Nom de Sa Majesté la Reine".

Cependant, le juge municipal avait-il le droit d'entendre ce procès sur cette dénonciation, sans qu'il y ait eu un acte d'accusation au nom de Sa Majesté la Reine?

Il est essentiel de ne pas oublier que, dans le cas qui nous occupe, la juridiction du magistrat est absolue et ne dépend pas du consentement du prévenu. Lorsqu'en effet un inculpé est traduit devant le tribunal comme conséquence d'une *dénonciation* d'avoir commis certaines offenses, et entre autres d'avoir tenu une maison de débauche, son consentement est immatériel (*C. Cr.,* art. 467). L'article 478 ne couvre que les cas prévus aux arts. 450, 468 et 475 où le consentement du prévenu est requis pour donner juridiction au magistrat. Il est alors impératif qu'il y ait, en outre de l'information, un acte formel d'accusation au nom de Sa Majesté la Reine.

Tel n'est pas le cas qui se présente, et quand la compétence du magistrat est absolue les tribunaux ont décidé qu'il n'était pas nécessaire qu'il y ait un acte d'accusation formel, et je ne vois pas de motif sérieux qui nous justifierait de changer cette jurisprudence constante.

Ainsi, dans Snow's Criminal Code of Canada, 6e éd. 1955, p. 409, l'on voit ce qui suit:—

> An information and complaint in a summary trial case is often used as the formal charge or indictment and care should be taken to see that it properly describes the offence mentioned in s. 467. . . .

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Taschereau J.

Dans *Ship v. The King* (1) M. le Juge Barclay de la Cour du Banc du Roi de Québec, parlant pour toute la Cour, s'est exprimé de la façon suivante:—

> Where the Magistrate has absolute jurisdiction . . . "before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him", it has been held that it is not necessary under this provision that there be a written charge. . . .

La cause actuelle est bien différente de celles qui nous ont été citées par l'appelante, *Woo Tuck v. Scalen* (2); *Gaboury v. Gagné; Fortier v. Gagné* (3); *Lavoie v. La Reine* (4). Dans ces trois arrêts la Cour d'Appel de Québec a justement réaffirmé le principe que les poursuites criminelles doivent être prises au nom de Sa Majesté. Elle a conclu dans les trois cas que les accusés devaient être libérés parce que les dénonciations avaient été poursuivies par les plaignants eux-mêmes, sans la participation du Souverain.

L'appel doit être rejeté.

Appeal dismissed.

Solicitors for the appellant: Lamer & Hébert, Montreal.

Solicitor for the respondent: André Tessier, Montreal.

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*June 21
*Oct. 2

ARCHIE ISSEMAN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH (APPEAL SIDE) FOR THE PROVINCE OF QUEBEC

Criminal law—Common gaming houses—Slot machines—Machine vending only amusement or "services"—The Criminal Code, 1953-54 (Can.), c. 51, ss. 168, 170, 176.

A machine that vends only "services" or amusement (the terms are synonymous) is within the definition of "slot machine" in s. 170(2) of the *Criminal Code*, if the result of one of any number of operations is

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

(1) (1949), 95 C.C.C. 143 at 150, 8 C.R. 26.
(2) (1928), Q.R. 46 B.R. 437, 51 C.C.C. 365 (*sub nom. Rex v. Woo Tuck*).
(3) (1929), Q.R. 48 B.R. 353.
(4) Q.R. [1954] B.R. 416.

a matter of chance or uncertainty to the operator. The difference in wording between s. 170 and s. 986(4) of the old *Code* has changed the law as laid down in *Laphkas v. The King,* [1942] S.C.R. 84. The finding of such a machine therefore gives rise, under s. 170(1), to a conclusive presumption that the place where it is found is a common gaming house, as defined in s. 168, and renders the keeper of the premises liable to the penalties prescribed by s. 176.

APPEAL from the judgment of the Court of Queen's Bench (Appeal Side) for the Province of Quebec (1), reversing an acquittal by a magistrate. Appeal dismissed.

Dollard Dansereau, Q.C., and *Rosario Richer,* for the appellant.

André Tessier, for the respondent.

The judgment of Kerwin C.J. and Taschereau, Locke, Fauteux, Abbott and Nolan JJ. was delivered by

TASCHEREAU J.:—M. le Juge municipal Pascal Lachapelle a rendu, le 27 juillet 1955, un jugement acquittant l'appelant, d'avoir, le 26 mai 1955, tenu une maison de jeu publique à Montréal, utilisée pour l'opération de "Bingo Pin Ball machines". Dans son jugement, le juge au procès se base sur les raisons qu'il a données dans une cause similaire de Roland Beausoleil, pour rejeter la plainte. Ce dernier jugement a été produit au dossier. La Cour d'Appel (1) a renversé cette décision, et le prévenu veut la faire rétablir.

Les arts. 170 et 176 du *Code Criminel* sont ceux qui s'appliquent dans la présente cause. L'article 170 se lit ainsi:—

170. (1) Aux fins des procédures prévues par la présente Partie, un local que l'on trouve muni d'un appareil à sous est *de façon concluante présumé une maison de jeu.*

(2) Au présent article, l'expression "appareil à sous" signifie toute machine automatique ou appareil à sous

a) employé ou destiné à être employé pour toute fin autre que la vente de marchandises ou services; ou

b) utilisé ou destiné à *être utilisé pour la vente de marchandises ou services*

(i) si le résultat de l'une de n'importe quel nombre d'opérations de la machine *est une affaire de hasard ou d'incertitude pour l'opérateur*;

(1) (1956), 23 C.R. 318.

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(ii) si, en conséquence d'un nombre donné d'opérations successives par l'opérateur, l'appareil produit des résultats différents; ou

(iii) si, lors d'une opération quelconque de l'appareil, celui-ci émet ou laisse échapper des piécettes ou jetons.

L'article 176 est dans les termes suivants:—

176. (1) Est coupable d'un acte criminel et passible d'un emprisonnement de deux ans, quiconque tient une maison de jeu ou une maison de pari.

(2) Est coupable d'une infraction punissable sur déclaration sommaire de culpabilité, quiconque

a) est trouvé, sans excuse légitime, dans une maison de jeu ou une maison de pari; ou

b) en qualité de possesseur, propriétaire, locateur, locataire, occupant ou agent, permet sciemment qu'un endroit soit loué ou utilisé pour des fins de maison de jeu ou pari.

A l'art. 168 on y voit les définitions suivantes:—

e) "maison de désordre" signifie une maison de débauche, une maison de pari ou une maison de jeu;

f) "jeu" signifie *un jeu de hasard ou un jeu où se mêlent le hasard et l'adresse.*

Dans cette cause de Beausoleil, identique à la présente, M. le Juge Lachapelle a dit ce qui suit:—

Cette machine ne paye aucune monnaie, ne distribue aucune marchandise ou jeton et ne procure au gagnant que le seul choix de jouer l'appareil de nouveau avec un certain nombre de points enregistrés tel que déjà décrits. *Les possibilités de chance du joueur sont laissées au caprice et hasard fixés d'avance par un mécanisme électronique compliqué, et l'habileté du joueur n'y est pour rien.*

Et plus loin dans son jugement, il s'exprime de la façon suivante:—

La machine sous saisie est certes plus dispendieuse à jouer que celle étudiée dans la cause de Adam (1), *mais comme résultat elle ne fait que procurer un divertissement et un amusement au joueur.*

Dans la cause de *Laphkas v. The King* (2), la machine qui faisait l'objet du litige a été déclarée légale parce qu'elle ne faisait que procurer un amusement légitime au joueur en retour d'une modique somme d'argent. Dans cette même cause, cette Cour a également décidé, qu'en vertu de l'ancien texte du *Code Criminel* (art. 986(4)), lorsqu'une machine ne vendait que des *"services"*, elle n'était pas illégale et que le mot *"services"* avait la même signification que le mot

(1) *Regina v. Adam*, [1953] R.L. 325.

(2) [1942] S.C.R. 84, 77 C.C.C. 142, [1942] 2 D.L.R. 47.

"amusements". Le savant juge de première instance a conclu que la machine en question dans la présente cause, ne faisait que vendre des *"amusements"* et a, en conséquence, déclaré l'opération de la machine légale.

Je ne puis m'accorder avec cette conclusion, et je partage entièrement les vues de M. le Juge Hyde de la Cour du Banc de la Reine qui, parlant au nom de tous ses collègues, en est arrivé à une conclusion contraire. Il signale en effet, avec raison, que la loi a été amendée depuis le jugement dans l'affaire *Laphkas,* et que la machine est illégale si elle est utilisée *pour la vente de marchandises ou services,* si le résultat de l'une de n'importe quel nombre d'opérations de la machine *est une affaire de hasard ou d'incertitude* pour l'opérateur. (*C. Cr.,* art. 170.)

On voit donc que lorsqu'une opération dépend du hasard, et que même si le résultat ne fournit que des "services" ou "amusements", deux mots qui ont le même sens, l'appareil est illégal, et la maison où il se trouve est présumée de façon concluante être une maison de jeu. Il ne fait aucun doute que, dans le cas présent, le résultat des opérations de cette machine est exclusivement du domaine du hasard, et fournit un amusement au joueur, *comme résultat de l'une de n'importe quel nombre d'opérations.* C'est à cette conclusion qu'en sont arrivés le juge au procès et la Cour du Banc de la Reine. Ceci fait tomber ce genre d'appareil sous le coup de la prohibition du statut.

Quant au point soulevé concernant l'absence d'un acte formel d'accusation, pour les raisons données dans la cause de *Beauvais v. The Queen* (1), je ne le crois pas fondé. Il s'agit en effet d'une dénonciation où le magistrat a juridiction absolue, et en conséquence, l'absence d'un acte formel d'accusation ne vicie pas les procédures. (*C. Cr.,* arts. 467 et 176.)

L'appel doit donc être rejeté avec, cependant, une modification qui devra être faite au jugement de la Cour du Banc de la Reine. Cette dernière Cour, comme elle avait le droit de le faire en vertu des dispositions de l'art. 638 (*C. Cr.*), a suspendu la sentence, à condition que le prévenu souscrive un engagement, sans caution, selon la formule 28 (*C. Cr.*).

(1) *Ante,* p. 795.

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Cet engagement devra être souscrit pour la durée d'une année à compter de la date du présent jugement, et non à compter de la date du jugement de la Cour d'Appel.

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RAND J.:—The machine in question here, subject to one added feature, can be taken to be as described by the language of the magistrate quoted by the Chief Justice of this Court in *DeWare v. The Queen* (1). The added feature is that by inserting in the machine not a five-cent piece which will initiate an operation but a sum reaching as high as $1 in coins a chance is created of having the normal scores increased by a quantity related to the amount deposited but dependent on a fortuitous relationship of results in the individual's operations. No person is obliged to make the additional deposit, but the machine is offered for that as well as for its ordinary use.

The issue is whether the device is within s. 170 of the *Criminal Code*. Since the use is entertainment within the meaning given the word "services" in *Laphkas v. The King* (2) and as no slug or token is discharged or emitted, the machine must, if at all, come within para. (*b*)(i) or (ii) of subs. (2) which defines "slot machine" as follows:—

> (2) In this section "slot machine" means any automatic or slot machine . . .
>
> (*b*) that is used or intended to be used for the purpose of vending merchandise or services if
>
> (i) the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator, [or]
>
> (ii) as a result of any given number of successive operations by the operator the machine produces different results.

The Court of Queen's Bench interpreted the finding of the magistrate to mean that the operations were essentially governed by chance, that whatever the skill exercisable in the control of the plunger or the flippers, there was not that degree which, although probably sufficient to exclude the machine from the category of the automatic, is insufficient to qualify the condition of chance in producing results. This interpretation was challenged by counsel for the appellant who took the finding to be related to the added feature

(1) [1954] S.C.R. 182 at 183, 108 C.C.C. 43, 18 C.R. 213, [1954] 2 D.L.R. 663.

(2) [1942] S.C.R. 84, 77 C.C.C. 142, [1942] 2 D.L.R. 47.

only. But as the section includes "intended" as well as actual use this does not help the appellant; and admittedly the bonus operation is pure chance. This brings the case within para. (*b*)(i).

I think it should be said that not every degree of influencing skill can be taken to eliminate or modify the contingent nature of results and that the scope for skill should be of such character and degree as to be capable of enabling an effectiveness to be maintained over the average of the unskilled.

But the machine comes also within the language of cl. (ii). The results are the scores and different results are different scores. The contention faintly advanced was that "different results" are in relation to their nature and not mere dimensions in the same nature; that, for example, different results must exhibit, say, scores, prizes and goods as against differences in scores and that the paragraph does not apply. But I see nothing to support that contention. The scores are the objects aimed at and accomplished and in ordinary parlance they are as fully capable of exhibiting differences as other results provided by these or similar machines.

A further ground challenged the validity of the conviction in the absence of an indictment, but on this I agree with my brother Taschereau.

I would, therefore, dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Gauthier, Dansereau & Hébert, Montreal.

Solictor for the respondent: André Tessier, Montreal.

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*May 10, 11, 14, 15, 16
*Oct. 2

ROGER WILSON (*Defendant*) .....APPELLANT;

AND

SWAN SWANSON (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Physicians and surgeons—Degree of skill required of practitioner—Specialist—Surgical operation—Mistaken diagnosis—Matters of judgment.

The defendant, a highly skilled surgeon, performed an operation on the plaintiff, following a tentative diagnosis (made independently by the defendant and others) of cancer. A growth was found in the plaintiff's stomach, and a test made by a pathologist while the plaintiff was still in the operating-room showed that it was probably malignant. The defendant thereupon decided to proceed with the operation rather than postpone it for a further (and more positive) test, which could not be completed in less than 24 hours. Because of his belief that the growth was malignant the defendant removed more of the plaintiff's organs than he would have done if he had known (as was later established) that it was benign.

Held (Kerwin C.J. and Locke J. dissenting): The plaintiff had failed to establish even a *prima facie* case of negligence on the defendant's part, and the action was rightly dismissed by the trial judge.

Per Rand and Nolan JJ.: A surgeon by his ordinary engagement undertakes with the patient that he possesses, and will faithfully exercise, the skill, knowledge and judgment of the average of the special class of technicians to which he belongs. Where the only question involved in one of judgment, the only test can be whether the decision made was the result of the exercise of the surgical intelligence professed, or was such that (apart from exceptional cases) the preponderant opinion of the group would have been against it. The only evidence given on behalf of the plaintiff in the case at bar failed to establish that this test had not been met. In particular, it was not established that any of the preliminary tests suggested in evidence would have been of any assistance in determining the nature of the growth.

Per Abbott J.: The medical man must possess and use that reasonable degree of learning and skill ordinarily possessed by practitioners in similar communities in similar cases, and it is the duty of a specialist such as the defendant, who holds himself out as possessing special skill and knowledge, to have and exercise the degree of skill of an average specialist in his field. In making the decision to proceed with the operation, the defendant exercised his best judgment in what he considered to be the best interest of his patient.

The evidence relating to certain pre-operative tests which, it was claimed, should have been made, was the only evidence which might be considered as *prima facie* evidence of negligence. But it fell short of meeting the test of *prima facie* evidence. The trial judge was right in holding not only that the plaintiff had failed to make out a *prima facie* case of negligence but that there had been no negligence.

*PRESENT: Kerwin C.J. and Rand, Locke, Abbott and Nolan JJ.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment at trial (2). Appeal allowed, Kerwin C.J. and Locke J. dissenting.

D. McK. Brown, for the appellant.

R. Young, for the respondent.

THE CHIEF JUSTICE (*dissenting*):—For the reasons given by Coady J.A. (1) this appeal should be dismissed with costs.

The judgment of Rand and Nolan JJ. was delivered by

RAND J.:—The defendant in this action is a highly skilled surgeon who is charged with negligence in an operation involving the removal of a stomach ulcer. The negligence is said to have lain in the decision to remove the ulcer as a malignant growth which called for the resection of a larger portion of the stomach, pancreas and spleen than would have been required for the benign growth which it was.

The circumstances under which the decision was made were these. On March 26, 1951 the respondent, at that time 67 years of age, was admitted to a hospital at Lethbridge, Alberta. He complained of pains in the epigastrium or upper central portion of the abdomen, was feverish and weak. He had been troubled with periodic indigestion for many years. In 1926 he had undergone a laparotomy to investigate what he described as an ulcer of the liver, the result of which was the removal of the appendix. In the next year severe pains in the abdominal region were relieved following another laparotomy by the severance of adhesions. In 1944-5-6-7 he suffered attacks of indigestion extending over a week or two accompanied by epigastric fullness and associated with hunger pains which passed away with eating, drinking milk or taking baking soda. Following a prolonged buttermilk diet in 1947 the symptoms of indigestion disappeared only to return in January, 1951, but accompanied by pain of a changed burning character. Before 1951 the pain was not accompanied by loss of weight, but between December, 1950 and March, 1951 he had lost between 15 and 20 pounds. His appetite generally was good and he suffered no nausea or vomiting.

(1) (1956), 18 W.W.R. 49 (*sub nom. Swanson v. X*), 2 D.L.R. (2d) 193.
(2) [1955] 3 D.L.R. 171.

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In the examination that followed a G.I. series of x-ray plates was taken which showed a filling defect of the lower third of the stomach and a presumptive diagnosis of cancer was made. As stated by Dr. Johnson of Lethbridge, "We were preparing him for laparotomy and gastric resection if possible" when he decided to return to British Columbia (for other than medical reasons) and there receive attention. The films were furnished him for the use of the British Columbia Cancer Clinic associated with the Vancouver General Hospital.

Following a similar examination in Vancouver a laparotomy was decided upon, again with the provisional diagnosis of cancer, "Cancer seems likely", and on April 23, 1951 the operation was carried out.

There were disclosed numerous adhesions fixing the stomach to the liver, the transverse colon and the pancreas. On the posterior aspect of the stomach a firm annular lesion, adhering to the pancreas, was felt. The stomach was mobilized by a number of transections.

At this point some doubt was entertained of the nature of the tumour and the stomach was opened. A large ulcer was disclosed on the posterior wall involving the depth of the pancreas. There was no gross evidence of malignancy. A section of the ulcer was taken out and subjected to what is called the "frozen" test, on which the pathologist, Dr. Fidler, called to the operating-room, whose eminence is unchallenged, reported that malignancy was probably present. The radical procedure was thereupon carried out. In the course of it and at the suggestion of Dr. Fidler, a further 2 inches of the stomach was removed than Dr. Wilson had thought necessary. The ulcer was 3·5 cm. in largest diameter and would be described as large. The entire spleen was removed, approximately four-fifths of the stomach and between two-thirds and three-quarters of the pancreas. It is conceded that a gastric resection was required; this meant the removal of substantial portions of those three organs as well as a small and unimportant bit of the liver. The issue is on the decision to remove what would have been called for in the presence of carcinoma.

The claim is supported by Dr. Kemp, a general practitioner in Vancouver; he is a certified anaesthetist and from 1920 to 1938 was so employed in the Vancouver General Hospital. For a short time he was with the British Columbia Workmen's Compensation Board since when he has engaged in general practice. He has published a handbook on endocrine glands entitled "Hormones and Vitamins in General Practice". He is not put forward as having special standing or competency in any feature of the medical questions raised and his evidence is a statement of what he would have done prior to and in the course of the operation had the patient been his and what, if during the operation, he had been asked by the surgeon for his opinion, he would have advised.

Dr. Kemp puts himself on two grounds: the first that certain preliminary tests should have been made, which would have been of assistance to the judgment when the stomach was opened; and the second that when the actual condition was revealed, the ulcer, on the assumption that it was benign, which he would make "until it is proved malignant", (although on another occasion he would still "have to be shown there was malignancy or the likelihood of it") should have been removed, the body closed, the "paraffin" test applied, and even perhaps other pathologists called into consultation. If the final judgment was of malignancy, a second operation would then be carried out. These positions will be dealt with in that order.

The alleged aids were several in number. The first was the fluoroscopic report of the radiologist in Lethbridge which was assumed to have been made in writing but which does not appear to have been forwarded to Vancouver. It seems to be implied, for nowhere is it expressly stated, that in some manner not clearly described the movement of the stomach observed on the fluoroscopic screen is, in the presence of carcinoma, of a special nature. That irregularity in the rhythmic motion might indicate the presence of an ulcer or tumour is understandable; the normal muscular action would be interfered with by foreign growth of a radically different structure imbedded in the stomach wall; and if that is what was meant it would indicate only a test for the presence of an ulcer, not one for the detection of carcinoma, and it would become of no significance once the

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laparotomy was done. Nowhere is the significance of the fluoroscopic evidence to the character of the growth precisely stated by Dr. Kemp and I decline on such a matter to draw any inference in conflict with the obvious probability of what lay behind the medical conclusion in Lethbridge. Where the difference between the malign and the benign character of a mass of cells is so difficult to appreciate as the evidence here demonstrates, and no competent opinion is given us that the effect of the former on the stomach's rhythmic action is clearly to be distinguished from that of the latter, a circumstance that would end doubt on the presence of malignancy, there is no ground for giving any weight to the contention made.

The second omission was that of the use of a gastroscope. This is a very small tube apparatus which, lowered into the stomach, enables one to view the inside of that organ. It was suggested that the device permitted, also, a small piece of the ulcer to be snipped off and subjected to pathological testing. But the use of the device for such a purpose was rejected by Dr. Kemp himself and both features were superseded by the laparotomy.

Then it was urged that the hydrochloric acid content of the stomach should have been ascertained. The contention was that the malignant ulcer "usually" brought about a decrease in the quantity of that acid. The authority for this was said to be Professor Boyd, eminent in pathology, but an examination of the 6th edition, 1947, of his work on "Surgical Pathology", at p. 248 discloses this statement: "In early carcinoma free H Cl is often present and it may be demonstrated if the fractional measure is used." Dr. Kemp agreed that in the early stages it is present in 50 per cent. of the cases of carcinoma and it is made quite clear by reference to other authorities that its presence or absence yields no dependable assistance to the determination of the nature of the tumour. If acid in this case had shown normal, malignancy would not have been ruled out.

A similar point was made for a test for lactic acid: its presence suggests the possibility of malignancy and it is not normally found in a fasting stomach; but on the facts before us, no inference drawn from its presence or absence would have been of value.

The presence of occult blood in the stomach fluid was injected into the same views; bleeding is present in both types of tumour but Dr. Kemp stated his understanding to be "that minute bleeding is more common in the malignant ulcers", a statement on its face of no weight.

Another criticism was the absence of a blood count. On this Dr. Kemp observed that: "If one found the presence of a secondary anaemia in the absence of definite bleeding one would say, one would consider that that might point to malignancy." A blood count had been directed in the initial report on the examination in Vancouver. On April 26, two days following the operation, the blood count was reported as 81 per cent. haemoglobin which he agreed was not a significant anaemia.

These items exhibit in a striking manner the character and substance of his suggestions. It was in relation largely to his own physical condition and treatment that he has had medical experience of some of these tests. As a witness, he is in the position of the ordinary practitioner, who, for the purpose of giving evidence, consults work of specialists, as Dr. Kemp had done, and voices the findings or opinions they set forth. For example, in speaking of the location of ulcers, he had expressed the view that the "prepyloric was the most certain location for a malignant ulcer": this proved to be an opinion given him by a local surgeon and he admitted having no view of his own on the question at all. It is a matter of textbook or verbalized knowledge unsupported by habituated professional experience. He has been associated with no case nor was any mentioned in which there was what he claimed should have been the procedure to be followed, a partial resection completed pending a determination of the nature of the ulcer removed, the operation, if malignancy was found, to be renewed. The confident assertions of what he would have advised if his opinion had been asked, or would have done if the patient had been his, rest upon no experience in the application of the ideas so freely but imprecisely dealt with, and they lack that obvious professional caution which is a distinctive mark of a highly qualified specialist.

Dr. Kemp attacked the opinion of Dr. Fidler on the "frozen" test—made during the operation—that there was "probable" linitis plastica. This type of carcinoma was

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declared by him to be a diffused infiltration of the walls of the stomach as distinguished from involvement with an ulcer and he rejected the possibility that such an ulcer as that here could be so classified. On a number of relevant matters, however, he was either uninformed or misinformed. For example, he mistakenly thought Dr. Fidler had never had the gross specimen in his hands; he had overlooked in the doctor's report reference to a thickened mucosa around the ulcer which extended to the pylorus in the region of which the mucosa was much injected. He called Professor Boyd in aid of his view that linitis plastica was slow-growing and when nothing of that sort appeared switched, as his authority, to his early teacher of pathology. He was unfamiliar with different forms of linitis plastica carcinoma. Professor Boyd speaks of two, diffused and local, the latter at the pylorus. Dr. Bockus of the University of Pennsylvania Graduate School of Medicine speaks of varieties of linitis plastica as "the circumscribed and the diffused. The circumscribed type may simulate an ulcer in its gross appearance if surface destruction keeps pace with the growth, producing an actual ulcer defect on the x-ray films"; and "This is a common type of so-called ulcerating carcinoma which simulates benign gastric ulcer roentgeno-graphically."

Dr. Kemp was not aware that, in addition to polypoid, ulcerated, ulcer-like carcinomas with diffused infiltration into the neighbouring wall of the stomach, and extensively diffused carcinomas with a more or less uniform thickening of the whole or part of the stomach wall, there was a mixed type in which various combinations of the four types are found. He disclaimed any suggestion that Dr. Fidler was not justified in his opinion that the ulcer was probably malignant; but still he would not agree with the diagnosis for the reason that the picture described by Dr. Fidler "could have been one of inflammation". If such an inference were possible, that it would not have been drawn by either Dr. Fidler or Dr. Wilson needs no comment. He added that the difference between the scirrhous or infiltrating tissue produced by inflammation and new growth or carcinoma tissue is "very, very difficult to distinguish under a microscope".

I have dealt with his evidence in some detail because it is the foundation of the argument before us. I can only describe the opinions which it embodies as a collection of elementary views on the diagnosis of cancer by one who is a virtual stranger to the exercise of such a medical and surgical judgment. Dr. Kemp nowhere intimates that surgeons of the rank of Dr. Wilson would, in the circumstances here, have followed the course he outlined or that any considerable number of them would not have done what Dr. Wilson did. The latter admittedly executed the surgery with consummate technique, and admittedly acted in all according to his best judgment formed deliberately. Admittedly Dr. Fidler stands at the highest level of pathologists. If under the microscope—which reaches nearest to certainty in detecting malignancy—the interpretation could be erroneous, what significance could tests have which can give the same result in either type of tumour? On the basis of what appears in the case, I should say none whatever.

Dr. Palmer was accepted by Dr. Kemp as of outstanding competency. He focused in its real dimensions the question that faced Dr. Wilson. The alternatives were to postpone the larger excision and run the risk of postoperative complications—which actually followed—and the serious possibility of aggravating the activity of a malignancy, or to act on his own and Dr. Fidler's best judgment. The removal of the larger sections of the organs, while important, was not a vital circumstance. The respondent made a good recovery and as Dr. Palmer put it, the difference between impairment to the bodily health of the effects of the admittedly necessary resection and that carried out can be disregarded where there is good cause for it. Such a cause was faced in the avoidance of action that might have had fatal results to the respondent.

In the presence of such a delicate balance of factors, the surgeon is placed in a situation of extreme difficulty; whatever is done runs many hazards from causes which may only be guessed at; what standard does the law require of him in meeting it? What the surgeon by his ordinary engagement undertakes with the patient is that he possesses the skill, knowledge and judgment of the generality or average of the special group or class of technicians to which he belongs and will faithfully exercise them. In a given situation some

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may differ from others in that exercise, depending on the significance they attribute to the different factors in the light of their own experience. The dynamics of the human body of each individual are themselves individual and there are lines of doubt and uncertainty at which a clear course of action may be precluded.

There is here only the question of judgment; what of that? The test can be no more than this: was the decision the result of the exercise of the surgical intelligence professed? Or was what was done such that, disregarding it may be the exceptional case or individual, in all the circumstances, at least the preponderant opinion of the group would have been against it? If a substantial opinion confirms it, there is no breach or failure. No attempt has been made to show that the operation as completed was not within those limits. The only express evidence we have is that of Dr. Palmer who approved it; but there is the approval by action of Dr. Fidler as well as of Dr. Wilson himself. Dr. Kemp did not—and properly—pretend to suggest the mode of meeting the situation of anyone but himself.

An error in judgment has long been distinguished from an act of unskilfulness or carelessness or due to lack of knowledge. Although universally-accepted procedures must be observed, they furnish little or no assistance in resolving such a predicament as faced the surgeon here. In such a situation a decision must be made without delay based on limited known and unknown factors; and the honest and intelligent exercise of judgment has long been recognized as satisfying the professional obligation.

In *Rann v. Twitchell* (1), the following language is used:—

> He is not to be judged by the result, nor is he to be held liable for an error of judgment. His negligence is to be determined by reference to the pertinent facts existing at the time of his examination and treatment, of which he knew, or in the exercise of due care, should have known. It may consist in a failure to apply the proper remedy upon a correct determination of existing physical conditions, or it may precede that and result from a failure properly to inform himself of these conditions. If the latter, then it must appear that he had a reasonable opportunity for examination and that the true physical conditions were so apparent that

(1) (1909), 82 Vt. 79 at 84.

they could have been ascertained by the exercise of the required degree of care and skill. For, if a determination of these physical facts resolves itself into a question of judgment merely, he cannot be held liable for his error.

This was approved in *Green v. Stone* (1). In *DuBois v. Decker* (2), a qualification is introduced:—

> We are aware that he claimed to have waited ten days before operating, for the purpose of seeing whether the foot could not be saved, and that a physician and surgeon will not be held liable for mere errors in judgment. But his judgment must be founded upon his intelligence. He engages to bring to the treatment of his patient care, skill and knowledge, and he should have known the probable consequences that would follow from the crushing of the bones and tissues of the foot.

In *M'Clallen v. Adams* (3), Shaw C.J. deals with this feature:—

> The performance of this operation being within the scope of the plaintiff's authority, if in his judgment necessary or expedient, and that it was so, is to be presumed from the fact, it was not necessary for him to prove to the satisfaction of the jury, that it was necessary and proper, under the circumstances. . . .

In 1853 the Superior Court of New Hampshire in *Leighton v. Sargent* (4), following the general principles on the professional undertaking enunciated by Tindal C.J. in *Lanphier v. Phipos* (5), and in the many other English authorities cited, observed, on the matter of judgment:—

> To charge a physician or surgeon with damages, on the ground of unskilful or negligent treatment of his patient's case, it is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required; because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible.

These statements articulate what is in fact the actual or mutually understood though unexpressed undertaking of the specialist in surgery and they are cited because they deal specifically with the element involved here, judgment.

In reaching this conclusion I have not overlooked the difficulty on occasion of obtaining critical opinions in such matters from those qualified to give them. But throughout this unfortunate episode, Dr. Wilson was most candid and every facility was furnished to the respondent to make the most searching enquiry into the facts. Dr. Wilson was subjected to an exhaustive examination for discovery, many

(1) (1934), 119 Conn. 300 at 304.
(2) (1891), 130 N.Y. 325 at 330.
(3) (1837), 36 Mass. 333 at 335.
(4) (1853), 27 N.H.R. 460 at 474.
(5) (1838), 8 C. & P. 475, 173 E.R. 581.

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portions of which were put in evidence. Dr. Rose of Lethbridge was examined *de bene esse* and the respondent had the benefit of that before trial. Dr. Wilson as soon as the final report of the pathologist was received, himself conveyed to the respondent, then still in the hospital, its finding.

It is these circumstances and the fullness in which the case is before us that overbear the view expressed in the Court of Appeal that such an error called for a thorough explanation which—because no evidence was adduced by the defence—it did not receive. The onus was on the plaintiff to establish negligence; the entire facts are before us; nothing could have been added except opinions. There was no obligation on Dr. Wilson personally to support the means he took: a sensitive person might very well prefer to leave his conduct to the judgment of others. That he expressed his own opinion on discovery can be assumed and whatever was considered helpful to the respondent was read against him.

I would, therefore, allow the appeal and restore the judgment at trial with costs in both courts.

LOCKE J. (*dissenting*):—My consideration of the evidence in this matter leads me to the same conclusion as that reached by the learned judges of the Court of Appeal (1). I respectfully agree with the reasons for judgment delivered by Mr. Justice Coady.

I would dismiss this appeal with costs.

ABBOTT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) reversing the judgment of the Supreme Court of British Columbia (2), which had dismissed respondent's action in which he had sued appellant for alleged medical malpractice.

The respondent, who had had stomach trouble off and on for some years, in March 1951 (prior to which date this stomach trouble appears to have become aggravated), went to a medical clinic in Lethbridge, Alberta, of which one member was a Dr. Johnson. He was placed in Galt Hospital in Lethbridge where he was examined by Dr. Johnson and remained under observation for 16 days, until April 11,

(1) (1956), 18 W.W.R. 49, 2 D.L.R. (2d) 193. (2) [1955] 3 D.L.R. 171.

1951. The respondent was x-rayed and fluoroscoped, and this examination revealed that he had a large filling defect on the rear wall of the stomach. He was told that he most likely had stomach cancer and an exploratory operation was recommended.

The respondent, either because he was unwilling to accept this diagnosis as definitive or because he preferred to have further treatment and advice in British Columbia where his home was, came to Vancouver with the x-ray films taken in Galt Hospital and a letter from Dr. Johnson to the British Columbia Cancer Institute. He visited the cancer institute on April 13, 1951, delivered the x-ray films and Dr. Johnson's letter, and was examined by Dr. Crawford and another doctor of that institute. So far as the record discloses, the respondent did not bring with him any report of the Lethbridge radiologist who had made the x-ray examination. That same day he was also examined by Dr. Wilson, the appellant, in Dr. Crawford's presence. As a result of his own examination, a consideration of the x-rays, Dr. Johnson's letter, and the report of Dr. Crawford's examination, Dr. Wilson diagnosed probable cancer of the stomach and recommended an exploratory operation and the removal of the growth, if it was operable.

Some 10 days elapsed before respondent entered the Vancouver General Hospital where a room had been reserved for him by appellant. On entering the hospital he was also examined by an interne, Dr. Lambert, who diagnosed probable stomach cancer.

No further x-ray examination was made after respondent's arrival at Vancouver nor do any other special blood-tests or tests concerning the stomach area appear to have been made prior to the operation.

The operation took place on April 24, 1951, and after opening the abdomen and mobilizing the stomach, the surgeon could feel the lesion on the rear wall of the stomach, confirmed that it was a large one which it was necessary to remove and that it was attached to the pancreas. Up to this point he still considered the lesion was probably cancerous and decided it would be necessary to open the stomach and view the lesion itself. This was done. At this stage in the operation, after viewing the lesion, the

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surgeon entertained some doubt as to whether it might be benign rather than cancerous; he therefore sent for the hospital's chief pathologist Dr. Fidler, and after removing a small portion of the lesion, a lymph-node and adjoining tissue, gave it to the pathologist for a pathological test known as a frozen section. This test, although admittedly not conclusive, can be completed in 15 to 20 minutes. It should be mentioned here, that it is in evidence that a conclusive test could not be made in less than some 24 hours. The pathologist reported that in his opinion the lesion was probably malign, of a type known as linitis plastica. Appellant then removed a major part of the stomach, including all of the lesion, and handed it to the pathologist who, on examination, reiterated his opinion that it was probably malignant and suggested that a somewhat larger portion of the stomach be removed, which was done.

If the lesion were malignant, it is conceded, appellant was bound to remove the adjoining portion of the pancreas and the spleen, which in fact he did. On the other hand, if the lesion were benign, all that needed to be taken out was the infected portion of the stomach. Faced with these alternatives, the appellant decided to proceed with the removal of those portions of the organs necessary to ensure a complete eradication of the cancer, if such in fact existed. A final test of the infected organs by what is known as the paraffin wax method (which admittedly could not have been done under 24 hours) disclosed that the lesion was not malignant.

The patient suffered post-operative complications but ultimately made a good recovery and was discharged from hospital on May 31, 1951. It was admitted on behalf of appellant at the trial that as a result of the operation and the removal of a portion of the pancreas respondent had developed mild diabetes. Respondent, who was 67 years of age at the time of the operation in April 1951, testified at the trial, which was held some four years later in March 1955. He died prior to the hearing of the appeal to this Court.

The only significant medical evidence led by respondent consisted of a portion of appellant's examination for discovery and the evidence of a Dr. Palmer and a Dr. Kemp. In addition to this, medical records of the Vancouver General

Hospital, a copy of a letter from Dr. Johnson of Lethbridge, and a copy of Dr. Crawford's report were filed by respondent as exhibits.

The appellant elected to call no evidence and took the position that the respondent had failed to establish a *prima facie* case of negligence. This contention was upheld by the trial judge but has been reversed by the Court of Appeal.

In my opinion this appeal turns upon the question as to whether in the circumstances of this case the evidence of Dr. Kemp established a *prima facie* case of negligence against appellant. The learned trial judge held that it did not and while indicating that he felt both Dr. Palmer and Dr. Kemp were honest and endeavouring to help the Court to the best of their ability, stated that where the evidence of Dr. Kemp differed from that of Dr. Palmer, he preferred to accept the evidence of the latter. Aside from any question of credibility, where medical opinion evidence is involved, in my view the trial judge who heard the evidence was in a particularly favourable position to assess what weight should be given to such evidence.

The test of reasonable care applies in medical malpractice cases as in other cases of alleged negligence. As has been said in the United States, the medical man must possess and use that reasonable degree of learning and skill ordinarily possessed by practitioners in similar communities in similar cases, and it is the duty of a specialist such as appellant, who holds himself out as possessing special skill and knowledge, to have and exercise the degree of skill of an average specialist in his field: see Meredith, Malpractice. Liability of Doctors and Hospitals, 1956, at p. 62, and the authorities there referred to.

As I have said, appellant, before making his diagnosis of probable stomach cancer, had the benefit of a similar diagnosis made by Dr. Johnson after two weeks' observation of respondent in the hospital, an examination of the x-ray films taken in Lethbridge which clearly showed a large filling defect in the stomach, his own physical examination of the patient and the results of the examination made by Dr. Crawford. In the course of the exploratory operation, when appellant had some doubt as to whether or not the lesion was malignant, he obtained the

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opinion of a pathologist of recognized competence. He then made an admittedly difficult decision but the sort of decision which every surgeon must be called upon to make from time to time. In making that decision I am satisfied he exercised his best judgment in what he considered to be the best interest of his patient.

A great deal of the medical evidence was read to us at the hearing and I have again read all this evidence with care. I shall not attempt to review it in detail but I am satisfied that the only portion of Dr. Kemp's evidence which might be considered as *prima facie* evidence of negligence on the part of appellant is that portion relating to certain pre-operative tests which Dr. Kemp claimed he would have made. Dr. Kemp, who was the last witness to testify, stated that had the patient been his patient, before making a clinical diagnosis as to the probable character of the stomach lesion, he would have had certain tests made, including a test of the gastric juices and a blood count and that in addition he would have had fresh x-rays taken and a report from a radiologist. All that this proves, of course, is that Dr. Kemp would have made these additional tests, or had them made, not that other doctors would consider it necessary to do so. On cross-examination Dr. Kemp agreed that any conclusion which might be drawn from such tests could only be tentative and that to establish a conclusive diagnosis in the case of a suspected stomach cancer an exploratory operation must be undertaken and a pathological examination made of the suspected lesion. There is no evidence that either the medical history of the patient, or the result of the tests referred to by Dr. Kemp, would be of any assistance to the pathologist in his examination of the suspected tissue. The surgeon on receiving a report from the pathologist of probable cancer, as was the case here, would still have to decide what he should do.

As to Dr. Kemp's special qualifications, he testified that for many years he had practised as an anaesthetist. After the last war he was for some time with the Workmen's Compensation Board of British Columbia and since leaving that board has been engaged in general practice. He has never practised as a surgeon, is not a pathologist, and stated in cross-examination that he had never at any time suggested he was an authority on gastric disorders.

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Prima facie evidence has been defined as "Evidence, which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if it be accredited unless it be rebutted or the contrary proved": *Kirk v. Kirkland et al.* (1), affirmed *sub nom Johnson v. Kirk* (2).

In my opinion the evidence to which I have referred, given by a medical man of Dr. Kemp's limited experience and qualifications, falls far short of meeting such a test.

The learned trial judge found not only that the respondent had failed to make out a *prima facie* case of negligence but affirmatively that there was in fact no negligence. I respectfully share that view.

I would therefore allow the appeal with costs throughout and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitor for the plaintiff, respondent: R. Young, Vancouver.

Solicitor for the defendant, appellant: L. St. M. Du Moulin, Vancouver.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA (*Respondent*) ..... APPELLANT;

AND

THOMAS EDWARD NEILSON (*Petitioner*) ..... RESPONDENT.

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*May 16, 17, 18

*Oct. 2

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Accession and accretion—Island in navigable and tidal river granted by the Crown—Subsequent purchaser claiming accretion—Quieting Titles Act, R.S.B.C. 1948, c. 282—Land Registry Act, R.S.B.C. 1948, c. 171, s. 38(1), cls. (a) to (j).

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Nolan JJ.

(1) (1899), 7 B.C.R. 12 at 17. (2) (1900), 30 S.C.R. 344.

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The petitioner, as the registered owner of an island situate in the delta of a navigable and tidal river in British Columbia (the Fraser), claimed, under the *Quieting Titles Act,* the ownership of certain allegedly accreted lands. The island was granted by the Crown in 1889 and purchased by the respondent and his father in 1946. A provincial public road was constructed in 1931 leading from the village of Ladner to the north-westerly limit of the island and, as the important area claimed lay to the south-west of that road, the conditions as they existed prior to its construction were those to be considered. It was agreed that if there were accretion, it had been gradual and imperceptible, and that there was nothing in the terms of the Crown grant to prevent that accretion going to the petitioner. The trial judge allowed the claim and this judgment was affirmed by a majority in the Court of Appeal.

Held: The appeal should be allowed and, subject to any claim the petitioner might wish to make in respect of two small areas east of the road, the petition dismissed.

Per Kerwin C.J. and Locke, Cartwright and Nolan JJ.: The petitioner had failed to show that prior to the construction of the road, the area in question was not overflowed by the waters of the river at the medium high tide between the spring and neap tides and, consequently, had failed to establish that the area had through accretion ceased to be the property of the Crown.

Per Kerwin C.J.: The evidence was not sufficient to show that in 1930 any part of the area claimed was capable of ordinary cultivation or occupation.

Per Rand J.: The essential condition for accretion is a slow and imperceptible change resulting in the projection outwards of the mean high water line and the correlative annexation to the land of what was formerly below that line. The elements of a practical nature such as convenience or utility are irrelevant. The gradual rise was not, during its progress, accretion; it was a process of widespread emergence of land owned by the Crown.

APPEAL by the Attorney-General for the Province of British Columbia from the judgment of the Court of Appeal for British Columbia (1), affirming, Robertson J.A. dissenting, the judgment at trial (2). Appeal allowed.

J. D. Forin, for the petitioner, respondent.

M. M. McFarlane, for the respondent, appellant.

THE CHIEF JUSTICE:—These proceedings commenced with a petition under the *Quieting Titles Act,* R.S.B.C. 1948, c. 282, for a declaration that the petitioner, the present respondent, Thomas Edward Neilson, is the legal and beneficial owner of certain alleged accreted lands. The

(1) 16 W.W.R. 625, [1955] 5 D.L.R. 56.

(2) (1954), 13 W.W.R. (N.S.) 241, *sub nom. Re Quieting Titles Act and Neilson.*

petition was granted by Wilson J. (1) and the accreted lands outlined in red on a sketch attached to and forming part of his formal order. This order was subject only to the reservations contained in clauses (*a*) to (*j*) of subs. (1) of s. 38 of the *Land Registry Act*, R.S.B.C. 1948, c. 171, and amendments, and to a certain easement in favour of British Columbia Telephone Company as marked on the said plan, but free from all other rights, interests, claims and demands whatsoever. No question arises as to the reservations or easement. In the Court of Appeal for British Columbia (2), O'Halloran and Sidney Smith JJ.A. agreed in dismissing an appeal by the Attorney-General for the Province of British Columbia but Robertson J.A. dissented. The Attorney-General now appeals.

In 1943, the respondent and his father agreed to purchase from the then owner, C. S. V. Branch, Lot 471, Group 2, Municipality of Delta, New Westminster District, Province of British Columbia. This lot was an island situated in the delta of the Fraser River which is a tidal stream emptying into the Gulf of Georgia. When the island was patented in 1889 it contained 168 acres and a sketch attached to the Crown grant shows that the island was of irregular shape, bounded on the east by a slough and at all other points by the waters of the Fraser River. The purchase by the respondent and his father was completed in December 1946 and the respondent alone now has the title to the island with the exception of that part which, pursuant to a proviso in the Crown grant, was resumed in 1930 by the Crown for the purpose of the Ladner Ferry Road and which road was constructed in 1931. In fact, most of the road is built on land which allegedly had been added to Lot 471 but all of the road is excepted from the area awarded to the respondent by the order of Wilson J.

It was agreed that if there were an accretion, it had been gradual and imperceptible within the meaning of the authorities and that there was nothing in the terms of the Crown grant to prevent that accretion going to the respondent. It was also agreed that the prevailing mean high tide for the area in question is a twelve-foot tide at Point Atkin-

(1) (1954), 13 W.W.R. (N.S.) 241, *sub nom. Re Quieting Titles Act and Neilson.*

(2) 16 W.W.R. 625, [1955] 5 D.L.R. 56.

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son, as shown on the official tide tables. It is unnecessary to consider if s. 2 of the *Official Surveys Act*, R.S.B.C. 1948, c. 321, prevents the operation in British Columbia of the English common law in regard to accretion as that point which was taken before Wilson J. was abandoned by counsel for the appellant.

However, the appeal should succeed on the ground that the respondent has failed to produce evidence that prior to the construction of the Ladner Ferry Road in 1931 the area in question was not overflowed by the waters of the Fraser River at the high-water mark of the ordinary or neap tides. I consider that the law is correctly expressed in the Moore's History of the Foreshore, 3rd ed. 1888, at p. 678:—

> . . . it may be regarded as good law at this day, that the *terræ firma*, and right of the subject, in respect of title and ownership, extends beyond the lines of the *high spring tides* and *spring tides*, and down to the edge of the high-water mark of the *ordinary* or *neap* tides. . . .

reading "ordinary" and "neap" as synonymous. However, it was decided in *Attorney General v. Chambers* (1), that, in the absence of particular usage, the extent of the right of the Crown to the seashore is *prima facie* limited by the line of the medium high tide between the springs and the neaps, and, to avoid misunderstanding, it is preferable that that phraseology should be followed. In that case the principle of the rule which gives the seashore to the Crown is stated to be that it is land not capable of ordinary cultivation or occupation and so is in the nature of unappropriated soil. Lord Hale had given as his reason for thinking that lands only covered by the high spring tides did not belong to the Crown that such lands are for the most part dry and maniorable (*i.e.*, manurable); and therefore the Lord Chancellor, sitting in equity in the *Chambers* case and assisted by Baron Alderson and Mr. Justice Maule, determined that the reasonable conclusion was that the Crown's right is limited to land which is for the most part not dry, or maniorable.

By 1931, when the Ladner Ferry Road was built, Mr. McGugan, the surveyor engaged by the previous owner, Mr. Branch, had already made a survey and testified at the hearing of this petition that the conditions in 1930, immediately prior to the construction of the road, were about

(1) (1854), 4 De G.M. & G. 206, 43 E.R. 486.

the same as in 1953 when he made a new survey on the instructions of the respondent. However, this is not sufficient either by itself or in conjunction with the other evidence called on behalf of the respondent to show that in 1930 any part of the area in question was capable of ordinary cultivation or occupation. A reading of the entire record and even discounting, as did the trial judge, some of the testimony adduced on behalf of the appellant, satisfies me that the petitioner has failed to make out a case. Mr. McGugan when testifying as to the conditions in 1926, when the first survey was made by him, is reported as follows:—

> Well, yes, definitely at times, the whole of it must have been. On very high tides, the whole of that island, the original island must have been under water. I know when we were surveying on that island there, there were numerous sloughs we crossed all the time. We had to make long detours to get around these sloughs. There may have been—looking at Green Slough—there was a ridge which was quite high, and there were trees on it and that was high. Most of the rest of it was relatively, you would call it relatively low, and when the tides were in you just couldn't work on it, that was all.

