1945

CANADA
LAW REPORTS

Supreme Court of Canada

REPORTERS

ARMAND GRENIER K.C.

S. EDWARD BOLTON K.C.

PUBLISHED PURSUANT TO THE STATUTE BY

PAUL LEDUC K.C., Registrar of the Court

OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1945

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Louis St-Laurent K.C.

ERRATA

in volume 1945

Page 158, at the 16th line of the head-note, "appellant" should be "respondent", and, at the 18th line, "respondent" should be "appellant".

Page 179, f.n. (2) should be 29 S.C.R. 484.

Page 218, at the 35th line, "imparts" should be "imports".

Page 218, the 40th line should be replaced by the following: according to its terms; in that event, the respondent will pay interest.

Page 559, at the 5th line, "view" should be "views".

Page 595, f.n. (2) "9 App. Cas. 127" should be "9 App. Cas. 117".

Page 622, at the 38th line, "city" should be "company".

Page 669, at the 5th line of the captions, "operating" should be "owning".

Page 686, at the second last line, "appellant's" should be "respondents' ".

Page 688, at the 16th line, "inplicitly" should be "implicitly".

NOTICE

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

Attorney General of Quebec v. *Attorney General of Canada (Validity of section 770 Cr. C.)* [1945] S.C.R. 600. Special leave to appeal refused, 4th December, 1945.

City of Montreal v. *Montreal Locomotive Works and another* [1945] S.C.R. 621. Special leave to appeal granted, 27th December, 1945.

Comité Paritaire de l'Industrie de l'Imprimerie de Montréal et du District v. *Dominion Blank Book Company Limited* [1944] S.C.R. 213. Special leave to appeal refused, 30th January, 1945.

King, The, v. *Dominion Engineering Co. Ltd.* [1944] S.C.R. 371. Special leave to appeal granted upon terms, 23rd July, 1945.

Ontario Boys Wear Limited v. *The Advisory Committee and The Attorney General for Ontario.* [1944] S.C.R. 349. Special leave to appeal refused, 19th April, 1945.

Ottawa Electric Railway Company v. *The Corporation of the City of Ottawa.* [1945] S.C.R. 105. Special leave to appeal refused, 19th April, 1945.

Reference By the Board of Transport Commissioners for Canada, in the matter of The Transport Act, 1938 (2 Geo. VI, c. 53). [1943] S.C.R. 333. Appeal dismissed with costs, 16th April, 1945.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

A

	PAGE
Agar Heat (Canada) Ltd. v. Brockville Hotel Co. Ltd.	184
Association Internationale des Débardeurs, Local 375 v. Dussault	768
Attorney-General of Alberta v. The Royal Trust Co	267
Attorney-General of Canada, Attorney-General of Quebec v	600
Attorney-General of Canada v. Higbie	385
Attorney-General of Quebec v. Attorney-General of Canada	600
Aylmer, School Trustees for Municipality of, Congrégation du Très Saint Rédempteur v	685

B

Balthasar v. Drouin	517
Beauport (Town of) v. Quebec Railway, Light & Power Co	16
Bechtel (W. A.) Co. v. Stevenson	652
Bigras, Lamarre v	82
Bongard & Co., Hoefle v	360
Bonin, Campbell Auto Finance Co. v.	175
Breault v. Tremblay	217
Brockville Hotel Co. Ltd., Aga Heat (Canada) Ltd. v	184

C

Campbell Auto Finance Co. v. Bonin	175
Canada and Dominion Sugar Co. Ltd., Canadian National (West Indies) Steamships Ltd. v	249
Canada China Clay Ltd. v. Hepburn	87
Canadian National (West Indies) Steamships Ltd. v. Canada and Dominion Sugar Co. Ltd. v	249
Canadian Pacific Express Co. et al. v. Levy	456
Canadian Pacific Ry. Co. v. Rutherford	609
Canadian Wheat Board, Oatway v	204
Cie Navigation Saguenay et Lac St. Jean, S.S. "Richelieu" v	659
Congrégation du Très Saint Rédempteur v. School Trustees of the Municipality of the Town of Aylmer	685
Consumers Cordage Co. Ltd. v. St. Gabriel Land & Hydraulic Co. Ltd.	158
Crown Life Insurance Co., Gatineau Power Co. v	655

D

Drouin, Balthasar v	517
Duncan v. The King	748
Dussault, Association Internationale des Débardeurs, Local 375 v	768

E

East Crest Oil Co. Ltd. v. The King	191

F

Fiset v. Morin	520

G

Gatineau Power Co. v. Crown Life Insurance Co	655
Gauthier & Co. Ltd. v. The King	143
Giesbrecht et al., Wolfe (L. V.) and Sons v	441
Gill Brothers, Mission Sawmills Ltd. v.	766
Gray Coach Lines Ltd. v. Payne	614
Grenier, Latour v	749

H

Halbert v. Netherlands Investment Co. of Canada Ltd	329
Hepburn, Canada China Clay Ltd. v.	87
Higbie, Attorney-General of Canada v.	385
Hoefle v. Bongard & Co.	360

J

Johnson v. Johnson	455

K

King, The, v. City of Montreal	621
— —, Duncan v	748
— —, East Crest Oil Co. Ltd. v.	191
— —, Gauthier & Co. Ltd. v	143
— — v. Montreal Telegraph Co.	669
— —, McIntyre v	134
— — v. Northumberland Ferries Ltd	458
— —, Schmidt v	438
— —, Wright v	319
Kuchma v. The Rural Municipality of Taché	234

L

Lamarre v. Bigras	82
Lamport, Thompson v	343
Lashinsky, Sterling Woollens & Silks Co. Ltd. v	762
Latour v. Grenier	749
Levy, Canadian Pacific Express Co. et al. v	456

M

PAGE

Madden, Wartime Housing Ltd. v.... 169
Mission Sawmills Ltd. v. Gill Brothers 766
Montreal, City of, v. Montreal Locomotive Works Ltd..... 621
Montreal, City of, The King v..... 621
Montreal Locomotive Works Ltd., The City of Montreal v..... 621
Montreal Telegraph Co., The King v.. 669
Morin, Fiset v..... 520

Mc

McIntyre v. The King..... 134
McLean v. Pettigrew..... 62

N

Netherlands Investment Co. of Canada, Halbert v..... 329
New York Life Insurance Co. v Schlitt..... 289
Northumberland Ferries Ltd., The King v..... 458

O

Oatway v. The Canadian Wheat Board 204
Ottawa, City of, Ottawa Electric Railway Co. v..... 105
Ottawa Electric Railway Co. v The City of Ottawa..... 105
Ouvrard v. Quebec Paper Box Co. Ltd. 1

P

Parmley v. Parmley..... 635
Payne, Gray Coach Lines Ltd. v..... 614
Pettigrew, McLean v..... 62

Q

PAGE

Quebec Paper Box Co. Ltd., Ouvrard v. 1
Quebec Railway, Light & Power Co. v. Town of Beauport..... 16

R

Richelieu (S.S.) v. Cie Navigation Saguenay et Lac St. Jean..... 659
Royal Trust Company, Attorney-General of Alberta v..... 267
Rutherford, Canadian Pacific Ry. Co. v..... 609

S

St. Gabriel Land & Hydraulic Co. Ltd., Consumers Cordage Co. Ltd. v..... 158
Saskatoon (City of) v. Shaw..... 42
Schlitt, New York Life Insurance Co. v. 289
Schmidt v. The King..... 438
School Trustees for the Municipality of the Town of Aylmer, Congrégation du Très Saint Rédempteur v..... 685
Shaw, City of Saskatoon v..... 42
Sterling Woollens & Silks Co. Ltd. v. Lashinsky..... 762
Stevenson, Bechtel (W. A.)Co. v..... 652
Storgoff, In re..... 526
Sydney (City of) v. Wright..... 131

T

Taché, Rural Municipality of, Kuchma v..... 234
Thompson v. Lamport..... 343
Tremblay, Breault v..... 217

W

Wartime Housing Ltd. v. Madden.... 169
Withycombe Estate, In re..... 267
Wolfe (L. V.) and Sons et al v. Giesbrecht et al..... 441
Wright, City of Sydney v..... 131
Wright v. The King..... 319

A TABLE

OF THE

NAMES OF THE CASES CITED

IN THIS VOLUME

A

Name of Case	Where Reported	Page
A. & B. Taxis Ltd. v. Secretary of State for Air.	[1922] 2 K.B. 328	516
Ainslie Mining and Railway Co. v. McDougall.	40 Can. S.C.R. 270	612
Alston's Estate, Re	28 L.T. (O.S.) 337	415
Amand v. Secretary of State for Home Affairs.	[1942] 2 All. E.R. 381; [1943] A.C. 147.	531
American Automobile Insurance Co. v. Dickson	[1943] S.C.R. 143	78
Anderson v. Canadian National Railway Co.	[1944] O.R. 169	614
Andreas v. Canadian Pacific Railway Co.	37 Can. S.C.R. 1	444
Andrews v. Barnes	9 Ch. D. 133	356
Andrews v. Director of Public Prosecutions.	[1937] A.C. 576	79
Angers v. Duggan	Cameron, 3rd Ed. 92	214
Anselm, The	[1907] P. 151	667
Antaya v. Wabash R.R. Co.	24 O.L.R. 88	444
Archbald v. de Lisle	25 Can. S.C.R. 1	681
Aristocrat, The	[1908] P. 9	667
Armstrong v. Allan	8 T.L.R. 613	262
Arnold Estate, Re	44 D.L.R. 12	301
Arrospe v. Barr	8 R. 602	262
Arsenault v. The King	32 D.L.R. 622	418
Ashby's Cobham Brewery Co	[1906] 2 K.B. 754	280
Assad v. Latendresse	Q.R. 79 S.C. 286	66
Attorney-General v. Mersey Railway Co.	[1907] A.C. 415	36
Attorney-General of Alberta v. Attorney-General of Canada	[1939] A.C. 117; [1938] 3 W.W.R. 337.	212
Attorney-General for Alberta v. Attorney-General for Canada	[1943] A.C. 356	547
Attorney-General for Alberta v. Roskiwich.	[1932] S.C.R. 570	5
Attorney-General for British Columbia v. Attorney-General for Canada	14 Can. S.C.R. 345; 14 A.C. 295	402
Attorney-General for British Columbia v. Attorney-General of Canada	[1906] A.C. 552	406
Attorney-General for British Columbia v. Canadian Pacific Railway Co.	[1906] A.C. 204, 552; 11 B.C.R. 289.	395–396–433
Attorney-General for British Columbia v. Kingcome Navigation Co.	[1934] A.C. 45	547
Attorney-General for Canada v. Attorney-General for British Columbia	[1930] A.C. 111	604
Attorney-General for Canada v. Attorney-General for Ontario	[1898] A.C. 700; 23 Can. S.C.R. 458.	395
Attorney-General for Canada v. Attorneys General for Ontario, Quebec and Nova Scotia	[1898] L.J. P.C. 91	408 409
Attorney-General for Canada v. Cummings.	[1926] 1 D.L.R. 52	406
Attorney-General for Canada v. Ritchie Contracting and Supply Co.	[1919] A.C. 999	396
Attorney-General of Manitoba v. Manitoba Licence-Holders' Association	[1902] A.C. 73	545
Attorney General for Nigeria v. Holt	84 L.J. P.C. 98; [1915] A.C. 599	411
Attorney-General for Ontario v. Attorney-General for Canada	[1894] A.C. 189	604
Attorney-General for Ontario v. Attorney-General for the Dominion	[1896] A.C. 348	545

A—Concluded

Name of Case	Where Reported	Page
Attorney-General for Ontario v. Daly	[1924] A.C. 1011	547
Attorney-General of Ontario v. Hamilton Street Railway Co.	[1903] A.C. 524	215, 544
Attorney-General for Ontario v. Mercer	8 App. Cas. 767	407
Attorney-General for Ontario v. Reciprocal Insurers	[1924] A.C. 328	547
Aubertin v. Corporation du Village du Boulevard St. Paul	Q.R. 33 S.C. 289	703
Au Chung Lam alias Ou Lim v. The King	[1944] S.C.R. 136	5
Aylwin v. Judah	7 L.C.R. 128	682

B

Baker v. E. Longhurst and Sons Ltd.	[1933] 2 K.B. 461	447
Baker Estate, *In re*	13 Sask. L.R. 109	46
Baldwin v. Bell	[1933] S.C.R. 1	149
Ballard v. North British Railway Co.	60 Sc. L.R. 441	151
Bank of New Zealand v. Simpson	[1900] A.C. 182	377
Bank of Toronto v. Lambe	12 App. Cas. 575	31
Banque Canadienne Nationale v. Audet	[1931] S.C.R. 293	764
Banque Ville-Marie v. Morrison	25 Can. S.C.R. 289	710
Bartlett v. Wood	[1930] A.C. 629	358
Beddoe, *In re*	[1893] 1 Ch. 547	353
Bennan v. Parsonnet	83 N.J. L.R. 20	646
Bennefield v. Knox	17 D.L.R. 398	337
Beynon & Co. v. Codden & Son	4 Ex. D. 246	337
Bigaouette v. The King	[1927] S.C.R. 112	324
Billette v. Vallée	[1931] S.C.R. 314	759
Birely v. Toronto, Hamilton and Buffalo Railway Co.	25 Ont. A.R. 88; [1909] A.C. 624	471
Birmingham and District Land Co. v. London and North Western Railway Co.	34 Ch. D. 261	648
Bishop of Victoria v. City of Victoria	[1933] 3 W.W.R. 332	273
Bloom v. West	3 Col. App. Rep. 212	413
Bollman & Swartmout, Ex parte	4 Cranch 75	542
Booth Ltd., J.R. v. McLean	[1942] S.C.R. 205	179
Bowman v. Panyard Machine & Mfg. Co.	[1928] S.C.R. 63	214
Boyd v. Refuge Assurance Co. Ltd.	17 Sess. Cas. 955	316
Bozson v. Altrincham Urban District Council	[1903] 1 K.B. 547	336
Bray v. Ford	[1896] A.C. 44	447
Brett v. Rogers	L.R. 1 Q.B. 525	727
British American Brewing Co. v. The King	[1935] S.C.R. 568	525
Brophy v. Attorney-General of Manitoba	[1895] A.C. 202	334
Bulger v. The Home Insurance Co.	[1927] S.C.R. 451	525
Burrard Power Co. Ltd. v. The King	[1911] A.C. 87	404
Bursaw Estate, *In re*	19 Sask. L.R. 137	47
Bushel's Case	86 E.R. 777	582
Buszard v. Capel	8 B. & C. 141	430

C

Cairnbahn, The	[1914] P. 25	650
Calgary and Edmonton Railway Co. v. Saskatchewan Land and Homestead Co.	59 Can. S.C.R. 567	481
Cameron v. Excelsior Life Insurance Co.	[1937] 3 D.L.R. 224	212
Campbell Auto Finance Co. Ltd. v. Bonin	[1945] S.C.R. 384	772
Canada Atlantic Railway Co. v. Corporation of Cambridge	15 Can. S.C.R. 219	239
Canadian Agency Ltd. v. Tanner	6 Sask. L.R. 152	744
Canadian Allis-Chalmers Ltd. v. City of Lachine	[1934] S.C.R. 445	706
Canadian National Railway Co. v. Croteau	[1925] S.C.R. 384	176, 773
Canadian National Railway Co. v. Harricana Gold Mine Inc.	[1943] S.C.R. 382	488
Canadian National Railways v. Muller	[1934] 1 D.L.R. 768	618
Canadian National Railways Co. and Terwindt	[1930] 3 W.W.R. 345	281
Canadian National Steamships Co. v. Watson	[1939] S.C.R. 11	76

C—*Concluded*

Name of Case	Where Reported	Page
Canadian Northern Ontario Railway Co. v. Smith	50 Can. S.C.R. 476	468
Canadian Northern Railway Co. v. Billings	19 C.R.C. 193	275
Canadian Pacific Railway Co. v. Anderson	[1936] S.C.R. 200	199
— Pacific Railway Co. v. Parent	[1917] A.C. 195	76
— Pacific Railway Co. v. Pyne	48 D.L.R. 243	151
— Pacific Railway Co. v. Smith	62 Can. S.C.R. 134	451
— Pacific Railway Co. v. The Little Seminary of Ste. Thérèse	16 Can. S.C.R. 606	479
Canadian Pacific Wine Co. Ltd. v. Tuley	[1921] 2 A.C. 417; 2 Cam. 238	598
Carr v. Francis Times & Co.	[1902] A.C. 176	77
Cedars Rapids Man. and Power Co. v. Lacoste	[1914] A.C. 569	418, 485
"Celia", SS. v. S.S. "Volturno"	[1921] 2 A.C. 544	658
Chad v. Tilsed	2 Brod. & B. 403	415
Chaplin v. Hawes	3 C. & P. 554	150
Chapman v. Bluck	4 Bingham N.C. 187	377
Charrington & Co. Ltd. v. Wooder	[1914] A.C. 71	377
Chennell *In re*; Jones v. Chennell	8 Ch. D. 492	351
Child Welfare Act, *In re* The	[1943] 1 W.W.R. 269	336
Chinara and City of Oshawa, *Re*	35 O.W.N. 30	238
Christie v. The York Corporation	[1939] S.C.R. 50	773
Chung Chuck and The King	[1930] A.C. 244	594
"City of Peking", The	14 App. Cas. 40	156
Claxton v. Grandy	[1934] 4 D.L.R. 257	147
Clifford and O'Sullivan, *Re*	[1921] 2 A.C. 570	533
Coca-Cola Company of Canada v. Matthews	[1944] S.C.R. 385	212
Colonial Bank of Australasia v. Willan	L.R. 5 P.C. 417	342
Commissaires d'Ecoles de St. Adelphe v. Charest	Q.R. [1943] K.B. 504	694
Commissaires d'Ecoles de Sainte-Marie-de-Monnoir v. Auclair	23 R.L. n.s. 485	710
Commissioner of Income Tax, Bengal v. Mercantile Bank of India Ltd	[1936] A.C. 478	104
Commissioners of Inland Revenue v. Blot	[1921] 2 A.C. 171	104
Commissioners of Taxation v. Kirk	[1900] A.C. 588	467
Communanté des Soeurs des Sts. Noms de Jésus et Marie v. Corporation of the Village of Waterloo	M.L.R. 4 Q.B. 20	708
Compagnie des Terrains Dufresne Limitée v. Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de St. François d'Assise	Q.R. 41 K.B. 391	709
Consolidated Distilleries v. The King	[1933] A.C. 508	596
Consolidated Wafer Co. v. International Cone Co.	[1927] S.C.R. 300	469
Corporation de la Paroisse de St. Gervais v. Goulet	[1931] S.C.R. 437	86
Cory & Son v. Lambton and Hetton Collieries	86 L.J.K.B. 401	649
Cox v. Hakes	15 App. Cas. 506	546
Crédit Foncier Franco-Canadien and Village of Swansea	[1940] O.W.N. 53	246
Crowley's Case	2 Swan. 1	536
Cushing and Dupuy	5 App. Cas. 409; 1 Cam. 253	596
Custodian, The, v. Blucher	[1927] S.C.R. 420	658
Cuthbert v. Robinson	51 L.J. Eq. 238	412

D

Davie v. Bentick	[1893] L.R. 1 Q.B.D. 185	418
Davis v. The Royal Trust Co	[1932] S.C.R. 203	171
Deadman's Island Case	[1906] A.C. 552	406
De Bortoli v. The King	[1927] S.C.R. 454	214
Debt Adjustment Act, Reference *Re*	[1943] A.C. 356	547
Déchène v. City of Montreal	[1894] A.C. 640	525
Delta, Corporation of, v. Wilson	Cameron's S.C. Practice, 3rd Ed., p. 110	612
Dominion Trust Co. v. New York Life Insurance Co	[1919] A.C. 254	157, 296

D—*Concluded*

Name of Case	Where Reported	Page
Donald v. Suckling	L.R. 1 Q.B. 585	372
Dostaler v. Lalonde	Q.R. 29 K.B. 195	541
Doucet v. Macnider	Q.R. 14 K.B. 232	759
Dreifus v. Royds	64 Can. S.C.R. 346	524
Dugdale v. Lovering	L.R. 10 C.P. 196	648
Dugas v. Amiot	[1929] S.C.R. 600	758

E

Ecclésiastiques du Séminaire de St. Sulpice de Montréal v. Masson	Q.R. 10 K.B. 570	709
Ellor v. Selfridge	46 T.L.R. 236	150
Esquimalt and Nanaimo Railway Co. v. Treat	[1919] 3 W.W.R. 356	402

F

Farnsworth v. Territory of Montana	129 U.S. 104	549
Federal District Commission v. Dagenais	[1935] Ex. C.R. 25	510
Fitzhardinge (Lord) v. Purcell	[1908] 2 Ch. 139	411
Foncière Cie d'Ass. de France v. Perras	[1943] S.C.R. 165	78
Fong, Ex parte	[1929] 1 D.L.R. 223	572
Fontaine v. Payette	36 Can. S.C.R. 613	214
Forcier v. Coderre	[1936] S.C.R. 550	772
Forman and Fowkes v. Minister of Finance	[1937] 2 W.W.R. 428	273
Fortier v. Longchamp	[1941] S.C.R. 193	176, 773
Fowlie v. The Ocean Accident & Guarantee Corp.	4 O.L.R. 146; 33 Can. S.C.R. 253	316
Furois v. Cossette	Q.R. [1943] K.B. 239	521

G

Garfingle v. Eliasoph	Q.R. 51 K.B. 34	65
Gatineau Power Co. v. Cross	[1929] S.C.R. 35	519, 524
Gautret v. Egerton	L.R. 2 C.P. 371	418
Gendron v. McDougall	Cassels' Dig. 2nd Ed. 429	133
Gillespie and City of Toronto	19 Ont. App. R. 713	744
Gold Seal Ltd. v. Dominion Express Co	62 Can. S.C.R. 424	547
Gosnell v. Minister of Mines	2 Cameron S.C. Practice, 21	468
Gouin v. The King	[1926] S.C.R. 539	138, 440
Goulet v. Corporation de la Paroisse de St. Gervais	Q.R. 50 K.B. 513	709
Goyer v. La Corporation de la Ville St. Lambert	Q.R. 59 S.C. 232	703
Grand Trunk Railway Co. v. Barnett	[1911] A.C. 361	199
Grand Trunk Railway Co. v. McKay	34 Can. S.C.R. 81	614
Grand Trunk Railway Co. of Canada v. Attorney-General for Canada	[1907] A.C. 65	604
Gray, *Re* George Edwin	57 Can. S.C.R. 150	212, 546
Grayson Ltd., H. & C. v. Ellerman Line Ltd.	[1920] A. C. 466	190
Great Western Railway and Midland Railway v. Bristol Corporation	87 L.J. Ch. 414	377
Grierson v. City of Edmonton	58 Can. S.C.R. 13	274

H

Hadden v. Corporation of the City of North Vancouver	30 B.C.R. 497	422
Halford v. Cameron's Coalbrook Steam Coal Co.	16 Q.B. 442	128
Halifax, City of, v. Halifax Harbour Commissioners	[1935] S.C.R. 215	630
Halifax, City of, v. Reeves	23 Can. S.C.R. 340	480
Halliwell v. Venables	99 L.J. K.B. 353	150
Hamilton, Grimsby and Beamsville Railway Co. v. Attorney-General for Ontario	[1916] 2 A.C. 588	35
Hand v. Hampstead Land & Construction Co.	[1928] S.C.R. 428	176, 773

H—*Concluded*

Name of Case	Where Reported	Page
Hardy v. Central London Railway Co.	[1920] 3 K.B. 459	199
Harding v. Corporation of Cardiff	2 Ont. R. 329	238
Harmon v. Travelers Insurance Co.	[1937] 1 W.W.R. 424	316
Harper v. Township of East Flamborough	32 Ont. L.R. 490	744
Harrison v. Harrison	1 Car. [and] P. 412; 171 E.R. 1253	373
Harvey v. Ocean Accident and Guarantee Corporation	[1905] 2 Ir. R. 1	301
Hasseltine v. Nelles	47 Can. S.C.R. 230	337
Hendrickson v. Kallio	[1932] O.R. 675	337
Hill-Clarke-Francis Ltd. v. Northland Groceries (Quebec) Ltd.	[1941] S.C.R. 437	633
Hodge v. The Queen	9 App. Cas. 117	545
Holland v. Lanarkshire Middle Ward District Committee	1909 Sess. Cas. 1142	195
Honeywill & Stein Ltd. v. Larkin Bros. Ltd.	[1934] 1 K.B. 191	190
Howard v. Bodington	2 P.D. 203	117
Howard v. City of Toronto	61 O.L.R. 563	244
Howells v. Wilson	Q.R. 69 K.B. 32	76
Hunter v. Wright	[1938] 2 All. E.R. 621	151
Hurst v. Township of Mersea	[1931] O.R. 290	243
Hutcheon v. Storey	[1935] S.C.R. 677	447
Hynes v. Swartz	[1938] 1 D.L.R. 29	500

I

Inglis v. City of Toronto, *In re*	9 O.L.R. 562	243
Inland Revenue Commissioners v. Duke of Westminster	[1936] A.C. 1	101
Inland Revenue Commissioners v. Earl Fitzwilliam	[1913] 2 K.B. 593	280
Imerson v. Nipissing Central Railway Co.	57 O.L.R. 588	614

J

Jack v. Cranston	[1929] S.C.R. 503	524
James Bay Railway Co. v. Armstrong	38 Can. S.C.R. 511; [1909] A.C. 624	471
Jamieson v. Harris	35 Can. S.C.R. 625	444
Jerome v. Prudential Insurance Co. of America	6 Ins. L.R. 59	300
John Deere Plow Co. v. Wharton	[1915] A.C. 330	24, 560
Jones v. Canadian Pacific Railway Co.	83 L.J. P.C. 13	445
Jones v. Hough	L.R. 5 Ex. D. 115	264
Jones v. Township of Tuckersmith	33 O.L.R. 634	243
Jordin v. Crump	8 M. & W. 782	195

K

Kearney v. London, Brighton, etc., Railway Co.	L.R. 5 Q.B. 411; 6 Q.B. 759	151
King, The, v. Attorney-General of Ontario and Forrest	[1934] S.C.R. 133	397
King, The, v. Baker	[1929] S.C.R. 354	199
— — v. Barré	11 Can. Cr. Cas. 1	572
— — v. Elgin Realty Co. Ltd.	[1943] S.C.R. 49	281, 485
— — v. Frank	16 Can. Cr. Cas. 237	12
— — v. Halliday	[1917] A.C. 260	588
— — v. Hopper	[1915] 2 K.B. 431	328
— — v. Hughes	[1942] S.C.R. 517	328
— — v. Jalbert	[1938] 1 D.L.R. 721	418
— — v. Jeu Jang How	59 Can. S.C.R. 175	545
— — v. Junior Judge of the County Court of Nanaimo	57 B.C. Rep. 52	536
— — v. MacKay	[1930] S.C.R. 130	469
— — v. Morris	53 N.S.R. 525	549
— — v. Nat Bell Liquors	[1922] 2 A.C. 128; 62 Can. S.C.R. 118	342, 555
— — v. The Ship *Emma K*	[1936] S.C.R. 256	397
Kinghorn v. Larue	22 S.C.R. 347	133

K—*Concluded*

Name of Case	Where Reported	Page
Kinney v. Lockwood Clinic Ltd	[1931] O.R. 438	646
Kite, The	[1933] P. 154	151
Krawczuk v. Ostapovitch	[1921] 2 W.W.R. 534	418
Kuchma v. Rural Municipality of Taché	[1945] S.C.R. 234	703
Knudsen and The Town of St. Boniface, *In re*	15 Man. R. 317	242
Kurtz v. Moffitt	115 U.S. 487	549

L

Labrador Boundary, *Re*	[1927] 2 D.L.R. 401	383
Lacombe v. Power	[1928] S.C.R. 409	74
Laing v. The Toronto General Trusts Corporation	[1941] S.C.R. 32	214
Lake Erie and Detroit River Railway Co. v. Barclay	30 Can. S.C.R. 360	614
Lake Erie & Northern Railway Co. v. Brantford Golf and Country Club	32 D.L.R. 219	484
Lake Erie and Northern Railway Co. v. Schooley	53 Can. S.C.R. 416	511
Lambert v. Blanchette	Q.R. 40 K.B. 370	633
Lang Shirt Co.'s Trustees v. London Life Insurance Co	62 Ont. L.R. 83	301
Langevin v. Beauchamp	Q.R. 44 K.B. 569	65
Langham v. Governors of Wellingborough School	101 L.J. K.B.	151
"La Sauvegarde" v. Ayers	[1938] S.C.R. 164	179
Laurie v. Raglan Building Co. Ltd	[1942] 1 K.B. 152; [1941] 3 All. E.R. 332	147
Leamy v. The King	54 Can. S.C.R. 143	409
Lennox and Toronto Board of Education	58 O.L.R. 427	490
Léonard v. McCarthy	Q.R. 42 K.B. 569	571
Liebling v. The King	[1932] S.C.R. 101	4
Lieff v. Palmer	Q.R. 63 K.B. 278	76
Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick	[1892] A.C. 437	407
Lister v. Pickford	34 L.J. Ch. 582	412
Liverpool Borough Bank v. Turner	30 L.J. Ch. 379	116
Llewellin, *In re*, Llewellin v. Williams	37 Ch. D. 317	.. 358
London County Council v. Attorney General	[1902] A.C. 165	36
London Life Insurance Co. v. Trustee of the Property of Lang Shirt Co	[1929] S.C.R. 117	296
Law Advocate v. Earl of Home	28 Sc. L.R. 289	275
Lorenz v. Lorenz et al	Q.R. 28 S.C. 330	537
Lucas and Chesterfield Gas and Water Board	[1909] 1 K.B. 16	510
Lukey v. Ruthenian Farmers' Elevator Co. Ltd	[1924] S.C.R. 56	24
Lum Lin On, Ex parte	59 B.C. Rep. 106	530
Lyman v. Peck	6 L.C.J. 214	682
Lymburn v. Magland	[1932] A.C. 318	547

M

Machado v. Fontes	L.R. [1897] 2 Q.B. 231	76
Maclay v. Dixon	[1944] 1 All. E.R. 22	100
Mann v. Owen	9 B. & C. 595	544
Manning v. Carrique	34 Ont. L.R. 453	377
Marshall v. Curry	[1933] 3 D.L.R. 260	646
Martin v. Mackonochie	3 Q.B.D. 730	595
Matthews v. Good	56 N.S.R. 543	383
May, Ex parte	12 Q.B.D. 497	342
Mayor, etc., of Montreal v. Brown	2 App. Cas. 168	492
Mechanical and General Inventions Co. v. Austin et al	[1935] A.C. 346	618
Merchant Prince, The	[1892] P. 179	151
Migneault v. Malo	L.R. 4 P.C. 123	759
Miller v. Malepart	32 Can. Cr. Cas. 208	572
Mills v. City of Hamilton, *Re*	9 O.W.R. 731	243
Mitchell v. Tracey	58 Can. S.C.R. 640	555
Moir v. Huntingdon	19 Can. S.C.R. 363	214

M—Concluded

Name of Case	Where Reported	Page
Molison v. Woodlands	25 Man. R. 634	744
Montgomerie & Co. Ltd. v. Wallace-James	[1904] A.C. 73	312
Montréal, La cité de, v. Hénault	26 R.L. n.s. 270	541
Montreal, City of, v. Montreal Street Railway Co.	[1912] A.C. 333	32
Montreal, City of, v. Morgan	60 Can. S.C.R. 393	744
Montréal, Cité de, v. Société Radio-Canada	Q.R. 70 K.B. 65	633
Montreal Island Power Co. v. Town of Laval des Rapides	[1935] S.C.R. 304	274
Montreal Reserve Fund Life Assn. v. Dillon	34 Can. S.C.R. 141	612
Montreal Trust Co. v. Canadian Pacific Railway Co.	61 O.L.R. 137	614
Moquin v. Fong	Q.R. 44 K.B. 476	549
Mordue v. Palmer	L.R. 6 Ch. App. 22	359
Mulbera, The	[1937] P. 82	151

Mc

McCannell v. McLean	[1937] S.C.R. 341	618
McCrone v. Riding	[1938] 1 All. E.R. 157	81
McGowan v. Stott	99 L.J. K.B. 357	150
McIntosh v. Bell	[1932] O.R. 179	147
McKesson & Robbins Ltd. v. Biermans	[1937] S.C.R. 113; Q.R. 60 K.B. 289	727
McLaughlin v. Long	[1927] S.C.R. 303	444
McNutt, In the Matter of Annie	47 Can. S.C.R. 259	542
McShane v. Brisson	M.L.R. 6 Q.B. 1	541

N

Nadan v. The King	[1926] A.C. 482; 2 Cam. 400	594
National Life Assurance Co. of Canada v. McCoubrey	[1926] S.C.R. 277	213
Nautilus Steamship Co. Ltd. v. David and William Henderson & Co.	1919 Sess. Cas. 605	190
Neaverson v. Peterborough Rural District Council	[1902] 1 Ch. 557	412
New York Life Insurance Co. v. Gamer	303 U.S. 161	316
Nippon Menkwa Kabushiki Kaisha v. Dawson's Bank Ltd.	51 L.L.L.R. 147	261
North British Canadian Investment Co. v. Trustees of St. John School District	35 Can. S.C.R. 461	480
North Eastern Railway Co. v. Lord Hastings	[1900] A.C. 260	384

O

Ocean Accident and Guarantee Corp. v. Fowler	33 Can. S.C.R. 253	311
O'Connor v. Wray	[1930] S.C.R. 231	76
O'Kelly v. Downey	5 W.W.R. 859	418
Ontario Mining Co. v. Seybold	[1903] A.C. 73	403
Osborne v. Milman	18 Q.B.D. 471	543
Ottawa, City of, v. Canadian National Railways	[1925] S.C.R. 494; 56 Ont. L.R. 153	715
Ottawa, Corp. of the City of, v. Corp of Eastview	[1941] S.C.R. 448	172
Ottawa Electric Co. v. Brennan	31 Can. S.C.R. 311	471
Owen v. Routh	14 C.B. 327; 139 E.R. 134	373

P

Pacific Stages Ltd. v. Jones	[1928] S.C.R. 92	152
Parent et British Colonial v. Garneau	Q.R. 54 K.B. 335	66
Partington v. The Attorney General	L.R. 4 H.L. 100	100, 677
Pass of Ballater, The	[1942] P. 112	190
Pastoral Finance Association v. The Minister	[1914] A.C. 1083	274, 485
Patton v. Toronto General Trusts Corporation	[1930] A.C. 629	351
Pearce v. City of Calgary	9 W.W.R. 668	273
Pearson (Doe-dem) v. Ries	8 Bingham 178	377
Peck v. Harris	6 L.C.J. 206	682

P—*Concluded*

Name of Case	Where Reported	Page
Peek v. Larsen	L.R. 12 Eq. 378	264
Perlman v. Piché	Q.R. 54 S.C. 170	572
Pérusse v. Stafford	[1928] S.C.R. 416	74
Phillips v. Britannia Hygienic Laundry Co. Ltd	[1923] 1 K.B. 539	149
Plevins v. Downing	L.R. 1 C.P.D. 220	189
Plourde v. Roy	[1942] 2 W.W.R. 607; [1942] 3 D.L.R. 646	333
Pomfret v. Morie	[1931] 3 D.L.R. 557	337
Powell v. Streatham Manor Nursing Home	[1935] A.C. 243	761
Powers as to Wharfage Charges, *In re*	[1931] S.C.R. 431	34
Provincial Cinematograph Theatres v. Newcastle-upon-Tyne	90 L.J. K.B. 1064	533
Provincial Fisheries, *In re*	26 Can. S.C.R. 444	412
Provincial Secretary of Prince Edward Island v. Egan	[1941] S.C.R. 396	24
Provincial Treasurer of Alberta v. Kerr	[1933] A.C. 710	728
Pulbrook, Ex parte	[1892] 1 Q.B. 86	533

Q

Quebec Asbestos Corporation v. Couture	[1929] S.C.R. 166	633
Quebec Railway, Light & Power Co. v. Montcalm Land Co	[1927] S.C.R. 545	22, 172
Queen, The, v. Bank of Nova Scotia	11 Can. S.C.R. 1	407
— — v. Cruise	2 Ir. Ch. Rep. 65	410
— — v. Montminy	28 Can. S.C.R. 484	179
— — v. Musson	120 English Rep. 336	411
Quinn v. Guernsey	[1927] S.C.R. 134, 512	771
Quinn v. Leathem	[1901] A.C. 495	547
Quong-Wing v. The King	49 Can. S.C.R. 440	545

R

Radio Reference	[1932] A.C. 304	24
Reference *re* Chemicals	[1943] S.C.R. 1	212
Régimbald v. Chong Chow	Q.R. 38 K.B. 440	572
Regina v. Fletcher	2 Q.B.D. 43	584
Regina v. Gratex	12 Cox C.C. 157	196
Regina Industries Ltd. v. City of Regina	[1945] 1 D.L.R. 220	633
Regulation and Control of Radio Communication in Canada, *In re*	[1932] A.C. 304	24
Reichel v. McGrath	14 App. Cas. 665	214
Restitution S.S. Co. v. Pirie	61 T.L.R. 330	262
Rex v. Brixton Prison (Governor), Ex parte Savarkar	[1910] 2 K.B. 1056	533
— v. Cowle	2 Burr. 834	537
— v. Daly	55 O.L.R. 156	547
— v. Gallagher	37 Can. Cr. C. 83	324
— v. Labrie	61 D.L.R. 299	534
— v. McAdam	44 Can. Cr. Cas. 155; [1925] 4 D.L.R. 33; 35 B.C. Rep. 168	534
— v. Roberts	[1942] 1 All. E.R. 187	328
— v. Spence	45 O.L.R. 391	549
— v. Ward	85 L.J. K.B. 483	11
— v. Whitesides	8 O.L.R. 622	560
Reynolds v. Canadian Pacific Railway Co.	[1927] S.C.R. 505	619
Richard Evans & Co. Ltd. v. Astley	[1911] A.C. 674	300
Richards v. Gellatly	L.R. 7 C.P. 127	371
Ripstein v. Trower & Sons Ltd.	[1942] S.C.R. 107	525
Robert Addie & Sons (Collieries) Ltd. v. Dumbreck	[1929] A.C. 358	196
Robins v. National Trust Co. Ltd.	[1927] 1 W.W.R. 692; [1927] A.C. 515.	531
Roblin Rural Credits Society v. Newton	[1927] 1 D.L.R. 105	418
Rodrigue v. Dostie	[1927] S.C.R. 563	179
Roeske v. Senerius	[1922] 2 W.W.R. 977	337
Roy v. Plourde	[1943] S.C.R. 262	333
Ruddy v. Toronto Eastern Railway Co.	33 D.L.R. 193	508

S

Name of Case	Where Reported	Page
Salvas v. Vassal	27 Can. S.C.R. 68	179
Saskatchewan Natural Resources, Reference *re*.	[1931] S.C.R. 263; [1932] A.C. 28–	391, 408
Savarkar, Ex parte	[1910] 2 K.B. 1056	573
Scarr v. General Accident Assurance Corp.	[1905] 1 K.B. 387; 74 L.J. K.B. 237	316
Schloendorff v. The Society of New York Hospital	211 N.Y.R. 125	646
Schlomann v. Dowker	30 Can. S.C.R. 323	214
School Commissioners of St. Adelphe v. Charest	Q.R. [1943] K.B. 504; [1944] S.C.R. 391–	694
Scott v. London & St. Katherine Docks Co.	3 H. & C. 596	150
Seaman v. Burley	[1896] 2 Q.B. 344	532
Secretary of State v. Bank of India, Ltd.	[1938] 2 All. E.R. 797	648
Secretary of State v. O'Brien	[1923] A.C. 603	546
Secretary of State in Council of India v. Scoble.	[1903] A.C. 299	102
Shand Infants, *In re*	[1943] 1 W.W.R. 269	336
Shannon v. Lower Mainland Dairy Products Board	[1938] A.C. 708	547
Shawinigan Carbide Co. v. Doucet	42 Can. S.C.R. 281	157
Sheffield Waterworks, *Re*	L.R. 1 Ex. 54	480
Sheperd v. Johnson	2 East. 211; 102 E.R. 349	373
Silver v. Ocean Steamship Co	[1930] 1 K.B. 416	255
Silver Bros. Ltd., *In re*	[1932] A.C. 514	410
Sincennes-McNaughton Lines Ltd. v. The King	[1926] Ex. C.R. 150	157
Sisters of St. Joseph of the Diocese of London v. Fleming	[1938] S.C.R. 172	147
Slater v. Baker	2 Wils. K.B. 359	646
Sloboda v. Continental Casualty Co.	[1938] 2 W.W.R. 237	316
Spencer v. Alaska Packers Association	35 Can. S.C.R. 362	451
St. Catherine's Milling & Lumber Co. v. The Queen	14 A.C. 46	403
St. George Society v. Nichols	Q.R. 5 S.C. 273	759
St. Hilaire v. Lambert	42 Can. S.C.R. 264	480
Standard Fuel Co. v. Toronto Terminals Railway Co.	[1935] 3 D.L.R. 657	508
State of New York v. Wilby (alias Hume)	60 B.C. Rep. 370	535
Stirland v. Director of Public Prosecutions.	[1944] A.C. 315	440
Stirland v. Public Prosecutor	[1944] 2 A.E. 13	14
Strickler v. City of Colorado Springs	16 Col. 61	413
Sun Life Assurance Co. of Canada v. Jervis.	113 L.J. K.B. 174	215
Sun Life Assurance Co. v. The Superintendent of Insurance	[1930] S.C.R. 612; [1931] 4 D.L.R. 43.	
Supreme Court Act", *In re* "An Act to amend the	[1940] S.C.R. 49	469, 470 595
Surprenant v. Brault	Q.R. 32 K.B. 481	724
Swan Brewery Co. Ltd. v. The King	[1914] A.C. 231	103
Syndics d'Ecoles de la Municipalité de la Ville d'Aylmer v. Cousineau	Q.R. 75 S.C. 315	717

T

Tart v. G. W. Chilty and Co. Ltd	[1933] 2 K.B. 453	447
Temple v. Bulmer	[1943] S.C.R. 265	214
Theodore v. Duncan	[1919] A.C. 696	404
Tidy v. Battman	[1934] 1 K.B. 319	447
Tom Tong, Ex parte	108 U.S. 556	541
Toronto, City of, v. Brown Co	55 Can. S.C.R. 153	504
Tremblay v. Duke-Price Power Co.	[1933] S.C.R. 44	524
Trust and Loan Co. of Canada v. Gauthier.	[1904] A.C. 94	763
Tweedie v. The King	52 Can. S.C.R. 197	405

U

Union Colliery v. Bryden	[1899] A.C. 580	547
Union Colliery Co. v. The Queen	31 Can. S.C.R. 81	199
United Buildings Corporation Ltd. v. City of Vancouver	[1915] A.C. 345	244
United Motors Service Inc. v. Hutson	[1937] S.C.R. 294	150, 308
Untermyer Estate v. Attorney-General for British Columbia	[1929] S.C.R. 84	287
Uskmoor, The	[1902] P. 250	667

V

Name of Case	Where Reported	Page
Valin v. Langlois	5 App. Cas. 115; 3 Can. S.C.R. 1	467, 596, 602
Vancouver, City of, v. Attorney-General of Canada	[1944] S.C.R. 23	634, 719
Vaughan v. Eastern Townships Bank	41 Can. S.C.R. 286	412
Versailles Sweets Ltd. v. Attorney-General of Canada	[1924] S.C.R. 466	677
Veregin v. Smith	[1934] 1 W.W.R. 351	572
Vézina v. The Queen	17 Can. S.C.R. 1	495
Vita Food Products v. Unus Shipping Co	55 T.L.R. 402	263

W

Wagar v. Little	20 Alta. L.R. 47	337
Wakelin v. London & South Western Railway Co	12 App. Cas. 41	151
Walpole v. Canadian Northern Railway Co	[1923] A.C. 113	76
Walters v. Woodbridge	7 Ch. D. 504	353
Wanderers Investment Co. v. City of Winnipeg	27 Man. R. 450	238
Warner Quinlan Asphalt Co. v. The King	[1924] S.C.R. 236	468
Wadsworth v. Canadian Railway Accident Insurance Co	49 Can. S.C.R. 115	311
White v. The Rural Municipality of Louise	7 Man. R. 231	246
White v. Witt	5 Ch. D. 589	337
Wiedemann v. Walpole	[1891] 2 Q.B. 534	371
Wigle v. The Corporation of the Township of Gosfield	2 Cameron S.C. Practice 23	468
Williams v. Howarth	[1905] A.C. 551	410
Williams v. Moody	[1937] 2 W.W.R. 316	47
Williams v. Peel River Land and Mineral Co. Ltd.	55 L.T. 689	373
Willson v. Shawinigan Carbide Co	37 Can. S.C.R. 535	171
Wilson v. Esquimalt and Nanaimo Railway Co.	[1922] A.C. 202	32
Winnipeg, City of, v. Brock	45 Can. S.C.R. 271	237
Winnipeg Electric Co. v. Geel	[1932] A.C. 690	151
Wong Shee, *In re*	31 B.C. Rep. 145	534
Wood v. Esson	9 Can. S.C.R. 239	412
Wood v. Haines	38 O.L.R. 593	761
Woodhall, Ex parte	20 Q.B.D. 832; 57 L.J. M.C. 71	533
Wright v. The Sun Mutual Life Insurance Co.	29 U.C.C.P. 221	316
Wylie, Dame Mary, v. City of Montreal	12 Can. S.C.R. 384	747
Wynne v. Wynne	62 Can. S.C.R. 74	759

Y

Yuen Yick Jun, Ex parte	54 B.C. Rep. 541	534
Yukon Southern Air Transport Ltd. v. The King	[1942] Ex. C.R. 181	157

Z

Zakrzewski (Peter) v. The King	[1944] Ex. C.R. 163	410

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

1944

*Nov. 27
*Nov. 30

RENÉ OUVRARD ..... APPELLANT,

AND

QUEBEC PAPER BOX COMPANY LIMITED ..... RESPONDENT.

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

Criminal law—Accused, respondent, prosecuted for alleged infractions of Order in Council dealing with maximum or ceiling prices—Accused convicted after speedy trial under Part XV of the Criminal Code—Order in Council by federal authorities creating leave to appeal to Supreme Court of Canada in cases of offences against wartime regulations—Regulations made by the Order in Council—Extent of such right of appeal—Interpretation of the conditions imposed by the Order in Council—Right of appeal to Supreme Court of Canada still subject to sections 1023 and 1025 of the Criminal Code.

Under the provisions of the Criminal Code, there existed no right of appeal to provincial courts of appeal or to the Supreme Court of Canada from judgments rendered on summary conviction under Part XV of the Code. But right of appeal to these courts was allowed, on certain conditions, by a federal order in council, coming into force on the 7th of June, 1943, from such judgments when rendered on convictions for offences against wartime regulations. Certain regulations were made and established by the order in council, amongst which those material to this appeal read as follows: an appeal shall lie to a provincial court of appeal, by leave of such court, on any ground which involves a question of law or of mixed law and fact; a further appeal from the judgment of the court of appeal shall lie to the Supreme Court of Canada by leave of such Court; and it was also regulated that "sections 1023 to 1025 inclusive of the Criminal Code shall, insofar as the same are not inconsistent with this regulation, apply to any appeal to the Supreme Court of Canada***".

Held: That the effect of the regulations made by the order in council was not to give a right of appeal to the Supreme Court of Canada

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

1944

OUVRARD v. QUEBEC PAPER BOX LTD.