This is sufficient to dispose of the matter and I say nothing further as to the other grounds urged except to point out that it is difficult to believe that what the trial judge described as "ramparts", even if they existed in 1930, could be said to form an accretion in the accepted sense of that term.

The appeal should be allowed, the judgments in the Courts below set aside and subject to one reservation the petition dismissed. That reservation is as to two small areas east of the Ladner Ferry Road, one at its northern extremity and the other to the south of Lot 471 and east of the Ladner Ferry Road. These are included in the order of Wilson J. and shown on the sketch attached thereto, but no particular reference was made to these comparatively small bits as the argument was directed mainly to the large alleged accretion to the west of the road. The dismissal of the petition should be without prejudice to any claim the petitioner may wish to make in respect of them.

No order as to costs was made by the judge of first instance or by the Court of Appeal and the Attorney-General did not ask for costs in this Court. There should, therefore, be no costs in any Court.

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RAND J.:—This appeal raises a question of accretion. The respondent is the owner of land in the delta of the Fraser River granted by the Crown in 1889 which a plan annexed to the grant represents as an island. Since that time an area of what was then river bed to the west has been raised by alluvial deposits to an irregular level which at mean high tide is, to a greater extent than not, covered by water from 2 inches to 2 feet in depth. Narrow arms or reaches forming the outer rims or "ramparts", as Wilson J. at trial (1) described them, of the area have risen above the average level; and several sloughs or channels with their branches spread the incoming tides over it. It is covered with a mat of marsh growth about one foot thick and is overgrown with hydrophyte and hygrophyte types of vegetation such as sedges, rushes and weeds.

The Fraser River, from its sources and branches in the mountains to the north, carries a huge run-off in spring and the alluvial deposits are heavy. The process of the land formation is aptly described by Wilson J. (2):—

> The process by which this area, and, indeed, the whole of the Fraser delta, has been created is this: At a certain time the deposits of alluvial soil on the river bottom in any given area, such as the one I have to deal with, will reach an approximate low tidewater level. From this time on the deposits follow a curious pattern. The edges of the formed area present an obstacle against which the water washes, and which take from the water the heavier particles of silt and sand. The result is to build up about the perimeter of the emerging land a natural rampart which is higher than the area behind it. At its simplest this would result in the creation of a lake dyked off from the river. But the pattern is far more complicated. Running back from the outer margin are sloughs penetrating deep into the interior, and each of these sloughs has many branches. Along these sloughs, and along their branches, the pattern is repeated; the banks attract the heavier deposits and build up higher than the areas behind them. But this does not mean that accretion is arrested in these posterior areas. At high tides, and particularly at extreme high tides occurring during the freshet, when the river is heavy with alluvial matter, they receive large deposits of new earth. The lesser branches of the sloughs have banks that taper off from a high point near their emergence from a main slough to a level, at their tips, approximating that of the land or marsh surrounding them. They thus serve as channels to admit silt-laden water to those areas and carry on the work of soil building.
>
> They thus flood the lower land at mean high tide. The result at that stage of water, is that there are large flooded areas surrounded by natural dykes or ramparts which do not flood. The depth of the flooding varies

(1) (1954), 13 W.W.R. (N.S.) 241.

(2) (1954), 13 W.W.R. (N.S.) 241 at 247.

from a few inches to a foot or two, but it is nowhere great, and a man in knee-height rubber boots could probably walk over all but a few pockets at mean high tide.

The banks have lost their character of marsh land and are covered by upland growth. They are increasing in size and vary in width from a few feet to a hundred feet. The marsh is grown in sedges, bulrushes and other marsh vegetation. Through the marsh there are numerous high spots where upland growth is emerging.

The picture thus presented is of a skeleton of ridges emerging from a lower level of marshy soil. What may be called the main rampart extends from the north-westerly boundary of the original lot in the form of an arm curving westerly and southerly, a distance of approximately 4,000 feet roughly parallel to the down flow of the river. Wilson J. remarked that no one could question the fact that that arm was an accretion to the original lot, but whether that is so or not depends on the mode and circumstances of its formation.

In 1931 at the north-westerly end of the original lot, a ferry terminal was constructed which called for a public road, vested in the province, from that point southerly along roughly the western boundary of the island and extending to the town of Ladner on the mainland. The area claimed lies to the west of that road. In the course of the work a great deal of dredging was done and the discharge deposited just westerly of the highway at its northerly end. For some years a portion west of that deposit has been used as a garbage dump. Beyond these the main arm runs to its tip. The claim for accretion must, then, be established as of 1931: subsequent annexation would be to land owned by the province.

From the finding quoted, the deposit is seen to have been generalized and the rise, except as to the ridges, substantially uniform over the area as a whole. The process of vegetational generation, predominantly marine or marsh, was likewise generalized. In that state of things, has there been, in the true sense of the word, any degree of accretion?

As applied to land bounded by the sea, accretion, under the ruling in *The King v. Lord Yarborough* (1) and *Gifford v. Lord Yarborough* (2), is the acquisition of extension to land, as distinguished from land covered with water, by its

(1) (1824), 3 B. & C. 91, 107 E.R. 668 at 673.

(2) (1828), 5 Bing. 163, 130 E.R. 1023.

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owner through the slow and imperceptible withdrawal of the line of the mean high tide as that expression is defined in *Attorney General v. Chambers* (1), followed in *Lowe v. Govett* (2). The recession may be by the lowering of the sea level or by alluvion, the throwing up onto the shore by the flux and reflux of the tide of various kinds of marine matter. As this deposit rises the tide line retreats, and the boundary is gradually pushed out. It is found, then, in a situation of a fluid boundary. A sudden reliction of the water or displacement of land leaves the boundary as it was. The essential condition is a slow and imperceptible change resulting in the projection outwards of the boundary line and the correlative annexation to the land of what was formerly below the tide line: the determining fact is the line of the mean high tide which bounds the riparian land seaward.

The trial judge and O'Halloran J.A. in the Court of Appeal introduced into the idea of accretion elements which, while they may have been considered pertinent to the formulation of the rule, are not embraced within it nor can they be taken into account to supply a want of what the rule calls for as its necessary condition. These elements are of a practical nature: the general advantage from the standpoint of utility of giving the adjacent owner the added land which otherwise would remain less usable; and the maniorableness of the reclaimed portion, that is, its capacity to be worked by hand for ordinary land purposes such as the raising of herbage or crops. But these features of convenience and utility are irrelevant when the change of the tide line is perceptible, and they must be taken to be equally so when the change is imperceptible.

The rule is not one of justice or injustice, a consideration which, from the judgments below, one would gather to be of controlling importance. Here a private owner is claiming over 200 acres as an addition to his land to or for which he has contributed nothing. Under the Roman law, the line was drawn at that of the highest tides and Lord Hale was disposed to make it that of the neaps. The rule is of

(1) (1854), 4 De G.M. & G. 206, 43 E.R. 486 at 488.

(2) (1832), 3 B. & Ad. 363, 110 E.R. 317.

convenience and is arbitrary. It is said that the owner risks the loss of his land by action of the sea and should enjoy the benefit; but in either case the change must be imperceptible and he always has it within his power to prevent corrosion. How the Crown could, on its part, prevent withdrawal is not so apparent.

But accretion, the slow extension of land through the imperceptible change of boundary, is treated in both courts below as including the gradual generalized rise, through deposit, of the bed of a river. With the greatest respect I cannot but think this is a misconception. That gradual rise here was not, during its progress, accretion; it was on the contrary a process of widespread emergence of land owned by the Crown. Accretion does not arise until the high water line has retreated or been forced back by the expanding land. When the general low tide level in this case was reached, the area covered by water remained in the Crown: the deposit raising the bottom vertically had touched no other ownership. Then began the formation of outside ridges on that soil contemporaneously with that forming at the boundaries of the original lot. Except at the latter point they were emerging strips of what was river bottom unconnected with the lot. This generalized vertical formation had no element of progressive annexation to and extension of existing land resulting in a change of water boundary: the main ridge at the southerly end was in the same process and in the same degree of rising as at the northerly end.

Where the conditions of the operation of accretion for private benefit are not present, the ownership of the Crown is unaffected. The difficulties and confusion suggested by Wilson J. arise only when the rule is attempted to be applied to a situation in which its conditions are not present. The conditions in the Fraser delta may be exceptional but for that reason a modifying extension of the rule is not to be justified. I am unable to agree that, assuming certain portions of the ridges to satisfy the conditions of accretion, they carry with them the inner and larger body of soil which is not within those conditions; it would be a subtraction from ownership for which neither in convenience nor justice would there be any warrant. If, in such a situation, prac-

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tical necessities are to govern, the rule must be held not to given, the basis for any such assumption is not here present. attribute accretion to such strips which of themselves are quite without utility as land. But for the reasons already

I would, therefore, allow the appeal, reverse the judgment and declare the area in question to be vested in the Crown in right of the province. There will be no costs in any court.

While the question was not argued, the plan prepared by McGugan in 1953 shows two small areas east of the Ladner Ferry Road, one at its northern extremity and the other generally to the south of Lot 471, which are marked as accretions. Since I have not dealt with the matter of the respondent's right to these areas as against the Crown, the dismissal of the petition should be without prejudice to any claim he may wish to make in respect of them.

The judgment of Locke and Nolan JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1), dismissing the appeal of the present appellant from an order made by Wilson J. (2), upon an application under the *Quieting Titles Act*, R.S.B.C. 1948, c. 282. Robertson J.A. dissented and would have allowed the appeal.

The respondent is the registered owner of a parcel of land which was at one time an island situate in the Fraser River some five or six miles from the place where the south arm flows into the Gulf of Georgia. This land was by a Crown grant dated April 20, 1889, conveyed to Boyd Nordman and was described as follows:—

> All that parcel or lot of land situate in New Westminster District, said to contain one hundred and sixty-eight acres, more or less, and more particularly described on the map or plan hereunto annexed and coloured red, and numbered Lot four hundred and seventy one (471) Group Two (2) on the Official Plan or Survey of the said New Westminster District in the Province of British Columbia.

The plan referred to showed an island surrounded to the north and to the west by the Fraser River and to the east and south by the waters of a slough. Among the terms and conditions of the grant, the only one requiring notice

(1) 16 W.W.R. 625, [1955] 5 D.L.R. 56.

(2) (1954), 13 W.W.R. (N.S.) 241.

was that which reserved to the Crown the right to resume any part of the said lands which might be deemed necessary for the purpose of making, *inter alia,* roads or other works of public utility or convenience, providing, however, that "the land so to be resumed" should not exceed one twentieth part of the whole.

The respondent and his father acquired this land from one Branch, one of the successors in title of Nordman, by a deed dated December 30, 1946, the conveyance being expressed as being subject to the reservations, limitations, provisoes and conditions expressed in the original grant from the Crown. George Edward Neilson, the father of the respondent, died before the commencement of the proceedings and his interest passed to the respondent. The manner in which this was accomplished is not disclosed by the evidence. Sixteen years prior to the acquisition of this land by the respondent and his father, the Department of Public Works of British Columbia had established and constructed a road leading from the village of Ladner to a point immediately adjoining what was the north-westerly limit of the island, as shown on the plan annexed to the Crown grant.

Under the provisions of the *Highway Act,* R.S.B.C. 1924, c. 103, s. 8, the Minister of Public Works was empowered to establish such highways and to declare the same by a notice in the British Columbia Gazette. The notice published in this matter defined the limits of the highway which commenced at a point on the Ladner highway and ran from there in a general north-westerly direction through various parcels of land, including District Lot 471, and terminated at the point above stated. A plan showing the exact location of the road was filed in the registry office at that time but was not put in evidence, though two rough sketches were marked as exhibits which do not show adequately the relative position of the easterly limit of the road and the westerly limit of Lot 471. A plan, however, prepared by Mr. D. J. McGugan shows that the highway which became known as the Ladner Ferry Road and led to a wharf used by the ferry operating between that point and Woodwards Landing on Lulu Island incorporated a

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small part of Lot 471. No part of that lot, as described in the Crown grant, lay to the west of the westerly boundary of the road, a fact the importance of which will become apparent.

The claim of the respondent as advanced in his petition is that an area, now 207 acres in extent, all of which was undoubtedly at the time of the issue of the Crown grant to Nordman covered with water and part of the bed of the Fraser River, has through accretion become part of Lot 471, and a declaration was asked that the petitioner was the legal and beneficial owner in fee simple of all the area in question. All of it has been completely separated from the property described in the Crown grant since the establishment of the highway in 1930. The conditions as they existed prior to the construction of the road in 1930 are those which must be considered in determining the matter.

The Fraser is a navigable and tidal river which rises several hundred miles distant in the interior of northern British Columbia. Large quantities of silt are carried down by the stream and it is the deposit of this material upon the shores of the river and islands in the river and upon the bed of the stream itself which causes accretions of the nature giving rise to the present litigation. On a map published by the Canadian Hydrographic Service showing that part of the south arm of the Fraser River from Sand Heads to Tilbury Island, the whole area including Lot 471, as shown in the Crown grant, and an area equally as large lying to the west of Ferry Road is described as Ladner Marsh, and the river to the west of it as Ladner Reach.

Captain H. A. Young, who came to New Westminster in 1889 and was the master of a Dominion Government dredge working on the river for a very long period of years, said that in the early days of his employment paddle steamers plied between New Westminster and the village of Ladner and passed through the Green Slough, which ran along the eastern and southern boundary of what became Lot 471, and that boats from Ladner passed over the area now described as an accretion by the respondent which lies to the west of the highway. It was along the westerly banks of the Green Slough that the respondent and his father placed their dyke when they bought the property and were proceeding to make it ready for cultivation.

The time at which this use of the Green Slough and the property now lying to the west of the road ceased is not disclosed by the evidence. Mr. McGugan, a British Columbia land surveyor practising for more than forty years in New Westminster, had been asked by Branch in 1926 to survey Lot 471 and the area lying to the west of it. It is clear that between the times referred to by Captain Young and the date of McGugan's survey, very extensive deposits of silt had been made upon an area of approximately 200 acres lying between the western boundary of Lot 471 and Ladner Reach. While McGugan had made the survey in 1926, he did not prepare the plan which he produced until October 17, 1930. This was prepared from his field notes and shows the area and what he considered at that time to be an accretion to Lot 471 of 200.7 acres. Describing the area at that time, he said that he had fixed the boundaries of what he referred to as the accretion where he could see vegetation growing "indicating that that land was out of water sufficiently long to produce vegetation—might be grass or it might be brush or whatever it might be—but that was the point that decided it chiefly". He said that the whole of the land including Lot 471 must have been under water when the tide was very high and that when they were surveying the island there were numerous sloughs to be crossed. This was, of course, long prior to the time when Lot 471 was dyked and the land made suitable for cultivation. Comparing the level of the disputed area with that of other farm lands in the Fraser Delta, he said that it was virtually the same and, referring to Lot 471, said:—

> You see, I think this island, the original island was surveyed in 1885, and all of this area has been subject to flooding and deposit of sediment and silt all the time, so that in 1926, the elevation of the original Crown grant would be slightly higher than it was when originally surveyed.

According to this witness, some trees were growing on the bank of the Deas Slough which was to the north of Lot 471 at the point where the Ferry Road terminated, but the location of these in relation to the northern extremity of the road was not made clear.

Other than the evidence of McGugan, whose capacity as a land surveyor and whose complete reliability as a witness is not questioned, the respondent gave no further useful evidence as to the conditions existing in 1930.

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For the Attorney-General, Mr. T. H. Oliver who had lived in Ladner for sixty-four years, speaking generally of the area west of the road at the time this was constructed, said:—

> There was the bulrushes and more or less a few willows, vegetation, marsh vegetation.

and

> there was growth all through here. The toolies come first on the marshes.

This witness was a hunter and had frequently been on the property when hunting and said that the property would always be covered with water at high tide and, in answer to a question of the learned trial judge, said that he meant by this any high tide around 12 feet or over. He had been on the property when the road was being built and said that the biggest part of the trees which were shown to be growing near the northern extremity of the road had come since it was constructed. A photograph of the property taken in April 1954 showed a growth of trees along a considerable part of the westerly side of the road and these, he said, had grown following the construction of the road.

It should be said as to this witness that the learned trial judge said that he rejected his evidence, considering that he was more interested in preserving the area for duck-shooting than in giving a veracious picture of the terrain. I take this to refer to the witness's evidence of conditions as they were at the time of the trial in 1954, and not to what he had said as to the conditions twenty-four years earlier.

With these exceptions, there is no evidence as to the extent to which the property lying west of the highway built in 1930 was covered with water at medium high tide. There was, however, a considerable amount of evidence as to the condition of the property in 1948 and 1954, when the hearing took place. The learned trial judge also considered that it would assist him in appreciating the evidence if he were to examine the property himself and he spent a considerable time in doing so.

Under the provisions of the *Highway Act* referred to, the soil and freehold of every public highway were declared to be vested in His Majesty, and the entry by the Minister, his agents, servants or workmen operated as a complete

extinguishment of every title and claim to any lands so entered upon or taken possession of. These provisions of the Act, as it was at the date of the construction of the highway, are re-enacted in the *Highway Act,* R.S.B.C. 1948, c. 144.

In these circumstances, evidence directed to the condition of affairs as they were from eighteen to twenty-four years after the establishment of the road is of little weight, unless it has been shown that the conditions existing on the property were at these respective dates essentially the same.

The witness McGugan had in 1944 been employed by the respondent and his father to construct a dyke around Lot 471, as it was shown in the Crown grant, and had directed the carrying out of this work. McGugan was also a member of the dyking authority in the area set up in the year 1948 and in that year, when there was a serious flood, the board had constructed a dam across the upper end of Deas Slough (which was in reality a channel in the river through which the current flowed) which, he considered, had had the effect of causing more silt to be deposited in the area further down stream, including the property to the west of the road. He had again surveyed the property in dispute in 1953 and said that he considered that a high tide would cover part of it but that with a 12-foot tide they could work there all the time. He did not say upon what part of the area this could be done. He had then prepared a plan which showed the area in dispute as 207 acres in extent and said that there had been a tremendous amount of sand and silt deposit on the northerly portion of it, caused by the damming of the Deas Slough. Asked if he could express an opinion as to the extent of the deposits upon the area generally, he said that he could not be definite but that it had been very gradual.

Captain Young whose dredge had pumped the sand used in the construction of the road in 1930 said that, as a result of his experience, he thought an average of 12 feet would be the mean average high tide in that area.

The respondent who, after dyking Lot 471, had by work done upon it converted it into highly arable land, said that with a 12 or 14 foot tide there would be no water on the lands in dispute and that in July, August, September and

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most of October there would be no water on it at all in any tide. The land west of the road, he agreed, was quite useless for agricultural purposes in its present state and it would be necessary to dyke and drain it to make it so.

Mr. H. L. Huff, a retired inspector of lands for the provincial Department of Lands, had on the instructions of the department examined the property in 1949. Huff was a graduate in agriculture of the University of British Columbia and had examined the vegetation on the property in dispute. He said that it consisted of sedges, rushes, reeds, scattered willows along the higher portion, and on the highest portions a true deciduous tree growth of the type of alder. Asked as to whether there was a common name for the type of willow found there, he said:—

> Well, a willow is a tree, as far as that goes, but there is different types of vegetation and the types of vegetation out there are some hydrophyte and some hygrophyte types of vegetation. I make the distinction between that and your true grass or land vegetation which are your mesophyte type of vegetation.

Speaking of the trees growing at the north end of the property, he said that the deciduous type trees were from fifteen to twenty years old and that many were far less than that, and this applied also to the trees growing along the highway. He said that at a normal high tide "the great body of that marsh is covered by water". In 1949, accompanied by the Chief Inspector of Lands, he had started to walk on to the property from the road at a 12-foot tide and said that they did not get more than 20 feet from the road, that there was no wind at the time and said that he considered that was a normal high tide.

Mr. E. W. Taylor, a biologist in the employ of the British Columbia Game Department, had taken a series of photographs of the disputed property on April 17, 1954. These were taken on a calm day at around 5.30 in the afternoon. These photographs were taken from points about 400 yards west of the Ferry Road and not far distant from the westerly limit of the area. One showing the view to the east shows the line of trees which had grown along the west side of the highway and the greater part of the area covered with water, with some vegetation of the kind commonly seen in marshes growing in the water in the areas closest to

the camera. The view to the south shows a considerable area covered with what appeared to be bulrushes and similar marsh vegetation and a larger area mostly covered with water.

Mr. George Macey, an operator of a marine machine shop in Ladner, was called in rebuttal by the respondent and said that the average high tide in that area was around 11 or 12 feet and that a 12-foot tide would cover part but not all of the area in question. He said that there were times during the year when it was possible to drive a tractor along the high part of the area close to its westerly limit and said that with a 12-foot tide the portions of the area which would be visible were the banks of the sloughs running through the property, the edge of the area next to the river proper and quite a few places in the middle.

Further evidence as to conditions in 1954 were given by John Devington, a neighbour of the respondent who at times rowed across the area in a flat bottom boat in order to salvage logs or posts carried on to the area, who said that it required a 14-foot tide to provide sufficient water for operations of this nature.

The respondent also gave evidence as to using a tractor on part of the area and said that there were various upland grasses and pea vines growing in places.

By consent, a letter written by an official of the Game Commission containing information as to the mean high tide for the period October 1, 1952 to September 30, 1953, obtained from the official records kept at Steveston, was read into the record. This showed that in the area the average high tide was 12.1 feet, there being normally two high tides in each twenty-four hour period. The records further show that on April 17, 1954, at the time the photographs referred to were taken, the tide was 11.7 feet and that the high for that day was 12 feet, this occurring at 6.20 p.m.

In addition to this evidence, a number of aerial photographs were put in evidence. Of these, one had been taken in 1928 of Lot 471 and the area to the west of it, this being prior to the construction of the highway. Other than the

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sloughs, no water appears on the land but no evidence was given as to the state of the tide when the photograph was taken, and it is thus of no assistance.

By s. 9 of the *Quieting Titles Act*, the judge investigating the title is entitled to receive not only any evidence properly receivable by the Supreme Court on the question of title or which the practice of English conveyancers authorizes to be received on the investigation of a title out of court, but "any other evidence, whether the same is or is not receivable or sufficient in point of strict law", provided the same satisfies the judge of the truth of the facts intended to be made out thereby.

The learned trial judge in making his findings of fact does not say that he exercised the power thus given to him when he took a view of the area in question. This was done, according to the reasons delivered, for the customary purpose of such a view in order that the judge might better understand the evidence. It should be emphasized that this view was taken in the summer of 1954, twenty-eight years after McGugan had made his first survey, and twenty-four years after the construction of the Ferry Road.

The learned judge found upon the evidence that the mean high tide in the area in question is a 12-foot tide at Point Atkinson and that, at such a stage of the tide, the lower land in the area is flooded, while about the perimeter of the land a natural rampart has been formed which is not. He said:—

> The result, at that stage of water, is that there are large flooded areas surrounded by natural dykes or ramparts which do not flood. The depth of the flooding varies from a few inches to a foot or two, but it is nowhere great, and a man in knee-height rubber boots could probably walk over all but a few pockets at mean high tide.
>
> The banks have lost their character of marsh land and are covered by upland growth. They are increasing in size and vary in width from a few feet to a hundred feet. The marsh is grown in sedges, bulrushes and other marsh vegetation. Through the marsh there are numerous high spots where upland growth is emerging.

Having said this, the learned judge said:—

> I find that at mean high tide probably more of this land has water on it (although, in many places, an inconsiderable depth of water) than is high and dry.

and further:—

> But I do not consider this finding conclusive. The truth is that I think it impossible to call this 200-acre area foreshore. It is, as I have said, encompassed with natural walls and dykes stemming from and connected with the original island.

After saying that these ramparts, referring to the higher area along the westerly and northerly limits of the area, were undoubtedly accretions, the learned judge found that, as they were connected to the original island by these natural walls, they were accretions to the land of the petitioner. Whether they were continuous in 1954 was not stated.

Part of these findings, such as that as to the depth of water upon the area at mean high tide and as to the character of the vegetation, were clearly made as the result of the judge's own observations. The finding that the higher land around the perimeter of the area, to which reference was made, was connected to Lot 471, must clearly have been intended to refer to the situation that existed in 1930, prior to the time when the Ferry Road was built and, with great respect, is not supported by the evidence. Neither the evidence of McGugan nor the 1928 aerial photograph prove the existence of these so-called ramparts at that time or that they were connected with Lot 471 in any manner, and there is no other evidence on the point.

While the learned judge had found that it was impossible to call the area foreshore, he said further that, assuming this to be wrong, since McGugan had said that the disputed area was in 1926 of the same character and level as Lot 471, the land in the original grant was foreshore and, if the accretion was foreshore, it was subject to the same rules as an accretion of cultivable land and became the property of the petitioner.

I am unable, with great respect, to agree with these conclusions or with those of the majority of the Court of Appeal and agree with the dissenting judgment of Mr. Justice Robertson.

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The case of the petitioner as advanced in the petition is that, since the date of the Crown grant, "there has accreted to Lot 471 as it stood at the time of such Crown grant some 207 acres, mostly on the west side of Lot 471". It is alleged

> That a substantial portion of such accreted area is *now* grown over with willow or brush or grass and excepting for two very small sloughs is no longer washed by mean tides

and a declaration is asked that the petitioner is the legal and beneficial owner in fee simple.

The Crown grant to Nordman, read with the attached plan, was a grant of an island in the Fraser River. I think the only possible inference from the evidence is that this island had been gradually formed by vertical deposits of silt, carried down the river. As the Crown in the right of the province was the owner of the bed of the river, the island was its property. As pointed out by Robertson J.A., the area might have been sold by the Crown even though it were covered with water. As the land had been built up above the surface of the water, it was treated as the sale of an island, the area and limits of which were shown by the plan, and not as of a portion of the bed of the river. I can see no basis for finding that the area described in the grant was either foreshore or sold as such and the petition does not, indeed, suggest it.

In Sir Matthew Hale's treatise *De Jure Maris,* as it appears in Hargrave's Law Tracts at p. 12, dealing with the King's right of property on the shore, it is said:—

> The shore is that ground that is between the ordinary high-water and low-water mark. This doth *prima facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea.

As to what was included in the expressions "shore" or "*littus maris*", it is said that

> it is certain that that which the sea overflows, either at high-spring tides or at extraordinary tides, comes not as to this purpose under the denomination of *littus maris;* and consequently the king's title is not of that large extent, but only to land that is usually overflowed at ordinary tides.

The question as to the proper interpretation of the expression "ordinary tides" was considered in the judgment of Lord Cranworth L.C. in *Attorney General v. Chambers*

(1). In that case, in which the Lord Chancellor was assisted by Alderson B. and Maule J., Lord Cranworth said, referring to the statement of Hale, that it should be construed as the medium high tide between the springs and the neaps. A like interpretation had been placed on the expression in *Blundell v. Catterell* (2), to which the Lord Chancellor referred. See also 33 Halsbury, 2nd ed. 1939, p. 525 and cases referred to in note (*s*).

The onus rested upon the respondent to establish that, prior to the construction of the Ladner Ferry Road, the area in dispute had through accretion ceased to be the property of the Crown. To establish this, it was necessary for him to show that at that time the area was not overflowed by the water of the river at ordinary tides, so construed. This has not been shown and that is decisive of the matter against the respondent, in my opinion.

McGugan, speaking of conditions as they were in 1926 when the survey was made, when asked whether the area was swept by tidal waters, said:—

> Well, yes, definitely at times, the whole of it must have been. On very high tides, the whole of that island, the original island must have been under water. I know when we were surveying on that island there, there were numerous sloughs we crossed all the time. We had to make long detours to get around these sloughs. There may have been—looking at Green Slough—there was a ridge which was quite high, and there were trees on it and that was high. Most of the rest of it was relatively, you would call it relatively low, and when the tides were in you just couldn't work on it, that was all.

The matter was not explored further, in either direct or cross-examination and there is no other evidence on the point.

If there had been evidence that, prior to the construction of the Ladner Ferry Road, the so-called ramparts were not covered by water at mean high tide and, commencing at the north-west corner of Lot 471, extended continuously out into the river and surrounded or partly surrounded the lower portions of the bed of the river to the west of the respondent's property, the question as to whether the Crown's title was affected would require consideration.

(1) (1854), 4 De G.M. & G. 206, 43 E.R. 486.
(2) (1821), 5 B. & Ald. 268, 106 E.R. 1190.

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In my opinion, what has been called the doctrine of accretion is accurately stated in Coulson and Forbes on Waters and Land Drainage, 6th ed. 1952, at p. 39, where it is said:—

> Land formed by alluvion, or gradual and imperceptible accretion from the sea, and land gained by dereliction, or the gradual and imperceptible retreat of the sea, belongs to the owner of the adjoining *terra firma* Where the increase is sudden or perceptible, the land gained still belongs to its original owner. The word "imperceptible" means imperceptible in progress, and not in result—that is to say, where the increase cannot be observed as actually going on, though a visible increase is observable every year.

The principle is that gradual accretion enures to the land which attracts it. It applies to tidal and non-tidal and navigable or non-navigable rivers: *Foster v. Wright* (1). It was applied in this Court to lands through which the North Saskatchewan River runs in *Clarke v. City of Edmonton* (2).

If the so-called ramparts which were visible to the learned judge in 1954 extended in 1930 continuously from the north-west corner of Lot 471, westerly and then southerly along the boundary of the property in dispute, and had been gradually built up by accretion commencing on the foreshore of Lot 471 (and there is no evidence that they did), a question would arise as to whether the law relating to accretion would vest such a long narrow curving strip of land in a navigable river in the owner of the land upon which the accretion commenced and from which it was extended. It is not accurate, in my opinion, on the evidence in this case to say that this narrow strip of land is undoubtedly an accretion since if, for example, the portion of it along the westerly boundary of the property was formed by alluvion at that place and did not project out from Lot 471 and was not connected to an accretion there, it would be the property of the Crown, just as the island which formed the subject matter of the grant was its property. There is a complete absence of evidence, however, as to when and in what manner these ramparts rose above the surface of the water at medium high tide.

(1) (1878), 4 C.P.D. 438 at 444.

(2) [1930] S.C.R. 137, [1929] 4 D.L.R. 1010.

I am further unaware of any authority for the proposition that, assuming the ramparts were continuous and were true accretions to the respondent's property, the very large area of lands subject to flooding at medium high tide which were the property of the Crown and which lay between these ridges and Lot 471 thereby became the property of the respondent. No principle of the law as to accretion would make it so, in my opinion.

The conflict between the decision of the judges in *Gifford v. Lord Yarborough* (1), and part of the judgment of Lord Cranworth in *Attorney General v. Chambers* (2), which is discussed at length in the judgment of Palles C.B. in *Attorney-General v. M'Carthy* (3), does not touch any of the matters in issue in the present case. There is, however, a conflict which, I think, should be noted. In *Chambers' Case,* Lord Cranworth said, relying upon a passage from *De Jure Maris,* that the principle which gave the shore to the Crown was that it was land not capable of ordinary cultivation or occupation and so in the nature of unappropriated soil and, in Lord Hale's language, not maniorable. A passage in the judgment of Best C.J., referred to by O'Halloran J.A. in his judgment in this case, suggests that the right of the owner to an accretion depends not on the fact that the land which is above the mean high water mark is maniorable (or manurable) as it is left by the action of the tide but by virtue of the owner entering upon the area and improving it, thus acquiring title "by occupation and improvement". The question, it should be noted, was not one that was in issue in *Lord Yarborough's Case* and the accuracy of that portion of the judgment will have to be considered when the question arises. It does not arise in the present matter.

For these reasons, it is my opinion that this appeal should be allowed and, subject to one reservation, the petition dismissed. We were informed on the argument that the Attorney-General does not ask for costs in this Court. No order as to costs was made by Wilson J. or by the Court of Appeal and I would make no order as to the costs of the proceedings before them.

(1) (1828), 5 Bing. 163, 130 E.R. 1023.
(2) (1854), 4 De G.M. & G. 206, 43 E.R. 486.
(3) [1911] 2 I.R. 260.

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While the question was not argued before us, the plan prepared by McGugan in 1953 shows two small areas east of the Ladner Ferry Road, one at its northern extremity and the other generally to the south of Lot 471, which are marked as accretions. Since the matter of the respondent's right to these areas as against the Crown has not been dealt with, I think the dismissal of the petition should be without prejudice to any claim he may wish to make in respect of them.

CARTWRIGHT J.:—I agree that the appeal should succeed on the ground that the respondent has failed to establish that prior to the construction of the Ladner Ferry Road the area in question was not overflowed by the waters of the Fraser River at the high-water mark of the ordinary tides as defined in *Attorney-General v. Chambers* (1). This renders it unnecessary for me to consider the ground on which my brother Rand would allow the appeal.

I would dispose of the appeal as proposed by the Chief Justice.

Appeal allowed, no costs.

Solicitors for the petitioner, respondent: Campney, Owen, Murphy & Owen, Vancouver.

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

1955

**Oct. 26, 27

1956

*Jun. 14

*Oct. 2

UNION STEAMSHIPS LIMITED (*Defendant*) ..... APPELLANT;

AND

ARCHIE BARNES (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Shipping—Action by passenger for personal injuries due to negligence of ship's servant—Condition limiting shipowner's liability printed on back of passenger's ticket—Passenger not reading ticket—Whether reasonable attempt to bring condition to passenger's attention.

*PRESENT: Rand, Locke, Cartwright, Fauteux and Nolan JJ.

***Reporter's Note:* The appeal was first argued on Oct. 26 and 27, 1955, before Rand, Kellock, Estey, Locke and Fauteux JJ. On Jan. 24, 1956, the Court ordered a rehearing which took place on Jun. 14, 1956.

(1) (1854), 4 De G.M. & G. 206, 43 E.R. 486.

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UNION STEAMSHIPS LTD. v. BARNES

The plaintiff and his family boarded a ship operated by the defendant company in the early hours of the morning. There was no ticket-office on shore, and the plaintiff bought his ticket after he was on board. The ticket bore a notice on its face, in red print, to the effect that it was subject to the conditions printed on the back, and on the back was a condition relieving the defendant from any liability for injury, even if it resulted from the negligence of the defendant's servants. The plaintiff's evidence was that he knew that there was writing on the ticket, but had not read it or looked at the back. The plaintiff was seriously injured, as a result of the negligence of a steward on the ship.

Held (Rand and Cartwright JJ. *dissenting*): The defendant was not liable.

There being no law that prevented the carrier from entering into an agreement with a passenger which would relieve it from liability for injuries caused by the negligence of its employees, the question to be determined was whether the defendant had done what was reasonably sufficient to bring the limitative condition to the buyer's notice, and this was a question of fact. *Grand Trunk Pacific Coast Steamship Company v. Simpson* (1922), 63 S.C.R. 631, explained and distinguished. The trial judge had found that the form of the ticket was a reasonable attempt to bring the conditions under which he would be carried to the attention of the plaintiff, and this finding was conclusive. There was no evidence to support the further finding at the trial that the plaintiff had no reasonable opportunity to read the ticket. His acceptance of the ticket without protest, and embarking upon the voyage, precluded him from now reprobating its terms on the basis that he had not read it. *Grand Trunk Railway Company of Canada v. Robinson,* [1915] A.C. 740; *Hood v. Anchor Line,* [1918] A.C. 837, quoted and applied; *Nunan v. Southern Railway Company,* [1923] 2 K.B. 703 at 707, approved; *Parker v. The South Eastern Railway Company* (1877), 2 C.P.D. 416 at 423, doubted.

Per Rand and Cartwright JJ. (*dissenting*): In the circumstances of this case, it could not be said that the defendant had taken reasonable steps to bring notice of the condition to the attention of the plaintiff.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment at trial (2). Appeal allowed.

L. S. Eckardt and *A. H. Ainsworth,* for the plaintiff, respondent, at the first hearing.

A. Bull, Q.C., and *J. I. Bird,* for the defendant, appellant, at the first hearing.

L. S. Eckardt, for the plaintiff, respondent, at the second hearing.

J. I. Bird, for the defendant, appellant, at the second hearing.

(1) 14 W.W.R. 673, [1955] 2 D.L.R. 564.

(2) 13 W.W.R. 72, [1954] 4 D.L.R. 267.

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RAND J. (*dissenting*):—The question raised is whether a common carrier of passengers by water is entitled to rely on a condition printed on a ticket providing exemption from liability for negligence as forming a term of the carriage.

The vessel was engaged in a coastal service in British Columbia. The means employed was the printing on the ticket in small type and red ink of a notice that conditions were set forth on the back; and a line was provided for the passenger's name, whether for signature or mere insertion is not made clear. The respondent and his family had been taken aboard about 5 o'clock a.m., December 29, 1951 by means of a sling. Accompanied by them and a steward, he went to the purser's office to purchase passage and stateroom tickets to the next port of call. In the meantime, while the tickets were being purchased, the ship was already on her way out of the harbour. The respondent noticed printing on the face of the passage ticket but did not read it or sign it. He was in a hurry to get his children abed which called for some clothes in the baggage. The steward, accompanied by the respondent for the purpose of pointing out the piece of baggage to be brought up, left the stateroom to go below. The respondent, passing through a door into a dark space, fell down a hatchway and was badly injured.

The rule of law governing that question I take to be this: was what was done by the carrier reasonably sufficient to bring to the attention of the passenger—himself acting with the alertness of the ordinary man—this exceptional condition? Although Canadian courts, in contrast with those of many jurisdictions in the United States, have declined to hold that a common carrier cannot contract out for negligence, yet the requirement of notice laid down is intended to ensure that effective means within the range of reasonable action in the circumstances shall be employed to apprise a passenger of exceptional terms, in derogation of its common law duty, on which the carrier professes to undertake the transportation. Whatever the practicality of the choice presented by such a notice may be, theoretically, what is done must be such as is deemed to have brought notice of it to the patron's attention.

In the circumstances here it seems almost absurd to say that the passenger, already on his voyage, can be said to have been given reasonable notice of such an extreme and unusual term of the ticket, or, as it is put, that the carrier had taken reasonable steps to bring it to his attention. Everything was hurried; his getting aboard, the vessel getting under weigh, the purchase of the tickets with the steward at his elbow, the settling of the family in the stateroom and the hastening for the baggage. One has only to imagine the incongruity of stopping to examine a ticket in such surroundings to ascertain its terms.

It is in these conditions that the company claims to be able to say to him: "We told you that we carried only at your own risk of injury through our negligence and this you accepted." The examination of the ticket would, in those circumstances, be made by no person and none would anticipate such a condition. With an intention to carry passengers only at their own risk, one would have thought that common candour would make this known not by small letters on a small ticket but, at least in addition, by means that would make that important fact known almost to the dullest. It was not a case of a special feature: it was a regular ticket sold at the regular fare for passage on the regular service. If the company should object to advertising its terms in the suggested manner, for what reason would that be?

I can think of none other than that such an advertisement would not promote patronage. This would mean that passengers generally did not read the conditions and that there was no reason to provoke discussion on the matter unnecessarily; it would be sufficient when the passenger was injured to invite his attention to the terms of the ticket. Accidents would be relatively few and injuries would not be as objectionable a means of publication as the open notice.

Such a conditioned service could amount to a virtual deception of passengers. That it could be reasonable to place carriage of this nature at the entire risk of the passenger I agree; the special circumstances of a local accommodation in given areas even at that risk could no doubt be of much convenience to residents along the coast. But equally the terms of the accommodation should be openly avowed.

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I do not examine the question whether the undertaking, commenced when the passenger boarded and the ship weighed anchor, continued regardless of the terms on the ticket; I will assume that the passenger, knowing he must buy a ticket, agreed in advance that it should govern the carriage from the beginning.

That in these conditions the company has failed in its duty of constructive notification is supported by what has been laid down in the courts of England and Scotland. In *Henderson et al. (Steam-Packet Company) v. Stevenson* (1), which, as here, was a case of carrier by water, the language of Lord O'Hagan at p. 481, although more exacting, perhaps, than the decision of the House can be said to have been, is peculiarly apposite in indicating the background of general considerations in which the question is to be viewed:—

> When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted; and that the acceptance of them shall be unequivocally shewn by the signature of the contractor. So the Legislature have pronounced, as to cases of canals and railways, scarcely distinguishable in substance and principle from that before us; and if the effect of your Lordships' affirmation of the interlocutor of the Lord Ordinary be to compel some precaution of this kind, it will be manifestly advantageous in promoting the harmonious action of the law, and in protecting the ignorant and the unwary.

In *Parker v. The South Eastern Railway Company* (2), the duty of the company is stated by Mellish L.J. in these words:—

> But if what the railway company did is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability . . . that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

Hood v. Anchor Line (3). In this case a steamship passage ticket was enclosed in an envelope, delivered to the passenger, on the front of which was printed in capital letters a notice requesting the passenger to read the conditions

(1) (1875), L.R. 2 H.L. Sc. 470. (2) (1877), 2 C.P.D. 416 at 423.
(3) [1918] A.C. 837.

of the enclosed contract. The ticket itself, on its face, contained a notice that it was issued subject to conditions thereinafter set out and at the foot was a printed request to the passenger to read the contract carefully. The House of Lords held the steamship company to have taken all reasonable steps to bring to the knowledge of the passenger the existence of the conditions. Viscount Haldane at p. 843 considered the duty of the steamship company to depend upon the accepted standards of conduct according to which

> a reasonable man ought to behave in these circumstances towards the neighbour towards whom he is bound by the necessities of the community to act with forebearance and consideration.

And on p. 844, he defined the duty of the company:—

> My Lords, I agree that the appellant here (the passenger) was entitled to ask that all that was reasonably necessary as a matter of ordinary practice should have been done to bring to his notice the fact that the contract tendered to him when he paid his passage money excluded the right which the general law would give him, unless the contract did exclude it, to full damage if he was injured by the negligence of those who contracted to convey him on their steamer. Whether all that was reasonably necessary to give him his notice was done is, however, a question of fact, in answering which the tribunal must look at all the circumstances and the situation of the parties.

In *Fosbroke-Hobbes v. Airwork Ltd., and British-American Air Services, Ltd.* (1), an aeroplane had been hired for the carriage of the hirer and a party of guests. Just as it was preparing to set off, an envelope containing a "ticket" was handed to the hirer by the pilot. The ticket was a document called a "special charter" which contained, among other things, a number of conditions, one of which exempted the owners from liability for their own or their servants' negligence. The ticket contemplated signature by the passenger and its return when signed to one of the owners' officials. Before the hirer had an opportunity of seeing the contents of the envelope, the aeroplane started on its journey and almost immediately crashed. It was held by Goddard J., now Lord Goddard L.C.J., that the condition exempting the owner from liability was not binding on the hirer.

Many cases have been brought to our attention in which some special character of the service or the passenger was involved such as workmen's tickets, excursion or special fares. In these instances the special feature itself to the

(1) [1937] 1 All E.R. 108.

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ordinary patron would suggest special terms; and this circumstance plus a notice of conditions on the face of the ticket, with or without other acts of notification, can, in general, under the circumstances in which such services are ordinarily engaged, be found to be a compliance with the obligation on the carrier.

For these reasons I am unable to say that the Court of Appeal was wrong in finding that the company had not taken sufficient steps to give notice of the condition to the respondent and the appeal must be dismissed with costs.

The judgment of Locke, Fauteux and Nolan JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) which dismissed an appeal by the present appellant from the judgment for damages awarded by Wilson J. at the trial (2).

The appellant owns and operates a line of steamships carrying passengers and freight along the west coast of British Columbia. During the early morning hours of December 29, 1951, the Catala, of the appellant's line, called at Brem River on Toba Inlet to pick up passengers. The only description of the facilities for the embarkation of passengers is that given by the respondent, who said that it was a "float landing" and that he and his wife and their children and his brother-in-law were picked up in a sling and lowered to the deck. Their luggage had been taken on board prior to this in the same manner.

The respondent and his wife and children were going to Westview, British Columbia, a settlement adjoining Powell River. The appellant did not maintain any place for selling tickets at Brem River and these were purchased by the respondent from the purser shortly after he went aboard. The only account of what took place when the tickets were bought is that of the respondent who said that he went to a wicket at the purser's office and bought tickets for himself and his wife, and for a stateroom, and that without looking at the tickets he put them in his pocket and went to the

(1) 14 W.W.R. 673, [1955] 2 D.L.R. 564.
(2) 13 W.W.R. 72, [1954] 4 D.L.R. 267.

stateroom. He stated that he had no conversation with the purser about the tickets. A steward showed the respondent and his family to their room.

Apparently, the luggage had been placed in one of the holds and, shortly after they had gone to the stateroom, the respondent's wife asked him to get some articles out of their bags and he proceeded, with the steward who had shown them to their stateroom, to get the articles required. En route, in the darkness, he fell into a hatchway which was either unlighted or insufficiently lighted and suffered the injuries which gave rise to the action.

There are concurrent findings that these injuries were sustained due to the negligence of the steward and no question is raised as to this on the appeal, the only matter to be determined being whether, in view of the terms of the ticket purchased by the respondent, he has any enforceable claim.

On the face of the ticket it was stated to be good for the passage from Brem River to Powell River, where passengers for Westview would disembark, when stamped by the company's agent and presented with the coupon attached, and beneath this there appeared in red type the following words:—

> This ticket is issued subject to the conditions of carriage of passengers and baggage endorsed on the back hereof and those posted in the Company's office.

On the reverse side of the ticket there appeared in red type:—

> This ticket is good only for one month from date of issue as stamped on back. It is not transferable, no stop-over will be allowed and the person using it assumes all risk of loss or injury to person or property while on the vessel or while embarking or disembarking, even though such loss or injury is caused by the negligence or default of the shipowner, its servants or agents, or othewise howsoever.
>
> The holder hereof in accepting this ticket thereby agrees to all the conditions stipulated thereon.

Below this there was stamped: "Union Steamships Limited, Dec. 29, 1951, S.S. Catala."

The respondent is a logger by occupation and had been engaged in logging camps on the British Columbia coast for some fifteen years and had frequently travelled on vessels of the appellant company. He had a public school education. Cross-examined, he said that he knew there was some writing on the front part of the ticket but he did not read

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it and he did not look on the back. He was not asked, either in direct or cross-examination, as to whether he knew that there were any conditions affecting his passage endorsed anywhere on the ticket nor, indeed, whether, by reason of having travelled many times on the Union Steamship vessels, he was aware that their tickets were endorsed with any clause limiting their liability for negligence.

The defendants did not call the purser or anyone else who was present when the tickets were sold to the respondent.

The learned trial judge made the following findings:—

> Insofar as the form of the ticket is concerned it seems to me to be such that a reasonable attempt is made to bring to the attention of the passenger the conditions under which he is to be carried. The plaintiff did not in fact read the ticket and was unaware of the conditions endorsed thereon. He was not asked to agree to them, nor were they verbally or by any notice posted at the ticket booth brought to his notice.

Referring then to a passage said to have been taken from the judgment of Anglin J., as he then was, in *Grand Trunk Pacific Coast Steamship Company v. Simpson* (1), as to the burden of proof, he held that "considering the hour and the circumstances, I think he had no reasonable opportunity to read the ticket", and that the defendant had not discharged the burden which rested upon it.

In the Court of Appeal (2), O'Halloran J.A., who adopted the reasons delivered by Sidney Smith J.A., further expressed the opinion that the issuing of the ticket by the carrier and its acceptance by the respondent did not constitute a contract between them, the ticket being in reality no more than a receipt and that, accordingly, the conditions afforded no defence. Sidney Smith J.A., saying that the trial judge had said that the carrier had failed to satisfy him that reasonable means had been adopted to bring the limitative conditions to the attention of the respondent, considered that this finding of fact should not be disturbed. That learned judge did not mention the finding at the trial that the form of the ticket was a reasonable attempt to bring the conditions to the attention of the passenger. Davey J.A., who said that he was in substantial agreement with Sidney Smith J.A., referred to the finding at the trial that a reasonable attempt had been made, as far as the form of the ticket was concerned, to bring the special condi-

(1) 63 S.C.R. 361, [1922] 2 W.W.R. 320.

(2) 14 W.W.R. 673, [1955] 2 D.L.R. 564.

tions to the respondent's notice but that the trial judge had properly treated that finding as indecisive, for the conditions would not bind the respondent "unless he should have known the ticket was a contract or that it contained the special condition".

The ticket which the respondent purchased from the purser does not, as in *Simpson's Case,* contain a long series of printed conditions. There is but the one condition which is the one in question. It is difficult to think of a means whereby the attention of the purchaser of a steamship ticket could be better directed to its terms than by printing in red letters the notice which appeared on the face of the ticket in this matter. The language of the condition is perfectly clear. It is printed in red and the concluding sentence reads:—

> The holder hereof in accepting this ticket thereby agrees to all the conditions stipulated thereon.

The trial judge, while making the finding to which I have referred, was of the opinion, however, that, considering the hour and the circumstances, the respondent had no reasonable opportunity to read the ticket. As to this, it should be said that there is no evidence as to the lighting in the Catala, in front of the purser's office or in the passageway leading to the stateroom or in the stateroom itself. Neither the respondent nor the witnesses called on his behalf gave any evidence on this point and I think it should not be assumed against the appellant that there was not the usual lighting in steamers of this kind on the west coast, or that the respondent could not have readily read the conditions of the ticket had he taken the trouble to do so. The fact that it was early in the morning when the respondent and his family boarded the steamer does not seem to me, with respect, to affect the matter. It would, of course, be dark at this early hour in the morning in December, but I am unable to see how, in the absence of any evidence to indicate that the ship was not properly lighted, this can have any relevance.

In addition to saying that the ticket was issued subject to the conditions endorsed on the back of it, reference is made to "those posted in the company's office", and there

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is again no evidence as to whether any such conditions were so posted or what they were. In the absence of any such evidence, it is to the ticket alone that one must look if, indeed, a contract was made on its terms.

The question to be determined is one that is of general importance, particularly to carriers of passengers by sea who undertake the transport of passengers from places where there are no ticket offices in which tickets are sold, these, of necessity, being purchased aboard ship. In the case of a carrier such as the present appellant, it is a matter of common knowledge on the west coast that their passenger vessels stop at many small places between Alaska and Vancouver where it is not practical to maintain such offices and where there are no docks from which passengers may embark. Persons wishing to travel upon these vessels are well aware that these conditions prevail and that tickets for passage must be purchased on board from the purser.

There is a vast number of reported cases in which the liability of carriers of passengers for reward has been considered, where the tickets sold exempted the carrier from liability for the negligence of its employees. Any difficulty arising in determining the question of liability in a particular case appears to me to arise from the task of reconciling what has been said in some of the leading cases as to the applicable principles of law with statements made in others.

There was at the time in question no law which prevented the appellant company from entering into an agreement with a passenger which would relieve it from liability for injuries caused by the negligence of its employees. It is further to be remembered that the appellant obtained at the trial a finding that there had been on the part of the appellant a reasonable attempt to bring to the attention of the passenger the conditions under which he was to be carried. This finding in itself distinguishes the case from such cases as *Simpson's Case, supra,* where the jury had found that, while the plaintiff knew there was writing or printing on her ticket, the company had failed to do what was reasonably sufficient to give her notice of the conditions which it contained. I do not regard that case as declaring any principle which affects the present matter.

I do not think that what was said by Mellish L.J. in *Parker v. The South Eastern Railway Company* (1), can be taken without qualification to state the true principle to be applied in such cases. That case was in regard to a contract for the storage of luggage in a railway station, and the question considered in the Court of Appeal was whether the trial judge had left the proper questions to the jury. Mellish L.J. said in part (p. 423):—

> I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

As to the first of these three propositions stated in such absolute terms, there is room, in my opinion, for grave doubt. It is unnecessary to consider its accuracy in disposing of the present matter. Mellish L.J., having thus stated the matter, concluded, however, by saying that the real question was whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition.

The matter is expressed somewhat differently in the judgment of Viscount Haldane L.C. in *Grand Trunk Railway Company of Canada v. Robinson* (2). In that case, the plaintiff who was travelling at half fare on a freight train, in charge of a horse, was carried pursuant to a contract in a form approved by the Board of Railway Commissioners which bore across the fact of it, in large red type, the words "Read this Special Contract". The contract was made on his behalf by the owner of the horse and neither of the parties read its conditions, which provided that the passenger was carried at his own risk. It was not suggested in the case that the carrier made any misrepresentation as to the nature of the contract, or that the owner or the passenger did not have an opportunity to read its terms: they simply did not do so. As to this, the Lord Chancellor said (p. 748):—

(1) (1877), 2 C.P.D. 416. (2) [1915] A.C. 740.

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Moreover, if the person acting on his behalf has himself not taken the trouble to read the terms of the contract proposed by the company in the ticket or pass offered, and yet knew that there was something written or printed on it which might contain conditions, it is not the company that will suffer by the agent's want of care. The agent will, in the absence of something misleading done by his company, be bound, and his principal will be bound through him. To hold otherwise would be to depart from the general principles of necessity recognized in other business transactions, and to render it impracticable for railway companies to make arrangements for travellers and consignors without delay and inconvenience to those who deal with them.

Later, he continued saying:—

The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it.

This is to be compared with the third of the propositions stated in the judgment of Mellish L.J. in *Parker's Case, supra.* The difference is material: it is if the person contracting knew that there was something written or printed on it *which might contain conditions,* and not if the writing on the ticket constituted reasonable notice *that the writing contained conditions.*

In *Hood v. Anchor Line* (1), Viscount Haldane reiterated what he had said in *Robinson's Case,* that the question as to whether what was reasonably necessary to be done to draw the passenger's attention to the terms of the contract was, in substance, one of fact. Lord Finlay L.C., referring to *Parker's Case,* said that it showed that (p. 842)

if it is found that the company did what was reasonably sufficient to give notice of conditions printed on the back of a ticket the person taking the ticket would be bound by such conditions.

Lord Parmoor, after saying that the Lord Ordinary had found that the respondent had done what was reasonably sufficient to give the appellant notice of the conditions, said that it was not material that other or different steps might have been taken, and that a clearly-printed notice on the envelope which enclosed the ticket and on the face of the ticket was as effective for this purpose as if the representative of the respondents had, at the time when he issued the ticket, verbally called the attention of the appellant to the conditions and asked him to read them.

(1) [1918] A.C. 837.

The result of the decisions appears to me to be accurately summarized by Swift J. in *Nunan v. Southern Railway Company* (1):—

> A number of cases were cited to me to show how the Courts had dealt with the question of fact to be determined in this case in various circumstances. I have examined those cases for the purpose of ascertaining in what way a jury should be directed to approach the consideration of such a question of fact if the matter had been one to be decided by them. I am of opinion that the proper method of considering such a matter is to proceed upon the assumption that where a contract is made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders it, and if the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer to him whether he reads the document or otherwise informs himself of its contents or not, and the conditions contained in the document are binding upon him; but that if there be an issue as to whether the document does contain the real intention of both the parties the person relying upon it must show either that the other party knew that there was writing which contained conditions or that the party delivering the form had done what was reasonably sufficient to give the other party notice of the conditions, and that the person delivering the ticket was contracting on the terms of those conditions.

This statement was adopted by the Court of Appeal in *Thompson v. London, Midland and Scottish Railway Company* (2), *per* Lord Hanworth M.R. at p. 47.

I have examined the reasons for judgment delivered at the trial which are contained in the file forwarded to this Court and are reproduced in the printed case at p. 111. There is an inaccuracy in the passage quoted from the reasons of Anglin J. in *Simpson's Case*. As quoted it reads:—

> The burden is on the defendant to show that it has done all that *it could* to bring the limitative conditions to the plaintiff's notice.

The sentence, as it appears in the Reports of this Court at p. 378 of 63 S.C.R. (and in [1922] 2 W.W.R. at p. 331), reads that the burden is

> to show that it has done all that *could reasonably be required* to bring the limitative conditions to the plaintiff's notice.

It is the latter of these statements that is supported by authority, the former is not, and if it were applied as the test it would be error. Whether it was applied does not

(1) [1923] 2 K.B. 703 at 707. (2) [1930] 1 K.B. 41.

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appear to me to be clear since it was followed by a further quotation from the reasons of Anglin J. in which the expression "whether the carrier has done what was reasonably sufficient" appears.

The reasons do not suggest what other efforts the carrier might reasonably have been expected to make to bring the conditions to the passenger's attention. The suggestion that a carrier should be required to give a verbal notice, in addition to the printed notice, was rejected by Lord Finlay L.C. and Lord Parmoor in *Hood's Case*. The respondent admitted that he saw that there was writing on the face of the ticket and I think he must be taken to be thereby affected with knowledge that what was written referred to the contract of carriage and with notice of what would have been disclosed had he read it.

I can find no evidence in the record to support the statement that the respondent had no reasonable opportunity to read the ticket and it is to be noted that Davey J.A. was of the opinion that it could not be supported. In my opinion, the issue in the present matter is determined by the finding of fact that the endorsement on the face of the ticket printed in red ink and referring to the conditions endorsed on its reverse side constituted a reasonable attempt to bring to the passenger's attention the terms of the contract and I consider that his acceptance of the ticket without protest and embarking upon the voyage precludes him from reprobating its terms, relying upon the fact that he did not read it.

I would allow this appeal with costs throughout, if demanded.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a unanimous judgment of the Court of Appeal for British Columbia (1) affirming a judgment of Wilson J. (2) in favour of the respondent for $10,328.50 damages for personal injuries.

In this court no question was raised as to the amount of damages or as to the injuries suffered by the respondent having been caused by the negligence of the appellant's

(1) 14 W.W.R. 673, [1955] 2 D.L.R. 564.
(2) 13 W.W.R. 72, [1954] 4 D.L.R. 267.

servant. The submission of the appellant is that it is relieved from liability by the conditions printed on the ticket purchased by the respondent.

Counsel for the respondent does not attack the form of the ticket, which bore a notice on its face printed plainly in red ink stating that it was issued subject to the conditions on its back, conditions which, in turn, were clearly and legibly printed.

On the uncontradicted evidence the respondent did not read the ticket, he simply put it in his pocket and proceeded to his stateroom. There is no evidence that he had any actual knowledge of the fact that the appellant proposed to make it a condition of the contract of carriage that he must bear all the risk of injury resulting from the negligence of its servants, nor is there any evidence that he knew that the ticket had printed upon it either conditions or the terms of a proposed contract. The respondent stated that there was writing on the front part of the ticket but that he did not look at the writing "so as to read it".

On its facts this case does not fall within the line of cases in which a passenger knows that his ticket has printed upon it the terms of a proposed contract and, with such knowledge, does not bother to read it.

In my opinion the evidence supports the concurrent findings of fact in the courts below that the appellant has failed to satisfy the onus of shewing that reasonable means were adopted to bring the proposed condition relieving it from liability for the negligence of its servants to the attention of the respondent, "in", to use the words of Sidney Smith J.A., "the obvious realities of the situation".

I would dismiss the appeal with costs.

Appeal allowed with costs, if demanded.

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

Solicitors for the defendant, appellant: Campney, Owen, Murphy & Owen, Vancouver.

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*June 8, 11, 12
*Oct. 2

AND

TOMBILL GOLD MINES LIMITED (*Plaintiff*) ..... } APPELLANT;

ROBERT M. P. HAMILTON, PHILIP D. P. HAMILTON, WILLIAM S. HARGRAFT, THE GENERAL ENGINEERING COMPANY LIMITED AND GECO MINES LIMITED (No Personal Liability) (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Interpretation—Agreement to provide services as "mining consultants"—Extent of obligation—Acquisition of new claims.

G. Co. carried on a business of operating or managing mining properties on behalf of others, advising on questions of mining and metallurgy, and supplying the services of qualified mining engineers for persons who required them. It entered into an agreement with T. Co. (a mining company) to provide "an engineer's services" for a stated number of days in each month, in return for a monthly "retainer". H, a qualified mining engineer employed by G. Co., was the person most frequently consulted by T. Co. While the agreement was still in effect H learned of a discovery made by a prospector who was not in any way connected with T. Co., and went to inspect the claims. Before leaving he had a telephone conversation with the president of T. Co., in which he told him that he was going on a trip for other clients and if possible would "get some claims staked in the same approximate area" for T. Co. He secured an option on the claims and then returned to Toronto, where he and the officers of G. Co. proceeded to raise the money to take up the option. He offered T. Co. an opportunity to participate, but this offer was declined. T. Co. later brought this action, claiming an accounting of the profits made by the defendants out of the transaction, on the ground that all claims and other mining interests or properties that came to H's attention were to be submitted to T. Co.

Held (Kerwin C.J. and Cartwright J. *dissenting*), the action must fail. The written agreement was not ambiguous in its terms, and it did not require G. Co. and its employees to bring to the plaintiff's attention any properties or prospects of which they learned, or impose any of the other obligations suggested by the plaintiff. This was a complete answer to the plaintiff's claim. Nothing in the telephone conversation before H's trip had the effect of imposing such an obligation on the defendants.

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

Per Kerwin C.J. and Cartwright J., *dissenting*: In all the circumstances disclosed by the evidence, and particularly the telephone conversation, the acquisition of these claims by H on behalf of himself and the other defendants constituted a breach of trust, and the plaintiff was therefore entitled to the profits made by them as a result of that breach of trust.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Gale J. (2), dismissing the action.

T. Sheard, Q.C., S. H. Robinson, Q.C., and *W. D. Jordan*, for the plaintiff, appellant.

C. F. H. Carson, Q.C., F. A. Beck, Q.C., and *A. Findlay, Q.C.*, for the defendants, respondents.

THE CHIEF JUSTICE (*dissenting*):—For the reasons given by Roach J.A. the appeal should be allowed except as against the defendant Geco Mines Limited, as to which the action stands dismissed. In my opinion, the plaintiff is entitled to judgment against the other defendants for the amount of profits which they recovered on the transfer to Geco Mines Limited of their title to or interests in all the claims in question in this action. This is not the view of the majority of the members of this Court and it therefore becomes unnecessary to decide whether interest should be allowed by the Senior Master of the Supreme Court of Ontario, to whom I would have referred the matter. The plaintiff would be entitled as against those other defendants to its costs of the action and of the appeals to the Court of Appeal and to this Court, while no costs would be payable to Geco Mines Limited in any Court.

The judgment of Taschereau, Locke and Abbott JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal taken by the preent appellant from the judgment of Gale J. at the trial (2), by which the appellant's action was dismissed. Roach and J. K. Mackay JJ.A. dissented and would have allowed the appeal.

(1) [1955] O.R. 903, [1955] 5 D.L.R. 708.

(2) [1954] O.R. 871, [1955] 1 D.L.R. 101.

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The appellant is a mining company incorporated under the Ontario *Companies Act* in the year 1935 and, during the period with which we are concerned, owned certain mining properties in the province, carried on prospecting and held shares in other mining companies.

The respondent Hargraft is a mining engineer, with some 28 years' experience, employed by the respondent The General Engineering Company Limited, at the city of Toronto. The activities of this company may be generally described as those of operating or supervising the management of mining properties on behalf of others, advising on questions of mining and metallurgy and supplying the services of qualified mining engineers for those requiring the same.

In the year 1946 the appellant company had acquired a number of properties in the neighbourhood of Geraldton, Ontario, and employed Hargraft to supervise and direct the operations on them and the exploration of their various claims. In 1948 the appellant dispensed with his services and he entered the employ of the General Engineering company. Thereafter, by arrangements made by the appellant with that company, Hargraft rendered professional services to the appellant from time to time. The terms of these arrangements do not affect the matter to be decided in this action.

On January 22, 1952, the appellant wrote to the General Engineering company a letter which read as follows:—

> This is to confirm our recent discussion regarding an engineering contract for the year 1952.
>
> Our understanding is that you will be paid a retainer of $200.00 per month. We will be given a monthly credit of an engineer's services of five days per month—any time exceeding five days to be charged at $35.00 per day. It is understood, of course, that travelling expenses are extra.
>
> The above is satisfactory to this Company, and we would ask you to please confirm if this is your understanding.

This letter was written on the appellant's behalf by J. A. Grant, its president, and the principal witness on its behalf at the trial.

On January 26, 1952, the General Engineering company wrote to Mr. Grant acknowledging the letter and confirming the agreement covering our work as Mining Consultants to Tombill Gold Mines Limited for the year 1952.

No correspondence was exchanged between the parties in regard to the year 1953 but, as found by the learned trial judge, the engagement was continued in that year on the same terms, save that the monthly fee of $200 was reduced to $100 and the number of days for which the appellant was to have what was referred to as "a monthly credit of an engineer's services of five days per month" was reduced to $2\frac{1}{2}$ days per month.

While evidence was given of discussions which took place between the parties prior to January 22, 1952, and minutes of certain directors' meetings of the appellant in which the matter was discussed were put in evidence, none of these was admissible, in my opinion, the agreement covering the period in question having been reduced to writing and there being no attempt made to impeach its terms.

It is upon this agreement that the appellant must rely in support of the claim pleaded in para. 12 of the statement of claim in the following terms which, while relating to the earlier employment in the year 1949, are said to apply to the agreement made in respect of the year 1953:—

> Under the terms of its employment the Defendant The General Engineering Company Limited was to make available to the Plaintiff and the said Defendant did make available to the Plaintiff the services of the Defendant Hargraft to supervise the Plaintiff's further exploration of its mining properties and to seek out and develop new mining properties for the Plaintiff particularly in the Port Arthur Mining Division. All mining properties and interests in mining properties and options to purchase mining properties and interests in mining properties available for acquisition which came to the attention of the Defendant Hargraft and which he considered to have merit were to be submitted to the Plaintiff. In 1949 the said Defendant The General Engineering Company Limited was so employed on a retainer basis for a period of six months, and during 1950 was so employed on a per diem basis and from January 1st, 1951 was so employed continuously on an annual retainer basis plus a per diem charge to be made under certain circumstances.

At the time the agreements relating to the years 1952 and 1953 were made, the General Engineering company was actively engaged in carrying on its business, of the nature above referred to, at Toronto. In addition to managing certain mining properties, the services of its mining engineers were available to those requiring professional services of this nature. While this was undeniably so, the appellant takes the attitude that throughout this period and, indeed, continuously since the year 1949, an obligation

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had rested upon the General Engineering company to bring any mining properties or mineral claims, or, presumably, information received by them from prospectors in regard to ground that was not staked, to the attention of the appellant company. A company engaged in the activities carried on by the General Engineering company might, of course, agree to do this for reward but, as a practical matter, it appears to me inconceivable that it would do so for an amount such as was stipulated for in the agreement made in respect of the year 1953 or in any of the preceding years.

The agreement, it may be noted, does not stipulate anything of the kind and this is decisive of the question. The learned trial judge and all of the learned judges of the Court of Appeal have arrived at this conclusion.

During the year 1953, prior to the acquisition of the properties to which this action relates, Hargraft had rendered services to the appellant in regard to a uranium property in Saskatchewan and a nickel prospect in the Emo area of Ontario, and Grant had on very many occasions consulted him about various properties as to which he sought information. These were, apparently, all in respect of properties which had come to Grant's attention from other sources.

Shortly following July 14, 1953, the General Engineering company received a letter dated at Geraldton from a prospector, Roy Barker, which said:—

Dear Mr. Hargraft

We have been prospecting this spring and have found a big break that looks good to us.

We have sent samples to Milton Hersey Wpg. and Bell Haileybury, they say our average samples sent [*sic*], 7% copper and 25% zinc in one sample sent.

We are sending you some samples, if you care to check these assays and are interested let us know. It's a new part for prospecting.

Barker was a part-time prospector who was not connected in any way with the appellant company, though he had on an earlier occasion endeavoured to interest it in a prospect which Hargraft had looked at for the appellant and found worthless.

The General Engineering company was at the time engaged in some mill construction work for the McLeod Cockshutt Mining Company which had an operating mine

adjoining the property of the appellant, and Hargraft had intended going to Geraldton in connection with this work early in August and wrote to Barker on July 20, 1953 suggesting he would meet him then. As a result, however, of a further message from Barker, he decided to go earlier and wired saying that he would be there on July 28.

It is necessary in Ontario, to enable a person to stake a mineral claim, to have a miner's licence issued under the provisions of *The Mining Act*, R.S.O. 1950, c. 236. During the year 1946 when Hargraft, before associating himself with the General Engineering company, had been employed by the appellant, the latter had obtained a mining licence in his name and this had been renewed and the annual fee of $5 paid by the appellant between that time and the time in question. Hargraft had discussed with the two Hamiltons who were principals in the General Engineering company the letter from Barker and they had agreed with him to share the expense of examining the property, the location of which was then unknown to any of them. As doing this might require the staking of other claims, Hargraft telephoned to Grant to get the number of his own mining licence. According to Hargraft, he had earlier that spring spoken to Grant about his licence saying that he preferred to renew it himself, but Grant had said that as it was only a matter of $5 he would renew it with his own. Such licences expire annually on March 31. Hargraft said that when he telephoned to Grant he asked if the latter had renewed the licence and asked for the number, saying that he was going on a trip for other clients and that "if it was possible I would try and get some claims staked in the same approximate area if I could for Tombill". According to Grant, when Hargraft telephoned he had asked for his (Grant's) mining licence and then said he would like to have his own licence and asked for the number of it. Grant said he gave the information requested. He remembered nothing about any further conversation at that time.

Hargraft went to Geraldton and met Barker and two other prospectors who were associated with him in staking the claims and proceeded by air to their location, which proved to be at a place some 80 miles south-east of Geraldton near Manitouwadge Lake. His examination showed Hargraft that the claims might be very valuable and, after

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arranging with prospectors to stake a number of additional claims adjoining those they had previously staked, and after going to the property of the McLeod Cockshutt company and doing the work for that company which he had proposed to do early in August, he returned to Toronto.

Much has been made in the case of the reference made by Hargraft, according to his own account, to the matter of "other clients". Those to whom he referred were, according to him, named Easson and McConnell. According to Hargraft, before he had proceeded to the property, one of the Hamiltons had spoken to Easson while he himself had spoken to McConnell about this property that had been drawn to their attention and said that the latter had said that they could count on him up to $1,000. Neither Easson nor McConnell was called to give evidence and whatever discussion took place with either of these men appears to have amounted to nothing more than suggesting to them that they had what might be an interesting prospect which they might wish later to participate in and that McConnell, at least, agreed to contribute to the extent mentioned.

On his return to Toronto, having obtained an oral option for the claims, he and the Hamiltons proceeded to raise the money to comply with the terms of the option. None of the claims had been staked in the name of Tombill or on its behalf but, on instructions from the two Hamiltons, Hargraft telephoned to Grant on August 6 to offer the appellant an interest of 25 per cent. in the option. Hargraft's account of what took place differs to some extent from that of Grant. According to the former, he told him that he had returned from his trip, that the property was one that warranted further investigation and that a group was being formed to take it over, that it was a base metal property, and gave him the names of two of the prospectors. He said that he told Grant that the General Engineering company was to have the management both of the financing and of the property in the very early stages, to which Grant replied that he would have no part of anything that General Engineering was to manage and hung up the receiver, terminating the conversation. According to Grant, when Hargraft telephoned, he said that they had an option on a group of claims and were offering the Tombill company an opportunity to participate, though he did not say to what

extent. Thereupon, according to Grant, he said they would not be interested, that General Engineering were acting for Tombill as consultants and the property would belong to Tombill. While Hargraft denies that the latter statement was made, the attitude said to have been expressed was at least consistent with the claim now advanced in the action.

Thereafter, the General Engineering company informed the Tombill company that they wished to terminate the arrangement existing between them and that Hargraft's services would be no longer available. Hargraft, the Hamiltons and their associates thereafter formed the respondent Geco Mines Limited and caused the claims, both those staked by Barker and his associates and those staked by them on Hargraft's direction, to be conveyed to that company and, apparently, profited greatly in the transaction.

The claim of the appellant as pleaded, that under the terms of the employment the General Engineering company undertook to seek out and develop mining properties for the plaintiff and that all mining properties and interests in mining properties and options to purchase mining properties and interests in mining properties available for acquisition which came to the attention of the defendant Hargraft and which he considered to have merit were to be submitted, failed. The agreement of January 22, 1952 is not ambiguous and it contains none of these suggested provisions. I have read with care all of the extensive evidence adduced at the trial of this action, apparently in an endeavour to establish that these obligations rested upon the General Engineering company. Even if this evidence as to what occurred between the parties prior to the agreement of January 22, 1952 had been admissible in evidence, and in my opinion none of it was, it would not support the appellant's claim. It is true that in some instances Hargraft suggested areas in which the appellant might conduct prospecting and examined some prospects which came to his attention in the course of work done by him for the appellant, as in the case of the worthless prospect located by Barker, but this cannot vary the terms of the written agreement or support the claims advanced in the terms hereinbefore quoted.

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This being so, I must confess my inability to understand how the discussions between Hargraft and Grant after Barker's letter of July 14, 1953 had been received but before the former left to examine the property, could have imposed upon Hargraft and his employers an obligation which theretofore did not exist. These respondents were under no duty to submit Barker's letter or the prospect referred to to the appellant. They were, as pointed out by the learned Chief Justice of Ontario, at perfect liberty to negotiate for the acquisition of these properties on their own behalf or on behalf of any other client. They had decided to investigate the property on their own behalf and had mentioned the matter to Easson and McConnell, suggesting that they had a prospect in which the latter might be interested, and McConnell had agreed to contribute to the expense of the examination. They had already decided upon this when Hargraft telephoned to Grant and asked for his mining licence and told him that they were going to examine a property for other clients and, if there was an opportunity, would stake some claims for Tombill. This was clearly simply gratuitous on the part of Hargraft and there is no pretence whatever in the evidence given on behalf of the appellant that it had been arranged that the trip which resulted in the staking of further claims and obtaining the option was made on behalf of the appellant. Hargraft and the Hamiltons had intended to offer a participation up to 25 per cent. to Tombill but, whether Grant's account of what occurred when Hargraft telephoned him on August 3 or that given by the latter be accepted, Grant refused to have anything to do with the matter and, according to Hargraft, terminated the conversation before he had an opportunity to offer him the proposed participation.

Hargraft clearly acted improperly when he obtained another mining licence and when the additional claims staked by Barker and his associates under Hargraft's licence were recorded. These matters are proper to be referred to as affecting his credit but, otherwise, have no bearing on the matter to be determined, which is one as to the construction of the written agreement. Whether it was inaccurate for him to say to Grant that he was going to examine the

property on behalf of other clients is, in my opinion, equally irrelevant since he and the Hamiltons were completely free to stake the property on their own behalf if they wished to do so.

In agreement with the opinions expressed by the learned trial judge and the learned Chief Justice of Ontario, I consider that the evidence in this case does not disclose a cause of action and I would dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario (1) affirming, by a majority, a judgment of Gale J. (2), dismissing the appellant's action with costs. Roach and J. K. Mackay JJ.A., dissenting, would have allowed the appeal and awarded the appellant the relief claimed in the statement of claim, except as against the defendant Geco Mines Limited.

The relevant facts are fully set out in the reasons in the Courts below, [1954] O.R. at 871 and [1955] O.R. at 903, and it is not necessary to repeat them.

I am in substantial agreement with the reasons of Roach J.A. but, as I am differing from the learned trial judge and the majority in the Court of Appeal, I propose to state my reasons briefly.

Except on one point, there appears to be little, if any, difference between the findings as to the primary facts made in any of the reasons given in the Courts below. The difference of opinion is as to whether on such facts it should be held that the dealings of the respondents other than Geco Mines Limited with the claims in question in this action fell within the scope of the employment of The General Engineering Company Limited as agent of the appellant and whether the acquisition of those claims was a benefit derived by the respondents from such agency.

During the year 1952, the contractual relationship between the appellant and The General Engineering Company Limited was defined in a letter dated January 22, 1952, from the appellant to The General Engineering Company Limited reading as follows:—

This is to confirm our recent discussion regarding an engineering contract for the year 1952.

(1) [1955] O.R. 903, [1955] 5 D.L.R. 708.

(2) [1954] O.R. 871, [1955] 1 D.L.R. 101.

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> Our understanding is that you will be paid a retainer of $200.00 per month. We will be given a monthly credit of an engineer's services of five days per month—any time exceeding five days to be charged at $35.00 per day. It is understood, of course, that travelling expenses are extra.
>
> The above is satisfactory to this Company, and we would ask you to please confirm if this is your understanding.

This was assented to by The General Engineering Company Limited by a letter of January 26, 1952, reading as follows:—

> We wish to acknowledge and thank you for your letter of January 22nd, which sets forth our understanding of the agreement covering our work as Mining Consultants to Tombill Gold Mines Limited for the year 1952.

It is common ground that this contract was continued in 1953, subject to the variations that the monthly payment was reduced to $100 and the amount of engineer's services to be given was reduced to 2½ days per month, and, so varied, was in force at the time of the events out of which this action arises.

I do not find it necessary to consider the exact nature of the services which the appellant, under the terms of its contract, was entitled to call upon The General Engineering Company Limited to perform as it is clear that such services would include the examination by Hargraft of a specific property or area for the purpose of advising the appellant whether or not it should endeavour to acquire the same. It was not, and could not be, disputed that, if the appellant had heard of Barker's discovery from sources unconnected with the respondents and had asked The General Engineering Company Limited to make an examination and report to it, The General Engineering Company Limited could not have acquired the property for itself.

Assuming the correctness of the view, entertained by all the judges in the Courts below, that the relationship between the parties in July and August 1953 was such that when Hargraft received Barker's letter of July 17, 1953, the respondents were free, if they saw fit, to acquire the claims for themselves, I am respectfully of opinion that the learned trial judge and the majority in the Court of Appeal have failed to give due weight to the arrangement made between Hargraft, representing the respondents, and J. A. Grant, representing the appellant, before the former set out for Geraldton.

The effect of the evidence as to the conversation between the two is accurately summarized by Roach J.A. in the following paragraph in his reasons (1).

> Accepting everything that Hargraft swears he told Grant—I am not concerned at the moment with what he now says he had in his mind and did not tell him—it would certainly convey to Grant the meaning that General Engineering was sending Hargraft into the mining country on behalf of some other client and that while there he, Hargraft, would, if conditions were favourable, stake some claims for Tombill; it was for that purpose that Hargraft required the number of his miner's licence. That was agreeable to Grant. He apparently did not state in terms that he agreed. If any expenses were to be incurred in connection with that staking Tombill was liable for them under its contract, and there was no suggestion by Grant that Tombill did not want any expenses incurred on its behalf. Hargraft knew perfectly well that Grant was agreeing to the proposal on behalf of Tombill.

It is not open to doubt that if, after satisfying the requirements of the respondents' "other clients", Hargraft had spent time making investigations and staking claims for the appellant, The General Engineering Company Limited could have treated the time so spent as a discharge *pro tanto* of its obligation to supply $2\frac{1}{2}$ days of engineer's service during the current month and could have required payment from the appellant at the contract rate for any additional time expended.

It is as to the existence of these "other clients" that the difference of opinion between the learned trial judge and the Court of Appeal in regard to the primary facts arose. The learned trial judge says (2) in dealing with the conversation between Grant and Hargraft:—

> At that time Mr. Hargraft honestly believed, as was the fact, that others beside the defendants were to have an interest in any claims that might be staked or acquired. Two gentelmen by the names of Easson and McConnell had already been approached with respect to the proposition and had agreed to advance $1,000 each toward the acquisition of title to the claims involved. Those two persons, therefore, were the "other clients" whom Mr. Hargraft had in mind when he spoke to Mr. Grant on that occasion although I think it is only fair to say that it was also planned to include the General Engineering company in any allocation of the claims if they appeared to have merit.

(1) [1955] O.R. at 925.

(2) [1954] O.R. at 879.

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The view of the majority in the Court of Appeal is expressed as follows by the learned Chief Justice of Ontario (1):—

> Hargraft made inquiry from the plaintiff as to the number of his licence for the purpose of staking the additional claims already referred to. At that time, he intimated to the president of the plaintiff company that he was going to Geraldton on behalf of other clients to look at certain property and that he might be able to stake some claims in the same area for the plaintiff. In my opinion, his statement to the president of the plaintiff company was untrue. It was true that he was going to Geraldton on the business of another client, but it was not true that he was going in to inspect the properties in question on behalf of other clients. He went to inspect those properties on behalf of himself and his associates.

The analysis of the evidence on this point made by Roach J.A. fully supports the conclusion, at which he also arrived, that there were no "other clients" on whose behalf the investigation of Barker's discovery was made by Hargraft.

There being then no "other clients" there remained the obligation undertaken by the respondents to the appellant, an obligation which prevented the former from acquiring the claims for themselves without being guilty of a breach of the fiduciary duty in relation to this particular property which they had undertaken in the arrangement made between Hargraft and Grant. I agree with Roach J.A. that the efficacy of this arrangement was not lessened by the circumstance that it was proposed by Hargraft to Grant.

We are not called upon to speculate as to the motives which prompted Hargraft to propose the arrangement which the evidence shews was made.

It is clear that once the true facts came to the knowledge of the appellant it promptly took the position that it was beneficially entitled to the claims in question.

For the reasons given by Roach J.A., with which I have already indicated my substantial agreement, and for those given above I would allow the appeal and direct judgment to be entered in the terms proposed in the final paragraph of the reasons of Roach J.A. As the majority of the Court are of opinion that the appeal fails it becomes unnecessary for me to consider whether the order referring the matter to the Master should provide for the charging of interest

(1) [1955] O.R. at 916-7

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against the respondents. I would direct that the appellant recover its costs in this Court from the respondents other than Geco Mines Limited and would make no other order as to costs in this Court.

Appeal dismissed with costs, KERWIN C.J. *and* CARTWRIGHT J. *dissenting.*

Solicitors for the plaintiff, appellant: Holden, Murdoch, Walton, Finlay & Robinson, Toronto.

Solicitors for the defendants, respondents: White, Bristol, Beck & Phipps, Toronto.

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*June 18
*Oct. 2

GEORGE A. LESLIE (*Plaintiff*) .....APPELLANT;

AND

THE CANADIAN PRESS (*Defendant*) ...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeals—Ordering new trial on grounds of misdirection, etc.—Whether substantial wrong or miscarriage occasioned—Burden in this connection —The Judicature Act, R.S.O. 1950, c. 190, s. 28(1).

Where a new trial of a civil action is sought on the ground of misdirection of the jury it is sufficient, under s. 28(1) of the Ontario *Judicature Act,* for the appellant to show that the misdirection may have affected the verdict; he is not required to show that it actually did so. If thereafter the appellate Court is in doubt as to whether it did or not, it is then for the respondent to show that the misdirection did not in fact affect the verdict. *Storry v. C.N.R.,* [1941] 4 D.L.R. 169 at 174, disapproved.

Defamation—Defences—Justification—Fair and accurate report of judicial proceeding—Charge to jury and jury's findings—Whether substantial wrong or miscarriage occasioned—The Judicature Act, R.S.O. 1950, c. 190, s. 28(1).

An action for libel was based upon the publication by the defendant of a newspaper account of the proceedings at a trial. The defendant pleaded both justification and that the words complained of constituted a fair and accurate report of proceedings in court. The jury found that the words were a report of judicial proceedings, that they were substantially true, but that they were not a fair and accurate report, and that they were "harmful without intent". On these findings the trial judge dismissed the action.

*PRESENT: Kerwin C.J. and Rand, Fauteux, Abbott and Nolan JJ.

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Held, the judgment should be affirmed.

Per Kerwin C.J. and Fauteux, Abbott and Nolan JJ.: The trial judge's directions to the jury did not make clear the distinction between the question whether the statements contained in the article were true and the question whether the article was a fair and accurate report of a judicial proceeding. But the jury by their answers had in fact distinguished between these questions, and the defendant had clearly shown that no substantial wrong or miscarriage had resulted from the misdirection; the appeal should therefore be dismissed under s. 28(1) of the Ontario *Judicature Act*.

Per Rand J.: Although the record of the previous trial, to which the report related, did not of itself prove the truth of the matters stated, and could not be resorted to for the purposes of the plea of justification, the plaintiff's own evidence supplied any inadequacy there might otherwise have been in this respect. There was therefore evidence to support the jury's finding on this plea, and that finding was conclusive.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario, affirming the judgment of LeBel J., after a trial with a jury, dismissing the action.

G. A. Leslie, plaintiff, appellant, in person.

P. B. C. Pepper, for the defendant, respondent.

The judgment of Kerwin C.J. and Fauteux, Abbott and Nolan JJ. was delivered by

THE CHIEF JUSTICE:—This is an action for damages for an alleged libel contained in a dispatch sent out by the defendant, The Canadian Press, and appearing in a newspaper. On the first trial the case was withdrawn from the jury, but the Court of Appeal for Ontario directed a new trial whereat the presiding judge, after having received answers to questions put to the jury, dismissed the action. The Court of Appeal affirmed that decision and the plaintiff now appeals to this Court.

The Canadian Press accepts responsibility for the article in question which was printed in a newspaper published by one of its subscribing members. That article reads:—

> Toronto, June 12th,—(C.P.) George A. Leslie, former house officer at the Royal York Hotel, used to take lengthy trips in a certain elevator, "sometimes for 15 minutes, sometimes for a whole hour."
>
> Catherine Ross, the elevator operator, today told a court hearing a slander suit in which Leslie is plaintiff that Leslie said he loved her and wanted her to go out with him.
>
> Leslie is suing L. C. Parkinson, hotel personnel manager, and the Canadian Pacific Railway, owner of the hotel, for alleged slander by Parkinson. Parkinson denied the charge.

Miss Ross said the manager told Leslie to stay away from her and not talk to her, but Leslie persisted.

Miss Ross, who said that Leslie was on duty during the times he rode in her elevator, used to ask her during the elevator trips to go out with him.

"He didn't like me snubbing him", she said.

The questions put to the jury on the second trial and their answers are as follows:—

1. Do you find the words complained of (including those in the first paragraph) a report on judicial proceedings? Answer "yes" or "no". Answer: Yes.
2. Do you find the words complained of substantially true or false? Answer either "true" or "false". Answer: True.
3. If your answer to Question No. 2 is "false", do you find the words complained of defamatory of the plaintiff? Answer "yes" or "no". Answer:
4. If your answer to Question No. 3 is "yes", do you find the words complained of are substantially a fair and accurate report of the court proceedings in question? Answer "yes" or "no". Answer: No.
5. Do you find the defendant, in writing this report, was actuated by malice? Answer "yes" or "no". Answer: Harmful without intent.

The directions of the trial judge to the jury were not clear as to distinguishing between the questions whether the statements contained in the article were true and whether the latter was a fair and accurate report of the proceedings of one day at the trial of the earlier action for slander, but the provisions of subs. (1) of s. 28 of *The Judicature Act*, R.S.O. 1950, c. 190, require consideration. That subsection enacts:—

28. (1) A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to the jury, or by reason of any omission or irregularity in the course of the trial, unless some substantial wrong or miscarriage has been thereby occasioned.

The terms of a similar provision in England were before the House of Lords in *Bray v. Ford* (1), and in several cases in Ontario, including the most recent one to which we were referred, *Arland and Arland v. Taylor* (2). It was there

(1) [1896] A.C. 44.

(2) [1955] O.R. 131, [1955] 3 D.L.R. 358.

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pointed out by Laidlaw J.A., speaking on behalf of the Court, that in *Storry v. C.N.R.* (1), Chief Justice Robertson had said at p. 174:—

> In a criminal case . . . the appeal . . . is to be allowed unless the Court is "of opinion that no substantial wrong or miscarriage of justice has actually occurred" (s. 1014 (2) of the *Criminal Code*). In a civil case the provision is that a new trial shall not be granted on the ground of misdirection "unless some substantial wrong or miscarriage has been thereby occasioned" . . . The burden is on the respondent in the one case of showing that there was no substantial wrong or miscarriage of justice, while in the other case the burden is on the appellant of showing that there was some substantial wrong or miscarriage of justice.

As Laidlaw J.A. points out, this opinion is in direct conflict with that expressed by Meredith C.J.C.P. in *Gage v. Reid* (2), which was apparently not referred to in the *Storry* case, and it is also in conflict with the opinions in *Anthony v. Halstead* (3), and *White v. Barnes* (4). Laidlaw J.A. had also in *Temple v. Ottawa Drug Company Limited et al.* (5), expressed the view that "an appellant who seeks a new trial on the ground of misdirection must at least establish a doubt in the mind of the Court as to whether the misdirection occasioned a substantial wrong or miscarriage". There, and in the *Arland* case, he found it unnecessary to determine whether the onus rested on the appellant to show that such a result actually occurred. In *Bray v. Ford* (6) the House of Lords had not set forth any general rule. Bearing in mind the right of the plaintiff in such an action as this to have the issues passed upon by the jury, I am of opinion that the preferable rule and the one that should be adopted is that it is sufficient for the complaining party to show that a misdirection may have affected a verdict and not that it actually did so; and that, if an appellate Court is in doubt as to whether it did or not, it is then for the opposite party to show that the misdirection did not in fact affect the verdict.

(1) [1941] 4 D.L.R. 169, 53 C.R.T.C. 71.
(2) (1917), 38 O.L.R. 514, 34 D.L.R. 46.
(3) (1877), 37 L.T. 433.
(4) [1914] W.N. 74.
(5) [1946] O.W.N. 295.
(6) [1896] A.C. 44.

In the present case the defences set up by the respondent were: (1) That the statements were true; (2) that they were not defamatory; (3) that they constituted a fair and accurate report of judicial proceedings and were therefore privileged. Counsel for the defendant addressed the jury on all these defences and by their answers to questions 1 and 4 the jury were in fact distinguishing between the report of the slander action in the article complained of and the issue of the truth or falsity of the statements contained in it. I have not overlooked the fact that the efforts of counsel for the defendant had not succeeded in having the trial judge clarify the position, or the circumstance that the plaintiff, although having considerable experience in litigation, is not a lawyer and has acted for himself throughout these proceedings. Upon consideration of the entire record I am clearly of the opinion that the defendant has shown that no substantial wrong or miscarriage has been occasioned.

The appeal should be dismissed with costs.

RAND J.:—This is an action for libel. It is brought on what purports to be a news report of evidence given at a trial in which the present plaintiff, the appellant, was suing one Parkinson and the Canadian Pacific Railway Company for slander.

Three defences are pleaded: justification, a fair and accurate report of a judicial proceeding, and that the words are not defamatory. The finding of the jury on the first ground was against the plaintiff; no answer was given to the third; and the second was found against the respondent. The determining question is whether the first finding was vitiated by the language of the charge or by a failure in proof.

That there was some confusion in the charge in relation to the first two grounds is conceded. The attention of the trial judge was drawn to it by Mr. Pepper but the correction exhibited the same confounding of a fair and accurate account of what had taken place with the truth of the facts

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Rand J.

to which the language related. In view of the action of the jury on the second question, the precaution to rely on the first plea appears to have been well advised.

The report, in the light of the jury's action, was a selection of items disclosed in the course of the trial and considered newsworthy through what, apparently, was thought to be their "spiciness", and for the purposes of the second plea the record of the previous trial was put in evidence.

At the same time the main witness in the former case was called. She agreed that she had then been asked various questions and had given the answers which had previously been read in court, but she was not asked formally if the answers were true. In addition, she testified to certain of the primary facts. The ground was taken before us that the previous record of its own force could not be resorted to for the purposes of the plea of justification and that the respondent must rely on the testimony given by the witness alone.

On this view, which in the circumstances I consider to be sound, was there a sufficient foundation for the finding on that plea? On the testimony of the witness mentioned which was limited to what was thought to be the main item I should have held it insufficient.

But any inadequacy in this respect was supplied by the appellant himself. He admitted having made a remark to the effect of the significant item reported. That remark which gives colour to the course of conduct charged against him—of wasting his time in one of the hotel elevators—can be interpreted in two ways: as evidence either of a generous interest in the young woman operator—an interest in which the appellant's wife was said to have participated—or as a personal regard which led him to seek her company.

Which interpretation was to be given it was a question for the jury, to be found on a total of impressions and effects that are denied to a Court in appeal. The jury, it is true, is not infallible: it may have come to the wrong conclusion. The truth was hidden within the mind of the appellant and it may be that only an imaginative discrimination could appreciate the motivation for which he so strongly contended. But to the possible frailty of judgment of the jurors all such controversies are subject.

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Rand J.

The apparent inability of the appellant to realize the conclusive effect of the finding of justification is attributable to the fact that this selective report had in it nothing of significance or of serious interest to the reading public, and it was quite unnecessarily reported only because of the character of its matter. But that inability, however understandable, cannot affect the consequences of the verdict.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, respondent: John J. Robinette, Toronto.

THE BOARD OF HEALTH FOR THE TOWNSHIP OF SALTFLEET (*Respondent*) ..... APPELLANT;

1956

*June 13

*Oct. 2

AND

GEORGE KNAPMAN (*Applicant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Public health—Powers, duties and responsibilities of local boards of health—Requiring abandonment of unfit premises—"Due examination" —Duty to act judicially—Hearing interested persons—The Public Health Act, R.S.O. 1950, c. 306, sched. B, s. 7.

Certiorari—Effect of statutory restriction—Ineffectiveness of privative section where natural justice denied by inferior tribunal—The Public Health Act, R.S.O. 1950, c. 306, s. 143.

The power of a local board of health, under s. 7 of the statutory by-law under the Ontario *Public Health Act*, to order premises vacated, and if necessary to eject the occupants forcibly, is predicated upon the board's being "satisfied upon due examination" that the premises are either (i) unfit for the purpose of a dwelling or (ii) a nuisance, or (iii) in some way dangerous or injurious to the health of the occupants or of the public. In deciding whether or not one of these conditions exist, and to answer the allegation. If the board, instead of doing of the premises in question, or other persons whose rights may be affected, an opportunity to know which of the causes is alleged to exist, and to answer the allegation. If the board, instead of doing this, refuses to listen to those whose rights may be vitally affected, its action may be reviewed by the Court on *certiorari*, notwithstanding s. 143 of the Act.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Gale J. (2).

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

(1) [1955] O.W.N. 615, [1955] 3 D.L.R. 248.

(2) [1954] O.R. 360, [1954] 3 D.L.R. 760.

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BD. OF HEALTH, SALTFLEET TP. v. KNAPMAN

H. F. Parkinson, Q.C., and *J. R. McCallum*, for the appellant (respondent in the Court below).

C. L. Dubin, Q.C., and *S. Paikin*, for the respondent (applicant in the Court below).

THE CHIEF JUSTICE:—For the reasons given by Gale J. (2) this appeal should be dismissed with costs.

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

CARTWRIGHT J.:—This is an appeal brought pursuant to special leave granted by this Court, from a judgment of the Court of Appeal for Ontario (1) affirming a judgment of Gale J. (2) ordering that certain resolutions passed by the appellant be removed into the Supreme Court of Ontario by way of *certiorari*.

The relevant facts are fully set out in the reasons for judgment of Gale J., with which I am in substantial agreement, and a brief summary of such facts will be sufficient for the purpose of indicating the reasons for the conclusion at which I have arrived.

The resolutions in question were passed at a meeting held at 7 p.m. on July 29, 1953; they provided (i) that written notice be delivered to the occupants of a number of dwellings owned by the respondent requiring them to vacate the same within 14 days, and (ii) that any occupants who had not vacated the buildings at the expiration of the time stated in the notice should be forcibly evicted.

The proceedings before the appellant board were initiated by the medical officer of health and the sanitary inspector for the Township of Saltfleet who had inspected some of the buildings on the day on which the resolutions were passed. The respondent and several of the occupants had learned that the meeting had been convened to consider action such as was taken and attended to ascertain the nature of the complaints and to make submissions in answer to any adverse allegations as to the condition of the buildings. They were informed by members of the appellant board that the meeting was private and were denied any hearing.

(1) [1955] O.W.N. 615, [1955] 3 D.L.R. 248.

(2) [1954] O.R. 360, [1954] 3 D.L.R. 760.

It was argued for the appellant that its action was the exercise of an administrative authority and not of a judicial or quasi-judicial function.