Rinfret J.

from any and all judgments or decisions of a provincial court of appeal, with the sole proviso that leave of the Supreme Court of Canada be given by that Court; but

Held: That the result and effect of the regulations were that an appeal only lies to the Supreme Court of Canada, by leave of that Court "on any questions of law on which there has been a dissent in the court of appeal" (s. 1023 Cr. C). or "if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case" (s. 1025 Cr. C.). The provisions contained in these two sections are not in any way inconsistent with the regulations and must be taken into account in any appeal to this Court under the regulations made by the order in council.

Therefore, applying to the appellant's application for leave to appeal to this Court the regulations so interpreted, the motion should be dismissed: there having been no dissent in the Court below, this Court has no jurisdiction to grant leave, as the applicant has not shown that the judgment to be appealed from, in respect to the main point involved in the appeal, conflicts with the judgment of any other court of appeal in a like case.

APPLICATION for leave to appeal to this Court from a decision of the Court of King's Bench, appeal side, province of Quebec, allowing the respondent's appeal from the judgment of the Court of King's Bench (Crown side) and quashing the conviction of the respondent, after speedy trial before the Court of Sessions of the Peace, for having committed infractions of an Order of the Wartime Prices and Trade Board. The Court of King's Bench (Crown side) had quashed the conviction in one out of ten charges, but had affirmed the convictions in the others.

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

Gérard Lacroix K.C., for the application.

Chas. A. Cannon K.C. contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—The appellant is an investigator of the Wartime Prices and Trade Board. The respondent, which is a manufacturer of packing boxes, was prosecuted by the appellant, acting on behalf of the Board, before the Court of the Sessions in the city of Quebec for ten alleged infractions of order in council no. 8528, dated the 1st of November, 1941 (and amendments thereto),

which deals with maximum or ceiling prices at which manufactured goods may be sold after the 1st day of December, 1941.

For the purpose of the present judgment, I do not find it necessary to enter into the particulars of each one of these charges (no. 22171 to no. 22180).

The accused was tried under Part XV of the Criminal Code and found guilty of all charges. It appealed to a judge of the Court of King's Bench (Crown Side), who heard the appeals, quashed the conviction in no. 22172, but affirmed the convictions in all the other cases.

By order in council no. 4600, which came into force on the 7th of June, 1943, the Minister of Justice having reported

> that in many of these prosecutions under Part XV aforesaid, questions of law of first rate importance are not infrequently raised relating to the validity and the construction of wartime regulations and it has been represented to him that, in the interest of uniformity of decisions, as well as the true construction of all wartime regulations, further appeals should be allowed to the provincial courts of appeal and the Supreme Court of Canada wherever, in the opinion of the Court to be appealed to, an important question of law or of mixed law and fact is raised,

it was deemed necessary or advisable,

> for the security, defence, peace, order and welfare of Canada that such appeals be provided for.

Certain regulations were accordingly made and established and those which are material to the present appeal read as follows:—

> 2. In any proceedings under Part XV of the Criminal Code for an offence against wartime regulations, an appeal from a judgment of the county or district court judge, or in the province of Quebec, the judge of the Court of King's Bench, Crown Side, on any ground of appeal which involves a question of law or of mixed law and fact shall lie to the court of appeal by leave of such Court.
>
> 3. A further appeal from a judgment or decision of the court of appeal shall lie to the Supreme Court of Canada by leave of such Court.
>
> * * *
>
> 6. Sections 1023 to 1025 inclusive of the Criminal Code shall, insofar as the same are not inconsistent with this regulation, apply to any appeal to the Supreme Court of Canada taken pursuant to this regulation.
>
> 7. The Attorney General of Canada shall have a right of appeal in any case where the Attorney General of the province in which the offence is alleged to have been committed has such right.

The respondent secured from the Court of King's Bench (Appeal Side) (that Court being the court of appeal for

1944

OUVRARD v. QUEBEC PAPER BOX LTD.

Rinfret J.

the province of Quebec referred to in the regulations) leave to appeal in the nine cases where the conviction had been affirmed. The appeals were heard by that Court both on questions of law and on questions of mixed law and fact. They were allowed in every one of the cases and the nine convictions were quashed.

The appellant then moved for leave to appeal to this court from these judgments of the Court of King's Bench under the provisions of the Order in Council No. 4600.

In his notice of motion the appellant alleged that the cases involved questions of public law and of the meaning and real extent of the regulations enacted under the *War Measures Act* of Canada; and that, amongst other questions, the Court was asked to decide mainly:—

9. (*a*) What may constitute a sale during the basic period under regulations enacted pursuant to the *War Measures Act* of Canada and especially in virtue of order in council no. 8528, as well as orders flowing therefrom;

(*b*) If the *mens rea,* or criminal intent, constitutes a necessary element in offences created by order in council no. 8528, and the orders flowing therefrom;

(*c*) Which is the meaning and the extent of the reference to the Canadian Criminal Code in said order in council no. 8528, and the orders made pursuant thereto.

The appellant further alleged that the decisions of the courts up till now were not unanimous on these specific points and, moreover, that the judgment rendered in the premises by the Court of King's Bench (Appeal Side) was in conflict with several other judgments of other courts of appeal in similar cases, while the Supreme Court of Canada had never so far decided these specific points in relation to the interpretation of the regulations and orders enacted pursuant to the *War Measures Act* of Canada.

The petition for leave to appeal, as originally served, did not indicate the judgments of the other courts of appeal alleged to be in conflict with the decision appealed from. As a preliminary objection the respondent, therefore, invoking the judgment in *Liebling* v. *The King* (1), argued that the Court should not entertain the application.

The appellant, however, had subsequently served an additional notice in which he referred to four different

(1) [1932] S.C.R. 101

judgments which he alleged to be in conflict with the judgment now appealed from and, as this additional notice was served sometime before the motion came to be heard before the Court, it was thought that this was a sufficient compliance with the rules of the Court and it was decided that the respondent "should take nothing" by the objection so made by him.

Another objection made by the respondent was that, while both the Court of King's Bench (Crown Side) and the Court of King's Bench (Appeal Side) had delivered two separate judgments on the matters now before the Court, there was only one notice of appeal to the Supreme Court of Canada and the respondent was entitled to be told from which of the two judgments the appellant intended to appeal to this Court. The appellant, being requested to optate between the two, thereupon declared that he abandoned the appeal from the judgment rendered on the case numbered 22171 and bearing number 3573 in the Court of King's Bench (Crown Side) and thus limited his appeal to the eight other convictions and to the judgment in the appeal bearing number 3574 in the Court of King's Bench (Appeal Side).

Two questions stand to be decided on the application for leave to appeal. The first one concerns the extent of the right of appeal conferred by the regulations under order in council no. 4600. The other question is whether, under those regulations as they must be interpreted, the appellant has succeeded in making out before this Court a case where leave to appeal ought to be granted to him in the circumstances.

Dealing with the first question. It must be remembered that up till order in council no. 4600 there existed no right of appeal to the Supreme Court of Canada from judgments rendered on summary conviction under Part XV of the Criminal Code. (*Attorney General for Alberta* v. *Roskiwich* (1); *Au Chung Lam alias Ou Lim* v. *The King* (2). The object of order in council no. 4600 is, amongst other things, to give a right of appeal to the Supreme Court of Canada in proceedings under Part XV of the Criminal Code

(1) [1932] S.C.R. 570. (2) [1944] S.C.R. 136.

1944

OUVRARD v. QUEBEC PAPER BOX LTD.

Rinfret J.

for an offence against wartime regulations, but such right of appeal is given only under certain conditions and what we have to decide is precisely what those conditions are.

It was contended by counsel for the appellant that the effect of the regulations under order in council no. 4600 is to give a right of appeal from any and all judgments or decisions of the court of appeal, with the sole proviso that leave of the Supreme Court of Canada be given by that Court.

The respondent, however, questioned such an interpretation of paragraph (3) of the regulations and argued that there was no intention by order in council no. 4600 to change the ordinary conditions under which an appeal could be brought to this Court, except that in these matters leave of the Court itself would be required. As the law stood before, there was a right to appeal *de plano* "on any question of law on which there has been dissent in the Court of Appeal"; and also

> there was a right of appeal when the judgment intended to be appealed from conflicted with the judgment of any court of appeal in a like case, provided leave to appeal was granted by a Judge of the Supreme Court of Canada.

This was under sections 1023 and 1025 of the Criminal Code and, in both instances, it applied only to proceedings in respect of an indictable offence.

If we were to accept the appellant's interpretation of the regulations, it would mean that no account should be taken of paragraph (6) which enacts that

> Sections 1023 to 1025 inclusive of the Criminal Code shall * * * apply to any appeal to the Supreme Court of Canada taken pursuant to this regulation.

This paragraph states that the sections mentioned "shall apply" and, therefore, effect must be given to it "in so far as the same are not inconsistent with these regulations", as stated in the paragraph.

Now, the only inconsistency with sections 1023 to 1025 of the Criminal Code that we can find in the regulations is the proviso that the appeal lies to the Court only "by leave of such Court". Otherwise the provisions contained in sections 1023 to 1025 are not in any way inconsistent with the regulations and, therefore, must be taken into account in any appeal to this Court under these new regulations. This

interpretation is further strengthened by the fact that if order in council no. 4600 were not to be construed as just indicated, it would mean that appeals in proceedings upon summary convictions under Part XV of the Criminal Code, which did not exist before the order in council was passed, would, by such order in council, be made wider than appeals in proceedings in respect of indictable offences. That, of course, would lead to absurd consequences.

More particularly, having regard to the fact that, by force of section (9) of the order in council no. 8528, the same contravention, or failure, to observe any regulation, or order, constitutes an offence which may be tried either upon summary conviction under Part XV, or, if the Attorney General of Canada or of any province so directs, upon indictment. So that the trial of the same offence, according as upon summary conviction or upon indictment, would thus be made susceptible of an appeal to the Supreme Court of Canada under different conditions, and conditions which would be such that the right of appeal in proceedings in respect of indictable offences would be more restricted than in proceedings upon summary conviction.

It is only reasonable to believe that the intent of the order in council was to put the appeals in one or the other of these matters upon the same footing, except that on indictable offences, as already provided for by the Criminal Code, no leave is necessary when there has been in the court of appeal a dissent on a question of law, or, where there has been no dissent, a right of appeal lies by leave of a judge of the Court where the judgment conflicts with that of another court of appeal in a like case; and in proceedings on summary conviction under Part XV of the Criminal Code a new right of appeal is created, where none existed before, and all the usual conditions under sections 1023 to 1025 Cr. C. apply, except that in each case no appeal lies unless the Supreme Court itself grants leave to appeal.

In our view, therefore, the effect and result of the regulations under order in council no. 4600, so far as it applies to appeals to the Supreme Court of Canada, are as follows: In proceedings under Part XV of the Criminal Code for offences against wartime regulations an

1944

OUVRARD v. QUEBEC PAPER BOX LTD.

Rinfret J.

appeal now lies to the Supreme Court of Canada by leave of that Court "on any questions of law on which there has been dissent in the court of appeal" (Criminal Code, section 1023), or "if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case" (Criminal Code, section 1025).

Applying to the present application for leave the regulations so interpreted, as there has been no dissent in this case, this Court has jurisdiction to grant leave only if it can be shown that the judgment appealed from conflicts with the judgment of any other court of appeal in a like case.

The appellant was able to suggest that such a conflict existed only on two of the questions mentioned in his notice of motion, one being:

> If the *mens rea*, or criminal intent, constitutes a necessary element in offences created by order in council no. 8528, and orders flowing therefrom;

the other being:

> Which is the meaning and the extent of the reference to the Canadian Criminal Code made in said order in council no. 8528, and the orders made pursuant thereto.

Perhaps it should be noted that, after all, this second question is really included in the first question.

But the appellant was unable to refer the Court to any judgment of another court of appeal conflicting with the judgment appealed from on the main point involved in the appeal, to wit:—

> What may constitute a sale during the basic period under regulations enacted pursuant to the *War Measures Act* of Canada and especially in virtue of order in council no. 8528, as well as orders flowing therefrom.

The latter is really the fundamental point in the proceedings against the respondent.

The Court of King's Bench (Appeal Side), held that the proof made by the appellant of the alleged sales by the respondent during the basic period were not sales within the meaning of order in council no. 8528, but merely deliveries of articles covered by contracts of sale within the meaning of the said order entered into long prior to the 15th day of September, 1941. In consequence of that decision, the appellant has failed to establish one of the two essential elements of the offences

charged. The appellant, in view of the fact that there has been no dissent and that no conflict is alleged, is unable to ask this Court to reverse the judgment of the court of appeal on this fundamental question, and it means, therefore, that, even assuming there is a conflict on the other points raised in the appeal and even if he should succeed in getting this Court to reverse the judgment of the court of appeal on these other points, the respondent would, nevertheless, remain acquitted. The appeal would be devoid of any possible practical result and the Court would be asked only to pass upon an academic question.

In the circumstances the appeal cannot be entertained, leave to appeal should not be granted, and the motion to that effect should be dismissed.

Application dismissed.

Solicitor for the appellant: *Paul Roy.*

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

FRED MIHALCHAN ..... APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Burglary—Possession by night of implements of housebreaking—Ordinary tools of the accused's trade as truck driver—Proof of unlawful purpose—Lawful excuse—Onus of proof—Evidence—Sufficiency—Criminal Code, section 464a.

The appellant, a truck driver, was charged with having been found in possession by night, without lawful excuse, of instruments of housebreaking, contrary to section 464a of the Criminal Code and was convicted before a judge of the County Court. The trial judge found that some of the instruments, but not all of them, were tools a truck driver might use in his trade, while all of the instruments so found were capable of being used for purposes of housebreaking. But he further stated that he was satisfied, in all the surrounding circumstances established in evidence, that at that particular time and place the tools were not in the appellant's possession for an innocent purpose, and, "on the whole of the evidence", he found the appellant

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

1944

MIHALCHAN v. THE KING

guilty. The conviction was affirmed by a majority of the Court of Appeal. The dissenting judge was of the opinion that the trial judge failed to apply the principle in *Rex* v. *Ward* (85 L.J.K.B. 483), where it was held that the accused had *prima facie* satisfied the onus cast upon him of proving that he had a lawful excuse for his possession of the tools and that the onus was then cast upon the prosecution of proving affirmatively that the accused had no lawful excuse for being in possession of the tools at that particular time and place.

Held, Kellock J. dissenting, that, in the circumstances of this case and upon the evidence, the trial judge was legally warranted in drawing the conclusions he arrived at. The decision in *Rex* v. *Ward* (*supra*) does not apply. In that case, the trial judge had directed the jury that it was for the accused to establish to their entire satisfaction that his possession of the implements was lawful; while the Court of Criminal Appeal held that the jury had not been properly directed with regard to the onus of proof. In the present case the trial judge was sitting alone without a jury; it was not necessary for him to expound the law and then verbally apply it to the facts in giving his reasons for judgment; and it should be sufficient if it appears he was alive to the law and that he properly charged himself when reaching his finding upon the evidence. Moreover, the findings alone would be sufficient to take this case out of the application of the *Ward* case.

Per Kellock J. dissenting:—The trial judge did not properly direct himself as to the law applicable as laid down in the *Ward* case. Therefore, the question for decision is as to whether or not he must "inevitably" have come to a conclusion of the guilt of the accused on the evidence, notwithstanding such misdirection; and this must depend upon whether the Crown discharged the onus of establishing beyond reasonable doubt that the accused had possession with guilty intent. The circumstances disclosed in evidence upon which the Crown can rely are not sufficient to make the result, that the accused was guilty, inevitable. There should be a new trial.

APPEAL by Mihalchan, one of the accused, from the judgment of the Court of Appeal for British Columbia (1) dismissing (O'Halloran J.A. dissenting) his appeal from his conviction, on a trial before the County Court of Westminster, Whiteside J., on a charge of being found by night in possession of instruments of housebreaking without lawful excuse, contrary to section 464 (*a*) of the Criminal Code.

The appellant and one Smylski were charged jointly with possession of housebreaking instruments. The implements consisted of a substantial assortment of tools, together with a piece of celluloid, found in the car the

(1) [1944] 82 Can. Cr. Cas. 87

appellant was driving. The trial judge acquitted Smylski but convicted the appellant and sentenced him to six months' imprisonment.

No one appearing for the appellant.

E. Pepler K.C. for the respondent.

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

THE CHIEF JUSTICE.—The appellant was convicted in the County Court Judge's Criminal Court at New Westminster, B.C., of having been found in possession by night, without lawful excuse, of instruments of housebreaking, contrary to section 464 (*a*) of the Criminal Code.

The conviction was affirmed by the Court of Appeal, but there was a dissent in that Court and the appeal here is on the question on which there has been dissent.

In the formal judgment appealed from the dissent is expressed thus:—

> Mr. Justice O'Halloran dissents from this judgment upon the grounds that the trial judge misdirected himself as to the onus of proof and failed to apply the correct legel principles in considering the explanation of the appellant in relation to his possession of the alleged housebreaking instruments and in discharging the onus placed upon him by section 464 (*a*) of the Criminal Code.

In his reasons the learned dissenting judge stated that, in his opinion, the trial judge failed to apply the principle in *Rex* v. *Ward* (1). The point would be that when once the instruments found in the possession of the accused, although capable of being used for purposes of housebreaking, are also shown to be the ordinary tools which the accused might well use in his trade, the accused thus establishes *prima facie* a sufficient excuse, and the burden shifts upon the prosecution of satisfying the jury, from the other circumstances, that the accused had no lawful excuse for being in possession of these tools at that particular time and place.

In the *Ward* case (1), the Deputy Chairman had directed the jury that it was for the accused to establish to their satisfaction that his possession of the implements in ques-

(1) [1915] 85 L.J.K.B. 483

1944

MIHALCHAN v. THE KING

Rinfret J.

tion was lawful. It was held by the Court of Criminal Appeal that the jury had not been properly directed with regard to the onus of proof and the appeal was allowed.

In the present case the trial judge was sitting alone without a jury. It was not necessary for him to expound the law and then verbally apply it to the facts in giving his reasons for judgment. It should be sufficient if it appears he was alive to the law and that he properly charged himself when reaching his finding upon the evidence. (*The King* v. *Frank* (1)).

Here no error in direction, or self-direction, was made manifest and the learned judge's reasons do not warrant the conclusion that he misdirected himself, or that he proceeded upon an erroneous view of the law, and this is not to be assumed.

The appellant is a truck driver and the learned judge found that some of the instruments in the appellant's possession—but not all of them—were tools a truck driver might use in his trade; while all of the instruments so found were capable of being used for purposes of housebreaking. These findings alone would be sufficient to take the case out of the application of *Rex* v. *Ward* (2).

But, moreover, the learned judge was satisfied, in all the surrounding circumstances established in evidence, that at that particular time and place the tools were not in the appellant's possession for an innocent purpose; and, as stated in his judgment, "on the whole of the evidence" the learned judge found the appellant guilty.

It was recognized in the *Ward* case (2) that "other circumstances" might displace the *prima facie* proof, or show a guilty intent, and it was, of course, for the learned trial judge in the present case, acting as judge and jury, to say whether or not, in the particular circumstances, the possession was innocent.

With deference, I do not see here any misdirection on the part of the trial judge and I think, in the circumstances and upon the evidence, he was legally warranted in drawing the conclusions he arrived at.

I would dismiss the appeal.

(2) [1915] 85 L.J.K.B. 483. (1) [1910] 16 Can. Cr. Cas. 237, at 240.

KELLOCK J. (dissenting).—All the members of the Court of Appeal were of opinion that, with the exception of the piece of celluloid, all the tools found in the possession of the accused were tools which the accused might reasonably require in his occupation as a truck driver in Northern British Columbia. The possession of such tools, excepting the celluloid, was then *prima facie* explained. (*Rex* v. *Ward* (1).) The learned trial judge believed the statement of the accused that the celluloid had come into his possession with the car when he purchased the latter some months earlier. O'Halloran J.A. who dissented did so because in his view the learned trial judge had misdirected himself in failing to apply the principle of the above decision with the result that the evidence was never properly considered from the standpoint of the burden under which the Crown came by reason of the explanation furnished by the accused's occupation for his possession of the tools, excepting the celluloid.

A reading of the judgement at trial, coupled with the learned judge's report, satisfies me that the learned judge did not properly direct himself as to the law applicable as laid down in *Rex* v. *Ward* (1). In his report he says that the accused's excuse for being on his way to Port Haney seemed flimsy

> when heard in connection with his explanation of why he happened to have such a complete housebreaking equipment in his truck

(he should have said car). The explanation of the accused for his possession of the tools apart from the celluloid by reason of his occupation was perfectly good, and as I have said, was so regarded by all the members of the Court of Appeal, and as to the celluloid, the learned judge believed the accused when he said it had come with the car. To my mind the above passage indicates that the learned judge paid no attention to the fact that the tools were tools of the accused in connection with his occupation and regarded the burden imposed by section 464 (*a*) Cr. C. as never having been other than throughout on the accused.

If that be so the question for decision is as to whether or not the learned trial judge must inevitably have come to a conclusion of the guilt of the accused on the evidence,

(1) [1915] 85 L.J.K.B. 483.

1944

MIHALCHAN v. THE KING

Kellock J.

notwithstanding the misdirection; *Stirland* v. *Public Prosecutor* (2). This must depend upon whether the Crown discharged the onus of establishing beyond reasonable doubt that the accused had possession with guilty intent. The circumstances disclosed in evidence upon which the Crown can rely is (1) the presence of the celluloid, (2) the evidence as to the errand in Port Haney upon which the accused was engaged at the time and (3) the evidence of the appellant and Smylski that they had approached the garage thinking it was a place where they could buy cigarettes.

In my opinion there is no "inevitability" about the celluloid in view of the acceptance by the learned trial judge of the explanation with regard to it, and if it amounts to nothing it adds nothing to the other circumstances. As to number 2, its coupling by the learned judge in his report, with the explanation by the accused of his possession of the tools, as already pointed out, makes it impossible for me to say he would not have believed this evidence had he not been in error with regard to the tools. In addition there was a tailor by the name of Mostrenko in Port Haney, and the learned judge has misapprehended this part of the evidence as he refers to "the very inadequate sum" of three dollars paid to the appellant by Smylski "for the trip". It was not paid for the trip but for the gas which would be used on the trip. It was therefore not an inadequate sum at all.

This leaves (3) above. What is the evidence with regard to this? Smylski says:—

> I thought I would go and buy a chocolate bar, or soft drink. We got near the side-walk, and he (the appellant) said "It is closed". And we were talking about it was too far to go back, and then he said "There is someone stealing the car". We ran back.

The appellant said:—

> At that time I did'nt think it was constable Saunders, but we passed the car, walking to the garage. We stopped there and noticed there was —it was not a business place at night, like it was a confectionery; not in our line. We decided to turn back because it was too far to go to town from there. It would be foolish. Either that or we would have to go back. And sudden, I heard the car start, and I said "Joe somebody is stealing our car".

Constable Saunders said that he noticed the car, which later proved to be the appellant's, parked by the roadside

(2) [1944] 2 A.E. 13.

1944

MIHALCHAN v. THE KING

Kellock J.

with its lights out. He stopped and got out and before the appellant and Smylski came up he had been there long enough to get into the car, start and stop the engine and get out of the car. As he had driven past the garage previously he had noticed "two figures near the garage and I thought it was somebody just walking by".

The reason given by the accused and Smylski for leaving the car and approaching the garage was that they thought it was a place where they could buy cigarettes. They had previously driven past a number of places where they could have done so.

Would the learned trial judge have refused to believe this as an explanation of the presence of the accused near the garage or should he have done so, had he correctly approached a consideration of all the evidences. With respect I find myself unable to say that such a result was inevitable. I therefore think that there should be a new trial and I would allow the appeal accordingly.

Appeal dismissed.

1943
*Oct. 26, 27
28.

1944
*Mar. 15.

QUEBEC RAILWAY LIGHT & POWER COMPANY (PETITIONER). } APPELLANT;

AND

THE TOWN OF BEAUPORT AND OTHERS (RESPONDENTS)..... } RESPONDENT;

AND

THE ATTORNEY GENERAL FOR CANADA AND THE ATTORNEY GENERAL FOR QUEBEC..... } INTERVENANTS.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

THE TOWN OF BEAUPORT (PETITIONER) ..... } APPELLANT;

AND

QUEBEC RAILWAY LIGHT & POWER COMPANY (RESPONDENT). } RESPONDENT;

AND

THE ATTORNEY GENERAL FOR CANADA AND THE ATTORNEY GENERAL FOR QUEBEC..... } INTERVENANTS.

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

*Constitutional law—Carriers—Railway company—"Undertaking" of company declared "for general advantage of Canada"—Added power to operate auto bus service—"Subject to all provincial * * * enactments"—Tariff of tolls—Jurisdiction—Federal or provincial authority—Whether auto busses are "works"—Section 91 (29) and section 92 (10 c) B.N.A. Act.*

The Quebec Railway, Light & Power Company applied for an order of the Board of Transport Commissioners approving its tariff of tolls for the carriage of passengers on the motor busses operated by it; while the town of Beauport petitioned the Quebec Public Service Board for an order by which the same tolls would be fixed. The Board of Transport Commissioners dismissed the company's application for want of jurisdiction; while the appellate court of Quebec, reversing the decision of the President of the Public Service Board, held that that Board was without jurisdiction to deal with such tolls

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Rand JJ.

on the ground that the railway company fell under the exclusive jurisdiction of the federal board. The decisions being contradictory, both the railway company and the town of Beauport appealed to this Court.

Held, Davis and Hudson JJ. dissenting, that the fixing of fares, or tolls, to be charged by the railway company in respect of its motor bus service, was within federal jurisdiction; but that federal legislation was lacking, as regulation of tolls over such service is not included in the powers granted to the Board of Transport Commissioners.

Per Davis and Hudson JJ. dissenting.—Jurisdiction over the fares, or tolls, of the railway company's autobus system is vested in the province. Such jurisdiction has not been transferred to the Dominion under Dominion Acts and should be exercised by the Quebec Public Service Board.

Per Rinfret J. and Kerwin J.:—A Dominion Act of 1895 declared the "undertaking of the (railway) company * * * a work for the general advantage of Canada" and thus brought the company under the legislative authority of the Parliament of Canada (*Quebec R. L. & P. Co.* v. *Montcalm Land Co.* [1927] S.C.R. 545). The word "undertaking" as used in the statute comprises the whole of the works of the company, not only the works existing in 1895 but all its future enterprises. The auto busses owned and operated by the company fall within the meaning of the term "works" in head 10 (*c*) of section 92 B.N.A. Act and, therefore, can properly be brought and integrated into the "undertaking".

Per Rand J:—The steam railway and the tramway system of the company are both within the legislative jurisdiction of the Dominion (*Montcalm Land Co.'s* case, *supra*). The works of the company are, in the jurisdictional aspect, to be considered as if they had been specifically set forth in section 91 (29) of the B.N.A. Act. The federal legslation of 1939, adding the power to operate auto busses is within the scope of the legislative field appropriate to the subject matter of the declaration in the Dominion Act of 1895. It cannot be denied to such an undertaking modifications in operational means and methods designed more efficiently to carry out its original and essential purposes. The controlling fact is that the identity of the works is presented: they remain in substance the works of transportation dealt with by the declaration.

Per Rinfret, Kerwin and Rand JJ:—The proviso of the amending federal Act of 1939 whereby the power to operate auto busses "subject to all provincial and municipal enactments" was conferred, does not give to the provincial Board jurisdiction to deal with the fares and tolls to be charged by the company. Such proviso made autobus service amenable to provincial laws for certain purposes, e.g. the right to license and regulate traffic, but the exclusive field of the Dominion as to regulation of rates is unaffected by that Act.

Per Davis J. (dissenting):—The generality of the language of the subsection (2) added by the Dominion Act of 1939, imposing a condition on the grant of the power to operate auto busses, is sufficient to involve the regulation and control by the province of the motor busses on the municipal and provincial highways of the province, and

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

the fixing of fares or tolls, for uniformity or otherwise, by a provincial board comes within the condition, upon a proper construction of the subsection.

Per Hudson J. (dissenting):—The declaration contained in the Dominion Act of 1895 does not, and never was intended by Parliament to, extend to the operation of auto busses on the highways, either in respect of the regulations of rates or otherwise.

APPEAL from an order of the Board of Transport Commissioners for Canada (1), ruling that the Board had no jurisdiction in the matter of the fares, or tolls, to be charged by the Quebec Railway Light & Power Company in respect of the motor bus service operated by it; and

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (2), which, reversing the judgment of the President of the Quebec Public Service Board (3), held that such matter was within the exclusive jurisdiction of the federal Board.

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

In the first appeal:

Paul Taschereau K.C. for the appellant.

Y. Prévost for the respondent: Town of Beauport.

F. Dorion K.C. for the respondent: Town of Courville.

C. Stein for the Attorney General for Canada.

Aimé Geoffrion K.C. and *R. Genest K.C.* for the Attorney General for Quebec.

In the second appeal:

Guy Hudon K.C. for the appellant.

P. H. Bouffard K.C. for the respondent.

C. Stein for the Attorney General for Canada.

Aimé Geoffrion K.C and *L. A. Pouliot K.C.* for the Attorney General for Quebec.

(1) (1941) 54 Can. Ry. and Transp. Cas. 120.

(2) Q.R. [1942] K.B. 110.

(3) (1941) 53 Can. Ry. and Transp. Cas. 174.

RINFRET J.—These are two appeals, heard together by this Court, which raise an identical question: whether the fares, or tolls, to be charged by the Quebec Railway Light & Power Co. in respect of its motor bus service are within the jurisdiction of the Quebec Public Service Board, or whether they are within the jurisdiction of the Board of Transport Commissioners for Canada, or, in other words, whether these fares and tolls come under the provincial or under the federal authority.

I do not propose to go in detail into the history of the Quebec Railway Light & Power Co., except in so far as it seems to me necessary for the purpose of explaining the grounds upon which I base my conclusions.

The company was originally incorporated by an Act of the legislature of the province of Quebec (Statutes of Quebec, 44-45 Victoria, c. 44) under the name of the Quebec, Montmorency and Charlevoix Railway Company. It was then undoubtedly a local provincial company, operating a railway solely within the province of Quebec.

Later, in 1894, the powers of the company were extended to permit it to operate an electric tramway within the limits of the city of Quebec and this was also done by legislation of the province of Quebec.

But in 1895 the parliament of Canada passed an Act (58-59 Victoria, c. 59) constituting the company a federal corporation; and sections (1) and (2) of that Act read as follows:—

(1) The undertaking of the Quebec, Montmorency and Charlevoix Railway Company, a body incorporated as mentioned in the preamble, and hereinafter called "the Company", is hereby declared to be a work for the general advantage of Canada.

(2) The Company as now organized and constituted under the said Acts of the province of Quebec is hereby declared to be a body politic and corporate within the legislative authority of the Parliament of Canada; and this Act and *The Railway Act* of Canada shall apply to the Company and its undertaking, instead of the said Acts of the province of Quebec and *The Railway Act* of Quebec: Provided that nothing in this section shall affect anything done, any rights or privilege acquired, or any liability incurred under the said Acts of the province of Quebec, prior to the time of the passing of this Act,—to all which rights and privileges the Company shall continue to be entitled and to all of which liabilities the Company shall continue to be subject.

The undertaking of the company was, therefore, "declared to be a work for the general advantage of Canada"; and, furthermore, the company was

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Rinfret C.J.

declared to be a body politic and corporate within the legislative authority of the Parliament of Canada;

and

this Act (that is to say, the Dominion Act of 1895) and *The Railway Act* of Canada were declared to apply to the company and its undertaking, instead of the Acts of the province of Quebec and *The Railway Act* of Quebec.

The same Act also contained the following section:—

(8) The Company may use and employ for the locomotion and propulsion of its cars, vehicles and rolling stock, where such power is required, electricity in all its forms, steam, and any approved mechanical power or other means, agency or force for such purposes that science or invention may develop,—and shall have all rights, powers and privileges necessary and essential to the management, operation and maintenance of its line as an electrical system either in whole or in part; and may acquire, use and develop every kind of electrical force, power and energy required or useful in the working of the undertaking, and apply such agencies and motive power for all its uses and purposes aforesaid.

In 1899 the name of the company was changed to the Quebec Railway Light and Power Company, its present name.

In 1939 the following subsection (2) was added by Parliament to the above section (8) by statute of Canada, 3 Geo. VI, c. 56:—

(2) It is enacted and declared that the Company's now existing powers apart from any limitations with respect to the use of steam, include the power to own, maintain, lease, possess and operate auto busses, trolley busses and all kinds of public or private conveyances whether propelled or moved by oil, vapour or other motor or mechanical power in, over and throughout any of the territory in which it is now authorized to operate, subject to all provincial and municipal enactments, in respect to highways and motor vehicles operated thereon and applicable thereto.

In my mind the legislation already reproduced is all that is necessary to be referred to for the purposes of the decision which we have to render.

As will be noticed, by the amendment of 1939 it was declared that the company's powers "include the power to own, maintain, lease, possess and operate auto busses".

Accordingly, the company applied for an order of the Board of Transport Commissioners approving its tariff of tolls for the carriage of passengers on the motor busses operated by it between the village of Boischatel and the city of Quebec. On the other hand, the town of Beauport peti-

tioned the Quebec Public Service Board for an order prescribing certain improvements in the service of the same auto busses, but mainly with the object of having fixed the rates and tolls on the same line.

The Board of Transport Commissioners dismissed the application of the railway company on the ground that it had no jurisdiction to deal with the company's tariffs of tolls or rates in question here; but on the petition of the town of Beauport to the Quebec Public Service Board, while the President of that Board (1) held that it had jurisdiction to entertain the request of the town, the judgment of the President went before the Court of King's Bench (appeal side) (2) which held that the provincial board had no jurisdiction and that the railway company, in the exercise of its statutory rights, fell under the exclusive jurisdiction of the Board of Transport Commissioners for Canada.

The two decisions being contradictory, the result was that both the town of Beauport appealed to this Court from the judgment of the Court of King's Bench (appeal side) and the Quebec Railway Light and Power Company appealed from the decision of the Board of Transport Commissioners.

The question to be decided is whether the control of the tariffs of the autobus rates and tolls of the Quebec Railway Light and Power Company comes under the jurisdiction of the provincial Public Service Board of Quebec, or under the jurisdiction of the Dominion Board of Transport Commissioners; and that is the only question at issue in the two appeals before this Court.

It is common ground that the railway company operates its autobus service between Jacques Cartier Square in the city of Quebec and the village of Boischatel, and that it holds a permit from the Public Service Board of the province; but also that, since the legislation of 1895 declaring the undertaking of the company to be a work for the general advantage of Canada, both the steam railway and the tramway system of the Quebec Railway Company are under the legislative jurisdiction of the Dom-

(1) (1941) 53 Can. Ry. & Transp. Cas. 174.

(2) Q.R. [1942] K.B. 110.

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Rinfret C.J.

inion. It was so decided in a judgment of this Court in *Quebec Railway, Light & Power Co.* v. *Montcalm Land Co.* (1).

In my opinion the autobus system also comes within the jurisdiction of the Dominion.

In 1895 the Dominion Act (58-59 Victoria, c. 59), declared the "undertaking of the company * * * a work for the general advantage of Canada". Obviously this was done to bring the company under the legislative authority of the Parliament of Canada by force of subsection (10) (*c*) of section (92) of *The British North America Act.* The effect of such a declaration is to bring the work which is the subject thereof under subsection (29) of section (91) of the Act.

Moreover, the company, by section (2) of the Dominion Act (58-59 Victoria, c. 59), is specifically declared to be "a body politic and corporate within the legislative authority of the Parliament of Canada"; and it is further enacted by the same section that

this Act and *The Railway Act* of Canada shall apply to the Company and its undertaking, instead of the said Acts of the province of Quebec and *The Railway Act* of Quebec.

It was argued that the declaration that the work was for the general advantage of Canada applied only to the undertaking as it stood in 1895, but, in my view, the declaration extends to the whole of the undertaking of the company, railway, tramway and autobus, for several reasons.

Most of what was said and decided by this Court in the *Montcalm Land* case (1) equally applies in the premises. As was said by Mr. Justice Newcombe, at p. 559 of the report of that case:—

One must look to what the respondents' claim involves; it is nothing less than provincial statutory compulsion of a Dominion railway corporation, either to exercise powers which Parliament has not conferred, or, in the exercise of its competent Dominion powers, to submit to provincial review and regulations, followed in either case by the consequence that, for failure to comply with the provincial order, the company may forcibly be deprived of its property, powers, rights and management, and ultimately subjected to an action for its dissolution; and this notwithstanding what is undoubtedly true that neither the constitution and powers of the company nor its authorized undertaking is subject to the legislative authority of the province. It is needless to say that these things cannot be done.

(1) [1927] S.C.R. 545.

The declaration that the undertaking is for the general advantage of Canada may not be severed; it must be understood to apply to the whole of the undertaking. As was said Mr. Justice Newcombe, it is impossible to admit of a dual control over the essential functions of a federal work.

It may be true that it was only by the Act of 1939 that the power to own, maintain, lease, possess and operate auto busses was for the first time specifically mentioned in the Acts respecting the company, but the Act of 1939 (3 Geo. VI, c. 56) was only declaratory. It must be noted that it is expressed in the following words:—

> The Company's now existing powers * * * include the power to own, maintain, etc., auto busses.

While it may be said that the word "undertaking" in the Act of 1895 covers all future enterprises of the company and means the railway and works of whatsoever description which the company has authority to construct and to operate (*Railway Act*, section 2-35), it must be noted that the powers of the company, as defined in its original charters, although making no reference to auto busses in particular, are very broad and include the

> propulsion of vehicles and rolling stock by any means, agency, or force that science or invention may develop

(section (6) of the statutes of Canada, 58-59 Victoria, c. 59).

It was further argued that a bus line is neither a physical thing nor a work susceptible of being made the subject of a declaration under subsection (10) (*c*) of section (92) of *The British North America Act;* and that, consequently, the declaration that the undertaking of the company was for the general advantage of Canada was ineffective to bring the autobus service under the federal jurisdiction. It was said that a work must have a *locus,* which obviously, it was alleged, the autobus service was utterly incapable of possessing and that, therefore, the declaration contained in the Dominion Act was inappropriate to bring the autobus system under the legislative authority of the Parliament of Canada.

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Rinfret C.J.

However, I would refer to what was said by Lord Dunedin in *In re Regulation and Control of Radio Communication in Canada* (1).

> "Undertaking" is not a physical thing, but is an arrangement under which, of course, physical things are used.

Applying that statement to the situation in the present case, I would be inclined to think that the word "undertaking" as used in the statute comprises the whole of the works of the company, which, upon that interpretation, were all included in the declaration that they were for the general advantage of Canada.

Accordingly, I am of opinion that the auto busses of the company can properly be brought and integrated into the undertaking which was declared to be for the general advantage of Canada. It would appear that it was the intention of Parliament that newly acquired works would fall within the declaration.

Much was made in the argument of the amendment inserted in 1939, whereby the power to operate auto busses was stated to be

> subject to all provincial and municipal enactments in respect to highways and motor vehicles operated thereon and applicable thereto.

Undoubtedly it could not be contended that for certain purposes the autobus service is not amenable to the provincial laws, but, in my view, that must mean: provincial laws of general application. (*Lukey* v. *Ruthenian Farmers' Elevator Co. Ltd.* (2); *John Deere Plow Co. Ltd.* v. *Wharton* (3).

The province has the control of its highways (*Provincial Secretary of Prince Edward Island* v. *Egan* (4). It has to maintain them and to look after the safety and convenience of the public by regulating and controlling the traffic thereon. An instance of the exercise of that control by the province might be the fact that the railway company held a permit from the Quebec Public Service Board; but I do not think that the submission to provincial and municipal enactments can be extended to anything beyond the regulations of the character just mentioned and surely not, in my opinion,

(1) [1932] A.C. 304, at 315.
(2) [1924] S.C.R. 56.
(3) [1915]A.C. 330, at 341.
(4) [1941] S.C.R. 396.

to the tariffs of rates and tolls of the company, which are made the subject of special laws and enactments under federal legislation and, in particular, under *The Railway Act* of Canada. Otherwise there would be that dual control, already adverted to and rendering the proper working and operations of the company practically impossible.

Now, *The Railway Act* of Canada deals with tolls and, having regard to all that I have said so far, my conclusions would have been that, in the premises, the Act should apply *mutatis mutandis* to the fixing of rates for the autobus system of the Quebec Railway Light & Power Co., in respect of which the Board of Transport Commissioners may exercise its jurisdiction.

It is true, nevertheless, that the Dominion *Railway Act* does not specifically refer to the regulation of bus lines and it may be that the specific power to deal with autobus traffic is not given to the Board of Transport Commissioners.

Two of my colleagues who, like me, are of the opinion that there is federal jurisdiction in relation to the auto bus tolls have come to the conclusion that the regulation of tolls over services of auto busses is not included in the powers of the Board of Transport Commissioners. In the circumstances, although personally I would be inclined to share the view expressed in his reasons for judgment by the Deputy Chief Commissioner, I will agree with the conclusions of my brothers Kerwin and Rand.

It follows that each appeal should be dismissed with costs, except that there should be no costs to or against either intervenant.

DAVIS J.—The appeals in these two cases were heard together. They raise the question whether the Quebec Public Service Board (a provincial board) or the Dominion Transport Board has the authority to fix the fares or tolls to be charged by the Quebec Railway, Light & Power Company in respect of its motor bus services. One appeal is from the judgment of the Court of King's Bench (appeal side) of the province of Quebec (1) which, reversing the decision of the President of the Quebec Public

(1) Q.R. [1942] K.B. 110.

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Davis J.

Service Board, (1) held that it was not a matter properly for determination by the provincial board on the ground that the Dominion Board of Transport Commissioners had exclusive jurisdiction in the matter. The other appeal is from the order of the Board of Transport Commissioners which decided that it had no jurisdiction in the matter of fares or tolls on motor buses. While it was not suggested on the argument, I should have thought it might well be that neither the provincial board nor the Dominion Board had clear authority to control and fix the fares. It seemed to be taken for granted, however, that one or the other of the boards must have authority.

If the railway company were a provincial company, there would appear to be no lack of jurisdiction in the provincial board, but the railway company having been declared by Dominion legislation some years ago to be a company within the legislative authority of the Parliament of Canada, it was contended that it was beyond the control of a provincial board, and that it was only the Dominion Transport Board that has jurisdiction over the company and the fares and tolls that it is entitled to charge. Shortly stated, that is the problem which is presented to the Court in these appeals.

The railway company, under the name of the Quebec, Montmorency and Charlevoix Railway Company, was originally incorporated, in 1881, by an Act of the legislature of the province of Quebec, 44-45 Vic., c. 44. It was a local provincial company, owning and operating a railway solely within the province of Quebec. In 1894 the province of Quebec, by 57 Vic., c. 71 (passed January 8th, 1894), extended the power of the Company to operate an electric tramway within the city of Quebec. Subsequently, in 1895, by 58-59 Vic., c. 59, the Parliament of Canada constituted the company a body corporate within the jurisdiction of the Parliament of Canada. Sections 1 and 2 of the said Act of Parliament read as follows:—

1. The undertaking of the Quebec, Montmorency and Charlevoix Railway Company, a body incorporated as mentioned in the preamble, and hereinafter called "the company", is hereby declared to be a work for the general advantage of Canada.

(1) (1941) 53 Can. Ry. & Transp. Cas. 174.

2. The Company as now organized and constituted under the said Acts of the province of Quebec is hereby declared to be a body politic and corporate within the legislative authority of the Parliament of Canada; and this Act and *The Railway Act* of Canada shall apply to the Company and its undertaking, instead of the said Acts of the province of Quebec and *The Railway Act* of Quebec: Provided that nothing in this section shall affect anything done, any rights or privilege acquired, or any liability incurred under the said Acts of the province of Quebec prior to the time of the passing of this Act,—to all which rights and privileges the Company shall continue to be entitled and to all of which liabilities the Company shall continue to be subject.

Much of the argument turns upon an amendment to the Dominion statute made by Parliament in 1939 whereby a subsection was added to section 8 of the original Act. It is important, therefore, to set out section 8 as it appeared in the original Act and remained untouched until 1939:

8. The Company may use and employ for the locomotion and propulsion of its cars, vehicles and rolling stock, where such power is required, electricity in all its forms, steam, and any approved mechanical power or other means, agency or force for such purposes that science or invention may develop,—and shall have all rights, powers and privileges necessary and essential to the management, operation and maintenance of its line as an electrical system, either in whole or in part; and may acquire, use and develop every kind of electrical force, power and energy required or useful in the working of the undertaking, and apply such agencies and motive powers for all its uses and purposes aforesaid.

In 1939, then, by Act of Parliament, 3 Geo. VI, c. 56, the following was added as subsection (2) of section 8 of the original Act:

(2) It is enacted and declared that the Company's now existing powers apart from any limitations with respect to the use of steam, include the power to own, maintain, lease, possess and operate auto busses, trolley busses and all kinds of public or private conveyances whether propelled or moved by oil, vapour or other motor or mechanical power in, over and throughout any of the territory in which it is now authorized to operate, subject to all provincial and municipal enactments, in respect to highways and motor vehicles operated thereon and applicable thereto.

It almost strikes one at a glance that the controversy must turn upon the meaning and scope of the concluding words of the added subsection

subject to all provincial and municipal enactments, in respect to highways and motor vehicles operated thereon and applicable thereto.

The railway company appears to have acquired and operated motor busses some little time prior to the amendment

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Davis J.

of 1939 and has continued to own and operate motor busses on municipal and provincial highways solely within the province of Quebec since that time. The town of Beauport desired to have the fares or tolls to be charged by the company in connection with the operation of its motor busses fixed by the provincial board known as the Quebec Public Service Board and the company desired its tariff to be fixed by the Dominion Board of Transport Commissioners.

Those who argued against the authority of the Dominion board and in favour of the authority of the provincial board, very strenuously pressed upon us the contention that the word "undertaking" used in section 1 of the Act of Parliament, 58-59 Vic., c. 59, above quoted, was not an appropriate word to cover, and does not cover, the rolling stock of the company, particularly the motor busses; the specific purpose of this argument being to establish the contention that the motor busses of the company cannot be regarded in law, under the wording of section 1, as "a work for the general advantage of Canada." What is said is that the authority of Parliament under section 92, head 10 (*c*) of the British North America Act is limited to "Works"—and does not mention "undertakings." It may be convenient here to set out section 92 (10):

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

10. Local works and undertakings other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(*b*) Lines of steam ships between the province and any British or foreign country;

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

While the opening words of 10 are "Local works and undertakings" and (*a*) uses "other works and undertakings," (*b*) uses neither word "works" nor "undertakings," and (*c*) uses only the word "works." The argument is that the "undertaking" of the company was not validly declared a work for the general advantage of Canada—that the authority

of Parliament is by 10 (*c*) limited to "works". A sentence is taken from the judgment of Lord Dunedin in the *Radio* case, (1) as a definition of these words "undertaking" and "works" and applied to the construction of the particular Act of Parliament which is before us. The sentence used by Lord Dunedin is,

> "Undertaking" is not a physical thing, but is an arrangement under which of course physical things are used.

It was argued from that that when the Act of Parliament, 58-59 Vic., c. 59, declared the "undertaking" of the company to be a work for the general advantage of Canada, it did not touch or affect the "works" of the company and, particularly for the argument of these appeals, that the word "undertaking" does not touch or affect the motor busses of the company because they are physical things moving about from place to place. I find it difficult to accept such an interpretation of the particular statute. The effect of the statute would be nugatory on such an interpretation. It seems to me that the word "undertaking" there used involves the totality of the works of the company and that the effect of the statute was that they were declared to be for the general advantage of Canada. Such a declaration was within the competence of the Dominion Parliament when the meaning and scope of the statute is fairly construed. The argument was advanced obviously to put the motor busses of the company beyond Dominion control and place them within provincial control, but I do not think that any such strained construction of the statute as contended for is necessary even to accomplish that end.

Section 2 of the Act of Parliament, 58-59 Vic., c. 59, declares the company

> to be a body politic and corporate within the legislative authority of the Parliament of Canada.