The appellant in passing the resolutions in question purported to act under s. 7 of the statutory by-law set out in sched. B to *The Public Health Act*, R.S.O. 1950, c. 306, which reads as follows:—

> 7. If the local board is satisfied upon due examination that a cellar, room, tenement or building within the municipality, occupied as a dwelling place, has become by reason of the number of occupants, want of cleanliness, the existence therein of a communicable disease, or other cause, unfit for such purpose, or that it has become a nuisance, or in any way dangerous or injurious to the health of the occupants, or of the public, the board may give notice in writing to such occupants, or any of them, requiring the premises to be put in proper sanitary condition, or requiring the occupants to quit the premises within such time as the board may deem reasonable. If the persons so notified, or any of them, neglect or refuse to comply with the terms of the notice, every person so offending shall be liable to the penalties mentioned in section 35 of this by-law and the board may cause the premises to be properly cleansed at the expense of the owners or occupants or may remove the occupants forcibly and close up the premises, and the same shall not again be occupied as a dwelling place until put into proper sanitary condition.

It will be observed that it is a condition precedent to the exercise by the board of the power to require the occupants of a building to quit it and to remove them by force if they fail to do so that it shall be satisfied upon due examination that such building has become either (i) unfit for the purpose of a dwelling, or (ii) a nuisance, or (iii) in some way dangerous or injurious to the health of the occupants or of the public. I agree with Gale J. that in deciding whether or not such condition exists a duty to act judicially rests upon the board. It would, I think, require the plainest words to enable us to impute to the Legislature the intention to confer upon the local board the power to forcibly eject the occupants of a building for certain specified causes without giving such occupants an opportunity to know which of such causes was alleged to exist or to make answer to the allegation; and I find no such words in the statute or the schedule.

Once it has been decided that the board was under a duty to act judicially it is clear, for the reasons given by Gale J., that, the appellant having refused to listen to those whose

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rights would be vitally affected by the orders it proposed to make, s. 143 of *The Public Health Act* does not deprive the Court of jurisdiction to proceed by way of *certiorari*.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the applicant, respondent: White, Paikin & Robson, Hamilton.

Solicitors for the respondent, appellant: Robinson, McCallum & McKerracher, Hamilton.

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*May 21, 22
*Oct. 2

CHARLES JAMES MOORE AND JANET MOORE (*Defendants*) ..... } APPELLANTS;

AND

THE ROYAL TRUST COMPANY (*Plaintiff*) ..... } RESPONDENT;

AND

GORDON B. MOORE, FRANCES MOORE, CHARLES GEORGE MOORE AND THE UNASCERTAINED ISSUE OF GEORGE MOORE (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills—Construction—Direction to trustees to permit beneficiaries to have "use and enjoyment" of property "as long as either of them shall occupy the same".

A testator, by clause 6 of his will, directed his trustees to permit his son A and his wife "as long as either of them shall occupy the same to have the use and enjoyment of" a named property. By clause 7 he provided in identical terms for another son, B, and his wife, in respect of a different property. At the time the will was made, both A and B were in occupation of the properties designated for their benefit, but before the testator's death B and his wife had left the property referred to in clause 7. By clause 9 the testator, "subject as aforesaid", devised and bequeathed all his property to his trustees on trust to convert and hold the proceeds for his children, their wives and issue.

Held, the effect of clauses 6 and 7 was to give to the beneficiaries named a licence to occupy the properties mentioned personally, whenever and so long as they desired, but no other right to the rents or profits of the properties. B and his wife, although they were not in occupation at the time of the testator's death, had a right at any time in the future, if they desired to do so, to occupy the property, and to have the use and enjoyment of it as directed by clause 7.

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*PRESENT: Taschereau, Rand, Locke, Cartwright and Nolan JJ.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment at trial (2). Appeal allowed.

D. A. Freeman, for the defendants, appellants.

T. G. Norris, Q.C., for Gordon B. Moore *et al.,* defendants, respondents.

R. D. Plommer, for The Royal Trust Company, plaintiff, respondent.

T. C. Marshall, for Frances Moore, defendant, respondent.

The judgment of Taschereau, Rand, Cartwright and Nolan JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) allowing an appeal from a judgment of Macfarlane J. (2) construing the will of the late George Moore, hereinafter referred to as "the testator".

The testator died on August 18, 1950, leaving a will dated February 8, 1944, probate of which was granted to the respondent The Royal Trust Company, the other persons named as executors having renounced their right to probate.

By clause 9 of the will, "subject as aforesaid", that is, subject to the provisions made in the preceding paragraphs of the will, the testator devises and bequeaths all his real and personal property to his trustees upon trust to convert and hold the proceeds for his children, their wives and issue in shares and subject to provisions the terms of which are not relevant to the questions before us.

Clauses 6 and 7 of the will are as follows:—

6. I DIRECT my Trustees to permit my son George Moore Junior and his wife Frances as long as either of them shall occupy the same to have the use and enjoyment of my property known as 3008 Thirty-sixth Avenue West in the said City of Vancouver otherwise known and described as Lot Twenty-five Block Thirty-one District Lot Two Thousand and Twenty-seven free of any duty rent or taxes and I DIRECT that my Trustees shall out of my Trust Fund pay the cost of maintaining any building thereon and the insurance of the same against damage by fire.

7. I DIRECT my Trustees to permit my son Charles James Moore and his wife Janet as long as either of them shall occupy the same to have the use and enjoyment of my property in the Municipality of Penticton British Columbia which is known as Lots Twenty-five and Twenty-six

(1) 16 W.W.R. 204, [1955] 4 D.L.R. 313.

(2) 13 W.W.R. 113, [1954] 3 D.L.R. 407.

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Cartwright J.

Block Twenty Map Nine Hundred and Thirty-seven free of any duty rent or taxes and I DIRECT that my trustees shall out of my Trust Fund pay the cost of maintaining any building thereon and the insurance of the same against damage by fire.

A number of questions were raised in the originating summons and an amendment made thereto by consent but in the Court of Appeal it was agreed that that Court was called upon to decide only the three following questions:—

(1) Was the learned Judge right in holding that Clauses 6 and 7 of the Will were entirely void for uncertainty?

(2) If not, is the restriction imposed by the words "as long as either of them shall occupy the same" void for uncertainty?

(3) If the learned Judge was wrong in holding Clauses 6 and 7 entirely void for uncertainty, and if the restriction imposed by the words "as long as either of them shall occupy the same" is not void for uncertainty, what is the meaning and effect of Clauses 6 and 7 of the Will?

It will be observed that the only difference between the wording of clause 6 and that of clause 7 is as to the names of the son and his wife and the description of the property; and, for purposes of construction, it will be sufficient to consider the wording of clause 6.

Macfarlane J. was of opinion that the words in this clause "as long as either of them shall occupy the same" constituted a determinable limitation and not a condition subsequent, that they were void for uncertainty and that, consequently, the gift failed. O'Halloran J.A. who delivered the unanimous judgment of the Court of Appeal was of the view that the words quoted were certain and unambiguous. The meaning he ascribes to them appears in clause (*a*) of the answer to question 3, set out above, as contained in the formal judgment of the Court of Appeal; the complete answer to question 3 being as follows:—

(*a*) Under clauses 6 and 7 of the said Will the beneficiaries respectively named therein are entitled to the use and enjoyment of the premises respectively described in the said clauses as long as they continue to live there or do not abandon them as a home and the direction in favour of such beneficiaries shall terminate if, as and when they cease to live there in the ordinary sense that they abandon their occupancy or possession of the premises as a home;

(*b*) Insofar as clause 6 is concerned, Frances Moore, widow of George Moore Junior is entitled to the use of the premises described in the said clause as long as she shall continue to live there or not abandon such premises as a home; such occupancy is free of any duty or rent and it is the duty of the Trustee out of the Trust Fund created under the said Will to pay the taxes on the said premises, the cost of maintaining the building thereon and the insurance of the same against fire.

(*c*) Insofar as clause 7 is concerned, Charles James Moore and Janet Moore do not retain any right to the use and enjoyment of the premises described in the said clause, and the said premises form part of the estate of the deceased George Moore in the same manner as if the said clause had not been written into the Will;

At the date of the will, George Moore Junior and his wife Frances were residing in the property described in clause 6 of the will and continued to do so until the death of the former on February 4, 1955 and Frances Moore has ever since continued to reside there.

At the date of the will, Charles James Moore and his wife Janet were residing in the property described in clause 7 of the will but a few years before the death of the testator they moved to Westview, British Columbia and the property described in clause 7 was let to a tenant. This was the situation at the death of the testator and since then the trustees have continued to let the property and have received the rentals. Up to the time of his death the testator allowed Charles James Moore and his wife to retain the rental income from the property, but I do not regard that fact as relevant to the question of the construction of the will.

Charles James Moore and Janet Moore have appealed from the judgment of the Court of Appeal and ask a declaration that they are jointly entitled to the property described in clause 7 as tenants for life. The respondent Frances Moore supports the judgment of the Court of Appeal. The other respondents, for whom Mr. Norris appears, support the judgment of the Court of Appeal; alternatively, they ask that the judgment of Macfarlane J. be restored.

After examining all the cases referred to by counsel in argument and in the factums, some of which are not easy to reconcile with each other, and returning to the words of the will before us I have concluded that the intention of the testator according to the true construction of the will was not to give to George Moore Junior and Frances his wife an estate for life in the property described in clause 6, determinable on their ceasing to occupy such property, or indeed any estate therein, but merely a licence to occupy such property personally, such occupation to be by both or by one of them. From the death of the testator the legal estate in the property in question was in the trustees on

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trusts for sale, with a power of postponement (under clause 12 of the will), but subject to the obligation to permit George and Frances, or either of them, personally to occupy the property rent free and with the other benefits set out in clause 6. I do not think that the words "as long as", as used in clause 6, necessarily require continuous occupation by one or other of George and Frances as a condition of their being entitled to the permission given by the clause, but rather that the testator has used these words as the equivalent of "while" or "during the time that" or "during such times as". Bearing in mind the limited assistance that is to be derived from the construction placed upon similar words in another instrument, I am to some extent fortified in this view by the decision of R. M. Meredith J., affirmed by W. R. Meredith C.J. and MacMahon J. in *Wilkinson v. Wilson* (1), in which words conferring benefits on the plaintiff "so long as he shall remain a resident on said lands" were construed as not requiring continuous residence but as entitling the plaintiff to the benefits during such times as he resided on the lands; and in which it was held that the plaintiff's absence during several years did not bring about a forfeiture of his rights.

If I am right in this view of the meaning of the clause, it follows that during such times as either George or Frances is in personal occupation of the property described in clause 6 they are entitled to use and enjoy it free of rent or of any obligation to pay taxes, insurance premiums or costs of maintenance, but that they are not entitled to let the property or to claim any rents or profits that may be derived from it when neither of them is in personal occupation. Any rents or profits received during such periods would go to the trustees on the trusts declared for the residue of the estate. A similar construction should be placed on clause 7 of the will.

It follows from what I have said above that, in my opinion, Frances Moore is entitled to continue to reside in the property described in clause 6 and that should she cease to reside there in the future she could none the less return to the property and claim the benefits of such clause.

(1) (1894), 26 O.R. 213.

It follows also that Charles and Janet Moore have the right to call upon the trustees to permit them to occupy the property described in clause 7 and are entitled while either of them is residing there to the benefits of such clause.

It is true that on this construction the sale of the properties described in clauses 6 and 7 cannot take place during the lifetime of the beneficiaries unless they consent, and that practical difficulties may be encountered in regard to the trustees renting the properties during such times as the beneficiaries do not wish to avail themselves of the permission to occupy; but it will be to the advantage of such beneficiaries, inasmuch as they share in the income from the residue, to facilitate the renting of the properties during any substantial periods of absence and it is to be hoped that the suggested difficulties will not prove insurmountable.

I would allow the appeal to the extent of varying the formal order of the Court of Appeal so that the answer to question 3 therein set out shall read as follows:—

(*a*) Under clauses 6 and 7 of the said Will the beneficiaries respectively named therein are entitled to the use and enjoyment of the premises respectively described in the said clauses during such time or times as they or either of them occupy such premises personally, but are not otherwise entitled to the rents or profits thereof.

(*b*) In so far as clause 7 is concerned, Charles James Moore and Janet Moore or either of them are entitled to occupy the premises described in the said clause in the manner set out in clause (*a*) of this answer, upon giving the trustees reasonable notice of their desire so to do.

The order as to costs made by the Court of Appeal should stand and the costs of all parties in this Court should be paid out of the estate, those of the respondents The Royal Trust Company, Gordon B. Moore and the unascertained class represented by Mr. Norris as between solicitor and client.

LOCKE J.:—Some assistance in construing clauses 6 and 7 of the will is to be obtained by a consideration of its other provisions and of the circumstances existing at the time of the death of the testator in August 1950.

After the clauses which have occasioned the present dispute, the testator bequeathed his entire estate to the trustees upon trust to invest the capital and to divide what was referred to as the trust fund into three equal shares. As to one of these, the trustees were directed to hold the same upon trust during the life of the testator's son Gordon

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Moore to pay him from time to time or to employ for his maintenance and advantage such part of the capital and income thereof as they, in their uncontrolled discretion, should think fit. The reason for this provision appears to have been that Gordon Moore was apparently regarded by his father as incapable of wisely handling his own affairs and it was shown that, as of the date of the application made by the Royal Trust Company, he was mentally infirm and incapable of doing so or understanding the nature of the proceedings.

The other two shares of the trust fund were directed to be held upon similar trusts, namely, to pay one-half of the income to the sons George and Charles James and one-half to their respective wives and, upon the death of either husband or wife, to pay all of the income to the survivor in the case of the sons during their lifetime or, should the survivor be the wife, until her death or remarriage. Upon the death of the sons and, should their wives survive them, upon the death or remarriage of either of them, the shares were to be held as to both capital and income in trust for their children.

A further provision of the will enabled the trustees in their uncontrolled discretion to raise from time to time any part of the capital of the shares held in trust for the sons George and Charles and to employ it for the benefit, maintenance or advantage of the son, his wife or their children.

The trustees named in the will, in addition to the trust company, were Mr. J. R. Kerr and Mr. R. J. Filberg, personal friends of the testator in whose judgment he had confidence.

By s. 22 of the *Wills Act*, R.S.B.C. 1948, c. 365, every will is to be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will. As the material shows, the testator had purchased the house in Penticton as a place of residence for Charles James Moore and his family in 1936 and they resided there until April 1948, when the son decided to change his occupation and endeavour to obtain employment elsewhere At that time he and his family moved to Westview, British Columbia. Charles James Moore says that he discussed the matter at that time with his father and rented the Pentic-

ton house with his father's approval and consent on April 8, 1948, for a term of two years. A short memorandum of lease dated April 8, 1948, signed by the son and by the testator was produced with the material filed on the application. Charles James Moore thereafter moved to White Rock, British Columbia, where he has since lived. Between the date the Penticton house was leased and the death of the testator, the son received the rent by his consent.

Affidavits were filed by Charles James Moore and by his wife stating that they were desirous of returning to reside in Penticton but were restrained from doing so in the meantime by consideration for their daughter who was in a state of ill health.

In the case of the son George Moore and his wife Frances, they appear to have lived continuously in the house on 36th Avenue in Vancouver since a period some years prior to the death of the testator, and upon the death of her husband Frances Moore has continued to live there.

In *Perrin et al. v. Morgan et al.* (1), Viscount Simon L.C. said that the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended, and that the question is not what the testator meant to do when he made his will but what the written words he used mean in the particular case. As required by the section of the *Wills Act* above referred to, the will is to be construed as if it had been made immediately before the death of George Moore in August 1950.

In my opinion, in considering the will as a whole, it is apparent that the desire of the testator was to ensure a competence to his sons, their wives and their children, and not to permit the sons George or Charles to obtain control of any part of the capital unless, in the good judgment of the three trustees, this would be advisable in the interests of themselves and their families. It was, I think, part of his plan that both George and Charles and their families should have a home provided by his estate and maintained at its expense.

(1) [1943] A.C. 399 at 406, [1943] 1 All E.R. 187.

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Locke J.

Immediately prior to the death of the testator, the situation in regard to the Penticton house was that it had been rented and Charles James Moore was living elsewhere. The son had vacated it under the above-mentioned circumstances. The language of clause 7 permitting Charles James Moore and his wife to have the use and enjoyment of the Penticton property "as long as either of them shall occupy the same" obviously did not mean as long as they continued to occupy it since neither was in possession, to the knowledge of the testator. The licence, as I think it is, was thus clearly to be exercised by them thereafter and, in my opinion, has not been affected by the fact that at least from 1950 to the time of the application in 1954 they continued to live at White Rock and may still be exercised by them.

As to clause 6, the rights of Frances Moore are unaffected and continue for the period defined by the will.

I have considered with care the judgment of the learned trial judge, Macfarlane J., and the authorities relied upon by him for his conclusion. With great respect, my consideration of the evidence leads me to the conclusion that the intention of the testator in this case is ascertainable by consideration of the terms of the will and the circumstances permissible to be considered in construing it.

I agree with the answers to the questions proposed by my brother Cartwright and would allow the appeal to the extent indicated by him. I also agree with his proposed order as to costs.

Appeal allowed with costs; order of Court below varied.

Solicitors for the appellants: Freeman, Freeman, Silver & Koffman, Vancouver.

Solicitors for Gordon B. Moore et al., defendants, respondents: Norris & Cumming, Vancouver.

Solicitors for The Royal Trust Company, plaintiff, respondent: Douglas, Symes & Brissenden, Vancouver.

Solicitors for Frances Moore, defendant, respondent: Taylor, Marshall & Munro, Vancouver.

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*Feb. 10, 13, 14
*Oct. 2

IN THE MATTER OF THE ESTATE OF STELLA MAUD WATERS;

COLONEL DONALD MACKENZIE WATERS (in his personal capacity) .....APPELLANT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION, COLONEL DONALD MACKENZIE WATERS and MARJORY T. O'FLYNN, Executors of the will of the deceased; MARJORY T. O'FLYNN (in her personal capacity); LIEUTENANT-COMMANDER DONALD MACKENZIE WATERS; JOHN GAVIN WATERS; ST. ANDREWS PRESBYTERIAN CHURCH, BELLEVILLE; AND THE OFFICIAL GUARDIAN .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Distribution of accumulated profits in form of stock dividend —Subsequent redemption of shares so issued—Effect—Whether shares, and proceeds of redeemed shares, income or capital in hands of trustee-shareholder—The Income Tax Act, 1948 (Can.), c. 52, s. 95A, enacted by 1950, c. 40, s. 32—The Companies Act, R.S.O. 1950, c. 59, ss. 78, 96.

Trusts and trustees—Trust assets including shares in incorporated company —Issue of stock dividend by company as means of distributing accumulated profits—Redemption of shares—Whether shares, and proceeds of redeemed shares, income or capital in hands of trustees—The Income Tax Act, 1948 (Can.), c. 52, s. 95A, enacted by 1950, c. 40, s. 32.

A company incorporated under the Ontario *Companies Act* obtained supplementary letters patent authorizing the creation of 500,000 new preference shares, redeemable by the company on notice to the shareholders, and, on redemption, to be cancelled and not reissued. These supplementary letters were obtained pursuant to a decision by the company to avail itself of s. 95A of the *Income Tax Act*, 1948, as enacted in 1950, as a means of making available to the shareholders a large undistributed surplus. After payment of the tax provided for in that section the company, pursuant to by-laws, issued 240,000 preference shares "as fully paid and non-assessable", and in the following two years about one-third of these shares were redeemed, at various times. A block of shares in the company was held by the trustees of an estate, and 64,000 of the new shares were issued to the trustees as a stock dividend; of these about 18,000 were subsequently redeemed.

Held: The trustees received the shares so issued, and the proceeds of those that were redeemed, as capital of the estate, for the benefit of the remaindermen, and not as income for the benefit of the life tenants.

*PRESENT: Kerwin C.J. and Rand, Kellock, Locke and Cartwright JJ.

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Once shares were issued as paid-up, the portion of the undistributed profits appropriated for the purpose of paying them up immediately became capitalized, and the shares were themselves an addition to the capital stock of the company.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of McLennan J. (2) on a motion for the opinion, advice and direction of the Court. Appeal dismissed.

R. N. Starr, Q.C., and *G. R. Colville*, for the appellant.

R. H. Sankey, Q.C., for Lt.-Cmdr. D. M. Waters, respondent.

G. F. Henderson, Q.C., for Marjory T. O'Flynn and St. Andrews Presbyterian Church, Belleville, respondents.

W. M. Montgomery, Q.C., for the executors and trustees, respondents.

F. T. Watson, Q.C., for the Official Guardian, representing infants and unborn and unascertained persons, respondent.

The judgment of Kerwin C.J. and Kellock, Locke and Cartwright JJ. was delivered by

KELLOCK J.:—The company, the proceeds of the redemption of whose preferred shares are in question in these proceedings, was incorporated as a private company under the Ontario *Companies Act* by letters patent dated May 2, 1893, with an authorized capital of 30,000 shares without nominal or par value, all of which were issued as fully paid. By supplementary letters patent, dated December 12, 1950, the authorized capital of the company was increased by the creation of 500,000 preference shares having a par value of $1 each, redeemable by the company on ten days' notice to the holders, such shares on redemption to be cancelled and not reissued.

On October 19, 1950, it was reported to the annual meeting of shareholders that the directors considered that the company should elect, under s. 95A of the *Income Tax Act*, 1948 (Can.), c. 52, enacted in 1950 by 11-12 Geo. VI, c. 40, s. 32, to pay a tax of 15 per cent. on its undistributed income as at April 30, 1949. The directors advised that after payment of the tax, $240,000 of the remaining profits should

(1) [1955] O.R. 268, [1955] C.T.C. 130, 55 D.T.C. 1052, [1955] 2 D.L.R. 176.

(2) [1954] O.W.N. 649, [1955] C.T.C. 126, [1954] 4 D.L.R. 852.

"be placed in the hands of the Shareholders" by creating preference shares to the value of $500,000 and issuing $240,000 of such shares by way of a stock dividend. It was also stated that the company "could" then redeem the preference shares "from time to time" and that the amount of the "redemption price" would not be taxable in the hands of the shareholders. The meeting duly resolved to follow this procedure.

On the following November 28, a by-law was passed authorizing the application for supplementary letters patent for the above increase in the authorized capital. These letters, as already mentioned, were obtained after the by-law had been confirmed by the shareholders. On November 28, 1950 also, another by-law was passed by the directors authorizing the issue of fully-paid shares for the amount of any dividends which might be declared.

The tax under s. 95A was paid on January 25, 1951, and on February 9 following, a stock dividend of $240,000 was declared payable by the allotment "as fully paid and non-assessable" of $240,000 redeemable preference shares.

Of these shares the respondent trustees received 64,000, of which, as at the date of the launching of these proceedings, May 14, 1953, 17,920 had been redeemed at various dates commencing March 1, 1951. The question involved is whether the remaining shares or the proceeds of those redeemed are to be regarded as capital or income in the hands of the trustees, who hold the corpus of the estate of the late Stella Maud Waters for the benefit of certain life tenants and remaindermen.

It was, of course, open to the company to have distributed the fund of $240,000 by way of dividend in cash, in which event it is perfectly clear on the authorities, to which I shall refer, that the trustees would have received the moneys as income to which the life tenants would have been entitled. Such a course, however, would have resulted in liability to income tax on the part of the trustees, as payment of the tax under s. 95A did not render free from taxation in the hands of the shareholders any cash dividends although paid out of the undistributed profits in respect of which the tax was paid. "Dividends" are rendered expressly liable to taxation by s. 6(1)(*a*)(i) of the statute.

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However, while it was provided by s. 73(3), as enacted by s. 28 of the amending statute of 1950, that where the whole or any part of a corporation's undistributed income on hand has been capitalized a dividend shall be deemed to have been received by each shareholder equal to the latter's portion of the undistributed income so capitalized, subs. (4) provided that in computing the taxpayer's income, his "portion of the payer corporation's tax-paid undistributed income as of the time the dividend is deemed to have been received" should be deducted from the amount of the dividend. Subsection (6) of s. 73 further provided that where a corporation has paid a stock dividend the corporation shall, for the purpose of subs. (3), "be deemed to have capitalized immediately before the payment undistributed income on hand equal to the lesser of (*a*) the undistributed income then on hand, or (*b*) the amount of the stock dividend". Accordingly, by using its tax-paid undistributed profits for the purposes of a stock dividend, thereby capitalizing them, the company could give to its shareholders the benefit of its payment of tax under s. 95A, and in this way only. But only by the payment of dividend in redeemable preference shares and the subsequent redemption thereof could the proceeds of redemption escape taxation in the hands of the shareholders, as subs. (2) of s. 73 specifically provided that, where a company having undistributed income on hand redeemed any of its *common* shares, the shareholders should be deemed to receive a dividend equal to the lesser of (*a*) the amount or value received, or (*b*) "his portion of the undistributed income then on hand".

It may be said that while, for the purposes of the *Income Tax Act,* a company's undistributed profits may be "capitalized", such need not be the result for all purposes. Such result must depend, for present purposes at least, upon company law, namely, in the case at bar, the relevant provisions of *The Companies Act,* R.S.O. 1950, s. 59. An examination of the relevant provisions of this statute, however, will show that the income tax legislation has the appropriate company law within its purview.

By s. 78 of the Ontario Act, by-laws "for creating and issuing any part of the capital as preference shares" may be enacted by the directors, who, by s. 80(1), may make provision "for the purchase or redemption" of such shares.

By subs. (2) no such by-law which has the effect of increasing or decreasing the capital of the company shall be valid unless confirmed by supplementary letters patent. Subsection (3) provides, however, that subs. (2) shall not apply to any by-law which creates or attempts to create redeemable or convertible preference shares. In the present case supplementary letters patent were issued.

Section 96 must also be taken into account. It provides that, for the amount of any dividend which the directors may lawfully declare payable in money, they may declare a stock dividend and issue therefor shares of the company "as fully paid or partly paid", or they may credit the amount of the dividend on shares already issued but not fully paid.

It would therefore appear clear upon the face of this statute that an issue of paid-up shares by way of stock dividend requires the contemporaneous appropriation of sufficient of the company's undistributed profits to provide for the payment up of the shares; in other words, for the capitalization of the requisite amount. It follows from this that the subsequent payment out to the shareholders of this paid-up capital in redemption of the shares would, so far as the company is concerned, also be a payment of capital no matter how soon or late after the employment of the profits in paying up the shares.

It is, however, contended on behalf of the appellant life tenant that there was no "permanent" addition to the company's capital of the fund here in question and that, the stated object of the issue of the preference shares having been "to place in the hands of the shareholders" the said fund, this is sufficient, regardless of the procedure actually adopted by the company, to enable the Court to declare that the proceeds of redemption constitute income and not capital. As this question has given rise to differences of opinion in recent Ontario decisions, it will be desirable to consider them. Before doing so, however, it is essential to consider the leading case on this branch of the law, namely, *Hill et al v. Permanent Trustee Company of New South Wales, Limited et al.* (1). In the course of delivering the opinion of the Judicial Committee in that case, Lord Russell of Killowen said, at p. 729:—

(1) [1930] A.C. 720.

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. . . moneys paid in respect of shares in a limited company may be income or corpus of a settled share *according to the procedure adopted,* i.e., according as the moneys are paid by way of dividend before liquidation or are paid by way of surplus assets in a winding up.

(The italics are mine.)

His Lordship went on to say that

Each process might appear to involve some injustice, the former to the remainderman, the latter to the tenant for life

but that the only method by which the rights of the respective *cestuis que trust* can be safeguarded and made incapable of being varied or affected by the conduct of the company, is by the insertion of special provisions in the trust instrument clearly defining the respective rights of income and corpus in regard to moneys received by the trustee from limited companies in respect of shares therein held by him as part of the trust estate.

Lord Russell, commencing at p. 730, laid down certain rules, in part as follows:—

(1.) A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no more concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A. absolutely or as trustee for A. for life only.

(2.) A limited company not in liquidation can make no payment by way of return of capital to its shareholders *except as a step in an authorized reduction of capital.* . . .

(4.) Other considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits, so deals with it that no part of it leaves the possession of the company, but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders, who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend.

With respect to profits applied in accordance with rule 4, his Lordship said at p. 732:—

In other words, moneys which had been capable of division by the company as profits among its shareholders have ceased *for all time* to be so divisible, and can never be paid to the shareholders except upon a reduction of capital or in a winding up. The fully paid shares representing them and received by the trustees are therefore received by them as corpus and not as income.

At p. 732, Lord Russell referred to the decision of the House of Lords in *Bouch and Bouch v. Sproule* (1), in the following words:—

> In *Bouch v. Sproule* (1), no moneys, in fact, left the company's possession at all. It is not an authority which touches a case in which a company parts with moneys to its shareholders. The essence of the case was that the company, not by its statements, but *by its acts,* showed that what the shareholders got from the company was not a share of profits divided by the company, but an interest in moneys which had been converted from divisible profits into moneys capitalized and rendered *for ever* incapable of being divided as profits.

(The italics are mine throughout.)

In *Hill's Case* the company had made a distribution in cash.

In my opinion there is nothing in any part of the judgment delivered by Lord Russell which lends any countenance to the contention that undistributed profits of a company which have become capitalized by "conversion by the company of the profits into share capital" (p. 730) must remain permanently with the company in order to retain that character. He himself recognized that they might be paid out "upon a reduction of capital", and payment out may occur at any time after capitalization so long as what is done is in accord with the governing legislation.

Nor is there any support for any such contention in anything that was said or decided in *Bouch and Bouch v. Sproule* (1). As already pointed out, that case is to be treated as one in which in fact no money left the company at all. What their Lordships contradistinguished in that case was the situation where, in the language of Lord Herschell, at p. 397, the company has accumulated profits and used them, *in fact,* for capital purposes, and the quite different situation where (p. 403) it being

> within the power of the company to capitalise these sums by issuing new shares against them to its members in proportion to their several interests,

a

> permanent appropriation of the moneys to the capital purposes to which they had already been temporarily appropriated

has actually occurred by their being converted into share capital.

(1) (1887), 12 App. Cas. 385.

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The decision of the Court of Appeal in England in *In re Duff's Settlements, National Provincial Bank, Ltd. v. Gregson et al.* (1), is useful in this connection. In that case the trustee of certain settlements held shares in a company which, from time to time, had allotted shares at a premium, the aggregate amount of which premiums had been paid, in conformity with s. 56(1) of the *Companies Act, 1948*, c. 38, into a "share premium account". The section stipulated that the provisions of the Act relating to reduction of share capital of a company should apply to the share premium account as if it were paid-up share capital of the company. The company, having obtained the approval of the Court, paid to shareholders certain moneys out of this account and the question was whether such moneys in the hands of the trustee constituted capital or income of the trust funds. It was held to be capital. In the course of his judgment, at pp. 929-30, Jenkins L.J., who delivered the judgment of the court, referred to *Hill's Case* as well as certain other decisions and continued:—

> The cases to which we have referred show that the character, as a matter of company law, of any given distribution as it leaves a company determines its character in the hands of the recipient. The relevant company law in the present case seems to us to require that the distribution here in question should be treated from the point of view of the payer, that is, the company, as a distribution by way of return of capital. It follows, to our minds, that the trustees' proportion of the distribution should similarly be treated in their hands as paid-up capital returned by the company. . . . The provision in sub-s. 2 permitting the application of a share premium account in paying up bonus shares does not, in our view, assist the tenants for life. This merely enables a company to substitute actual capitalization for the notional capitalization produced by the section itself. The section, as we read it, produces the same result on a direct distribution of a share premium account *as if the company had first gone through the formality of actual capitalization by bonus shares and then paid off the bonus shares by way of reduction of capital* . . . If the terms of s. 56 are concerned, as Mr. Walton submitted, with the "mechanics" of the distribution of premiums received on the issue of shares, still the "mechanics" are, in our judgment, an essential factor in determining the character as between capital and income of the sum distributed. A company, having an artificial person, can (as it has been laid down) make a distribution amongst its members (otherwise than in a winding up) in one of two ways—*but only in one of two ways*: that is, by a distribution of divisible profit, that is, by way of dividend; and by way of a return of capital pursuant to an order of the court on a petition for reduction of capital in accordance with the Act. The question whether a given distribution lawfully made by a company is of the former or of the latter description may thus justly be determined by reference to the method or

(1) [1951] Ch. 923, [1951] 2 All E.R. 534.

mechanics of distribution, permitted or enjoined by the Act, which the company has adopted in regard to it; and the answer to that question must prima facie also determine the question whether the distribution is capital or income as between tenant for life and remainderman of a settled shareholding: see *per* Lord Russell in *Hill v. Permanent Trustee Company of New South Wales.*

(The italics are mine.)

In his use of the words "prima facie" in *Hill's Case* at p. 731, Lord Russell indicated that "some provision in the trust deed" would be required to change the result produced by the rule he had just enunciated.

Subject to the effect of s. 61 of the (Dominion) *Companies Act, 1934,* c. 33 (now R.S.C. 1952, c. 53), in cases where that statute is applicable, the principles enunciated by Jenkins L.J. in the language above set out apply in the case at bar and are in accord with the view which I have expressed as to the effect of the provisions of the Ontario *Companies Act* upon the procedure or "mechanics" adopted by the company here in question. This view is in accord with that reached by McRuer C.J.H.C. in *Re McIntyre* (1).

McLennan J., the judge of first instance in the case at bar, followed the decision in *McIntyre's Case* and held the moneys in question were part of the corpus of the estate (2). This judgment was affirmed on appeal (3). A similar view was expressed by Ferguson J. in *Re Hardy Trusts* (4), but he felt himself bound by *Re Fleck, infra,* and his judgment was affirmed on appeal (5).

The appellant relies upon the decisions in *Re Fleck* (6), and the later decision of Gale J. in *Re Mills* (7). *Fleck's Case,* which was binding on the Court of Appeal in the present case, was distinguished by that court.

(1) [1953] O.R. 910, [1954] 1 D.L.R. 192.

(2) [1954] O.W.N. 649, [1955] C.T.C. 126, [1954] 4 D.L.R. 852.

(3) [1955] O.R. 268, [1955] C.T.C. 130, 55 D.T.C. 1052, [1955] 2 D.L.R. 176.

(4) [1955] O.W.N. 273, [1955] C.T.C. 138, 55 D.T.C. 1062, [1955] 2 D.L.R. 296.

(5) [1955] O.W.N. 835, [1955] C.T.C. 220, 55 D.T.C. 1175, [1955] 5 D.L.R. 10.

(6) [1952] O.R. 113, [1952] C.T.C. 196, [1952] D.T.C. 1050, [1952] 2 D.L.R. 657, affirmed [1952] O.W.N. 260, [1952] C.T.C. 205, [1952] D.T.C. 1077, [1952] 2 D.L.R. at 664.

(7) [1953] O.R. 197, [1953] C.T.C. 115, [1953] 2 D.L.R. 80.

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In *Fleck's Case* the company in question had been incorporated under the *Companies Act*, Canada. Having paid income tax pursuant to s. 95A, the directors declared a stock dividend in redeemable preference shares and subsequently, on the same day, provided for their redemption. Hogg J.A., the judge of first instance, after considering *Hill's Case, supra,* and *Bouch and Bouch v. Sproule, supra,* deduced their principle as follows (p. 119):—

> The principle to be deduced from these judgments is that there must be, in fact, a conversion by the company of its profits or surplus into share capital in order that they shall be regarded as corpus and not income in the hands of a trustee, or as between a life tenant and a remainderman. Furthermore, that where a company has the power to deal with profits by converting them into capital of the company such exercise of its power is binding upon the person interested under a trust of the original shares set up by the testator's will.

Having so laid down the principle, the learned judge felt himself able, however, to come to the conclusion that the preferred shares there in question

> did not form part of the paid-up capital of the Company and therefore the surplus profits represented by them were not capitalized.

To my mind, with respect, if this is to be taken as a statement of fact, it is in conflict with the evidence, as the stock dividend to which the shares owed their issue was expressly declared to be "out of said tax paid undistributed income", which was thereby inescapably capitalized. In so far as the learned judge's statement is a conclusion of law, I find it impossible to reconcile it with his earlier statement of principle that

> where a company has the power to deal with profits by converting them into capital of the company such exercise of its power is binding upon the person interested under a trust of the original shares.

The company can, in the language of Lord Halsbury in *Commissioners of Inland Revenue v. Blott; The Same v. Greenwood* (1), "convert them into capital as against the whole world". In my opinion, the fact that, as Hogg J.A. says, "the steps taken by the Company were induced because of the provisions of the Income Tax Act" is irrelevant.

The learned judge referred to s. 61 of the Dominion *Companies Act* and then proceeded as follows, at p. 120:—

(1) [1921] 2 A.C. 171 at 182.

To use the language, in part, of Lord Herschell in *Bouch et al. v. Sproule, supra,* and applying it to contrary circumstances, it was obviously contemplated and was, I think, certain that no money would in fact remain in the hands of the Company as paid-up capital. The substance of the whole transaction and the intention of the Company as well as the form or manner in which it was carried out shows that the share of surplus profits represented by the $20,000 in question was not converted into capital by newly-created shares but was distributed as a dividend to the trustee shareholders. The real pith and substance of the arrangements were to distribute the surplus profits of the Company in the form of money, and they were not dealt with so that, to use the words of Lord Russell in the *Hill* case, *supra,* they could "never be paid to the shareholders except upon a reduction of capital or in a winding up". The issue of redeemable shares was in the nature of a conduit-pipe to convey or transfer the surplus profits accumulated by the Company to the pockets of the shareholders as cash.

In this view the learned judge held the moneys in the hands of the trustee to be income. As already mentioned, this decision was affirmed on appeal without extended reasons (1).

In my opinion, with respect, the reasoning in *Fleck's Case* is erroneous. Once shares are issued as paid-up shares, that portion of the undistributed profits in the hands of the company appropriated for the purpose of paying up the shares, immediately becomes capitalized. The provisions of the Ontario Act to which I have referred so provide and I am unable to read the relevant provisions of the Dominion Act in a contrary sense. That Act, by ss. 7 and 12, provides for the creation of redeemable preference shares by either letters patent or supplementary letters patent or, under s. 59, by by-law. Section 61, to which Hogg J.A. referred, provides that if redemption, instead of being effected by payment to the shareholders of the capital behind the shares, the paid-up capital of the company being thereby reduced, is effected out of undistributed profits, the paid-up capital is deemed not to have been reduced. The plain implication of this provision is that if the redemption is effected by repayment to the shareholders of the paid-up capital in respect of such shares, a reduction of paid-up capital does occur which can be validly effected only upon the sanction of the shareholders, confirmed by supplementary letters patent under s. 49(2). These provisions, there-

(1) [1952] O.W.N. 260, [1952] C.T.C. 205, [1952] D.T.C. 1077, [1952] 2 D.L.R. at 664.

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fore, perhaps even more plainly than s. 96 of the Ontario Act, completely reject any idea that payment to shareholders in accordance with such provisions is payment of anything other than capital.

In *Fleck's Case* the company had on hand a fund of over $515,000 after payment of tax under s. 95A, and had declared a stock dividend of 1,000 redeemable preferred shares of a par value of $100 which it immediately proceeded to redeem. The company had, therefore, sufficient funds left in its undistributed profit account after payment up of the par value of the issued shares, to effect their redemption. In view of s. 61, it must be considered that redemption took place out of profits, that being the only way it could validly have taken place without supplementary leters patent being obtained. Hogg J.A. would appear to have thought that the employment by the company of profits for the purpose of redemption rendered the proceeds income in the hands of the trustee. As this point does not arise in the case at bar, I express no final opinion upon it, although it is not obvious how a capital asset in the hands of trustees, namely, the shares, can become transformed into income merely because the company employs surplus profits to redeem them. It is further to be observed that s. 61 provides that

> the surplus resulting from such redemption or purchase for cancellation shall be designated as a capital surplus, which shall not be redeemed or distributed by the company except as provided in sections forty-nine to fifty-eight, both inclusive, of this Act.

Even where redemption takes place out of profits, therefore, the capital paid up on the shares originally appropriated out of profits remains as capital. This emphasizes, if emphasis be needed, that, in the purview of the statute, profits which have been used to pay up an issue of shares become capital and remain so from the moment the shares are so paid up.

In my opinion, therefore, as already stated, *Fleck's Case*, apart from the point above mentioned, as to which I express no final opinion, is out of harmony with the earlier authoritative decisions to which I have referred.

I would dismiss the appeal but, in the circumstances, I think the costs of all parties should be taxed and be paid out of the estate, those of the trustees as between solicitor and client.

RAND J.:—The question here is between a life tenant and a remainderman whose interests are in shares of the capital stock of a company incorporated under the Ontario *Companies Act*. The dispute arises through the fact that at the death of the testator the company had accumulated a large amount of earnings which thereafter were capitalized into redeemable preference stock over the beneficial ownership of which the issue is joined.

The nature of a life interest in property depends upon the kind of property. If land, it will be possession and use or income of rents; if money or money obligations, it will be income of interest; where the asset is common stock of a commercial company, the income consists of dividends. The large amount of accumulated earnings, in this case, was, at the death, reflected in the value of the stock; the testator might have made it clear that the shares, in the value based on the assets then existing, were to be treated as capital and the income thereafter to be related to subsequent earnings only; but he did not do that; what he did was to bequeath the "income".

The question, in such circumstances, of what is income has been before the Courts in a number of cases and the principles applicable have been considered in both the House of Lords and the Judicial Committee. From them the following considerations, among others, emerge. A joint stock company, having modern powers and, in the absence of special provisions, bound to the preservation in its capital asset structure of property representing its share capital, is in absolute control of the profits which its business produces. They may be distributed as dividends, kept in reserves, applied to restore lost capital assets or be capitalized by appropriating them as assets representing or fulfilling the payment of unpaid existing or newly issued share capital.

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Rand J.

In *Hill et al. v. Permanent Trustee Company of New South Wales, Limited et al.* (1), Lord Russell of Killowen summarizes some settled propositions dealing with payments of money to shareholders and speaks of the "capitalization" of accumulated profits as follows:—

> (4.) Other considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits, so deals with it that no part of it leaves the possession of the company, but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders, who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend.

And at p. 735:—

> Their Lordships desire to adopt the language used by Eve J., and to say in regard to the funds out of which the sums of 19,380*l* and 8,360*l* were paid by the Buttabone Company to the trustee company: "Unless and until the fund was in fact capitalized it retained its characteristics of a distributable property . . . no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital. It remained an uncapitalised surplus available for distribution, either as dividend or bonus on the shares, or as a special division of an ascertained profit . . . and in the hands of those who received it it retained the same characteristics."

Knowledge of that control over this type of property is to be attributed to the testator: it is with this actually or imputedly in mind that he confers the life interest: he knows or is held to know that the receipt of income or capital will depend on the acts of the company.

When accumulated earnings are capitalized, the precise theory according to which the transformation takes place is by no means clear. If a dividend has been declared which the shareholder has the option of receiving either in cash or in paid up new shares, the latter alternative is to be deemed to consist of two steps: the creation of a real credit in the amount of the dividend to the shareholder, a debt owing by the company to him; and the application of that debt by way of release as payment for the new stock. The right to receive the dividend and its constructive receipt constitute a payment of income to the shareholder which belongs to the life tenant to whom the substituted stock goes as to a purchaser. On this stock he will be liable to tax as for income: *Swan Brewery Company, Limited v. The King* (2).

(1) [1930] A.C. 721 at 731. (2) [1914] A.C. 231.

On the other hand, the capitalization of the accumulation directly without the option of a dividend presents difficulty in theoretical conception. In substance the interest of the shareholder represented by the original stock merely changes its form: from being X percentage of Y it becomes X plus A percentage of Y plus B. Nothing is withdrawn from the company and no immediate additional value passes to the shareholder. The company by declaration appropriates an asset available for dividends to the capital asset structure and creates for the shareholder a new capital stockholding, with the same fractional interest in a new total capital asset as before.

In *Bouch and Bouch v. Sproule* (1), the question was considered. Although the reasons, following the facts, are less than assured on the matter of an alternative right to elect for the dividend, they seem to me to hold that what was to be determined was the intention of the company as that was evidenced by its corporate acts interpreted in the total circumstances. At p. 399 Lord Herschell says:—

> I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly-created shares.
>
> * * *
>
> Upon the whole, then, I am of opinion that the company did not pay, or intend to pay, any sum as dividend, but intended to and did appropriate the undivided profits dealt with as an increase of the capital stock in the concern.

At p. 401, Lord Watson:—

> But in a case like the present, where the company has power to determine whether profits reserved, and temporarily devoted to capital purposes, shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company.

And at pp. 402-3:—

> In these circumstances it was undoubtedly within the power of the company, by raising new capital to the required amount, to set free the sums thus spent out of the reserve fund and undivided profits for distribution among the shareholders. It was equally within the power of the company to capitalize these sums by issuing new shares against them to its members in proportion to their several interests. I am of opinion that the latter alternative was, in substance, that which was followed by the company.

(1) (1887), 12 App. Cas. 385.

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Rand J.

And at p. 405:—

> If I am right in my conclusion the substantial bonus which was meant to be given to each shareholder was not a money payment but a proportional share of the increased capital of the company.

In the present case a new element is introduced by the provisions of the *Income Tax Act,* 1948 (Can.), c. 52, as amended, enabling a company by paying a tax, in this case 15 per cent., on earnings accumulated up to 1949, to capitalize the remaining fund by the issue of a stock dividend free from income tax in the hands of the shareholders. The earnings, if distributed as dividend, would have been taxable. This power furnishes a means by which, through the issue, as authorized by the appropriate company law, of redeemable preference shares, an amount of money equal to that of the earnings converted will reach the shareholders by the redemption; the nature of that payment, capital or income, will depend on the proper interpretation of what the company has done.

The corporate action in this case was embodied in a resolution of the shareholders electing under s. 95A of the *Income Tax Act,* 1948 (Can.), c. 52, enacted by 1950, c. 40, s. 32, to pay the required tax of 15 per cent. on the undistributed income on hand as of April 30, 1949 and to issue the necessary redeemable preferred shares to take up the amount remaining. Following this the directors passed by-laws to implement the resolution. Preferred shares were issued in the amount of $240,000 at the rate of $1 a share which absorbed approximately the total of the remaining accumulation. They contained provisions for redemption; they also carried a right to non-cumulative dividends at the rate of 3 per cent. per annum but only when as and if they were declared in any year by the directors. The redemption was to take place on notice at any time or from time to time and in such amounts as the company might decide. Dividends at 3 per cent. per anum were paid annually from the time of issue in 1951 until the proceedings started in June 1953. The number of shares redeemed as of May 11, 1953 was 17,920 out of a total of 64,000 owned by the estate. The redemption was in the number of 1,280 shares every two months, the first having been made on March 1,

1951; and at that rate, the redemption would be completed in approximately $8\frac{1}{3}$ years. In these circumstances can it be found that the preferred shares were income and enured to the benefit of the life tenant?

I take the principle laid down to be that unless the earnings as such actually or constructively pass from the company to the shareholder there is, for all purposes, capitalization. But the argument is that the machinery of capitalization and redemption can be used to effect a transfer of the earnings as such to the shareholders.

Here, the retention of the preferred shares as part of the capital stock is sufficient of itself to negative the conclusion that the shares belong to the life interest as dividends: but I have reached the same conclusion on a broader ground.

When earnings are "capitalized", they cease at that moment to be "earnings"; they become part of the capital assets; and if the transaction has not the elements of dividend and purchase, the shares, *prima facie,* are not income. Mr. Henderson urged very plausibly that the company's intention was to release those earnings and pass them to the shareholders as such in a single act consisting of several parts. The fallacy lies in overlooking what has taken place. The company undoubtedly intends by its total act to pass money to the shareholder: but if what the company does converts the earnings into capital, the "intention" of the company must take account of that fact: it "intends" that fact; and to carry the intention to a conclusion it intends to distribute capital assets by means of an authorized reduction in capital stock. Here form is substance; and the moment form has changed the character of the earnings as assets, the intention follows that change.

In the absence of a statutory provision, a stock dividend, so-called, would not appear to be "income": and the exemption from taxation provided for the shares here simply suspends the provision of the *Income Tax Act* imposing tax. From the standpoint of tax, it is indifferent to the company and the shareholder whether the ultimate receipt of money is capital or income: in neither case is it taxable. But its form is fixed and determined: and in the absence of special directions in the will, we are not at liberty to disregard what the testator is to be deemed to have foreseen as the possible action of the company.

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Rand J.

I would, therefore, dismiss the appeal with costs of all parties to be paid out of the estate, those of the trustees as between solicitor and client.

Appeal dismissed.

Solicitors for the appellant: Sinclair, Goodenough, Higginbottom & McDonnell, Toronto.

Solicitors for the executors and John Gavin Waters, respondents: Malone, Malone & Montgomery, Toronto.

Solicitors for Marjory T. O'Flynn (in her personal capacity), respondent: Cameron & Sprague, Belleville.

Solicitors for Lt.-Cmdr. D. M. Waters, respondent: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.

Solicitor for St. Andrews Presbyterian Church, Belleville: S. Gordon Robertson, Belleville.

The Official Guardian, Toronto, representing infants.

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*June 5, 6
*Oct. 2

IN THE MATTER OF THE TRUST DEED OF ARTHUR STURGIS HARDY;

THE OFFICIAL GUARDIAN, representing infants and unborn and unascertained persons who may be interested in the corpus of the estate .....APPELLANT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION, Trustee, ARTHUR S. HARDY, JOSEPHINE HARDY, DOROTHY ELVIDGE and IAN F. H. ROGERS .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Distribution of accumulated profits in form of stock dividend —Immediate redemption of shares so issued—Effect—Whether proceeds income or capital in hands of trustee-shareholder—The Income Tax Act, 1948 (Can.), c. 52, s. 95A, enacted by 1950, c. 40, s. 32—The Companies Act, R.S.C. 1952, c. 53, s. 83(3).

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*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Nolan JJ.

Trusts and trustees—Trust assets including shares in incorporated company—Issue of stock dividend by company as means of distributing accumulated profits—Redemption of shares—Whether proceeds income or capital in hands of trustees—The Income Tax Act, 1948 (Can.), c. 52, s. 95A, enacted by 1950, c. 40, s. 32.

If a company incorporated under the *Dominion Companies Act* elects under s. 95A of the *Income Tax Act*, 1948, as enacted in 1950, to pay tax on its undistributed income, and thereafter creates preference shares, issues them to the shareholders as a stock dividend, and immediately redeems them out of the undistributed profits, the proceeds of the redemption reach the shareholders not as tax-free income but as non-taxable capital. A trustee, therefore, who, holding shares in the company as a trust asset, receives moneys in redemption of preference shares so issued, receives them as capital of the trust rather than as income. From the time that the trustee becomes entitled to receive a certificate for these shares their status, as between the settlor and the remaindermen under the trust, does not differ from that of the shares originally received by the trustee, and a capital asset (the shares) in the hands of a trustee will not be transformed into income merely because the company uses surplus profits to redeem the shares.

Re Fleck, [1952] O.R. 113 (affirmed [1952] O.W.N. 260), overruled.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Ferguson J. (2) on a motion for the opinion, advice and direction of the Court. Appeal allowed.

F. T. Watson, Q.C., for the appellant.

G. F. Henderson, Q.C., for the individual respondents.

H. F. Parkinson, Q.C., for the trustee, respondent.

The judgment of Kerwin C.J. and Locke, Cartwright and Nolan JJ. was delivered by

THE CHIEF JUSTICE:—The following question was submitted to a judge of the Supreme Court of Ontario for his advice and opinion:—

> Does the Thirty-one thousand one hundred and sixty-eight dollars ($31,168) representing the proceeds in respect of the share of Arthur Sturgis Hardy and payable to the Trustees of the Trust Deed of the said Arthur Sturgis Hardy on the redemption of 31,168 preferred shares, being part of the redemption of 260,000 preferred shares of G. T. Fulford Co. (Limited) issued by way of stock dividends out of the tax paid undistributed income of the company following an election by the company to exercise rights under Section 95A(1) of the *Income Tax Act*, S.C. 1948, Chapter 52, constitute income or capital in the hands of the Trustees?

(1) [1955] O.W.N. 835, [1955] C.T.C. 220, 55 D.T.C. 1175, [1955] 5 D.L.R. 10.

(2) [1955] O.W.N. 273, [1955] C.T.C. 138, 55 D.T.C. 1062, [1955] 2 D.L.R. 296.

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Kerwin C.J.

If he had not considered himself bound (as indeed he was) by the decision of the Court of Appeal in *Re Fleck* (1), Ferguson J., before whom the application came, would have found that the money constituted capital in the hands of the trustees and not income, but in view of that authority he declared otherwise. The Court of Appeal decided that it was bound by its previous decision and dismissed an appeal by the Official Guardian, who now appeals to this Court.

Mr. Arthur Sturgis Hardy, referred to in the question, is one of the beneficiaries entitled to share in the estate of the late Senator Fulford, who died October 15, 1905. The trust deed is dated August 7, 1928, and was made between Mr. Hardy, as settlor, and The Toronto General Trusts Corporation, as trustees. That trust deed, after reciting the fact that the settlor, in the event he should survive his mother, who was a daughter of Senator Fulford, would be entitled to one-quarter of a distributive share or interest in one-half of the capital of the residuary estate, and the desire of the settlor to assign to the trustees 85 per cent. of his share if and when he should become entitled thereto, declared that:—

> Securities or assets, if any, of the estate of the Honourable George Taylor Fulford which may be assigned and transferred in specie to the Trustees herein by the Executors and Trustees of the Estate of the said Testator to form or partly form the said eighty-five per cent of the distributive shares of the Settlor in said estate shall be retained by the Trustees as investments of the Trust Estate,

this being followed by provisions for changing the investments from time to time. One of the obligations imposed upon the trustees was:—

> During the lifetime of the Settlor, but subject as hereinafter provided, to pay to the Settlor or to expend for his benefit the net annual income derived from the Trust Estate,

with power to encroach upon the capital in a manner which does not affect the present consideration. Among the powers conferred upon the trustees was to take up as part of the trust estate any allotment of new stock in any com-

(1) [1952] O.W.N. 260, [1952] C.T.C. 196, [1952] D.T.C. 1050, [1952] 2 D.L.R. 657, affirmed [1952] O.W.N. 260, [1952] C.T.C. 205, [1952] D.T.C. 1077, [1952] 2 D.L.R. at 664.

pany whose stock formed part of such estate, to purchase the proportion of shares allotted by reason of the shares held, all of such new shares to be held as part of the trust estate.

A further paragraph of the trust deed read:—

Provided further, and notwithstanding anything hereinbefore contained, the Settlor hereby declares that shares of Capital Stock in the G. T. Fulford Company, Limited, and Dr. Williams Medicine Company, Limited, Fulford Hanson Company or of any subsidiary Company of the G. T. Fulford Company Limited or in any business way connected therewith or of any one or more of said Companies which may be assigned and transferred to the Trustees in the due course of the administration of the estate of the said Honourable George Taylor Fulford deceased, as representing or forming part of the eighty-five per cent. of the Settlor's distributive shares therein may be retained by the Trustees herein as investments of the Trust Estate for such length of time or times as they the Trustees in their discretion may deem advisable, without the Trustees incurring liability by so retaining same; the intention of the Settlor is that no shares in the Capital stock of any of said Companies or business hereinbefore referred to in this paragraph shall form part of the fifteen per cent. of his distributive shares in the said estate which he intends to retain for his own use and purpose and which is not included in the Trust Estate hereby assigned, transferred and set over.

The G. T. Fulford Co. (Limited) was incorporated following the death of Senator Fulford in the year 1905 under the provisions of the *Dominion Companies Act*, to take over and carry on the business theretofore engaged in by him. The authorized capital was originally 10,000 shares of the par value of $100 each, and of these shares the trustees in due course received 1,193, which were held under the terms of the deed of trust. From the time of its incorporation the company actively engaged in business, earning substantial profits, and on December 31, 1949, had accumulated a surplus from earnings amounting to $314,063.41.

By appropriate steps the company elected under subs. (1) of s. 95A of the *Income Tax Act*, 1948 (Can.), c. 52, enacted by 1950, c. 40, s. 32, to be assessed and to pay a tax on such accumulated earnings and this being done, there remained in the hands of the company a tax-paid undistributed surplus of $266,953.90. Thereafter a by-law was adopted enabling the company to issue fully paid shares for the amount of any dividend, and on January 6, 1953, supple-

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mentary letters patent were granted to the company increasing the authorized capital by the creation of 500,000 3 per cent. non-cumulative redeemable preference shares of the par value of $1 each.

On January 21, 1953, a resolution was adopted by the directors which, after reciting the amount of the tax-paid undistributed income on hand, read:—

> IT IS RESOLVED that a stock dividend be and the same is hereby declared to be payable out of the said tax paid undistributed income to shareholders of the company as of this date in the amount of one preference share for each common share held by a shareholder.

On the same date, a further resolution was passed, which, after reciting the issue of the 10,000 preference shares, resolved that they be redeemed, and this was done, the trustees receiving from the company the sum of $1,193.

On April 10, 1953, a resolution declaring a further stock dividend of 25 of the preference shares for each common share "payable out of the said tax paid undistributed income" was adopted. A resolution authorizing their redemption was passed later on the same day. These were then redeemed, the trustees receiving a further sum of $29,975.

While in the view that I take of the matter it does not assist in the determination of the question, it may be noted that at the meeting which authorized the stock dividend and the redemption of the preferred shares, the chairman stated that it had not been the intention of the company to make the preference shares part of its capital structure and that they had been created with the sole view of immediately redeeming them when they were issued in order to take advantage of the provisions of the *Income Tax Act* whereby the company might by paying a tax of $47,109.51, distribute the tax-paid surplus tax-free in the hands of the shareholders. The motive or purpose is, however, irrelevant if it is made out that the accumulated profits have been capitalized: *Commissioner of Income Tax, Bengal v. Mercantile Bank of India, Limited et al.* (1).

I consider that none of the provisions of the *Income Tax Act* affects the question as to whether these moneys were income to which the settlor was entitled or capital which the trustees were required to hold for the benefit of those entitled in remainder.

(1) [1936] A.C. 478 at 495.

While the resolutions of January 21 and April 10, 1953, referring to a stock dividend "to be payable out of the said tax paid undistributed income" might have been more clearly expressed, both resolutions were undoubtedly passed under the authority of s. 83(3) of the *Companies Act,* now R.S.C. 1952, c. 53, the intention obviously being to convert the tax-paid undistributed income to the extent of $260,000 into capital and to issue the preference shares fully paid to the shareholders. There was no intention that the dividend should be paid in money to the shareholders as the wording of the resolutions might suggest. It was the said sum of $260,000 which by virtue and in consequence of the resolutions became part of the paid-up capital of the company that was employed for the redemption of the shares.

The respective rights of the settlor and those entitled in remainder are to be tested as of the time when the issue and allotment of the shares was authorized and their distribution directed.

It is the action taken by the company that is decisive of the matter. In *In re Bouch; Sproule v. Bouch* (1), Fry L.J. said in part:—

> When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital.

This statement of the law was approved in the judgment delivered by Lord Herschell in the House of Lords on the appeal (*Bouch and Bouch v. Sproule* (2)), and in *Commissioners of Inland Revenue v. Blott; The Same v. Greenwood* (3), per Viscount Haldane at p. 186. While the latter case was one concerned with income tax, Viscount Haldane discussed the general principle applicable in the case of companies incorporated under *The Companies (Consolidation) Act,* 1908, and while part of his remarks are inapplicable to companies incorporated by letters patent

(1) (1885), 29 Ch.D. 635 at 653. (2) (1887), 12 App. Cas. 385 at 397.
(3) [1921] 2 A.C. 171.

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under the *Dominion Companies Act,* the statement at p. 182 as to the effect of the company's action applies equally, in my opinion, to such companies:—

> Such a company is a corporate entity separate from its shareholders, but the latter can control its action by passing resolutions in general meeting. If these resolutions are directed to what falls within the capacity of the company as the Act of Parliament defines it, they are treated as concerned with internal management, and if they have been passed in accordance with the statute and the articles of association no Court has jurisdiction to interfere in a question which is for the proper majority of the shareholders alone. The company, acting with the assent so given of the shareholders, can decide conclusively what is to be done with accumulated profits. It need not pay these over to the shareholders. It can convert them into capital as against the whole world, including, as I think the principle plainly implies, the Crown claiming for taxing or for any other purposes. The only question open is, theerfore, whether the company has really done so.

In the present matter it is abundantly clear that it was the desire of the shareholders to distribute the accumulated profits among the shareholders without paying the high rate of income tax that would be payable by them if the dividend was declared in cash. In so far as the shareholders themselves were concerned, this result was accomplished by the creation, allotment and subsequent redemption of the preference shares. That in doing so they affected the rights of the settlor and those entitled in remainder in the present matter was not a matter with which *qua* shareholders or directors they were concerned.

In *Commissioners of Inland Revenue v. Fisher's Executors* (1), Lord Sumner, referring to statements which appear in some of the reported cases that it is the intention of the company that is said to be dominant, said that desires and intentions are things of which a company is incapable, these being the mental operations of its shareholders and officers, and that:—

> The only intention that the company has, is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance.

It was the net annual income derived from the trust estate which the trustees were required to pay to the settlor. The fully paid-up preference shares allotted to the trustees were part of the authorized capital of G. T. Fulford Co. (Limited) and were accretions to the capital of the estate. From the time when the trustees became entitled to receive a certificate from the company for these preference

(1) [1926] A.C. 395 at 411.

shares, their status as between the settlor and those entitled in remainder did not differ from that of the common shares received by the trustees from the Fulford estate. There is nothing in the language of the trust deed to indicate an intention that the word "income" should be given an extended meaning and include distributions of this nature.

In a judgment delivered contemporaneously herewith in *Re Waters; Waters v. The Toronto General Trusts Corporation et al.* (1), Kellock J., with whose reasons I agreed, left open a point that did not arise in that case. It is now necessary to deal with it and it must be laid down that a capital asset (shares) in the hands of trustees will not be transformed into income merely because a company uses surplus profits to redeem shares. In fact those undistributed profits do not reach the shareholders as tax-free income, but as non-taxable capital. It must be taken that *Re Fleck* (2), was wrongly decided.

The appeal is allowed and the question submitted to the Court answered by stating that the moneys referred to constitute capital in the hands of the trustees. All parties may have their costs in all courts out of those moneys, the costs of the trustees to be as between solicitor and client.

RAND J.:—For the reasons given by me in *Re Waters; Waters v. The Toronto General Trusts Corporation et al.* (1), judgment in which is being delivered contemporaneously with this, I would allow the appeal and answer the question submitted by stating that the moneys referred to constitute capital in the hands of the trustees. The costs of all parties in all courts shall be paid out of these moneys, those of the trustees as between solicitor and client.

Appeal allowed.

The Official Guardian for Ontario: P. D. Wilson, Toronto.

Solicitors for the respondents The Toronto General Trusts Corporation: Parkinson, Gardiner, Roberts, Anderson & Conlin, Toronto.

Solicitors for the other respondents: Gowling, MacTavish, Osborne & Henderson, Ottawa.

(1) *Ante*, p. 889.

(2) [1952] O.R. 113, [1952] C.T.C. 196, [1952] D.T.C. 1050, [1952] 2 D.L.R. 657, affirmed [1952] O.W.N. 260, [1952] C.T.C. 205, [1952] D.T.C. 1077, [1952] 2 D.L.R. at 664.

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*May 25
*Oct. 2

PRUDENTIAL TRUST COMPANY LIMITED AND CANUCK FREEHOLD ROYALTIES LIMITED (*Plaintiffs*) ..... APPELLANTS;

AND

EDMOND G. CUGNET AND RAYMOND A. CUGNET (*Defendants*) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Validity and binding effect—Non est factum—Circumstances supporting plea—Whether plea may be asserted against subsequent assignee for value of other party's rights under contract.

H, acting as agent for A. Co., persuaded C to sign what was represented to be a mere grant of an option of mineral rights, but was in fact an assignment and transfer of a share in those rights. A. Co. later assigned all its rights of this nature to one of the plaintiff companies (the other company being a bare trustee for it). In an action brought to establish the plaintiffs' rights under the agreement, the defendants (C and his son, the purchaser under an agreement for sale), pleaded *non est factum*.

Held (Cartwright J. dissenting): The defendants were entitled to succeed, and the assignment should be held void *ab initio*.

Per Taschereau, Fauteux and Nolan JJ.: The representation having been as to the nature and character of the document, and not merely as to its contents, the mind of the defendant did not go with his hand, although he knew that he was dealing with his mineral rights. *Carlisle and Cumberland Banking Company v. Bragg*, [1911] 1 K.B. 489, applied; *Howatson v. Webb*, [1907] 1 Ch. 537; [1908] 1 Ch. 1, distinguished. The document was void *ab initio*, and any option contained therein and which, admittedly, the defendant agreed to grant and for which he received payment, could not be severed and must fall with the rest of the transaction.

Per Locke J.: The plea of *non est factum* would clearly have been available to the defendants if the action had been brought by A. Co., on whose behalf H was acting. Negligence on C's part would not estop him from setting up that defence as against the plaintiffs, since a person signing a document other than a negotiable instrument owed no duty to the public at large, or to other persons unknown to him who might suffer damage by acting upon the instrument on the footing that it was valid in the hands of the holder. *Carlisle and Cumberland Banking Company v. Bragg, supra*, followed. In any event the proximate cause of the damage was the fraudulent act of H.

Per Cartwright J. (*dissenting*): Even if the misrepresentation could be said to have been as to the nature of the deed, the negligence (*i.e.* lack of reasonable care) of the defendant in signing and sealing it without reading it prevented him from asserting the defence of *non*

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Nolan JJ.

est factum as against the plaintiffs which gave valuable consideration on the strength of the deed. The rule is that, generally speaking, a person who executes a document without taking the trouble to read it is liable on it and cannot plead that he mistook its contents, at all events as against a person who acting in good faith in the ordinary course of business has changed his position in reliance on such document. The defence operates in the case of a blind or illiterate person as an exception to that rule, but does not extend to a case such as the present.

In so far as the *Bragg* case decides that the rule that negligence excludes a plea of *non est factum* is limited to the case of negotiable instruments and does not extend to a deed such as the one at bar, it should not be followed.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment at trial (2). Appeal dismissed.

J. L. McDougall, Q.C., for the plaintiffs, appellants.

D. G. McLeod, for the defendants, respondents.

The judgment of Taschereau, Fauteux and Nolan JJ. was delivered by

NOLAN J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan (1), unanimously affirming the judgment of the learned trial judge (2).

The appellant Prudential Trust Company Limited (hereinafter referred to as the appellant Prudential) is a trustee on behalf of the other appellant Canuck Freehold Royalties Limited. The respondent Edmond Cugnet is a retired farmer who emigrated in 1902 from France to the Weyburn district in Saskatchewan. The respondent Raymond Cugnet is his son.

On October 31, 1949, the respondent Edmond Cugnet granted petroleum and natural gas leases to Rio Bravo Oil Company Limited in respect of the south-east quarter of section 27 and to Bandy Lee in respect of the north-west quarter of section 27, both in township 7, range 13, west of the second meridian.

On November 1, 1950, the appellant Prudential entered into an agreement with one Lamarr, whereby the company agreed to act for him as trustee of such mineral rights in petroleum, natural gas and related hydrocarbons as he

(1) 15 W.W.R. 385, [1955] 4 D.L.R. 18. (2) 11 W.W.R. 634.

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might purchase or lease from owners in Saskatchewan and agreed to file caveats in its own name in the various land titles offices against the titles of the registered owners to protect such interests as he might acquire.

Subsequently Lamarr incorporated Amigo Petroleums Limited, in which he owned all the shares, which company sent out agents to purchase petroleum rights and to obtain oil leases from the owners, the documents being taken in the name of the trustee, the appellant Prudential.

One Nickle acquired, by assignment, the beneficial interest of Amigo Petroleums Limited in the petroleum rights so purchased or leased and, in turn, assigned his interests so acquired to the appellant Canuck Freehold Royalties Limited.

On May 1, 1951, an agreement was entered into between the appellant Canuck Freehold Royalties Limited and the appellant Prudential, whereby the latter agreed to hold in trust properties which had already been acquired.

It is not in dispute that the appellant Prudential is a bare trustee for the appellant Canuck Freehold Royalties Limited.

On January 26, 1951, one Edward W. Hunter, acting as an agent of Amigo Petroleums Limited, called upon the respondent Edmond Cugnet at his home in Weyburn, Saskatchewan. At the time of this visit the respondent was playing cards in the sitting room and Hunter told him that he wanted to talk about mineral rights, whereupon they both went into another room. Hunter then told the respondent that he wanted an option in respect of the mineral rights on the north-west quarter and the south-east quarter of section 27 and offered to pay $32 on each of the quarter-sections for an option to take a petroleum and natural gas lease, such lease to take effect upon the expiration of the leases previously granted to Rio Bravo Oil Company Limited and Bandy Lee, and $32 yearly rental for each of the quarter-sections when the option was exercised and the petroleum and natural gas lease granted.

After a short conversation between them, the respondent Edmond Cugnet signed a document entitled "assignment", wherein he assigned and transferred to the appellant Prudential an undivided one-half interest in all petroleum,

natural gas and related hydrocarbons in and under the said lands, subject to the terms and conditions of the petroleum and natural gas lease covering the said lands, and agreed to deliver to the appellant Prudential, as assignee, a registrable transfer of such interest. The respondent also granted to the appellant Prudential an exclusive option to acquire a petroleum and natural gas lease covering the said lands for a term of 99 years, to be computed from the date of the assignment, upon the termination of the current petroleum and natural gas lease. At the same time the respondent Edmond Cugnet executed a transfer, in favour of the appellant Prudential, of an undivided one-half interest in all of the mines and minerals within, upon or under the lands in question, reserving thereout all coal.

After the execution of the documents by the respondent Edmond Cugnet, Hunter left, taking the documents with him, and on January 29, 1951, the respondent Edmond Cugnet received from the appellant Prudential a copy of the assignment and also a cheque for $64. The respondent Edmond Cugnet did not read the assignment or the transfer when they were executed by him, nor did he read the copy of the assignment when it was returned to him by the appellant Prudential.

On February 2, 1951, the appellant Prudential registered a caveat against the lands in question in the land titles office at Regina as instrument no. F.C. 2281.

On September 21, 1951, a letter was sent by the solicitors of the respondent Edmond Cugnet to the appellant Prudential, complaining about the transaction and requesting that the assignment and transfer be returned to them. On April 3, 1952, the respondent Raymond Cugnet, a son of the other respondent, filed a caveat against the titles of the lands in question, based upon an agreement for sale between his father as vendor and himself as purchaser, which agreement was entered into on November 12, 1945. On January 22, 1953, the registrar of land titles at Regina, pursuant to a requirement directed to him by the respondent Raymond Cugnet, gave notice to the appellant Prudential that the caveat of that company would lapse unless there was filed with him within 30 days a judge's order providing that

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the caveat continue beyond that period. The appellant Prudential obtained a judge's order continuing the caveat for an additional period of 30 days and providing for further continuance if, within the said 30 days, it brought an action to establish its rights under the caveat and filed with the registrar a certificate of *lis pendens* issued in the same action. In the result, this action was commenced and the certificate of *lis pendens* filed.

At trial it was contended on behalf of the appellants that the evidence adduced on behalf of the respondents did not establish a plea of *non est factum* as to the documents in question and that the transaction between Hunter, in the name of the appellant Prudential, and the respondent Edmond Cugnet was voidable and not void and that the appellant Canuck Freehold Royalties Limited was a *bona fide* purchaser for value without notice and was entitled to the interest in the lands in question specified in the assignment and to a transfer of an undivided one-half interest in the petroleum and natural gas within, upon or under the said lands. In the alternative, the appellants contended that the appellant Canuck Freehold Royalties Limited was entitled to the option as specified in the assignment.

The respondents took the position that the transaction was not merely voidable, but void *ab initio*, and that a plea of *bona fide* purchaser for value was of no assistance to the appellant Canuck Freehold Royalties Limited. They further contended that in any event, irrespective of misrepresentation, there was no *consensus ad idem* between the parties and no agreement between them, or that the agreement, if any, was void for uncertainty.

The learned trial judge, who was favourably impressed with the evidence of the respondent Edmond Cugnet, found that he never intended to complete the assignment and transfer, as they now appear in the record, and relied on the misrepresentation of Hunter that the documents he was asked to sign constituted only the granting of an option. Hunter was not called as a witness at the trial, his whereabouts being unknown. The learned trial judge further found that the respondent Edmond Cugnet was mistaken as to the nature and character of the assignment and transfer and that this mistake was induced by the fraudulent

misrepresentation of Hunter, the agent of the appellant Prudential. In the result, the learned trial judge held that the plea of *non est factum* was established and that the documents were void.

With respect to the submission on behalf of the appellants that Canuck Freehold Royalties Limited was a purchaser for value without notice of the fraud inducing the signing of the documents, the learned trial judge held that, while the evidence supported this submission, the rights of Canuck Freehold Royalties Limited were invalid and unenforceable because the documents were void. Further, the learned trial judge refused to give effect to the submission on behalf of the appellants that in any event Canuck Freehold Royalties Limited was entitled to the rights under the option granted by the respondent Edmond Cugnet and contained in the assignment, on the ground that the whole transaction, as evidenced by the documents, was void and the documents themselves were in a like position. The judgment of the learned trial judge, dismissing the action of the appellants, declared that the assignment and transfer were void and of no effect and ordered that they be delivered up to the respondent Edmond Cugnet for cancellation, and directed that the caveat and certificate of *lis pendens* be vacated.

From that judgment an appeal was taken to the Court of Appeal and by a unanimous judgment the appeal was dismissed on the ground that the plea of *non est factum,* as found by the learned trial judge, must be sustained. The Court of Appeal granted special leave to appeal from that judgment to this Court.

In the Courts below the appellants relied on *Howatson v. Webb* (1), affirmed on appeal (2). In that case the defendant Webb, who was formerly the managing clerk to one Hooper, acted as his nominee in a building speculation relating to certain property of which Hooper was the owner. Shortly after leaving Hooper's employment he was requested by Hooper to execute certain deeds, and, on asking what those deeds were, he was told by Hooper that they were deeds transferring the property in question, and the defendant thereupon signed them. One of the deeds

(1) [1907] 1 Ch. 537. (2) [1908] 1 Ch. 1.

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so signed was a mortgage between the defendant, as mortgagor, of the one part, and one Whitaker, of the other part, and contained the usual covenant by the mortgagor for payment of principal and interest. In an action by the transferee of the mortgage for payment of the principal debt and interest the defendant pleaded *non est factum.* It was held that the misrepresentation being only as to the contents of a deed known by the defendant to deal with the property, the plea failed and that the defendant was liable on the covenant. Warrington J. at p. 549 said:—

> What does the evidence in the present case shew? I may go so far in the defendant's favour as to say that Webb, having regard to his knowledge of Hooper, when Hooper said that the deeds were "deeds for transferring the Edmonton property," was justified in believing that they were deeds such as a nominee could be called upon to execute either in favour of a new nominee or for the purpose of putting an end to his own position of nominee, and certainly not a deed creating a mortgage to another person. But in my opinion that is not enough. He was told that they were deeds relating to the property to which they did in fact relate. His mind was therefore applied to the question of dealing with that property. The deeds did deal with that property. The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed. He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents. The deed contained a covenant to pay. Under those circumstances I cannot say that the deed is absolutely void. It purported to be a transfer of the property, and it was a transfer of the property. If the plea of *non est factum* is to succeed, the deed must be wholly, and not partly, void. If that plea is an answer in this case, I must hold it to be an answer in every case of misrepresentation. In my opinion the law does not go as far as that. The defence therefore fails.

The appellants contend, on the authority of *Howatson v. Webb,* that, while the respondent Edmond Cugnet was indifferent and careless as to what he signed, nevertheless he is bound by what he did sign and cannot successfully maintain a plea of *non est factum.*

The respondents rely on *Carlisle and Cumberland Banking Company v. Bragg* (1), where the facts were that the defendant, who pleaded *non est factum,* signed a document which purported to be a continuing guarantee by him, up to a certain amount, of the payment by one Rigg of any sum which might, at any time thereafter, be or become due from Rigg to the plaintiff, a banking company, on the general balance of his banking account with them. In fact the defendant had been induced by the fraud of Rigg

(1) [1911] 1 K.B. 489.

to sign the document, without reading it, and not knowing that it was a guarantee, but believing it to be a document of a different character; namely, an insurance paper. Buckley L. J. said at p. 495:—

> The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying, "this is a conveyance of your property," or "this is your lease," and he does not inquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatsoever they are. If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed. As to what amounts to materially misleading there is of course a question. *Howatson v. Webb* was a case in which the erroneous or insufficient information was not enough for the purpose.

Kennedy L.J. said at p. 497:—

> The principle involved, as I understand it, is that a consenting mind is essential to the making of a contract, and that in such a case as this there was really no consensus, because there was no intention to make a contract of the kind in question.

In order to determine the effectiveness of the plea of *non est factum* as applied to the facts of this case, it is necessary to examine the authorities.

The old cases on misrepresentation as to the contents of a deed were based upon the illiterate character of the person to whom the deed was read over, and on the fact that an illiterate man was treated as being in the same position as a blind man. Sheppard's Touchstone, 8th ed. 1826, p. 56.

An early instance of the application of the plea is to be found in *Thoroughgood's Case* (1), where it was held that a deed executed by an illiterate person does not bind him, if read falsely either by the grantee or a stranger; (2) that an illiterate man need not execute a deed before it be read to him in a language which he understands, but if the party executes without desiring it to be read, the deed

(1) (1582), 2 Co. Rep. 9a, 76 E.R. 408.

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is binding; (3) that if an illiterate man execute a deed which is falsely read, or the sense declared differently from the truth, it does not bind him.

It appears in more recent cases that the application of the plea has been extended beyond the earlier cases, which turned upon the question of illiteracy or blindness.

This extension is well illustrated in *Foster v. Mackinnon* (1), where the facts were that the defendant had been induced to put his name upon the back of a bill of exchange, making himself liable as indorser, on the fraudulent representation of the acceptor that he was signing a guarantee. The bill got into the hands of a *bona fide* holder for value, who sued the defendant as indorser, and the result of the action was that the defendant, having signed the document without knowing it was a bill and under the belief that it was a guarantee, and not having been guilty of any negligence in so signing it, was held not liable on the indorsement. Byles J. at p. 711 said:—

> It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

In *Bagot v. Chapman* (2), a married woman, entitled to a reversionary interest, was induced by her husband to execute a document which he represented to be a power of attorney enabling him to raise money at some future time. It was, in fact, a mortgage for £12,000 of a reversionary interest to which she was entitled, containing a personal covenant for payment by the wife. The wife knew that if her husband did eventually raise money under the document it would be raised out of her reversionary interest. She did not intend to create a present charge or incur any personal liability. In an action brought by

(1) (1869), L.R. 4 C.P. 704. (2) [1907] 2 Ch. 222.

the mortgagees against the husband and wife for foreclosure and judgment on their covenants the wife pleaded, amongst other defences, *non est factum*, which was upheld. Swinfen Eady J. said at p. 227:—

> It is well settled that where a person is induced to execute a deed by a false representation as to the nature and character of the document he is signing—where the document is of a totally different character from what he was told it was—such a deed does not bind him.

The learned judge distinguished *Howatson v. Webb* at p. 227:—

> The present case is different from the recent case of *Howatson v. Webb*, where the grantor was told that the deeds signed by him related to the property to which they did relate, and were deeds transferring that property, and his mind was applied to the question of dealing with that property.

The principle that ignorance of the contents of a deed will not support a plea of *non est factum* was applied in *L'Estrange v. F. Graucob, Limited* (1). In that case the buyer of an automatic slot machine alleged that when she signed the order form she had not read it and knew nothing of its contents and that the clause excluding warranties could not easily be read owing to the smallness of the print. There was no evidence of any misrepresentation by the sellers to the buyer as to the terms of the contract. Scrutton L.J. said at p. 403:—

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

In *Marks v. The Imperial Life Assurance Company of Canada* (2), affirmed on appeal (3), the facts were that the wife of an insured, named as beneficiary in certain insurance policies, signed with the insured a borrowing agreement in respect of each policy. It was found as a fact that the insured misrepresented to his wife the nature of the documents she was signing, telling her that they were merely for the purpose of changing, to her advantage, the scheme of payment of the insurance moneys. It was held that the wife was entitled to succeed upon the plea of

(1) [1934] 2 K.B. 394. (2) [1949] O.R. 49, [1949] 1 D.L.R. 613.
(3) [1949] O.R. 564, [1949] 3 D.L.R. 647.

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non est factum, since it was clear that the two documents signed by her bore no relation in class or character to the documents described to her by the husband when she signed them. McRuer C.J.H.C., after a valuable review of the authorities, said at p. 68:—

> It would appear to be clear from these authorities that where a person signing a document is misled by the misrepresentation of another as to its true nature and character, as distinct from the purport and effect of its contents, it is invalid and the plea of *non est factum* is a good plea.

In *Curtis v. Chemical Cleaning and Dyeing Co.* (1), the dispute was as to whether or not the plaintiff, who had taken a dress to the defendants' shop to be cleaned and had signed a paper headed "receipt", was bound by a condition that the cleaners accepted no liability for any damage however arising. It was held that the defendants could not rely on the exemption clause because their assistant, by an innocent misrepresentation, had created a false impression in the mind of the plaintiff as to the extent of the exemption and thereby induced her to sign the receipt. Denning L.J., referring to the *L'Estrange* case, *supra,* said at p. 808:—

> If the party affected signs a written document, knowing it to be a contract which governs the relations between them, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

and again at p. 808:—

> In my opinion any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption.

The question for determination is whether the principle contained in *Carlisle and Cumberland Banking Company v. Bragg, supra,* or that contained in the earlier case of *Howatson v. Webb, supra,* should be applied to the facts of this case.

It is to be observed, as was pointed out by the Court of Appeal in the present case, that in *Howatson v. Webb, supra,* the misrepresentation was made by a solicitor and that the defendant, also a solicitor, should have realized

(1) [1951] 1 K.B. 805.

that he was signing a mortgage and not a transfer. Halsbury, 3rd ed. 1955, Vol. 11, p. 360, note (*o*), also makes reference to the fact that the defendant was a solicitor and could not have been misled if he had read the document, but chose to execute it without doing so. When the defendant Webb asked what the deeds were that he had been asked to sign he was told that they were just deeds transferring the Edmonton property. In fact one deed was a mortgage, but it is to be remembered that in England a mortgage operates as a conveyance and is a transfer of property by way of mortgage. The Court may have been influenced by the fact that the document signed by Webb was not of a character "wholly different" from what was represented to him.

The principle contained in *Carlisle and Cumberland Banking Company v. Bragg, supra,* was approved in this Court in *Minchau v. Busse* (1). Sir Lyman Duff C.J.C. said at p. 294:—

> The law is stated in the most satisfactory way in the judgment of Buckley L.J. in *Carlisle & Cumberland Banking Co. v. Bragg,* [1911] 1 K.B. 489 at p. 495.

In my view, while the respondent Edmond Cugnet knew that he was dealing with his petroleum and natural gas rights, the representation made to him was as to the nature and character of the document and not merely as to its contents. It was represented to be an option to grant a petroleum and natural gas lease, when, in fact, it was an assignment and transfer to the appellant Prudential of an undivided one-half interest in the petroleum and natural gas rights of the respondent Edmond Cugnet in the lands in question in the action.

Applying the principle contained in *Carlisle and Cumberland Banking Company v. Bragg, supra,* as I do, I have come to the conclusion that the mind of the respondent Edmond Cugnet did not go with his hand and that the plea of *non est factum* has been established.

It was contended on behalf of the appellant Prudential, in the alternative, that, in any event, the appellant Canuck Freehold Royalties Limited was entitled to the option con-

(1) [1940] 2 D.L.R. 282.

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tained in the document in question, which, on the evidence, the respondent Edmond Cugnet agreed to grant and for which he received payment.

With this contention I am unable to agree. The option is predicated upon the assignment and transfer to the appellant Prudential of an undivided one-half interest in the petroleum and natural gas upon or under the lands in question. It is an option given jointly by the respondent Edmond Cugnet and the appellant Prudential to grant a petroleum and natural gas lease to the appellant Prudential or its nominee.

Moreover, the option provided that, in addition to the share of the production to which the appellant Prudential, or its nominee, would become entitled as lessee under the terms of any lease obtained under the option, the appellant Prudential should be entitled to its share of production reserved by the respondent Edmond Cugnet and the appellant Prudential as lessors under such lease.

In my view, if the assignment of the one-half interest is void, then that portion of the document granting the option cannot be severed and falls with the rest of the transaction.

Having come to the conclusion that the plea of *non est factum* has been established and that the whole transaction is void, it is unnecessary to consider the other points raised in argument on the appeal.

I would dismiss the appeal with costs.

LOCKE, J.:—The question as to whether the respondents in the present matter are entitled to rely upon the plea of *non est factum* is not determined by deciding whether that plea would succeed if this action had been brought by the principals on whose behalf Hunter acted in obtaining the signature of Edmond Cugnet to the disputed documents: there remains the further and, to my mind, the more difficult question whether they are entitled to assert that defence as against the present appellants.

Hunter, at the time, appears to have been acting on behalf of Amigo Petroleums Limited, for which company the trust company was simply a bare trustee. Considering the matter, first, from the standpoint as to whether the agreement would have been enforceable if the action had been brought by the latter company, it is my opinion that

either a defence of *non est factum* or that Edmond Cugnet had been induced to sign the documents by fraudulent misrepresentation made to him by Hunter would have defeated the claim, though the first would have rendered the agreement void *ab initio* while the latter would merely render it voidable. Despite statements in some of the decided cases such as *Howatson v. Webb* (1), which would suggest that the plea *non est factum* cannot succeed if the person signing the document is aware that the instrument he is asked to sign disposes of some interest in his property, where as here documents represented as being simply an option on mineral rights to be operative in the event of an outstanding option being dropped, include in fact an out and out sale of an undivided half interest in the mineral rights, the defence is, in my opinion, an answer.

The question as to whether the respondents are entitled to rely upon the defence is raised by the plea of estoppel by conduct in the reply to the statement of defence. The basis for the contention is that Edmond Cugnet having, by his conduct, enabled Hunter and his principals to sell what appeared on the face of it to be a half interest in the mineral rights to a purchaser for value acting in good faith, he cannot dispute the validity of the instruments as against the latter. The estoppel, it is said, arises by reason of the negligence of Edmond Cugnet. The question is the same as that referred to by Buckley L.J. in *Carlisle and Cumberland Banking Company v. Bragg* (2), in the following terms:—

> There has been so much discussion during the argument as to the plea of *non est factum*, and the relevance of negligence in relation to it under the circumstances of this case, that I wish to say a few words expressing my view of the law on the subject. In an action upon a deed, the defendant may say by way of defence that it is not his deed, *non est factum*. If it is found to be his deed, the plaintiff gets judgment and there is an end of the case. But suppose that it is found not to be his deed, and he succeeds on *non est factum*, the case is not necessarily over, because the plaintiff may say, "True you have established that this is not in fact your deed; but you are estopped by your conduct from saying that it is not your deed, and I can recover against you, although it is not your deed." It is only in this latter case that the question of estoppel comes into action. Negligence has nothing to do with the question whether the deed is in fact the deed of the defendant. Negligence has only to do with the question of estoppel.

(1) [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1.

(2) [1911] 1 K.B. 489 at 494.

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That negligence of the nature suggested would preclude a person from relying upon the defence *non est factum* if the document were a negotiable instrument appears to have been suggested, if not decided, in *Foster v. Mackinnon* (1). The instructions to the jury in that case which were approved by the unanimous decision of the court said in part:—

> If the defendant's signature to the document was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict.

In the earlier case of *Swan v. The North British Australasian Company* (2), a decision referred to by Byles J. when delivering the judgment of the court in *Foster's Case,* there is a review of the earlier authorities to be found in the judgment of Martin B. at pp. 644 *et seq.* At p. 649 that learned judge said in part:—

> I think it may be said with certainty that there is not one of them which is an authority for the proposition that, where a deed is not the deed of the party, he may be estopped by negligence or carelessness on his part from being permitted to aver that it is not.

Channell B. who agreed with Martin B. said at p. 658:—

> It would seem that an estoppel may arise out of circumstances having reference to a bill of lading or negotiable instrument taking effect by virtue of the law and custom of merchants, where no estoppel could arise from nearly similar circumstances with respect to a document not operating by virtue of the law and custom of merchants.

and referred to what had been said by Lord Chancellor Cottenham in *William M'Ewan and Sons v. James and Archibald Smith et al.* (3).

In *Bragg's Case,* Vaughan-Williams L.J. and Kennedy L.J. expressed the opinion that what had been said in *Foster's Case* as to the possible effect of negligence was applicable only to the case of a negotiable instrument.

In *France v. Clark* (4) where the question was as to the effect of a transfer of shares signed in blank which had been fraudulently made use of by the person with

(1) (1869), L.R. 4 C.P. 704.
(2) (1862), 7 H. & N. 603, 158 E.R. 611.
(3) (1849), 2 H.L. Cas. 309 at 325, 9 E.R. 1109 at 1115.
(4) (1884), 26 Ch.D. 257.

whom they had been deposited as security, Selborne L.C., at p. 262, referred to the rule relating to negotiable instruments in these terms:—

> The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a *bonâ fide* holder for value without notice.

That reason has no application to documents such as those signed by Edmond Cugnet in the present case.

It is my opinion that the result of the authorities was correctly stated in *Bragg's Case*. To say that a person may be estopped by careless conduct such as that in the present case, when the instrument is not negotiable, is to assert the existence of some duty on the part of the person owing to the public at large, or to other persons unknown to him who might suffer damage by acting upon the instrument on the footing that it is valid in the hands of the holder. I do not consider that the authorities support the view that there is any such general duty, the breach of which imposes a liability in negligence. I think the validity of the contention may be tested by asking whether, in a case such as this, an action for damages would lie at the suit of Canuck Freehold Royalties Limited against Edmond Cugnet. The answer to that question must, in my opinion, be in the negative: *Bank of Ireland v. Evans Trustees* (1), Parke B. at p. 410; *Swan's Case, supra,* at p. 650. If, indeed, there were such a duty, I think, for the reason pointed out by Channell B. in *Swan's Case,* that such an action would fail since the proximate cause of the damage was the fraudulent act of Hunter.

For these reasons, it is my opinion that the appeal should fail and be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—The question raised for decision in this appeal is which of two innocent parties is to suffer for the fraud of a third.

The relevant facts and the view of the Courts below are fully set out in the reasons of my brother Nolan and I propose to give only a brief summary of the salient points on which the rights of the parties depend.

(1) (1855), 5 H.L. Cas. 389, 10 E.R. 950.

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On January 26, 1951, the respondent Edmond G. Cugnet, hereinafter called "Cugnet Senior" signed and sealed a document whereby he conveyed an undivided one-half interest in all petroleum, natural gas and related hydrocarbons in and under two quarter-sections owned by him to Prudential Trust Company Limited, hereinafter called "Prudential", and granted to that company an option to acquire upon the termination of an existing petroleum and natural gas lease a petroleum and natural gas lease covering the said lands for a term of 99 years from January 26, 1951, on the same terms as those contained in the existing lease except that the cash rental was to be 25 cents per acre. Cugnet Senior was induced to sign this document by the fraudulent representation made to him by one Edward Hunter that it contained only the grant of an option. Cugnet Senior is literate, has had experience in buying and selling properties, has been successful, and, in his own words, has "lots of money". He signed the document without reading it. He does not suggest that anything was done to prevent him reading it but appears to have been anxious to return without delay to the game of cards which had been interrupted by Hunter's arrival. He had not met Hunter previously. Hunter took the document away with him but two or three weeks later Cugnet Senior received a copy of it together with a cheque for $64 the amount of the consideration which he had agreed to accept. He did not read this copy until some months later when his son, the respondent Raymond A. Cugnet, called his attention to its contents. In the meantime the copy had been hanging up on a spike in the kitchen at the home of Cugnet Senior. Prudential in taking the conveyance was acting as bare trustee for Amigo Petroleums Limited. During February 1951, the last-mentioned company transferred the one-half interest and the option to one Nickle who, in turn, transferred them for value to the appellant Canuck Freehold Royalties Limited, hereinafter called "Canuck", for which Prudential holds as bare trustee. Canuck had no notice or knowledge of the fraud practised by Hunter.

In upholding the respondent's plea of *non est factum* the learned trial judge distinguished the case at bar from *Howatson v. Webb* (1), on the ground that the misrepresen-

(1) [1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1.

tation was in the latter as to the contents of the document and in the former as to the nature and character of the document. I must confess that I find difficulty in discerning a difference between a conveyance of a half interest in the oil and gas under specified lands and the grant of an option to obtain a 99-year lease of such oil and gas which is greater or more fundamental than the difference between a reconveyance by a bare trustee of the legal estate in specified land to the beneficial owner thereof and a mortgage of such land containing a personal covenant to pay. The following words of Warrington J. at the trial (1), might well be applied in the case at bar:

> . . . but it seems to me that these dicta contained in the judgments clearly point to this, that if a man knows that the deed is one purporting to deal with his property and he executes it, it will not be sufficient for him, in order to support a plea of *non est factum*, to shew that a misrepresentation was made to him as to the contents of the deed. The deed in the present case is not of a character so wholly different from that which it was represented to be as to come within the principle within which Lord Hatherley held that the case before him did not fall.

It is clear that Cugnet Senior knew that the deed which he was executing was one purporting to deal with the petroleum and natural gas under two correctly specified quarter-sections owned by him. On the assumption that a distinction can validly be drawn between the facts in *Howatson v. Webb, supra,* and those in *Carlisle and Cumberland Banking Company v. Bragg* (2), it is my view that on its facts the case at bar falls within the class of cases of which the former is an example.

If, however, it be assumed that the Courts below were right in holding that the document of January 26, 1951, was entirely different in nature from what Cugnet Senior believed it to be, it is my opinion that in signing and sealing the document without reading it he was guilty of such negligence that as between himself and Canuck, which gave valuable consideration on the strength of the deed which he had in fact signed and sealed, he must bear the loss.

The general principle was stated as follows by Lord Halsbury sitting in the Court of Appeal in *Henderson & Co. v. Williams* (3):—

> I think that it is not undesirable to refer to an American authority, which, I observe, was quoted in the case of *Kingsford v. Merry, Root v. French* in which, in the Supreme Court of New York, Savage C.J. makes

(1) [1907] 1 Ch. at p. 547. (2) [1911] 1 K.B. 489.
(3) [1895] 1 Q.B. 521 at 528-9.

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observations which seem to me to be well worthy of consideration. Speaking of a bona fide purchaser who has purchased property from a fraudulent vendee and given value for it, he says: "He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer, who, by his indiscretion, has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade materially rests."

In *Farquharson Brothers & Company v. King & Company* (1), Lord Halsbury L.C. presiding in the House of Lords reaffirmed the above passage and pointed out that in the case then before the House the Court of Appeal had fallen into error through disregarding the words "who, by his indiscretion".

A branch of the principle so stated is the rule that, generally speaking, a person who executes a document without taking the trouble to read it is liable on it and cannot plead that he mistook its contents, at all events, as against a person who acting in good faith in the ordinary course of business has changed his position in reliance on such document. But it is said that the plea of *non est factum* operates as an exception to this salutary rule. That this is so in the case of a blind or illiterate person may be taken to be established by *Thoroughgood's Case* (2), but whether the exception extends to an educated person who is not blind is a question which was treated by Mellish L.J. in *Hunter v. Walters* (3) and by Warrington J. and the Court of Appeal in *Howatson v. Webb, supra,* as being still open. In the former case at pp. 86-7, Mellish L.J. says:—

> Now, I am of opinion that there is evidence that both Hunter and Darnell were induced by the fraud of Walters to execute that deed; but the mere circumstance that they were induced to execute it by fraud does not make it a void deed in point of law. But it is said that there is something more than this, and that where a deed is procured by an actual false representation respecting the contents of the deed itself, or respecting the legal effect of the deed, there the deed is not only voidable, but is actually void at law, and, being void, the parties are in the same position as if it had never been executed at all. Thence, no doubt, it would follow, that Mr. Walters never got any estate in these premises at all, and therefore that an equitable mortgage by him would be altogether invalid.
>
> Now, in my opinion, it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied him-

(1) [1902] A.C. 325 at 331, 332. (2) (1582), 2 Co. Rep. 9a, 76 E.R. 408.
(3) (1871), L.R. 7 Ch. 75 at 87.

self as to what the contents of the deed really were, may not, by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it.