In my opinion when Parliament in 1939 amended section 8 of its original Act of 1895 by adding thereto subsection (2) above quoted, it extended, or at least expressly defined, the power of the company to own, maintain and operate auto busses in, over and throughout any of the territory in which the company is authorized to operate. But Parliament made a conditional grant of the power—the condition

(1) [1932] A.C. 304, at 315.

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

DAVIS J.

being that the exercise of the power was to be subject to all provincial and municipal enactments in respect of highways and motor vehicles operating thereon and applicable thereto. It might well lead to a state of chaos if a Dominion company had a right to operate motor vehicles on municipal and provincial highways according to its own ideas without reference to the provincial laws, rules and regulations governing the operation of other motor vehicles on the public highways in the province. For instance, you could not in any practical sense have a province requiring all motor vehicles to travel on the right hand side of the road and a Dominion company denying any authority of the province over it because it was a Dominion company, and asserting the right to run its motor vehicles on the left hand side of the road. Counsel for the company, confronted with such situations, admitted frankly that the company was undoubtedly liable to what he called "all ordinary regulations of general application," respecting motor vehicles on provincial and municipal highways, but contended that that does not include the control or fixing of fares or tolls, because according to his argument you cannot read the word "tolls" into the general words of the subsection to which the power to operate motor busses is made subject. His contention is that the fixing of tolls for the motor busses, because the company itself is a railway company, comes under the Dominion *Railway Act* and the Dominion *Transport Act*.

In my opinion the generality of the language of the 1939 amendment imposing a condition on the grant of the power is sufficient to involve the regulation and control by the province of the motor busses on the municipal and provincial highways of the province; and the fixing of fares or tolls, for uniformity or otherwise, by a provincial board comes within the condition of the subsection upon a proper construction thereof. It was contended by the Dominion that that construction involves an unwarranted delegation of legislative authority beyond the power of Parliament. I think the principle is that stated in the *John Deere Plow* case (1):

(1) [1915] A.C. 330, at 341.

It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation.

And in *Bank of Toronto* v. *Lambe* (1):

They (their Lordships) cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks.

The appeals should in my opinion be disposed of in accordance with the above conclusion.

KERWIN J.—The Quebec Railway, Light and Power Company was formerly known as the Quebec, Montmorency and Charlevoix Railway Company. That company was incorporated by a special Act of the legislature of the province of Quebec. This Act was amended from time to time until by the year 1895 the Company had been authorized to own and operate a railway within a certain area of the province of Quebec and to own and operate an electric tramway within the city of Quebec and its environs. In 1895, the Parliament of Canada passed an Act embodying therein such provisions of the provincial Acts as were desired to be retained in force and enacting the following as sections 1 and 2:

1. The undertaking of the Quebec, Montmorency and Charlevoix Railway Company, a body incorporated as mentioned in the preamble, and hereinafter called "the Company", is hereby declared to be a work for the general advantage of Canada.

2. The Company as now organized and constituted under the said Acts of the province of Quebec is hereby declared to be a body politic and corporate within the legislative authority of the Parliament of Canada; and this Act and *The Railway Act* of Canada shall apply to the Company and its undertaking, instead of the said Acts of the province of Quebec and *The Railway Act* of Quebec: Provided that nothing in this section shall affect anything done, any rights or privilege acquired, or any liability incurred under the said Acts of the province of Quebec prior to the time of the passing of this Act,—to all which rights and privileges the Company shall continue to be entitled and to all of which liabilities the Company shall continue to be subject.

Subsequently the Company acquired from the Montmorency Electric Power Company the latter's business and

(1) (1887) 12 App. Cas. 575, at 586.

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Kerwin J.

undertaking and also the business and undertaking of the Quebec District Railway Company, and in 1899 its name was changed to its present title. The appellant company and the other companies mentioned were incorporated for provincial objects and it is only by virtue of the declaration in section 1 of the Act of 1895 that the Dominion could acquire any jurisdiction. That section was passed in pursuance of exception (*c*) to head 10 of section 92 of *The British North America Act* and no more extended meaning than the word "works" therein bears on its proper construction may be ascribed to the word "undertaking" in section 1 of the 1895 Act.

In the year 1939, section 8 of the Dominion Act of 1895 was amended by adding thereto subsection 2. As thus amended section 8 now reads:—

> 8 (1) The Company may use and employ for the locomotion and propulsion of its cars, vehicles and rolling stock, where such power is required, electricity in all its forms, steam, and any approved mechanical power or other means, agency or force for such purposes that science or invention may develop,—and shall have all rights, powers and privileges necessary and essential to the management, operation and maintenance of its line as an electrical system, either in whole or in part; and may acquire, use and develop every kind of electrical force, power and energy required or useful in the working of the undertaking and apply such agencies and motive powers for all its uses and purposes aforesaid.
>
> (2) It is enacted and declared that the Company's now existing powers apart from any limitations with respect to the use of steam, include the power to own, maintain, lease, possess and operate auto busses, trolley busses and all kinds of public or private conveyances whether propelled or moved by oil, vapour or other motor or mechanical power in, over and throughout any of the territory in which it is now authorized to operate, subject to all provincial and municipal enactments, in respect to highways and motor vehicles operated thereon and applicable thereto.

It appears that some time prior to the enactment of the amendment of 1939 the Company had commenced to operate auto busses in the city of Quebec and adjoining territory. The meaning to be ascribed to the word "works" in exception (*c*) to head 10 of section 92 of *The British North America Act* has been considered in *City of Montreal* v. *Montreal Street Ry. Co.* (1); *Wilson* v. *Esquimalt and Nanaimo Railway Company* (2); *In Re Regulation and Control of Radio Communication in Canada* (3). Whatever the precise construction may be, I am satisfied that the busses owned and operated by the Company fall within

(1) [1912] A.C. 333, at 342. (2) [1922] A.C. 202, at 208.
(3) [1932] A.C. 304, at 315.

the meaning of that term so that they would be part of the Company's works as much as the rails and tramcars of the Company's electric tramway system. As to these, it has been decided by this Court in *Quebec Railway, Light and Power Company* v. *Montcalm Land Company* (1), that the Quebec Public Service Commission (now the Public Service Board) had no jurisdiction to order the Company to cause its tramcars to run more frequently. Unless, therefore, the concluding words of the amendment of 1939,

> subject to all provincial and municipal enactments, in respect to highways and motor vehicles operated thereon and applicable thereto,

have the effect of altering the position, the Public Service Board has no jurisdiction to deal with the fares or tolls to be charged by the Company for travel on its auto busses. The words quoted are not, in my opinion, apt to confer such a power. The proviso might apply to such things as the necessity of the busses to carry license plates and of the drivers thereof to obey the provincial or municipal regulations as to traffic, but it does not cover the fixing of fares. It was submitted by the Attorney General for the Dominion that Parliament would have no power to delegate such authority but, since I deem the proviso inapplicable, it is unnecessary to express any opinion upon the point.

It does not follow that jurisdiction must reside in The Board of Transport Commissioners for Canada. Upon the declaration being made that the works of the Company were for the general advantage of Canada,

> the effect of subsection 10 of s. 92 of *The British North America Act* is * * * to transfer the * * * works mentioned * * * into s. 91 and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament. *City of Montreal* v. *Montreal Street Ry. Co.* (2).

It is the "works", however, and not the Company that is thus brought within the jurisdiction of the Dominion. Section 2 of the 1895 Act cannot by itself effect any such result but the "works" being considered as an enumerated head of section 91, Parliament may enact such further legislation as is necessarily incidental to the exercise of its jurisdiction over them, and, in a proper case, it may be necessary to consider how far particular provisions of *The*

(1) [1927] S.C.R. 545.

(2) [1912] A.C. 333, at 342.

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Kerwin J.

Railway Act apply to them. Section 323 of that Act was referred to but in my view it has no application. The "tolls" therein mentioned are defined by clause 32 of section 2 but it seems plain that these provisions refer only to tolls for railways as defined in clause 21 of section 2. The word "rolling stock" used in the last mentioned clause, as defined in clause 24, clearly refers only to railways. It is not all charges made, even by a railway company, that fall within the jurisdiction of the Dominion Board. *In re Powers as to Wharfage Charges* (1).

The appeal in each case should be dismissed with costs, except that there should be no costs to or against either intervenant.

HUDSON J.—The main controversy in these appeals is whether the right to control rates on busses operated by the Quebec Railway, Light and Power Company on the streets and highways in the town of Beauport lies within the authority of the Transport Board of Canada or the Public Service Board of Quebec.

The Quebec Railway, Light and Power Company was incorporated by a statute of the legislature of Quebec but in 1895, by an Act of the Parliament of Canada, the undertaking of the Company was "declared to be a work for the general advantage of Canada", and the Company as then organized was declared to be a body politic and corporate within the legislative authority of the Parliament of Canada and that the *Railway Act* of Canada should apply to the Company and its undertakings, instead of the Acts of the province of Quebec and the *Railway Act* of Quebec. By this and subsequent Acts the Company was given the ordinary powers of railway and tramway companies.

In 1939, by Act of Parliament, the Company's powers were extended by providing:

> 8. (2) It is enacted and declared that the Company's now existing powers apart from any limitations with respect to the use of steam, include the power to own, maintain, lease, possess and operate auto busses, trolley busses and all kinds of public or private conveyances whether propelled or moved by oil, vapour or other motor or mechanical power in, over and throughout any of the territory in which it is now authorized to operate, subject to all provincial and municipal enactments, in respect to highways and motor vehicles operated thereon and applicable thereto.

(1) [1931] S.C.R. 431.

The right to license, regulate and control traffic on streets and highways within a province lies with the legislature of such province. Such right has been actively exercised by the provinces since Confederation and has never been seriously challenged. It has been recognized by provincial courts on numerous occasions, and recently by this Court in the case of *Provincial Secretary of Prince Edward Island* v. *Egan* (1).

The right of the Dominion to interfere with such licence, regulation and control is confined strictly to matters falling within one or other of the enumerated heads of section 91 of *The British North America Act.*

It is contended here that the busses of the Quebec Railway, Light and Power Company and the operation thereof became part of the undertaking of the Company and fell within the exclusive jurisdiction of the Dominion by virtue of the declaration made in 1895.

Unlike other legislative powers allotted to the Dominion on the one hand and the provinces on the other, the jurisdiction transferred by declaration under section 92 (10) (*c*) of *The British North America Act* is conferred by an Act of the Parliament of Canada itself and may be repealed, varied, qualified or limited in its application, whenever that Parliament so decides. This is the effect of a decision of the Judicial Committee of the Privy Council in the case of *Hamilton, Grimsby and Beamsville Railway Company* v. *Attorney-General for Ontario* (2). There the Hamilton, Grimsby and Beamsville Railway had been incorporated by an Act of the legislature of Ontario. One of its lines crossed the railway line of the Grand Trunk Railway Company, a Dominion railway. By reason of the provision then existing in the *Railway Act,* all railways connected with or crossing a Dominion railway were deemed to be works for the general advantage of Canada. Subsequently, the Dominion *Railway Act* was amended and it was provided that such provincial railway should be a work for the general advantage of Canada, in respect only of the connection or crossing, and certain other matters not here relevant. A provincial board made an order with respect to sanitary conveniences on the provincial railway cars. This was contested

(1) [1941] S.C.R. 396.

(2) [1916] 2 A.C. 588.

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Hudson J.

on the ground that the railway had become a Dominion railway under the original declaration. However, it was held by the Judicial Committee that this was not so, that the Act could be repealed, or amended and, as stated by Lord Buckmaster,

> the declaration is a declaration which can be varied by the same authority as that by which it was made

and that in this instance it was properly varied.

New and subsequently acquired works may fall within such a declaration but it must appear that Parliament so intended.

In the present case the claim is that a declaration made in 1895 extended to works first authorized by Parliament in 1939.

The operation of autobusses was not necessarily incidental to the operation of the railway. Somewhat similar situations have been the subject of discussion in the House of Lords. In the case of *London County Council* v. *Attorney-General* (1). Reading at p. 169 Lord Macnaghten said:

> The London County Council are carrying on two businesses—the business of a tramway company and the business of omnibus proprietors. For the one they have the express authority of Parliament; for the other, so far as I can see, they have no authority at all. It is quite true that the two businesses can be worked conveniently together; but the one is not incidental to the other. The business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of steamship owners is incidental to the undertaking of a railway company which has its terminus at a seaport.

In the case of *Attorney-General* v. *Mersey Railway Company* (2), a similar decision was arrived at.

Here, as in the two above mentioned cases, it appears that the railway company undertook the autobus business because of competition on the highway. I am satisfied that the railway company had no authority to carry on this autobus business until 1939.

The amendment of 1939 does not in terms transfer jurisdiction to the Dominion. In effect it rejects any assumption of control by the Dominion and expressly recognizes maintenance of provincial control. It is difficult to see how an authority to operate a new kind of service,

(1) [1902] A.C. 165. (2) [1907] A.C. 415.

subject to all provincial and municipal enactments in respect to highways and motor vehicles operated thereon and applicable thereto,

can be construed as evidencing an intention by Parliament to place such services under Dominion control.

Neither in the Dominion *Railway Act* nor in any legislation applicable to this company is there any provision for control of traffic on the highways in respect of rates or otherwise. It has been suggested that the regulation of tolls and rates is essentially different from the control of physical things on the highways. I cannot see this. The highways are owned by the municipality or the province and it is the duty of the municipality to maintain them and to provide for the safety and convenience of the public thereon.

The regulation of rates charged by common carriers using highways is nowadays universally recognized as in the public interest. The fact that Parliament has not seen fit to make any provision for such regulation in the present case strongly supports the view that it was intended that such regulation should be left with the province, where such regulation was already in force.

My conclusion then is that the declaration of 1895 does not and never was intended by Parliament to extend to the operation of autobusses on the highways, either in respect of the regulation of rates or otherwise.

It was strongly argued that Parliament had no power to make a declaration under section 92 (10) (*c*) of the *British North America Act* affecting the right of control here in question. It was pointed out that on several occasions the Judicial Committee held that the word "works" used therein is confined to physical things, and that here the only physical things involved were busses which were not moving on rails the property of the railway company but freely amidst general traffic on a public highway. To my mind, this question is open to some doubt and, in view of the conclusion I have arrived at as to the intention of Parliament, it is unnecessary for me to express my opinion.

I would allow the appeal in the case of Town of Beauport v. Quebec Railway, Light and Power Company, and dismiss the appeal in Quebec Railway, Light and Power Company v. Town of Beauport.

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Rand J.

RAND J.—These two appeals raise the same questions of law and were argued together. The first is by the town of Beauport from a judgment of the Court of King's Bench, appeal side, holding that the regulation of tolls for autobus and tramway services, and of the quantum and quality of those services furnished by the Quebec Railway, Light and Power Company, was not within the legislative powers of the province; the second is from an order of The Board of Transport Commissioners dismissing an application by the Company for the approval of tolls for the same services.

At the time the proceedings were initiated, the Quebec Railway, Light and Power Company was carrying on within the city of Quebec and surrounding district a line of steam railway between the city and Cape Tourment, a point about thirty miles to the east, a tramway system serving the city proper, and as well an autobus service both within and without the city.

By a judgment of this court rendered in 1927 (*Quebec Railway, Light and Power Co. v. Montcalm Land Co.* (1)), it was held that, under the legislation of 1895 declaring the undertaking of the company to be a work for the general advantage of Canada, both the steam railway and the tramway system were within the legislative jurisdiction of the Dominion.

In 1939 (3 Geo. VI, c. 56) the powers of the company were enlarged by the following provision:

> (2) It is enacted and declared that the Company's now existing powers apart from any limitations with respect to the use of steam, include the power to own, maintain, lease, possess and operate auto busses, trolley busses and all kinds of public or private conveyances whether propelled or moved by oil, vapour or other motor or mechanical power in, over and throughout any of the territory in which it is now authorized to operate, subject to all provincial and municipal enactments, in respect to highways and motor vehicles operated thereon and applicable thereto.

The autobus services have been integrated with those of both the railway and the tramway system. The company has provided for joint carriage by railway and autobus and by tram and autobus, both within and beyond the city. Questions may, therefore, arise as to tolls between points on the tramway system proper, between points on the autobus routes, and between points on either the railway

(1) [1927] S.C.R. 545.

or the tramway and on the autobus routes, and *vice versa*. Admittedly, all rates confined to the railway and the tramway are within the federal jurisdiction and the application of *The Railway Act* 1919. The question raised is whether the tolls applicable between points on the routes of the autobus services and between those points and points on the tramways are likewise within that exclusive jurisdiction and, if so, whether they come within the scope also of that Act.

The works of the company are, in the jurisdictional aspect, to be considered as if they had been specifically set forth in section 91 (29) of the B.N.A. Act. Was, then, the legislation of 1939, adding to the powers of the company, within the scope of the legislative field appropriate to the subject-matter of the declaration? I think it was. We cannot deny to such an undertaking modifications in operational means and methods designed more efficiently to carry out its original and essential purposes. The controlling fact is that the identity of the works is preserved: they remain in substance the works of transportation dealt with by the declaration.

Nor do I think there can be attributed to the last clause of that provision an effect which would nullify the operative part of the subsection. What was intended to be and was done was the creation of new powers in the federal works as such, and not merely the addition of a corporate capacity. The contrary view involves the introduction of a dual control over the essential functions of such an undertaking. The concluding language, therefore, must be taken to refer only to provincial regulation arising from ownership and control of highways which might affect features of the autobus operations. It is, at most, a legislative disclaimer of intention to encroach upon an area, in different aspects common to both jurisdictions: but the exclusive field of the Dominion, within which lies the regulation of rates, is unaffected.

The further question arises, however, whether *The Railway Act* 1919 extends to tolls either in respect of the autobus services proper or the joint services of autobus and tramway. By the enactment of 1895, section 2, *The Rail-*

1944

QUEBEC RAILWAY LIGHT & POWER CO. v. TOWN OF BEAUPORT.

Rand J.

way Act of Canada is to apply to the undertaking of the company, and by section 323 of *The Railway Act* 1919 it is provided:

> Nor shall the company charge, levy, or collect any toll or money for any service as a common carrier, except under and in accordance with the provisions of this Act.

Can the regulation of tolls for autobus or joint autobus and tramway services be brought within the language of that legislation?

There can be little question that *The Railway Act* 1919, as its title indicates and as its provisions confirm, is concerned primarily with transportation by railways. Service "as a common carrier," in the absence of a context clearly extending it, means, therefore, as a carrier by railway. All services incidental to that form of transportation are within the clause of section 323 quoted. But autobus services are not incidental to either the railway or the tramway: they are a new form of primary transportation. Now the word "railway" imports locomotion on or over "rails," furnishing a service within fixed and rigid limits: and precise language would be necessary to bring within its scope transportation operations by means of power and vehicles unknown when the legislation was first enacted, with a service of a highly mobile character and involving different considerations of public policy. Closely associated with railway service is carriage by water, but this is the subject of special provisions of *The Railway Act* 1919. That enactment cannot, therefore, be held to embrace the regulation of tolls for autobus transportation, either alone or in conjunction with the tramway.

Then, does the specific application of "The Railway Act of Canada" to the undertaking of the company by the legislation of 1895 add in any way to what otherwise would follow from the declaration? To hold that it does would be to imply a very broad *mutatis mutandis* which is not, in my opinion, warranted. The enactment of 1895 did no more than to apply the Dominion Act to such of the company's activities as were within its ambit.

There is, then, federal jurisdiction in relation to these tolls, but federal legislation is lacking. It is not suggested that there was in force in the province at the time of Con-

federation any law of carriers adequate or appropriate to fill the hiatus in that legislation. However inconvenient it may appear, therefore, it follows that the regulation of tolls for services in whole or in part by autobus is not within the powers of the Board of Transport; and as *The Provincial Transportation and Communication Board Act* is inapplicable within the exclusive dominion field, these tolls lie outside of any existing statutory control.

The same conclusion follows as to the regulation of the autobus services in the manner proposed.

The appeals should be dismissed with costs except as to the Intervenants.

Both appeals dismissed with costs, no costs to or against intervenants.

In the first appeal:

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

Solicitors for the respondent: Town of Beauport:
Gagnon, DeBilly, Prévost & Hone.

Solicitors for the respondent: Town of Courville:
Dorion, Dorion & Noël.

Solicitors for the respondent: Village of Boischatel:
Dumoulin & Rémillard.

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

Solicitor for the Attorney General for Quebec:
L. A. Pouliot.

In the second appeal:

Solicitor for the appellant: *Yves Prévost.*

Solicitor for the respondent: *P. H. Bouffard.*

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

Solicitor for the Attorney General for Quebec: *Achille Pettigrew.*

1944

* Oct. 24, 25.
* Dec. 20.

THE CITY OF SASKATOON..... APPELLANT;

AND

EMILY JANE SHAW..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Wills—Husband and Wife—Application by testator's widow under The Dependants' Relief Act, R.S.S. 1940, c. 111—S. 8 (1) (2)—On finding that reasonable provision not made by will for her maintenance, question as to effect of s. 8 (2) as to extent of allowance to be awarded.

On an application, under *The Dependants' Relief Act,* R.S.S. 1940, c. 111, by the widow of a testator for an order making reasonable provision for her maintenance, if the widow has satisfied the Court of the condition stated in s. 8 (1) of the Act, namely, that the testator has by will so disposed of real or personal property that reasonable provision has not been made for her maintenance, she is entitled, under s. 8 (2), to an allowance which, in the opinion of the Court, is not less than the share of the testator's estate which she would have received if he had died intestate leaving a widow and children (i.e., one-third of the estate). Rand J. dissented.

Per Rand J., dissenting: The underlying purpose and conception of s. 8 (1), which is reasonable provision for *maintenance,* is carried through into s. 8 (2), and what is envisaged is a determination "in the opinion of the Court" of what the actual maintenance of the widow—the pecuniary dimensions of her actual living—in the circumstances of intestacy would have been and to take the amount so found as the measure for determining the supplementary or original allowance called for by s. 8 (1). The Court is to exercise its judgment upon the resources that would go into actual maintenance under intestacy and to determine to what extent that would be received from the intestate share. The minimum allowance for maintenance should be what the reasonable maintenance of the widow, under the circumstances of intestacy, would have drawn from her share of the estate.

APPEAL by the City of Saskatoon from the judgment of the Court of Appeal for Saskatchewan (1) rendered on an appeal by the said appellant and others from the judgment of Anderson J. (2) on an application of the present respondent under *The Dependants' Relief Act,* R.S.S. 1940, c. 111.

Elmer Shaw, late of Abernethy in the province of Saskatchewan, died on April 6, 1941, leaving his widow (the present respondent) and no children. He left a large estate. By his will, he gave to his wife a sum of money,

(1) [1944] 1 W.W.R. 433; [1944] 2 D.L.R. 223.
(2) [1943] 2 W.W.R. 567; [1943] 4 D.L.R. 712.

*PRESENT:—Rinfret C.J. and Hudson, Taschereau and Rand JJ. and Thorson J. *ad hoc.*

his household furniture, etc., his motor car, the dwelling house on his farm for her lifetime, and an annuity. These and other provisions in his will are described in the judgments in the Courts below (above cited). His widow (the present respondent) applied in the Court of King's Bench, Saskatchewan, for relief under the said Act.

From the judgment given on the first hearing of the application an appeal was taken to the Court of Appeal and from its judgment an appeal was brought to this Court (1). This Court agreed with the construction of the Act by the Court of Appeal to the effect that s. 8 (1) of the Act sets out a condition as a basis for the jurisdiction which enables the Court to intervene and that condition requires the Court to be of the opinion that reasonable provision has not been made in the will for the dependant to whom the application relates. This Court also agreed with the Court of Appeal in finding that, on the evidence before the Court, it could not be said that the deceased had by his will so disposed of his real or personal property that reasonable provision had not been made for the maintenance of his widow. This Court, however, held that leave should be given to file further material and remitted the matter to the Court of King's Bench, Saskatchewan.

Further material was filed, and the application came on for rehearing before Anderson J. in the said Court of King's Bench (2), who found on the evidence that the applicant had discharged the onus cast on her of proving that the testator had by his will so disposed of real and personal property that reasonable provision had not been made for the applicant's maintenance; and held that, by force of s. 8 (2) of the Act, the applicant was entitled to a one-third share in the estate; the will was to stand in full force and effect (including, *inter alia,* the provision for the payment of succession duties, etc., which by the will were payable out of residue) save with the variation that for the annuity given to the applicant by the will there was substituted one-third of the estate, as at the time of the testator's death, free from deductions or one-third clear. As a

(1) [1942] S.C.R. 513, where the judgments below are cited and their holdings described.
(2) [1943] 2 W.W.R. 567; [1943] 4 D.L.R. 712.

1944

CITY OF SASKATOON v. SHAW

further reason for his order, Anderson J. held that, in the exercise of his discretion under s. 8 (1) and s. 8 (2), the applicant was entitled to the allowance made as being maintenance "reasonable, just and equitable in the circumstances".

On appeal to the Court of Appeal for Saskatchewan (1), that Court found that reasonable provision for the applicant's maintenance was not made by the terms of the will, and held that, the Court being obligated to comply with s. 8 (2) of the Act, the applicant should be awarded as an allowance under the provisions of the Act one-third of the estate after payment of debts, funeral and testamentary expenses, that the award should be paid out of the residue of the estate and stand in lieu of all the benefits provided for the applicant under the will, including the provision relieving her from payment of succession duty but excluding the bequests to her of the car, the household furniture and use of the house. (The Court found that such award would amply provide reasonable maintenance).

The appellant limited its appeal to this Court to the question of whether the Court, having found the testator did by his will so dispose of real and personal property that reasonable provision was not made for the maintenance of the applicant, was bound under said s. 8 (2) of the Act to award her one-third of the estate.

G. H. Yule K.C. for the appellant.

E. L. Leslie K.C. for the respondent.

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

HUDSON J.—This controversy arises out of a claim by the respondent under *The Dependants' Relief Act* of Saskatchewan, to a share of her deceased husband's estate.

The late Mr. Shaw was a prosperous farmer residing in Saskatchewan and died there, leaving an estate of a value of over $300,000. By his will he provided for his widow a life annuity of $3,600 per annum, in addition to some small specific bequests.

(1) [1944] 1 W.W.R. 433; [1944] 2 D.L.R. 223.

The Dependants' Relief Act, 1940 (c. 36), R.S.S. 1940, c. 111, provides that a dependant, i.e. wife, husband or child of a testator, may make an application to the Court for an order making reasonable provision for his or her maintenance. Section 8 defines the relief which may be granted on such application:

> 8. (1) If upon an application the court is of opinion that the testator has by will so disposed of real or personal property that reasonable provision has not been made for the maintenance of the dependant to whom the application relates, then, subject to the following provisions and to such conditions and restrictions as the court deems fit, the court may, in its discretion, make an order charging the whole or any portion of the estate, in such proportion and in such manner as it deems proper, with payment of an allowance sufficient to provide such maintenance as the court thinks reasonable, just and equitable in the circumstances.
>
> (2) No allowance ordered to be made to the wife of the testator shall, in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children.

Mrs. Shaw, the respondent, applied to the Court for relief. The application was heard by Mr. Justice Anderson who held that under the will the testator had failed to make reasonable provision for the maintenance of his widow and that she thereby became entitled under subsection 2 to a one-third of the estate of the deceased, free from all deductions. Mr. Justice Anderson also held, in exercise of the discretion given to him by subsections 1 and 2 of section 8, that because of the mode of accumulation of the estate of the deceased as well as other relevant facts and circumstances he was of the opinion that an allowance of one-third of the estate for the widow was reasonable, just and equitable.

On appeal, the Court of Appeal sustained the judgment of Mr. Justice Anderson in holding that the allowance provided by the will was inadequate and that the applicant was entitled to one-third of the estate under subsection 2 of section 8, but held that she was not entitled to receive this free of deductions specified in the judgment. The point as to whether or not one-third was just and equitable under all of the circumstances was not dealt with.

The appeal to this Court was brought on behalf of one of the residuary beneficiaries. It was conceded here that the amount allowed by the will was insufficient and the

1944

CITY OF SASKATOON v. SHAW

Hudson J.

appeal was expressly limited to a question of the construction of the Act. There was no cross-appeal in respect of the deductions.

Before giving consideration to the relevant language of the statute, it will be helpful to look at the law as to the rights of widows in Saskatchewan prior to the passing of this statute.

In early territorial days the common law right of a widow to dower was abolished, but in 1910-11 the Saskatchewan Legislature amended *The Devolution of Estates Act* providing that the widow of a man who died leaving a will by the terms of which his widow would, in the opinion of the judge before whom an application was made, receive less than she would have if he had died intestate leaving a widow and children, might apply to the Supreme Court for relief, and on such application the Court might make an allowance out of the estate as should in the opinion of the judge be equal to what would have gone to such widow under *The Devolution of Estates Act*.

These provisions, with slight alterations, were reenacted in 1918-19 and in several subsequent years, lastly by a separate Act entitled *The Widows' Relief Act*. In 1919 they came before the Saskatchewan Court of Appeal for consideration in a case of *In re Baker Estate* (1), and the statement of the late Mr. Justice Lamont at pp. 112 and 113 as to the purpose and effect of the statute is worthy of quotation at some length:

> The language of secs. 11*a* and 11*g* clearly indicates an intention on the part of the Legislature to restrict the right of a man to dispose of his property by will to the exclusion of his wife.
>
> From the abolition of dower by the Territories' *Real Property Act* to the enactment of the above sections, a man living in the territory now forming this province had the power to dispose by will of all his property without making the slightest provision for his wife and children. Cases arose in which men willed away their property without making any, or sufficient, provision for the widow and cases of such hardship arose that the Legislature took steps to prevent the injustice being continued.
>
> The Legislature had previously provided that in case a man died intestate leaving a widow and child, or children, one-third of his real and personal property should belong to the widow. The Act as it now stands gives the Court jurisdiction to place the widow in as favourable

(1) 13 Sask. Law Rep. 109.

a position where her husband has made a will but in which he has not left her as large a share of his property as would have been hers had he died without a will.

The first question therefore is: Did the deceased Baker by his will leave his widow one-third of his real and personal estate?

A perusal of the will shows that he did not. He left her only the income until she remarried, (if she should remarry) and even then she was directed to use that income for the maintenance of the children as well as herself. If she remarried, she lost it all.

The learned trial judge was of opinion that if a man made ample provision for the needs of his widow until she married another, whose duty it would be to provide for her maintenance, that she did not stand in need of "relief". With deference, I think he misinterpreted the language of sec. 11*a*. The "relief" for which a widow may apply to the Court is not the procuring of such a sum of money as will be sufficient to provide her with the necessaries of life according to her station. It is relief against the provisions of a will by which she has been left a lesser share of the property of her late husband than she would have received had he died intestate. If the will does not leave her the equivalent of what she would have received upon intestacy, she need not be bound by its terms but may apply to the Court for that equivalent. This is what the widow has done here, and in my opinion she is entitled to one-third of the estate.

I do not see that either she or the children would be placed in any better position if the Court gave her that share in any of the ways provided by the Act other than by way of a lump sum. I think, therefore, she should be given a lump sum.

The decision in the *Baker* case (1) was followed in subsequent cases: *In re Bursaw Estate* (2), and *Williams* v. *Moody* (3), so that it was the accepted law in that province until the Act of 1940 that a widow had an absolute right to a one-third share in her late husband's estate, save where there was available to the executors or administrators of the husband an answer or defence in any suit for alimony.

The Dependants' Relief Act, passed in 1940, is an Act to provide relief for dependents including not merely a wife but also a husband and children. Section 8 (1) includes any dependant and authorizes the Court to make an order for such maintenance as the Court thinks reasonable, *"subject to the following provisions* * * *."

The first following provision is subsection 2 which relates only to a dependant who is a wife and, in her case, provides that no allowance shall, in the opinion of the Court, be less than she would have received if the hus-

(1) 13 Sask. L.R. 109. (2) (1924) 19 Sask. Law Rep. 137.
(3) [1937] 2 W.W.R. 316.

1944

CITY OF SASKATOON v. SHAW

Hudson J.

band had died intestate, etc. This language is the language of the provision in *The Widows' Relief Act* until then in force, as is subsection 3 of section 8.

Mr. Yule in a very careful argument contended that from section 3 and section 8 (1) it was perfectly clear that what the Legislature had in mind was to provide reasonable maintenance for the dependant, whether such dependant was a wife or otherwise, that subsection 2 could not be reconciled with a number of other sections of the Act, and that if it were given the construction of the Courts below it would create a most unreasonable situation, particularly in the case of large estates, that for these reasons the provision of subsection 2 of section 8 should be disregarded.

It does not seem to me that the Court should accede to these arguments. The language of subsection 2 of section 8 is clear. It does not create a new or unknown right but recognizes, subject only to the provisions of section 8 (1), a state of things that had existed under the law of Saskatchewan as repeatedly stated by the Legislature and the Courts over a period of thirty years. It would not be right to attribute to the Legislature an intention to reduce the pre-existing provision for the benefit of the widow, unless expressed in clear and definite language. Here the language is an affirmation and not a denial of the right.

In respect of the conflict with other sections of the Act, as pointed out by Chief Justice Martin, it may well be that these provisions are not applicable to a case where a widow is allotted one-third of the estate. But these provisions are still applicable to cases where a periodic allowance is directed, and the fact that the provisions of the statute are not applicable to an order made under section 8 (2) cannot affect the plain meaning of the words used in that section and which constitute an exception in favour of the widow.

It may be that the statute will sometimes produce unreasonable results, particularly in the case of large estates, but in enactments of this character unreasonable or unfair instances are bound to occur. The Legislature was, no doubt, legislating with an eye to the average case, and it does not appear that in such an average case in the Prov-

ince of Saskatchewan the present statute would create any undue hardship, particularly in view of what the widow would have got in that province at any time during the preceding thirty years.

I agree with the Court of Appeal. Having come to this conclusion, it is unnecessary to deal with the finding of Mr. Justice Anderson, that in any event a one-third interest would be reasonable considering the way in which the estate had been accumulated. If it had been necessary to decide this question, then I think the matter should be referred back to the Court of Appeal because we have not here the evidence upon which Mr. Justice Anderson's finding is based.

I would dismiss the appeal, costs of all parties to be paid out of the estate.

RAND J. (dissenting)—This appeal raises a question of the interpretation of *The Dependants' Relief Act*, 1940, of Saskatchewan. That Act is designed to assure provision for a minimum maintenance for dependants notwithstanding contrary testamentary disposition. Dependants include husband, wife, and children either under twenty-one years of age or unable, by reason of either physical or mental disability, to earn a livelihood.

The pertinent sections are as follows:

3. Where a person dies domiciled in Saskatchewan, leaving a will and leaving a dependant or dependants, an application may be made to the Court of King's Bench by or on behalf of any dependant for an order making reasonable provision for his or her maintenance.

8. (1) If upon an application the court is of opinion that the testator has by will so disposed of real or personal property that reasonable provision has not been made for the maintenance of the dependant to whom the application relates, then, subject to the following provisions and to such conditions and restrictions as the court deems fit, the court may, in its discretion, make an order charging the whole or any portion of the estate, in such proportion and in such manner as it deems proper, with payment of an allowance sufficient to provide such maintenance as the court thinks reasonable, just and equitable in the circumstances.

(2) No allowance ordered to be made to the wife of the testator shall, in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children.

13. (1) Where an order is made under this Act, then for all purposes, including the purposes of enactments relating to succession duties, the will shall have effect, and shall be deemed to have had effect as from the testator's death, as if it had been executed, with such variations as are specified in the order, for the purpose of giving effect to the provision for maintenance made by the order.

1944

CITY OF SASKATOON v. SHAW

Rand J.

(2) The court may give such consequential directions as it thinks fit for the purpose of giving effect to an order, but no larger part of the estate shall be set aside or appropriated to answer by the income thereof the provision for maintenance thereby made than such a part as, at the date of the order, is sufficient to produce by the income thereof the amount of the said provision.

(3) A certified copy of every order made under this Act shall be filed with the clerk of the surrogate court out of which the letters probate or letters of administration with the will annexed issued, and a memorandum of the order shall be indorsed on, or annexed to, the original letters probate or letters of administration with the will annexed, as the case may be.

16. No dependant for whom provision is made pursuant to this Act shall anticipate the same, and no mortgage, charge or assignment of any kind whatsoever of or over such provision made before the order of the court shall be of any force, validity or effect.

From the language of section 8 (1) it will be seen that the condition of jurisdiction to make an order is that the Court, by reason of the dispositions of the will, should find that reasonable provision has not been made for the maintenance of the dependant. With that finding made, the scope of the Court's duty as well as discretion is clearly indicated. Subsection 5 of the same section requires the Court, in addition to the other considerations laid down, to have regard to the pecuniary resources of the dependant. The legislation, therefore, is intended to operate on the estate by permitting the Courts to supplement the means of the dependant, whether arising from the will or existing *dehors,* so as to secure to him a maintenance that in the opinion of the Court will be reasonable, just and equitable in the circumstances.

The applicant here was the widow. The Court found that the will did not make an allowance to her sufficient to satisfy the requirements of section 8 (1). It then proceeded to make an order under that subsection. At this point subsection (2) entered and, in its construction of that provision, the Court held that it was bound, as a minimum sufficient in the circumstances, to award to the widow the undivided share she would have received had the husband died intestate leaving children. This, under the intestate statute, would be one-third of the net estate. The question is whether or not the Court, in so construing the provision, was right.

In its ascertainment of the preliminary question, the Court came to the conclusion that an annual allowance of $5,559.40 would have satisfied the subsection. The

will made provision for annual payments to the widow of $3,600. She enjoyed a private income of $1,200; and, disregarding certain other bequests to her, the difference between these two amounts, $5,559.40 and $4,800, was found to represent the sum by which her reasonable maintenance exceeded what, by the effect of the will, was available to her. The estate was of a gross value of $332,712.30. In addition to the annuity, there was bequeathed to the wife a legacy of $1,000, a life interest in the home, furniture valued at $750 and a motor car valued at $750. All succession duty was payable out of the residue. The award to the widow of one-third of the corpus did not, by the judgment below, displace the life interest in the home, the furniture or the automobile.

Prior to the enactment of this legislation, there had been what was known as *The Widows' Relief Act* under which the Court could and was bound to make such an award to the widow as would make up a share of the estate equal to what she would have received had the husband died intestate leaving children. There was in this statute nothing to indicate any other mode of division than that of a fractional share of the corpus, nor was there any power to make an award that would give her anything beyond that share.

It should be remarked that relief legislation of the nature of that in question, which in recent years has appeared in various parts of the world, is not intended to convert courts into will-making or will-destroying bodies. The principle that the distribution of property at death should lie not only in the right but also in the discretion and judgment of the owner, is trenched upon only within well-defined limits. What these statutes do is to enable the Court to subtract from the estate appropriated to others, sufficient to secure to certain dependants certain benefits: subject to those overriding interests, the original dispositions remain.

In the case of large estates, the construction given the subsection leads admittedly to absurdities. In the present instance, if instead of $3,600 the annuity to the widow had been fixed at $4,500, a difference which, considering her age at the husband's death, 79 years, would have had an insignificant effect upon the total distribution, the

1944

CITY OF SASKATOON v. SHAW

Rand J.

statute would not have become operative. And the absurdity rises as the independent means of the widow are greater. The difference of opinion between the testator and the Court as to the sufficiency of those means might be a paltry sum but it would automatically disrupt what might otherwise be considered a wise distribution of benefits. And other anomalies are disclosed in many combinations of circumstances quite within the reaches of probability.

Consistently with section 3, the controlling language in subsection (1) of section 8 is unequivocal. It is reasonable provision for *maintenance* of the dependant, whether that dependant is the widow or a child, that is the desideratum. Maintenance of a dependant does not, however, reach to that enjoyment of property which consists solely of the exercise of rights of ownership, even though, as in the case of a widow, it might be property in the accumulation of which she should consider herself to have shared. The allowance contemplated looks essentially to the living needs, in a broad sense, of the dependant and not to the creation of a rôle of owner.

The construction of the preliminary question already laid down by this Court in this same estate (1) excludes the view that, in the case of a widow, the reasonable provision must, as a minimum, be what is required by subsection (2); but it is this fact that, in applying subsection (2), leads to the seeming logical hiatus in the theory underlying the first subsection. What appears as anomalous is that provision conditioned in maintenance in subsection (1) should be followed by a discrete absolute under subsection (2). But I have come to the opinion that this apparent incommensurability lies not so much in the intention of the legislation as in misconception in the interpretation of subsection (2).

What the Court below in effect holds is that, upon the preliminary ground being established, *The Intestate Succession Act* automatically applies as a minimum for the benefit of the widow. Now, if that were so, why in the subsection should we have the language, "No allowance ordered to be made to the wife of the testator shall,

(1) [1942] S.C.R. 513.

in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children"? Why, "in the opinion of the court"? Certainly the opinion of the Court is not called into action to declare academically the unquestioned effect of the intestate law; and whatever subsection (2) may mean, it cannot, in my opinion, intend only that automatic recognition. We must give some meaning to these words but I cannot find in the judgments below that that has been done.

What, then, is the matter upon which the judging faculty of the Court is to be exercised? This involves, I think, an examination of the word, "received." It has been taken that that word means simply and exclusively "been entitled to by law"; but in a context calling for the exercise of opinion or judgment by the Court, I must attribute to it a less rigid signification.

What, under the subsection, the Court must do is to contemplate the widow in relation to her maintenance under an intestacy. The share which in those circumstances the law awards her may, and generally will, be the source of her maintenance; but it is by no means necessary that the whole of it would, in fact, serve that end. Its application to maintenance would have its limit in the total exhaustion of her share during her lifetime. The statute is dealing, however, with probabilities and these are to be forecast by the Court to which the question is submitted.

In the case of intestacy we may have the widow being "maintained" in her actual needs and requirements and even indulgences by the share the law awards her; these may be free or restricted depending upon her total resources; and, in advance, to estimate judicially the actual pecuniary measure of that maintenance is of the sort of task daily accepted in our Courts. Over and above that maintenance, however, the intestacy may have placed within her control, to do with by way of disposing or otherwise as she might please, property far in excess of what she would actually use or need. But this statute, intended to realize the substance of the widow's just and legitimate rights to security, is not concerned

1944

CITY OF SASKATOON v. SHAW

Rand J.

to furnish her with a substratum through which to gratify a desire to exercise formal rights of ownership or to share in the distribution of her husband's property.

The "opinion of the court" may be said to be exercised if a substantial equivalent of the widow's share under intestacy should be ascertained and granted as an allowance under subsection (1): or even if specific assets should be set aside as that equivalent. That is not, of course, what the court below did. The former would ordinarily involve the conversion of a share of bulk into periodic payments. But could the mathematics of a life annuity to be purchased by a bulk share, to be charged upon the estate, and to be paid as maintenance, be the matter of the "opinion"? I do not think so. And the moment we go beyond the undivided intestate share as such we are at large upon the proper construction of the subsection.

An analysis of subsections (1) and (2) raises a doubt as to the precise signification of the word, "allowance". That may be either the total sum which the Court finds the will should have given to complete the reasonable provision for the dependant or the amount by which the actual allowance of the will falls short of that figure. In the former sense, the full allowance being provided by order would, in cases where there is partial provision by the will, necessarily involve a substitution for what is given by the will. In the latter sense, the will is maintained *in toto* in its provision for the dependant and the supplementary allowance would be charged upon the distribution outside of that.

The condition of the application is that the Court should be of opinion that the testator "has by will so disposed of real or personal property that reasonable provision has not been made for the maintenance of the dependant". Now, there is nothing in the Act dealing with substitution and, in view of section 13, the language just quoted—where there is no question as between dependants—means essentially disposal of property to persons other than the dependant; there is no reason to touch allowances to the dependant and the failure of reasonable provision takes into account what may have been so

given. But this makes significant to the order the difference between inadequate provision in the will for the dependant and provision in the will for non-dependants.

Then, in passing to subsection (2), to ascribe to the word, "allowance", the meaning of a supplementary provision may at first sight appear to present a difficulty, but I think a closer examination dispels it. Whether the order operates with a supplementary effect or as a substitutional or original provision for the whole amount, the total allowance is in fact "ordered"; it exists by reason of the order; "ordered to be made" means made by reason of the order; the total allowance is what it is because of the order. The language is to be interpreted as if the subsection read:

> No (total) allowance (for maintenance) ordered to be made to the wife of the testator shall, in the opinion of the court, be less than (the total allowance for maintenance) she would have received if the husband had died intestate leaving a widow and children.

From this consideration of the section, it is clear to me that the underlying purpose and conception of subsection (1) are carried through into (2) and that what is envisaged is a determination "in the opinion of the court" of what the actual maintenance of the widow—the pecuniary dimensions of her actual living—in the circumstances of intestacy would have been and to take the amount so found as the measure for determining the supplementary or original allowance called for by the first subsection. The Court is to exercise its judgment upon the resources that would go into actual maintenance under intestacy and to determine to what extent that would be received from the intestate share. It would be received because it would proceed from that share to absorption in the maintenance.

Such a construction not only reconciles subsections (1) and (2) but gives meaning to all of the language of (2) and brings it within the theory that underlies the statute as a whole: it escapes the anomalies and absurdities of the alternative construction: and it carries out the intention and purpose of the legislative language of guaranteeing to the widow, in such a case, as a minimum as ample a maintenance under a will as if the husband's property had been distributed by law.

1944

CITY OF SASKATOON v. SHAW

Rand J.

I would, therefore, allow the appeal and send the matter back to the judge of first instance to have it ascertained by him what the reasonable maintenance of the widow, under the circumstances of intestacy, would have drawn from her share of the estate. That amount will be the minimum allowance for maintenance, and for the difference between that and the provision made by the will, an order for a supplementary allowance should be made, charged upon property otherwise disposed of, as the judge may determine. The costs of both parties in all Courts should be paid out of the estate.

THORSON J. (*ad hoc*)—The effect of *The Widows' Relief Act,* R.S.S. 1930, chap. 91, and previous legislation to the same effect was that a man could not by his will validly leave his widow in a worse position than she would have been in if he had died intestate leaving a widow and children, and that if he attempted to do so, the Court, on her application for relief from the terms of the will, would make an allowance to her equal to one-third of his estate, since this would be the amount, according to the intestacy law of the province, that would have gone to her if he had died intestate leaving a widow and children. The only fact which the widow had to prove was that her deceased husband by his will had left her less than one-third of his estate. This state of the law gave the widow an absolute right to one-third of her husband's estate notwithstanding the terms of his will. This right existed whether the husband had made reasonable provision for his wife's maintenance or not, and whatever the means of the widow might be. On the other hand, the Court had no power to allow the widow more than one-third of the estate even if this was inadequate to provide reasonable maintenance for her, no matter what the size of the estate was. Moreover, the only dependant of the testator to whom relief could be given was his widow.

The defects in this social legislation were largely met by *The Dependants' Relief Act,* 1940 (c. 36), R.S.S. 1940, chap. 111, which repealed *The Widows' Relief Act,* extended the right to relief to other dependants of the testator than only

his widow and established a new test of entitlement to relief. The nature of the test and the power of the Court to grant relief appear from section 8 (1), which reads as follows:

> 8. (1) If upon an application the court is of opinion that the testator has by will so disposed of real or personal property that reasonable provision has not been made for the maintenance of the dependant to whom the application relates, then, subject to the following provisions and to such conditions and restrictions as the court deems fit, the court may, in its discretion, make an order charging the whole or any portion of the estate, in such proportion and in such manner as it deems proper, with payment of an allowance sufficient to provide such maintenance as the court thinks reasonable, just and equitable in the circumstances.

Two fundamental changes in the law were made. It is no longer possible for a widow to obtain relief from the terms of her husband's will merely on proof that he has left her less than one-third of his estate. She must now satisfy the Court that the testator has by will so disposed of real or personal property that reasonable provision has not been made for her maintenance. Until the Court is of opinion that such is the case, it has no power to interfere with the terms of the will or order the payment of any allowance to her. The test of her entitlement to relief is a new one, namely, proof that reasonable provision has not been made for her maintenance. This is one change in the law. There was also another change, for when the Court, on the evidence before it, is of opinion that reasonable provision has not been made for the maintenance of the widow, it is not restricted to allowing her one-third of the estate, but may order the payment of an allowance sufficient to provide reasonable maintenance for the widow "as the court thinks reasonable, just and equitable in the circumstances". Such allowance may greatly exceed one-third of the estate and may conceivably in a given case exhaust it. In this respect also there is a radical change in the law.

It is admitted that the respondent satisfied the onus cast upon her by section 8 (1) and that the Court below had the right to order the payment of an allowance to her. This appeal is limited to the construction of section S (2) which provides as follows:

> 8. (2) No allowance ordered to be made to the wife of the testator shall, in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children.

1944

CITY OF SASKATOON v. SHAW

Thorson J. (*ad hoc*)

The Court of Appeal ordered payment to the respondent of one-third of the estate of her deceased husband as a reasonable provision for her maintenance. The estate was a large one, amounting to over $332,000.

The amount provided by the will, apart from certain specific bequests, together with her own means gave the respondent an annual income of $4,800. She gave evidence in support of her application under the Act that the annual amount required for reasonable provision for her maintenance was $5,559.40. The amount received was, therefore, approximately $63 per month less than the amount required.

Counsel for the appellant contended that the Court, having acquired jurisdiction to order the payment of an allowance, the respondent having proved that reasonable provision had not been made for her maintenance, had no jurisdiction beyond making an order for payment of an allowance sufficient to provide such maintenance as the Court thought reasonable, just and equitable in the circumstances and had no authority to do more than order the payment of an additional allowance of $63 per month, since that would meet the needs of the respondent and remove her cause of complaint; that section 8 (1), together with section 3 (which gives a dependant the right to apply to the Court for an order making reasonable provision for his or her maintenance), is the governing section of the Act and that section 8 (2) must be brought into line with it; and that the interpretation placed upon section 8 (2) by the Court below makes the section inconsistent with and repugnant to section 8 (1), section 3 and several other sections of the Act.

The answer to this argument, as I read the Act, is that section 8 (2) is an exceptional section. The broad scheme of the Act is that a man's freedom to dispose of his estate by will is made subject to his duty to make reasonable provision for the maintenance of his dependants, and that if he fails in such duty the Court will intervene and give such relief from the provisions of his will as the necessity of the case demands. Section 3 allows any dependant, as defined by the Act, to apply to the Court for an order making reasonable provision for

his or her maintenance, but each dependant applicant must comply with the test of entitlement established by section 8 (1), for this is a condition of the jurisdiction of the Court to intervene. When the onus of proof imposed upon the applicant has been discharged and the Court has acquired jurisdiction to act, the applicant is entitled to the order contemplated by section 8 (1)—an order for payment of an allowance sufficient to provide such maintenance as the Court thinks reasonable, just and equitable in the circumstances. Every successful dependant is entitled to this order, whether it be the widow or any other dependant. The power conferred upon the Court by section 8 (1), once the condition for its exercise has been complied with, is, however, made *"subject to the following provisions"*, one of which is section 8 (2). That section puts the widow who has met the statutory test of entitlement in an exceptional position, not enjoyed by any other dependant of the testator, and imposes an exceptional obligation upon the Court which does not rest upon it when it is dealing with any dependant applicant other than the widow. When the widow has proved her entitlement to relief, the Court is required by section 8 (1) to order the payment of an allowance sufficient to provide such maintenance as the Court thinks reasonable, just and equitable in the circumstances, but the Court is also required by section 8 (2) to see to it that the allowance ordered by it shall not, in the opinion of the Court, "be less than she would have received if the husband had died intestate leaving a widow and children", that is to say, that it shall not be less than one-third of the estate.

Effect must be given to both section 8 (1) and section 8 (2). To contend that section 8 (1) is the controlling section and that section 8 (2) must be brought into line with it involves the elimination of the words "subject to the following provisions" from section 8 (1) and the rejection of section 8 (2) altogether in every case where, because of the size of the estate, one-third of it would exceed the requirements of the widow for her maintenance. This would make the construction of section 8 (2) depend upon the size of the estate. There is no need to strain

1944

CITY OF SASKATOON v. SHAW

Thorson J. (*ad hoc*)

the words of section 8 (2) to force it into line with section 8 (1), and full effect can be given to both sections if section 8 (2) is regarded as putting the widow in an exceptional position as compared with that of other dependants. That was, in my opinion, the intent of section 8 (2), expressed in clear and explicit terms in which I see no ambiguity. Once a widow has proved her entitlement to relief, the Act gives her the benefits of both section 8 (1) and section 8 (2), whichever are the greater. She is entitled to such allowance as the Court has power to order under section 8 (1) to make reasonable provision for her maintenance, and, if that is less than one-third of the estate, she is entitled under section 8 (2) to an allowance that is not less, in the opinion of the Court, than one-third of the estate, even if such allowance, by reason of the size of the estate, exceeds the amount required for reasonable provision for their maintenance. The allowance ordered by the Court may be greater than one-third of the estate, but it must not be less.

Counsel for the appellant also argued that the respondent was not entitled by section 8 (2) to one-third of the estate and that the Court below had failed to consider the effect of the words "in the opinion of the court" contained in the section. His contention was that these words meant that the Court must consider what the respondent would have had to maintain herself if one-third of the estate had gone to her on the death of her husband, and that it must form an opinion as to how much she would reasonably spend for her maintenance if one-third of the estate had gone to her. This contention involves importing into the section words that are not there and different from those that are there. What would the respondent have received if her husband had died intestate leaving a widow and children? The answer is that she would have received one-third of the estate, with no restriction upon her rights in respect of it. Section 8 (2) is, therefore, a direction to the Court that the allowance ordered by it shall, in the opinion of the Court, not be less than one-third of the estate. It is not a direction that it shall not be less than something else, such as what the widow would spend for her maintenance if she had one-third of the estate. The Court is required to measure the respective

amounts involved, the amount of the allowance proposed on the one hand, and the amount of one-third of the estate on the other, and form an opinion as to their equivalency. The allowance need not necessarily take the form of one-third of the estate so long as it is not less than one-third would be. It may take various forms, as section 8 (3) indicates, but if an allowance other than one-third of the estate, such as an allowance of periodic payments, is ordered, the Court must be sure that such allowance is not less than one-third of the estate. How could the Court more precisely determine the amount of the allowance ordered, to ensure that it will not be less than one-third of the estate, than by ordering that one-third of the estate should be paid? And how could it be said that in so doing the Court has disregarded the judicial function required to be performed by the words "in the opinion of the court" contained in the section, even if these words are not specifically referred to in the reasons for judgment of the Court below?

The Court was faced with a problem similar to that which faced the Court under *The Widows' Relief Act* and similar previous legislation. The language of section 8 (2) of the present Act is similar to that of section 8 of *The Widows' Relief Act,* from which it appears to have been substantially borrowed. Under that and similar previous legislation the Court was directed, in effect, to make such allowance as shall, in the opinion of the Court, be equal to one-third of the estate, and the Court, in such cases as *In re Baker Estate* (1), met the direction of the section by allowing the successful widow one-third of her husband's estate. I see no reason why the Court should not follow a similar practice under section 8 (2) of the Act under review.

I agree that the appeal should be dismissed. The costs of the parties throughout should be payable out of the estate.

Appeal dismissed. Costs of all parties to be paid out of the estate.

Solicitor for the appellant: *G. H. Yule.*

Solicitors for the respondent: *MacPherson, Milliken, Leslie & Tyerman.*

(1) (1919) 13 Sask. L.R. 109.

1944

*Nov. 6
*Dec. 20

H. J. G. McLEAN (DEFENDANT)..... APPELLANT;

AND

DAME JANET ALICE PETTIGREW (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Automobile—Person invited by driver who was also owner—Accident—Injury to passenger—Damages—Invitation made and accepted in Quebec—Accident occurring in Ontario—Negligence of driver proven—Conflict of laws—Whether Quebec or Ontario law applicable—Driver liable, if negligence actionable under Quebec law and punishable under Ontario law—Agreement by benevolent driver to carry passenger as a favour—Not a contract of transport nor a "contrat de bienfaisance"—Arts. 1053 and 1054 C.C.—Criminal Code, s. 285—Highway Traffic Act (Ont.) R.S.O., 1937, c. 288, as amended in 1939 by 3 Geo. VI, c. 20, s. 6.

The respondent, having accepted in Montreal an invitation from the wife of the appellant to accompany them on a trip to Ottawa, was seriously injured as the result of an accident occurring in Ontario. The automobile was owned and driven by the appellant. The respondent's action for damages was maintained by the trial judge for an amount of $5,536.18, which judgment was affirmed by the appellate court.

Held that the appeal to this Court should be dismissed. Upon the evidence, the negligence of the appellant has been established; and the respondent was entitled to maintain her action, as such negligence, actionable under the law of Quebec, was punishable under the law of Ontario.

Per The Chief Justice and Hudson, Taschereau and Estey JJ.—The respondent has fulfilled the two conditions required in order to establish the liability of the appellant: first, the negligent act of the appellant was a quasi-offence for which the respondent would have recovered damages in Quebec, if the act had been committed in that province, and, secondly, the respondent has established that such act was "wrongful" i.e. "non justifiable", and therefore punishable under the law of Ontario, as it has been established that the appellant has driven his car "without due care and attention," in violation of a statuory law of that province (*Highway Traffic Act, s. 27*).

Per The Chief Justice and Taschereau and Estey JJ.—An agreement between the benevolent driver of an automobile and a passenger whom he has invited to travel with him, as a favour, is neither a contract of transport, which necessarily implies an onerous remuneration, nor a contract of prestation of gratuitous services, generally called "contrat de bienfaisance". Therefore, no "responsa-

PRESENT:—Rinfret CJ. and Hudson, Taschereau, Kellock and Estey JJ.

bilité contractuelle" can be incurred by a benevolent driver; and any claim by an invited guest must derive from an offence or a quasi-offence.

Canadian National Steamships Co. Ltd. v. *Watson* ([1939] S.C.R. 11) ref.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, MacKinnon J. and maintaining the respondent's action.

The respondent was a passenger in an automobile owned and driven by the appellant, having accepted an invitation from the wife of the appellant to accompany them on a trip to Ottawa. About four miles from the town of Rockland, in the province of Ontario, the car suddenly left the road and went into the ditch. As a result of the accident, the respondent was injured, sued the appellant for damages and was awarded by the Superior Court a sum of $5,536.18; and the appellate court affirmed the judgment.

Aimé Geoffrion K.C. and *John Bumbray K.C.* for the appellant.

James P. Diplock and *James E. Mullally* for the respondent.

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

TASCHEREAU J.:—Dans le cours du mois de juillet 1940, l'intimée, alors qu'elle était passagère dans l'automobile du demandeur, fut victime d'un accident pour lequel elle réclame de l'appelant, propriétaire et conducteur bénévole de la voiture, la somme de $9,536.18. Elle avait accepté, à Montréal, l'invitation de se rendre à Ottawa en compagnie de l'appelant et son épouse, et au cours du voyage, sur la route près de Rockland, dans la province d'Ontario, l'automobile dérapa, et l'intimée fut sérieusement blessée.

La Cour Supérieure lui a accordé $5,536.18, et la cour d'appel de la province de Québec a unanimement confirmé ce jugement.

La demanderesse invoque la responsabilité contractuelle de l'appelant, avec qui un contrat de transport gratuit, appelé contrat de bienfaisance, serait intervenu, et qui

1944

McLEAN v. PETTIGREW

Taschereau J.

l'obligerait aux "soins d'un bon père de famille". Elle fait également reposer son droit à des dommages sur la responsabilité quasi-délictuelle de l'appelant, qui serait engagée par la faute la plus légère (*levissima culpa*).

Malgré que les parties soient toutes deux domiciliées dans la province de Québec, et que l'accident se soit produit dans la province d'Ontario, l'intimée invoque la loi de la province de Québec comme étant celle qui doit déterminer ce litige. Elle soumet que, relativement à l'obligation contractuelle, c'est la loi du lieu où le contrat est intervenu qui doit trouver son application; et en ce qui concerne la responsabilité quasi-délictuelle, sa prétention est à l'effet que la loi de la province de Québec s'applique, car le quasi-délit reproché à l'appelant donnerait ouverture à une action en dommages dans la province de Québec, s'il était commis dans cette province, et est à la fois "wrongful" ou "non-justifiable" dans la province d'Ontario. Et à l'appui de cette dernière soumision, l'intimée a cité quelques autorités qui la justifieraient et que j'examinerai tout à l'heure.

Voyons en premier lieu s'il y a contrat entre le conducteur bénévole de l'automobile et son passager. Il est certain que l'acte de courtoisie que pose une personne qui en invite une autre à monter dans sa voiture, ne peut être considéré comme un contrat de transport. Ce dernier est en effet essentiellement un contrat à titre onéreux. Les textes sont précis à ce sujet, et les principes généraux du droit doivent nécessairement nous conduire à la même conclusion. Comme le dit Josserand (Recueil Hebdomadaire, Jurisprudence générale, Dalloz 1926, chronique, page 22):—

> Le contrat de transport est une des opérations qui donnent naissance, de part et d'autre, au plus grand nombre d'obligations possibles, et dont le plexus obligatoire est le plus riche; cette caractéristique répugne à la notion du titre gratuit qui se retrouve au contraire dans les opérations à contexture simple (donation, dépôt).

La gratuité qui caractérise le transport bénévole est clairement incompatible avec le contrat de transport dont la rémunération est l'un des éléments essentiels. Et aussi la jurisprudence française est-elle définitivement fixée, et elle a conclu depuis longtemps qu'il n'y a pas de contrat de

transport entre le conducteur bénévole d'une voiture automobile et son passager qu'il transporte par complaisance. (Toulouse, 22 juin 1914, D.P. 1917, 2. 83; Nimes, 19 mai 1924, Rec. Somm. 1925, n° 740; Montpellier, 8 octobre 1924, D.P. 1925, 2. 41; Poitiers, 17 février 1925, D.P. 1925, 2. 41; Lyon, 23 mai 1925, Mon. Judic., 28 août; 10 juin 1925, Mon. Judic., 7 août).

Dans la province de Québec, la règle n'est pas différente, et il ne se trouve pas d'arrêt de la Cour Supérieure ou de la cour d'appel, je crois, qui contredise la jurisprudence française. Mais on prétend qu'entre le chauffeur bénévole et celui qu'il transporte, il y a contrat de prestation de services gratuits, qu'on appelle contrat de bienfaisance. Et l'intimée a cité quatre jugements qui justifieraient cette prétention.

Dans *Langevin* v. *Beauchamp,* (1) la question ne fut pas résolue, la cour d'appel s'étant contentée de déclarer qu'il y avait responsabilité de la part du conducteur de l'automobile, sans déterminer si cette responsabilité naissait d'une obligation contractuelle ou d'une faute quasi-délictuelle.

Quant à la décision dans la cause de *Garfingle* v. *Eliasoph,* (2) elle semble plutôt à l'effet que la responsabilité du conducteur bénévole est purement quasi-délictuelle. Ainsi, M. le juge Létourneau s'exprime ainsi:—

> Sous les articles 1053 et 1054 de notre Code civil, il ne peut être ainsi distingué entre la faute grossière et la faute légère, si celle-ci tout aussi bien que celle-là a pu donner lieu à un accident; la faute légère sera dans ce cas, tout autant que la faute lourde, génératrice de responsabilité.

Et, pour sa part, M. le juge Bond dit:—

> In my opinion, the question of responsibility of the appellant must be determined by the provisions of article 1053 C. C. which provides that every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Mais la cour d'appel s'est définitivement prononcée en 1932 et a conclu à la double responsabilité, contractuelle et quasi-délictuelle, du conducteur bénévole.

(1) [1928] Q.R. 44 K.B. 569 (2) [1931] Q.R. 51 K.B. 34

1944

McLEAN v. PETTIGREW

Taschereau J.

Parlant au nom d'une cour unanime, dans *Parent et British Colonial* v. *Garneau* (1) M. le juge Dorion dit ce qui suit:

> Cette responsabilité résulte, ou bien d'un quasi-délit (Art. 1053 C.C.), et alors elle est encourue pour la faute la plus légère (*levissima culpa*). ou bien d'un contrat, et alors elle n'existe que si le contrevenant n'a pas accompli ses obligations avec les soins d'un bon père de famille (*levis culpa*) Art. 1064 C.C. Cette question est traitée au long dans l'ouvrage de M. Rutsaert: Le fondement de la responsabilité civile extra-contractuelle, (page 248).
>
> Il me paraît hors de toute qu'il y a contrat entre le chauffeur bénévole et celui qu'il transporte, il y a *duorum consensus in idem placitum*. Quelle différence y a-t-il entre le contrat de louage de services et le contrat de prestation de services gratuits? La même que celle qui existe entre la vente et la donation. L'un est contrat à titre onéreux et l'autre, un contrat à titre gratuit. Dans les deux cas les obligations du débiteur sont celles d'un bon père de famille et ses responsabilités, celles qui résultent de la faute légère.

En 1941, dans une cause de *Assad* v. *Latendresse*, (2), M. le juge E. M. W. McDougall a adopté également la théorie de la faute contractuelle, sans exclure la responsabilité quasi-délictuelle, et dit ce qui suit:—

> Considering, moreover, that if the case be regarded from the point of view of a breach of the agreement to carry the plaintiff safely, (faute contractuelle), it is a matter of indifference that the accident may have occurred outside the limits of the jurisdiction within which the agreement was entered into (Quebec), and there is nothing in the law which declares such remedy to be repugnant to the remedy in delict.

Dans les causes que je viens de citer, les faits ne se présentaient pas comme se présentent ceux qui font l'objet du présent litige. En effet, l'intérêt qu'il y avait de distinguer entre la responsabilité contractuelle ou quasi-délictuelle ne reposait que sur la question de savoir si le conducteur bénévole était responsable de sa faute lourde, de sa faute légère, ou de sa faute très légère. La jurisprudence a répondu que dans l'un ou l'autre cas, la faute lourde n'était pas nécessaire pour engendrer la responsabilité, et que la preuve d'une faute très légère ou légère était suffisante, pour qu'il y ait responsabilité, quasi-délictuelle dans le premier cas, et contractuelle dans le second. La différence entre les fautes légère et très légère semble bien difficile à établir, et j'avoue qu'il m'est impossible, à moins de rester dans les sphères de la théorie, de tracer une ligne de démarcation facilement applicable aux cas concrets qui se

(1) [1932] Q.R. 54 K.B. 335, at 341 (2) [1941] Q.R. 79 S.C. 286, at 287

présentent tous les jours. Aussi, est-il moins nécessaire de rechercher s'il y a responsabilité quasi-délictuelle ou contractuelle du conducteur bénévole, quand les parties sont domiciliées dans la province de Québec, où l'accident se produit, et où s'instruit le procès. Que la responsabilité soit quasi-délictuelle ou contractuelle, peu importe! Elle est engendrée, dans les deux cas, par des fautes dont la différence de degré est à peine déterminable. Le demandeur n'a qu'à poser le dilemme, et il doit obtenir des dommages.

Mais dans le présent cas, il n'en est pas ainsi, car si la responsabilité est contractuelle, c'est la loi de la province de Québec (*lex fori*) qui s'applique, et l'intimée doit réussir. Mais si, au contraire, c'est en vertu des principes de la responsabilité quasi-délictuelle que cette cause doit être jugée, alors la situation peut être différente.

En Cour Supérieure, l'honorable juge MacKinnon, se basant sur les précédents cités plus haut, a accepté la théorie de la double responsabilité et a maintenu l'action. En cour d'appel, messieurs les juges Prévost, McDougall et Marchand ont exprimé l'opinion qu'il y avait responsabilité contractuelle et délictuelle, tandis que M. le juge en chef Létourneau refuse de considérer l'aspect contractuel, à cause de la rédaction de la déclaration qui limiterait la demanderesse à un recours quasi-délictuel. Enfin, M. le juge St-Germain conclut que la responsabilité de l'appelant est engagée soit contractuellement, soit par le quasi-délit qu'il a commis.

C'est la première fois que ce tribunal est appelé à résoudre la question de savoir s'il existe des rapports contractuels entre le conducteur bénévole et son invité qui prend place dans sa voiture automobile. Comme nous l'avons vu précédemment, il ne se forme pas entre les deux parties de contrat de transport, car la notion de gratuité répugne à l'existence d'une semblable convention. Y a-t-il cependant un contrat de bienfaisance qui oblige le conducteur complaisant?

Le contrat de bienfaisance n'est pas défini dans notre code. Le code Napoléon le définit ainsi:—

> Le contrat de bienfaisance est celui dans lequel l'une des parties procure à l'autre un avantage purement gratuit.

1944

McLEAN v. PETTIGREW

Taschereau J.

Malgré l'absence de définition, un semblable contrat existe tout de même chez nous, car il y a de nombreux contrats, reconnus dans notre droit comme en France d'ailleurs, où l'un des contractants procure à l'autre un avantage sans aucune contre-partie. Ainsi, la donation est le plus important que l'on puisse classifier dans cette catégorie à laquelle viennent se joindre aussi le dépôt, le mandat, ou le prêt à usage, dont cependant certains cessent d'être des contrats de bienfaisance quand ils sont salariés.

Mais tous ces contrats dits de bienfaisance, où un avantage purement gratuit est procuré, sont productifs d'obligations. Ainsi, la donation suppose une libéralité de la part du donateur et l'acceptation du donataire. Et lorsque le concours des volontés est intervenu, le contrat est parfait et devient irrévocable, sauf les cas prévus par la loi, ou une condition résolutoire valable (Art. 755 C.C.). Le donateur aura donc l'obligation de délivrer, et cette obligation donne ouverture à une action personnelle contre le donateur en défaut, en faveur du donataire.

Mais y a-t-il de semblables obligations qui naissent du transport bénévole?

Savatier (Traité de la responsabilité civile, tome 1er, 1939, p. 163) répond dans l'affirmative à cette question, et il s'appuie sur quelques arrêts des tribunaux français.

Ainsi, le tribunal civil d'Avignon a décidé en 1924 (Dalloz, Recueil Hebdomadaire, 1924, p. 711) qu'il s'établit un contrat de bienfaisance entre le propriétaire d'une automobile et celui qu'il consent à promener à titre gratuit, et ce principe a été confirmé par le tribunal civil de Nimes (Recueil des Assurances, 1925, p. 443). Ce dernier tribunal cependant a réformé l'arrêt rendu par le tribunal civil d'Avignon, parce que ce dernier en était venu à la conclusion que le propriétaire de la voiture ne devait répondre que de sa faute lourde, et le tribunal de Nimes au contraire a conclu que la faute légère était suffisante pour engager la responsabilité du conducteur bénévole.

La Cour d'Appel de Lyon a jugé dans le même sens (Recueil des Assurances, 1926, p. 54) et trois arrêts de la Cour d'Appel de Dijon (Gazette du Palais, 1928, vol. 2, p. 885; Gazette du Palais, 1929, vol. 2, p. 60; et Gazette du

Palais, 1929, vol. 2, p. 592) appuient la même thèse et concluent à l'existence d'un contrat purement de bienfaisance productif d'obligations.

Savatier qui, comme nous l'avons vu, partage cette opinion, regrette (cité *supra* page 164) que, d'une façon générale, la jurisprudence en France n'ait pas accepté sa manière de penser et qu'elle ait refusé de voir un contrat dans le transport gratuit.

En effet, l'étude de la jurisprudence révèle que, si elle a manifesté quelques hésitations, elle est maintenant ralliée au système opposé, et elle a définitivement précisé que le transport bénévole exclut toute idée de contrat de transport ou de bienfaisance. Ce n'est pas sur le terrain contractuel que doit se placer le passager blessé au cours d'un transport gratuit, mais il doit faire reposer son action sur un délit ou un quasi-délit du conducteur bénévole. Ce principe a été reconnu par la plupart des tribunaux en France, et il est admis par la grande majorité des auteurs.

C'est ainsi qu'en 1914, le tribunal de Toulouse (Dalloz, Jurisprudence générale, 1917, Recueil périodique, p. 83) décide qu'aucun contrat de transport ne se forme entre le propriétaire d'une automobile et une personne qu'il transporte gratuitement et par pure complaisance dans sa voiture.

La Cour d'Appel de Grenoble (Gazette du Palais, 1924, vol. 2, p. 189) décide que le transport bénévole d'un tiers par un propriétaire d'automobile exclut l'idée de tout contrat; un tel transport n'engendre à la charge du propriétaire d'autre obligation que celle de répondre du préjudice provenant d'une faute, d'une négligence ou d'une imprudence.

Le Tribunal Civil de la Seine (Recueil des Sommaires, 1925, p. 42, n° 739) statue que:—

> La personne transportée à titre gratuit dans une automobile ne peut, en cas d'accident, invoquer un contrat de transport; elle doit, pour réussir dans sa demande en indemnité, prouver la faute du défendeur.

Et, à la même page du même Recueil se trouve une décision du tribunal de Nimes, 19 mai 1924, où un arrêt semblable a été rendu. (*Vide* dans le même sens Dalloz, Jurisprudence générale, 1925, Recueil périodique, p. 41 et p. 44; Dalloz, Jurisprudence générale, 1926, Recueil pério-

1944

McLEAN v. PETTIGREW

Taschereau J.

dique, p. 121, où sont citées des décisions des cours de Grenoble, de Caen, de Paris, de Lyon, de Douai et de Nimes).

En 1927, la Cour d'Appel d'Aix (Dalloz, Jurisprudence générale, 1927, Recueil Hebdomadaire) a jugé également que le propriétaire d'une automobile ne peut être considéré comme lié à celui qu'il transporte bénévolement dans sa voiture par un contrat de transport.

En 1927, la Cour de Cassation, (Chambre des requêtes) (Dalloz, Jurisprudence générale, 1927, Recueil périodique) a formellement décidé que le transporteur bénévole est responsable envers la personne transportée des accidents causés par sa faute, mais que cette responsabilité est délictuelle et non contractuelle. Et la Cour de Cassation, l'année suivante, insiste encore sur la nécessité de la faute délictuelle. En 1928, cette jurisprudence est réaffirmée de nouveau par la Cour de Cassation (Sirey, lois et arrêts, 1928, p. 353); (Gazette du Palais, 1928, vol. 1, p. 616).

Le Juris-Classeur Civil, 2ième appendice, articles 1382-1386, fascicule 9, 1936, paragraphe 559) contient ce qui suit:—

> Si le transport a lieu à titre purement bénévole et gratuit, par complaisance, comme c'est le cas lorsqu'un automobiliste invite, par exemple, des amis à faire une promenade, la jurisprudence est bien fixée aujourd'hui en ce sens qu'on ne peut appliquer, en cas d'accident, ni les règles du contrat ni celles de l'article 1384.

La Cour de Cassation, en 1929, a rendu un autre arrêt dans le même sens (Sirey, lois et arrêts, 1929, p. 249) et conclut que la base de la responsabilité dans le cas de passage bénévole se trouve dans les termes de l'article 1382 du code civil.

Le 30 décembre 1931, la Cour de Cassation (Sirey, arrêts, 1932, p. 62) applique encore l'article 1382 du code civil, de même que la Cour d'Appel d'Angers (Gazette du Palais, 1936, vol. 1, p. 323), où toute idée de responsabilité contractuelle est exclue.

Enfin, pour ne citer que ce dernier arrêt, la Cour d'Appel de Bordeaux en 1936 (Recueil Hebdomadaire, Dalloz Jurisprudence générale, 1936) signale de nouveau la nécessité de la faute délictuelle, pour que soit engagée la responsabilité du conducteur bénévole.

A cette longue série d'arrêts, ajoutons quelques opinions d'auteurs contemporains, et l'on verra que seule la faute quasi-délictuelle est génératrice de la responsabilité du conducteur.

Colin et Capitant (Droit Civil Français, vol. 2, p. 212) s'expriment ainsi:—

Lorsque le transport est fait à titre gracieux, la situation est différente car il n'y a pas alors contrat de transport.

Planiol et Ripert (Traité pratique de droit civil français, vol. 6. p. 848):—

La question a été posée à propos des accidents survenus aux personnes transportées en automobile à titre gracieux. Les demandeurs en responsabilité ont d'abord invoqué la responsabilité contractuelle du transporteur; mais les arrêts ayant généralement refusé d'admettre qu'il y ait contrat dans cette hypothèse, ils ont fait appel à l'article 1384.

Esmein: S. 1926, 1, 249, dit ce qui suit:—

Ce n'est pas qu'un service gratuit ne puisse faire l'objet d'un engagement juridique: Le code civil l'admet pour le mandat et le dépôt: et il en peut être ainsi pour l'engagement d'opérer un transport: En parlant d'un prix dans la définition du transport, l'article 1710 a simplement envisagé le cas usuel. Mais le plus souvent celui qui offre un transport gratuit n'a pas l'intention de s'obliger juridiquement et par suite la responsabilité ne peut être rattachée à une obligation contractuelle.

Josserand (Dalloz, Jurisprudence générale, 1926, Recueil Hebdomadaire, Chronique, p. 22);—

On comprend dès lors que nos jurisdictions, faisant table rase de toute conception contractuelle, se refusent, en général, à faire dériver la responsabilité de l'automobiliste envers son obligé, aussi bien d'un contrat innommé, à contenu plus ou moins défini, que d'un contrat de transport.

Il faut donc renoncer, et nos juridictions renoncent pour la plus grande majorité, à construire la responsabilité de l'automobiliste complaisant sur le plan contractuel: C'est dans le domaine extra-contractuel qu'il faut en situer l'origine et en rechercher les éléments.

René Roger (Dalloz, Jurisprudence générale, 1935, Recueil périodique, à la page 39) dit ceci:—

Peu importe le qualificatif, car il est certain que l'intention de se lier par contrat n'existe pas: ni le voiturier, ni le voyageur n'ont d'action l'un contre l'autre, le premier pour obliger le voyageur à monter, le second pour forcer le voiturier à le prendre.

Et enfin, Mazeaud, (Traité de la responsabilité civile, délictuelle et contractuelle, 3ième éd. p. 142, n° 113) dit ce qui suit:—

Voici maintenant une personne qui demande à l'un de ses amis de l'amener dans sa voiture automobile ou qui accepte la place qui lui est offerte. Un accident se produit. Y a-t-il responsabilité contractuelle du

1944

McLEAN v. PETTIGREW

TaschereauJ.

transporteur? La question se pose journellement devant les tribunaux. La jurisprudence, d'abord divisée, est aujourd'hui fixée: elle affirme qu'on ne peut pas admettre ici une responsabilité contractuelle, car il n'y a pas de contrat, même innommé. En principe, il faut approuver cette solution. Il est certain que dans cette hypothèse, le transporteur qui rend un service d'amitié ou de complaisance n'entend assumer aucune obligation, pas plus que le transporté songe à lui demander un engagement quelconque.

Cette théorie acceptée par la jurisprudence et les auteurs se justifie parfaitement. Pour que le transport gratuit fût un contrat de bienfaisance, il faudrait de toute nécessité, non pas seulement que le transporteur avantageât gratuitement la personne transportée, mais il faudrait également qu'une fois le contrat conclu, il liât les parties, et fût productif d'obligations. Il est clair que ni le transporteur ni le transporté n'ont d'action pour faire exécuter l'engagement auquel ils ont consenti. Car cet engagement est révocable à volonté, contrairement au contrat de complaisance où la révocation, sauf par exception, donnerait ouverture à une action en dommages. On a peine à concevoir la position d'un demandeur réclamant des dommages parce qu'un ami complaisant, qui l'avait prié de se promener dans sa voiture, a décidé subitement de canceller son invitation. La frivolité d'une semblable réclamation dispense de songer à sa possibilité, et d'en discuter la valeur.

Si donc, il n'existe pas d'action pour sanctionner la révocation d'une invitation de cette nature, c'est qu'il n'y a pas de contrat intervenu, et que toute réclamation de l'invité doit procéder d'un quasi-délit.

Certains auteurs ont prétendu découvrir une obligation à la charge du transporteur en disant que celui-ci ne saurait déposer son ami en cours de route, loin du point de départ et du lieu de destination, sans engager sa responsabilité. Il est clair qu'il n'engagerait pas sa responsabilité plus que l'ami complaisant qui inviterait une autre personne à loger chez-lui, et qui le mettrait à la porte avant l'expiration du temps fixé pour son départ.

Mazeaud (tome 1er, 3ième éd., p. 144) répond ainsi à cette objection:—

> Certes dans le cas envisagé, la responsabilité du conducteur serait engagée; mais ce ne serait nullement comme on le présuppose sa responsabilité contractuelle: l'ami abandonné sur la route baserait sa demande sur la faute délictuelle du transporteur. La preuve en est que

si, au cours du transport, la voiture ne peut poursuivre sa route à la suite d'une avarie, quand même cette avarie serait due à un mauvais entretien de la machine, on sent bien que le conducteur n'engagera aucune responsabilité: parce qu'il n'a pas assumé l'obligation d'effectuer le transport

Ni le conducteur ni le passager n'entendent se lier contractuellement. Aucun des deux ne songe à acquérir des droits ou à assumer des obligations. Le transport purement bénévole est donc un simple acte de courtoisie, où n'entrent pas les éléments du contrat avec les droits et obligations qui y correspondent. Il y a bien, comme dit Josserand, de l'obligeance, mais il n'y a pas d'obligations.

Ce que je viens de dire couvre le cas où un transporteur n'a aucun intérêt au transport qu'il consent à faire, c'est-à-dire le cas où il agit à titre purement bénévole. Mais évidemment, la situation pourrait être différente dans le cas où le transport n'est que l'accessoire d'une autre opération. Il se peut, en effet, que le transport soit lié à une convention ou à des rapports extra-contractuels plus généraux, et alors dans ce cas, pour voir s'il y a eu contrat, il faudra, comme le dit Mazeaud (vol. 1, p. 140):—

analyser l'opération d'ensemble envisagée, et voir si cette opération est ou non une convention... sans poser de règle absolue, tout dépendant des circonstances de fait; il semble que le plus souvent dans de pareilles situations, celui qui rend service entend ne s'obliger à rien, et la preuve c'est qu'on ne retiendrait pas sa responsabilité contractuelle s'il refusait d'accomplir sa promesse; la responsabilité résultant d'un accident au cours du transport sera donc généralement délictuelle.

Mais dans le cas qui nous occupe, rien de tel ne se présente, car le transporteur n'avait aucun intérêt au transport qu'il a consenti à effectuer, et ce même transport a été dégagé de toute autre opération. Il ne s'agit pas d'un accessoire, mais du but même qu'on s'est proposé.

Il semble donc que la théorie en France doive s'appliquer ici car le contrat de bienfaisance en France est exactement ce qu'il est chez nous. Cependant, si sous les deux droits il n'y a pas de responsabilité contractuelle, il y a tout de même une responsabilité qui s'attache au conducteur de l'automobile.

En France, on s'est demandé si cette responsabilité découle de l'article 1382 du Code Napoléon, à savoir, s'il faut qu'il y ait preuve de faute, ou si la responsabilité provient de l'article 1384 C.N., (notre article 1054 C.C.) qui rendrait le propriétaire de l'automobile responsable par le fait même

1944

McLEAN v. PETTIGREW

Taschereau J.

de la chose. Des opinions différentes ont été émises à ce sujet, et M. Josserand (Dalloz, Répertoire général, 1926, Recueil Hebdomadaire, (Chronique) p. 24) dit ceci:—

La vérité est que la responsabilité du fait des choses inanimées, telle qu'elle est inscrite dans le premier alinéa de l'article 1384, se déduit, comme d'ailleurs toutes les responsabilités du même ordre, qu'elles dérivent du fait des personnes ou de celui des animaux ou encore de celui des bâtiments, de l'idée de pouvoir et de maîtrise: la où est le pouvoir, là où se trouve la direction, là doit également résider la responsabilité.

D'autres auteurs ne partagent pas cette idée, et les tribunaux en France se sont divisés sur cette question. Mais, chez nous, dans un cas comme celui qui nous occupe, l'article 1054 C.C. ne trouve pas son application. Lorsqu'un conducteur bénévole d'une voiture automobile conduit un passager qui est blessé, ce n'est pas la chose elle-même qui cause le dommage, mais c'est la personne conduisant la voiture qui est l'auteur du dommage, et il s'ensuit qu'à cause de cette "intervention humaine", il faut prouver faute en vertu de l'article 1053 C.C.

Ce principe a été affirmé par cette Cour dans la cause de *Lacombe* v. *Power,* (1), et M. le juge en chef Anglin s'exprime ainsi à la page 411:—

Before the plaintiff can invoke a presumption of fault against the defendants under article 1054 C.C., she is obliged to establish (*a*) that the damage was in fact caused by the thing in question within the meaning of that article, and (*b*) that that thing was at the time under the care of the defendant. The automobile on which the deceased was working was safe and harmless while in the position in which he had placed it on the third floor of the defendant's garage. It became dangerous only because it either started of itself or was put in motion. If the proper inference from the evidence was that the automobile started of itself, without the intervention of human agency, and owing to something inherent in the machine, the ensuing damage might be ascribable to it as a "thing" and be within the purview of article 1054 C.C. But if its movement was due to an act of the deceased, conscious or unconscious, the damage was caused, not by the thing itself, but by that act, whether it should be regarded as purely unvoluntary and accidental or as amounting to negligence or fault. On the latter hypotheses, the provision of article 1054 C.C. invoked by the appellant, does not apply.

Le même principe a été ré-affirmé la même année dans *Pérusse* v. *Stafford* (2):—

In the second place, it is contended that fault is presumed against the defendant under article 1054 of the Civil Code, because the injury was caused by a thing under her care. Our view is that that provision has no application to a case where, as here, the real cause of the

(1) [1928] S.C.R. 409 (2) [1928] S.C.R. 416, at 418

accident is the intervention of some human agency—the question whether such human agency—that of the driver in this case, is at fault being a question of fact. Damage is not caused by a thing which is in the control of the defendant within the meaning of article 1054 C.C., where it is really due to some fault in the operation or handling of the thing by the person in control of it.

Quel que soit le principe appliqué en France, il est certain qu'ici la responsabilité de l'automobiliste bénévole n'existe que si le passager peut prouver une faute, imputable au conducteur, et pour laquelle ce dernier peut être recherché dans la province de Québec, où l'action est instituée.

Je suis donc d'opinion que cette faute doit être délictuelle ou quasi-délictuelle, et que la plus légère entraîne la responsabilité du conducteur, tout en faisant cependant les réserves nécessaires, concernant certains risques qui peuvent être normalement envisagés par le passager, et dont parle M. le juge Rivard dans la cause de *Langevin* v. *Beauchamp* (1). Mais ici cette question ne se présente pas.

Je n'ai pas de doute que, si l'accident pour lequel des dommages sont réclamés dans la présente cause s'était produit dans la province de Québec, l'appelant serait quasi-délictuellement responsable. On peut en effet lui reprocher de s'être engagé par un temps pluvieux dans une côte à une vitesse trop grande, eu égard à la condition dangereuse de la route, condition qui était indiquée sur un panneau visible de tous, et d'avoir continué sa route à trente milles à l'heure dans une courbe en appliquant maladroitement ses freins. Il a certainement commis une faute, et une plus grande prudence eut sans doute prévenu ce malheureux accident.

Mais les parties sont domiciliées à Montréal, où l'action a été instituée, et c'est dans la province d'Ontario que l'accident est arrivé. Dans ces conditions, la responsabilité contractuelle étant éliminée, pour réussir, la demanderesse doit établir en premier lieu, que le quasi-délit commis en Ontario aurait donné ouverture à une action en dommages dans Québec, s'il eût été commis dans cette dernière province. En second lieu, il lui faut aussi démontrer que

(1) [1928] Q.R. 44 K.B. 569

1944

McLEAN v. PETTIGREW

Taschereau J.

l'acte reproché au conducteur, pour employer l'expression des auteurs, est "wrongful, i. e. non-justifiable" selon la loi du lieu où a été commis le quasi-délit.

C'est la règle posée par Dicey (Conflict of Laws, 5th Ed. p. 770) et adoptée par les tribunaux. Dicey dit:—

> An act done in a foreign country is a tort, and actionable as such in England, if it is both
>
> (1) wrongful i.e. non-justifiable, according to the law of the foreign country where it was done; and
>
> (2) wrongful i.e. actionable as a tort, according to English law, or, in other words, is an act which, if done in England, would be a tort.

L'auteur ajoute que le mot "wrongful" a un sens différent dans les deux clauses ci-dessus. Dans la première, il signifie un acte qui n'est pas innocent ou excusable, ou en d'autres mots,—

> which is either actionable or punishable according to the law of the country where it was done.

Dans l'autre clause, il signifie un acte qui, s'il était fait en Angleterre, donnerait ouverture à une action suivant la loi anglaise. (*Vide Machado* v. *Fontes* (1): *Canadian Pacific Railway Co.* v. *Parent* (2); *Walpole* v. *Canadian Northern Railway Co.* (3); *O'Connor* v. *Wray* (4); *Canadian National Steamships Co.* v. *Watson* (5); *Lieff* v. *Palmer* (6); *Howells* v. *Wilson* (7). Comme on peut le voir, le droit de la demanderesse à des dommages dépend de l'effet combiné du *lex loci delicti commissi* et du *lex fori.*

De ces causes, celle qu'il importe surtout de retenir, est la cause de *Canadian National Steamships* v. *Watson* (5), où Sir Lyman Duff, alors juge en chef du Canada, a défini la véritable signification du mot "wrongful". Il dit ce qui suit:—

> It is now settled that, in an action brought in the province of Quebec for damages in respect of personal injuries due to a tortious act committed outside that province, the plaintiff's right to recover rests upon the

(1) L.R. [1897] 2 Q.B. 231
(2) [1917] A.C. 195, at 205
(3) [1923] A.C. 113, at 119
(4) [1930] S.C.R. 231
(5) [1939] S.C.R. 11, at 13
(6) [1937] Q.R. 63 K.B. 278
(7) [1936] Q.R. 69 K.B. 32

fulfilment of two conditions. These conditions are stated in the following passage in the judgment of Lord MacNaughton in *Carr* v. *Francis Times & Co.* (1):—

"In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and secondly, the act must not have been justifiable by the law of the place where it was committed."

"Justifiable" here refers to legal justification; and an act or neglect *which is neither actionable nor punishable* cannot be said to be otherwise than "justifiable" within the meaning of the rule (*Walpole* v. *Canadian Northern Railway Co.* (2).

That this rule prevails in Quebec results from *O'Connor v. Wray* (3).

Si l'acte que l'on reproche à McLean ne donne pas ouverture à une action civile en Ontario, et s'il n'est pas "punishable" dans cette province, même s'il est "wrongful" dans Québec, alors l'intimée ne peut pas réussir.

J'ai dit déjà que si le quasi-délit avait été commis dans la province de Québec, l'intimée aurait pu réclamer en vertu de l'article 1053 C.C. Mais il est certain qu'il n'a pas été démontré qu'il existe un recours civil dans Ontario contre le conducteur bénévole, au profit du passager qui subit des lésions corporelles comme résultat d'un accident. Au contraire, la loi ontarienne dénie semblable action, et la précision du texte ne prête à aucune ambiguité.

La section 47 du *Highway Traffic Act* se lit ainsi:—

The owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from such motor vehicle.

Il n'existe donc pas de recours civil dans Ontario, mais l'acte est-il "punishable", et peut-on dire que l'appelant a violé quelque disposition du Code Criminel ou de l'Ontario *Highway Traffic Act?*

La conduite de l'appelant ne présente certainement pas les caractéristiques d'une offense criminelle, et je ne puis me convaincre que sa maladresse ou son inhabilité révèlent les éléments nécessaires qui me permettent de qualifier de crime l'acte qu'il a posé. *American Automobile Insurance*

(1) [1902] A.C. 176, at 182. (2) [1923] A.C. 113.
(3) [1930] S.C.R. 231.

1944

McLEAN v. PETTIGREW

Taschereau J.

Co. v. *Dickson* (1). Mais, il en est autrement je crois du reproche qu'on lui fait qu'il a violé un statut provincial, ce qui fait que son acte était punissable dans l'Ontario, et par conséquent non justifiable. L'article 27 du *Highway Traffic Act* se lit ainsi:—

> Every person who drives a motor vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway shall be guilty of an offence and shall be liable in the case of the first offence to a penalty of not less than $5 and not exceeding $50, and in the case of a second or subsequent offence, within one year of the commission of the first offence, to a penalty of not less than $10 and not exceeding $100, or to imprisonment for a term not exceeding one month.

Il est vrai que le magistrat de Rockland a acquitté l'appelant d'une accusation portée en vertu de cet article, mais cette décision n'a évidemment pas l'autorité de la "chose jugée" et ne peut lier les tribunaux civils. (*La Foncière Compagnie d'Assurance de France* v. *Perras* (2).) Pour ma part, je suis d'opinion, comme le juge au procès et la cour d'appel, que l'appelant n'a pas conduit sa voiture avec le "due care and attention" que requiert la section 27. Car, il me semble certain que s'il avait fait preuve du soin voulu et de l'attention nécessaire, cet accident aurait été évité.

C'est évidemment un manque de soin et d'attention que de conduire comme l'a fait l'appelant dans les conditions que j'ai mentionnées précédemment, et je ne vois pas comment je pourrais sur ce point différer d'opinion avec le juge de première instance et la cour d'appel, dont les jugements me paraissent bien fondés.

Il ne faudrait pas confondre l'article 27 du *Highway Traffic Act* avec les dispositions du paragraphe 6 de l'article 285 du Code Criminel. Jusqu'en 1939, le *Highway Traffic Act* contenait un article rédigé à peu près dans les termes que l'on trouve maintenant au paragraphe 6 de l'article 285 du Code Criminel, et par conséquent, ce que l'on est convenu d'appeler le "reckless driving" n'était pas une offense créée par l'autorité fédérale, mais bien par l'autorité provinciale.

En 1938, cependant, le Code Criminel a incorporé dans l'article 285 des dispositions relatives au "reckless driving" de sorte que cette offense est devenue une offense criminelle. Elle consiste, comme on le sait, à conduire sur une

(1) [1943] S.C.R. 143, at 150 (2) [1943] S.C.R. 165

route publique un véhicule à moteur d'une "façon insensée ou d'une manière dangereuse pour le public", eu égard à toutes les circonstances, y compris la nature, l'état et l'utilisation du chemin.

En 1939, la législature d'Ontario a en conséquence rappelé sa propre loi, devenue inopérante par suite de la législation fédérale, et lui a substitué l'offense prévue à l'article 27 du *Highway Traffic Act,* que l'on appelle communément le "careless driving".

Il ne fait pas de doute que le degré de négligence dont il faut faire preuve pour se rendre coupable en vertu des dispositions du Code Criminel, 285, paragraphe 6, est de beaucoup supérieur au degré de négligence qu'il est nécessaire de prouver, pour que l'acte soit punissable sous la loi provinciale où seul, le manque de soin voulu et d'attention constitue l'offense. Une disposition semblable à celle que l'on trouve dans la loi d'Ontario existe en Angleterre (section 12, *Road Traffic Act,* 1930) et a fait l'objet de commentaires de la part de Lord Atkin, dans la cause de *Andrews* v. *Director of Public Prosecutions* (1). Il dit ce qui suit:—

> Section 12 of the *Road Traffic Act 1930,* imposes a penalty for driving without due care and attention. This would apparently cover all degrees of negligence.

Je suis d'opinion, qu'il a été démontré que le demandeur n'a pas fait preuve de ce soin et de cette attention que requiert l'article 27 du *Highway Traffic Act,* et qu'en conséquence l'acte qu'il a posé et qui a eu pour résultat de causer à l'intimée des lésions corporelles graves, est punissable en vertu de la loi d'Ontario, l'endroit où le quasi-délit est arrivé. Au sens des autorités citées plus haut, il est "wrongful" i. e. "non-justifiable".