This passage is quoted by Warrington J. in *Howatson v. Webb* and in the Court of Appeal (1), Farwell L.J. says:—

I think myself that the question suggested, but not decided, by Mellish L.J. in that case will some day have to be determined, viz., whether the old cases on misrepresentation as to the contents of a deed were not based upon the illiterate character of the person to whom the deed was read over, and on the fact that an illiterate man was treated as being in the same position as a blind man: see *Thoroughgood's Case,* and Sheppard's Touchstone, p. 56; and whether at the present time an educated person, who is not blind, is not estopped from availing himself of the plea of *non est factum* against a person who innocently acts upon the faith of the deed being valid.

While he does not refer specifically to the question suggested by Mellish L.J., Buckley L.J. gives an answer to it in *Carlisle v. Bragg, supra,* at p. 496, where, speaking of the plea of *non est factum,* he says:—

I do not think myself that cases of this kind are to be confined to the blind and illiterate. Blindness and illiteracy constitute a state of things of which the equivalent for this purpose may under certain circumstances be predicated of persons who are neither blind nor illiterate. If a document were presented to me written in Hebrew or Syriac, I should for the purposes of that document be both blind and illiterate—blind in the sense that, although I saw some marks on the paper, they conveyed no meaning to my mind, and illiterate as regards the particular document, because I could not read it. It seems to me that the same doctrine applies to every person who is so placed as that he is incapable by the use of such means as are open to him of ascertaining, *or* is by false information deceived in a material respect as to, the contents of the document which he is asked to sign.

With the greatest respect, it appears to me that instead of the word "or" which I have italicized in this passage the word "and" ought to have been used. In a case where the deed in question has in fact been executed by the person raising the plea it is of the essence of the plea of *non est factum* that such person shall have been deceived as to its contents. I do not, of course, suggest that Buckley L.J. used the word "or" by inadvertence, for it seems clear

(1) [1908] 1 Ch. 1 at 3, 4.

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that Bragg was capable by the use of such means as were open to him of ascertaining the contents of the document which he was asked to sign. All that he had to do was to read it.

An anxious consideration of all the authorities referred to by counsel and in the Courts below has brought me to the conclusion that, in so far as *Carlisle v. Bragg* decides that the rule that negligence excludes a plea of *non est factum* is limited to the case of negotiable instruments and does not extend to a deed such as the one before us, we should refuse to follow it. I do not read the judgment of Sir Lyman Duff C.J. in *Minchau v. Busse* (1) and particularly his reference at p. 294 to the judgment of Buckley L.J. as binding us to follow everything that was decided in *Carlisle v. Bragg*.

In my view the effect of the decisions prior to *Carlisle v. Bragg* is accurately summarized in Cheshire and Fifoot on Contract, 4th ed. 1956, at pp. 206-7, as follows:—

> The rule before 1911 was that if A., the victim of the fraud of C., was *guilty of negligence* in executing a written instrument different in kind from that which he intended to execute, then he was estopped as against innocent transferees from denying the validity of the written contract.

That rule was, I think, laid down by Byles J. delivering the unanimous judgment of the Court in *Foster v. Mackinnon* (2) as being applicable to all written contracts. It appears to me that the Court of Appeal in *Carlisle v. Bragg* misinterpreted the following passage in the judgment of Byles J. at p. 712:—

> Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.
>
> In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

(1) [1940] 2 D.L.R. 282. (2) (1869), L.R. 4 C.P. 704.

> But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange.

This does not say that the rule, that the signer if guilty of negligence will be estopped from denying the validity of a document as against a purchaser for value in good faith, is confined to the case of negotiable instruments; but rather that a person who knows he is signing a negotiable instrument cannot deny its validity to a holder in due course although he was guilty of no negligence in affixing his signature.

It may be said that the term negligence is inappropriate because it presupposes a duty owed by Cugnet Senior to Canuck, but in the passages quoted the term is, I think, used as meaning that lack of reasonable care in statement which gives rise to an estoppel. As it was put by Sir William Anson (1) in an article on *Carlisle v. Bragg*:—

> And further, there seems some confusion between the negligence which creates a liability in tort, and the lack of reasonable care in statement which gives rise to an estoppel. Bragg might well have been precluded by carelessness from resisting the effect of his written words, though the Bank might not have been able to sue him for negligence.

On the facts in the case at bar it cannot be doubted that Cugnet Senior failed to exercise reasonable care in signing the document in question. He executed a deed which he knew dealt with the oil and gas under his property without reading it, relying on the statements as to its contents made by Hunter who was a stranger to him. It does not appear that anything was done to prevent his reading the document. He chose to sign it unread rather than to absent himself for a few more minutes from the game of cards. His conduct, in my opinion, precludes him from relying on the plea of *non est factum* as against Canuck which purchased relying on the deed, in good faith, for value, and without notice or knowledge of any circumstance affecting the validity of the deed.

The terms of the deed appear to me to be sufficiently clear and I think that the plea that it is void for uncertainty must be rejected.

(1) (1912), 28 L.Q.R. 190 at 194.

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In the result I would allow the appeal with costs throughout and direct that judgment be entered for the relief claimed in the amended statement of claim.

Appeal dismissed with costs.

Cartwright J.

Solicitors for the plaintiffs, appellants: Thom, Bastedo, McDougall & Ready, Regina.

Solicitor for the defendants, respondents: D. G. McLeod, Regina.

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*May 8, 9
*Oct. 24

R. C. STEVENSON, C.A., as Attorney in Canada for the Non-Marine Underwriters at Lloyds (*Defendant*) ..... APPELLANT;

AND

RELIANCE PETROLEUM LIMITED (*Plaintiff*) ..... RESPONDENT.

AND

RELIANCE PETROLEUM LIMITED (*Plaintiff*) ..... APPELLANT;

AND

CANADIAN GENERAL INSURANCE COMPANY (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile liability policy—Loss arising from "ownership, use or operation" of vehicle—Tank truck delivering gasoline at service station—Negligence of driver.

Insurance—General liability policy—Express exclusion of "claim arising or existing by reason of . . . any motor vehicle"—Meaning and effect—Delivery of gasoline by tank truck—Negligence resulting in damage to third persons.

A company engaged in the distribution of petroleum products employed in that business tank trucks with which gasoline and other products were delivered to service stations. While gasoline was being delivered from one of these tank trucks it escaped as a result of the negligence

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

of the driver of the truck and caught fire, and the fire caused extensive damage to the service station and to property of other persons then on the premises. The company paid the claims of the persons damaged, and then sought indemnity under two policies of insurance.

Held: The company was entitled to recover under one policy, but not under the other.

The first policy, an automobile liability policy, expressly insured against liability "arising from the ownership, use or operation" of the vehicle, and the loss clearly arose from the "use" of the tank truck within the meaning of the insuring clause. That term included not only the transportation of the gasoline from the company's premises to the service station but also its delivery into the tanks at the service station. (*Per curiam.*)

The second policy, however, was a general liability policy, and specifically excluded "any claim arising or existing by reason of . . . Any motor vehicle". This must be taken to be an exclusion of liability arising in any way from the ownership, use or operation of an automobile, or precisely what was covered by the other policy. The exclusion extended even to the finding that the truck driver had been negligent in not ascertaining the quantity of gasoline already in the tank before starting to deliver it, since this was merely a circumstance annexed to the act of delivery. (*Per* Kerwin C.J. and Taschereau, Rand and Cartwright JJ.; Locke J. *contra.*)

Per Locke J. (*dissenting in part*): The loss was covered in part by the second policy as well as the first. The risk covered by this policy was not defined by statute, and the policy was to be construed *contra proferentem*. *Anderson v. Fitzgerald,* (1853), 4 H.L. Cas. 484 at 507, applied. The liability for the negligent act of the driver fell squarely within the insuring clause and was not excluded by the special exclusion, construed, as it should be, in the sense in which the insured person might reasonably understand it; if the insurer had intended to exclude this risk it should have done so in clear and unambiguous terms, which admitted of no doubt. *Life Association of Scotland v. Foster et al.,* (1873), 11 M. (Ct. of Sess.) 351 at 371; *Provincial Insurance Company, Limited v. Morgan et al.,* [1923] A.C. 240 at 250, referred to. The insurer had therefore committed a breach of its contract in declining to investigate the claims made against the insured, to conduct the defence of the litigation and to pay the judgments up to the limits in the policy. The action against this insurer was one for damages for breach of contract, and the insurer's conduct amounted in law to a waiver of its right to insist upon compliance by the insured with the provisions of the contract as to admitting liability or settling claims. *Jureidini v. National British and Irish Millers Insurance Company, Limited,* [1915] A.C. 499 at 505, 507, applied.

APPEALS from the judgment of the Court of Appeal for Ontario (1), on appeal from the judgment of Spence J. (2) in two actions tried together.

(1) [1954] O.R. 846, [1954] 4 D.L.R. 730.

(2) [1953] O.R. 807, [1953] 4 D.L.R. 755.

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STEVENSON v. RELIANCE PETROLEUM LIMITED

RELIANCE PETROLEUM LIMITED v. CANADIAN GENERAL INSURANCE COMPANY

B. J. Thomson, Q.C., for the defendant Stevenson, appellant.

W. G. Burke-Robertson, Q.C., for the plaintiff, appellant and respondent.

R. F. Wilson, Q.C., for the defendant Canadian General Insurance Company, respondent.

The judgment of Kerwin C.J. and Taschereau J. was delivered by

THE CHIEF JUSTICE:—In the action by Reliance Petroleum Limited against R. C. Stevenson, C.A., in his capacity as attorney in Canada for the Non-Marine Underwriters at Lloyds, Spence J., the trial judge (1) considered that the liability of Reliance for the negligence of their employee Anstey arose out of the use of the tank truck and, therefore, the claim fell within the following clause of the policy of insurance issued by Lloyds to Reliance:—

> The Insurer agrees to indemnify the Insured . . . against the liability imposed by law upon the Insured . . . for loss or damage arising from the ownership, use or operation of the automobile.

We are not concerned with the legislation respecting automobile insurance, to which counsel for Lloyds referred, but with the terms of the policy. There is no doubt on the evidence that Anstey was negligent and that a liability was imposed by law upon Reliance for the loss or damage detailed in the reasons for judgment in the Courts below. The tank trucks, which admittedly were covered by the policy, were stated, in the application therefor, to be used in the business of the insured, which was that of distributing oil and gasoline. These tank trucks were not merely to transport those products to service stations, but they were equipped so as to permit the discharge of gasoline into the tanks in such stations through faucets and hose. In the Court of Appeal (2) Roach J.A. considered that what was done in the present case fell as well within the "operation" as the "use" of the tank truck and, in fact, that these two terms were synonymous. With respect, I am unable to agree, as it must be taken that the two words were inserted to denote different things and I am not satisfied that "operation" by itself would be sufficient to cover the cir-

(1) [1953] O.R. 807, [1953] 4 D.L.R. 755.

(2) [1954] O.R. 846, [1954] 4 D.L.R. 730.

cumstances with which we are dealing. However, the liability imposed upon Reliance was for loss or damage arising from the "use" of the tank truck and that is sufficient to warrant the dismissal of Lloyds' appeal with costs.

The appeal by Reliance against the dismissal by the Court of Appeal of its action against Canadian General Insurance Company raises different problems, only one of which, however, I find it necessary to consider. That company had issued to Reliance what is called a "GENERAL PUBLIC LIABILITY POLICY" and it is not suggested that the claims advanced by Reliance fall within the terms of the policy itself, because it covered merely the liability of Reliance for damages caused by bodily injury, sickness, or disease. In a "PROPERTY DAMAGE ENDORSEMENT" attached to the policy it was stated that the endorsement was issued "In consideration of an additional premium", but the body of the document shows that the additional premium was included in that prescribed for the policy. By para. 1 of this endorsement the company agreed:—

> TO PAY on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law, or assumed by the Insured under contract as set forth hereinafter, for damages because of injury to or destruction of property caused by accident occurring within the Policy Period and while this Endorsement is in force.

However, this agreement was "subject to the Statements, Exclusions and Special Conditions of the Policy" and in the policy, under the heading "EXCLUSIONS", appears the following:—

> This Policy shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of any of the following matters:
>
> * * *
>
> 3. Any motor vehicle (including trailer or semi-trailer) that is required by law to have a license or permit, and which is off premises owned, rented or controlled by the Named Insured, or which is owned, hired or leased by the Insured, and, except with respect to operation by independent contractors, the ownership, maintenance or use, including loading or unloading, of any (a) watercraft while away from such premises or (b) aircraft.

Differing from Lloyds' policy, which was a standard automobile insurance policy, the "PROPERTY DAMAGE ENDORSEMENT" of Canadian General Insurance Company when read, as it must be, subject to exclusion no. 3, was not to cover the insurance of automobiles, but other forms of

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public liability. In fact the very kind of insurance covered by Lloyds for "loss or damage arising from the ownership, use, or operation of the automobile" is clearly and specifically excepted from the risk undertaken by Canadian General Insurance Company.

The appeal by Reliance should be dismissed with costs.

RAND J.:—The questions on this appeal are whether the loss suffered is within the general public liability policy of the respondent Canadian General Insurance Company, or within the motor vehicle liability policy of the appellant Lloyds, or both; but notwithstanding Mr. Thomson's comprehensive argument I am of the opinion that the judgment of the Court of Appeal (1) was right.

His first contention is that the damage did not arise from the "use" of the automobile as that word appears in Lloyds' policy:

> The Insurer agrees to indemnify the Insured . . . against the liability imposed by law upon the Insured . . . for loss or damage arising from the ownership, use or operation of the automobile within Canada . . .

The main ground is that what was present was not negligence in any function attributable to an automobile: it was negligence in a function added to but distinct from that of an automobile, that is, the discharge of gasoline into the tank of a service station: the want of care of an employee in the course of work dissociated from operation or use of the truck. He classified what was being done with a number of examples of similar non-automobile uses of such a vehicle: receiving visitors on a home trailer while stationary; using spray-painting equipment set up on and moved from place to place on a truck; a circus truck carrying a cage from which a lion escapes and does mischief; a peanut or like familiar stand set up in a truck and disposing of its wares at different places. These can, no doubt, be described as separate and distinct in their nature and purpose from that of the automobile; the use of the truck can properly be differentiated from the function of the apparatus or means conveyed; but the question is whether we have here such a severable activity.

(1) [1954] O.R. 846, [1954] 4 D.L.R. 730.

Was the negligence of the employee in the course of work other than that of his operation or use of the truck? What was the undertaking entered upon by means of the truck? It was to carry gasoline products for delivery at filling stations, not merely to carry; delivery was as much a part of what was being done by means of the truck as the carriage.

Did the fire, then, result from negligence in delivering the gasoline? I cannot see how that can be seriously doubted. For negligence we must have human action: the truck is not "self-operating" or "self-using"; "use" implies human direction and utilization of a means; it is the combination of the two that constitutes the act to which innocence or negligence is to be imputed. That is the act intended to be embraced by the language of the clause. Here the overflow was physically the direct result of the pressure from the oil in the tank truck which was then under the control of the driver. His failure to ascertain the capacity of the underground tank and to remain at the truck faucet or closing valve constituted negligence in relation to the use of the truck in discharging the gasoline. That was part of the function of the tank truck and does not come within the class of differentiated uses mentioned.

An analogous "use", as distinguished from "operation", is exemplified in the case of a bus. The undertaking in such a case includes the entrance and exit to and from the bus of passengers. If the steps are defective and a passenger is injured, could it be said that injury did not arise out of the "use"? The expression "use or operation" would or should, in my opinion, convey to one reading it all accidents resulting from the ordinary and well-known activities to which automobiles are put, all accidents which the common judgment in ordinary language would attribute to the utilization of an automobile as a means of different forms of accommodation or service. It may be said that in these instances "use" and "operation" are equivalents: but the statute uses both words and meaning can be given to each in this manner where the "use" is that in fact of the automobile.

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Rand J.

Canadian General Insurance Company claimed exemption on two grounds, but I find it necessary to deal with one only. Its general contract is to indemnify the insured against liability imposed by law for damages to property "caused by accident". The exclusion is in this language:

> This Policy shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of any of the following matters:
>
> * * *
>
> 3. Any motor vehicle . . . which is owned, hired or leased by the Insured. . . .

I agree with Roach J.A. that damage from accident arising by reason of "any motor vehicle" includes the damage done here. That phrase contemplates damage done by such a vehicle in use or operation within the scope and course of its ordinary functions. Here the insured is engaged in selling gasoline and other automobile supplies and in delivering them by means of tank trucks, a commercial activity that has become of wide dimensions. What the clause aims at is to exclude from its coverage the area of automobile insurance and to embrace public liability arising from other causes than automobiles. It is expressed in broad but unambiguous language which is to be interpreted in the light of the common knowledge of this new feature of our social condition.

But "use", it is argued, is to be distinguished from "operation"; that the condition of this exclusion, being in derogation of the general language of liability, must be confined to the narrowest common function of automobiles which the trial judge found to be "operation". The words can, obviously, be given distinct meaning by limiting the scope of "operation" to the mere locomotion of the vehicle, and attributing to "use" the discharge of the gasoline. But this limitation must be rejected because of the associated language and because of its overriding implication involving all liability related to an automobile. The fact that in the statutes of Ontario automobile insurance is dealt with in a most particularized manner must be kept in mind when we are dealing with insurances against public liability and the presence of such an exclusion.

I have not overlooked the finding of the Court of Appeal that the truck driver was negligent in not measuring the depth of gasoline in the tank before commencing to deliver.

But, just as the failure to remain at the truck during the discharge, that was merely a circumstance annexed to his act of delivery; the cause of the disaster was the unattended discharge into an unexamined tank, a composite negligent act in the operation of the truck.

I would, therefore, dismiss the appeal with costs.

LOCKE J. (*dissenting in part*):—These two appeals were heard together and were taken from two judgments of the Court of Appeal for Ontario (1), one of which dismissed the appeal of the appellant Stevenson from the judgment of Spence J. at the trial (2), the other allowed the appeal of the respondent Canadian General Insurance Company from a judgment of that learned judge delivered at the same time. As the evidence as to the occurrence which gave rise to the claims was equally applicable to both actions, they were, by consent, tried together.

The actions were brought upon policies of insurance issued by the Non-Marine Underwriters at Lloyds and by Canadian General Insurance Company, and the questions to be determined are as to the construction of the language of these policies. It is, however, necessary to consider the evidence to assist in determining these questions of construction.

Reliance Petroleum Limited is a distributor of oil and oil products in London, Ontario, and makes its deliveries of gasoline to service stations in that vicinity in tank trucks. On September 1, 1951, Ronald Riddell, the operator of a service station rented by him from the Reliance company, ordered by telephone a quantity of standard and ethyl gasoline. Anstey, an employee of the Reliance company, drove one of its gasoline trucks, which carried five tanks, to the service station to make the delivery. The tanks carried on the truck were each equipped with faucets to which a hose might be connected for delivering the gas into underground tanks. These faucets were operated by a spring mechanism so designed that it was necessary to hold them open while gas flowed from the tank by the force of gravity. After delivering the 200 gallons of ethyl gasoline which had been ordered, Anstey connected the hose to the faucet of

(1) [1954] O.R. 846, [1954] 4 D.L.R. 730.

(2) [1953] O.R. 807, [1953] 4 D.L.R. 755.

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Locke J.

a tank carrying standard gasoline, of which, according to him, Riddell had ordered 400 gallons. Without measuring the quantity of gasoline in the underground tank to which the delivery was being made, he then, instead of remaining at the faucet, as required by the regulations made under *The Gasoline Handling Act*, R.S.O. 1950, c. 156, placed a stick, carried by him on the truck for the purpose, in such a manner as to keep the spring mechanism of the faucet open, and left the truck apparently for the purpose of obtaining payment for the gasoline being delivered. While he was thus absent, due to the fact that the underground tank already contained more gasoline than Anstey had thought, it overflowed. Gasoline spreading into the garage on the service station property and then igniting caused extensive damage.

Actions to recover damages for loss sustained were brought against the Reliance company by five persons who had personal property on the premises, by the owner of the service station property and by Riddell, and judgments were recovered which, with costs, totalled $15,498.40. In addition, the company incurred legal costs in connection with the actions totalling $934.70.

Both Lloyds and Canadian General Insurance Company took the attitude that the Reliance company was not insured against this risk by their respective policies. Lloyds, while disputing liability, entered into the usual non-waiver agreement with the Reliance company and took part in negotiations for settlement of the claims and in the defence of the actions that were brought. Canadian General Insurance Company, however, declined to take any part in the matter, preferring to stand upon the ground that its policy did not insure risks of this nature.

While the learned trial judge did not specifically so find, it is implicit in the reasons for judgment delivered by him that he considered Anstey's conduct negligent and as having at least contributed to the loss sustained. The judgment of the Court of Appeal, delivered by Roach J.A., found in terms that Anstey had been negligent in allowing the gasoline to spill out on the surface of the area and in failing, as required by regulations made under *The Gasoline Handling Act*, to remain in constant, uninterrupted control of the spring faucet at the rear of the tank truck. Apart

from the regulations, the learned judge said that a common law duty rested upon Anstey to use consummate care in handling the gasoline and that he had failed in that duty.

The policies differ in their nature and must be considered separately. The policy issued by Lloyds had originally been issued through their representative in Canada to McManus Petroleums Limited of London on October 27, 1948, and continued by renewal certificates in the name of Reliance Petroleum Limited. The last of these which continued the policy in force was dated October 27, 1950.

The policy as originally issued was the standard owner's form of automobile insurance approved by the Superintendent of Insurance for use in Ontario, and by the renewal certificate, all its terms, provisions and conditions were continued in force for the period of a year. Apparently no new application was taken from the Reliance company, the renewal certificates stating that the insured, by accepting the certificate, renewed and reaffirmed as of the date of the renewal the statements in the signed application in the policy that was renewed. The business of McManus Petroleums Limited was described in the application made by it as gas and oil distributors, and in answer to the question as to the purpose to which the insured automobiles would be chiefly used, the answer made was "Incidental to Insured's Business". No description of the vehicles intended to be insured appears in the material filed at the trial, the application referring to a "fleet schedule attached". It is, however, common ground that the insured vehicles described in the schedule included tank trucks of the nature of the one driven by Anstey and that it was one of those intended to be covered.

The policy, as required by s. 207 of *The Insurance Act*, R.S.O. 1950, c. 183, insured, *inter alia*, the owner against the liability imposed by law upon it for loss or damage arising from the ownership, use or operation of the automobile within Canada resulting from damage to property. The question is as to whether the liability of the Reliance company for Anstey's negligent act is covered by this language.

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Spence J. was of the view that it arose out of the use of the tank truck and so the risk was insured. Roach J.A. considered that it fell within both the words "use" and "operation".

The argument addressed to us on behalf of Lloyds, put briefly, is that the history of the Ontario legislation regarding automobile insurance since it was first referred to by that name in c. 30 of the statutes of 1914, and the changes made since that time by the introduction of the financial responsibility provisions in 1930, when the words "ownership, maintenance, use or operation" first appeared, show that it was the intention to provide the forms of policies designed to insure against an automobile accident in the commonly conceived sense of that expression and to provide indemnity which would be available to persons injured or for damage occasioned by the operation of the automobile as a means of transport on the highways and elsewhere. This, it is contended, indicates that neither the expression "operation" nor "use" was intended to apply to an occurrence such as this where the vehicle was stationary and the negligence was in the operation of the faucet designed to permit the discharge of gasoline from the tanks.

This contention has been most ably advanced by Mr. Thomson but I am unable to accept it. It is the insuring contract and not the statute that we are required to construe. The meaning of these words is not to be considered standing alone but in the context in which they are employed in the contract and effect is to be given to the intention of the parties collected from their expression of it as a whole.

The policy was issued in acceptance of the application and the application was, by its terms, made part of the contract of insurance. The tank trucks insured were, as stated in the application, to be used in the business of the insured, which was stated to be that of distributing oil and gas. These tank trucks were designed both as a means of transporting, *inter alia*, gasoline to filling stations and also discharging the material into tanks through the faucets and connecting hose. In my view, the operation of manipulating the faucets for the purpose of permitting the gasoline to flow from the tank truck to the underground tank at the

filling station was a use of the truck, within the meaning of the insuring clause in the contract, equally as the transport from the premises of the insured to the filling station was within that expression.

Canadian General Insurance Company's policy, described on its face as a "General Public Liability Policy", was issued to the Reliance Company on June 22, 1950. By the policy itself, as distinct from the property damage endorsement attached to it, the insurer agreed to indemnify the insured to the extent provided against damages because of bodily injury, sickness or disease as set forth in the insuring agreements, subject to certain exclusions and special conditions. One of the exclusions read:—

> This Policy shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of any of the following matters:
>
> * * *
>
> 3. Any motor vehicle (including trailer or semi-trailer) that is required by law to have a license or permit, and which is off premises owned, rented or controlled by the Named Insured, or which is owned, hired or leased by the Insured, and, except with respect to operation by independent contractors, the ownership, maintenance or use, including loading or unloading, of any (a) watercraft while away from such premises or (b) aircraft.

By the policy, the insurer further agreed to pay on behalf of the insured all sums which it should become obligated to pay by reason of the liability imposed upon the insured by law for damages because of bodily injury, sickness or disease, including death, at any time resulting therefrom caused by events occurring within the policy period and suffered or alleged to have been suffered by any person or persons, to serve the insured by the investigation of any such claims and to defend in its name on its behalf any suit claiming damages on account of such injuries. By the special conditions the insured was required to give the insurer notice of any such claim and the insurer was entitled to determine whether it should be settled or litigated. It was further provided that the insured should not voluntarily assume or acknowledge any liability or interfere in any negotiation or legal proceeding conducted by the insurer on account of any claim, nor, except at its own expense, settle any claim. Compliance with these conditions was stated to be a condition precedent to the obligation of the insurer to indemnify the insured.

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The property damage endorsement made "subject to the Statements, Exclusions and Special Conditions of the Policy" obligated the insurer to pay all sums which the insured should become obligated to pay

> by reason of the liability imposed upon the Insured by law . . . for damages because of injury to or destruction of property caused by accident occurring within the Policy Period and while this Endorsement is in force.

The obligation of the insurer to serve the insured by the investigation of claims and to defend actions against the insured, as contained in the policy itself, was repeated. A further clause in the endorsement, so far as it concerns the present matter, read:—

> This Endorsement shall have no application with respect to and shall not extend to nor cover any claim for injury to or destruction of (a) property owned or occupied by or leased to the Insured.

The property occupied by Riddell as a service station was in November 1950, owned by John J. Gardiner and Leona Gardiner and leased by them to the Reliance company for a term of 5 years. The property, together with the buildings erected upon it and certain equipment used in the operation of the filling station, was in turn sublet by the Reliance company to Ronald E. Riddell by a lease which was in effect at the time the fire occurred.

The actions brought were compromised by the Reliance company, with the approval of Lloyds but without the approval of Canadian General Insurance Company, for amounts which were found by the learned trial judge to have been reasonable. In some of the cases, evidence was taken at a trial and liability found. In others, apparently liability was admitted and judgment entered for the amount agreed upon. These judgments were paid by the Reliance company before the present actions were commenced.

It is contended by Canadian General Insurance Company that the insured did not comply with the conditions of the policy above referred to, requiring it to refrain from acknowledging any liability or interfering in any negotiations for settlement of claims and from paying claims the extent of which had not been finally determined by judgment after an actual trial of the issue of negligence The learned trial judge considered that this defence was not open to the insurance company, a conclusion with which I respectfully agree.

While Canadian General Insurance Company did not repudiate the policy by contending that the risk had never attached, it took the attitude that the damages caused or contributed to by Anstey's negligence did not fall within the terms of the contract. In my opinion, this position is untenable. If, as I think to be the case, the risk was insured, the insuring company committed a breach of its contract in declining to investigate the claims, to conduct the defence of the litigation and to pay the judgments to the extent the policy provided. The action is one for damages for breach of the contract and, in my opinion, the conduct of the insuring company amounted in law to a waiver of its right to insist upon compliance by the insured in these respects with the terms of the contract, as was found in similar circumstances by the Supreme Court of the United States in *St. Louis Dressed Beef and Provision Company v. Maryland Casualty Company* (1). The legal consequences of the action of the insuring company in this matter do not differ in this respect, in my opinion, from that resulting from the repudiation of liability based upon charges of fraud and arson considered in *Jureidini v. National British and Irish Millers Insurance Company, Limited* (2). I refer to the judgments of Viscount Haldane L.C. at p. 505 and of Lord Dunedin at p. 507.

The language of exclusion 3 has quite understandably given rise to a difference of opinion. Spence J. considered that the purpose of the policy was to insure losses due to accidents in the general conduct of the business of the insured and that a loss due to the exploding or igniting of petroleum products was a loss within the contemplation of both parties. Roach J.A., saying that there could never be an accident "caused by" the mere existence of a motor vehicle, considered that what was intended to be excluded was an accident caused by the negligent use or operation of a motor vehicle and that this was such an accident.

It is to be remembered that, unlike the form of policy issued by Lloyds, the risk to be insured by this policy was not defined by statute. The wording of the policy is that of the insurance company and it is to be construed, in my opinion, *contra proferentem: Anderson v. Fitzgerald* (3).

(1) (1906), 201 U.S. 173. (2) [1915] A.C. 499.
(3) (1853), 4 H.L. Cas. 484 at 507, 10 E.R. 551.

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Locke J.

The language of the property damage endorsement forming part, according to the company's own designation, of a general public liability policy whereby it agreed to pay on behalf of the insured all sums which the latter should become obligated to pay by reason of the liability imposed by law because of injury to or destruction of property caused by accident, is clear. The exclusion is expressed in a most unfortunate manner. It refers to a claim arising "by reason of any motor vehicle, required by law to have a license, which is owned by the Insured". Here, as found by the Court of Appeal, Anstey was negligent in allowing the gasoline to spill out on the surface of the area, in failing to remain in control of the spring faucet and in failing to use consummate care in handling the gasoline. It was shown by the evidence that before opening the faucet he failed to ascertain by the use of a dip-stick the quantity of gasoline already in the tank, and it was his failure to do this which apparently led him to think that he could leave the spring faucet held open by a piece of wood and go into the service station to discuss business with Riddell. This act of negligence was one of the causes of the accident: the breach of *The Gasoline Handling Act* was another.

The liability for this negligent act appears to me to fall squarely within the insuring clause in the endorsement and not to be excluded by exclusion 3, which is an exception from liability and is to be construed in the sense in which the insured person might reasonably understand it: *Life Association of Scotland v. Foster et al.* (1). In *Provincial Insurance Company, Limited v. Morgan et al.* (2), Lord Russell of Killowen said that the printed forms which insurance companies offer for acceptance to the insuring public should state in clear and unambiguous terms the events upon which the insuring company will escape liability under the policy, and that these exceptions should be expressed in words which do not admit of doubt. It would, in my opinion, be giving a strained and quite unwarranted construction to the words "any claim arising by reason of any motor vehicle" as including negligent acts such as

(1) (1873), 11 M. (Ct. of Sess.) 351 at 371.

(2) [1933] A.C. 240 at 250.

failing to ascertain the amount of gasoline in the tank in advance of opening the faucet and in failing otherwise to exercise the requisite degree of care, as found by Roach J.A.

In view of the conclusion of the Court of Appeal that the risk was not insured by reason of exclusion 3, the question as to whether any of the claims were affected by the provision of the endorsement excluding claims for destruction of property leased to the insured was not considered. The learned trial judge was of the view that this should be construed as referring only to property occupied by or under the control of the insured and that, as the service station had been sublet to Riddell, this did not apply. I am unable, with great respect, to agree with this. The claim of Gardiner which was compromised for a total payment of $7,112.50 was for the damage caused to the property leased to the Reliance company for a term of 5 years from November 1, 1950, and the fact that it was thereafter sublet to Riddell does not, in my opinion, affect the matter. The language of the endorsement appears to me to be clear and unambiguous.

I would allow the appeal of the Reliance company as against Canadian General Insurance Company and direct that judgment be entered for the amounts found payable at the trial in respect of the claims other than that of Gardiner, with costs throughout against that company. I would dismiss the appeal of Lloyds with costs.

CARTWRIGHT J.:—The nature of these appeals and the facts relevant to their determination are set out in the reasons of my brother Locke. I agree with the conclusion, which has been reached in the first appeal by my brother Locke, the Court of Appeal and the learned trial judge, that the liability imposed by law upon Reliance Petroleum Limited for the losses sustained by the seven persons set out in para. 5 of the statement of claim arose from the use of the insured tank truck, and I do not find it necessary to decide whether it arose also from its operation. I agree that the appeal must be dismissed with costs.

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Cartwright J.

In the appeal of Reliance Petroleum Limited against Canadian General Insurance Company I find it necessary to consider only one of the defences raised, *i.e.*, that the appellant's claim is excluded by the terms of exclusion 3 contained in the policy.

The relevant words of the policy setting out the respondent's agreement to pay are as follows:—

> . . . the Insurer . . . subject to the Statements, Exclusions and Special Conditions of the policy . . . agrees with the Insured . . .
>
> To PAY on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law . . . for damages because of injury to or destruction of property caused by accident occurring within the Policy Period and while this Endorsement is in force.

The words relied upon as excluding the appellant's claim are as follows:—

> This Policy shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of any . . . motor vehicle . . . owned . . . by the Insured.

I have already indicated my agreement with the unanimous opinion in the Courts below that the liability of the appellant for which it claims indemnity under the policy arose from the use of the tank truck owned by it. The tank truck is a motor vehicle. But for the fact that contrary opinions have been expressed in this case I would have thought it clear that the words "any claim arising or existing by reason of any motor vehicle" in their ordinary sense include a claim arising from the negligent use of a motor vehicle. Indeed the words quoted seem to me to be at least as comprehensive as those of the insuring agreement in the standard form of owner's policy, "arising from the ownership, use or operation of the automobile". I do not think that in ordinary speech it would be said that a claim arising from the ownership or from the use or from the operation of a motor vehicle did not arise or exist by reason of a motor vehicle. So to hold would, I think, render the clause meaningless, and it is a fundamental rule that in construing an instrument effect must as far as possible be given to every clause.

The rule expressed in the maxim, *verba fortius accipiuntur contra proferentem,* was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

It was suggested that one of the grounds on which Reliance Petroleum Limited was found liable for the damages caused was the negligent failure of its employee to measure the depth of gasoline in the tank before commencing delivery and that a claim resulting from such negligence does not fall within the words of exclusion quoted above. As to this I agree with the view expressed by my brother Rand that this omission and the omission to remain at the truck during the discharge of gasoline were merely circumstances annexed to the delivery. They were the circumstances which rendered the use made of the tank truck a negligent one.

A motor vehicle was the instrument by the negligent use of which the damages were inflicted and in my opinion the claims for those damages arose by reason of the motor vehicle.

As already mentioned, the conclusion at which I have arrived as to the construction of the exclusion makes it unnecessary for me to consider the other grounds submitted by Mr. Wilson in support of the judgment of the Court of Appeal.

I would dismiss the appeal with costs.

Appeals dismissed with costs, LOCKE J. *dissenting in part.*

Solicitors for the plaintiff, respondent and appellant: Ivey, Livermore & Dowler, London.

Solicitors for the defendant Stevenson, appellant: Haines, Thomson, Rogers, Benson, Howie & Freeman, Toronto.

Solicitors for the defendant Canadian General Insurance Company, respondents: Day, Wilson, Kelly, Martin & Morden, Toronto.

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*May 20, 21
*Apr. 24
*Oct. 2
*Oct. 24

MARCEL LANGLOIS (*Plaintiff*) ..... APPELLANT;

AND

CANADIAN COMMERCIAL CORPORATION (*Defendant*) ..... RESPONDENT.

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

Crown—Liability of Crown agent to pay interest—Canadian Commercial Corporation—Money awarded by provincial Court as liquidated damages—Whether interest can be allowed against corporation—The Canadian Commercial Corporation Act, 1946 (Can.), 10 Geo. VI, c. 40, ss. 3, 9, 10, 15.

If judgment is given in a provincial Court against Canadian Commercial Corporation for damages for breach of contract, interest on the damages can be allowed against the corporation pursuant to the general law of the province. By virtue of s. 10 of the *Canadian Commercial Corporation Act,* the obligation incurred by the corporation on behalf of the Crown is to be considered as having been incurred by the corporation itself. It is therefore in the same position as any other private corporation.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), affirming, Barclay and McDougall JJ. dissenting, the judgment at trial.

The appeal was argued on March 20 and 21, 1956, and judgment (2) was delivered on April 24, 1956, reversing the judgment appealed from and holding the defendant liable to the plaintiff for breach of contract for $20,000, with costs and with interest from the date the defendant was put *en demeure* by the service of process, on the authority of *Montreal Gas Company v. Vasey* (3). Leave was obtained by the defendant to argue the question of the liability for interest, which had not been raised at the hearing of the main appeal. The defendant accordingly moved to vary the judgment in respect of interest, and the reasons for judgment now reported are those delivered, following that reargument, on the motion to vary.

G. Favreau, Q.C., and *P. Ollivier,* for the defendant, respondent, applicant on the motion to vary.

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

(1) [1954] Que. Q.B. 247.
(2) (1956), 4 D.L.R. (2d) 263.
(3) [1900] A.C. 595.

V. Pager, Q.C., and *F. Auclair*, for the plaintiff, appellant, *contra*.

The judgment of Kerwin C.J. and Fauteux and Abbott JJ. was delivered by

THE CHIEF JUSTICE:—By leave of the Court we heard argument upon a point not previously raised. It is now contended that the respondent is an agent of the Crown and that its predecessor, Canadian Export Board, acted as such in the negotiations which, as we have held, resulted in a contract between the latter and the appellant; that the Crown may not be charged with interest on any principal sum, except by virtue of a special statutory provision, or of its own consent; that the respondent is in the same position as the Crown and, therefore, interest should not be allowed.

The respondent is the successor of the Canadian Export Board, whose rights and obligations under the contract it inherited, and was established by a Statute of Canada of 1946, 10 Geo. VI, c. 40, ss. 3(5), 9, 10 and 15(2) of which are as follows:—

> 3. (5) The Corporation is for all its purposes an agent of His Majesty and its powers may be exercised only as an agent of His Majesty.
>
> 9. The Corporation may, on behalf of His Majesty, contract in its corporate name without specific reference to His Majesty.
>
> 10. The Corporation may sue and be sued in respect of any right or obligation acquired or incurred by it on behalf of His Majesty as if the right or obligation had been acquired or incurred on its own behalf.
>
> 15. (2) From the day this Act comes into force, all rights and obligations acquired or incurred by the Canadian Export Board shall, for the purposes of legal proceedings, be deemed to have been acquired or incurred by the Corporation on behalf of His Majesty.

Reading these together, it seems clear that, while the respondent may only exercise its powers as agent of the Crown, that is because it is not in the general business of buying and selling goods and merchandise, but only for the limited purposes as set forth in the other provisions of the Act. As long as it keeps within the powers thus conferred, it may, by s. 9, contract in its corporate name without

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Kerwin C.J.

specific reference to His Majesty, and by s. 10, which is the important provision, not only may it sue and be sued in respect of any right or obligation acquired or incurred by it on behalf of His Majesty (which includes the contract in question made with Canadian Export Board), but some meaning must be attached to the latter part of the section "as if the right or obligation had been acquired or incurred on its own behalf". If the obligation in this case had been incurred on its own behalf, the decision of the Judicial Committee in *International Railway Company v. Niagara Parks Commission* (1) would apply. It was there held that there was nothing to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as his principal and that the Commissioners, having entered into a certain agreement "on their own behalf", as well as on behalf of the Crown, had done so on the express terms that they were to be liable for its fulfilment. By the latter part of s. 10 of the respondent's Act, the obligation here in question is to be taken to have been incurred on its own behalf. It is, therefore, in the same position as if it were not an agent for the Crown and it is subject to the general law of the province of Quebec, as the case was fought on the basis that it was the law of that province that was applicable.

The point now taken by the respondent is without foundation and it must pay the costs of the motion asking for leave to raise it and of the new argument.

The judgment of Taschereau and Kellock JJ. was delivered by

KELLOCK J.:—The respondent contends that interest ought not to have been included in the amount for which judgment was directed to be entered and moves to vary accordingly.

By s. 3(5) of the *Canadian Commercial Corporation Act,* 1946 (Can.), 10 Geo. VI, c. 40, it is provided that:—

> (5) The Corporation is for all its purposes an agent of His Majesty and its powers may be exercised only as an agent of His Majesty.

It is contended, in view of this provision, that the Corporation cannot be subjected to any greater liability than the Crown itself and that had the Crown been sued in the

(1) [1941] A.C. 328, [1941] 2 All E.R. 456, [1941] 3 D.L.R. 385, [1941] 2 W.W.R. 338, 53 C.R.T.C. 1.

Exchequer Court, as it might have been, s. 47(*b*) of the *Exchequer Court Act*, R.S.C. 1952, c. 98, would have been a bar to the recovery of interest. It may be noted that the contract here in question is in writing.

Assuming this contention to be otherwise sound, s. 10 of 10 Geo. VI must be considered. That section reads as follows:—

> 10. The Corporation may . . . be sued in respect of any . . . obligation . . . incurred by it on behalf of His Majesty as if the . . . obligation had been . . . incurred on its own behalf.

In my opinion, the proper interpretation of this provision is that, once it is determined in any case that the contract sued on falls within the ambit of the statute, the case against the corporation thereafter proceeds in the provincial Court as though the "obligation" of the corporation sought to be enforced "had been incurred on its own behalf", that is, had been incurred by the corporation itself. Had such been the case then unquestionably arts. 1067 and 1077 of the *Civil Code* would apply and the corporation would be liable for interest. The contention that the section merely permits the corporation to be sued instead of the Crown renders, in my opinion, the words "as if the obligation had been incurred on its own behalf" mere surplusage. To give any meaning to these words, I think they must be construed as indicated above, namely, that it is the express intention of the statute that the corporation shall stand in the same position before the Court as any private corporation.

Accordingly, the motion must be dismissed with costs.

Appeal allowed with costs; motion to vary dismissed with costs.

Solicitors for the plaintiff, appellant: Deslauriers, Trépanier & Auclair, Montreal.

Solicitor for the defendant, respondent: A. Nadeau, Montreal.

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*Oct. 3, 4
*Oct. 24

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ROBERT FITTON .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Appeals to Supreme Court of Canada—Questions of law alone—Admissibility of confession—Court of Appeal holding confession inadmissible on mistaken ground of law—The Criminal Code, 1953-54 (Can.), c. 51, s. 598(1)(a).

Where a Court of Appeal orders a new trial on the ground that a statement by the accused was wrongly admitted at the trial, and there is dissent on this point, there is a right of appeal by the Crown if the difference of opinion between the majority and the minority was based, not on any question in respect of the evidence or the inferences to be drawn from it, but on differing views of the law applicable to the situation, and different interpretations of decided cases; the question of the admissibility of the statement is in such circumstances one of law alone.

Kerwin C.J. and Cartwright J. (dissenting) were of opinion that there was no dissent in the Court of Appeal on any question of law.

Evidence—Confessions—Admissibility—Test of voluntary nature of statement—Effect of decisions—Questioning by police officers—Suggested "cross-examination"—Intimation that previous statement not believed.

The decision in *Boudreau v. The King*, [1949] S.C.R. 262, did not extend in any way the rule laid down in *Ibrahim v. The King*, [1914] A.C. 599 at 609, as to the admissibility of confessions in evidence at the trial. It is still the law that a statement is admissible in evidence if it is shown to have been voluntary "in the sense that it has not been obtained . . . either by fear of prejudice or hope of advantage exercised or held out by a person in authority", and the Crown need go no further than this, even in a case where questions have been asked by the police of a person in custody. In particular, the Crown is not required to show that the statement was not otherwise influenced by the course of conduct adopted by the police, or that it was "self-impelled" in any sense other than that it was not induced by fear or hope.

The accused, having been taken to the police station early in the morning, and there given an account of his movements on the previous evening, was left there all day, not formally under arrest. About 5 p.m. the police officers returned and told the accused that they had been working all day on the case (one of murder) and that they had discovered further facts indicating that what he had told them in the morning was untrue. The accused thereupon "blurted out" a damaging statement, whereupon he was stopped and given a formal warning in respect of a charge of murder, after which he made a statement, obtained in the form of question and answer, that was reduced to writing and signed by him.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright, Fauteux, Abbott and Nolan JJ.

Held: There was nothing in the circumstances to make either the oral statement or the written one that followed it inadmissible in evidence, and the trial judge had rightly admitted them both.

Criminal law—Trial judge's charge to jury—Whether defence adequately put to jury—Murder.

The accused was charged with the murder of a young girl by choking her, the theory of the Crown being that the killing took place during the commission of a rape. The principal ground of defence, based on a statement made by the accused to the police, was that sexual intercourse had taken place with the full consent of the girl, and that the act that resulted in her death had taken place some time later, and was in no way connected with the act of intercourse.

Held: This defence had been adequately put to the jury by the trial judge, and there was no ground for interfering with the conviction.

APPEAL by the Attorney-General for Ontario from the judgment of the Court of Appeal for Ontario (1) ordering a new trial on an indictment for murder. Appeal allowed and conviction restored.

W. B. Common, Q.C., and *W. C. Bowman, Q.C.,* for the appellant.

D. G. Humphrey, and *J. G. J. O'Driscoll,* for the accused, respondent.

THE CHIEF JUSTICE (*dissenting*):—The respondent's conviction of murder was set aside by the Court of Appeal for Ontario (1) and the Attorney-General for that Province now appeals based on the dissent of Roach J.A. on two points, as to one of which Aylesworth J.A. agreed with him. The majority ordered a new trial on both grounds. As to the question of the admissibility of the oral and written statements of the accused, my view is that the dissent was on a question of fact and therefore we are without jurisdiction. According to my interpretation of the reasons in the Court of Appeal there is no difference as to the law, but merely as to its application to the circumstances. The evidence on the *voir dire* was uncontradicted and, in my opinion, the reasons of the majority and minority in the Court of Appeal are based on conflicting views as to the proper inferences to be drawn from that evidence. Such inferences are questions of fact.

However, the majority of the members of this Court read the reasons delivered in the Court of Appeal differently and are of opinion that this Court has jurisdiction. Since

(1) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

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that is to be the judgment of the Court, I conceive that I should do what I would not otherwise do—express my opinion upon both points. I am unable to discern any error in the trial judge's charge and particularly that he had not presented all aspects of the accused's defence to the jury. As to the other point, in view of the decision of this Court in *Boudreau v. The King* (1) I deem it unnecessary to restate the law as there enunciated, and applying that rule I agree with Roach J.A. that the trial judge correctly interpreted and applied it.

As the majority of the Court are of opinion that there is jurisdiction, the appeal is accordingly allowed and the conviction restored.

TASCHEREAU J.:—The respondent was convicted by the Honourable Mr. Justice Treleaven and a jury at the Toronto assizes on April 27, 1956, on the following indictment:—

> The jurors for our Lady the Queen present that Robert George Fitton on or about the 18th day of January in the year 1956, at the city of Toronto in the county of York, murdered one Linda Lampkin, contrary to the Criminal Code.

The respondent was found guilty and sentenced to be executed, but the Court of Appeal, Mr. Justice Roach dissenting, allowed the appeal and directed a new trial (2). The majority of the Court reached the conclusion that there had been misdirection of the jury by the learned trial judge in matters of law under ss. 201 and 202 of the *Criminal Code,* and that the theory of the defence was not adequately explained to the jury.

The Chief Justice of Ontario, Laidlaw J.A. and Schroeder J.A. held that the oral admission and the signed statement of the respondent were improperly admitted at the trial, and allowed the appeal and also directed a new trial on this ground. Mr. Justice Aylesworth (dissenting on this ground) as well as Mr. Justice Roach, held that the learned trial judge did not err in law in holding that the oral admission and the signed statement of the accused were admissible in evidence at the trial, and would have dismissed the appeal on this point.

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.
(2) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

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Her Majesty the Queen now appeals to this Court pursuant to the provisions of s. 598 (1) (*a*) of the *Criminal Code*, which reads as follows:—

598. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under paragraph (*a*) of section 583 or dismisses an appeal taken pursuant to paragraph (*a*) of section 584, the Attorney General may appeal to the Supreme Court of Canada

(*a*) on any question of law on which a judge of the court of appeal dissents.