Il s'ensuit que l'intimée a établi deux des conditions nécessaires pour engager la responsabilité de l'appelant. L'acte qu'elle lui reproche est un quasi-délit pour lequel elle obtiendrait des dommages dans la province de Québec, s'il était commis dans cette province. Elle a aussi démontré qu'il est "wrongful" dans Ontario, parce qu'il constitue une violation d'un statut provincial. L'appelant ne peut pas être exonoré, et l'appel doit être rejeté avec dépens.

(1) [1937] A.C. 576, at 584

1944

McLEAN v. PETTIGREW

Hudson J.

HUDSON J.—I have had an opportunity of reading the judgment prepared by my brother Taschereau and agree with him that this appeal should be dismissed with costs for the reasons stated by him, but express no opinion as to the possibility of a contractual liability of the defendant.

KELLOCK J.—In my opinion, on the basis of the law as stated by the then Chief Justice of Canada in *Canadian National Steamships Limited* v. *Watson* (1), the respondent was entitled to maintain her action. The negligence of which she complains is actionable under the law of Quebec and I think that it was also punishable under the law of Ontario.

Respondent alleged that her damages were caused, among other things, by the negligence of the defendant in

> conducting his automobile in a manner contrary to the provisions of the laws governing the operation of motor vehicles and the dictates of careful and prudent driving.

The respondent was a gratuitous passenger in the appellant's automobile on a trip from Montreal to Ottawa in the month of July, 1940 and was injured when the appellant's automobile left the road in the province of Ontario near Rockland. The accident occurred as the automobile proceeded down a hill and around a curve. It was raining at the time. The road was smooth asphalt, and was not very well banked. As the appellant approached the hill, there was a large sign confronting him containing the warning "Drive slowly on wet pavement". A member of the Ontario provincial police who attended at the scene of the accident testified that the appellant told him that he had not seen this sign. Some distance closer to the brow of the hill, there was another sign indicating the existence of the sharp curve. The finding of negligence in the judgment of the Superior Court is in the following terms:

> The Court considers that when defendant started down a hill at 40 miles per hour on a slippery, greasy road with a sharp turn at the foot of the hill which required the application of the brakes to slacken its speed, that he was inviting trouble and that he was driving his automobile without due care and attention.

(1) [1939] S.C.R. 11, at 13.

It was held in the Superior Court and by the Court of King's Bench on appeal that the appellant had brought himself within the provisions of section 27 of the *Highway Traffic Act*, R.S.O. 1937, chapter 288 as amended in 1939 by 3 Geo. VI, chapter 20, section 6. This enactment is taken from section 12, subsection (1) of the Imperial *Road Traffic Act 1930,* chapter 43 which created a new and less serious offence than the offence described in section 11 of the Act, corresponding to subsection (6) of section 285 of the Criminal Code. In referring to the offence created by section 11, Lord Atkin in *Andrews* v. *Director of Public Prosecutions* (1), said:

> Section 12 of the *Road Traffic Act, 1930,* imposes a penalty for driving without due care and attention. This would apparently cover all degrees of negligence. Section 11 imposes a penalty for driving recklessly or at a speed or in a manner which is dangerous to the public. There can be no doubt that this section covers driving with such a high degree of negligence as that, if death were caused, the offender would have committed manslaughter.

In *McCrone* v. *Riding* (2) Lord Hewart L.C.J. in dealing with the offence created by section 12 said:

> I think that it is not without significance that the statute uses both the word "care" and the word "attention". In other words, the driver, whoever he may be, experienced or inexperienced, must see what he is about. He must pay attention to the thing he is doing and perceiving that which he is doing or entering upon, he must do his best and he must show proper care in the doing of that thing upon which he is intent.

I see no reason to differ from the courts below in their view that section 27 of the Act applied.

Evidence was given on behalf of the appellant at the trial that he had been acquitted on a charge of careless driving under the section, tried in Rockland 2nd of August, 1940. This acquittal, however, does not stand in the way of a finding in this action that the appellant had committed an offence under the section: *La Foncière Compagnie D'Assurance de France* v. *Perras* (3).

(1) [1937] A.C. 576, at 584. (2) [1938] 1 All. E.R. 157, at 158.
(3) [1943] S.C.R. 165.

1944

McLEAN v. PETTIGREW

Kellock J.

It is therefore not necessary for me to consider the other ground upon which the respondent seeks to support the judgment.

I would dismiss the appeal with costs.

ESTEY J.—I am of opinion, for the reasons given by Mr. Justice Taschereau, that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appelant: *Bumbray & Carroll.*

Solicitors for the respondent: *Diplock & Mullally.*

1944

*Oct. 31, Nov. 1, 2, *Dec. 20.

ALBERT LAMARRE ÈS-QUAL. AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

ALBERT BIGRAS (DEFENDANT)..... RESPONDENT.

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

Insolvency—Action by trustee to annul deed of sale—Practice and procedure—Party interested not joined in the proceedings before the Court—Dismissal of action—Husband and wife—Married woman appearing as plaintiff—Want of marital authorization—Absolute nullity—Party to the deed not made defendant or mis-en-cause but acting as co-plaintiff with trustee—Whether sufficient to allow the Court to adjudicate—Arts. 176, 183, 1032 et seq. C.C.

The appellant Lamarre, acting as trustee to the bankruptcy of an estate represented by a deceased trader's universal legatees, one of which unmarried and the other a married woman separated as to property, brought an action to annul the sale of an immoveable property by the legatees to the respondent. The two legatees were joined as co-plaintiffs, although they took no part in the conclusions taken in the statement of claim. The husband was a party to the deed of sale for the purpose of authorizing his wife; but he did not authorize her to act as plaintiff in the case. The judgment of the Superior Court, maintaining the appellants' action, was reversed by the appellate court which held that the want of authorization by the husband to enable his wife to appear in court constituted a cause of nullity of the action.

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

Held, affirming the judgment appealed from (Q.R. [1943] K.B. 691) but on another ground, that the Superior Court could not pronounce the nullity of the contract of sale, as one of the contracting parties, i.e. the husband, had not been called before the Court. *La Corporation de la Paroisse de St. Gervais* v. *Goulet* ([1931] S.C.R. 437).

The appellants had based their action on three different grounds; but, before the Court, they urged only one of them, i.e. their right of action (*action paulienne*) under article 1032 et seq. C.C.

Held, also, that the appellant Lamarre, in his quality of trustee representing the creditors, was entitled to bring alone the present action, as *action paulienne;* and, therefore, it was immaterial whether the husband had authorized or not his wife to act as plaintiff, as her presence as such was entirely unnecessary.

Held, further, that, although the trustee could thus act alone, the appellant's action could not be maintained, as the legatees, as vendors, have not been made parties to the action as defendants or mises-en-cause; but, even if their presence as co-plaintiffs could be considered sufficient to allow the Court to adjudicate on the merits of the case, the wife would still be acting without the authorization of her husband.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Décary J. and dismissing the appellants' action.

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

J. P. Lanctot K.C for the appellant.

B. Panet Raymond K.C. and *J. P. Lavallée* for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—Le demandeur, en sa qualité de syndic à la faillite de feu Dame Catherine Campion, représentée par Delle Albina Sénécal et Dame Gertrude Meehan, ses légataires universelles, a institué des procédures devant la Cour Supérieure de Montréal, pour faire annuler certains actes intervenus les 18 juin et 8 octobre 1940, devant le notaire J. H. Savaria.

Le 18 juin 1940, Albina Sénécal et Dame Gertrude Meehan, épouse séparée de biens de Gérard Vincent, ont reconnu que l'intimé Albert Bigras avait avancé un certain

(1) Q.R. [1943] K.B. 691.

1944

LAMARRE v. BIGRAS.

Taschereau J.

montant d'argent pour payer les dettes de la succession de feu Dame Catherine Campion, et en considération du fait que ledit Bigras avait administré les biens de la succession et avait avancé de l'argent pour son bénéfice, elles ont consenti à vendre au dit Bigras un immeuble situé dans la ville de Montréal, et décrit à l'acte. Cet immeuble était hypothéqué en une somme de $7,500.00.

Aucun prix de vente n'est mentionné à l'acte, et le 8 octobre 1940, voulant sans doute le compléter, les mêmes parties ont signé un nouveau contrat, affectant le même immeuble, dans lequel il est stipulé que la vente est consentie pour le prix de sept mille cinq cent une piastres ($7,501.00), dont les venderesses ont reconnu avoir reçu une piastre ($1.00) dont quittance. Quant à la balance de sept mille cinq cent piastres ($7,500.00), elle était payable à Delle Aline Théroux.

M. le juge Décary, de la Cour Supérieure de Montréal, a maintenu cette action dirigée contre l'intimé, et est arrivé à la conclusion que ces ventes avaient été faites en fraude des droits des créanciers, et qu'elles devaient être annulées en vertu des articles 1032 et suivants du Code Civil.

Le demandeur ès-qualité, qui s'était adjoint Delle Albina Sénécal et Dame Gertrude Meehan comme demanderesses, a invoqué trois raisons pour conclure à l'annulation des actes des 18 juin et 8 octobre 1940. La première est que les droits de succession provinciaux n'étaient pas payés au moment où la vente a été consentie; la seconde est que les venderesses ont été trompées par l'intimé vu qu'elles n'ont pas compris la teneur et la portée des actes intervenus; et la troisième est qu'elle a été faite en fraude des droits des créanciers. Seul le troisième motif a été accueilli par la Cour Supérieure.

Le défendeur Bigras inscrivit cette cause devant la cour d'appel de la province de Québec qui maintint l'appel et rejeta l'action (1). La raison donnée et soulevée pour la première fois par la Cour elle-même, est que le demandeur ès-qualité poursuivait conjointement avec Albina Sénécal et Dame Gertrude Meehan, et qu'il n'apparaît pas que cette dernière, qui est l'épouse séparée de biens de Gérard

(1) Q.R. [1943] K.B. 691.

Vincent, ait été autorisée par son mari à instituer cette action. Il est admis que ledit Gérard Vincent n'a pas autorisé son épouse à ester en justice, et qu'il n'a pas été assigné comme partie à l'instance.

La cour d'appel en est venu à la conclusion que ce défaut d'autorisation du mari comporte une nullité que rien ne peut couvrir, et qu'en conséquence, la Cour ne peut annuler la vente de l'immeuble faite au défendeur par lesdites Dame Gertrude Meehan et Delle Albina Sénécal. Il est donc bon de noter que lorsque la vente de l'immeuble en question a été faite à l'intimé Bigras, Vincent, comme il le fallait, est intervenu à l'acte de vente pour autoriser son épouse.

Devant cette Cour, les appelants, abandonnant les autres motifs, ont limité leur action au recours qui leur serait conféré par les articles 1032 et suivants du Code Civil. Cette action en est une qui n'appartient qu'aux créanciers, qui seuls peuvent attaquer en leur propre nom les actes faits par leurs débiteurs en fraude de leurs droits. En instituant une semblable action, le demandeur ès-qualité syndic à la faillite agissait comme représentant des créanciers, et il avait indiscutablement le droit en cette qualité d'instituer les procédures telles que modifiées, afin de faire entrer dans le patrimoine de la faillite un actif qui en aurait été soustrait frauduleusement. La présence comme demanderesses de Delle Albina Sénécal et de Dame Gertrude Meehan me semble entièrement inutile, et je suis d'opinion que le demandeur pouvait seul, en sa qualité de syndic, instituer l'action. Les légataires universelles de Dame Campion sont parties à l'acte de vente que l'on prétend avoir été fait en fraude des droits des créanciers, et elles ne sont pas en conséquence des tierces personnes à qui est donnée, en vertu de l'article 1032, le recours de "l'action paulienne". Si la présence de ces deux demanderesses n'est pas nécessaire, il s'ensuit logiquement qu'il est indifférent que Vincent ait ou non autorisé son épouse à instituer la présente action.

Cependant, l'action telle que libellée demande l'annulation des actes intervenus entre les deux légataires de Dame Catherine Campion et l'intimé Bigras, les 18 juin

1944

LAMARRE v. BIGRAS.

Taschereau J.

et 8 octobre 1940. Elle vise à faire mettre de côté *in toto* ces deux actes en question, et elle doit en conséquence être dirigée contre toutes les parties à l'acte, qui ont intérêt à être assignées devant la Cour pour y défendre leurs droits. Il existe une jurisprudence constante à cet effet, et qu'il est inutile de citer ici au long. Qu'il suffise de rappeler la cause de *La Corporation de la Paroisse de St-Gervais* v. *Goulet* (1).

Or, dans le présent cas, Albina Sénécal et Gertrude Meehan ne sont pas défenderesses ni mises-en-cause, et il s'ensuit que la nullité de l'acte ne peut pas être prononcée.

On a argumenté qu'il n'est pas nécessaire que Delle Sénécal et Dame Meehan soient en cause, vu qu'elles apparaissent comme demanderesses à l'action, et que ceci est suffisant pour permettre à la Cour de juger de la validité des actes intervenus.

Je ne puis accepter cette présentation, car même si elle était juste, Dame Gertrude Meehan est irrégulièrement demanderesse, vu que son mari ne l'a pas autorisée à instituer des procédures et n'est pas partie à l'action. C'est en vain également qu'on a soutenu que la vente peut être annulée pour partie. Il s'agit dans le présent cas d'un immeuble entier, et le transport argué de nullité doit être rescindé pour le tout ou subsister pour le tout, car, comme le dit M. le juge Prévost, la Cour ne peut imposer à l'une des parties un contrat qui ferait l'intimé propriétaire d'une moitié indivise de l'immeuble.

Il est presque inutile de rappeler que l'autorisation du mari était essentielle dans la présente cause. Dans les cas où elle est nécessaire, cette absence d'autorisation comporte une nullité absolue que rien ne peut couvrir. L'article 176 du Code Civil est à l'effet qu'une femme mariée ne peut ester en jugement sans l'autorisation ou l'assistance de son mari, quand même elle serait non commune ou marchande publique. Quant à la femme mariée séparée de biens, elle ne peut non plus ester en justice sauf, dit le Code, dans le cas prévu par le dernier alinéa de l'article 177 C.C. Le dernier alinéa de cette article est à l'effet que si une femme mariée est séparée de biens, sa capacité d'agir civilement est déterminée par les articles 210 et 1422 C.C. Or, si

(1) [1931] S.C.R. 437

l'on réfère à l'article 210 C.C., on voit que la séparation de biens rend la femme capable de tous les actes de la vie civile, et supprime la nécessité de l'autorisation maritale et judiciaire. Enfin, l'article 1422 C.C. dit que la femme mariée ne peut sans autorisation, aliéner ses immeubles.

Or, dans le cas qui nous occupe, il fallait à Dame Meehan l'autorisation de son mari, qu'elle a d'ailleurs obtenue pour vendre l'immeuble en question à l'intimé Bigras. Il me semble impossible de soutenir qu'il ne lui faut pas également cette même autorisation, dans un procès où l'on demande d'anéantir l'acte de vente qu'elle a consenti, avec cette autorisation nécessaire.

L'action ne peut donc pas réussir, et à cause de cette conclusion où j'arrive, il me semble inutile de discuter les autres questions qui ont été soulevées.

Je rejetterais l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Lanctot & Hamelin.*

Solicitor for the respondent: *J. P. Lavallée.*

CANADA CHINA CLAY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

MITCHELL F. HEPBURN, TREASURER OF THE PROVINCE OF ONTARIO, FOR HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO (PLAINTIFF) ..... RESPONDENT.

1944
*Nov. 13
*Dec. 20

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Taxation—Companies—Company selling its assets to another company—Payment by latter by allotment and issue of shares in it to trustee for shareholders of the vendor company—Liability of vendor company to tax under The Security Transfer Tax Act, 1939, Ont. (1939, c. 45)—Secs. 1 (b), 2 (a), 5 (1) (b), 19 (c) of the Act, and Regulation 26 made under the Act.

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

1944

CANADA CHINA CLAY LTD. v. HEPBURN

The Security Transfer Tax Act, 1939, Ont. (1939, c. 45), imposes a tax, payable by the vendor, transferer or assignor, "upon every change of ownership consequent upon the sale, transfer or assignment" of a "security" (defined by the Act to include any share of capital stock issued by any company), and authorizes regulations "determining what constitutes a sale, transfer or assignment within the meaning of this Act." By regulation 26, "if any company * * * makes distribution of or assigns to its shareholders assets consisting of taxable securities such distribution or assignment shall be deemed to constitute a sale, transfer or assignment of such securities within the meaning of the Act". By s. 5 (1) (*b*) of the Act, the allotment by a company "of its shares in order to effect an issue thereof" shall not be subject to the tax.

Appellant, a company, by an agreement sold its assets to another company, part of the consideration being payment by the latter of a sum to be satisfied by the allotment and issue by the purchasing company of 144,950 shares of its capital stock to shareholders of appellant pro rata. Appellant was to surrender its charter as soon as possible. In accordance with the agreement, the directors of the purchasing company allotted the shares to a trustee for the shareholders of appellant to be distributed among such shareholders, delivery of certificates of shares in the purchasing company to be made on surrender for cancellation of certificates of shares in appellant.

Held: Appellant was liable to the tax imposed by said Act. (Rand and Kellock JJ. dissented).

Per Kerwin J.: The effect in law of the agreement and other proceedings (keeping in mind the distinction between a share and the certificate of the share) was that appellant became owner of the shares and (within the meaning of the Act and regulation 26) transferred or assigned them to its shareholders, and consequent upon that transfer or assignment there was a change of ownership from appellant to its shareholders. In contemplation of law there were two transactions, one between the two companies and the other between appellant and its shareholders.

Per Hudson J.: The shares went to appellant's shareholders because, as such shareholders, they were entitled by law to the proceeds of the sale of appellant's assets. Under all the circumstances, it should be held that the purchasing company in making the distribution of shares did so on behalf of appellant, and that this in fact amounted to a distribution of taxable assets by appellant within the meaning of regulation 26.

Per Taschereau J.: In determining whether appellant was liable for the tax, the substance and not the form of the transaction must be considered. In substance what was done was, issue of the shares in fulfilment of the purchasing company's obligation to appellant, and distribution, out of those shares, of appellant's assets (in contemplation of its voluntary liquidation) in fulfilment of appellant's obligation to its shareholders. That was what was covered by the procedure followed, and the direction to the purchasing company to issue the shares to appellant's shareholders did not change what was done in substance; this mere delegation did not affect or alter the legal rela-

tions existing between the parties. The absence of actual delivery and change of possession of certificates of shares by the purchasing company to appellant and by appellant to its shareholders—a purely physical formality, which is merely the evidence, and not a constituting factor of the rights of the shareholders—is irrelevant and has no bearing on the ownership of the shares; there was a legal change of ownership of the shares, which is what is taxable under the Act.

Per Rand and Kellock JJ. (dissenting): The shares were never "issued" prior to their issue to the shareholders of appellant or to the trustee for them, and, therefore, there was no transfer or assignment or change of ownership thereafter to which the tax could attach. Appellant was never a shareholder of the purchasing company in respect to these shares; its only right under the agreement was to call for issue to third persons, namely, its own shareholders. Once given that the agreement constituted a real transaction, as to which no question was raised, its contents determined the legal rights of the parties thereto, and they were entitled to have the transaction take the form which it did take (*Partington* v. *Attorney-General,* L.R. 4 H.L. 100, at 122; *Maclay* v. *Dixon,* [1944] 1 All E.R. 22, at 23; *Inland Revenue Commissioners* v. *Duke of Westminster,* [1936] A.C. 1, at 19, 24 *et seq.,* 28, 31, cited. *Swan Brewery Co. Ltd.* v. *The King,* [1914] A.C. 231, discussed and distinguished).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario dismissing the defendant's appeal from the judgment of Mackay J. against it for a tax claimed by the plaintiff under *The Security Transfer Tax Act, 1939,* Ontario (1939, c. 45).

By an agreement between the defendant and another company, both incorporated under the *Companies Act* of Canada, the defendant sold all its assets to the other company (hereinafter sometimes called the purchasing company). The purchasing company, besides assuming two existing hypothecs, was to pay a net amount of $1,220,479, to be satisfied by the allotment and issue by the purchasing company of 144,950 shares of its capital stock to the shareholders of the defendant pro rata. The directors of the purchasing company passed a by-law (subject to confirmation by its shareholders) authorizing the execution and carrying out of the agreement and directing allotment and issue of the 144,950 shares to the shareholders of the defendant or to the trustees for said shareholders, and subsequently passed a resolution allotting the shares to a certain trust company as trustee for the shareholders of the defendant to be distributed by said trustee among the shareholders of the defendant so that

1944

CANADA CHINA CLAY LTD. v. HEPBURN

each shareholder of the defendant would receive one share of the capital stock of the purchasing company for each two shares of the capital stock of the defendant held by such shareholder, and authorizing and directing the said trust company upon surrender up for cancellation by any shareholder of the defendant of his share certificate or certificates representing shares of the capital stock of the defendant, to deliver to such shareholder a certificate or certificates representing one share of the capital stock of the purchasing company for each two shares represented by the certificate or certificates so surrendered. Further details of the agreement, etc., appear in the reasons for judgment now reported.

The plaintiff, as Treasurer of the Province of Ontario and suing on behalf of His Majesty the King in right of the Province of Ontario, sued the defendant, claiming a declaration by the Court that the said issue and allotment of shares to the shareholders of the defendant was a change of ownership under *The Security Transfer Tax Act, 1939,* Ontario (1939, c. 45), a declaration that the said allotment and issue of shares was subject to tax under said Act, and an order directing the defendant to pay to the plaintiff the sum of $1,449.50 plus the penalties provided by the Act. The defendant denied that there was any tax imposed by the Act on the transaction.

The matter came before the Court by way of special case on the following question or questions: (1) Was the said allotment of 144,950 shares of its capital stock by the purchasing company an allotment in order to effect an issue thereof within the meaning of s. 5 of said Act? If the Court should be of opinion in the affirmative, then judgment should be for defendant, dismissing the action with costs; but if the Court should be of opinion in the negative, then there was the further question, (2) Was the said allotment and issue of 144,950 shares of its capital stock by the purchasing company a transfer of shares within the meaning of s. 2 of said Act and Regulation 26 of the Regulations passed pursuant to said Act and as such subject to transfer tax? If the Court should be of opinion in the affirmative, then there should be judgment for the

plaintiff for $1,499.50 with costs; if the Court should be of opinion in the negative, then there should be judgment for defendant, dismissing the action with costs.

The relevant provisions of the Act and the said Regulation 26 are sufficiently set out in the reasons for judgment now reported.

The case was heard by Mackay J. who, at conclusion of the hearing, gave judgment for the plaintiff, holding that there was "in substance, in effect a transfer within the contemplation of" the Act. An appeal to the Court of Appeal for Ontario was dismissed (no written reasons being given). Special leave to appeal to this Court was granted by the Court of Appeal for Ontario.

S. H. Robinson for the appellant.

C. R. Magone K.C. for the respondent.

KERWIN J.—The sole point for determination raised by the parties to this litigation is whether the appellant, Canada China Clay, Limited, is liable to the respondent, the Treasurer of the Province of Ontario, for a tax and penalties under the provisions of the Ontario *Security Transfer Tax Act, 1939,* and No. 26 of the regulations made by the Lieutenant-Governor in Council in pursuance thereof. So far the appellant has met with no success, as the action of the plaintiff, respondent, was sustained by the trial judge and an appeal therefrom was dismissed by the Court of Appeal for Ontario. In my opinion, the Courts below were right in so deciding.

By section 2 of the Act:—

> There shall be imposed, levied, collected and paid to His Majesty for the uses of Ontario, a tax,—
>
> (*a*) upon every change of ownership consequent upon the sale, transfer or assignment of a security made or carried into effect in Ontario;

By section 1 (*b*):—

> Security shall include,—
>
> (i) any share of capital stock or debenture stock and any bond or debenture issued by any association, company, corporation or government;

1944

CANADA CHINA CLAY LTD. v. HEPBURN

Kerwin J.

Section 19 (*c*) enacts:—

The Lieutenant-Governor in Council may make regulations,—

(*c*) determining what constitutes a sale, transfer or assignment within the meaning of this Act;

Regulation 26 reads as follows:—

If any company, corporation, association or syndicate for any reason, makes distribution of or assigns to its shareholders assets consisting of taxable securities such distribution or assignment shall be deemed to constitute a sale, transfer or assignment of such securities within the meaning of the Act.

By a written agreement, the appellant sold and Canada China Clay and Silica, Limited, purchased all the business, undertaking, goodwill and corporate franchise of the vendor, and all of its movable and immovable property, cash on hand and accounts receivable. In consideration of the transfer, the purchaser agreed, in addition to assuming two hypothecs, to pay the vendor certain specified sums of money, less the vendor's liabilities, other than its capital stock,

leaving a net amount of one million two hundred and twenty thousand four hundred and seventy-nine dollars ($1,220,479.00), the whole to be satisfied by the allotment and issue by the purchaser of one hundred and forty-four thousand nine hundred and fifty (144,950) shares without nominal or par value of the capital stock of the purchaser as fully paid and non-assessable shares to the shareholders of the vendor pro rata to the number of shares of the vendor held by each of its shareholders.

This agreement was authorized by a by-law of the directors of Canada China Clay and Silica, Limited, which also authorized and directed its directors to allot and issue the 144,950 shares to the shareholders of Canada China Clay, Limited, or to the trustees for those shareholders. Pursuant to the by-law and agreement the directors of Canada China Clay and Silica, Limited, allotted the shares to Chartered Trust and Executor Company as trustee for the shareholders of the appellant, to be distributed by the trustee among such shareholders so that each would receive one share of the capital stock of Canada China Clay and Silica, Limited, for each two shares of the capital stock of the appellant held by such shareholder.

What was the effect in law of these proceedings? The appellant sold its assets and the consideration therefor was the 144,950 shares of the capital stock of Canada China

Clay and Silica, Limited. Having been allotted and issued by the directors of the latter company, these shares are a "security" as defined by section 1 (*b*) of the Act. Although allotted and issued direct to a trustee for the shareholders of the appellant, once the distinction between a share of capital stock of a company and the certificate of such share is borne in mind, I am unable to agree with the contention that the appellant did not become the owner of these shares. Whatever question might have arisen as to whether the distribution by the appellant to its shareholders of assets consisting of taxable securities was a transfer or assignment under section 2 (*a*) of the Act, appears to me to be set at rest by regulation 26 which did not go beyond the terms of section 19 (*c*) of the Act. This being so, there was a change of ownership from the appellant to its shareholders consequent upon the transfer or assignment of the shares of the purchasing company. In one sense while there was but one transaction, in contemplation of law there were two transactions, one between the two companies and the other between the appellant and its shareholders.

It was argued that the appellant was not subject to the tax in view of the provisions of section 5 (1) (*b*) of the Act, which so far as is material reads as follows:—

> The following transactions shall not be subject to the tax imposed by this Act,—
>
> (*b*) the allotment by an association, company or corporation of its shares in order to effect an issue thereof.

The short answer to that contention, in my view, is that no claim is made to a tax upon the allotment by Canada China Clay and Silica, Limited, of its shares.

The appeal should be dismissed with costs.

HUDSON J.—I agree that this appeal should be dismissed with costs and have very little to add to what has been said by my brothers Kerwin and Taschereau.

The appellant company sold its undertaking and entire assets to Canada China Clay and Silica Ltd. The consideration for this sale was the assumption by the purchaser of the outstanding obligations of the appellant and a sum of $1,220,479 which was to be satisfied by

1944

CANADA CHINA CLAY LTD. v. HEPBURN

Hudson, J.

the allotment and issue by the purchaser of 144,950 shares of its capital stock to the shareholders of the appellant pro rata. The appellant agreed to surrender its charter as soon as possible and, in order to insure the fulfilment of the agreement notwithstanding the dissolution, the appellant appointed the purchaser "its true and lawful attorney for it and in its name, place and stead to execute and deliver all" deeds, transfers, etc., of the undertaking, property and assets of the appellant in favour of the purchaser, etc.

The assets were duly conveyed by the appellant to the purchaser and thereupon the directors of the purchasing company allotted the shares in question to the Chartered Trust and Executor Company as trustee for the shareholders of the appellant, to be distributed by said trustee among the said shareholders, one share of the capital stock of the purchaser for each two shares held by such shareholder for the appellant company. It further provided that the certificates should be issued to such shareholders upon surrender for cancellation of the shares which were held in the appellant company.

In the result, the entire proceeds of the sale by the appellant came to its shareholders in the form of share certificates in the purchasing company.

To fulfill its undertaking in the agreement for sale the appellant was bound to surrender its charter as soon as possible. In order to effect a legal surrender it was necessary for it to comply with the provisions of section 29 (1) (*a*) of the Dominion *Companies Act, 1934*, which provides as follows:

> 29. (1) The charter of a company may be surrendered if the company proves to the satisfaction of the Secretary of State
>
> (*a*) that it has no assets and that any assets owned by it immediately prior to the application for leave to surrender its charter have been divided rateably amongst its shareholders or members; * * *

The delivery of share certificates in the purchasing company was made conditional on surrender for cancellation of the certificates in the appellant company.

All these proceedings appear from the record to have been almost contemporaneous and to be merely steps in a single transaction.

The shares in question went to the shareholders of the appellant because they were shareholders of that company and as such entitled by law to the proceeds of the sale of that company's assets.

Under all of these circumstances, in my opinion it should be held that the purchasing company in making the distribution of shares did so on behalf of the appellant, and that this in fact amounted to a distribution of taxable assets by the appellant within the meaning of Regulation 26.

TASCHEREAU J.—On the 17th of September, 1941, the appellant, Canada China Clay, Limited, sold all its assets to Canada China Clay and Silica, Limited.

In consideration of this sale, the purchaser agreed to pay to the vendor $504,426.89 for the mine buildings, plant and equipment; $195,868.88 in respect of the amount spent by the vendor in the exploration and development of its mine properties; $31,211.44 for current assets; $1,000,000 for mine properties, less $511,028.21, amount of liabilities, making a grand total of $1,220,479. This sum was payable by the allotment and issue by the purchaser of 144,950 shares without nominal or par value of its capital stock, as fully paid and non-assessable, to the *shareholders of the vendor.*

The agreement entered into was ratified by the directors and shareholders of the respective companies, and, at a later date, the directors of the Canada China Clay and Silica, Limited, were authorized and directed to issue 144,950 shares of its capital stock to the shareholders of the Canada China Clay, Limited, or to the trustees for said shareholders.

No tax was paid by the vendor company under *The Security Transfer Tax Act, 1939,* in respect of the allotment and issue of these shares, and the Treasurer of the Province of Ontario, therefore, brought action against the appellant in which he claimed a declaration by the Court that the said issue and allotment of shares direct to the shareholders of Canada China Clay, Limited, is a change of ownership under the Act, that said allotment and issue of shares is subject to tax under the *Security Transfer Tax*

1944

CANADA CHINA CLAY LTD. v. HEPBURN

Taschereau J.

Act, and an order directing the defendant-appellant to pay the sum of $1,449.50, plus the penalties provided by the Act.

The contention of the defendant is that the agreement entered into with the Canada China Clay and Silica, Limited, to allot and issue 144,950 shares of its capital stock, did not in any way constitute a change of ownership within the meaning of the *Security Transfer Tax Act,* and that the transaction is not subject to any tax imposed by the Act.

The action was maintained and the judgment of Mr. Justice Mackay was unanimously confirmed by the Court of Appeal.

The relevant sections of the *Security Transfer Tax Act* are the following:—

1. In this Act,—

(*b*) "Security" shall include,—

(i) any share of capital stock or debenture stock and any bond or debenture issued by any association, company, corporation or government;

2. There shall be imposed, levied, collected and paid to His Majesty for the uses of Ontario, a tax,—

(*a*) upon every change of ownership consequent upon the sale, transfer or assignment of a security made or carried into effect in Ontario;

4. The tax imposed by this Act shall be payable in security transfer tax stamps or cash by the vendor, transferor, assignor or, in the case of transfers and deliveries referred to in clauses *c* and *d* of section 2, by the person, company, corporation, bank or trust company making delivery.

5. (1) The following transactions shall not be subject to the tax imposed by this Act,—

(*b*) the allotment by an association, company or corporation of its shares in order to effect an issue thereof.

19. The Lieutenant-Governor in Council may make regulations,—

(*c*) determining what constitutes a sale, transfer or assignment within the meaning of this Act;

REGULATION 26.

If any company, corporation, association or syndicate for any reason, makes distribution of or assigns to its shareholders assets consisting of taxable securities *such distribution* or assignment shall be deemed to constitute a sale, transfer or assignment of such securities within the meaning of the Act.

In order to determine if the appellant is bound to pay the amount of tax which is claimed, the substance and not the form of the transaction must be considered. It

is quite true that under the Act (section 5, paragraph (*b*)), the allotment of shares by a company, in order to effect an issue thereof, is exempt from taxation, and the form with which the transaction has been clothed would at first sight create the impression that there has been no transfer of shares.

But I do not think that this is the situation. In selling its assets to the Canada China Clay and Silica, Limited, the appellant was entitled to receive 144,950 shares without nominal or par value. That was the consideration for the sale, as these shares represented the purchase price paid for the property of the appellant company. If the Canada China Clay and Silica, Limited, had not fulfilled its obligation to allot, issue and deliver such shares, the appellant would have been entitled to bring action to compel it to do so.

Normally, the shares should have been issued to the appellant, which was the party entitled to them, and they would have become a part of its assets, available for distribution to its shareholders, in the event of a voluntary liquidation, which was then contemplated. These operations really involved two transactions, the first between the two companies, and the second, between the appellant and its shareholders.

The direction given to the purchaser to issue these shares to appellant's shareholders did not change the substance of these two independent transactions, and this mere delegation of payment did not affect or alter the legal relations existing between both parties. The procedure followed, in reality covered these two transactions, and as a result of the single operation that has taken place, two different obligations have been fulfilled. The Canada China Clay and Silica, Limited, has paid its debt to the appellant, and the latter, out of these shares, has distributed its assets to its shareholders.

There was no actual delivery and change of possession of a certificate of shares by the Canada China Clay and Silica, Limited, to the appellant and by the latter to its shareholders; but the absence of this purely physical formality, which is merely the evidence, and not a constituting factor of the rights of the shareholders, is irre-

1944

CANADA CHINA CLAY LTD. v. HEPBURN

Taschereau J.

levant, and has no bearing whatever on the ownership of these shares. In fact, there was no transfer of a certificate of shares, but there was a legal *change of ownership*, and this is precisely what is taxable under the Act (section 2, paragraph *a*).

I believe that the appellant cannot escape the payment of the tax, and that the appeal should be dismissed with costs.

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

KELLOCK J.—This is an appeal from an order of the Court of Appeal for Ontario affirming the judgment at trial in favour of the respondent in an action brought by the latter for a declaration that a certain transaction fell within the provisions of *The Security Transfer Tax Act, 1939* (chapter 45), and for the recovery of certain taxes consequent thereon. The parties submitted a special case for the opinion of the Court from which it appears that by an agreement dated the 17th of September, 1941, between the appellant as vendor and Canada China Clay and Silica, Limited, as purchaser, it was provided that the latter should purchase the assets of the former upon certain terms. The important clause in the agreement is 3 (*a*), which reads as follows:

3 (*a*) To pay to the Vendor the sum of Five Hundred and Four Thousand Four Hundred and Twenty-Six Dollars and Eighty-nine Cents ($504,426.89) for the mine buildings, plant and equipment of the Vendor and One Hundred and Ninety-five Thousand Eight Hundred and Sixty-eight Dollars and Eighty-eight Cents ($195,868.88) in respect of the amount spent by the Vendor in the exploration and development of its mining properties and Thirty-one Thousand Two Hundred and Eleven Dollars and Forty-four Cents ($31,211.44) for current assets of the Vendor and in addition the sum of One Million Dollars ($1,000,000.00) for the mining properties and all other assets of the Vendor less Five Hundred and Eleven Thousand and Twenty-eight Dollars and Twenty-one Cents ($511,028.21) being the amount of the liabilities of the Vendor other than its Capital Stock, leaving a net amount of One Million Two Hundred and Twenty Thousand Four Hundred and Seventy-nine Dollars ($1,200,-479.00), the whole to be satisfied by the allotment and issue by the Purchaser of One Hundred and Forty-four Thousand Nine Hundred and Fifty (144,950) shares without nominal or par value of the Capital Stock of the Purchaser as fully paid and non-assessable shares to the Shareholders of the Vendor pro rata to the number of shares of the Vendor held by each of its Shareholders;

The execution of this agreement by the purchasing company was authorized by by-law of the directors of the company, paragraph 2 of which provided as follows:

> 2. That under and pursuant to the terms of such Agreement upon the approval of this By-law by the Shareholders, the Directors be and are hereby authorized and directed to allot and issue One Hundred and Forty-four Thousand Nine Hundred and Fifty (144,950) shares without nominal or par value of the Capital Stock of this Company as fully paid and non-assessable shares to the Shareholders of Canada China Clay, Limited, or to the Trustees for said Shareholders.

Subsequent to the execution of the agreement, a resolution was passed by the directors of the purchasing company allotting the shares to a trust company as trustee for the shareholders of the appellant company to be distributed pro rata in accordance with their shareholdings in the appellant.

The learned trial judge held that the transaction was subject to tax as being a transfer within the Act. The appeal to the Court of Appeal was dismissed, no written reasons being given.

By section 1 (*b*) of the Act, it is provided that " 'security' shall include (i) any share of capital stock or debenture stock and any bond or debenture *issued* by any * * * company". Section 2 (*a*) is the taxing section. It provides for a tax upon "every change of ownership consequent upon the sale, transfer or assignment of a security made or carried into effect in Ontario". By section 4, it is provided that the tax is payable by the vendor, transferor or assignor. By section 19, the Lieutenant-Governor in Council is authorized to make regulations determining what shall constitute a sale, transfer or assignment within the meaning of the Act. Under the authority of this section, regulations were passed including regulation 26 as follows:

> If any company * * * for any reason, makes distribution of or assigns to its shareholders assets consisting of taxable securities such distribution or assignment shall be deemed to constitute a sale, transfer or assignment of such securities within the meaning of the Act.

For the appellant, it is contended that there was no "change of ownership" of any "issued" shares at all and that section 2, by reason of the definition of "security", applies only to a change of ownership of shares already issued. Appellant argues that, upon well settled principles, unless

1944

CANADA CHINA CLAY LTD. v. HEPBURN

Kellock J.

the transaction can be brought within the fair intendment of the legislation, having regard to the language employed, the respondent must fail. Counsel for the respondent admits, as perforce he must, that in the form in which the transaction is found, it is not caught by the language of the statute, but he argues that it is the substance of the transaction which must be looked at and he contends that the substance of the transaction here in question is a sale by the appellant of its assets for shares in the purchasing company and a distribution by the appellant of those shares to its shareholders. In his factum, he says: "It is submitted that a company cannot by the mere expedient of changing the form but not the substance of a transaction escape taxation".

It may be granted at once that had the transaction now in question taken a form other than that which it did take, namely the issue of the shares to the vendor, the appellant company, and the distribution of such shares to the shareholders of the appellant, it would clearly have fallen within the provisions of regulation 26 and, even without that regulation, within the language of section 2 (*a*) itself. The transaction, however, did not assume that form.

Lord Cairns in his oft quoted judgment in *Partington* v. *Attorney General* (1) said:

> I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the leter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

In giving the judgment of the Court in *Maclay* v. *Dixon* (2) Scott L.J. said at page 23:

> In my opinion, they were both entitled so to arrange the matter, as not to attract the control of the Acts, or, putting it positively, as to prevent the Acts from applying. If the actual transaction was not within the Acts, it made no legal difference that the parties had intentionally kept it out of the Acts.

(1) (1869) L.R. 4 H.L. 100 at 122.
(2) [1944] 1 All E.R. 22.

In the case at bar then, the Crown must show a transfer involving a change of ownership of a "security" within the meaning of the *Security Transfer Tax Act*. Having regard to what the Act states is a security, the burden upon the Crown is to show in the first place that the shares in question were issued, and in the second place that *subsequently* there was a transfer of the shares to a new owner.

The first question which arises, then, is as to when the shares in question became "issued" shares within the meaning of the Act. In order that a share may be issued, it must be issued to somebody who is a shareholder. In my opinion, the shares in question were never "issued" at any time prior to their issue to the shareholders of the appellant company or to the trustee for them, and, therefore, there was no transfer or assignment or change of ownership thereafter to which the tax could attach. The respondent does not seek to make any point with respect to any question of transfer as between the trustee for the shareholders and the shareholders themselves no doubt because there would be no change of ownership as between such trustee and the shareholders who would be the beneficial owners.

The appellant company was never at any time a shareholder of the purchasing company in respect to these shares. It never had any right under the agreement in question except the right to call for the issue of these shares to third persons, namely, its own shareholders. Once given that the agreement constituted a real transaction, and there is no question raised with regard to this, its contents determine the legal rights of the parties thereto and the only legal right of the appellant, as above pointed out, on the document was the right already mentioned.

In *Inland Revenue Commissioners* v. *Duke of Westminster* (1), Lord Russell of Killowen said:

> The Commissioners and Finlay J. took the opposite view on the ground that (as they said) looking at the substance of the thing the payments were payments of wages. This simply means that the true legal position is disregarded, and a different legal right and lia-

(1) [1936] A.C. 1 at 24.

1944

CANADA CHINA CLAY LTD. v. HEPBURN

Kellock J.

bility substituted in the place of the legal right and liability which the parties have created. I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case.

Lord Russell then referred to what was said by Lord Cairns in *Partington* v. *Attorney General* already cited above, and proceeded:

If all that is meant by the doctrine is that, having once ascertained the legal rights of the parties, you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good. That is what this House did in the case of *Secretary of State in Council of India* v. *Scoble* (1); that and no more. If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilties of the parties being different from what in law they are, then I entirely dissent from such a doctrine.

The substance of the transaction between Allman and the Duke is, in my opinion, to be found, and to be found only, by ascertaining their respective rights and liabilities under the deed, the legal effect of which is what I have already stated.

Lord Tomlin dealt with the same point at page 19 as follows:

Apart, however, from the question of contract with which I have dealt, it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter," and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the incertain and crooked cord of discretion" for "the golden and streight metwand of the law." Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

(1) [1903] A.C. 299.

I refer also to the judgment of Lord MacMillan at page 28, as well as to the judgment of Lord Wright at page 31 as follows:

> And once it is admitted that the deed is a genuine document, there is in my opinion no room for the phrase "in substance." Or, more correctly, the true nature of the legal obligation and nothing else is "the substance." I need not develop this point, as I agree with what has been said by my noble and learned friends, Lord Tomlin and Lord Russell of Killowen.

The shares in question herein were issued pursuant to the resolution of the directors, Exhibit C, which allotted the shares to the trustee for the shareholders of the appellant company to be distributed among them in a certain proportion. Whether a shareholder in the appellant company could be made a shareholder in the purchasing company against his will, or whether he does not become such until he has taken effective steps to accept the shares to which he is entitled, need not be decided on this appeal. In my view, the appellant company at least, never became a shareholder and never had any shares issued to it. It was, therefore, never in a position to distribute or transfer or assign the shares to its shareholders. The agreement between the two companies might have been drawn in such a way as to come within the provisions of the Act and the regulations, but the parties provided otherwise, as they were entitled, in my view on the basis of the above authorities, to do.

I do not think that the authorities to which we were referred by counsel for the respondent are in point. They arose in other circumstances and under other statutory provisions and I do not find any principle in them applicable to the case at bar. I desire to refer to one only, namely, *Swan Brewery Company, Limited* v. *The King* (1), and to the judgment of Lord Sumner, particularly at page 235. What was in question in the case was whether or not certain bonus shares were to be considered a dividend within the meaning of a statute of Western Australia defining dividend as including "every dividend, profit, advantage or gain intended to be paid or credited to or distributed among any members or directors of any company." In that case the company, having certain accumu-

(1) [1914] A.C. 231.

1944

CANADA CHINA CLAY LTD. v. HEPBURN

Kellock J.

lated profits, passed resolutions providing for the transfer of a portion thereof to share capital account and issued to the existing shareholders new shares as fully paid up for the same amount. It was held that these shares fell within this definition as being advantages to the shareholders. Lord Sumner, however, went on to say that what was done was, in a sense, all one transaction, but that there were really two transactions, namely the creation and issue of the new shares on the company's part and on the shareholders' part the satisfaction of the liability to pay for them by acquiescing in the transfer from the reserve to share capital. He held in effect that what had taken place was the distribution among shareholders of the profits in question and the repayment by the shareholders to the company of the same amount as the price of the new shares. This judgment has been considered in *Commissioners of Inland Revenue* v. *Blot* (1) and *Commissioner of Income Tax, Bengal* v. *Mercantile Bank of India, Limited* (2). Whatever may have been the facts of the transaction dealt with in the *Swan Brewery* case (3), the question there involved was quite different from that in the case at bar. I do not read the opinion of Lord Sumner as expressed in the latter part of his judgment as laying down a principle of general application opposed to the principle affirmed by the judgments in the *Duke of Westminster* case (4) already mentioned.

For these reasons, I would allow the appeal with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Holden, Murdoch, Walton, Finlay & Robinson.*

Solicitor for the respondent: *C. R. Magone.*

(1) [1921] 2 A.C. 171.
(2) [1936] A.C. 478.
(3) [1914] A.C. 231.
(4) [1936] A.C. 1.

THE OTTAWA ELECTRIC RAILWAY COMPANY ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF OTTAWA ..... RESPONDENT.

1944

**Nov. 22, 23
*Dec. 20

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Street Railways—Municipal Corporations—Agreement between City of Ottawa and Ottawa Electric Ry. Co., ratified and confirmed by c. 84, statutes of Canada, 1924—Application by City to Board of Transport Commissioners for decrease in fares chargeable by Company—Question whether City had complied with proceedings required before making application—Form of resolution by City Council—Interpretation of agreement, statute—Words of provision, whether imperative, or directory only.

An agreement between the City of Ottawa and the Ottawa Electric Ry. Co. (a company incorporated by Act of Parliament of Canada), which agreement was ratified and confirmed by c. 84, statutes of Canada, 1924, provided, *inter alia,* for application for increase or decrease of fares on a certain part of the Company's railway. Clause 9 (*c*) of the agreement provided that "should the revenue to be derived from the operation of [said part of the railway] appear likely to be more than sufficient, in the opinion of the City expressed by resolution, to provide during the five year period next succeeding the five year period then current, for [items specified in clause 9 (*a*)], then the City may notify the Company in writing, one year before the end of any five year period, that it considers the fares excessive", and, if no satisfactory adjustment was made within one month, the City might apply to the Board (now the Board of Transport Commissioners for Canada) for a decrease in fares.

The City Council at a meeting "received and adopted" a presented report of the City's Board of Control recommending that the City Clerk notify the Company that "in accordance with clause 9 of the" said agreement, it was the City's "intention to apply for a reduction in the current tariff of fares"; and the City Clerk notified the Company that "under authority of clause "c" of section 9 of the [said agreement], the City Council, at a meeting held on * * * passed a resolution and instructed me to notify your company that it considers the present fares excessive and if no satisfactory adjustment is made within one month from * * * it is the intention of the City to apply to the Board of Transport for such a decrease in fares during the next five year period as will allow a revenue not more than sufficient to provide for the items specified in clause "a" of section 9 of the said agreement". Later the City applied to the Board for an order decreasing the fares.

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

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

The Company contended, by way of preliminary objection, that before giving the notice the City had failed to express by resolution the opinion that the revenue to be derived appeared likely to be more than sufficient to provide during the next five year period in question for said items, as required by the said agreement and statute of 1924, and that therefore the City was not entitled to give the notice or maintain its application to the Board. That question came before this Court, by leave of the Board of Transport Commissioners, on appeal from holdings of the Board.

Held (affirming holdings of the Board, 56 C.R.T.C. 317), that the City was entitled to give the notice and to maintain its application.

Per the Chief Justice and Taschereau J.: The fact that the City Council's resolution, instead of reproducing the exact words of said clause 9 (*c*), adopted a report which proceeded by way of a reference to the clause itself, did not justify the Company's objection. Whether the terms of the clause be held as being imperative or directory, the condition therein stated in respect of the resolution was sufficiently complied with—indeed more than substantially—and the action taken by the City Council completely satisfied the requirements of the clause. The resolution necessarily imported the City's opinion that the Company's revenues appeared likely to be more than sufficient for the purposes in question, and in effect expressed that opinion. Also, no prejudice could result to the Company on account of the alleged omission in the resolution. Also, it was not to be assumed (nor was there any evidence) that the resolution was adopted without due deliberation and after careful consideration. (The words of said Act of 1924, so far as material in this case, merely confirm and validate the agreement and make it binding as a contract between the parties; though the Act, because of its direction to the Board and because the agreement affects the interest of the general public, may not be considered merely as providing and imposing mutual obligations on the Company and the City. Also the Act, rather than conferring a privilege of applying to the Board, really restricts the parties' rights in that connection; the Company is under the Board's jurisdiction existing under the *Railway Act,* and said Act of 1924 limits the right of each party to apply to the Board as to fares, to the terms and conditions of the agreement. The agreement as ratified by the Act, in so far as clause 9 (*c*) is concerned, only deals with the procedure whereby the Board's jurisdiction is to be set in motion; it indicates what form will be given to the application to the Board —a certain resolution of the City Council and the notice in writing to the Company).

Per Kerwin J.: The Act of 1924 did more than merely ratify and confirm the agreement; and the agreement should be construed as a statutory enactment. Even considered as such, the first part of clause 9 (*c*), down to the word "resolution", is merely directory, not imperative, and the word "then" in the phrase "then the City may notify the Company in writing" means no more than that the parties were making provision for the City's application; it does not mean that the City may give notice only if it should first specifically express its opinion by resolution. The lack of a resolution expressed in the precise words used in clause 9 (*c*) was not fatal to the City's appli-

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

cation made after its notice to the Company. There was nothing to indicate that thorough consideration was not given to the matter by the City Council, nor was there any prejudice to the Company.

Per Rand J.: The provisions of the agreement dealing with fares and the Board's powers over them must be taken to have become, by the Act of 1924, the subject of statutory enactment. But the mere expression of opinion by the City in a formal resolution is not an imperative step to the right to raise the question of fares. To the language used by Parliament in restricting the power to deal with the fares, which involves the taking away of the general privilege under the *Railway Act*, there should not be attributed the intention of surrounding the public trust lying on the City Council with conditional formalities of no substantive value. The formality intended to be secured was approval of the Council before executive action should take place, and whether that approval should lie in a resolution fomally expressing the opinion of the Council, to be followed automatically by executive action, or in one instructing the giving of the notice, would be a matter of indifference. The essential protection to the Company was that there should be no unauthorized action; that behind any step by the executive should stand the knowledge, opinion and approval of the Council. That protection was present here. The resolution directing the giving of the notice, by the necessary implication of its terms, involved the opinion of the Council essential to the propriety of its action.

Per Kellock J.: The principle of the decision in *Halford* v. *Cameron's Coalbrook Steam Coal, etc., Co.*, 16 Q.B. 442, applies. The resolution of the City Council did "express" (giving to that word the meaning adopted in the *Halford* case: "represent in words", "exhibit by language" or "shew or make known") that the City was of the opinion specified in said clause 9 (*c*), and was sufficient, though the word "opinion" or a similar term was not used.

APPEAL by the Ottawa Electric Railway Company (a company incorporated by an Act of the Parliament of Canada) from the order of the Board of Transport Commissioners for Canada (1) deciding in favour of the City of Ottawa a preliminary question of law raised in connection with an application by the City to the Board under clause 9 (*c*) of a certain agreement in writing between the City and the Company dated January 25, 1924. That agreement is set out in the schedule to, and is ratified and confirmed by, c. 84 of the Statutes of Canada, 1924 (and see c. 143 of the Statutes of Ontario, 1924, as to confirmation, etc., by the Legislature of Ontario).

The City's application to the Board, which was dated August 6, 1943, was for an order decreasing the fares established and in effect on that part of the Company's

(1) 56 Canadian Railway and Transport Cases 317.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

transportation system as is situate within the limits of the City of Ottawa and such other parts as are situate outside such limits but within the area specified in clause 4 (*c*) of said agreement (which parts are called "the said part" in clause 9 (*c*) of said agreement quoted in the reasons for judgment now reported), which existing rates of fare had been established and approved by an order of the Board of Railway Commissioners for Canada in 1933.

Said clause 9 (*c*) and other relevant provisions of the agreement (and also the enacting provisions of the said Act of 1924) are set out in the reasons for judgment now reported. Said clause 9 (*c*) provides for certain proceedings before such an application as that now in question is made by the City. A certain resolution was passed by the City Council, and, following it, a notice was given to the Company. These are also set out in the said reasons for judgment. The Company contended that the resolution of the City Council, in the form which it took, was not a compliance with what was required, and that, therefore, the City was not entitled to give the notice to the Company nor to maintain its application to the Board.

The Board held (MacPherson C. dissenting) that the City was entitled to give the notice to the Company and was entitled to maintain its application to the Board. The Board granted to the Company leave to appeal to the Supreme Court of Canada upon the following questions, which, in the opinion of the Board, were questions of law and of jurisdiction:

Whether, as a matter of law, the Board was right—

1. In holding that the Applicant [the City] was entitled to give to the Respondent [the Company] the notice dated June 27th, 1942.

2. In holding that the Applicant is entitled to maintain its application to the Board dated the 6th day of August, 1943.

W. F. Schroeder K.C. and *J. L. Kemp* for the appellant.

G. C. Medcalf K.C. for the respondent.

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

THE CHIEF JUSTICE—On the 6th of August, 1943, the Corporation of the City of Ottawa applied to the Board

of Transport Commissioners for Canada for an Order decreasing the fares in effect on that part of the Company's transportation system situate within the limits of the City of Ottawa and such other parts as are situate outside such limits but within the area specified in clause (*c*) of section 4 of a certain agreement between the City and the Ottawa Electric Railway Company, dated January 25th, 1924, which rates of fares were established and approved by an Order of the Board of Railway Commissioners for Canada (as it then was), dated August 31st, 1933, to be effective for a period of five years from and after the 13th day of August, 1933.

It was submitted in the application that the rates of fares presently in effect were excessive and produced a larger revenue from the operation of the said part of the Company's system than was

> sufficient to provide the said Company during the five-year period commencing with the 13th day of August, 1943, with the cost of operating the said part of the said Company's transportation system, and such portion of the cost of operating works in connection therewith as is properly chargeable to the said part, and in maintaining and keeping up the same in an efficient condition and making proper provision for their depreciation, renewal and replacement, and for a just and reasonable rate to the Company on the capital investment in the said part and on such portion of the capital investment in the said works as is properly chargeable to the said part.

The answer of the Company to the application, as it was originally fyled on August 13th, 1943, amounted to a general denial, but it was subsequently amended on the 10th of September, 1943, and then alleged that, before giving the notice under section 9 (*c*) of the agreement between the Company and the City, the latter had failed to express by resolution the opinion that the revenue to be derived from the part of its transportation system affected by the agreement appeared likely to be more than sufficient to provide for the five year period next succeeding the five year period then current, which expression of opinion was required by the terms and provisions of the agreement and the statute into which it was incorporated, being Chapter 84 of the Statutes of Canada, 14-15 George V; and that the City was not, therefore, entitled to give the said notice and the proceedings were not now maintainable.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

In its reply, the City admitted that the Council thereof did not express by resolution, on or before the 13th day of August, 1942, its opinion that the revenue to be derived from the operation of that part of the street railway owned and operated by the Company appeared likely to be more than sufficient to provide for the items specified in clause (*a*) of section 9 of the agreement; but it added that such opinion was expressed in the notice served upon the Company of its intention to apply to the Board for a decrease of fares. On behalf of the City, it was submitted that, as a matter of law, the failure of the Council to pass such a resolution in no way affected its right to make its application to the Board.

In view of the respective contentions above referred to, a special case was submitted to the Board of Transport Commissioners on the preliminary question of law raised by the pleadings.

On January 12th, 1944, the majority of the Board, upon consideration of all that had been placed before it, arrived at the conclusion that on a true construction of the agreement and Statute the City had substantially and sufficiently complied with the provisions of section 9 (c) of the agreement to entitle it to give the Company the notice and to make and maintain its application to the Board for an Order decreasing the present rates of fares.

The Board took the view that, as between the parties, the agreement, even although validated by the Statute, was to be regarded as having created only obligations arising out of a contract; that the agreement was to be construed accordingly, and that the provision with regard to the resolution to be passed by the Council was directory, rather than absolute or imperative, and that no disadvantage, or prejudice, to which the Company may have been put could result to the Company from the course that had been followed by the City.

One of the Commissioners, however, Mr. MacPherson, was of a contrary opinion. He thought that the condition set out in section 9 (*c*) had to be fulfilled before the City had a right to give the notice to the Company, or

to make an application to the Board, that the City admitted that it had not been fulfilled, and that the application should, therefore, be dismissed.

There was then an application to the Board for leave to appeal to this Court, which was granted and, by an Order, dated February 12th, 1944, the following questions, which, in the opinion of the Board are questions of law and jurisdiction, were submitted to us:—

Whether, as a matter of law, the Board was right—

1. In holding that the Applicant was entitled to give to the Respondent the notice dated June 27th, 1942.

2. In holding that the Applicant is entitled to maintain its application to the Board dated the 6th day of August, 1943.

It is not necessary to discuss in detail the history of the preceding Companies which were known as the Ottawa City Passenger Railway Company and the Ottawa Electric Street Railway Company, Limited, and which, in the year 1893, were amalgamated and followed by incorporation of the appellant under the name of the Ottawa Electric Railway Co.

It is sufficient to say that the appellant Company was created by a Statute of the Parliament of the Dominion of Canada and carries on a transportation business by means of electric street cars and busses throughout the City of Ottawa and beyond the City limits into the City of Hull, which is in the Province of Quebec.

The appellant and the respondent entered into an agreement bearing date of the 25th of January, 1924, which was duly confirmed by a by-law of the City, bearing the same date, and which deals with the terms and conditions of the operations of the appellant's business in the City of Ottawa.

The appellant, being a federal Company, came under the provisions of the *Railway Act*. The agreement was confirmed and validated by Statute of the Parliament of Canada, to which it was attached as a schedule.

The City is under the jurisdiction of the provincial legislature and the agreement was also validated and confirmed by the Ontario Legislature (Chapter 143 of the Statutes of Ontario, 1924).

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

For the purpose of the present appeal, it does not seem that we are concerned with the Ontario Statute and it will be sufficient to refer to the provisions of the Dominion Statute.

In the preamble of that Statute it is recited, among other things, that the Company has prayed that the agreement be ratified and confirmed, and that the parties be empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder. It is important to set out in full sections 1 and 2 of the Statute, reading as follows:—

1. The agreement set out in the Schedule to this Act, dated the twenty-fifth day of January, 1924, between the Company and the Corporation is ratified and confirmed, and the parties thereto are hereby empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder.

2. Notwithstanding the provisions of *The Railway Act, 1919,* and amendments thereto, the rates of fares on The Ottawa Electric Railway Company's transportation system, as established by the said agreement, shall not be altered before the thirteenth day of August, 1928, either by the parties thereto or by the Board of Railway Commissioners for Canada, and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement.

The relevant portions of the agreement, which, as already stated, is attached as a schedule to the Dominion Statute, are sections 4 (*b*), 9 (*a*) (*b*) (*c*) (*d*), and 13, as follows:—

4. (*b*) Notwithstanding any provision of the Railway Act (Canada) 1919, or of any subsequent Act amending the same, or of any order in council made thereunder, the above fares shall not be altered until the 13th day of August, 1928, and then only if such alteration is permitted in accordance with clause 9 hereof and only while such alteration remains in force.

9. (*a*) Should the Company consider that the revenue to be derived from the operation of the part of its transportation system within the City limits, as they may be from time to time, and from the other lines mentioned in sub-clause (*c*) of clause 4 hereof (hereinafter in this clause called "the said Part") will be insufficient to provide during the five year period next succeeding the five year period then current, for the following items, viz., the cost of operating the said part and such portion of the cost of operating works in connection with the Company's transportation system as is properly chargeable to the said part, and of maintaining and keeping up the same in an efficient condition, and of making proper provision for their depreciation, renewal and replacement, and for a just and reasonable return to the Company on the capital investment in the said part and on such portion of the capital investment in the said works as is properly chargeable to the said

part, as such capital investments may be from time to time, the Company may notify the City in writing not later than one year before the end of any five year period, that it cannot profitably continue, after such period, the tariff of fares then in effect on the said part, and shall submit therewith a tariff of fares, and the tariff of fares to be effective during the next five year period shall thereupon be open for discussion between the parties hereto.

(*b*) Should no satisfactory adjustment be effected within one month after such notification, the Company may, at any time thereafter, apply to the Board of Railway Commissioners for authority to charge such an increased tariff of fares on the said part of the said system, during the next five year period, as will produce a sum sufficient to provide in such period for the said items.

(*c*) Should the revenue to be derived from the operation of the said part appear likely to be more than sufficient in the opinion of the City expressed by resolution, to provide during the five year period next succeeding the five year period then current, for the said items, then the City may notify the Company in writing, one year before the end of any five year period, that it considers the fares excessive, and if no satisfactory adjustment of the matter is made within one month after such notification, the City may apply to the Board for such a decrease in fares upon the said part during the next five year period, as will allow a revenue not more than sufficient to provide for the said items.

(*d*) Whenever notice has been served by the Company or by the Corporation under clause 9 of this Agreement, any accountant or engineer instructed by the Corporation by a resolution shall have full right of access to the books, records, documents, vouchers and balance sheets of the Company, and shall have full right to examine the same, and to take extracts therefrom.

13. The parties hereto agree to join in applying to the Parliament of the Dominion of Canada and to the Legislature of the Province of Ontario for legislation confirming and ratifying this Agreement, and declaring the same to be valid, legal and binding upon the parties hereto (the expense of such legislation to be borne by the Company).

The proceedings, whereby the application of the City involved in the present appeal was initiated, are entered in the minutes of the City Council, of June 25th, 1942, as follows:—

MINUTES OF THE CITY COUNCIL

Transportation Building,

June 25th, 1942,
4.30 p.m.

PRESENT:—All the members with the exception of Aldermen Ash, Band, Bradley and Hamilton.

Special meeting called by His Worship the Mayor.

Controller Geldert presented Report No. 16 of the Board of Control.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

REPORT No. 16, BOARD OF CONTROL

To the Council of the Corporation
of the City of Ottawa.

Gentlemen:

1. OTTAWA ELECTRIC RAILWAY CO.

The Street Railway Committee having adopted a motion to instruct the City Clerk to notify the Ottawa Electric Railway Co. that, in accordance with Clause 9 of the agreement between the Corporation and the Railway Company, dated January 25, 1924, it is the Corporation's intention to apply for a reduction in the current tariff of fares, the Board recommends that the City Clerk give such notice to the Railway Company.

The five year extension period of the agreement with the Company expires on August 13, 1943, and it is required that notice of one year be given the Company of any change that may be contemplated by the City in the agreement.—Carried.

2. OTTAWA ELECTRIC RAILWAY CO.

The Street Railway Committee having adopted a motion to instruct the City Clerk to notify the Ottawa Electric Railway Co. of the Corporation's intention to re-examine the terms of the agreement respecting bus services with a view to securing a revision of these terms, the Board recommends that the City Clerk give such notice to the Railway Company.—Carried.

3. OTTAWA ELECTRIC RAILWAY CO.

The Street Railway Committee having adopted a motion to instruct the City Clerk to notify the Ottawa Electric Railway Co. of the City's intention to seek reconsideration of the terms of the agreement relating to the cost of snow removal from City streets, the Board recommends that the City Clerk give such notice to the Railway Company.—Carried.

Respectfully submitted

June 25th, 1942.

(Sgd.) J. E. S. LEWIS, Chairman,
E. A. BOURQUE,
G. M. GELDERT,
J. A. FORWARD,
C. E. PICKERING.

1. Moved by Controller Geldert, seconded by Controller Bourque, that Report No. 16 of the Board of Control, just presented, be received and adopted.—Carried.

This was followed by a notice, bearing date of June 27th, 1942, signed by the City Clerk, addressed to the Manager of the appellant Company, and reading thus:—

I beg to inform you that under authority of Clause "C" of Section 9 of the Agreement between your Company and the City of Ottawa, dated January 25th, 1924, the City Council, at a meeting held on Thursday the 25th day of June, instant, passed a resolution and instructed me to notify your company that it considers the present fares excessive and if no satisfactory adjustment is made within one month from the date

of this notification it is the intention of the City to apply to the Board of Transport for such a decrease in fares during the next five year period as will allow a revenue not more than sufficient to provide for the items specified in clause "A" of Section 9 of the said Agreement.

The question involved in the appeal is whether, in the circumstances set out above, the City was entitled to give the Company the notice as provided in section 9 (*c*) of the agreement and to make and maintain its application to the Board of Transport Commissioners.

Counsel for the Company argued that the majority of the Board, while correctly holding that the provisions and conditions of the 1924 agreement relating to the alteration of fares have been given the force of the Statute, erred in holding that these provisions and conditions should be construed in precisely the same way as if they had been matters not of enactment but of private agreement; that the conditions enumerated in section 9 (*c*) of the agreement with respect to the passage of a resolution by the City were directory and not imperative and that strict compliance therewith is not necessary; that the City has substantially complied with the provisions of that section, and that the appellant has suffered no disadvantage or prejudice by reason of the failure of the City to comply with those provisions.

The appellant submits that the provisions of section 9 (*c*), being a part of the Statute (chapter 84, 14-15 George V), are imperative and absolute, first, because such provisions relate to a privilege, right or power granted with a direction that certain regulations, formalities or conditions shall be fulfilled, secondly, because it is a provision of the Statute which enables the parties affected by it to take legal proceedings under certain specified circumstances, thirdly, that it is part of the Statute which confers jurisdiction upon a tribunal of limited authority and statutory origin and is one of the conditions and qualifications annexed to the grant, fourthly, it is a provision relating to Court procedure, fifthly, it is a condition precedent to the right to give the notice without the giving of which the proceedings before the Board of Transport Commissioners for Canada cannot be launched.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

The real reply of the City was, in effect, that, even if there had been no resolution preceding the notice sent to the Company on the 27th of June, 1942, such resolution was not necessary.

There was some discussion at bar with regard to the true meaning of the admission made by the City in its reply before the Board that its Council had not expressed by resolution the opinion provided for by section 9 (*c*) of the agreement. In my view, that admission does not mean any more than that the resolution of the Council had not used the precise words of section 9 (*c*).

It cannot be said that there was no resolution at all, and the only interpretation that can be given to the admission as made in the reply, consistent with the facts and circumstances as we know them, must be that the text of the resolution is not couched exactly in the words of the agreement.

There can, however, be no question about the notice sent by the City Clerk in carrying out the order of the Council. It says distinctly that a resolution was passed instructing him

> to notify your company that it considers the present fares excessive and if no satisfactory adjustment is made within one month from the date of this notification it is the intention of the City to apply to the Board of Transport for such a decrease in fares during the next five year period as will allow a revenue * * *.

The notice itself is clearly worded according to section 9 (*c*) and was unobjectionable as to its form for all intents and purposes.

This Court was invited by counsel for the Company to construe section 9 (*c*) strictly and to decide that the conditions therein mentioned had to be adhered to according to the rules of interpretation of statutes; while counsel for the City contended that, although validated by Statute (Chapter 84), as between the parties, the agreement should be construed according to the general rules accepted for the interpretation of contracts.

A rather large number of cases were referred to by each counsel in support of his respective contention; but, as was observed by Lord Campbell in *The Liverpool Borough Bank* v. *Turner*(1):—

(1) (1860) 30 L.J.Ch. 379, at 380.

No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed.

After having very carefully read the cases to which the Court was referred by counsel, and also some others, I had to come to the same conclusion as Lord Penzance in *Howard* v. *Bodington* (1), where he said:—

I have been very carefully through those cases, but upon reading them all the conclusion at which I am constrained to arrive is, that you cannot glean a great deal that is very decisive from a perusal of those cases.

The statutes and agreements under discussion in the decided cases are on all sorts of subjects and I think it must be said that the Court must determine its opinion by an interpretation of the particular statute, or agreement, which it has to apply in the case submitted to it.

In the Statute of 1924 (Chapter 84) now under consideration, the agreement, while being "ratified and confirmed" by section 1, was not made part of the Act. The object of that section is to give the agreement validity and to state that "the parties thereto are hereby empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder". Be it noticed that the authorization is to carry out the obligations and the privileges thereunder and, therefore, those of the agreement. No power or authorization is added to the agreement itself.

Section 2 of the Statute derogates from certain provisions of *The Railway Act, 1919,* in respect of the rates of fares, but merely to state that "as established by the said agreement [they] shall not be altered before the thirteenth day of August, 1928." That part of the section may now be disregarded, as the date fixed has now long since expired. Then section 2 goes on:—

and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement.

Again, therefore, it does not derogate from the agreement itself and merely confirms the "terms and conditions" thereof in regard to any alteration in fares.

(1) (1877) 2 P.D. 203, at 211.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

RINFRET C.J.

The words of the Statute, so far as material in the present case, merely confirm and validate the agreement and make it binding as a contract between the parties. The intention of the legislature, gathered from the provisions of the only two sections of the Statute, would appear, therefore, to limit the effect of the enactment to the validating of the agreement between the Company and the City.

It may not, however, be considered merely as providing and imposing mutual obligations on the Company and the City, because of the direction given in the Statute to the Board of Railway Commissioners for Canada, and also because it may not be denied that the agreement also affects the interest of the general public in their right to utilize the facilities of the Company.

As between the appellant and the respondent, it would seem that their respective obligations and privileges, to use the words of section 1 of the Statute, are reciprocal. Clauses 9 (*a*) and 9 (*c*) of the agreement clearly lead to that view; but I cannot agree with counsel for the Company that section 2 of Chapter 84 confers a privilege on either party in respect of the right to apply to the Board of Railway Commissioners for Canada (now the Board of Transport Commissioners). On the contrary, I would think that it restricts the rights of the parties in that connection. There can be no question that the Company is under the jurisdiction of the Board and that, in particular, in respect of its rates and fares, the effect of section 2 restricts the right of each party to the agreement to apply to the Board and limits it to the terms and conditions of the agreement. So far as that point is concerned, I fail to see how it can be said that the Statute confers a privilege on either party.

This leads me to say that the questions submitted to the Court hardly raise a point as to the jurisdiction of the Board. Neither the agreement, nor the Statute, created that jurisdiction. It existed under the *Railway Act* by reason of the incorporation of the Company as a federal entity and, but for the agreement and Statute, the jurisdiction of the Board would have been general and unaltered. Perhaps it was suspended in regard to

rates and fares until the 13th day of August, 1928, but since that date the question is no longer one of jurisdiction. The latter is not derived either from the agreement or from the special Statute; the right of control which the Board exercises over the rates of fares of the Company is given to it by the *Railway Act,* and the agreement as ratified by the Statute, in so far as 9 (*c*) is concerned, only deals with the procedure whereby the jurisdiction of the Board is to be set in motion. It indicates what form will be given to the application to the Board:—a certain resolution of the City Council and the notice in writing to the Company.

I would not, therefore, follow the contention of the City to the extent of saying that the failure of the City Council to pass a resolution was wholly immaterial, but the discussion on that point is really irrelevant in the premises, because, as a matter of fact, there was a resolution passed by the Council. Report No. 16 of the Board of Control was adopted by a resolution of the Council. The minutes of June 25th, 1942, show that a resolution was then and there carried by the Council and the question, as it presents itself, is not, therefore, whether a resolution is necessary or not under clause 9 (*c*) of the agreement, but rather whether the particular resolution adopted by the Council was sufficient for the purpose which the City intended thereby to achieve.

The point raised by counsel for the Company is that the resolution was not effective because it was not strictly adopted in the words of section 9 (*c*) and, to be more precise, because it did not express the opinion of the City that the revenue to be derived by the operation of that part of its transportation system within the City appeared likely to be more than sufficient to provide during the five year period next succeeding the five year period then current for the items enumerated in section 9 (*a*) of the agreement, and that the City considered the fares excessive.

It is true that the resolution is not in the express terms of section 9 (*c*), but the word "expressed" in 9 (*c*) cannot mean any more than "put forth" and does not exclude the idea that the opinion can be implied. It is, to my

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rinfret C.J.

mind, the necessary implication of the report of the Board of Control that they were acting under clause 9 (*c*) of the agreement. It refers to clause 9 and it states that "it is the Corporation's intention to apply for a reduction in the current tariff of fares". Obviously the intention of the City was to make an application to the Board for a reduction of the fares "in accordance with Clause 9", in view of the fact that the conditions provided for in that clause had arisen; and that intention was clearly conveyed to the Company by the notice sent on behalf of the City on June 27th, 1942, in the very terms of the section.

The only quarrel of the Company is really with the form of the resolution and nothing else.

For my part, I cannot see that the objection can have any merit, because, instead of reproducing in the resolution the exact words of section 9 (*c*), the report of the Board of Control and the resolution of the Council proceeded by way of a reference to the clause itself. Whether the terms of that clause be held as being imperative or directory, I would hold that the condition therein stated, in respect of the resolution to be adopted by the Council, has been sufficiently complied with—indeed more than substantially—and that the action taken by the City Council completely satisfied the requirements of that particular clause. In effect it expressed the opinion referred to in that clause and it necessarily imports the opinion of the respondent that the revenues of the appellant were more than sufficient for the purposes in question. Any alleged omission (and I do not agree that there is any) should certainly be considered as non-essential, and, in the words of Fry, on Specific Performance, 6th edit., p. 440, as the omission of a term which is neither "important" nor " considerable".

Nor can I see what prejudice can have resulted, or can result, to the appellant on account of the alleged omission in the resolution of the City Council. The resolution, even if it carried out strictly the provision in clause 9 (*c*), is really of no value to the appellant as a source of information, or as a guarantee of careful and informed consideration by the Council before entering into the rate

dispute. The Company was fully and completely informed of what the City intended to do by its resolution and by its notice. There cannot be the slightest doubt about the City's intention and there is nothing in clause 9 (*c*) to the effect that the opinion which the City expresses in its resolution should only be arrived at after due deliberation.

Moreover, it is not to be assumed that the resolution was adopted by the Council without due deliberation and after careful consideration of the matters involved. There is certainly no evidence to the contrary in the material before the Court.

I would, therefore, answer the questions submitted by the Board in the affirmative. The appellant should pay the costs of the respondent on the appeal to this Court.

KERWIN J.—I have had the advantage of reading the proposed judgment of my Lord the Chief Justice and, while I agree in the result, my reasons for so doing differ in some respects from his and I therefore propose to state them shortly.

The application to the Board by the City was made in pursuance of the agreement of January 25th, 1924, and it is therefore unnecessary, in my view, to consider or express any opinion as to the effect of subsection 5 of section 325 of the *Railway Act*, R.S.C. 1927, chapter 170. I agree that the reply of the City to the amended answer of the Company is not an admission that the City had not expressed by resolution its opinion that the revenue to be derived from the operation of the relevant part of the Company's transportation system would appear likely to be more than sufficient to provide for the stated items during the five year period next succeeding the five year period then current. It means no more than that the resolution passed by the City Council on June 25th, 1942, was not phrased in the precise words used in section 9 (*c*) of the agreement.

I concur with the Assistant Chief Commissioner of the Board that the Dominion statute of 1924 does more than merely ratify and confirm the agreement of January 25th, 1924, between the City and the Company. The various

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Kerwin J.

cases cited on this point are of very little assistance and one must come to a conclusion upon a consideration of all the terms of the agreement and statute. Ratification and confirmation was accomplished by section 1 of the Act:—

> The agreement set out in the Schedule to this Act, dated the twenty-fifth day of January, 1924, between the Company and the Corporation is ratified and confirmed, and the parties thereto are hereby empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder.

Section 2, however, enacts:—

> Notwithstanding the provisions of *The Railway Act, 1919*, and amendments thereto, the rates of fares on The Ottawa Electric Railway Company's transportation system, as established by the said agreement, shall not be altered before the thirteenth day of August, 1928, either by the parties thereto or by the Board of Railway Commissioners for Canada, and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement.

It is true that the period ending August 13th, 1928, has long since expired and we need not, therefore, concern ourselves with what might have been the position if some one other than the City had applied to the Board during that period for a reduction of fares. But the provision that "the rates of fares * * * shall not be altered * * * by the Board of Railway Commissioners for Canada", coupled with the last leg of section 2 "and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement" lead me to the conclusion that something more than mere approval of the agreement is accomplished and that in fact the agreement should be construed as a statutory enactment.

Even considered as such, the first part of clause 9 (*c*) of the agreement down to the word "resolution" is merely directory and not imperative. Again, expressions used in other agreements and enactments and the decisions thereon are of little assistance. Provision is made by clauses 9 (*a*) and 9 (*b*) for an application by the Company if it thought the revenue would be insufficient. Clause 9 (*c*) provides for an application to be made by the City and I think no further meaning may be attached to the word "then", in the phrase "then the City may notify the Company in writing", than that the parties were making pro-

vision therein for the City's application. It does not mean that the City may give notice to the Company only if it should first specifically express its opinion by resolution.

In view of clause 15 of the agreement:

> The Company may at the request of the City, to be expressed by by-law, substitute other streets or parts thereof for the purpose of reaching the objective points of the extensions referred to in Schedule "A".

wherein it will be noted that the request of the City to the Company to substitute other streets is to be expressed by by-law, it may be that the parties did not want any possible implication to arise that by the general law the City should pass a by-law when proceeding under clause 9. It does not follow, however, that the lack of a resolution expressed in the precise words used in 9 (*c*) is fatal to the City's application to the Board after it had notified the Company of its intention so to apply. It was forcefully argued by Mr. Schroeder that the passing of a resolution by the City Council in the exact terms of clause 9 (*c*) would insure that the matter would receive thorough consideration but there is nothing to indicate that such consideration was not given to the matter when it came before the City Council on June 25th, 1942, and the report of the Board of Control was received and the recommendation therein contained that the City Clerk give the required notice to the Company, was adopted. Neither on this nor any other ground can I find that any prejudice was suffered by the Company.

The questions submitted by the Board of Transport Commissioners for Canada should be answered in the affirmative and the appellant should pay the costs of the respondent of the appeal to this Court.

RAND J.—This is an appeal from an order of the Board of Transport on two questions of law which relate to the right of the respondent to proceed with an application to the Board for a reduction of fares on the street railway of the appellant. The controversy arises out of the interpretation of a clause in an agreement entered into between the parties in 1924. The agreement deals generally with the relations between the City and the Company, and the particular clause, with the procedure preliminary to a modification of fares.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rand J.

The clause is as follows:

9. (*a*) Should the Company consider that the revenue to be derived from the operation of the part of its transportation system within the City limits, as they may be from time to time, and from the other lines mentioned in sub-clause (*c*) of clause 4 hereof (hereinafter in this clause called "the said Part"), will be insufficient to provide during the five year period next succeeding the five year period then current, for the following items, viz., the cost of operating the said part and such portion of the cost of operating works in connection with the Company's transportation system as is properly chargeable to the said part, and of maintaining and keeping up the same in an efficient condition, and of making proper provision for their depreciation, renewal and replacement, and for a just and reasonable return to the Company on the capital investment in the said part and on such portion of the capital investment in the said works as is properly chargeable to the said part, as such capital investments may be from time to time, the Company may notify the City in writing not later than one year before the end of any five year period, that it cannot profitably continue, after such period, the tariff of fares then in effect on the said part, and shall submit therewith a tariff of fares, and the tariff of fares to be effective during the next five year period shall thereupon be open for discussion between the parties hereto.

(*b*) Should no satisfactory adjustment be effected within one month after such notification, the Company may, at any time thereafter, apply to the Board of Railway Commissioners for authority to charge such an increased tariff of fares on the said part of the said system, during the next five year period, as will produce a sum sufficient to provide in such period for the said items.

(*c*) Should the revenue to be derived from the operation of the said part appear likely to be more than sufficient, in the opinion of the City expressed by resolution, to provide during the five year period next succeeding the five year period then current, for the said items, then the City may notify the Company in writing, one year before the end of any five year period, that it considers the fares excessive, and if no satisfactory adjustment of the matter is made within one month after such notification, the City may apply to the Board for such a decrease in fares upon the said part during the next five year period, as will allow a revenue not more than sufficient to provide for the said items.

On June 25th, 1942, the City, acting under the power of paragraph (*c*), by its council passed a resolution instructing the city clerk to notify the Ottawa Electric Railway Company that, in accordance with clause 9 of the agreement between the Corporation and the Railway Company, dated January 25th, 1924, it is the Corporation's intention to apply for a reduction in the current tariff of fares.

The motion before the council was by way of adopting a report from the Board of Control which in turn had approved a recommendation of a committee of the council. The report recited that the current five year period of the agreement would expire on August 13th, 1943, and that notice of one year had to be given to the Company of any change in fares that might be sought by the City.

The notification was by letter as follows:

June 27th, 1942.

D. N. GILL, Esq.,
Manager, Ottawa Electric Ry. Co.,
56 Sparks Street,
Ottawa, Ontario.

Dear Sir:

I beg to inform you that under authority of Clause "C" of Section 9 of the Agreement between your Company and the City of Ottawa, dated January 25th, 1924, the City Council, at a meeting held on Thursday the 25th day of June, instant, passed a resolution and instructed me to notify your company that it considers the present fares excessive and if no satisfactory adjustment is made within one month from the date of this notification it is the intention of the City to apply to the Board of Transport for such a decrease in fares during the next five year period as will allow a revenue not more than sufficient to provide for the items specified in clause "A" of Section 9 of the said Agreement.

Yours truly,

NRO/RFH City Clerk.

In the material before this Court there is nothing to indicate anything further between the parties before August 6th, 1943, when the City launched its application to the Board. The answer by the Company was simply a denial that the rates were excessive or would produce a larger revenue during the ensuing five year period than would meet the requirements enumerated in the agreement. Subsequently, in an amended answer, the Company raised the point that under clause 9 (*c*) it was a condition to the right to make an application that the City should have formally passed a resolution expressing its opinion on the revenue of the Company to be derived in the next succeeding five year period, substantially in the terms of the clause, and that, as no such resolution had been passed, the right to make an application had not arisen. On this issue the Board held that such a formal step was not a prerequisite to the application but at the request of the appellant stated the following questions of law to this Court:

Whether, as a matter of law, the Board was right—

1. In holding that the Applicant was entitled to give to the Respondent the notice dated June 27th, 1942.

2. In holding that the Applicant is entitled to maintain its application to the Board dated the 6th day of August, 1943.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rand J.

The appellant was incorporated by a statute of parliament and its undertaking has been declared a work for the general advantage of Canada. The contract was confirmed by chapter 84, Statutes of Canada, 1924, in the following terms:

1. The agreement set out in the Schedule to this Act, dated the twenty-fifth day of January, 1924, between the Company and the Corporation is ratified and confirmed, and the parties thereto are hereby empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder.

2. Notwithstanding the provisions of *The Railway Act, 1919,* and amendments thereto, the rates of fares on The Ottawa Electric Railway Company's transportation system, as established by the said agreement, shall not be altered before the thirteenth day of August, 1928, either by the parties thereto or by the Board of Railway Commissioners for Canada, and thereafter any alteration in such fares shall be governed by the terms and conditions of the said agreement.

In the argument before the Board and this Court a great deal of discussion took place as to the effect of this language; whether by it the contract or any part of it had been made statutory or whether the result was simply to leave the agreement authorized, in its character as contract. I have little doubt that the provisions dealing with fares and the powers of the Board over them have become the subject of statutory enactment. In the absence of this special code, the fares would be subject to the general jurisdiction of the Board under the *Railway Act.* It would be extraordinary if we should find that statutory jurisdiction modified materially by a purely contractual stipulation.

There remains the narrow point whether a formal resolution containing only the expression of opinion by the City is an imperative step to the right to raise the question of fares. The "opinion" and the notice to the Company are obviously bound up with each other: certainly a state of mind is ordinarily assumed to precede action, and to be in harmony with it. There is no requirement that the notification be authorized by resolution, nor that the resolution now insisted on is in any way to be communicated to the Company. These considerations, so far from indicating any special significance in the resolution of opinion, appear rather to treat that opinion and the notice as two parts of a single act. It was contended by Mr. Schroeder that

the object was to ensure a certain deliberation on the part of the council in the course of which, data available from annual reports of the Company or other public sources would be or might be brought under examination. But so far as that contention confines such a purpose to the mere expression of opinion, I am unable to accede to it.

The precise particulars by which parliament has restricted the power to deal with these fares involves the taking away of the general privilege, under the *Railway Act,* of any recognized public body to raise such a question before the Board. The entire interests of the public of Ottawa have, therefore, been entrusted to the City Council and I cannot attribute to the language of parliament the intention of rendering that trust precarious by surrounding it with conditional formalities of no substantive value.

What clause 9 (*c*) contemplates is, first, preliminary negotiation between the City and the Company to reach agreement and, failing that, an application to the Board. The executive arm of the City consists of a Board of Control and the Mayor. The formality intended to be secured was approval of council before executive action should take place, and whether that approval should lie in a resolution formally expressing the opinion of the council, to be followed automatically by executive action, or in one instructing the giving of the notice, would seem to me to be a matter of indifference. The essential protection to the Company was that there should be no unauthorized action; that behind any step by the executive should stand the knowledge, opinion and approval of the council. That protection was present here. The resolution directing the notice to be given by the clerk, by the necessary implication of its terms, involved the opinion of the council essential to the propriety of its action.

By clause 9 (*a*) the Company has the right, "if it should consider" fares to be inadequate, to raise the question with the City. Under this a state of mind, even adverse in opinion to its action, is irrelevant and I can see no reason why the opposite should, in pure formality, be taken to be the import of the language used in relation to the City when that is capable of another and perfectly reasonable construction. This points also to the place of

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Rand J.

emphasis in the words, "in the opinion of the City expressed by resolution"; it is not "opinion" but "resolution"; opinion will be deemed to be in harmony with action but it must be deducible from "resolution", as we have it here.

The appeal should be dismissed with costs.

KELLOCK J.—The point involved in this appeal is taken in paragraph 2 of the amended answer of the appellant, to the effect that the respondent had "failed to express by resolution" the opinion referred to in paragraph 9 (*c*) of the agreement of the 25th of January, 1924, and that, having so failed, it was not entitled to give the notice provided for by the said clause. Appellant contends that the agreement is to be taken as part of the Statute, 14-15 Geo. V, chapter 84, that the words above quoted are to be construed as mandatory and not merely directory, and when so regarded the resolution of the respondent's council of June 25th, 1942, is not a compliance with the terms of the agreement. On behalf of the respondent, it is contended, (1) that clause 9 (*c*) should be construed as a contractual provision and not as part of the statute, and when so construed, the resolution of June 25th, 1942, if in any respect deficient, which is denied, complies with all the essential terms of the agreement; (2) that if the clause in the agreement is to be construed as a statute, that part of clause 9 (*c*) above referred to is merely directory; and (3) even if the clause is to be construed as mandatory, the resolution of the respondent council completely satisfied its requirements.

It will be convenient to consider this last contention first. The question is as to whether appellant is right in its assumption that any resolution which meets the requirements of clause 9 (*c*) must contain *in explicit terms* the opinion of the council of the respondent on the matter dealt with by that clause.

In *Halford* v. *Cameron's Coalbrook Steam Coal, etc., Company* (1), there was involved the construction of 7 & 8 Victoria, Chapter 110, section 45, which enacted as

(1) (1851) 16 Q.B. 442.

to bills of exchange made or accepted on behalf of any company subject to the Act that

every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the names of two of the directors of the company on whose behalf or account the same may be so made or accepted, *and shall be by such directors expressed to be made or accepted by them on behalf of such company;*

and that every such bill should be binding upon the company and the company should be liable thereon. In the case before the court, acceptance, as far as the directors were concerned, consisted of their signatures followed by a description of them as directors of the company appointed to accept the bill. It was objected on behalf of the company that the requirements of the statute had not been met and that the action did not lie.

The court (Lord Campbell C.J., Patteson, Coleridge and Erle JJ.) held that the objection was not a valid one. Lord Campbell, in giving the judgment of the court, said at page 445:

But we think that there is no necessity for the very words and syllables here mentioned to be written by the two directors on the face of the bill. According to Dr. Johnson, the meaning of the verb "to express" is "to represent in words; to exhibit by language; to shew or make known in any manner". Now do not the two directors who have accepted this bill represent in words, exhibit by language, shew and make known, that the bill is accepted by them as directors on behalf of the company?

In my opinion, the principle of this decision applies to the case at bar. Turning to the resolution of the 25th of June, 1942, it is as follows:

Moved by Controller Geldert, seconded by Controller Bourque, that Report No. 16 of the Board of Control, just presented, be received and adopted.—Carried.

The Report referred to is as follows:

1. OTTAWA ELECTRIC RAILWAY CO.

The Street Railway Committee having adopted a motion to instruct the City Clerk to notify the Ottawa Electric Railway Co. that, in accordance with Clause 9 of the agreement between the Corporation and the Railway Company, dated January 25, 1924, it is the Corporation's intention to apply for a reduction in the current tariff of fares, the Board recommends that the City Clerk give such notice to the Railway Company.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Kellock J.

The five year extension period of the agreement with the Company expires on August 13, 1943, and it is required that notice of one year be given the Company of any change that may be contemplated by the City in the agreement.—Carried.

It is to be noted that what was to be notified to the appellant by the city clerk under the resolution "in accordance with clause 9" of the agreement of the 25th of January, 1924, was that it was the respondent's intention to apply for a reduction in fares. The resolution states that "the five year extension period of the agreement expires on August 13, 1943". This refers to the order of the Board of Railway Commissioners for Canada of August 31st, 1933, which had established different rates of fares from that originally provided for under the agreement of January 25th, 1924, made pursuant to clause 9 (*c*). This would be well understood by the appellant. The resolution goes on to state that "it is required that notice of one year be given the Company of any change that may be contemplated by the City in the agreement". There is no change but one provided for in clause 9 (*c*) "in accordance with" which the notice was to be given and this is with respect to a reduction of fares during the five year period next succeeding the period expiring August 13th, 1943. Such a change must be based upon the opinion of the respondent which the clause describes. Can it be said that this resolution could be otherwise understood by the appellant?

In my opinion, the resolution does "represent in words" or "exhibit by language" or "shew or make known" that the city was of the opinion specified in the clause, although the word "opinion" or a similar term is not used. I think the principle of the decision above referred to is to be applied to the facts of the case at bar. I do not think there is any substance in the argument put forward on behalf of the appellant that if the word "opinion" were to be found in the resolution, there would necessarily have been any difference in the consideration given to the matter when the resolution was before the council of the respondent for consideration. I see no weight in this argument as in any way touching the interpretation to be given to the language of the agreement in question.

1944

OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA.

Kellock J.

I agree with my Lord the Chief Justice with regard to the effect of the admission contained in the respondent's reply.

In view of the opinion to which I have come, it is not necessary to deal with the other points argued.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *MacCraken, Fleming, Schroeder & Burnett.*

Solicitor for the respondent: *Gordon C. Medcalf.*

THE CITY OF SYDNEY (DEFENDANT).....APPELLANT;

AND

GRACE I. WRIGHT (PLAINTIFF).....RESPONDENT.

1944

*Nov. 28, 29
*Dec. 20

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Appeal—Jurisdiction—Supreme Court Act (R.S.C. 1927, c. 35), s. 39—"Amount or value" of the "matter in controversy" in the appeal—Appeal from judgment restraining appellant from proceeding with tax sale.

The City of Sydney appealed from the judgment of the Supreme Court of Nova Scotia *in banco* (18 M.P.R. 20) dismissing its appeal from the judgment of Graham J. (*ibid*) restraining it from proceeding with the advertised sale for arrears of taxes, or at any future time selling or attempting to sell for taxes, certain land which adjoined land of respondent, and declaring that the land in question was a public way and not assessable. A motion was made to quash the appeal to this Court for want of jurisdiction. The taxes to which the proceeds of the advertised sale could be applied did not exceed $1,500. The value of the land in question was assumed to be $7,200.

Held: The appeal should be quashed for want of jurisdiction, as "the amount or value of the matter in controversy" in the appeal did not exceed $2,000, within s. 39 (*a*) of the *Supreme Court Act* (R.S.C. 1927, c. 35). The "matter in controversy" was the right of the City to collect $1,500 of taxes through the sale of property. As to "the amount or value", it is the interest of the appellant that must be considered (*Kinghorn* v. *Larue*, 22 S.C.R. 347, at 349); and this was

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

1944

CITY OF SYDNEY v. WRIGHT.

clearly the taxes; and their amount was the measure of value which determined the jurisdiction (*Gendron* v. *McDougall*, Cassels' Digest, 2nd. Ed., p. 429, cited). (Special leave to appellant to appeal to this Court was refused).

MOTION to quash an appeal brought by the defendant, the City of Sydney, from the judgment of the Supreme Court of Nova Scotia *in banco* (1) dismissing its appeal from the judgment of Graham J. (2) restraining it from proceeding with the advertised sale for arrears of taxes, or at any future time selling or attempting to sell for taxes, a certain piece of land which adjoined land of the plaintiff, and declaring that the land in question was a public way and not assessable. At the opening of the hearing of the appeal in this Court, counsel for the respondent moved that the appeal be quashed for want of jurisdiction, on the ground that the amount or value of the matter in controversy in the appeal did not exceed $2,000. Counsel for the appellant opposed the motion, but asked, if necessary, for special leave to appeal (leave was refused by the Supreme Court of Nova Scotia *in banco*). This Court reserved judgment on the motions, and heard the appeal. In the judgment now reported, this Court, dealing only with the motions, quashed the appeal, and refused special leave to appeal.

E. H. Charleson and *B. B. Jordan* for the appellant.

G. F. Henderson for the respondent.

The judgment of the Court was delivered by

RAND J.—When this appeal was called, a motion to dismiss for want of jurisdiction was made by the respondent. The appeal was heard on the merits and judgment on the motion reserved.

The point of jurisdiction depends upon whether or not within section 39 (*a*) of the *Supreme Court Act* "the amount or value of the matter in controversy in the appeal exceeds the sum of $2,000." The action was brought for an injunction to restrain the City of Sydney from proceeding with a tax sale of a strip of land adjoining property owned

(1) 18 M.P.R. 20; [1944] 2 D.L.R. 133.

(2) 18 M.P.R. 20, at 20-26; [1944] 2 D.L.R. 133, at 133-138.

by the respondent. The taxes to which the proceeds of the sale could be applied were not more than $1,500. The land was assessed for $7,200 and for the purposes of deciding the question raised I will assume that sum to be its value. Further relief claimed was a declaration that the strip had, by dedication, become a public highway. The Courts below upheld the plaintiff's contention.

What, then, is the matter in controversy in this Court? It is the right of the City to collect $1,500 of taxes through the sale of property. Then, as to "the amount or value", it is to the interest of the party appealing that we must look: Taschereau J., in *Kinghorn* v. *Larue* (1). What is that here? It is clearly the taxes, and their amount is the measure of value which determines the jurisdiction.

For that conclusion we are not without authority. The point is governed by *Gendron* v. *McDougall* (2). There the plaintiff had obtained a judgment for $231 and in execution seized an immovable worth $2,000. The defendant filed an opposition *à fin de distraire,* claiming the land seized to be his property. Gendron contested that opposition but it was maintained. He then appealed to this Court which, on a challenge to the jurisdiction, held that the value of his interest in the appeal was $231 only. I see no difference in principle between that case and the present.