The evidence might be summarized as follows:—

At approximately 9 p.m. on January 18, 1956, the respondent, who is an employee of a cartage agency under contract with the Post Office Department, took the deceased Linda Lampkin for a ride in his mail truck, and two hours later left her dead body on Commissioners Street in south central Toronto. When the body was discovered, the underclothing was ripped and torn, and it is in evidence that this young girl of 13 years old, had been the subject of sexual intercourse. Around her neck was a deep groove in the flesh tissue, which corresponded in size to the width of a scarf which she was wearing. The evidence reveals that she died of asphyxia due to strangulation.

After having discovered the body, the Toronto police force, as a result of their investigation, took the respondent Fitton into custody the next morning. During the day, Fitton made oral admissions and signed a statement, and it is the admission of this statement, which has been allowed by the trial judge, which is the first point in issue in the present appeal.

I must admit that I am at a loss to understand the contradictory position taken by the respondent on this matter. This written statement was admitted without objection, and constitutes the only defence raised by the respondent. It is now said that it has been illegally admitted as not having been made freely and voluntarily. With this last contention I cannot agree, and I fully share the views of my brother Fauteux who holds that it was admissible and that this case must be governed by the rules laid down by this Court in *Boudreau v. The King* (1).

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.

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I am also of the opinion, for the reasons given by my brother Fauteux, that the rejection or admissibility of this statement is not merely a question of fact, but raises a question of law, conferring jurisdiction on this Court, in view of the dissenting opinions in the Court below.

I further endorse what has been said by Mr. Justice Roach in his dissenting judgment as to the exposition of the theory of the defence by the trial judge, and as to the use that could be made of the expert evidence of Dr. McLean and as to the obligation of the jury to reject any of his opinions which he was not qualified as an expert to give.

I would allow the appeal and restore the conviction.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.:—The rule on the admission of confessions, which, following the English authorities, was restated in *Boudreau v. The King* (1), at times presents difficulty of application because its terms tend to conceal underlying considerations material to a determination. The cases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them.

The inference one way or the other, taking all the circumstances into account, is one for drawing which the trial judge is in a position of special advantage; and unless it is made evident or probable that he has not weighed the circumstances in the light of the rule or has misconceived them or the rule, his conclusion should not be disturbed.

The Chief Justice of Ontario, speaking for the majority of the Court of Appeal, has treated the expression "freely and voluntarily", used in *Boudreau v. The King,* as if it connoted only a spontaneous statement, one unrelated to anything as cause or occasion in the conduct of the police officers; but with the greatest respect that is an erroneous

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R 81.

interpretation of what was there said. The language quoted must be read primarily in the light of the matters that were being considered. As the opening words show, there was no intention of departing from the rule as laid down in the authorities mentioned; the phrase "free in volition from the compulsions or inducements of authority" (1) means free from the compulsion of apprehension of prejudice and the inducement of hope for advantage, if an admission is or is not made. That fear or hope could be instigated, induced or coerced, all these terms referring to the element in the mind of the confesser which actuated or drew out the admission. It might be called the induced motive of the statement, *i.e.,* to avoid prejudice or reap benefit. As Professor Wigmore intimates, the terms promise or threat may be reduced to the word "inducement", but that again may raise a question of meaning; and the justification of the illustrative use of other words is that together they indicate the general conception of influence of a certain kind producing the admission. Even the word "voluntary" is open to question; in what case can it be said that the statement is not voluntary in the sense that it is the expression of a choice, that it is willed to be made? But it is the character of the influence of idea or feeling behind that act of willing and its source which the rule seizes upon. Nothing said in *Boudreau v. The King* was intended to introduce a new quality of that influence.

But it was with an enlarged view of what that case decided that the Chief Justice held the questions, express or implied, of the police officers, taken to be of the nature of cross-examination, that is, as I understand it, that they suggested several items of his earlier statement to be false, and put without a warning, *ipso facto,* as having "instigated" it, ruled out the statement. In this I think he has, and in a matter of law, erred. The accused was not at the time under formal arrest although he had been requested to stay in the police station and, for the greater part of the time, remained in the general office, and the earlier questions were such as the police might have addressed to any person in the remotest way drawn into the enquiry. Ques-

(1) *Boudreau v. The King, supra,* at p. 269.

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tions without intimidating or suggestive overtones are inescapable from police enquiry; and put as they were here, they cannot by themselves be taken to invalidate the response given. The question still remains: was the statement made through fear or hope induced by authority?

The rules adopted in England relating to this matter express, no doubt, the wisdom of long experience; but they in fact contemplate questioning after the arrest has been decided on and a warning given; and there is discretion in the trial judge to admit a statement notwithstanding their non-observance. In this country they have no other force than what their innate good sense may suggest in individual determinations, as considerations to be kept in mind in weighing the total circumstances.

On the *voir dire* no attempt was made by counsel to show by cross-examination either coercion or inducement, and it was frankly conceded that the admission of the evidence, if not facilitated, was not seriously challenged for the reason that the statement contained the only evidence upon which the defence intended to rely. Not only, then, was the testimony of the officers accepted by the trial judge and unopposed on behalf of the accused, but its admission was looked on as for the benefit of the defence. In that situation I should say that there is nothing to warrant a finding that the statement was not shown to have been voluntary; and the ruling in appeal, on this view, also, is on a question of law.

I am, therefore, in agreement with Roach J.A. and Aylesworth J.A. that the admission of the statement by the trial judge should not have been disturbed.

The second ground of dissent was from the holding of the Court that the charge was inadequate in presenting the case for the defence. That defence was extremely simple and it was contained in two or three sentences of the statement. It was to the effect that after the sexual intercourse had taken place and after the accused had proceeded on his route to another mail-box,

> she started kibitzing around again and I just went out of my head. I grabbed her by the scarf and she just went limp. She didn't breathe no more, then I continued with the rest of my mail run.

The act causing death was thus represented to have been completely divorced from the sexual act. The trial judge, after making it clear that the jury could believe any part of the evidence and disbelieve any other part, applied this rule to the statement. He contrasted this direct evidence with the circumstantial facts which could be held to show that death from strangulation had been immediately connected with the act of intercourse; and his final reference to the statement was in these words:

> Now gentlemen, as I see it, if I may put this very briefly to you, I would think that you would take that statement of the accused, consider it very carefully, and if you conclude that it is the truth or if you really have an honest doubt as to whether it is the truth or not, he is entitled to the benefit of that doubt and you would not find him guilty of murder but guilty of manslaughter.

Counsel urged before us that this paragraph in some way deals with strangulation accompanying ravishment but I cannot so construe it. It is, strictly, more favourable to the accused than was justified: in effect it says, if you think the circumstances of tightening the scarf were as he puts them, you are to find manslaughter. This rules out intent in the act within s. 201(*a*)(ii) or (*c*) of the *Criminal Code*.

I think we must credit the jury with ordinary intelligence. The defence had been elaborated to them by counsel, it was set forth on the statement which they had in the jury-room and they were told how to deal with it. There was no complication in the facts or their interpretation or in the distinction between the two views of the facts put to them, and I have not the slightest doubt that they came to their verdict with an intelligent appreciation of both.

I would, therefore, allow the appeal and restore the conviction.

The judgment of Locke and Nolan JJ. was delivered by

NOLAN J.:—The respondent was convicted of murder at a trial before a judge sitting with a jury. On appeal to the Court of Appeal for Ontario the appeal, by a majority judgment, was allowed, the conviction quashed and a new trial ordered (1). This is an appeal by the Attorney-General for Ontario pursuant to the provisions of s. 598 (1) (*a*) of the *Criminal Code*.

(1) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

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At about 7.45 p.m. on January 18, 1956, the deceased, Linda Lampkin, left a dancing-school at 40 Wellesley Street East in the city of Toronto and at approximately 8.30 p.m. she boarded a Jane Street bus at Jane and Bloor Streets and shortly afterwards left it at Jane and Annette Streets. At approximately 8.45 p.m. a young girl was seen talking to the driver of a Royal Mail truck at Jane Street and St. John's Road.

The respondent was employed by the Bacon Cartage Company Limited as a Royal Mail truck-driver and his route on the day in question covered the area in which the deceased was last seen alive. The respondent turned in his truck at the Bacon Cartage garage at 104 Berkeley Street at 10.57 p.m., although his usual time was between 9.30 and 10 p.m.

At approximately 11.05 p.m. on January 18, 1956, the body of the deceased was found on Commissioners Street in the city of Toronto. Her wool skirt and underslip were pulled up around her waist. The three pairs of underpants she was wearing were torn, exposing her thighs and genitalia, and her brassiere was torn, exposing her breasts. One shoe was missing. A red truck, similar to the one driven by the respondent, was seen, during the evening of January 18, parked on Commissioners Street in the vicinity of the place where the body was found.

A *post-mortem* examination disclosed that the deceased had been a virgin and that death had been caused by asphyxia due to strangulation resulting from the application of extreme force to a silk scarf which was knotted around her neck. There was a mark almost encircling the neck which showed a complete ring of bruising, with the exception of a gap under the right ear where the bruising was reduced. It was the opinion of the pathologist that such force would have to be applied for several minutes to cause death. The deceased had been the subject of a completed act of sexual intercourse. There was a tear in her hymen and in her vagina which, in the opinion of the pathologist, would have caused great pain. Her face was dark with acute congestion of blood and there were tiny

haemorrhages in the skin of the face, the forehead, the ears and the mucous membrane of the eyes. Bloodstained froth had issued from the nose and mouth.

On the morning of January 19, 1956, two officers of the Toronto police force went to the Globe and Mail garage, at which time the respondent was putting mail-bags into a truck. The truck was searched and a paper bag containing two apples, a bobby pin and a tube of lipstick were found inside. This lipstick was, in evidence, identified and admitted by counsel for the respondent to have been the property of the deceased. The respondent was observed to be collapsing or fainting.

The respondent was taken by Detective Sergeant O'Driscoll and Detective Coghill to police headquarters, where he was interrogated by Detective-Sergeant O'Driscoll, and a T-shirt, a pair of trousers and a windbreaker were taken from the person of the respondent. An examination of the clothing disclosed that there was human blood on the trousers and the leather jacket. The detective-sergeant told the respondent that he was "investigating the rape and murder of a girl by the name of Linda Lampkin" and that she lived on Brookside Avenue. This was the first time her name had been mentioned. The respondent said that he knew the deceased and that the last time he saw her was about 5.15 in the afternoon of January 17. He denied that he had seen her on January 18. He gave an account of his movements on January 18 until he stopped work at night. The discussion, which contained no reference to Linda Lampkin, lasted until approximately 9 a.m. and no caution was given. The discussion was not taken down in writing. O'Driscoll and Coghill left to be present in court at 10 a.m. and the respondent was left in the custody of Detective Smith, who told the respondent that he wanted to get on paper a record of his movements on January 18. Detective Smith had typed about one paragraph when he was relieved by Detective Sergeant Simmonds, who typed the statement as it was related to him by the respondent. When it was finished the respondent read it, made certain changes and signed it. No objection as to its admissibility was made at trial and it was admitted in evidence.

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In his statement the respondent said that about the end of June he had met the deceased when he was collecting mail on his route and about a week later had taken her, at her request, for a drive around part of his route; that he had seen her three times since then, but only to say "hello". The statement relates his movements during January 18 and concludes by stating that he did not know anything about a lipstick or how it got in the truck.

Detective Sergeant Simmonds then asked the respondent for a list of the box clearances on his route, which was given and typed on a sheet of paper, which was admitted at trial. He had a sandwich and milk brought in for the respondent for lunch.

At approximately 5 p.m. Detective Sergeant Simmonds and Detective McNeely again interviewed the respondent, who had been kept in the main detective office since the morning interview. What took place at this afternoon interview is described in the evidence of Detective Sergeant Simmonds:—

> We took our coats and hats off and hung them up and Detective McNeely and I went up to the accused and I told him, I said, "I want to have another word with you. Would you come over to the office with us?" He stood up and followed us out. We went over to the small room off the main detective office and into the office there.
>
> I told the accused to sit down and he sat down at a desk, at a chair opposite a desk, and I said to him, I said, "You know who I am. I was talking to you this morning" or words to that effect. I said, "This is Detective McNeely, my partner." I then sat down at the desk opposite him and Detective McNeely sat to my right.
>
> I said to the accused man, "Bob, you have been sitting in the office here this afternoon and I haven't seen you since I left you around noon when you told me where you were last night and your movements last night." I said, "You have had all afternoon to think over where you were last night."
>
> He said, "What I told you this morning was true." I said, "Well, it no doubt was true as far as your work with the post office was concerned but," I said, "we have been out going over the area in the west end of the city where you worked and we have been working pretty hard this afternoon," and I said, "I have received information to the effect that you were seen last night with Linda Lampkin at St. John's Road and Jane about 8.45 p.m."
>
> He was sitting in the chair, which has arms on it, and he had his elbows on the arms and his hands crossed in front of him and he was looking at me and at this moment he looked down to the floor, he put his head down. I was just about to say something else to him when McNeely spoke up, and McNeely said to him, "Yes, Bob, we have been working since 5 o'clock this morning. It may be necessary for us to take you out

with us in the police car and have you show us just how you do your work in the west end in the area that you work in. There may be other witnesses out there—we don't know—who may have seen things. We don't know. But the lipstick that was found in your truck this morning has been identified." He then said, "And along with this information that we obtained this afternoon, it indicates that you may have been seen with Linda Lampkin last night. We don't believe what you have been telling us."

At this point the accused who was still looking at the floor paused and —or he just seemed to just sit there, he didn't say anything, and at this point he said, "I was just thinking of my wife and my kids. I didn't mean to do it. She started kibitzing around and I grabbed her by the scarf and she didn't breathe no more."

At this moment I said, "Just a minute, Bob," and I pulled the drawer open in the desk and there was a pad of what we call caution sheets in the drawer and I put them on the table. I wrote some detail on the top of this caution sheet which has a printed form at the top, including the fact that I was at headquarters and the date and my name, the name of the accused and his age, and the charge. And I read from the sheet to the accused man.

The learned trial judge ruled that the inculpatory oral statement made in the course of this interview,

I was just thinking of my wife and kids. I didn't mean to do it. She started kibitzing around and I grabbed her by the scarf and she didn't breathe no more.

was voluntary and admissible in evidence.

As soon as the respondent had made this statement he was immediately stopped, charged with the murder of the deceased and cautioned.

The written statement was obtained by question and answer and was written down in longhand by Simmonds. When it was completed the respondent was asked to read it aloud, including the caution, which he did, and then he signed it.

In the written statement the respondent said that he had seen the deceased on the evening of January 18; that she had come over to his truck and asked if she could go for a ride, he had said she could and she had gotten into the truck.

The statement further says:

I parked up on Gooch Ave. to empty my small mail bag and tie up my big one and she started necking and then I had intercourse with her and then I went on a ways and did my other box and she started kibitzing around again and I just went out of my head, I grabbed her by the scarf and she just went limp. She didn't breathe no more, then I continued with the rest of my mail run and dropped my mail off and drove down to

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Cherry St. and took in my CODs I had left. She still wasn't breathing so the best thing I thought was to get rid of her. I drove to Commissioner St., I don't know Commissioner St. very well, I took her out of the truck and put her on the ground there. Then I took the truck back to Berkeley St. and went home.

At about 8.10 p.m. Detectives Simmonds, McNeely and Sellar drove the respondent out to the west end of the city to try to find the missing shoe. It was found underneath a truck on a vacant lot in the downtown area on Berkeley Street. A broken compact was found in the shoe. The girl's wallet was found by the police stuck in a sewer-grating on a street in the vicinity of a garage where the mail trucks were stored.

The learned trial judge held that the last-mentioned written statement was voluntary and it was admitted in evidence.

The majority judgment of the Court of Appeal for Ontario (Pickup C.J.O. and Laidlaw and Schroeder JJ.A.), reversing the learned trial judge, held that (1):

> . . . the Crown has failed to show that the oral statement made by the appellant, or the written statement made by him immediately afterwards, was free and voluntary. Therefore the learned judge, in my opinion, should not have admitted either of those statements in evidence. The erroneous admission in evidence of these incriminating statements is in itself sufficient to warrant this Court directing a new trial.

It is contended by counsel for the respondent that this Court has no jurisdiction to entertain the appeal on the question of the admissibility of the second statement, as it is not a strict question of law, but rather a question of fact, or at least a question of mixed law and fact. Section 598 (1) of the *Criminal Code,* under which the appeal on this ground is taken, reads as follows:

> 598. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under paragraph (*a*) of section 583 or dismisses an appeal taken pursuant to paragraph (*a*) of section 584, the Attorney General may appeal to the Supreme Court of Canada
>
> (*a*) on any question of law on which a judge of the court of appeal dissents, or
>
> (*b*) on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the judge may, for special reasons, allow.

(1) [1956] O.R. at pp. 714-5.

If the decision as to the admissibility of the oral and second written statements turned upon the inferences to be drawn from the evidence, it would seem clear, from the decisions of this Court, that that was not a question of law alone and consequently this Court would be without jurisdiction.

In a case in which a statement is received in evidence over the objection of counsel for the accused and the point is raised that the statement is not free and voluntary, having been obtained by fear of prejudice or hope of advantage held out by a person in authority, the Court must weigh the evidence and determine the credibility of the witnesses. The correctness of such a decision could not, I think, be raised before this Court on an appeal on a question of law alone.

In the present case entirely different considerations arise. The statements were admitted in evidence without objection. Indeed, it may be said that the second statement contained the defence of the respondent to the charge. No conflict arose as to the manner in which the statements were obtained, no suggestion was made that they had been improperly instigated or induced, and that they were free and voluntary appears to have been unchallenged.

In other words, the voluntary nature of the statements was not in dispute at trial. There was no evidence of any previous threat or promise and nothing in law to warrant their exclusion. To hold them to be inadmissible would, in my view, be contrary to established legal principles and would raise a question of law alone.

Assuming that this Court has jurisdiction to hear the appeal as to the admissibility of the oral and second written statements of the accused, it remains to be determined, as a question of law alone on which there has been dissent, whether they were properly admissible in evidence.

It was contended by the respondent in this Court that the statements obtained by the police officers were not freely and voluntarily made, but were obtained as a result of cross-examination calculated to induce admissions.

On the other hand the Crown contended that, even though there was cross-examination (which was not conceded), failure to give a warning, or other violation of the

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usual rules relating to the proper securing of statements, such violation or failure does not, of itself, necessarily render such statements inadmissible.

In *Regina v. Gavin et al.* (1), it was held (*per* Smith J.) that when a prisoner is in custody the police have no right to ask him questions. This decision was overruled by the Court of Criminal Appeal in *Rex v. Best* (2), which was a case in which, while the prisoner was in custody and had been cautioned, he was searched and a sum of money was found in his possession. The constable thereupon asked the prisoner where the money came from. Lord Alverstone C.J. at p. 693 said:

> There is no ground for interfering in this case. It is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial. There are many cases in which the prisoner is entitled to give an explanation as to anything found on him, and the question might give him an opportunity of saying and shewing that the thing found was his own property. In our opinion *Reg. v. Gavin* is not a good decision, and it is commented on in a note printed at the end of the report. The decision has certainly not been followed to its full extent. As set out in the report the statement of the law is too wide and requires qualification.

In *Rex v. Voisin* (3), the Court of Criminal Appeal considered the effect of the decision in *Rex v. Best, supra,* and at p. 539 A. T. Lawrence J. said:—

> We read that case as deciding that the mere fact that a statement is made in answer to a question put by a police constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion excluding the evidence; but he should do so only if he thinks that the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made in circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner.

In the present case there was no evidence of inducement or coercion, no evidence of threat or promise of reward.

In my view it would be quite impossible to discover the facts of a crime without asking questions of persons from whom it was thought that useful information might be obtained. Indeed, such questions might give the suspected person an opportunity of demonstrating that the suspicion of guilt attaching to him was without foundation. The questioning must not, of course, be for the purpose of

(1) (1885), 15 Cox C.C. 656.
(2) [1909] 1 K.B. 692, 2 Cr. App. R. 30, 22 Cox C.C. 97.
(3) [1918] 1 K.B. 531, 13 Cr. App. R. 89, 26 Cox C.C. 224.

trapping the suspected person into making admissions and every case must be decided according to the whole of the circumstances.

The question of the admissibility of a statement made by an accused person was fully discussed in the judgment of this Court in *Boudreau v. The King* (1). In that case the appellant Boudreau was convicted of murder and the point of dissent on which he came before this Court was the improper reception of two written statements, the first containing an admission of intimacy with the wife of the murdered man and the second, in addition to a repetition and an elaboration of the first admission, a full confession of the deed itself. At the time of making them the appellant was held under a coroner's warrant as a material witness. There was no more than a suspicion against him when, in the first conversation with police officers in which questions were asked him, he purported to detail his movements on the two or three days before the death and admitted the intimacy. Boudreau having consented to make the statement in writing, a justice of the peace was summoned and the statement was made out, signed and sworn to by him. Before the signing the justice read out the words of the usual warning, which were printed across the top of the paper. Two days later, after a formal warning, a further discussion took place with two police officers and, while one of them was momentarily out of the room and after a reference had been made to his mother, Boudreau suddenly burst out with the words: "J'aime autant vous le dire, c'est moi qui l'a tué." The second statement was put in writing, with the consent of the appellant, and was signed and sworn to by him. The trial judge ruled that these statements were admissible in evidence and the majority of the Court of King's Bench, Appeal Side, Province of Quebec, agreed with him.

In this Court, Kerwin J. (as he then was), at p. 267, states that the fundamental question is whether a confession of an accused offered in evidence is voluntary and goes on to point out that the mere fact that a warning was given is not necessarily decisive in favour of admissibility, but, on the other hand, the absence of a warning should not bind

(1) [1949] S.C.R. 262, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.

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the hands of the Court so as to compel it to rule out a statement. Accordingly, the presence or absence of a warning is a factor and, in many cases, an important one.

Rand J., at p. 269, points out that no doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove. The rule is directed against the danger of improperly instigated, or induced, or coerced admissions and the statement should be that of a man "free in volition from the compulsions or inducements of authority".

Kellock J., at p. 276, states that in all cases the question is whether the Crown has satisfied the onus that the statement has, in fact, been made voluntarily and that in none of the cases is it laid down that a statement made by a person in custody, in answer to questions put by a person in authority, is, as a matter of law, inadmissible.

In *Boudreau v. The King* the Court followed the governing principle as stated by Viscount Sumner in *Ibrchim v. The King* (1):

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

The principle laid down in *Ibrahim v. The King* was followed by this Court in *Prosko v. The King* (2), where, at p. 237, Anglin J. pointed out that the two American detectives who had the custody of the appellant were persons in authority and that the appellant was in the same plight as if in custody in extradition proceedings under a warrant charging him with murder and that no warning had been given, and that while these facts did not, in themselves, suffice to exclude the admissions, they were undoubtedly circumstances which required that the evidence tendered to establish their voluntary character should be closely scrutinized.

Applying the principles contained in the authorities to the facts of the present case, I am of the opinion that the statements were properly admissible in evidence.

(1) [1914] A.C. 599 at 609.

(2) (1922), 63 S.C.R. 226, 37 C.C.C. 199, 66 D.L.R. 340.

It was contended by the respondent that there was misdirection and non-direction amounting to misdirection on the part of the learned trial judge in that he had failed to lay the theory of the defence adequately before the jury and failed to direct the jury as to how the law in relation to murder should be applied to the facts that they might find.

The majority of the members of the Court of Appeal, that is Pickup C.J.O. and Laidlaw, Aylesworth and Schroeder JJ.A., upheld this contention. The appeal was allowed and a new trial was directed.

Roach J.A., dissenting, held that there was no misdirection or non-direction amounting to misdirection by the learned trial judge in such matters of law and that there was no failure to lay the theory of the defence adequately before the jury and no failure to direct the jury as to how the law in relation to murder should be applied to the facts, and would have dismissed the appeal.

The main theory of the defence is that the respondent had sexual intercourse with the deceased with her consent and, although the act of sexual intercourse was completed, the deceased was not sexually satisfied and wanted it repeated; that she then commenced to annoy the respondent and that, without intending to do her any harm, he grabbed her scarf and "she just went limp". This theory is based upon the evidence that there was haemorrhaging from injury to her private parts and consequently the deceased was not dead when the act of sexual intercourse took place. Put shortly, the intercourse and strangling were independent acts.

The Crown contended that the deceased had been raped and strangled and that the act of strangulation was done in furtherance of the act of rape.

In my view, the real problem which presented itself to the jury was the difficulty in reconciling the written statement of the respondent with the other evidence in the case. In other words, did the respondent cause the death of the deceased under the circumstances as set out in his statement, or did her death ensue as a result of bodily harm intentionally inflicted by him to facilitate the act of sexual intercourse?

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I agree with the opinion of Roach J.A. that the learned trial judge placed the two opposing theories fairly before the jury, so that they could not fail to understand the issue they had to decide. I am further in agreement with Roach J.A. that the fact of haemorrhaging is equally consistent with the Crown's theory that the respondent was throttling the girl while he was attempting, or engaging in, the act of intercourse as it is with the theory of the defence that the intercourse was completed and the strangling occurred subsequently.

The defence that the act of sexual intercourse was voluntary on the part of the deceased was rejected by the jury and, in view of the evidence relating to the disarray of the clothing of the deceased when her body was found, the pathological evidence as to the description of her injuries, together with the photographs which were entered as exhibits at the trial showing the condition of her neck and head, in my opinion it was properly rejected.

At the trial objection was quite properly taken to the evidence of the pathologist, Doctor McLean, where he stated that the deceased had been raped. This was a matter for the jury, but, on cross-examination, the doctor made it quite clear that he was not prepared to venture an opinion, based on his medical observations, as to whether the deceased had or had not consented to having sexual intercourse with the respondent.

I have nothing further to add to the reasons of Roach J.A. on the appeal on the ground of misdirection.

In the result, in my view, the charge was adequate and there was no misdirection or non-direction amounting to misdirection and, in any event, no substantial wrong or miscarriage of justice has occurred.

I would allow the appeal and restore the conviction.

CARTWRIGHT J. (*dissenting*):—On April 27, 1956, the respondent was convicted before Treleaven J. and a jury at the Toronto assizes of having murdered one Linda Lampkin on or about January 18, 1956. He appealed, and applied for leave to appeal, to the Court of Appeal on a number of grounds. His appeal was heard on June 18 and 19, 1956, the Court being composed of Pickup C.J.O. and Laidlaw, Roach, Aylesworth and Schroeder JJ.A. At the conclusion

of the argument the learned Chief Justice announced that the appeal was allowed, the conviction quashed and a new trial directed, with Roach J.A. dissenting, and that written reasons would be delivered later. These were delivered on June 27 (1).

Pickup C.J.O., with whom Laidlaw and Schroeder JJ.A. agreed, was of opinion that the appeal should be allowed on two grounds, (i) that the Crown had failed to show that an oral statement made by the respondent to two police officers between 5 and 6 p.m. on January 19 and a written statement made by him immediately afterwards were free and voluntary; and that the erroneous admission in evidence of these statements was in itself sufficient to require the quashing of the conviction, and (ii) that, even assuming for the purpose of dealing with the sufficiency of the charge of the learned trial judge to the jury that the statements were admissible, the learned trial judge had failed to lay the theory of the defence adequately before the jury and had failed to direct them as to how the law in relation to murder should be applied to the facts as they might find them.

Roach J.A. was of opinion (i) that the learned trial judge was right in holding that the written statement referred to above was admissible, and, while he does not say so expressly, it is, I think, implied in his reasons read as a whole that he was also of opinion that the oral statement which preceded it was admissible, (ii) that, while not saying that the charge of the learned trial judge was a perfect charge, he was satisfied "that it was entirely adequate; that there was no misdirection and no non-direction amounting to misdirection, and that in any event no substantial wrong or miscarriage of justice has occurred".

Aylesworth J.A. agreed with the reasons and conclusion of Pickup C.J.O. on the ground of the inadequacy of the charge to the jury; but as to the admissibility of the statements he said (2):—

> I do not, however, agree that the statements given to the police by the appellant were inadmissible. On the contrary, I think they were admissible and were properly received in evidence at the trial. I concur in the reasons of my brother Roach in this respect and I have nothing to add to those reasons.

(1) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

(2) [1956] O.R. at p. 735.

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It would appear from the paragraph quoted that Aylesworth J.A. read the reasons of Roach J.A. as deciding that the oral as well as the written statement was admissible.

In the result Aylesworth J.A. agreed with the order proposed by Pickup C.J.O.

On June 28, 1956, the Attorney-General for Ontario gave notice of appeal to this Court. In the view which I take of this case it is necessary for me to deal only with the point relating to the admissibility of the statements made by the respondent and therefore I quote only those parts of the notice of appeal which refer to that point. These are as follows:—

> In regard to the second statement of the Respondent filed as Exhibit 53 at the trial [*i.e.*, the written statement referred to above], the Chief Justice of Ontario, Laidlaw and Schroeder, JJ.A., held that the learned trial Judge erred in law in holding that the said statement was admissible in evidence at the trial and allowed the appeal also on this ground.
>
> Mr. Justice Roach and Mr. Justice Aylesworth (dissenting on this ground) held that the learned trial Judge did not err in law in holding that the said statement was admissible in evidence at the trial.
>
> The Attorney-General for Ontario appeals to the Supreme Court of Canada upon the following grounds: . . .
>
> 2. There was dissent on a question of law by the Honourable Mr. Justice Roach and the Honourable Mr. Justice Aylesworth from the majority judgment of the Court of Appeal for Ontario which erred in law in holding that the trial Judge erred in holding that the second statement of the Respondent, filed as Exhibit 53 at the trial, was admissible in evidence at the trial.

Counsel for the respondent moved at the opening of the hearing before us to quash the appeal on the ground that ground of appeal no. 2, quoted above, did not raise a strict question of law alone. The Court decided to hear the argument of the motion with the argument of the appeal

In my opinion the motion should be granted. After reading all the evidence and everything that was said by counsel and by the learned trial judge during the hearing and disposition of the issue raised as to the admissibility in evidence of the oral and written statements above referred to and everything said on the point in the reasons for judgment delivered in the Court of Appeal I am unable to discern any dissent on, or indeed any difference of opinion as to, any point of law. The difference of opinion was as to whether the proper inference to be drawn from the evidence

as to the primary facts leading up to and surrounding the making of the statements was that the Crown had satisfied the onus of showing that the statements in question were freely and voluntarily made. In the circumstances of the case at bar the question whether or not that inference should be drawn was, in my opinion, one of fact.

The evidence of the witnesses on the *voir dire* as to what I have called the primary facts was not conflicting nor was its veracity attacked in cross-examination and all of the learned judges in the Courts below have proceeded on the basis that it contained an accurate account of what occurred. The effect of that evidence is set out in some detail in the reasons delivered in the Court of Appeal (*vide* [1956] O.R. 696). I propose to give a comparatively brief summary of it.

The lifeless body of Linda Lampkin was found on Commissioners Street late in the evening of January 18, 1956, and the police immediately commenced an investigation. At about 7 a.m. on January 19, police officers visited the place in which a truck which had been driven by the respondent on the previous evening was standing. They examined the truck and found in it a bobby-pin and a lipstick said to have belonged to the deceased. On seeing the lipstick the respondent collapsed and the officers rendered some assistance to him. When he had recovered his composure Sergeant-Detective O'Driscoll and Detective Coghill asked him to accompany them to police headquarters. On arrival there he was questioned by these two officers in a small room, called the interrogation-room, until about 9 a.m. During this period police officers took from him a windbreaker, a shirt, a pair of pants, scrapings from his finger-nails and some hairs taken from his head and body. Shortly after 9 a.m. these detectives left and Detective Simmonds proceeded to obtain a statement from the respondent which was later typewritten and was signed by the respondent about noon. There was nothing in this statement of an incriminating character. It contained a denial of having seen the deceased on January 18. Just after this statement was signed and completed, Sergeant-Detective O'Driscoll and Detective Coghill entered the interrogation-room, and Detective Simmonds left them there with the

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respondent. They remained for a short time. The respondent was given a sandwich and a glass of milk for lunch. The respondent was kept in the general detective office during the afternoon, under close supervision, while Detective Simmonds and Detective McNeely continued their work of investigation elsewhere. About 5 p.m. they returned to headquarters and again took the respondent into the interrogation-room where he had been in the morning. They told the respondent that they had been working since 5 o'clock in the morning, that they had been working pretty hard, that they had received information that he was seen with the deceased on the previous day about 8.45 p.m., that it might be necessary for them to take him out with them in the police car to the west end in the area that he worked in, that there might be other witnesses out there who might have seen things, that the lipstick that was found in his truck had been identified and that they did not believe what he had been telling them. It was at this point that the respondent made the oral incriminating statement. He was at once formally cautioned and then made the longer statement which was reduced to writing and signed by him.

After a full recital of this evidence, the learned Chief Justice of Ontario quotes from the judgment delivered in this Court in *Boudreau v. The King* (1), and continues (2):—

> The principle as set forth in that case is a positive rule of English criminal law. It has been applied in many subsequent cases to which I need not refer, because the ruling which ought to be made by the Court depends on the evidence and particular circumstances disclosed therein in each case. I simply direct my mind and consideration to the fundamental question: Were the statements in question in the instant case freely and voluntarily made?

After a further review of the facts and another reference to the *Boudreau* case the learned Chief Justice continues (3):—

> Applying that principle to the particular facts in this case, I have reached the conclusion that the Crown has failed to show that the oral statement made by the appellant, or the written statement made by him immediately afterwards, was free and voluntary. Therefore the learned

(1) [1949] S.C.R. 262 at 269, 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81.

(2) [1956] O.R. at p. 712.

(3) *Ibid.* at pp. 714-5.

judge, in my opinion, should not have admitted either of those statements in evidence. The erroneous admission in evidence of these incriminating statements is, in itself, sufficient to warrant this Court directing a new trial.

Roach J.A. opens the portion of his reasons dealing with this point as follows (1):—

> In my opinion the learned trial judge was right in holding that it was admissible. The question before him and now before this Court may be stated thus: Was that statement freely and voluntarily made or was it obtained from the appellant either by fear of prejudice or hope of advantage exercised or held out to him by the detectives? If it was a free and voluntary statement it was admissible: if it was not it should have been barred.
>
> There can be no doubt as to the rule.

The learned justice of appeal then refers to *Ibrahim v. The King* (2), quoting a passage on which, amongst others, the judgments in this Court in *Boudreau's Case* were founded. He stresses the fact that the respondent had not given evidence on the *voir dire*, attaches great weight to the caution given immediately before the taking of the written statement, points out that there had been no threats or promises and in concluding says (3):—

> In determining whether the answers made are admissible or not, the Court inevitably must come back to the primary question: Were they made voluntarily in the sense described in the rule as laid down by Viscount Sumner, *supra*?

On reading and rereading the reasons of Pickup C.J.O. and Roach J.A. I look in vain for any difference as to the applicable law.

It was suggested in argument that the learned Chief Justice of Ontario had held as a matter of law that the fact, if established, that police officers "cross-examined" the respondent while in *de facto* custody and under suspicion required the trial judge as a matter of law to reject the statements. I can find no such ruling in his reasons. He regarded the fact that certain questions were put as one of the relevant circumstances to be weighed in deciding the question before the Court which he had already accurately described in words, which I have quoted above, which do not differ in any matter of substance from those used by Roach J.A.

(1) [1956] O.R. at pp. 724-5. (2) [1914] A.C. 599 at 609.
(3) [1956] O.R. at p. 726.

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There is no suggestion in any of the reasons that the learned trial judge misdirected himself on the law on this branch of the case. His conclusion on the evidence before him was that the statements were shewn to be voluntarily made. The minority in the Court of Appeal reached the same conclusion but the majority were of the contrary opinion. It is not relevant to inquire which conclusion I would have reached on the evidence, for such a conclusion is one of fact and not of law.

No doubt there may be cases in which the question whether a statement made by an accused is admissible in evidence becomes one of law; but, in my opinion, the case at bar is not such a case. I conclude that we are without jurisdiction to deal with ground 2, quoted above from the notice of appeal of the Attorney-General. This being so it follows that the appeal cannot succeed as it is clear from the portion of the reasons of the learned Chief Justice of Ontario secondly quoted above that in dealing with this ground the majority decided that the erroneous admission of the statements in question was in itself sufficient to require the directing of a new trial.

If, contrary to the view that I have expressed, it could be asserted that (i) there is a difference of substance between the statement of the principles of law which are to be applied in determining whether a statement by an accused is admissible made by Pickup C.J.O. and that made by Roach J.A. and (ii) that there was error in the former statement, it would not follow that so far as this ground of appeal is concerned the appeal should be allowed and the conviction restored. Before restoring the conviction this Court would, at least, have to be satisfied that it could safely be affirmed that but for the supposed error in law the majority in the Court of Appeal would necessarily have concluded that the statements were admissible. As is pointed out by Lord Sumner in *Ibrahim v. The King, supra,* at pp. 609-10, the question whether it has been shewn by the prosecution that the statement of an accused was voluntary in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority is one of fact to be

decided by the trial judge. The Court of Appeal has jurisdiction to weigh the evidence as to the circumstances surrounding the making of the statement and to substitute its decision for that of the trial judge. This Court has no jurisdiction to re-weigh the evidence and substitute its opinion for that of the Court of Appeal. In view of the rule that the onus of proving a statement by an accused to have been voluntary in the sense mentioned rests upon the prosecution, I find difficulty in accepting the view that it can ever be said as a matter of pure law that the question whether that onus has been satisfied must be answered in the affirmative. However in view of the conclusion which I have reached above as to our lack of jurisdiction in this case, I do not pursue these questions further.

I would quash the appeal.

FAUTEUX J.:—This is an appeal from a majority judgment of the Court of Appeal for Ontario (1) setting aside the conviction of the respondent for the murder of one Linda Lampkin and ordering a new trial. The appeal is taken under the provisions of s. 598(1)(*a*) of the *Criminal Code* and the questions of law as to which a dissent is alleged are (i) whether, as held by Pickup C.J.O., with the concurrence of Laidlaw and Schroeder JJ.A., Roach and Aylesworth JJ.A. dissenting, a written statement, filed as ex. 53, and an oral statement immediately prior thereto, both made by the respondent, were illegally admitted in evidence, and (ii) whether, as held by Pickup C.J.O., with the concurrence of Laidlaw, Aylesworth and Schroeder JJ.A., Roach J.A. dissenting, the trial judge failed to lay the theory of the defence adequately before the jury and direct them as to how the law in relation to murder should be applied to the facts.

Dealing with question (i): it is the submission of counsel for the respondent that this Court has no jurisdiction to entertain this ground of appeal for the reason that it does not involve a question of law in the strict sense, but a pure question of fact or at the most a question of mixed law and fact. With this submission I am unable to agree. Whether or not evidence is admissible is always a question to be determined in the light of what the law is with respect to

(1) [1956] O.R. 696, 115 C.C.C. 225, 24 C.R. 125.

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the particular nature of the evidence tendered. While as to certain subject-matters of evidence such as confessions, this determination requires a prior examination of the facts which, if judicially found to be within the rule of law governing the admission of such evidence, will render the same admissible, any question as to what the rule is in the matter involves a question of law in the strict sense. Hence a divergence of views between the majority and minority members of a Court of Appeal as to what the law is clearly gives jurisdiction to this Court to examine the point and satisfy its statutory duty to determine the matter. With reference to the rule of law governing the admissibility of the extrajudicial admissions made by the respondent in the present instance, Roach J.A., for the minority, said (1):—

> There can be no doubt as to the rule. It was stated by Viscount Sumner in *Ibrahim v. The King,* [1914] A.C. 599 at 609, as follows: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, *in the sense that* it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."
>
> * * *
>
> There is no positive rule of evidence that if improper questions are asked of a prisoner in custody the answers to them are, merely on that account, inadmissible. The cases are reviewed by Kellock J. in *Boudreau v. The King,* [1949] S.C.R. 262 at 270 *et seq.,* 94 C.C.C. 1, 7 C.R. 427, [1949] 3 D.L.R. 81. I do not review them here. In determining whether the answers made are admissible or not, the Court inevitably must come back to the primary question: Were they made voluntarily *in the sense* described in the rule as laid down by Viscount Sumner, *supra.*

(The italics are mine.)

On the other hand, Pickup C.J.O., for the majority, stated (2):—

> In my opinion, the Crown does not discharge the onus resting upon it by merely adducing oral testimony showing that an incriminating statement made by an accused person was not induced by a promise or by fear of prejudice or hope of advantage. That statement of the rule of law is too narrow. The admissions must not have been "improperly instigated or induced or coerced": per Rand J. in *Boudreau v. The King, supra,* at p. 269. The admissions must be self-impelled and the statement must be the statement of a man "free in volition from compulsions or inducements of authority".

(1) [1956] O.R. at pp. 725-6. (2) [1956] O.R. at p. 714.

Thus it appears that Roach J.A., with the concurrence of Aylesworth J.A., held the view that the decision of this Court in *Boudreau v. The King* did not change the law as stated by Viscount Sumner and that a declaration made by an accused is a voluntary statement if it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. In the view of Pickup C.J.O. and Laidlaw and Schroeder JJ.A., this statement of the rule is too narrow and in addition to proving that the statement has not been obtained by fear of prejudice or hope of advantage, the prosecution must further show that the statement was not otherwise influenced by the course of conduct adopted by the police, that it must be self-impelled, failing which it is not a voluntary one in the sense required by law. The merit of each of these views of the law is, of course, foreign to the consideration of our jurisdiction to entertain this ground on appeal, for it is the precise point which this Court will have to determine on the appeal itself. The above difference in the statement of the law applied is essentially what gives jurisdiction to this Court. It may be added, before parting with the consideration of this preliminary objection, that none of the cases invoked by the respondent supports it or conflicts with the views here expressed.

On the merits of ground (i): as to what the law is in the matter, I agree with the views held by Roach and Aylesworth JJ.A. As I read the reasons for judgment of the majority in this Court in *Boudreau v. The King, supra,* I find nothing to suggest an intention to modify the rule of law as stated by Viscount Sumner. With respect to the English "Judges' Rules" as to questions put by police officers, it has been repeatedly and again recently said that they are administrative rules for the guidance of police officers but not rules of law and that a breach thereof does not *per se* render the statement inadmissible if the true test of voluntariness laid down by Viscount Sumner is met: *Regina v. Wattam* (1); *Regina v. May* (2); *Regina v. Bass* (3); *Regina v. Harris-Rivet* (4). As to all the evidence in

(1) (1952), 36 Cr. App. R. 72 at 77.
(2) (1952), 36 Cr. App. R. 91 at 93.
(3) (1953), 37 Cr. App. R. 51 at 56.
(4) (1955), 39 Cr. App. R. 176 at 183.

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this case and particularly that related to the circumstances prior to and contemporaneous with the impugned statements, it is extensively reviewed in the reasons for judgment of Roach J.A. in the Court below (1), and need not likewise be related here. In brief, while the law-enforcement officers were apprising the respondent at police headquarters, where he had agreed in the morning to accompany them, that, as a result of further investigation, they could not believe some of the declarations he had there made in the morning, he was preoccupied in mind, eventually breaking his silence by saying:—

> I was just thinking of my wife and kids. I didn't mean to do it. She started kibitzing around and I grabbed her by the scarf and she didn't breathe no more.

He was immediately stopped and informed that he was arrested on a charge of murder, and having been given the customary warning, he proceeded to make the declarations reduced in writing in ex. 53, which he signed. The above attitude and utterances of the respondent are no evidence that his mind was in any way affected by fear of prejudice or hope of advantage. On the evidence, led in the cross-examination of the police officers relating the event, the thoughts of the respondent throughout the day had been directed to his wife and children, and he was explaining that it was on account of them that he had made, in the morning, some false declarations. Indeed it was never suggested by counsel for the respondent at any stage of the trial, including that of the procedure on *voir dire,* nor can it be implied from any of the questions or answers appearing in any part of the whole of the evidence, that the impugned statements were not voluntary in the sense indicated by Viscount Sumner or that the burden of the Crown to meet that particular test had not been discharged. As the issue was tried before, and left to, the jury, these impugned statements, on the unchallenged information given at the hearing before this Court by counsel for the respondent, were represented by the defence to be voluntary in any sense of the word and truthful. The submission that these particular statements were inadmissible was raised for the first time for the purpose of the appeal, not in the original, but in a supplementary notice of appeal. That these statements were voluntary under the rule stated by Viscount Sumner

(1) [1956] O.R. at p. 715.

is not challenged by the majority in the Court below which found it necessary to hold as a matter of law that the statement of the rule was too narrow and, on the law they applied, found as a fact, not that fear of prejudice or hope of advantage was exercised or held out by the police, but that the course of conduct they adopted precluded any conclusion that the statements were self-impelled. Assuming that it could be said that the conduct of the police in the circumstances of this case was not in accordance with the "Judges' Rules", it was, particularly under the authorities above quoted, within the discretion of the trial judge, if otherwise satisfied that the test of voluntariness stated by Viscount Sumner had been met, to admit these statements in evidence. Again, while the defence objected successfully to the admissibility of certain declarations made subsequent to the signing by the accused of ex. 53, it did not invite the Court to reject the impugned statements. And if, on the view the trial judge formed on the *voir dire,* the occasion arose for him to exercise this discretionary power, I find it impossible to say that he failed to do so judicially in admitting them in evidence.

Dealing with question (ii): the theory of the Crown was that Linda Lampkin had been strangled in furtherance of the act of rape. The theory of the defence, contained in the statement filed as ex. 53, was that, sexual intercourse having taken place with her full approval and consent, Linda Lampkin not being sexually satisfied began to annoy the accused who then grabbed her scarf without intending any harm, "and she didn't breathe no more". The evidence with respect to the condition both of the body of the victim and of her clothing is violently inconsistent with any suggestion of consent on her part. On the evidence, the cause of death was asphyxia due to strangulation resulting from the forceful tightening during a continuous period of 3 to 5 minutes of a knotted scarf she had around her neck, producing thereby a deep groove in the flesh-tissue corresponding in size to the width of the scarf. The fact that

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death actually occurred subsequent to the rape does not necessarily show that this forceful and continuous tightening of the scarf, which brought death by strangulation, was divorced from the act of rape. As Roach J.A. puts it (1):—

> That theory [the theory of the defence] rested on the foundation that the act of sexual intercourse was voluntary on her part and that she wanted it repeated. Remove that prop from beneath that theory and it would collapse. It was her persistence, so the accused said, in wanting the act repeated that caused him to take hold of the scarf. That was his explanation. If that explanation should be rejected then he must have taken hold of it for some other purpose. What was that other purpose? That other purpose, according to the Crown's theory, was to overpower her so that against her will he could have sexual intercourse with her.
>
> That the accused killed the girl there was no doubt. He said so. What the jury had to decide was: Did he slay her under the circumstances contained in his explanation or did her death ensue as the result of bodily harm intentionally inflicted by him to facilitate him in having sexual intercourse with her?

Weak as it was, the theory of the defence was put to the jury and I agree with Roach J.A. that the two opposing theories were fairly and squarely explained to them in such a manner that they could not fail to understand the issue they had to decide according to law.

There remains to consider two other grounds of appeal raised by the respondent before the Court of Appeal and with which the majority did not find necessary to deal in view of their conclusions as to the two points already heretofore considered. It is the respondent's submission that the learned trial judge failed to instruct the jury (i) as to what use could be made of the expert evidence of Dr. Chester McLean and (ii) of their obligation to reject any of his opinions which he was not qualified as an expert to give.

These objections are dealt with in the reasons for judgment of Roach J.A. and I am in respectful agreement with the manner in which he disposed of them.

I am also of the opinion that, on all the evidence in this case, no jury properly instructed could, if true to their oath, return any other verdict than that the accused was guilty as charged.

I would allow the appeal, set aside the judgment of the Court of Appeal for Ontario, and restore the verdict of the jury.

(1) [1956] O.R. at pp. 732-3.

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ABBOTT J.:—A question which has caused me some difficulty is that raised by respondent in his motion to quash the appeal, namely, whether or not, in connection with the ground of appeal relating to the admissibility of certain oral and written statements made by respondent, there was dissent on a question of law. I have reached the conclusion that there was.