The appellant had applied to the Court of Appeal for special leave to bring the controversy to this Court but it was refused, and by consent the application was renewed before us. The case, however, is *sui generis* and is not, in my opinion, one in which special leave should be granted.

The appeal should be quashed with costs to the respondent of one motion.

Appeal quashed, with costs to the respondent of a motion; the application for leave to appeal dismissed without costs.

Solicitor for the appellant: *Finlay MacDonald.*

Solicitor for the respondent: *John MacNeil.*

(1) (1893) 22 S.C.R. 347, at 349.
(2) (1885) Cassels' Digest, 2nd Ed., p. 429.

1944

*Nov. 29, 30
*Dec. 20

RODERICK McINTYRE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Charge of rape—Evidence—Corroboration—Charge to jury —Misdirection—New trial.

The appeal was from the judgment of the Court of Appeal for Ontario (81 C.C.C. 319) dismissing (Laidlaw J.A. dissenting) appellant's appeal from his conviction on a charge of rape. The issue at the trial was whether or not the complainant voluntarily consented to the intercourse. A witness, R., who had arrived at the scene of the alleged offence shortly after what took place, testified to there being a "matted down" area of about 20 x 6 feet. The complainant in her evidence had said nothing about such condition. Appellant testified that such condition existed before what took place. In charging the jury the trial Judge said that the evidence of R. and two other men corroborated the complainant's story in regard to some of the material aspects thereof and he followed by detailing certain matters of their evidence, including the condition of the area as described by R.

Held (Taschereau and Kellock JJ. dissenting): The conviction should be quashed and a new trial directed.

Per the Chief Justice and Kerwin J.: It was not necessary that the complainant should have given some particular bit of evidence before an independent witness upon that point could corroborate her general story on the issue of consent. As part of the Crown's case, it was quite proper to show the condition of the particular area when R arrived, and the jury would not be bound to believe appellant's evidence as to its condition before the occurrence. But it was misdirection to say that evidence of the matted down condition of the area after the occurrence could constitute corroboration of a material aspect of the complainant's story as to which she had not testified. And it could not be said that the misdirection had caused no miscarriage of justice.

Per Rand J.: It was beyond controversy on the evidence that the state of the surface of the area could not have furnished the slightest corroboration to the complainant's story or to the case of the Crown. The charge to the jury was, therefore, in that respect, a misdirection in law and of such a nature that it could not be said that it might not have influenced the jury in reaching their verdict.

Per Taschereau and Kellock JJ. (dissenting): The reference in question in the charge to the condition of the area, having regard to its context, related, not to any supposed statement of the complainant as to the condition of the area which was corroborated by R., but to a reference earlier in the charge to the complainant's evidence as to the nature of the alleged assault, and would be so understood by the jury; and R.'s evidence as to the condition of the area was consistent with, and could properly be regarded as corrobora-

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

1944

MCINTYRE v. THE KING

tive of, the complainant's evidence with respect to the struggle alleged by her to have taken place, unless it were clearly established as a matter of fact that the struggle described by her was of such a limited character that it could not have been the cause of an area of the extent described by R., and on that question the jury, if accepting complainant's evidence that she did not consent and was attacked, and giving due weight to the circumstances, might well have considered that no difficulty arose, and that was a question of fact, expressly left as such to, and entirely one for, the jury. There was really no question of law involved in the dissent in the Court of Appeal, but merely matters of fact, and therefore the appeal should be quashed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing (Laidlaw J.A. dissenting) the appellant's appeal from his conviction, at trial before Greene J. and a jury, on a charge of rape.

H. Freshman for the appellant.

W. B. Common K.C. for the respondent.

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

KERWIN J.—The conviction of the appellant McIntyre on a charge of rape was upheld by the Court of Appeal for Ontario with Mr. Justice Laidlaw dissenting. As I consider there should be a new trial, I refrain from discussing the evidence except as it may be necessary to explain my reasons for so doing.

If the offence occurred, there is no doubt that the appellant committed it. He admits that he had intercourse with the complainant, Eva Pettigrew, at the time and place mentioned by her, but his defence is that she consented voluntarily. The intercourse took place about noon on a bright Sunday, May 23rd, 1943, not far from a travelled highway in the Township of Ancaster. The exact spot is part of the abandoned right-of-way of an electric railway company and is described in the evidence as being about twenty feet by six feet in area. The ground surrounding it is filled with weeds and tall grass.

After the occurrence, Eva Pettigrew complained to one or more of the occupants of a neighbouring farm house, one of whom described the condition of the particular

(1) 81 Can. Crim. Cas. 319.

1944

McINTYRE v. THE KING

Kerwin J.

area immediately thereafter as "matted down". There would appear to be no denial of this fact but, in view of the defence, the important question in this connection was as to the condition of that area before the complainant and accused had reached it. The only one who gave any evidence on this question was the accused, who said it was "well flattened" and "the only matted down spot in the whole territory."

The vital point in the whole case was as to whether the complainant consented or, if she had consented, whether such consent had been extorted by threats or fear of bodily harm (*Criminal Code*, s. 298). The trial judge told the jury that they "should be reluctant to convict in a case of this kind upon the uncorroborated evidence of the complainant" but that "it is within your power to do so." He then dealt with the question "whether the story of the complainant had been corroborated in a material aspect." He stated that the evidence of three people in the farm house "amply corroborates the story as told by Eva Pettigrew in regard to some of the material aspects of that story." He then detailed some of these aspects and stated, as one of them:— "They described the condition of the area twenty feet by six where the grass was pressed down", and concluded:— "So in several matters they corroborated the evidence of Eva Pettigrew as she gave it in the witness box here to-day." Later in his charge he said:— "She says that she did not consent, and that she was overpowered by fear when he threatened her with bodily harm. Indicating that there was perhaps some struggle or evasion—it is for you gentlemen to say—there was a beaten down area in the grass and weeds there of some twenty feet by six."

It was pointed out in argument before us that the trial judge was in error in stating that three occupants of the farm house had described the condition of this lot where the grass was pressed down. As a matter of fact only one had referred to it but, as we may deal only with the dissent in the Court below, I disregard this discrepancy. All that was required was that the corroboration should be of the evidence of the complainant that the accused had carnal knowledge of her without her consent or with consent that had been extorted by threats or fear of bodily harm

It was not necessary that the complainant should have testified to some particular bit of evidence before an independent witness upon that point could corroborate her general story on the issue of consent. As part of the Crown's case, it was quite proper to show the condition of the particular area when the independent witnesses arrived, and the jury would not be bound to believe the evidence of the accused as to its condition before the occurrence.

However, that is not what the trial judge told the jury. He instructed them that the evidence could be taken by them as corroborating her story in regard to some of the material aspects thereof and then gave as one aspect the condition of the area. As a matter of fact she had said nothing about it. It was misdirection to say that evidence of the matted down condition of the area after the occurrence could constitute corroboration of a material aspect of the complainant's story as to which she had not testified. It is in this sense that I understand Mr. Justice Laidlaw's statement:—"There could not, of course, be corroboration, ample or otherwise, of evidence not given by the complainant, Eva Pettigrew, and in my opinion there was a misdirection to the jury in this matter." In any event, later in his judgment he states:—"There was again [referring to the same point] misdirection of such a character and magnitude as to make the trial unfair to the appellant."

In other parts of his charge, the trial judge had told the jury that they were the sole judges as to what facts had been proved by the evidence; that while it was his duty to review some of the highlights of the evidence and to comment on them, if he saw fit, he could not pretend to review everything and, if he expressed an opinion of the facts, they were not bound to follow it unless their own opinion happened to be the same; and, towards the conclusion of his charge, he stated that he did not pretend to have covered all the evidence,—that there might be parts of it that were important that they recalled which he had not gone over but that he was satisfied that among their twelve joint memories they would have before them everything that was of any real importance.

1944

McINTYRE v. THE KING

Kerwin J.

These general observations, however, cannot weigh in this case where the question of consent was of prime importance, nor does it matter that the judge was right in pointing out other evidence which, if the jury believed it, would warrant them in treating it as corroboration. There being misdirection, I am unable to say that there has been no miscarriage of justice. The fact that counsel for the accused did not object at the trial should not be taken, in the circumstances, to indicate that the point was negligible. There had already been one trial where the jury disagreed, and, considering the evidence as a whole in the record before us and the importance attached to the matted down area by the trial judge, the Crown has failed to convince me that but for the misdirection the verdict would necessarily have been the same. *Gouin* v. *The King* (1).

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

The judgment of Taschereau and Kellock JJ., dissenting, was delivered by

KELLOCK J.—This is an appeal from an order of the Court of Appeal for Ontario dismissing an appeal from the conviction of the appellant on a charge of rape. Appellant relies upon the dissenting judgment of Laidlaw J. A. as establishing jurisdiction in this Court pursuant to the provisions of section 1023 of the *Criminal Code.*

The difference of opinion in the Court below was with regard to certain portions of the charge of the learned trial judge. Laidlaw J.A. was of opinion that there was material misdirection and that the Crown had not met the onus thereby cast upon it of showing that there had been no miscarriage. The Chief Justice of Ontario and Gillanders J.A. were of opinion that there was no misdirection, the Chief Justice being further of the view that even if it could be said that misdirection existed, it was quite improbable that it had had any effect upon the result. The question in issue at the trial was as to whether or not there had been consent on the part of the complainant, the defence being that there had been such consent.

(1) [1926] S.C.R. 539, at 544.

1944

McINTYRE v. THE KING

Kellock J.

In his charge, the learned trial judge said:

> The evidence of the three gentlemen near by, the farmer Mr. Robson, his father-in-law and his brother-in-law Scott, amply corroborates the story as told by Eva Pettigrew in regard to some of the material aspects of that story. In other words, they painted the scene as she has told it to you. They found the man naked. They told you how she arrived at the house with nothing but her skirt and jacket on, and they described the condition of the area twenty feet by six where the grass was pressed down. So in several matters they corroborated the evidence of Eva Pettigrew as she gave it in the witness box here to-day.

The complainant did not give any evidence with regard to the condition of the area at any time. In the course of his judgment, Laidlaw J.A., after pointing this out, refers to the description given by complainant as to her struggle with the appellant, and the evidence of the appellant that the place in question was matted down at the time he and the complainant came there. The ground of dissent was that Robson's evidence could not amount to corroboration of any evidence given by complainant either as to the condition of the area or as to her struggle with the appellant, for the reason that she had given no evidence as to the condition of the area and the extent of the beaten down area described by Robson could not have been caused by the struggle described by the complainant.

In considering whether or not there was misdirection in the charge, the language of the learned trial judge is to be scrutinized to see what the jury might reasonably be considered to have understood from it. It is, of course, misdirection if a jury is directed to treat something as corroboration which is not in law corroboration. In the present case, the question is whether there is to be taken from what the learned trial judge told the jury that the complainant had made some statement in evidence with regard to the condition of the area which was corroborated by Robson, or whether his charge is to be taken as referring only to her evidence as to her struggle, and if the latter, then was the evidence of Robson in any way corroborative of it?

To my mind, the context in which the above portion of the charge appears affords an answer to the first branch of the question.

The learned trial judge had first warned the jury that they should be reluctant to convict upon the uncorroborated

1944

McINTYRE v. THE KING

Kellock J.

evidence of the complainant and pointed out that if they did so, it was a very serious responsibility to assume unless her story had "been corroborated in some material aspect". He then proceeded to say:

> It is proper that we should take just a moment to consider as to whether the story of the complainant has been corroborated in a material aspect. I think I need only recall to you her story as to what took place in that gully or depression in the land that has been referred to, about her clothes being removed, and *the nature of the assault* which she alleges this man made upon her.

Then followed the portion of the charge which is objected to as already set out above. In my opinion, the reference to the condition of the area in the part objected to relates to the reference in the earlier part to the complainant's evidence as to the nature of the assault which she alleged had been made upon her and, in my opinion, would be so understood by the jury. The learned trial judge in a subsequent passage of his charge, returns to the relation of the complainant's evidence as to the assault and the existence of the beaten down area and the bearing of the one upon the other when he said:

> Indicating that there was perhaps some struggle or evasion—it is for you gentlemen to say—there was a beaten down area in the grass and weeds there of some twenty feet by six.

I am of opinion, therefore, that in the portion of the charge objected to as first set out above, there is no implication that the learned trial judge was telling the jury that the complainant had made any statement with regard to the condition of the beaten down area.

There remains to be considered the second branch of the question, namely, as to whether or not the evidence of Robson could be properly regarded as corroborative of the evidence of the complainant with respect to the struggle which she alleged had taken place between herself and the appellant. To put the matter another way, while the complainant had not said that the grass was pressed down as the result of the struggle, she had given evidence of a struggle and Robson's evidence as to the condition he found would be consistent with a struggle having taken place at that point and therefore corroborative of the evidence of the complainant unless it were clearly established as a matter of fact that the struggle described in evidence by the

complainant was of such a limited character that it could not have been the cause of an area of the extent described by Robson. In considering this matter, it is to be remembered that if the complainant's evidence that she did not consent and that she was attacked was accepted by the jury, the latter may well have considered that the complainant was not to be held literally to her account of the struggle as she was not, in her agitated condition in the circumstances of the attack, likely to have noted it in detail or to have remembered it fully afterwards. Giving due weight to the circumstances, the jury may well have considered that no difficulty arose in this matter. In my view, this was a matter of fact entirely for the jury and no ground is presented for interference by the court. This question of fact was expressly left to the jury as such in the second passage of the charge to which I have referred, namely: "Indicating that there was perhaps some struggle or evasion—it is for you gentlemen to say—there was a beaten down area in the grass and weeds there of some twenty feet by six". The learned dissenting judge refers to this part of the charge but takes the view that the complainant's description of the struggle and the extent of the beaten down area were quite inconsistent the one with the other. This is a finding of fact. With respect, this was, in my opinion, a matter purely within the province of the jury.

The fact that appellant had given evidence that the area was beaten down when he and the complainant first arrived at the place has no relevancy to the point under discussion. The learned trial judge in the passage of his charge referred to, was not dealing with any evidence given by the appellant, but was dealing with the evidence of the complainant and some aspects in which her evidence was corroborated by that of Robson. He had already charged the jury—

> There are two things that I wish to stress in regard to the facts of the case as apart from the law: in my review I cannot pretend to review everything; I try to assist you with a review of some of the more important parts of the evidence, but that does not relieve you from your duty, with your twelve joint memories, of recollecting and considering anything that may be of importance in deciding the real issue

1944

McINTYRE v. THE KING

Kellock J.

in this case; and if I express an opinion on the facts, or seem to express an opinion, you are not bound to follow my opinion unless your own happens to be the same.

Viewing the evidence as I do, there is no question of law involved in the dissent below, but merely matters of fact. I would, therefore, quash the appeal.

RAND J.—This is an appeal by the accused from a conviction for rape and comes here through the dissent in the Court of Appeal for Ontario of Laidlaw, J.A., on a point of law.

The only issue at the trial was consent or no consent, and the point on which the dissent arose was in relation to a portion of the judge's charge which dealt with corroboration.

The woman was twenty years of age and the young man eighteen. Her story was of struggle until exhaustion, although terrified by threats of bodily injury. The occurrence took place a short distance in the country from the city of Hamilton in a low-lying area about twenty feet by six, over which the grass had been beaten down until it was almost flat. Pictures of the surrounding land indicated the grass to be fairly high and somewhat coarse and heavy.

A witness, who had reached the spot while the accused was still there and naked, gave evidence of that state of the grass. The complainant had not in her evidence referred to it. The accused gave a similar description of it but added that it was in that condition when he and the complainant had come to it. This latter feature was not challenged either in cross-examination or in rebuttal.

In his charge to the jury, the trial judge used the following language:

> They told you how she arrived at the house with nothing but her skirt and jacket on, and they described the condition of the area twenty feet by six where the grass was pressed down. So in several matters they corroborated the evidence of Eva Pettigrew as she gave it in the witness box here to-day.

And later in the charge:

> Indicating that there was perhaps some struggle or evasion—it is for you gentlemen to say—there was a beaten down area in the grass and weeds there of some twenty feet by six.

In the peculiar circumstances of the case presented, extraordinary even as told by the complainant, and in view of the sole issue before the jury, I doubt that any single suggestion could have carried more weight to incline the balance of their judgment than that the grass in this spot might have shown the condition it did as a result of her struggles. So far, however, from that being the fact, it is beyond controversy, on the evidence, that the state of the surface of the area could not have furnished the slightest corroboration to the story of the complainant or to the case of the Crown. It was, therefore, a misdirection in law and of such a nature that we are quite unable to say that it might not have influenced the jury in reaching their verdict.

The conviction should, therefore, be quashed and a new trial directed.

Appeal allowed, conviction quashed, and new trial directed.

Solicitor for the appellant: *Herbert Freshman*

1944
*Nov. 14, 15
1945
*Feb. 6

GAUTHIER & COMPANY LIMITED (SUPPLIANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Negligence—Motor vehicles—Highways—Evidence—Crown—Collision between Crown's vehicle and another vehicle—Claim for damages against Crown—Crown's vehicle skidding across highway into path of other vehicle—Prima facie case of negligence—Onus of explanation—Nature of onus—Whether onus discharged in the circumstances—Res ipsa loquitur as against Crown.

A Bren gun carrier owned by the Crown and driven in the course of his duties by a member of the armed forces of Canada, while proceeding westerly on a highway in Ontario about 1.45 p.m. on January 11,

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

1945

GAUTHIER & COMPANY LTD. v. THE KING

1943, skidded so that its rear part was across the south side of the road in the path of the suppliant's motor ambulance which was proceeding easterly on its right side of the road; and a collision resulted. The suppliant's claim against the Crown for damages was dismissed by Thorson J., [1944] Ex. C.R. 17, who held that the suppliant had not established a case of negligence against the Crown. The suppliant appealed.

Held (Kerwin and Rand JJ. dissenting): The appeal should be allowed and the suppliant should have judgment for damages.

The driver of a vehicle meeting another vehicle on a highway has a duty under s. 39 (7) of the *Highway Traffic Act* (R.S.O. 1937, c. 288), and there is a similar duty at common law, to allow to the other vehicle one half of the road free; and a breach of that duty, occasioning damage, will establish a *prima facie* case of negligence against such driver, casting upon him the onus of explanation (the nature of this onus discussed). Such explanation should (in the words of Lord Dunedin in *Ballard* v. *North British Ry. Co.*, 60 Sc. L.R. 441, at 449) "show a way in which the accident may have occurred without negligence". Such a way was not, in the circumstances of this case, shown by the mere fact of the skidding (which, by itself, is a "neutral fact", equally consistent with negligence or no negligence) nor by the evidence (on proper inference from the facts established by evidence accepted by the trial judge). (The phrase *res ipsa loquitur* is applicable to a claim against the Crown under s. 19 (*c*) (as enacted by 2 Geo. VI, c. 28) of the *Exchequer Court Act*. The negligence spoken of in s. 19 (*c*) may be established by legitimate inference from facts proved by the application of the phrase).

Per Kerwin and Rand JJ., dissenting: The evidence did not justify a finding of negligence on the part of the driver of the carrier. Skidding on a slippery road cannot be taken *per se* as negligence on a driver's part. Even if the doctrine *res ipsa loquitur* applies to the Crown (which it was unnecessary to determine), the explanation by a witness (who considered that the skid had been caused by the left tread striking a smooth or icy patch on the road, though he could not find any), taken in the light of the circumstances, was sufficient to displace any onus resting upon the Crown.

APPEAL by the suppliant from the judgment of Thorson J., President of the Exchequer Court of Canada (1) dismissing its claim, made by way of petition of right, for damages caused by a collision between its motor ambulance and a Bren gun carrier owned by the Crown and driven in the course of his duties by a member of the armed forces of Canada.

Walter F. Schroeder K.C. for the appellant.

Robert Forsyth K.C. for the respondent.

(1) [1944] Ex. C.R. 17; [1944] 2 D.L.R. 273.

The judgment of Kerwin and Rand JJ., dissenting, was delivered by

KERWIN J.—This is an appeal by the suppliant from the dismissal by the Exchequer Court of his petition of right. The suppliant is the owner of a motor ambulance which, on January 11th, 1943, was being driven from Ottawa easterly towards Hawkesbury on Ontario Provincial Highway No. 17. About 1.45 o'clock in the afternoon a collision occurred between it and a Bren gun carrier, owned by the respondent and driven by Private D. G. Dunn. Originally it was claimed that Dunn had been guilty of negligence in not having the carrier under proper control and in driving at an excessive rate of speed. The suppliant's driver testified that as the vehicles approached each other, the carrier zigzagged in its course, and that it was travelling at an excessive rate of speed. The President of the Exchequer Court did not believe this and other evidence to the same effect and no attack was made before us on these findings.

The highway had been well ploughed and it was between twenty-four and twenty-six feet wide with a snow bank on each side of the ploughed portion. The surface consisted of hard packed snow without ruts. It was in good winter condition and safe for driving. It had snowed a little that day and there had been some sleet but, while the road was slippery, it was not dangerously so.

Dunn had been sent out with the carrier on what is known as a track test, that is, a run to test the caterpillar treads on the carrier. He had gone from the proving grounds on highway 17 easterly as far as Cumberland. The weather had been fine but it had started to snow a little and sleet and Dunn, therefore, obeyed the standing order in such circumstances that he should return to the proving grounds. He accordingly started off from Cumberland and travelled westerly, with the right hand tread of the carrier on the ploughed shoulder and slightly higher than the left. Dunn had driven trucks for a number of years and had driven Bren gun carriers for some months. Both he and Staff-Sergeant Hall testified that having the

1945

GAUTHIER & COMPANY LTD. v. THE KING

Kerwin J.

right tread on an encrustation of snow on the north side of the highway permitted one to have the carrier under greater control.

Dunn saw the motor ambulance approaching some distance away and knew the two vehicles would meet at a certain slight curve in the road. He kept on his regular course, considering that that was the proper thing to do, but when he was about eight or ten feet east of the apex of the curve, the carrier slid southwesterly from the north to the south side of the road so that when it came to a stop it was across the south half of the road facing north, with its rear end in the snow bank on the south side of the road. The motor ambulance was not able to avoid running into it and hence the damage.

There was a gradual slope on what must be emphasized has been found to be, and is, a slight curve in the road. Much has been made of Dunn's cross-examination as to why he kept on the same course and on this point I can do no better than extract the following from the reasons for judgment of the learned President:—

> As Dunn was taking this bend the outside of the right track of the carrier was on the right shoulder of the road with the left track slightly down on the road because of the slope of the road to the south. On his cross-examination Dunn stated that this would be likely to throw him into a skid as he came around the curve but he continued to drive on the same course he had been following. From this statement counsel for the suppliant strongly contended that it was negligent on the part of the driver to continue to drive in this manner. Indeed, this was the only specific ground of negligence that was strongly urged against the driver. The evidence on this must, however, be looked at as a whole. Dunn stated that he did not expect to skid at all. He was staying on his course and driving as he did because he knew that if he tried to pull out of his course it would be likely to cause him to skid. If he had lowered the right track of his carrier to the same level as his left the carrier would have been in the middle of the road.

With this I entirely agree and, like the learned President, can find no negligence on the part of Dunn.

Mr. Schroeder argued that the carrier, proceeding westerly, had no right on the south half of the road and that the driver of the ambulance, as to whom there was no suggestion of negligence, could rely upon the carrier not being found where it was not to be expected. It may be that in certain cases (some of which have actually come before the courts), if nothing more was in the record, the evidence might

be sufficient for the court to find on the balance of probabilities that the driver of a vehicle was negligent. But that is not this case. We know that it was the skid that caused the carrier to leave the north side of the road and go to the south. Motoring in wintertime in our climate is subject to many vicissitudes, and skidding on a slippery road cannot be taken *per se* as negligence on the part of a driver. A skid "by itself is neutral. It may or may not be due to negligence": *per* Lord Greene in *Laurie* v. *Raglan Building Co. Limited* (1). We were referred to the decision of the Ontario Court of Appeal in *McIntosh* v. *Bell* (2), and to the decision of this Court in *Claxton* v. *Grandy* (3), approving of the former. In my view, the surrounding circumstances in each of these cases were entirely different from that presented to the Court in the present appeal.

Reliance was also placed on *res ipsa loquitur,* a doctrine which has been much overworked: *The Sisters of St. Joseph of the Diocese of London* v. *Fleming* (4). It is true that Dunn could not explain the skid. He had kept his course and, while he was not asked whether he had passed other curves or bends, another witness, Constable Harkness, testified that there were "a lot of curves" on the highway, and I agree with the President that it is proper to assume that Dunn negotiated them safely. He had been travelling at fifteen miles per hour while making his test from the proving grounds to Cumberland but on the return journey, because of the change in the weather, he put the carrier into third gear and reduced his speed to ten to twelve miles per hour. The change of gear gave him a little more power and he was thus able to travel more slowly and keep the carrier under better control. Hall considered that the skid had been caused by the left tread striking a smooth or icy patch on the road, although he could not find any. It is unnecessary to determine whether the doctrine applies to the Crown because, even if it did, Hall's explanation is sufficient to displace any onus resting upon the respondent.

The appeal should be dismissed with costs.

(1) [1942] 1 K.B. 152, at 154; [1941] 3 All E.R. 332, at 336.
(2) [1932] O.R. 179.
(3) [1934] 4 D.L.R. 257.
(4) [1938] S.C.R. 172 at 177.

1945

GAUTHIER & COMPANY LTD. v. THE KING

The judgment of the majority of the Court (Taschereau, Kellock and Estey JJ.) was delivered by

KELLOCK J.—This is an appeal from a judgment of the learned President of the Exchequer Court dismissing a claim by the appellant for damages to a motor vehicle occasioned by the negligence, as it was alleged, of an officer or servant of the Crown. The damages claimed are the result of a collision between a motor ambulance of the appellant and a Bren gun carrier, driven by one Private Dunn, a member of the armed forces of Canada. The collision occurred at about 1.45 p.m. on January 11th, 1943, on Ontario Provincial Highway No. 17. The appellant's ambulance was proceeding easterly while the Bren gun carrier was proceeding in the opposite direction. Each of the vehicles, until immediately prior to the collision, was on its proper side of the road. The ambulance was proceeding at about 25 miles, and the carrier at from 10 to 12 miles, per hour. At or about the place of the collision, the road curves to the south, when one is facing west, and as the carrier was on this curve, the rear end of it slid off to the driver's left, placing it directly in the path of the ambulance, giving the driver of the latter no opportunity of avoiding a collision. The ambulance ran into the left side of the carrier.

Among the particulars of negligence alleged by the appellant against the driver of the carrier, were the following:

1. Failing to have control of the said tank or if he had such control, failing to exercise it.
2. Operating the said tank without regard to the safety of the petitioner's motor vehicle or the operator thereof or the passengers therein or of other persons using the said highway.
3. Failing to turn out to the right of the centre line of highway so as to allow the motor vehicle of the petitioner one-half of the said highway free, and crossing from the north to the south half of the said highway when very close to the motor vehicle of the petitioner, thus making an accident inevitable.

4. Travelling at an excessive rate of speed having regard to the condition of the highway and to other circumstances then and there existing.

The learned trial judge absolved the appellant's driver of all negligence. He held that it was for the appellant to establish negligence on the part of the driver of the carrier which, in his Lordship's opinion, the appellant failed to do. He refused to apply *res ipsa loquitur*.

The evidence adduced on behalf of the appellant established the facts of the accident already set forth, including the fact that when the vehicles were approximately 50 feet from each other, the carrier "zig-zagged" and came over or slid over to the south side of the road directly in the path of the ambulance, giving the latter no opportunity to avoid the collision. Evidence as to the damage sustained by the ambulance was, of course, also given.

In my opinion, the appellant had, on this evidence, established a *prima facie* case of negligence as against the respondent. The duty cast upon drivers of vehicles meeting each other upon a highway, is set out in section 39, subsection 7, of *The Highway Traffi Act*, R.S.O. 1937, chapter 288, which provides that

where a person travelling or being upon a highway in charge of a vehicle meets another vehicle, he shall turn out to the right from the centre of the road, allowing to the vehicle so met one-half of the road free.

In *Baldwin* v. *Bell* (1) Lamont J., in delivering the judgment of himself and Rinfret J. (as he then was), said:

The non-observance by an automobile driver of the precautions prescribed or duties imposed by the legislature is usually *prima facie* evidence of negligence.

This was said with relation to the predecessor of the statutory provision above referred to. I refer also to *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* (2).

The driver of a vehicle meeting another vehicle on a highway is entitled to rely on the performance by the approaching vehicle of the duty cast upon it by the statute

(1) [1933] S.C.R. 1 at 12. (2) [1923] 1 K.B. 539 at 548.

1945

GAUTHIER & COMPANY LTD. v. THE KING

Kellock J.

referred to, and is in his turn bound by a similar duty. A breach of this duty occasioning damage will establish a *prima facie* case of negligence on the part of the driver of the offending vehicle, casting upon the latter the onus of explanation. I shall return later to the nature of this onus. Apart from the existence of the duty imposed by statute, there would appear to be a similar duty at common law. *Chaplin* v. *Hawes* (1); Beven, 4th Edition, 138, 139 and 686; Gibb, "Collisions on Land", 4th Edition, 118. The mere fact of an accident taking place on a highway may not give rise to any inference of negligence on the part of the operator of either vehicle concerned, but whether or not in any particular case that will be so, is dependant upon the circumstances. *Halliwell* v. *Venables* (2); *McGowan* v. *Stott* (3); *Ellor* v. *Selfridge* (4). Apart from the statute applicable in the case at bar, I am of opinion that the principle of the cases just referred to applies in the present instance, the carrier being, in the words of Lord Greene in *Laurie* v. *Raglan Building Co. Ltd.* (5), "in a position where it has [had] no right to be" at the time it met the appellant's ambulance. This fact resulting in the damage to the appellant's vehicle, amounts *prima facie* to negligence on the part of the operator of the carrier. Counsel for the respondent at the trial would appear to have acted upon the view which I have above expressed, as evidence was called in defence. In my opinion, he was right in so doing.

Before considering this evidence, it will be convenient to consider the nature of the onus resting upon the respondent at the conclusion of the appellant's case. I refer first to the judgment of Duff C.J., in *United Motors* v. *Hutson* (6). After referring to the judgment of Erle C.J. in *Scott* v. *London & St. Katherine Docks Co.* (7), his Lordship proceeded:

> Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff.

(1) (1828) 3 C. & P. 554.
(2) (1930) 99 L.J., K.B. 353.
(3) (1923) 99 L.J., K.B. 357.
(4) (1930) 46 T.L.R. 236.
(5) [1941] 3 All E.R. 332, [1942] 1 K.B. 152.
(6) [1937] S.C.R. 294, at 296 *et seq.*
(7) (1865) 3 H. & C. 596, at 601.

He cited the judgment of Lord Halsbury in *Wakelin's* case (1). He then referred to a second class of cases to which the phrase *res ipsa loquitur* is applied, where by force of a specific rule of law, if certain facts are established, the defendant is liable unless he prove that the occurrence out of which the damage has arisen falls within the category of inevitable accident. Such a case is illustrated by *The Merchant Prince* (2) and cases where there is a statutory onus such as that in question in *Winnipeg Electric Co.* v. *Geel* (3). I do not know of any authority which would bring the facts of the case at bar within this second class. In my opinion, the case falls within the first class. The explanation called for on the part of the defendant in this kind of case has been dealt with in a number of authorities, notably in the oft cited judgment of Lord Dunedin in *Ballard* v. *North British Railway Co.* (4):

> I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence, but what is the next step? I think that if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion. For example, in *Scott v. The London and St. Katherine Docks Co.* (5), a case where a bag of flour fell on a man who was passing along a quay in front of a warehouse, it would not have been sufficient to say that the flour bag might have fallen from a passing balloon.

After referring to the judgment of Erle, C.J., in that case, Lord Dunedin proceeded:

> I take notice of the word "explanation". It is not in absence of "proof" by the defendant that there is reasonable evidence of want of care.

Reference may also be made to *The Kite* (6); *Langham* v. *Governors of Wellingborough School* (7); *The Mulbera* (8); *Canadian Pacific Railway* v. *Pyne* (9), *per* Duff J., as he then was, delivering the judgment of the Privy Council; *Hunter* v. *Wright* (10); *Kearney* v. *London, Brighton etc., Ry. Co.* (11).

(1) *Wakelin* v. *London & South Western Ry. Co.*, (1886) 12 App. Cas. 41, at 44, 45.
(2) [1892] P. 179.
(3) [1932] A.C. 690.
(4) (1923) 60 Sc. L.R. 441, at 449.
(5) (1865) 3 H. & C. 596.
(6) [1933] P. 154.
(7) (1932) 101 L.J., K.B. 513.
(8) [1937] P. 82, at 91.
(9) (1919) 48 D.L.R. 243, at 246.
(10) [1938] 2 All E.R. 621.
(11) (1870) L.R. 5 Q.B. 411, at 413; (1871) 6 Q.B. 759.

1945

GAUTHIER & COMPANY LTD. v. THE KING

Kellock J.

Turning to the evidence adduced in defence, it was established that the presence of the carrier on the south side of the road at the time of the collision was due to a skid, the rear end of the carrier going around to the driver's left, taking the whole vehicle across the road so that, at the time it was run into by the ambulance on its left side, it was across the south half of the highway. Skidding of a vehicle on a highway by itself is a "neutral fact", equally consistent with negligence or no negligence. The case *Pacific Stages Ltd.* v. *Jones* (1) is an illustration of skidding which was not due to any negligence of the operator. I do not think the *decision* in *Claxton* v. *Grandy* (2) is inconsistent with this view. Accordingly, for the respondent in the circumstances of this case to go no farther than to show that the accident was occasioned by the skidding of the carrier, was not to show "a way in which the accident may have occurred without negligence", in the language of Lord Dunedin in *Ballard's case* (3).

There were but three witnesses called for the respondent. The relevant parts of the evidence of Staff Sergeant Hall are as follows:

Q. What would make it slide? You did not see it slide?

A. No, I did not see it slide.

Q. Your statement could only be an opinion? I am curious to know?

A. The only thing I could attribute it to was that the left track must have struck a frozen spot somewhere on the road which caused the carrier to lose its grip.

Q. Would that be a likely thing to happen if the road were uneven in its composition; that is, some parts more frozen than others or more slippery than others?

A. Not unless he hit a bare spot, it would not, because with the road packed *ordinarily* he could run that vehicle wide open on any curve with no fear of skidding, but if they should strike a spot in the road that was icy enough or frozen enough the vehicle would slide, certainly.

Not only was there no evidence of any such spot on the highway, but the same witness established affirmatively that there was no such condition.

Q. You do not know, as a matter of fact, that there was such a spot there?

A. Actually I do not know, no, sir.

Q. You did not make any investigation to ascertain if there was?

A. I looked over the road pretty well.

(1) [1928] S.C.R. 92.

(2) [1934] 4 D.L.R. 257.

(3) (1923) 60 Sc. L.R. 441, at 449.

Q. You did not see any such spot?
A. No.

So far as the operator of the carrier is concerned, he gave the following evidence:

Q. What explanation can you give of why your car should slide to the left?

A. Well, as I said that day, I could not give any—the reason for causing it.

Q. There must have been some cause?

A. I could see no reason for it to happen whatever. It happened so quickly. I seen nothing ahead of me to cause it or I could not see what caused it after.

These answers were made to questions put by the learned trial judge as well as the further answer a little later on:

Q. You cannot give me any other explanation of how your car suddenly slid off your side of the road—the back end of it slid off to your left?

A. No, sir, I cannot.

I do not know what the trial judge had in mind in his use of the word "other" unless it were that the fact that the carrier was on the curve at the time, which his Lordship had just then been discussing with the witness, was a contributing factor. The third witness made no contribution with regard to this matter.

However, notwithstanding that part of the evidence of the witnesses for the respondent referred to above, if, on all the evidence, a reasonable explanation of the cause of the skidding appears, consistent with absence of negligence on the part of Dunn, the respondent is, of course, entitled to the benefit of it.

In my view, an examination of all the evidence establishes that the skidding of the carrier was due to a combination of factors: (1) the condition of the surface of the road due to the sleet which was falling, (2) the elevation of the right side of the carrier by reason of the slope in the road from north to south due to the banking of the curve, (3) the turning of the carrier to the left off the soft crust of the shoulder on to the hard-packed snow of the more travelled part of the road, and (4) the carrier's speed in the circumstances.

On the day in question, the carrier was engaged in a road test for the purpose of observing wear in the materials of its moving tracks. The driver was under instructions

1945

GAUTHIER & COMPANY LTD. v. THE KING

Kellock J.

from Sergeant Hall to return to his headquarters and take the carrier off the road in the event of certain weather conditions developing. According to Hall, "it was beginning to sleet and snow, and I told the lads if the road became dangerous they were to report to the proving ground and leave the vehicle. This condition came up."

A little later he said:

Q. Are these vehicles particularly dangerous on the highway when there has been sleet falling?

A. Yes, there is a danger of skidding.

Q. But there is less danger, you have told me, than there is in the case of a truck or motor car?

A. Well, where there is soft snow, there is.

Q. And where there is hard-packed snow there is still less danger of skidding than in the case of a truck or motor car?

A. Yes, sir.

Q. Unless the wheel were suddenly turned or unless there was a frozen bump on the road which this tank hit, you cannot account for the sudden movement from the north to the south side?

A. I cannot, sir.

Q. But the suddenly turning of the wheel might account for it?

A. Not on a hard-packed road. On sleet it will be apt to, yes.

Q. And you say there was sleet at this time?

A. It was sleeting.

THE PRESIDENT: If there was sleet the skid might happen as the result of either turning or hitting a frozen part?

WITNESS: That is right, sir.

According to Dunn, it had begun to sleet for some 15 or 20 minutes before the accident and he was a little "leary" of the highway. At first, he denied having turned the wheel of the carrier at all, although at the time of the skid, he "was commencing to take the bend in the road", that is, as he explained, he was within 8 or 10 feet of the sharp point of the curve when the skid took place. Subsequently, he admitted what was obvious, that he had already begun to turn his wheel before the carrier skidded. For some distance east of the curve, he had been travelling with the right track of the carrier in the snow crust on the north shoulder of the road. The evidence shows that this was a good surface on which to travel. According to Hall, however, the carrier left this shoulder and at the time *it started to slide,* it "was about a foot from the incrustation". It then skidded about 25 feet in a southwesterly direction. The learned trial judge makes a specific finding in accordance with this evidence, which

was based upon Hall's observation of the tracks of the carrier. Dunn, however, denied that his course had varied from the shoulder at any time prior to the skid. The fact that he did change course is an important factor, as the hard-packed snow on the road proper, with the sleet on it, would not afford the grip which the soft crust of the shoulder had done.

Dunn describes the slope of the road on the curve from north to south, and its effect on the carrier, as follows:

Q. Your right track was up on the shoulder?
A. Yes.
Q. And would that be likely to throw you into a skid as you came around the curve?
A. It would.

By the President:

Q. Would it?
A. Yes.
Q. Why would it in the snow?
A. My left track was down—
Q. Your right was up on the shoulder?
A. Yes.

By Mr. Shroeder:

Q. Was your right track away up on the shoulder higher than your left track?
A. Slightly.
Q. And coming around a curve in that manner would be likely to cause you to skid, you have told me?
A. Yes.
Q. And you knew that as you saw this automobile approaching this sharp curve—you do not admit it is a sharp curve—you knew that?
A. Yes.

He is then questioned as to whether or not with this knowledge he had tried to change his position on the road, and he said that what he meant when he made the above answers was that he would skid "if I tried to pull out of it", that is, I presume, if he tried to change his position on the road. As already pointed out, he had changed his course. He also gave the following evidence:

Q. And continued toward this sharp curve in a manner which was more likely to cause you to skid?
A. *At that far back I could not see the road was higher at that point until I came onto it.*
Q. It had been all the way?
A. There was a shoulder.

1945

GAUTHIER & COMPANY LTD. v. THE KING

Kellock J.

Q. But you had no reason to believe that that part was any different?
A. No.
Q. You did not know whether it was or not.
THE PRESIDENT: Coming to the curve, does the road slope?
WITNESS: There is a slight slope of the road to the south.

By Mr. Shroeder:

Q. There was more of a slope and even a greater distance between the right track and the left track at the curve than at the point before the curve?
A. I do not know how to describe that.
Q. The road is banked to the south here, you notice on exhibit 4, and if you continued with your right track on the shoulder and the left track on the road the right track at the curve would be elevated even higher than the left track before you came to the curve?
A. Yes.

He had thus turned the carrier to the left off the soft shoulder where it had a footing, on to the hard-packed snow with its covering of sleet. This, together with the elevation of the right track by reason of the construction of the road at the curve, would, as he knew, be likely to cause this heavy vehicle of eight tons to skid to its left, and that is what happened. Dunn said he had not observed the banking of the road at the curve and did not expect to skid, but in my view, he ought to have anticipated the elevation of the curve which is a very common construction, and to have taken all proper measures to proceed around the curve safely: *The "City of Peking"* (1). It is evident on his own evidence that had he realized the presence of the slope on the curve, he would have gone even more slowly than he did. I would adopt the language of Sir Wilfrid Greene, M.R., in *Laurie* v. *Raglan Building Co. Ltd.* (2):

> If roads are in such a condition that a motor car cannot safely proceed at all, it is the duty of the driver to stop. If the roads are in such a condition that it is not safe to go at more than a foot pace, his duty is to proceed at a foot pace.

See also *McIntosh* v. *Bell* (3), cited in *Claxton* v. *Grandy supra.* In the circumstances, I do not think the operator of the carrier is to be acquitted of negligence. The respondent has not shown "a way in which the accident may have occurred without negligence". In reaching this conclusion on the evidence, I am differing from the learned trial judge

(1) (1888) 14 App. Cas. 40, at 44.
(2) [1941] 3 All E.R. 332, at 336; [1942] 1 K.B. 152, at 154-155.
(3) [1932] O.R. 179, at 186.

only as to the proper inference to be drawn from the facts as established by the evidence accepted by him. *Dominion Trust Co.* v. *New York Life Insurance Co.* (1), *per* Lord Dunedin at 258.

It was contended on behalf of the respondent that *res ipsa loquitur* is not applicable to a claim against the Crown under section 19 (*c*) of the *Exchequer Court Act*. I am unable to accept this contention. The meaning of the phrase has been variously expressed, but it simply means that from certain proved facts, an inference of negligence arises. Such inference is justified as an inference "of fact legitimately arising out of the facts established by the evidence." *Per* Duff J., as he then was, in *Shawinigan Carbide Co.* v. *Doucet* (2). I am unable to see in principle why the negligence spoken of in paragraph (*c*) of section 19 of the *Exchequer Court Act,* as enacted by 2 George VI, chapter 28, section 1, may not be established by legitimate inference from facts proved by the application of the phrase *res ipsa loquitur*. If there must be evidence of negligence under the section, this is the evidence. There is no authoritative decision to the contrary and it has been decided in *Yukon Southern Air Transport Limited* v. *The King* (3) that the phrase is applicable under the section. A similar view was expressed by Maclean J., in *Sincennes-McNaughton Lines Ltd.* v. *The King* (4).

I would, therefore, allow the appeal and direct the entry of judgment in favour of the appellant for the sum of $509.94, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *MacCraken, Fleming, Schroeder & Burnett.*

Solicitor for the respondent: *R. Forsyth.*

(1) [1919] A.C. 254.
(2) (1909) 42 Can. S.C.R. 281, at 304.
(3) [1942] Ex. C.R. 181.
(4) [1926] Ex. C.R. 150, at 158.

1944
*Nov. 3
1945
*Feb. 6

CONSUMERS CORDAGE COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

ST. GABRIEL LAND & HYDRAULIC COMPANY, LIMITED (PLAINTIFF). RESPONDENT.

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

Contract—Agreement called "lease"—Enjoyment of water power rights and immoveables appurtenant thereto—Action for unpaid "rental" instalments—Renewal periods of 21 years—Same stipulated "for ever" —Validity of agreement during current period—Whether agreement a "lease" in perpetuity—Such lease not contrary to law of Quebec— Resolutory condition in the agreement—Crown entitled to claim back power rights—Whether agreement contrary to public order—Validity of the agreement during current period—Agreement not illegal, and, if illegal, merely voidable—Articles 990, 1593, et seq., 1601, 1608, 1609, 1657, 1660 C.C.

In an agreement, called a "lease", entered into in 1876, respecting certain water power rights in the Lachine canal forming a part of the public domain together with the immoveable appurtenant thereto, situated in the city of Montreal, it was stipulated that "at the expiration of said term of twenty-one years, from the first day of March, 1851, the period for the termination of the present lease, and at such subsequent period of twenty-one years thereafter forever, the parties of the first part shall grant, and the parties of the second part shall take, a renewal of these presents * * * save and excepting only the amount of the yearly rent herein stated" for such subsequent period of 21 years, it being provided that, should the Crown at such period, increase the amount of the rent, the rent to be paid would be increased in the same ratio. It was also provided that the agreement could be resiliated at any time by the Crown, in case the latter would require the water power, or any part thereof, for public purposes. Pursuant to deeds of transfer, the appellant now stands, in respect of the deed, in the place and stead of the parties of the first part and the respondent in the place and stead of the parties of the second part. The current twenty-one year period or renewal, having started on the first day of March, 1935, would thus expire in 1956. The respondent brought an action against the appellant for $2,000, representing five unpaid "rental" instalments of $400 each, which became due and payable respectively on July 1st, 1939 to July 1st, 1941, both inclusive. The trial judge held that the agreement was a lease in perpetuity of property, and, as such, contrary to the law of Quebec, against public policy, and, therefore, void and of no effect *ab initio;* but, as the appellant had been in peaceable possession of the property and water rights for a period of time, he granted to the respondent a sum of $1,066.66 as representing the reasonable

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

value for that use and occupation. On appeal, the judgment of the trial judge was reversed. The defendant company appealed to this Court (1).

Held, affirming the judgment appealed from (Q.R. [1944] K.B. 305) that the agreement was a valid subsisting one for the current period of 21 years at the time of the institution of the respondent's action and that the action should be maintained for the full amount of $2,000 claimed by it.

Per The Chief Justice and Kerwin, Taschereau and Estey JJ.:—The agreement is not contrary to public order nor prohibited by law. Assuming it to be illegal on account of being made in perpetuity, it would then be merely voidable, remaining in existence until annulled by a judgment of a court of justice; and it would be difficult for the appellant to succeed on that ground in view of the absence in its plea of any conclusions for annulment. But the agreement is not illegal. A lease, or demise, of property in perpetuity is not contrary to the law of Quebec; perpetuity of consideration is acknowledged by the Civil Code and no text makes it contrary to public order or illegal; in fact, several grants recognized by the code are perpetual. The nullity of the agreement, therefore, does not arise in this case. Moreover, were there a question of perpetuity, the existence in the agreement of a resolutory condition, resulting from the intervention of the Crown in claiming back the power rights for public purposes, would be sufficient to eliminate any doubt as to the validity of the agreement in that respect. Finally, as a result of their own free will, the parties have renewed their agreement until 1956, and the agreement continues to govern their relations, duties, obligations and rights, at least until the expiration of that period.

Per Rand J.—Whether the agreement is considered as *bail à rente, louage* or *contrat innommé,* it was at least within a *de facto* term of twenty-one years when the rent for which the action was brought accrued.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (2), reversing the judgment of the Superior Court, Greenshields C.J., which had maintained the respondent's action in part for $1,066.66, and maintaining that action for the full amount of $2,000 as claimed.

A. H. Elder K.C. and *Paul Casey K.C.* for the appellant.

Aimé Geoffrion K.C. and *R. C. Holden K.C.* for the respondent.

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

(1) *See* [1944] S.C.R. 381. (2) Q.R. [1944] K.B. 305.

1945

CONSUMERS CORDAGE CO. LTD. v. ST. GABRIEL LAND & HYDRAULIC CO. LTD.

Rinfret C.J.