As to the admissibility of the incriminating oral and written statements made by the accused, in his reasons in the Court below, Roach J.A. (speaking for himself and Aylesworth J.A.) has stated the rule of law to be applied in the following terms (1):—

> Was that statement freely and voluntarily made or *was it obtained from the appellant either by fear of prejudice or hope of advantage exercised or held out to him by the detectives?*

(The italics are mine.)

It is to be noted that he has used the precise words of the rule as laid down by Lord Sumner in *Ibrahim v. The King* (2), with the exception that he has substituted the words "the detectives" for "a person in authority".

The Chief Justice of Ontario, speaking for the majority and referring to the rule in question, held that (3):—

> In my opinion, the Crown does not discharge the onus resting upon it by merely adducing oral testimony showing that an incriminating statement made by an accused person was not induced by a promise or by fear of prejudice or hope of advantage. That statement of the rule of law is too narrow. The admissions must not have been "improperly instigated or induced or coerced": per Rand J. in *Boudreau v. The King, supra,* at p. 269. The admissions must be self-impelled, and the statement must be the statement of a man "free in volition from the compulsions or inducements of authority". The statement must be "freely and voluntarily made".

This difference between the dissenting judgment and that of the majority is in my view clearly a question of law, which gives this Court jurisdiction.

Moreover, referring to the statements made by the respondent, Roach J.A. said (4):—

> The appellant did not give evidence either on the *voir dire* or in defence to the charge. To put it otherwise he has not at any time said in evidence that in making the statement he felt under any compulsion or that it was induced by any fear of prejudice or hope of advantage held out to him. When he blurted out the words "I was just thinking of my

(1) [1956] O.R. at p. 724.
(2) [1914] A.C. 599 at 609.
(3) [1956] O.R. at p. 714.
(4) *Ibid.*, at pp. 725-6.

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wife and kids", and so forth, he was immediately stopped by the detectives and cautioned. He said he understood that caution. If he understood it then he understood that he was not obliged to say anything, because in administering the caution to him he was told "you are not obliged to say anything unless you wish to do so". In my respectful opinion the statement could be held inadmissible only on the theory that he did not understand the caution, in the face of his statement, not denied, that he did, or that, though he understood it, he still felt under some compulsion induced by some improper external stimulus to make it.

I do not think it should now be held that he did not understand the caution, in the face of his statement that he did. If he understood it then I can see no room for the suggestion that, despite his understanding, he still felt some compulsion. It would have been quite a different matter if, on the *voir dire,* he had gone into the witness-box and stated either that he did not understand the caution or that, understanding it, he nevertheless made the statement because he was fearful that if he did not he would be prejudiced, or hoped that if he did it might be to his advantage. In the absence of such a complaint or explanation coming out of his mouth, to hold now either that he did not understand the caution or that, understanding it, he felt under some compulsion, would in my respectful opinion be to act on sheer speculation, and would not be justified by the evidence.

It was not suggested on cross-examination of the officers on the *voir dire,* in the argument submitted by counsel for the accused to the trial judge, or in the argument presented to this Court, that what the detectives said to the appellant with respect to the information they had obtained that afternoon was not true and that by pretending that they had such information they had tricked the accused into making an admission of guilt. If I understood the argument of counsel for the appellant in this Court it was simply this, that when the detectives told the accused that as a result of their investigations they had received some information to the effect that he had been seen with the deceased on the previous night at St. John's Road and Jane Street, and that they did not believe what he had told them to the contrary in the morning, they thereby invited him to make some reply. I concede that that is so. It is true that what the detectives said consisted of affirmative statements and was not interrogatory, but I think there could have been no other reason for them to make those statements than to invite a reply. The detectives did not know what the reply might be. It might be a denial or an explanation, or it might be an admission. Let me assume for the moment that the detectives hoped that it would be an admission of guilt. The fact remains that they made no threats that may have raised any fear in the mind of the appellant, nor did they hold out any promise or hope of advantage if he admitted his guilt nor did they suggest to him that he might be prejudiced if he did not.

As I read this passage, the learned judge has held that in his opinion there was no evidence to justify a finding that the respondent's statements were obtained from him "either by fear of prejudice or hope of advantage exercised or held out to him" by the two detectives. This is a question of

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law upon which I share his view. I am therefore in agreement with Roach and Aylesworth JJ.A. that the statements in question were properly admitted by the trial judge.

As to the other ground of dissent, I am in respectful agreement with Roach J.A. that there was no misdirection and no non-direction amounting to misdirection. There is nothing which I could usefully add to his reasons for judgment.

I would allow the appeal and restore the conviction.

Appeal allowed and conviction restored.

Solicitor for the appellant: Clarence P. Hope, Toronto.

Solicitors for the respondent: Humphrey & Locke, Toronto.

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*Oct. 9, 10
*Oct. 24

C. EDWARD SYLVESTER (*Defendant*) ..APPELLANT;

AND

JOHN CRITS, an infant, by his next friend Neil Crits, AND NEIL CRITS (*Plaintiffs*) ..... } RESPONDENTS;

AND

LIONEL A. MACKLIN, THE STRATFORD GENERAL HOSPITAL TRUST AND THE STRATFORD GENERAL HOSPITAL CORPORATION (*Defendants*).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Physicians and surgeons—Negligence—Anaesthetist—Sufficiency of precautions taken to prevent explosion—Use of combination of ether and oxygen—Danger from static electricity.

An anaesthetic was administered by introducing oxygen from a tank into a can containing ether, and then forcing the mixture of ether and oxygen through a tube (known as a Magill tube) into the patient's throat. Almost immediately after the start of the anaesthetizing process the patient developed a cyanotic condition, necessitating the administration of pure oxygen. The tubes were thereupon withdrawn from the can and oxygen was drawn from the tank into a bag, from which it was introduced through the Magill tube into the patient's lungs. As soon as the bag was filled the tube from the tank was again inserted in the ether-can, but with the pressure reduced. When the patient's condition had returned to normal the Magill tube was disconnected from the oxygen-bag, with a view to restoring the flow of the anaesthetic. At that moment a violent explosion took place, causing serious injuries to the patient. It was established in evidence

*PRESENT: Kerwin C.J. and Rand, Kellock, Cartwright and Fauteux JJ.

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that the explosion had been caused by a spark of static electricity setting aflame the ether-oxygen mixture that had escaped from the can while the Magill tube was disconnected, and accumulated near the patient's head.

Held: The anaesthetist was liable in damages for the patient's injuries. It amounted to negligence in the circumstances to leave the oxygen flowing into the ether-can while the Magill tube was not connected to it. It was not sufficient merely to reduce the pressure; the oxygen should have been turned off at the tank, which would have entailed no material delay and would have substantially reduced the danger. It was conceded that the ether-oxygen vapour was highly explosive, and that in surgical operations there was constant danger of a spark from static electricity. Admittedly there was no absolute security against either spark or explosion, but the duty of all working in such conditions was to reduce that possibility to the practicable minimum. There was no evidence that what was done in this case was approved as standard practice in hospitals.

A second alleged ground of negligence was the failure to remove the ether-can from the operating-table, close to the patient's head. But the anaesthetist's conduct in this respect had been approved by other medical witnesses, and it would be dangerous for a Court to attempt in such a matter to proscribe a step approved by the general experience of technicians and not shown to be clearly unnecessary or unduly hazardous.

APPEAL from a judgment of the Court of Appeal for Ontario (1), in so far as it reversed the judgment of Smily J. at trial (2).

G. F. Henderson, Q.C., and *R. F. Merriam,* for the defendant Sylvester, appellant.

J. D. Arnup, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

RAND J.:—This is an appeal by an anaesthetist from a judgment (1) holding him responsible for an explosion of ether-oxygen gas in the preparatory stages of a tonsillectomy in an action brought as well against the surgeon and the hospital. Smily J., at trial, dismissed the action (2), and this was affirmed by the Court of Appeal (1) except as to the anaesthetist.

The items of negligence relied on are reduced to two: the first, that a small can containing a quantity of ether into which oxygen was introduced and from which the mixed gas was conveyed to the patient had been kept on the operating-table at a distance of between 6 and 7 inches

(1) [1956] O.R. 132, 1 D.L.R. (2d) 502.

(2) [1955] O.R. 332, [1955] 3 D.L.R. 181.

from the face of the patient; and the second, that during a suspension of anaesthetizing and while pure oxygen was being administered to counteract cyanosis, the flow of oxygen into the can and thence into the air was allowed to continue, producing a condition for the explosion which followed.

With the first ground I find it unnecessary to deal. Schroeder J.A., who gave the judgment in appeal, held it to have been practicable to keep the can in some other place than on the operating-table. During the trial the suggested place was the floor, but I would accept the opinion of Dr. Gordon that that is no place for any part of the apparatus in such a procedure. Dr. Nichols agreed that at times he had removed the can from the table, but where or under what circumstances was neither asked nor stated. The practice followed here was approved by Dr. Gordon, and it would be extremely dangerous for a Court to attempt in such a matter to proscribe a step for technicians where their general experience approves it and it is not clearly unnecessary and unduly hazardous.

The second ground, however, does not appear to be open to that stricture. It is conceded that in surgical operations there is a constant danger of a spark from static electricity and that the general means of avoiding it are known by all concerned. In particular there is a common understanding of "grounding" a charge, and of the scientific theory of differences in potential from which sparks may result. Among the means taken in the hospital to drain off or neutralize any electric condition were, a metal grid imbedded in the floor and gathered into a grounding, the wearing of cotton outer garments and leather-soled footwear, a regulated humidity, temperature and ventilation, and a prescribed mode of separating parts of the apparatus against the effects of different potentials. It is conceded also that the ether-oxygen vapour is a highly explosive mixture.

An absolute prevention of any diffusion of ether gas or of the ether-oxygen mixture is not practically possible. In the can here, besides an aperture for the admission of the oxygen tube, there was a somewhat smaller one, about $\frac{1}{4}$-inch in diameter, through which the vapour from ether

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as well as the mixture could escape into the air, designed to prevent a pressure being built up beyond the capacity of the patient to accept.

In this case, the patient, a young boy about 5 years of age, had been given pentothal to induce the first stage of anaesthesia. That was at once followed by the introduction of a small tube into the trachea, called a Magill tube, to which was connected another leading from the can. Into the can the oxygen was led from an oxygen-tank about 5 feet from the operating-table. The oxygen enters the can at a much reduced pressure from that in the tank. The tube may reach below the surface of the ether or above it, but in either case the flow causes the ether to bubble and the mixed vapour to rise and through a central orifice in the top of the can to pass into a connector and tubes leading into the trachea.

Within half a minute or so of the setting up of the apparatus connecting the oxygen-tank, the can and the patient, for some part of which the ether-oxygen gas was in flow, Dr. Sylvester noticed a bluish tinge about the lips of the patient and satisfied himself that a cyanotic condition was present which had to be corrected immediately The connector on the tube-system from the can was disconnected from the tracheal tube, the oxygen-tube was withdrawn from the can, and both connector and oxygen-tube were introduced into a rubber bag for the purpose of filling it with pure oxygen. The pressure from the tank was stepped up and the bag was filled in the course of 10 or 15 seconds. The oxygen-tube was thereupon removed from the bag, reinserted into the can and the pressure from the tank reduced—or intended to be reduced—to normal The oxygen-bag was then connected with the tracheal tube by means of the connector and by manual compression the oxygen was introduced into the child's lungs. In half a minute or so he was restored and respiration had become normal.

The next step was to disconnect the oxygen-bag from the tracheal tube and restore without delay the flow of the anaesthetic from the can into the lungs. To make that disconnection, Dr. Sylvester took hold firmly of the end of the tracheal tube with thumb and finger of the right hand and the metal face-piece of the bag and the connector with

the left hand and in a sort of sweeping or bending motion he brought about the separation. At that instant, with a sizzling sound, a flash of blue flame and a violent explosion followed, and the flame appeared to the doctor to be between the can and the patient's face. The effect reached to the surgeon who was standing at the foot of the operating-table and serious injuries were caused to the child.

No other cause is suggested than that of a spark of static electricity setting aflame the ether-oxygen mixture accumulated in the space between the can and the patient's head. As mentioned, from the breaking of the pipe-connection between the can and the tracheal tube until the oxygen-tube was removed from the can and connected with the oxygen-bag, and, following the "bagging" of the child, from the time of restoring the oxygen-tube to the can until the breaking of the connection between the oxygen-bag and the tracheal tube, the oxygen was flowing into the can mixing with the ether and escaping through both the small release aperture and the main opening from which led the tube to the patient. In addition to that, there was the flow of oxygen to the can before action was taken to restore respiration, and that the gas did not, in any quantity, then reach the lungs is indicated by the cyanotic development. The time, therefore, of the flow which escaped and was escaping when the final disconnection was made cannot have been less than 2 to 3 minutes. It does not require a technician's understanding to see that a dangerous volume of the gaseous mixture had built up in the immediate area in which the flash of flame appeared.

The evidence is not at all clear whether, when the bag was filled and the oxygen-tube restored to the tank, the pressure in the tank had been reduced by Dr. Sylvester or by a nurse. In one place his language would indicate that he had done it but in another he could not be certain that it was not by a nurse. It was suggested to him that, at that point, to have turned the oxygen-tank off completely would have entailed no material delay and would have reduced substantially the danger. This he first met with two objections, that he wanted the gas to be ready immediately upon resuscitation, and that it was just another manipulation which he thought unnecessary. Later, he spoke of the

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latter as the real objection. It was obviously as easy if not easier, to turn the oxygen pressure off completely than to turn it down to the normal. He could not say whether there was a flow-gauge on the tank, and the degree of flow was estimated. If this reduction had been made by a nurse it is impossible to say what amount was made or at what speed the flow continued. Upon restoring the anaesthetizing-system, it would have been only a matter of a second or so for him to reach to the oxygen-tank and open the valve and the time for the oxygen to pass through the distance of 6 or 7 feet of tube into the can and the distance of 6 or 7 inches to the mouth of the patient would not have exceeded 5 to 10 seconds. No doubt it was desirable to renew the anaesthesia without unnecessary delay, but since the respiration was back to normal and the effects of the pentothal were far from exhausted, the additional step would have been immaterial to the procedure.

The fact seems to be that Dr. Sylvester assumed that static electricity was sufficiently guarded against. Admittedly there is no absolute security against either spark or explosion. While all operations must run a risk of such an unlikely eventuality, the duty of all working in such conditions is to reduce that possibility to the practicable minimum. Was, then, the act of allowing the ether-oxygen mixture to escape reasonably necessary? Involved in that determination is its working out in actual practice and if it could be shown that a uniform practice throughout hospitals had found it to be one of the requirements of the procedure, then the Court is not in a position to dictate to that judgment. Was it a step approved by what is called "standard practice"?

On that there is a minimum of evidence. An answer given by the doctor on cross-examination is said by Mr. Henderson to establish that fact. To understand the answer, it is necessary to read a previous question and answer:

> Q. Now, I want to ask you what was your custom and practice in regard to that? That is to say, when you administer this type of anaesthetic using an ether-can did you always put it on the cotton sheet on top of the mattress? A. That was my custom and practice.

Q. Yes. Well, then, I believe you spoke of the fact that when you were administering the oxygen by means of the bag—compressing the bag —that the cotton sheet—that the oxygen was still flowing through the rubber tube into the ether can? A. That would be the practice, yes.

To this last language I can give only one interpretation, that "the practice" to which he refers was his practice and not standard or general practice. Neither Dr. Nichols nor Dr. Gordon was questioned specifically on this point; but that it was looked upon as one of importance appears from the cross-examination of Dr. Sylvester by counsel both for the hospital and for the plaintiff. It was, therefore, an issue clearly raised by the evidence but left in the state I have indicated.

I think the evidence justified the Court of Appeal in holding that it was an improper practice because quite unnecessary. Although to turn the oxygen on again to the normal pressure was an additional act, it was one that could fit easily and habitually into the procedure, even more so than turning the pressure down—without a gauge—to the normal. It created, undoubtedly, a serious increase in the hazard; the extra time involved was insignificant; and in the proximity to the patient of such a body of explosive gas it would seem to me, in the absence of the evidence of wide and confirmed experience, to be without justification. At any rate, I am quite unable to say that the view taken by the Court of Appeal was wrong.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, respondents: Gregory, Anderson, Ehgoetz & Bell, Stratford.

Solicitors for the defendant Sylvester, appellant, and the defendant Macklin: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the defendant corporations: Mitchell & Hockin, London.

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was no objection by counsel for the appellants to what had been done, it was too late thereafter to raise the objection that the order dispensing with the jury had been improperly made (*Scott* v. *Fernie Lumber Co.* (1904) 11 B.C.R. 91 at 96 referred to). The evidence of the charge and of the plea of guilty was relevant and admissible. Even if it were not so, there should not be a new trial as it would be impossible to find that any wrong or miscarriage had resulted: s. 28 of the *Judicature Act*. *Per* Cartwright J. (dissenting): The rule that the trial judge should decide questions as to the admissibility of evidence as they arise applies not only to criminal but also to civil cases whether tried with or without a jury. In the circumstances of this case, counsel should not be held to have acquiesced in the course taken at the trial simply because he did not attempt to argue against it after the trial judge had not merely stated that he proposed to follow such course but had announced his decision to do so, and consequently the rule in *Scott* v. *Fernie Lumber Co.* ((1904) 11 B.C.R. at 96) has no application. The failure of the trial judge to rule as to the admissibility of the evidence at the time when it was his duty to do so, deprived the appellants of their substantial right to have the action tried by a jury and there should be a new trial before a jury. Semble, for the reasons given by Abbott J., that the evidence in question was inadmissible. *Per* Abbott J. (dissenting): The plea of guilty implied no more than a desire for peace, and as such was not an admission at all, had no probative value in the subsequent civil action and the evidence that it had been entered should have been rejected. Furthermore, an admission made by counsel on behalf of an accused in a criminal proceeding is not evidence in a civil matter unless the authority to make such admission was an authority to make it for the purposes of a civil action as well (*Potter* v. *Swain and Swain* [1945] O.W.N. 514 referred to). In view of the inadmissibility of that evidence, there was in fact no reason for depriving the appellants of their prima facie right to a trial by jury. There was here a deprivation of a substantial right and not an exercise of discretion. Even had the evidence been admissible, counsel should have been given full opportunity to be heard on the point as to whether the trial should proceed with or without a jury. ENGLISH AND LAING v. RICHMOND AND PULVER **383**

4.——*Negligence—Collision at night with rear of disabled truck—Flares put out by truck driver—Truck lights off—Whether lighting equipment disabled—Damages for loss of life—Trustee Act, R.S.M. 1940, c. 221—Highway Traffic Act, R.S.M. 1940, c. 93.* The respondent and his wife (plaintiffs) were killed when the bus in which they were passengers collided at night with the respondent company's disabled tractor and trailer,

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which was stopped on the right-hand side of the pavement with a clearance for traffic of sixteen and a half feet. The administrators of the respective estates sued the owners and drivers of both the truck and the bus for damages under the *Trustee Act*, R.S.M. 1940, c. 221. The right rear wheels of the trailer had come off some hours before but the driver had been able to make the repairs and to continue his trip. Some forty miles further, the same wheels came off again and the driver pulled up on the side of the road. As the repairs could not be made at the time, the driver placed lighted flares as required by the *Highway Traffic Act*, turned off all the lights of both the tractor and the trailer and went to sleep in the cab of the tractor. The collision occurred some three hours later. The driver of another truck of the respondent company, who had been following him and who stopped when the breakdown occurred, did not stay with him. He continued on his way, put his truck in the company's garage some fourteen miles away and went home without communicating with anyone. The trial judge found that the sole cause of the accident had been the failure of the bus driver to keep a proper lookout, that the lighting equipment of the truck was disabled within s. 18(1) of the *Highway Traffic Act*, that the company had satisfied the onus under s. 82 of the Act with regard to its failure to have the lights of the truck burning and with regard to the moving of the truck, and awarded damages of $2,500 for each deceased. A majority in the Court of Appeal affirmed this judgment but increased the general damages to $5,000 for each deceased. *Held* (Kellock J. dissenting in part): That the appeal should be dismissed other than as to the quantum of damages, and the award of general damages made at the trial restored. *Per Curiam:* The trial judge had proceeded on the proper principles in assessing the damages under the *Trustee Act*. *Per* Taschereau, Locke and Abbott JJ.: There were concurrent findings that the real and effective cause of the accident had been the failure of the bus driver to keep a proper lookout. Although there had been a contravention of ss. 17 and 18 of the *Highway Traffic Act* on the part of the truck driver, in that the lights at the rear of the trailer were carried at the bottom instead of at the top of the box and in the failure to have the lights lit since the lighting equipment was not disabled as found by the trial judge, the concurrent finding that these defaults did not cause or contribute to the occurrence of the accident has not been shown to have been wrong. *Per* Kellock J. (dissenting in part): The truck company has not proved that the lighting equipment on its truck was disabled and that the failure to have the lights lit and to move the vehicle did not contribute to the accident. The effect of the breach of duty on the part of both drivers continued up to the moment of impact and

the legislature had, in effect, delegated its legislative authority and had exceeded its jurisdiction by allocating the issue to an inferior court. *Held:* The appeal should be allowed and the judgment at trial restored. *Per* Kerwin C.J., Rand, Kellock and Cartwright JJ.: A province can confer on a non-resident a right to enforce a duty, incident to the marriage status, in the province in accordance with provisions prescribed by the law in England for the relief of a deserted wife. The legislation is within head 16 of s. 92 of the *B.N.A. Act*, as a local or private matter. No other jurisdiction has any interest in the controversy and it concerns property within the province in a local sense. The action taken in England is only an initiating proceeding to adduce a foundation in evidence. It is unquestionable that a province can act upon evidence taken abroad either before or after proceedings are begun locally. In the converse situation, where the initiating step is taken within the province, there can be no conflict with Part II of the *Canada Evidence Act*. The arrangement is not a treaty, as there is nothing binding between the parties to it; and it would be extraordinary if a province should be unable within its own boundaries to aid one of its citizens to have such a duty enforced elsewhere. The legislation is a clear case of adoption and not of delegation. The action of each legislature is distinct and independent of the other. From the standpoint of legislative competency, there is no difference between the adoption of procedure and that of substantive law. No challenge could be made to the complementary English enactment here, and the province should be able to exercise the same power in relation to a subject of such a local and civil rights nature. (*Hodge* v. *The Queen*, 9 A.C. 117). Duties of this nature are daily enforced in the inferior courts in the province and the residence of the complaining party cannot affect the judical jurisdiction where the case is brought within the same class of legislative power. It is the same as if the wife had come to the province and there instituted the proceedings. The court is not completing an operative foreign order, it is making an original order of its own. The preliminary step taken elsewhere has no substantive efficacy until by acceptance it is adopted and incorporated in the action of the provincial court. The family court, having statutory jurisdiction to make maintenance orders, is, therefore, a court to which the reference of the Attorney General may be made. The modification from one currency to that of this country is not beyond provincial legislative power. *Per* Taschereau, Fauteux and Abbott JJ.: Since maintenance orders fall within the jurisdiction of inferior courts, there is no valid reason why such courts could not make a provisional order under s. 4 of the Act or make and enforce an order, under s. 5, based upon proceedings initiated in another

state. The maintenance of wives and children is a matter of a merely local or private nature in the province falling within head 16 of s. 92 of the *B.N.A. Act*. It is clearly competent for any province to determine for the purpose of a civil action brought in such province, what evidence is to be accepted and what defences may be set up. There is not, under s. 5(2) of the Act, delegation of legislative power to another state. It is merely a recognition by the law of the province of rights existing from time to time under the laws of another, in accordance with the principles of private international law. S. 5 is legislation in relation to the administration of justice in the province, including procedure in civil matters in the provincial courts, and as such, within the exclusive legislative competence of the province under head 14 of s. 92 of the *B.N.A. Act*. *Per* Locke J.: It is a valid exercise of provincial powers under head 13 of s. 92 of the *B.N.A. Act* to declare that the defences which may be relied upon in proceedings under the *Reciprocal Enforcement of Maintenance Orders Act* shall be those from time to time permissible under the laws of England. In substance, those laws are adopted and declared to be the law in the province. There is no delegation of the authority of the legislature. The objection that it is an attempt by the legislature to clothe an inferior provincial court with power to determine the legal rights of residents of the province, in respect of orders pronounced in another territorial jurisdiction, which would therefore be repugnant to s. 96 of the *B.N.A. Act*, cannot be sustained. The order does nothing more than to afford evidence upon which the magistrate may make an order against the husband. Any award made must depend entirely for its validity upon the order made by the magistrate under the Ontario statute. The legislation does not amount to a treaty. There is no evidence to suggest that an agreement existed between the province and the reciprocating state to legislate in this manner. ATTORNEY-GENERAL FOR ONTARIO v. SCOTT AND ATTORNEY-GENERAL FOR CANADA..... **137**

3.——*Prohibition—Validity of s. 31 of the Combines Investigation Act, R.S.C. 1927, c. 26, as re-enacted by 1952, c. 39, s. 3.* Section 31 of the *Combines Investigation Act* (R.S.C. 1927, c. 26, as re-enacted by 1952, c. 39, s. 3) empowers the court to order in addition to any other penalty the prohibition of the continuation or repetition of the offence of which the person has been convicted. The appellants pleaded guilty to a charge of conspiracy under s. 498(1)(*d*) of the *Criminal Code* and were fined. Upon application by the Crown, the trial judge directed that an order of prohibition issue under s. 31 of the *Combines Investigation Act*. The appellants appealed against that order and contended that s. 31 was *ultra vires* the Parliament of Canada in whole or

CRIMINAL LAW—*Continued*

decided that the ends of justice would not be effectively served by granting the accused's request, for that would have eliminated eighty-five per cent of the population from taking part in the administration of justice. Even if there had been any irregularities concerning the list of jurors, they would be covered by s. 1011 Cr. C. There was nothing more logical, since a mixed jury was concerned, than to have the judge, counsel for the Crown and for the accused address the jury in French and in English. Nothing in what counsel for the Crown said was such as to suggest that the jury bring in a verdict based on sentiments and prejudices and not exclusively on the evidence. S. 9 of the *Canada Evidence Act* does not forbid refreshing the memory of a witness by means of a previous testimony which he has given. There was no attempt to discredit or contradict the witness Petrie. She admitted that her memory was better at the time of the preliminary inquiry. Moreover, this is a question for the judge's discretion. Even if there had been some irregularities, s. 1014(*c*) Cr. C. would apply, as no substantial wrong or miscarriage of justice occurred. The evidence left the jury no alternative. It was entirely consistent with the guilt of the accused and inconsistent with any other rational conclusion. *Per* Rand, Kellock and Fauteux JJ.: The court has a discretion, not open to review, to permit leading questions whenever it is considered necessary in the interests of justice. Moreover, a witness may refresh his memory by reference to his earlier depositions and s. 9 of the *Canada Evidence Act* applies only when it is attempted to discredit or contradict a party's own witness. The contention that, because of the differences between the address of counsel in one language and the other, and between the two charges delivered by the trial judge, the accused was tried by two groups of jurymen, and further that s. 944 Cr. C. requires that the jury be addressed by one counsel only on each side, cannot succeed. The practice followed has been the invariable one in Quebec since 1892. Neither the differences in the addresses nor in the charges were of a nature to call for the interference of this Court. The judge, in exercising his discretion under s. 923 Cr. C., was right in his view that the ends of justice would be better served with a mixed jury. It cannot be said that the accused gave any reasonable explanation of how he came to be in possession of the things as to which he even attempted to make an explanation. There was, therefore, abundant evidence from which the jury could conclude, as they have done, that the possessor of the money and other items was the robber and murderer as well. *Per* Locke J.: The evidence of the police officer that he acted on "precise information" in searching for a rifle in the vicinity of the accused's camp, was clearly

CRIMINAL LAW—*Continued*

hearsay evidence and, therefore, improperly admitted. That evidence, to which so much importance was attached by counsel for the Crown and by the trial judge when the matter was presented to the jury, was on a point material to the guilt or innocence of the accused. It cannot, therefore, properly be said that there has been no substantial wrong or miscarriage of justice and consequently, s. 592 Cr. C. has no application. (*Makin* v. *A.G. for New South Wales* [1894] A.C. 57 and *Allen* v. *The King* 44 S.C.R. 331 followed). *Per* Locke and Cartwright JJ.: The evidence that the police officer had information that a rifle was concealed in a precisely indicated spot near the accused's camp, was inadmissible as being hearsay evidence. Proof that an accused has suppressed or endeavoured to suppress evidence is admissible, but, here, the foundation of the whole incident on which the jury were invited to find that he had suppressed evidence was this inadmissible hearsay evidence. It related to a vital matter and in view of the way it was stressed at the trial, counsel for the Crown cannot now be heard to belittle its importance. The transcript of the evidence given at the preliminary inquiry by the witness Petrie was used not for the purpose of refreshing her memory but for the purpose of endeavouring to have her admit that she was mistaken or untruthful in giving her evidence at the trial. The cross-examination of this witness was unlawful and was attended by further error in that no warning was given to the jury that any evidence of what she had said at the preliminary inquiry was not evidence of the truth of the facts then stated but could be considered by them only for the purpose of testing the credibility of the testimony which she had given at the trial. Although there is no evidence to suggest that any improper communication took place on the occasion of the visit to the cinema, this unfortunate incident falls within the principle stated in *Rex* v. *Masuda* 106 C.C.C. at 123 and 124. There is no escape from holding that the incident was fatal to the validity of the conviction. The judge did not direct his mind to the question whether the ends of justice would be better served by empanelling a mixed jury. The reasons given for the exercise of his discretion under s. 923 Cr. C. were irrelevant. Whether the empanelling of a jury of the sort requested by the accused would be attended with difficulty or whether the language of the accused was or was not that spoken by the majority of the population of the district were irrelevant considerations. The record has failed to disclose any ground sufficient in law to warrant the accused being denied his right to a jury composed entirely of persons speaking his language. The error is not cured by s. 1011 Cr. C. S. 1014(2) does not avail to support the conviction as it is impossible to affirm with

CRIMINAL LAW—*Continued*

applies to all the elements of the actus reus. In view of s. 2 of the *Act* which defines the word "child", and in view of the conclusive evidence heard at the trial, it is impossible to reasonably hold that the girl was not apparently of the age of 18, or that the respondent did not have an honest belief that she had reached that age. *Per* Rand and Locke JJ.: The general principle of criminal law is that accompanying a prohibited act there must be an intent in respect of every element of the act, and that is ordinarily conveyed in statutory offences by the word "knowingly". As is seen in s. 33(1)(*a*) and (*b*), the offending act embraces the elements of something done of a certain quality and by or in relation to a "child". The principle would thus extend the word "knowingly" to the age as well as to the conduct. The language of the statute contemplates the application of the principle of mens rea. It was not shown that the respondent either knew the age of the girl to be under 18 or was otherwise chargeable with that knowledge. *Per* Cartwright and Nolan JJ.: The words "knowingly or wilfully" govern the whole of s. 33. Therefore honest ignorance on the part of the accused of the one fact which alone renders his action criminal (in this instance the age of the girl) affords an answer to the charge. The jurisdiction of the Court of Appeal under the *Act* being the same as under s. 1014 of the *Criminal Code*, it had no jurisdiction to refer the matter back to the judge of the Supreme Court. Proceeding to give the judgment which the Court of Appeal ought to have given, the appeal should be dismissed as no tribunal acting reasonably could have found it to be established beyond a reasonable doubt that the respondent knew, or was wilfully blind to, the fact that the girl was under age of 18 at the time. *Per* Fauteux J. (dissenting): The words "knowingly or wilfully" in the section do not relate to all the constituent elements of the offence which are (1) the doing of an act; (2) contributing to the delinquency; (3) of a child. They relate only to the first. To apply them to the other two elements would permit the accused to substitute his own opinions and have them prevail over the opinion of the court as to whether the act complained of would contribute to delinquency or as to whether the person involved was "apparently" over the age of 18. The accused assumes the risk that the opinion he forms from appearance as to the age of the girl will be the same as the court's opinion. THE QUEEN v. REES..... **640**

11.——*Sexual offence against child—Evidence—Corroboration—Impotency and lack of opportunity pleaded but found not true by trial judge—Whether corroboration of evidence of child.* The appellant was convicted of unlawful sexual intercourse with his niece, a girl under 14 years of age. In his defence, he alleged lack of opportunity and the fact that he was impotent. In rebuttal, the girl's older sister testified that the appellant had had sexual intercourse with her a number of times, and the mother of the girls testified that the appellant had admitted to her acts of intercourse with the older girl. The trial judge held that the appellant's statement as to opportunity and impotence were false. The Court of Appeal for Ontario affirmed the conviction. *Held* (Cartwright and Nolan JJ. dissenting): The appeal should be dismissed. *Per curiam:* There was evidence upon which it was open to the trial judge to find that the child understood the nature and consequences of an oath and could therefore be sworn in as a witness. *Per* Taschereau, Fauteux and Abbott JJ.: There was evidence from which the trial judge could infer corroboration in law. Whether a false statement is or is not corroboration must depend upon all the circumstances in a particular case. In the present case, both the lack of opportunity and the physical incapacity to commit the offence were material facts, either of which, if true, afforded a complete defence to the charge. The nature of the false statements and the circumstances in which they were made were such as could lead to an inference in support of the evidence of the child. *Per* Cartwright and Nolan JJ. (*dissenting*): In all the circumstances of the case at bar, the false statements could not in law be regarded as corroboration of the evidence of the child. Evidence in corroboration must at the least be independent evidence from which it results as a matter of inference that it is more probable that the offence was committed by the accused than not. The false statements were not evidence of that nature. WHITE v. THE QUEEN..... **709**

12.——*Murder—Plea of self-defence and drunkenness—Fist fight—Criminal Code, s. 201(a)(i) and (ii).* The appellant was convicted of murder. His main defences had been self-defence, drunkenness and lack of intention to kill. The evidence was that the appellant and the victim had, in a deserted lane at about 2 a.m. on a very cold night, engaged in a drunken fist fight; that the victim fell to the ground and was kicked by the appellant; that while the victim was lying bleeding and unconscious, in below zero weather, the appellant removed the victim's coat, placed a leather belt around his head, running it through the mouth and knotting it tightly behind the left ear, and then abandoned him. The autopsy revealed numerous cuts on the head and a depressed fracture of the skull. The lungs contained an abnormal amount of blood. The conviction was affirmed by the Court of Appeal, without written reasons. *Held* (Rand, Cartwright and Nolan JJ. dissenting), the appeal should be dismissed. *Per* Kerwin C.J. and Taschereau

CRIMINAL LAW—*Continued*

and Fauteux JJ.: On the uncontradicted evidence of medical and law enforcement officials and the admittedly free and voluntary statements made by the appellant, the conclusion is irresistible that, failing any defence that could arise from the evidence, the appellant's conduct throughout the entire transaction could only manifest an intention either to cause the death of the victim or to cause the victim bodily injury known to him to be likely to cause or accelerate death and being reckless whether death ensued or not. It is impossible to say with any degree of certainty to which one of the various injuries death could ultimately be attributed. Whether the fracture of the skull was caused by the appellant, intentionally or accidentally, what he did, once his victim had become unconscious, on the medical evidence, accelerated death and there is no place for any speculation as to what his intentions then were if they are to be measured by his actions. Therefore, subject to the consideration of possible defences and assuming particularly that the appellant was sane and sober, as the law presumes, there could be no doubt that what he then did is only reasonably consistent with either an intention to kill or to cause such bodily injury known to him to be likely, in the circumstances, to cause or accelerate death, being reckless whether death ensued or not. Subject to the consideration of possible defences, whether such a killing by acceleration amounts to murder or manslaughter depends whether, on the evidence, the case is one within s. 201 (*a*)(i) or (ii) of the *Code*. The trial judge charged the jury as to insanity, provocation, self-defence and drunkenness. These directions are unimpeached by the appellant. Obviously, the jury reached the view that none of the defences was made out. Having particularly failed to find that the appellant was drunk to the extent required to support a defence of drunkenness, which was the main defence here, there was no other verdict possible but the one rendered. There was no substantial wrong or miscarriage of justice. *Per* Locke J.: All the acts of the appellant must be considered together and the matter cannot be limited to the blows which presumably felled the victim.There is no substance to the objection that the trial judge made a finding in law that the appellant's participation in the fight was an unlawful act and a crime when the facts were in dispute. The facts were not in dispute and assaulting another person is a criminal offence subject to the exceptions explained in the charge. Reading the charge as a whole, there was no misdirection for the trial judge to say that the appellant was presumed to intend all the consequences which might flow from the fight, even though he may not have known that the victim received a fractured skull, and that he was thus presumed to be guilty of murder, subject to possible defences. The necessity for proof of the intent required by s. 201(*a*) of the *Code* was impressed on the jury. The contention that the trial judge should have instructed the jury that if the victim fell during the fight and fractured his skull on some object it could amount to no more than manslaughter, cannot be entertained. If the appellant struck the victim with his fists intending to kill him or cause bodily harm that he knew was likely to cause death and being reckless whether death ensued or not, it would be murder and not manslaughter. The reading by the trial judge of s. 196 of the *Code*, coupled with the reference to the condition in which the victim was left and the instructions in the charge as a whole, was sufficient to dispose of the ground that the trial judge failed to tell the jury under what circumstances it would have been manslaughter under that section. The objection that the trial judge failed to instruct the jury, that if they found that the appellant accelerated the death, under what circumstances it would amount to manslaughter, ignores the instructions as to whether the appellant had caused the death and as to his intent in assaulting and leaving the victim gagged and unconscious in the snow. The jury, finding that the appellant was capable of forming the intent necessary to constitute the offence of murder, has by its verdict found that he had formed that intent. No other finding was open to them upon the evidence. No substantial wrong or miscarriage of justice occurred. *Per* Rand J. (dissenting): The brain contusion was the vital physical fact and therefore the question of actual intent was of the first importance. The charge confused the question of causing a homicide with that of attributing to the appellant an intent or state of mind. If the appellant knew nothing of the skull fracture or existing conditions that coupled with a knockdown could cause it, it is impossible to see how anything flowing from it could be considered to be within any legal presumption of intention related to consequences, natural or unnatural. It was fatal to the charge to omit the vital link of knowledge actual or imputed that could produce such a natural consequence, as well as the intent to bring such an injury about. As to the supplementary cause of tying the belt and abandoning the victim, which it was contended accelerated the death, the general verdict makes it impossible to say whether the jury proceeded upon the one cause or the other; and any finding by a court of appeal that the jury must have found guilt on the one or the other might be based on the one that the jury rejected. Furthermore, it cannot be seriously contested that the jury could have found in favour of the appellant that this supplementary conduct had not been carried out with the intent of s. 259 of the old *Code* and that the passion of the fight had not cooled.

HUSBAND AND WIFE—*Continued*

Court Officer" that the Intermediate Military Government had dropped the proceedings for lack of evidence and that according to the law the Polish marriage was not valid as no civil marriage was performed and the "wife" was entitled to consider herself not married. *Held* (Cartwright J. dissenting): That while the certificate of the English marriage was admissible in Evidence (Imperial Evidence Act, 14-15 Vict. c. 99; R.S.O. 1897, Vol. 3, p. XXIII) it could have no more probative value than it would have in the English courts. Its production did not constitute "strict" proof but at most raised a presumption as to its validity and, the presumption having been placed in doubt, the burden resting upon a plaintiff in an action for criminal conversation to establish that the "real" relation of husband and wife existed fell upon the appellant which he failed to discharge. *Catherwood* v. *Caslon* 13 L.J. M.C. 334 at 335; *The King* v. *Bailey* 31 Can. S.C.R. 338; *In re Stollery* [1926] 1 Ch. 284; *Rex* v. *Naguib* [1917] 1 K.B. 359. *Per* Cartwright J. (dissenting): The certificate of the English marriage was admissible in evidence and constituted *prima facie* evidence of the facts which it recorded. *Bogert* v. *Bogert and Finlay* [1955] O.W.N. 119, approved. The evidence of the appellant together with the English marriage certificate established a valid marriage unless at the time it was solemnized the "wife" was already married to M. *Burt* v. *Burt* 29 L.J. N.S. (P.M. & A.) 133 and *Catherwood* v. *Caslon* 13 M. & W. 261, distinguished. Whether the *prima facie* case for a valid marriage was displaced by the evidence of the marriage ceremony in Poland depended upon the evidence in the record as to that ceremony. There being no proof therein that the latter constituted a valid marriage there was no evidence to rebut the *prima facie* case made by the appellant. *Rex* v. *Naguib* [1917] 1 K.B. 359 at 361, 362, followed. *Rex* v. *Wilson* 3 F. & F. 119 and *Re Peete* [1952] 2 All E.R. 599, distinguished. The evidence of the ceremony in Poland without any proof of its validity was not evidence to lead the court to doubt the validity of the English marriage. Evidence of the marriage Law of Poland was equally available to both parties and it would be an anomaly to hold that evidence as to an alleged foreign marriage (which marriage if valid would be a defence to the charge or action as the case may be) which would be insufficient to afford any defence to one accused of bigamy, would yet be sufficient to furnish a defence to one sued for damages for criminal conversation. *Rex* v. *Christie* [1914] A.C. 545 at 564. The trial judge was right in ruling, as a matter of law, that there was no evidence in the record on which the jury could find the appellant's marriage was invalid, and in directing them to proceed on the basis that such marriage was established. Judgment of the Court of Appeal for Ontario [1954] O.W.N. 402, affirmed. LEWKOWICZ v. KORZEWICH..... **170**

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2.——*Separate as to property—Transfer of immoveable as security for husband's debt—Art. 1301 C.C.* To help her husband whose financial situation was bad and from whom the appellant was pressing the payment of a debt of $4,500, the respondent, separate as to property, signed a contract of sale of her immoveable property in favour of the appellant for $6,027, of which $4,500 was payable to her and the remainder to another creditor. She did not receive the money but gave receipt for it. The appellant signed a cheque for $4,500 to the order of the respondent which she endorsed and gave to her husband's solicitor who, in turn, made out a cheque of $4,500 payable to the appelant. The evidence showed that the respondent believed that the transfer of property was not in payment of her husband's debt but as security for it. *Held* (affirming the judgment appealed from): That the appeal should be dismissed. The Courts below were right in maintaining the action taken by the respondent to annul the transfer as what was attempted to be done was prohibited by Art. 1301 C.C. (*Lecrocque* v. *Equitable Life Assurance* [1942] S.C.R. 205 and *Kelly* v. *C.P.R.* [1952] 1 S.C.R. 521 referred to). RACINE v. ROUSSEAU AND EQUIPEMENT MODERNE LIMITÉE..... **470**

IMMIGRATION—— *Habeas corpus — Certiorari — Alien — Deportation order — Whether quashable — Whether order-in-council making regulations, invalid—Delegation of authority—Jurisdiction to review case—Immigration Act, R.S.C. 1952, c. 325, ss. 39, 61—Immigration Regulation 20(4).* S. 61 of the *Immigration Act* (R.S.C. 1952, c. 325) authorizes the Governor in Council to make regulations respecting the prohibiting or limiting of admission of persons by reason of an enumerated list of matters. By Regulation 20(4), the Governor in Council enacted that admission is prohibited "where in the opinion of a Special Inquiry Officer such person should not be admitted by reason of" the same enumerated list of matters that are found in s. 61 of the Act. The respondent a citizen of the United States of America and who did not have a Canadian domicile, was ordered deported by a special immigration officer as unsuitable under this regulation. The respondent applied for a writ of habeas corpus with certiorari in aid and also for an order by way of certiorari quashing the deportation. The judge of first instance ordered her discharged from custody. In view of the decision of this Court in *Masella* v. *Langlais* ([1955] S.C.R. 263), the Court of Appeal for Ontario struck out the direction for the respondent's discharge but quashed the deportation order. *Held:* Upon appeal by leave of the Court of

TAXATION—*Continued*

under s. 375(B) of the charter since its entire business was within its description, and alternatively that the rooms of the permanent guests should have been excepted. By s. 357, a business tax is payable by the occupier of a real property for the purposes of any trade, profession or other calling carried on for purposes of gain, . . . and is payable by such occupier, whether as owner, tenant or otherwise, and whether assessed as owner of such property for real property tax or not. S. 375(B) deals with an occupier conducting the business of "a lodging-house or rooming-house or renting rooms for living purposes or for sleeping purposes only or who is engaged in the business of providing meals for gain in such real property and who has in any one building, . . . during the civic year . . ., provided accommodation for five or more lodgers, roomers, or boarders". The resulting tax under the latter section is less than under s. 357. The appeal from the assessment was dismissed by the Court of Tax Appeals and by the Supreme Court of Nova Scotia in banco. *Held* (Rand and Cartwright JJ. dissenting): The appeal should be allowed. *Per* Kellock, Locke and Abbott JJ.: The business of the appellant was not that of a lodging-house or rooming-house, but in so far as the words "renting rooms for living purposes or sleeping purposes or providing meals for gain" are concerned, they describe one of the functions of a hotel, and therefore, of the appellant. The statute is to be applied distributively. It contemplates that if any part of a building is not occupied for one or other of these purposes, such part would fall outside the section. *Per* Rand and Cartwright JJ. (dissenting): The language of s. 375(B) excludes the appellant's business. The appellant neither keeps a lodging-house nor conducts the business of a rooming-house nor is it the keeper of either kind of house. The words "or who is engaged in the business of providing meals for gain in such real property" cannot be taken independently. They do not describe a restaurant. They refer back to the real property occupied by a person carrying on the business of lodging-house or rooming-house. Except as to the rented portions, the appellant was in possession of the entire building and, therefore, within s. 357. LORD NELSON HOTEL COMPANY LIMITED v. CITY OF HALIFAX..... **264**

3.——*Income tax—Wholesale news distributor—Whether reserve for loss on returns of periodicals deductible—Income War Tax Act, s. 6(1)(d).* The appellant, a wholesaler, distributed magazines, periodicals and books to retailers of the same on the basis that the latter were entitled to full credit for the return of unsold goods within a specified time. On its books, it treated the deliveries as outright sales. For income tax purposes, it set up a "reserve" for loss on returns which represented the profit

TAXATION—*Continued*

element in the sale value of goods delivered during the year which it estimated would be returned to it during the three months following the end of its fiscal year. The Minister disallowed the deduction of this "reserve" as prohibited under s. 6(1)(*d*) of the *Income War Tax Act*. It was allowed by the Income Tax Appeal Board and this decision was reversed by the Exchequer Court. *Held* (Kerwin C.J. dissenting): That the appeal should be allowed. *Per* Kellock J.: The deliveries made by the appellant were not "on consignment" nor were they on the basis of "sale or return". The property passed to the retailers upon delivery. But since there was a right of return, the sales were therefore subject to a condition subsequent with the result that the property would re-vest in the appellant. Accordingly, the appellant was not entitled to set up any reserve of profits, but should be entitled to deduct the estimated sales value itself, subject, when the actual figure is ascertained, to adjustment when the returns are actually made. *Per* Locke, Cartwright and Fauteux JJ.: The transactions were not outright sales or deliveries "on consignment" but were deliveries on a "sale or return basis". The property in the goods did not pass to the retailers nor were they liable for the amounts covering the deliveries other than for the goods sold or not returned within the agreed period. The claim for deduction has been established although the true nature of the transactions was not shown by the appellant's books. In computing the appellant's income, there should be excluded from the total of the sales any amount in respect of goods delivered and in the hands of retailers at the end of the fiscal year, for the purchase price of which the retailers were not then liable and, from the total of purchases, any amounts as the purchase price of such goods and the amounts set up in the accounts of the appellant for the year as a reserve for loss on returns should be deleted. *Per* Kerwin C.J. (dissenting): The appeal should be dismissed for the reasons given by Cameron J. SINNOTT NEWS COMPANY LIMITED v. MINISTER OF NATIONAL REVENUE..... **433**

4.——*Income — Alimony — Maintenance of child—Monthly payments ordered by decree—Whether lump sum paid by arrangement between parties in full settlement deductible—Income Tax Act, 1948, s. 11(1)(j).* Under a divorce decree, the respondent was ordered to pay to his wife $100 a month for the maintenance of their daughter. Subsequently, the wife accepted a lump sum of $4,000 in full settlement of all future payments. The Minister disallowed the deduction of this lump sum from the respondent's income. Both the Income Tax Appeal Board and the Exchequer Court held the amount to be deductible. *Held:* The appeal should be allowed. Since the $4,000 was not an