THE CHIEF JUSTICE—The respondent claimed from the appellant the sum of two thousand dollars ($2,000.00), representing five outstanding and unpaid rental instalments of four hundred dollars ($400.00) each which became due and payable respectively on July 1st, 1939, January 1st and July 1st, 1940, January 1st and July 1st, 1941, pursuant to and in virtue of the terms of an agreement entered into on the 29th day of February, 1876, in the city and district of Montreal, between Charles H. Gould et al. and John A. Converse.

Mr. Converse already had the enjoyment of the property and rights, which formed the subject matter of that agreement, since the year 1853, and he continued to hold such enjoyment until 1892 when the Dominion Cordage Company Limited, which had acquired the property and rights from him, sold them to the Consumers Cordage Company Limited, by deed, dated the 6th of January, 1892. Then, in 1938, the Consumers Cordage Company Limited, sold to the Consumers Cordage Company (1938) Limited, whose name was subsequently changed to that of of the appellant:—

All the Vendor's right, title and interest in and to the unexpired term of lease (*sic*) of Water Power from the Lachine Canal with all the privileges connected therewith as presently possessed by the Vendor in virtue of, under and pursuant to that certain deed passed before J. H. Isaacson, N.P., on the twenty-ninth day of February eighteen hundred and seventy-six under the number 23821 between John A. Converse and Charles H. Gould et al.

On the other hand, it is common ground that the respondent, the St. Gabriel Land & Hydraulic Company, Ltd., now stands, in respect to that deed, in the place and stead of C. H. Gould et al.

Under the agreement and in consideration of the rents, covenants, conditions, provisoes, and agreements therein contained, Gould

granted, bargained, demised and leased (to Converse) a portion of the surplus water, heretofore belonging and held in part by the Honourable Commissioners of Public Works, of the Province of Quebec, appointed under and by virtue of an Act of the Provincial Parliament, 9 Victoria, Chapter 37, and acting on behalf of Her Majesty the Queen, her Heirs and Successors; and which were conveyed by said Commissioners, by the said lease, bearing date the 14th day of February, 1851, to John Young and Ira Gould, to wit, the surplus water or water power hereinafter mentioned to be used on a lot of land the property of the party of the second part (John Young and Ira Gould) situated lying and being partly in the

St. Anne's ward of the said City of Montreal on the south side of the Lachine Canal and known and distinguished on the official plan and in the book of reference of the said ward by the number ten hundred and sixty-three No. 1063—and partly in the parish of Montreal and known and distinguished on the official plan and in the book of reference of the said parish of Montreal by the number two thousand five hundred and ten, No. 2510.

Gould et al. declared that the lease transferred and assigned to Converse

all and every the rights of them and each of them * * * in and to any portion of land lying above the cadastral lot of land No. 1062 of St. Anne's ward and between that lot and the line of the limits of the said City of Montreal along the present tow path on the south side of the Lachine Canal, be the same more or less, the said portion or strip of land being a portion of the land leased to the said late Ira Gould and Jacob DeWitt under and by the said lease of the 14th day of February, 1851.

Then the following clause appears in the agreement:—

To have and to hold the said Lot, with the easements and privileges and flow of Surplus Water, as aforesaid, unto the party of the second part, from the First day of March, 1851, for and during the term of twenty-one years therefrom, renewable as hereinafter provided; yielding and paying therefor to the parties of the first part the yearly rent or sum of eight hundred dollars Canada Currency payable in half-yearly instalments, to become due and payable on the first days of July and January in each year the first of which shall become due and payable on the first day of July, in the year of Our Lord One Thousand Eight Hundred and Sixty-Six—all previous rents up to the first day of January last 1876 having been paid.

Then follow several provisoes, to which it is not necessary to refer, and we come to the clause which has to be construed and applied in order to decide the present case:—

It is expressly agreed by and between the parties of the first part and the parties of the second part to these presents, that, at the expiration of the said term of twenty-one years, from the first day of March 1851, the period for the termination of this present Lease, and at such subsequent period of twenty-one years thereafter for ever, the parties of the first part shall grant, and the parties of the second part shall take a renewal of these presents, continuing and covering all the covenants, conditions, provisoes, and agreements, herein contained, save and excepting only the amount of the Yearly Rent herein stated, which said amount of Yearly rent for such subsequent period of Twenty-One years shall be determined in the following manner; that is to say, should said Commissioners at such period increase the amount of annual rent of the Water Power leased by them to the said JOHN YOUNG and IRA GOULD by the aforesaid instruments of Lease, then the said annual rent herein agreed to be paid shall thereafter be increased in the same ratio, but in no case to be made lower than the present rates. But without any such

1945

CONSUMERS CORDAGE CO. LTD. v. ST. GABRIEL LAND & HYDRAULIC CO. LTD.

Rinfret C.J.

increase of rents for Water Power on the part of said Commissioners, there shall be no change in the amount of Rent on the present Lease Ground and Water Power from period to period of twenty-one years for ever.

It was further provided between the parties that if, at any time thereafter, it was determined by the Commissioners of Public Works that the leased water power, or any part thereof, was required for the use of the canal, or for any provincial public works whatsoever,

thereupon, on reasonable notice (of not less than three calendar months) being given to the party of the second part (Converse) by said Commissioners, or the party of the first part, to that effect, this Lease, or the Lease for the term then current, and all matters herein or otherwise contained, shall cease and be void, so far as respects the part of portion so required for such public provincial purposes as aforesaid;

and Gould et al. assigned, transferred and set over to Converse all their rights to ask and demand of the Commissioners, in virtue of the lease of the 14th day of February, 1851, to be paid the then value with an addition of ten per cent. thereon of all buildings and fixtures that shall be on the said lot of land herein before described, according to a valuation thereof to be made by arbitrators appointed as stated in the agreement.

The present action having been brought by the respondent, as already stated, to recover five instalments of four hundred dollars ($400.00) each under the agreement, the case came before Greenshields C.J. of the Superior Court in Montreal.

In his judgment, the learned judge referred to what may be called the renewal or duration clause, reproduced above, whereby the agreement was to be renewed for periods of twenty-one years. He pointed out that such an agreement called a "lease", continued for all time and forever; that the periods of twenty-one years were there to provide for a possible change in the rent on the part of the Commissioners of Public Works, but they did not affect the duration of the agreement and, therefore, it was really a lease and demise of property in perpetuity.

The learned judge then referred to article 1601 of the Civil Code, as follows:—

The lease or hire of things is a contract by which one of the parties, called the lessor, grants to the other, called the lessee, the enjoyment of a thing, during a certain time, for a rent or price which the latter obliges himself to pay.

and interpreting the words in that article "during a certain time" (which in the French version of the code read "pendant un certain temps"), the trial judge came to the conclusion that this was a lease in perpetuity of property in the province of Quebec and, as such, contrary to the law of that province, against public policy and, therefore, void and of no effect *ab initio*. For that proposition, he cited several French authorities.

He found accordingly that the notice of three months, which the appellant, under reserve of all its rights, had given to the respondent on the 15th day of November, 1939, of the cancellation and termination of the alleged lease, to take effect three months from the date of that notice, was altogether inoperative. But taking into consideration that the appellant and its auteurs had been in peaceable possession of the leased property and water rights up to the 30th of April, 1940, and that the appellant should pay the reasonable value for that use and occupation, the learned judge granted, as a *quantum meruit*, to the respondent the sum of $1,066.66, with interest from the date of the institution of the action and costs.

The case went to the court of appeal and there the judgment of the learned trial judge was unanimously reversed.

The court of appeal was of opinion that the agreement in question was not a lease in perpetuity and probably not a lease at all, but rather an agreement *sui generis* for a first period of twenty-one years, which was "a certain time"; that the renewal, or duration, clause was really an independent covenant, severable from the main agreement for the first twenty-one years and that, accordingly, the main agreement was in conformity with the article of the code; but that, further, the agreement was not made in perpetuity, in view of the fact that it could be resiliated at any time by the Crown if it required the property and water rights for public purposes and, therefore, the character of perpetuity did not exist.

The court of appeal then pointed out that the appellant had taken no conclusions in its plea praying for the annulment of the deed, but merely claimed that the agreement had been terminated as a result of the notice

1945

CONSUMERS CORDAGE CO. LTD. v. ST. GABRIEL LAND & HYDRAULIC CO. LTD.

Rinfret C.J.

of three months given in November 1939, but that the notice did not have that effect and was quite inoperative in the circumstances; that the renewal clause had been acted upon by both parties as each period of twenty-one years occurred, and, in particular, on the 1st of March, 1935, which was the beginning of one of those periods. As a consequence, on that date, the parties had simply renewed for another period of twenty-one years, expiring on the last day of February 1956, and there was, accordingly, a valid subsisting agreement between the parties at least up to that time.

In 1956, when the current twenty-one year period would expire, the time would come for the parties to urge their pretended rights as a result of the expiration of the current period, and only then would it be open for them to raise their respective contentions with regard to the expiration of their mutual obligations.

For the present, the parties were in the midst of a twenty-one years period, provided for by the agreement, and which had been acted upon by each side, and the appellant, therefore, was under the duty of paying the instalments of rent which were claimed by the action. The appeal was maintained and the appellant was condemned to pay the sum of two thousand dollars ($2,000.00), representing the five instalments already mentioned, with interest from the date of the service of the action.

The appellant, who had not appealed from the judgment of the trial judge, now brings the judgment of the Court of King's Bench (appeal side) to this Court.

Before us, counsel for the appellant stated that he did not intend to argue that the agreement was contrary to public policy, or public order. It may be stated, however, that, if it had really been so, we apprehend that it would have been the duty of the Court to raise the question *proprio motu*. It is true that there are no conclusions in the plea praying for the annulment of the agreement, but, if the Court had been of the opinion that the agreement was against public order, it would have had, nevertheless, to declare the agreement void and null *ab initio;* and the only decision remaining to be given would have been one as to the costs between the parties.

If, however, the agreement, although not being against public order, was simply illegal on account of being made in perpetuity, then it might have been looked upon as merely voidable, remaining in existence until annulled by a judgment of a court of justice, and the appellant would have found itself in difficulty in view of the absence in its plea of any conclusions for annulment and by the fact that, far from praying for the annulment of the agreement, it only contended in its plea that the agreement was terminated by the notice it had given in November, 1939.

It is not our opinion, however, that the agreement is illegal and, consequently, voidable. A lease, or demise, of property in perpetuity is not contrary to the law of Quebec. For the discussion of that proposition, it is idle to refer to the modern French law, because the French Civil Code does not contain articles 1593 and the following of the Quebec Civil Code and the law is different. In fact, counsel for the appellant stated at bar that this case stood to be decided under the law having force in the province of Quebec alone.

The nullity of the agreement, therefore, does not arise in this case. Moreover, were there a question of perpetuity, the existence in the agreement of a resolutory condition, resulting from the intervention of the Crown claiming back the property and the rights in the water power for public purposes, would be sufficient to eliminate any doubt as to the validity of the agreement in that respect. Even in France, a concession in perpetuity, if found absolute, would not apparently be declared null, but would be reduced to ninety-nine years.

Perpetuity of consideration is recognized by the Quebec Civil Code and no text makes it contrary to public order, or illegal. In fact, several grants recognized by the code are perpetual, such as, for example: "A contract of sale" (Art. 1472 C.C.); "The alienation for rent" (Arts. 1593-1594-1595 C.C.); "The right to cut timber perpetually" (Art. 381 C.C.); "Constituted rents and all other perpetual or life rents" (Art. 388 C.C.); "Ground rents or other rents affecting real estate, although they are redeemable at the option of the debtor" (Arts. 389 and 391

1945

CONSUMERS CORDAGE CO. LTD. v. ST. GABRIEL LAND & HYDRAULIC CO. LTD.

Rinfret C.J.

C.C.); and "Constitution of rent" (Arts. 1787 and 1789 C.C.), under which the capital remains permanently in the hands of one party who pays yearly interest to the other on the capital of the rent and which may be constituted either in perpetuity or for a term, although redeemable by the debtor, subject to the provisions contained in articles 390, 391 and 392 C.C.

Of course, the agreement is styled a "lease", but it is hardly necessary to state that the name given to it by the parties does not change the nature of the agreement, and that point seemed to be common ground both between the parties and in the opinion of the judges of the Court of King's Bench.

We would be inclined to think that the agreement now under consideration is not strictly a lease, within article 1601 of the Civil Code. It was referred to in the court of appeal as a contract *sui generis*, or a lease for a specific term of twenty-one years, coupled with a personal undertaking to renew at the end of each succeeding period of twenty-one years. It does not follow however because the agreement does not come under article 1601 of the Civil Code, that it is not authorized under the law of Quebec, whether you call it a special contract for the use and enjoyment of water rights or a *contrat innommé*. The fact remains that this agreement, with its several covenants, cannot be said to be forbidden by the Code and that it does not violate any of its provisions. The policy of the code is the freedom of contract and it was open to the parties to stipulate the conditions upon which they agreed, provided they were not prohibited by law, or contrary to good morals or public order. (Art. 990 C.C.).

In our opinion, the respondent rightly submitted that under Quebec law the covenant for perpetual renewal is not contrary to public policy, nor prohibited by law, and that the covenant in the present agreement, as well as the agreement itself, is valid. Moreover, and in any event, as the agreement created rights and, for more than half a century has been acted upon and recognized as binding by the parties, no question of absolute nullity is involved.

The conduct of the parties leads to no other conclusion but that it was their expressed intention to renew their agreement for periods of twenty-one years, if the property and water rights were not taken by the Crown for purposes of public utility (Art. 1660 C.C.); and, the agreement being held good, the intention of the parties must prevail and they are mutually bound. More particularly, by force of the terms of the agreement, the lease was renewed on March 1st, 1935, for a period of twenty-one years without any objection being forthcoming on behalf of the appellant. That renewal period will end only in February, 1956, and we see no reason why the appellant should be relieved of its obligations thereunder.

At present, as a result of their own free will, the parties have renewed their agreement until the end of February, 1956, and the agreement continues to govern their relations, duties, obligations and rights, at least until the expiration of that period.

This is not an agreement having any connection with article 1608 of the Civil Code, applicable to persons holding real property by sufferance of the owner and without lease, or remaining in possession more than eight days after the expiration of their lease without any opposition or notice on the part of the lessor (Art. 1609 C.C.). It is not a case of tacit renewal. The renewal is covered by the agreement and the parties are governed, as between themselves, by the terms of the renewal clause.

For all these reasons, the appeal fails and the judgment of the Court of King's Bench (appeal side) should be affirmed with costs.

RAND J.—This appeal is supported, first, on the ground that, by reason of the provision for perpetual renewal obligatory upon both parties, the contract was void, and alternatively, that, being perpetual, it was a lease for an uncertain time within article 1657 of the Civil Code and was terminated by notice under that article: no other questions are raised.

1945

CONSUMERS CORDAGE CO. LTD. v. ST. GABRIEL LAND & HYDRAULIC CO. LTD.

Rand J.

On the first point, I find it unnecessary to decide whether what was created was a perpetual lease, subject to the condition of termination by the requirement for public purposes of the water power; or whether it can be defeated by the refusal of either party to join in a renewal at the end of a twenty-one year period. It is sufficient to say that in neither case is it void. Such a result seems to me to be excluded by article 1593 C.C. but, at any rate, there is too definite a recognition of a legal interest of this character to support the contrary view taken by the trial judge; and nothing in rule or principle against it was presented to us from the French law underlying the Civil Code.

If perpetuity is not "a certain time" within the meaning of article 1601 C.C., then such an interest is outside of the definition of that article. What these words mean, I think, is "limited time" and the articles of the seventh title generally bear that out. It receives support likewise from article 1593 C.C. In that interpretation, article 1657 C.C. is inapplicable.

Whether, then, as *bail à rente, louage* or *contrat innommé* it was at least within a *de facto* term of twenty-one years when the rent for which the action was brought accrued.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant. *Wainwright, Elder & Laidley.*

Solicitors for the respondent: *Heward, Holden, Hutchinson, Cliff, Meredith & Collins.*

WARTIME HOUSING LIMITED (DEFENDANT) ..... APPELLANT;

1945

*Feb. 6
*Feb. 12

AND

JOSEPH MADDEN AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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

Appeal—Jurisdiction—Action against incorporated company before Superior Court—Exception to the form—Defendant alleging company an emanation of the Crown—Could only be sued by way of petition of right in the Exchequer Court of Canada—Exception to the form dismissed—Whether "final judgment"—Supreme Court Act, section 2 (b).

In an action brought by the respondents against the appellant, a company incorporated under the provisions of the Dominion *Companies Act*, the latter fyled an exception to the form, alleging that it was an emanation of the Crown and that it could only be sued by way of petition of right in the Exchequer Court of Canada. The judgment of the Superior Court, dismissing the exception to the form, was affirmed by a majority of the appellate court. The appellant company having appealed to this Court, the respondents moved to quash the appeal for want of jurisdiction.

Held that the judgment, from which the appellant desires to appeal, is not a "final judgment" within the meaning of section 2 (*b*) of the *Supreme Court Act* and that this Court is without jurisdiction to entertain the appeal. The action having been instituted in the province of Quebec, the judgment appealed from, as it has been already settled by several judgments both in that province and in this Court, is only provisional and does not determine, in whole or in part, any substantive right in controversy, as the decision is still open to revision by the final judgment on the merits. *Davis* v. *The Royal Trust Company* ([1932] S.C.R. 203) and *Willson* v. *The Shawinigan Carbide Company* (37 Can. S.C.R. 535) followed.

The present case is not distinguishable from the above cases and several similar decisions, on the ground that all these cases were only between individuals, while here the Crown is alleged to be in reality the party affected by the judgment appealed from. Such a distinction cannot be made, at least in respect of the point raised by the respondents and which has to do with the finality of that judgment. *The Corporation of the City of Ottawa* v. *The Corporation of the town of Eastview et al.* ([1941] S.C.R. 448) and *Quebec Railway, Light & Power Co.* v. *Montcalm Land Co.* ([1927] S.C.R. 545) distinguished.

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

1945

WARTIME HOUSING LTD. v. MADDEN ET AL.

MOTION to quash the appeal for want of jurisdiction.

Exception to the form by Wartime Housing Limited, appellant, alleging that it was an emanation of the Crown and that respondents should have proceeded against it by way of petition of right before the Exchequer Court of Canada.

The exception to the form was dismissed by the Superior Court, Gibsone J. and that judgment was affirmed by a majority of the appellate court (1). The appellant appealed to this Court.

Antoine Rivard K.C. for the motion.

Fernand Choquette K.C. contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is a motion to quash for want of jurisdiction on the ground that the judgment appealed from is not a final judgment within the meaning of the Interpretation section of the *Supreme Court Act* (s. 2 (*b*)).

The appellant is a company incorporated under the provisions of the Dominion *Companies Act*.

On or about the 24th of December, 1942, the respondents sued the appellant company and one North, to have it declared that a certain agreement, referred to in the declaration, was binding upon the appellant and enforceable against it.

The action was brought in the Superior Court of the province of Quebec. The appellant then fyled and served an exception to the form, alleging that it was an emanation of the Crown, and that it could not be sued in the courts of Quebec, but only by way of petition of right in the Exchequer Court of Canada.

The exception was dismissed by Mr. Justice Gibsone and his judgment was affirmed by the majority of the Court of King's Bench (Appeal Side), Marchand J.A. dissenting.

The Company has appealed to this Court and the respondents now move to dismiss the appeal for want of jurisdiction, on the ground that the judgment appealed from is not a final judgment, as already mentioned above.

(1) Q.R. [1944] K.B. 366.

The case arises in the province of Quebec and it is already settled by several judgments, both in that province and in this Court, that the judgment appealed from is only provisional and does not determine, in whole or in part, any substantive right in controversy, as the decision is still open to revision by the final judgment on the merits. That question was decided in this Court in *Davis* v. *The Royal Trust Co.* (1), where the whole jurisprudence of the courts in Quebec was passed in review and particular reference was made to *Willson* v. *Shawinigan Carbide Co.* (2), *which* was there considered as conclusive on this point.

The result of these judgments, either referred to in the *Davis* case (1) or the *Davis* case (1) itself, as well as the *Shawinigan Carbide* case (2), was to the effect that, under Quebec law, an appeal on the merits opens all the interlocutories, especially if a reservation or an exception be fyled immediately after the rendering of the interlocutories; and Girouard J., delivering the judgment of this Court in the *Shawinigan* case (2), added:—

> Such has been the well settled practice and jurisprudence of the province of Quebec.

It follows that the judgment *a quo* cannot be considered as a final judgment, because it does not determine in whole or in part any substantive right of any of the parties in controversy herein.

Counsel for the appellant endeavoured to distinguish the present case from that of *Willson* v. *Shawinigan Carbide Co.* (2) or that of *Davis* v. *Royal Trust Co.* (1), on the ground that these other cases were only between individuals, while, in the premises, the Crown is alleged to be in reality the party affected by the decisions. He argued that, if the appellant was right in its contention that it was an emanation of the Crown, the proceedings against it could be brought only by way of petition of right before the Exchequer Court of Canada after the issue of a *fiat;* and that the Crown could not otherwise be sued before any court.

We do not think that such a distinction can be made, at least in respect of the point raised by the respondents and which has to do with the finality of the judgment appealed from.

(1) [1932] S.C.R. 203.
(2) (1906) 37 Can. S.C.R. 535.

1945

WARTIME HOUSING LTD. v. MADDEN ET AL.

Rinfret C.J.

The Supreme Court of Canada is a statutory court whose jurisdiction is founded exclusively on the provisions of the *Supreme Court Act;* and, unless the right to appeal to this Court is expressed in the Act, it has no jurisdiction to hear any case not therein provided for.

Under section 36 of the Act an appeal lies to this Court only from a final judgment, or from a judgment granting a motion for a nonsuit or directing a new trial. No distinction is made in the Act, with regard to a final judgment, whether the parties involved in the appeal are individuals or one of the parties happens to be the Crown.

It is true that, as a consequence of the two judgments so far rendered, if, in the end, upon an appeal to this Court on the merits, we should come to the conclusion that the appellant should not have been brought before the Superior Court in Quebec, but the proceedings should have been initiated by way of petition of right after the issue of a *fiat,* the appellant will have been put to the inconvenience of having to appear and defend itself before a forum which is not competent; it is only a temporary inconvenience which will disappear when this Court, being properly seized of an appeal, renders a decision according to the rights of the parties as the Court will define in its judgment.

In that respect, the inconvenience is not greater, or different, from that to which any other party might be put to, and we apprehend that this happening would only be the unavoidable result of contrary decisions in the courts of law acting within their jurisdiction.

Counsel for the appellant referred to the decision of this Court in *The Corporation of the City of Ottawa* v. *The Corporations of the Town of Eastview and The Village of Rockcliffe Park* (1); and also to another decision of this Court in *Quebec Railway, Light & Power Co.* v. *Montcalm Land Co.* (2).

Both of these cases are distinguishable. In the *Montcalm* case (2) a street railway company, operating within the province of Quebec, whose undertaking was subsequently declared by a Dominion Act to be a work for the general advantage of Canada, had been held by the

(1) [1941] S.C.R. 448. (2) [1927] S.C.R. 545.

Quebec Public Service Commission to be subject to the jurisdiction of the Commission, notwithstanding a declinatory exception made by the street railway company. Upon appeal from the Order of the Commission to the Court of King's Bench (Appeal Side), it was held that, in respect of the matter of complaint, the Commission had jurisdiction, notwithstanding the fact that the appellant company was incorporated by and derived its powers from the Parliament of Canada, and it was found that there was no error in the judgment rendered by the Commission affirming its jurisdiction.

In this Court, the respondent, the Montcalm Land Co., raised the preliminary point that this Court had not jurisdiction to entertain the appeal. It was said that the judgment of the Court of King's Bench was not pronounced in a judicial proceeding and was not final. The judgment of the majority of this Court, delivered by Newcombe J., was to the effect that the decision of the court of appeal had determined a substantive right of the appellant which was in controversy in that proceeding (p. 560). But it must be noted that this was not an appeal from the Superior Court of the province of Quebec; it was an appeal from the Public Service Commission, or Board. In that case the judgment of the court of appeal was final on the question of jurisdiction and it would not have been open to the Commission, or Board, to review that decision. The question of jurisdiction was decided once and for all and could not be raised again before the Commission, or Board (see chap. 17 of R.S.Q. 1925, sections 10 and 58, which were then in force).

Likewise, in the *Ottawa and Eastview* case (1) the respondents had applied to the Ontario Municipal Board to vary or fix the rates for water supplied by the city of Ottawa. The city applied to the Board for an Order dismissing the applications on the ground that the Board had no authority or jurisdiction to hear and determine them, by reason of the provisions of the special Acts relating to the appellant city and the powers vested in its council under such Acts. The Board dismissed the city's application and the dismissal was affirmed by the

(1) [1941] S.C.R. 448

1945

WARTIME HOUSING LTD. v. MADDEN ET AL.

Rinfret C.J.

Court of Appeal for Ontario. The city, by special leave from the Court of Appeal, appealed to this Court. The respondents moved to quash the appeal for want of jurisdiction on the ground that the judgment appealed from was not a final judgment within the meaning of subsection 2 (*b*) and section 36 of the *Supreme Court Act*. The appeal and the motion to quash were heard together. It was held that the point in controversy in the Court of Appeal, and upon which that Court had made an adjudication, was in respect to the jurisdiction of the Ontario Municipal Board and the right of the respondents to bring the appellant before that Board for the object mentioned (p. 466); and, in the view of this Court, the judgment of the Court of Appeal had determined a substantive right of the parties which was in controversy in that proceeding, and accordingly a matter well within the definition of "final judgment" in subsection 2 (*b*) of the *Supreme Court Act*. And the *Quebec Railway, Light & Power Co.* v. *Montcalm Land Co,* case (1) was referred to.

There again, if the judgment of the Court of Appeal affirming the jurisdiction of the Ontario Board had been allowed to stand without challenge by an appeal to this Court, the matter of jurisdiction would have been finally decided, and it would not have been open to the city of Ottawa again to raise the question before the Ontario Board, when it would hear the applications of the town of Eastview and the village of Rockliffe Park on their merits.

On the contrary, in the present case it follows from our judgments in *Willson* v. *Shawinigan Carbide Co.* (2) and *Davis v. The Royal Trust Co.* (3) that the whole question of the jurisdiction of the Superior Court is still open and can yet be raised upon the argument on the merits of the case, either before the Superior Court, or before the court of appeal in Quebec, or before this Court, if the case later comes before it. Indeed this Court would no doubt be competent to raise the question *proprio motu* when the appeal properly comes before it after a judgment on the merits by the courts below.

(1) [1927] S.C.R. 545. (2) (1906) 37 Can. S.C.R. 535.
(3) [1932] S.C.R. 203.

1945

WARTIME HOUSING LTD. v. MADDEN ET AL.

Rinfret C.J.

In the circumstances, we think the respondents are right in alleging that the judgment from which the appellant desires to appeal is not a final judgment within the meaning of the *Supreme Court Act* and that this Court is without jurisdiction to entertain the appeal.

The motion to quash should, therefore, be maintained and the appeal should be quashed, with costs against the appellant.

Motion allowed and appeal quashed with costs.

Solicitor for the appellant: *Fernand Choquette.*

Solicitors for the respondents: *Rivard & Blais.*

1944

*Dec. 20

1945

*Feb. 6

CAMPBELL AUTO FINANCE COMPANY (OPPOSANT) ..... APPELLANT;

AND

J. A. BONIN (PLAINTIFF-CONTESTANT). RESPONDENT.

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

Appeal—Jurisdiction—Petition for leave to appeal—Seizure of automobile—Opposition by third party—Agreement between the latter and possessor of car—Whether a sale or a pledge to guarantee loan—Question of general importance—Proper construction of section 41 of the Supreme Court Act—"Rights in future" (subs. (c))—Must be rights of the parties in the appeal—Lack of jurisdiction if one of the parties is not before the Court—Provincial appellate courts—Their jurisdiction to grant leave to appeal to this Court, untrammelled, unlimited and free from any restriction—Proviso of section 41, with its sub-clauses (a) to (f) applicable only to this Court.

The respondent seized, in execution of a judgment against one Rivard, an automobile found in his possession, and the appellant company demanded by means of opposition the nullity of the seizure, claiming to be the owner of the car. The appellant company alleged that, according to a certain contract with Rivard, it had bought the automobile; while the respondent contended that such contract did not constitute a sale, but simply a contract of pledge to guarantee the reimbursement of a loan. The Superior Court dismissed the appellant's opposition on the ground that the contract was simulated and was in reality an attempt to make the contract a pledge without the possession of the article pledged being in the hands of the

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

1945

CAMPBELL AUTO FINANCE CO. LTD. v. BONIN

appellant. The appellate court affirmed the judgment, holding that the appellant never intended to become the owner of the automobile, that in effect the agreement constituted a fraud against the law and that, consequently, the appellant acquired no rights in the automobile. The appellant company moved for leave to appeal to this Court, on the grounds that the judgment to be appealed from appears to be in conflict with some decisions of this Court and that the questions in issue involved matters of public interest and important points of law by which rights in future of the parties may be affected.

Held that this Court has no jurisdiction to grant leave to appeal. Subsection (*c*) of s. 41 of the *Supreme Court Act,* which provides that "the matter in controversy on the appeal (must) involve * * * rights in future of the parties", is not applicable to this case. The future rights of Rivard and of the appellant company may be involved in the appeal, but Rivard has not been made a party to the proceedings before this Court. Under that subsection, it is the "rights in future of the parties" in the appeal which must be affected; and the only rights of the parties in this appeal are their rights, present and immediate, arising from the allegations of the opposition and its contestation.

Held, also, that if this Court would have had jurisdiction or would have been in the place of the provincial appellate court, it would have decided without hesitation that this case was one of those where leave to appeal should have been granted, owing to the great importance of the questions therein raised, principally those concerning commercial matters. Kellock J. expressing no opinion.

Held further, that the jurisdiction of the "highest court of final resort" in a province to grant special leave to appeal to this Court, under section 41 of the *Supreme Court Act,* is untrammelled, unlimited and free from any restriction (1). The proviso in that section, with its sub-clauses (*a*) to (*f*) has no bearing as to the jurisdiction of the provincial courts and applies exclusively to the jurisdiction of the Supreme Court of Canada. Kellock J. expressing no opinion.

MOTION for leave to appeal to this Court from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, White J., and dismissing the appellant company's opposition to the seizure of an automobile by the respondent in execution of a judgment against one Rivard who was in possession of the car.

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

(1) Reporter's note:—Similar decisions have previously been rendered by this Court in *Canadian National Railway Company* v. *Croteau & Cliche* ([1925] S.C.R. 384), *Hand* v. *Hampstead Land and Construction Company* ([1928] S.C.R. 428) and in *Fortier* v. *Longchamp* ([1941] S.C.R. 193).

J. L. O'Brien K.C. for the motion.
A. Denis contra.

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

THE CHIEF JUSTICE: — La compagnie appelante fait une motion pour obtenir une permission spéciale d'appeler dans une cause où elle s'est portée opposante afin d'annuler une saisie exécution pratiquée par l'intimé sur une automobile trouvée en la possession d'un monsieur Albert Rivard, à la suite d'un jugement obtenu par l'intimé contre ce dernier, et où l'appelante a allégué qu'elle était la propriétaire de cette automobile et que, par conséquent, la saisie était illégale et nulle.

La Cour Supérieure, à Sherbrooke, a rejeté l'opposition et la Cour du Banc du Roi en Appel a confirmé le jugement de la Cour Supérieure.

Puis l'appelante ayant demandé à la Cour du Banc du Roi en Appel de lui accorder une permission spéciale d'appeler, on rejeta sa demande pour le motif

> que tout, dans cette affaire, se borne à une interprétation et application de certaines dispositions du code civil à l'égard de la preuve faite; et qu'en conséquence, la décision de la Cour du Banc du Roi en Appel, dont on demande à appeler à la Cour Suprême du Canada, ne met nullement en question les principes de droit consacrés par la jurisprudence de cette dernière, mais se borne au contraire à en faire une application aux circonstances particulières à l'espèce.

Pour ces raisons, la Cour du Banc du Roi en Appel se déclara non justifiée d'accueillir cette demande de permission spéciale et en est venue au contraire à la conclusion qu'elle devait la refuser.

Dans sa requête à cette Cour, l'appelante a représenté qu'elle appuyait son opposition à la saisie pratiquée par l'intimé contre Rivard sur un contrat consenti par Rivard à l'appelante, en vertu duquel cette dernière faisait l'acquisition, pour la cause y mentionnée, d'une automobile de la marque Chevrolet, année 1937; que, sur contestation de l'opposition, il fut allégué que ce contrat ne constituait pas une vente mais que c'était en réalité un contrat de gage en garantie du remboursement d'un prêt d'argent; que la Cour Supérieure du district de Saint-François à Sher-

1945

CAMPBELL AUTO FINANCE CO. LTD. v. BONIN.

Rinfret C.J.

brooke maintint les conclusions de la contestation de l'opposition en déclarant qu'en effet le contrat était simulé et qu'il était en réalité une tentative de faire un contrat de gage sans que la possession de l'article engagé fut délivré à l'appelante; que ce jugement fut confirmé par la cour d'appel; et que, dans les raisons données par M. le juge St-Jacques (avec qui les autres membres de la Cour ont concouru), il apparaît que la Cour a considéré l'intention de l'appelante comme étant seulement de s'engager dans le contrat en question dans le but de percevoir les charges payables par Rivard, dans le cas où Rivard exercerait son droit de réméré de l'automobile qui faisait l'objet du contrat, et que l'appelante n'entendait pas devenir la propriétaire de cette automobile; qu'un pareil contrat constituait une fraude à la loi; qu'il ressortait d'ailleurs des lettres patentes de la province d'Ontario incorporant la compagnie appelante, et dont le droit reconnaît les " chattel mortgages ", que bien que l'appelante avait le pouvoir en vertu de sa charte, d'acheter et de vendre des automobiles, cette charte démontre clairement que l'objet principal de l'appelante était le placement d'argent; que Rivard en passant son contrat se proposait seulement d'emprunter de l'argent, qu'il avait l'intention de remettre, et que l'appelante ne voulait pas faire autre chose que de faire une avance d'argent, qu'elle espérait se faire rembourser, et de percevoir les charges et les intérêts stipulés au contrat; qu'une vente même à réméré faite en la forme reconnue par la loi, mais entre des parties qui, en fait, avaient en vue un prêt, est nulle comme étant une fraude à la loi, même si elle ne constitue pas une fraude envers les tiers.

L'appelante allègue que ce jugement de la Cour du Banc du Roi en Appel paraît être en conflit avec les jugements de la Cour Suprême du Canada, qui ont décidé que la nature et la forme des contrats doivent être envisagés par les tribunaux sans se préoccuper des motifs ou des buts que les parties peuvent avoir eus en vue; et qu'en conséquence, ce jugement semble contredire les jugements de la Cour Suprême du Canada, qui sont à l'effet qu'un prêt ainsi fait sous la forme d'une vente à réméré doit toujours être envisagé comme une vente entre les parties, sauf bien entendu, le cas de fraude à l'égard des tiers. Il est ajouté dans la requête que la Cour Suprême du Canada

s'est prononcée d'une façon définitive quant à la validité de ces ventes avec droit de réméré lorsqu'elles ont pour fins de garantir un prêt et même lorsque les droits des tiers sont en jeu. Il en serait ainsi dans les causes de *Salvas* v. *Vassal* (1); *The Queen* v. *Montminy* (2); *Rodrigue* v. *Dostie* (3); et *"La Sauvegarde"* v. *Ayers* (4), mais particulièrement dans la cause de *J. R. Booth Ltd.* v. *McLean* (5). La requête pour permission d'appeler à cette Cour procède ensuite à remarquer le fait que, lors de la signature du contrat par Rivard en faveur de la compagnie appelante, ce dernier s'était engagé à signer, à l'ordre de l'appelante, un billet promissoire établissant le montant payable par Rivard s'il se décidait à exercer son droit de réméré, bien qu'il fût pourvu que, si Rivard n'exerçait pas le droit de réméré qu'il avait en vertu du contrat, alors ses obligations relatives au billet promissoire seraient limitées à ses obligations en vertu du contrat; mais que toutefois il n'y avait aucune preuve au dossier que le billet promissoire en question avait jamais été remis par Rivard à la compagnie appelante. Malgré cela, il appert, dans les raisons données par la Cour du Banc du Roi en Appel à l'appui de son jugement, que le fait par Rivard de s'engager à signer un billet promissoire, malgré qu'il n'était pas obligé de le payer, confirme l'impression que le contrat n'était véritablement qu'un contrat de prêt et non un contrat de vente. L'appelant soumet que, sur ce point-là, la Cour du Banc du Roi en Appel se trouve en conflit avec le jugement de la Cour Suprême du Canada dans la cause de *Equitable Life Insurance Society of the United States* v. *Larocque* (6).

Il y a également pendante, devant la Cour Supérieure du district de Saint-François de la province de Québec, une cause à l'instance de la demanderesse contre un nommé Albert Comtois et où une question semblable se présente; et cette cause a été prise en délibéré par le juge de première instance en attendant la décision sur la cause actuelle.

Enfin, l'appelante allègue dans sa requête que la question en litige en est une qui se présente fréquemment, tel qu'il appert, d'ailleurs, aux raisons de jugement de l'honorable juge Bissonnette; que cette question est d'une grande

(1) (1896) 27 Can. S.C.R. 68
(2) (1899) 28 Can. S.C.R. 484.
(3) [1927] S.C.R. 563
(4) [1938] S.C.R. 164
(5) [1927] S.C.R. 243.
(6) [1942] S.C.R. 205.

1945

CAMPBELL AUTO FINANCE CO. LTD. v. BONIN

Rinfret C.J.

importance et comporte des matières d'intérêt public et la décision de questions de droit considérables; que le point à décider est d'application générale et qu'il implique l'opération de la loi concernant les ventes à réméré, ainsi que d'autres matières de droit de grande importance, " par lesquelles les droits futurs des parties peuvent être atteints "; que le jugement de la Cour du Banc du Roi en Appel se base en partie sur l'interprétation des lettres patentes incorporant l'appelante ainsi que sur le droit de la province d'Ontario relatif à l'administration des compagnies qui font affaires sous l'empire de *Small Loans Act 1939* et également sous la loi des banques.

C'est pourquoi l'appelante conclut à ce que cette Cour lui accorde la permission spéciale d'appeler que lui a refusée la Cour du Banc du Roi en Appel.

La question de savoir si la permission d'appeler devrait être accordée ne présente vraiment pas de difficultés si l'on tient compte de la jurisprudence traditionnelle de notre Cour. Nous pouvons dire sans hésitation qu'il s'agit bien ici d'une cause où, nous mettant à la place de la cour d'appel dont la juridiction en l'espèce est illimitée, nous aurions certainement accordé la permission d'appeler, en raison de l'importance des questions soulevées, surtout en matières commerciales.

Mais, ainsi que d'ailleurs l'avocat de l'appelante l'a admis lui-même lors de la plaidoirie devant nous, la véritable difficulté qu'il rencontre sur son chemin est celle d'établir que l'article 41 de la *Loi de la Cour Suprême* nous confère la juridiction voulue pour permettre cet appel.

La seule sous-section qu'a invoquée l'avocat de l'appelante, et vraiment la seule qu'il pouvait invoquer, c'est la sous-section (c), en prétendant qu'il s'agirait de " matières par lesquelles les droits futurs des parties peuvent être atteints " et, à l'appui de cette prétention, il a fait remarquer que si le jugement rendu par la Cour du Banc du Roi en Appel sur l'opposition afin d'annuler de l'appelante devait rester final, il pouvait constituer chose jugée même entre elle et Rivard, et, en conséquence, de vendeur et acheteur qu'ils étaient respectivement à la face du contrat, ils devenaient prêteur et emprunteur par suite du jugement

Ce changement dans la nature du contrat avait pour effet de faire disparaître le titre de propriétaire de l'automobile que le contrat conférait à l'appelante, au cas où Rivard n'exercerait pas son droit de réméré, et de forcer l'appelante à réclamer de Rivard le remboursement de l'argent qu'elle était sensée seulement lui avoir prêté.

Par contre, si ce jugement ne constituait pas chose jugée à l'égard de Rivard, il en résultait une situation encore plus compliquée, à savoir que: le contrat devait être considéré comme un contrat de gage vis-à-vis de l'intimé, Bonin, tout en pouvant être déclaré un contrat de vente entre l'appelante et Rivard.

Il s'en suivait donc, suivant l'argument de l'avocat de l'appelante, que les droits futurs de l'appelante et de Rivard étaient nécessairement atteints par le jugement qui a été rendu en faveur de l'intimé, Bonin, à l'encontre des prétentions de l'appelante.

Mais la difficulté qui se pose à l'égard de cet argument de l'appelante, c'est que la sous-section (c) de l'article 41 de la *Loi de la Cour Suprême* ne confère pas juridiction à notre Cour pour accorder la permission d'appeler lorsque l'objet de l'appel implique des matières par lesquelles les droits futurs de toute personne peuvent être atteints. La sous-section exige que l'affaire en litige, objet de l'appel, implique les " droits futurs des parties ". Or, dans l'action principale intentée par Bonin contre Rivard, il est clair que ce dernier était une des parties au litige. Il l'était également lorsque Bonin fit émettre contre Rivard un bref d'exécution forcée et fit saisir l'automobile en question.

En vertu de l'article 267 du code de procédure civile, la saisie exécution de Bonin pouvait être contestée par voie d'opposition soit par le saisi lui-même, c'est-à-dire par Rivard, soit par les tiers, et par conséquent, entre autres par l'appelante. (Art. 646 C.P.C.).

Après le rapport de l'opposition par l'appelante, il incombait à cette dernière de faire signifier un avis à la partie saisissante (Bonin) ainsi qu'aux autres parties en cause, (Rivard), que l'opposition était rapportée et qu'elle devait être contestée dans les 12 jours de la signification de cet avis. (Art. 650 C.P.C.).

1945

CAMPBELL AUTO FINANCE CO. LTD. v. BONIN

Rinfret C.J.

Si ni le saisissant, ni aucun autre ne produisait de contestation de l'opposition dans les 12 jours suivant la signification de l'avis du rapport, l'opposante pouvait faire enregistrer défaut; et, sur certificat de cet enregistrement et inscription, elle acquérait le droit à main-levée avec dépens contre le saisi, à moins que le tribunal n'en ordonne autrement. (Art. 652 C.P.C.).

Mais si les autres parties ou quelqu'une d'elles contestaient l'opposition — ce qui est arrivé dans le présent cas — la contestation était alors assujettie aux règles et délais des causes sommaires. (Art. 653 C.P.).

L'intimé Bonin ayant contesté l'opposition, c'est un nouveau litige indépendant de l'action principale qui s'est alors engagé entre Campbell Auto Finance Company Limited et Bonin. Rivard, le débiteur saisi, n'a pas contesté et s'est trouvé dès lors en dehors de ce nouveau litige, auquel il n'a pas été partie.

Ce nouveau litige s'est terminé, comme nous l'avons dit, par le succès du présent intimé, tant en Cour Supérieur qu'en cour d'appel.

Sur les jugements qui ont été rendus jusqu'ici sur l'opposition de l'appelante, et que cette dernière veut maintenant porter en appel devant cette Cour, Albert Rivard ne peut plus être entendu. Il n'a été partie au litige qui y a donné lieu ni devant la Cour Supérieure, ni devant la Cour du Banc du Roi en Appel; et il n'est pas non plus partie à l'appel devant cette Cour.

Ce n'est pas à lui que l'opposante devait faire signifier la requête pour permission d'appeler qu'elle présente maintenant, mais c'est à l'intimé Bonin. Et si l'appelante obtenait la permission qu'elle demande, ce n'est pas à Rivard mais c'est à Bonin qu'elle devrait signifier son avis d'appel, et avec lui qu'elle engagerait la partie devant cette Cour.

Albert Rivard n'est donc pas une des parties dans l'appel que l'on nous demande de permettre. Par conséquent, alléguer que, par suite des jugements rendus et de l'affaire en litige, " objet de l'appel ", certaines matières sont impliquées par lesquelles les droits futurs de Rivard et de l'appelante, l'un à l'encontre de l'autre, seraient atteints, ce n'est pas rencontrer les exigences de la sous-

section (c) de l'article 41 de la *Loi de la Cour Suprême*. Ce que cette sous-section exige, c'est que les droits des parties elles-mêmes à l'appel, et, en l'espèce, les droits futurs de l'appelante et de l'intimé dans la présente cause, puissent être atteints par suite à la fois des jugements qui ont déjà été rendus et de celui que la Cour Suprême du Canada pourrait rendre si l'appel venait devant elle.

Nous ne pouvons voir aucun droit futur qui soit en jeu entre les parties immédiates à l'appel qu'on nous demande de permettre. Les seuls droits qui soient en litige dans l'appel sont les droits présents et immédiats résultant des allégations de l'opposition et la contestation que l'intimé en a faite.

Nous sommes donc forcés d'en venir à la conclusion que, quel que soit le désir que cette Cour puisse avoir de permettre l'appel dans cette cause-ci, elle n'a pas juridiction pour accorder cette permission; et il s'en suit que la requête pour permission d'appeler doit être rejetée avec dépens.

KELLOCK J.—The appellant founds this motion for leave upon the provisions of section 41 (c) of the *Supreme Court Act*. By the judgment from which leave to appeal is asked, it was held that as against the respondent, the contract between the appellant and Rivard was not a genuine transaction of purchase and sale and that the former obtained no title to the automobile in question. It is said that this judgment affects future rights of the appellant as against Rivard. This can be so only if, assuming for the moment that future rights are involved, Rivard is a party to the proceeding now before the Court and therefore, bound by the judgment. In my opinion, the proceeding here in question is a proceeding to which article 653 of the Code of Civil Procedure applies and Rivard did not become a party to that proceeding. Accordingly, no rights, present or future, as between the appellant and Rivard, are affected, I would dismiss the motion with costs.

Leave to appeal refused.

1944
*Nov. 20, 21
1945
*Feb. 6

AGA HEAT (CANADA) LIMITED (DEFENDANT) ..... APPELLANT;

AND

BROCKVILLE HOTEL COMPANY LIMITED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Alleged negligence in performance—Removal of equipment in kitchen of hotel—Oxy-acetylene torch used to cut ducts—Fire breaking out, damaging the hotel—Liability for the damage—Effect on liability of change made, at wish of hotel manager, in proposed place of cutting the ducts during the work.

Appellant agreed to deliver and erect certain cooking equipment in the kitchen of respondent's hotel and for that purpose to remove a range and canopy. To remove the canopy it was necessary to sever two ducts leading therefrom to a main duct, and appellant's man in charge of the work engaged a workman to do the cutting with an oxy-acetylene torch. It was intended to cut the two ducts near the canopy, but respondent's hotel manager expressed his wish that, for the sake of appearance, they be cut near the main duct (which involved no more labour) and appellant's man in charge agreed that this be done. The hotel manager then left the kitchen. While the workman was using the torch, oil and grease which had accumulated in the main duct caught fire, resulting in a fire which damaged the hotel.

Held, affirming judgment of the Court of Appeal for Ontario, [1944] O.R. 273, that appellant was liable to respondent in damages.

Per the Chief Justice and Kerwin and Rand JJ.: In the circumstances in which the work was carried out, the cutting was done and intended to be done as in performance of the contract; and whether or not it was at a point originally not strictly within the contract, there was sufficient doubt as to what was intended to render the acquiescence in the hotel manager's suggestion a specification of the precise point of severance. But even if the parties had looked upon it as a modification of the bargain, appellant's representative treated the act as performance under the contract, and must be taken to have had the implied authority of appellant to modify such an insignificant detail of performance, while keeping within the general scope of the work, having regard to appellant's interest in a satisfied customer.

Per Taschereau and Estey JJ.: The arrangement that the ducts be cut at the place desired by respondent's hotel manager was not a variation, alteration, or something outside, of the contract. It was rather an item within the terms of the contract which came up necessarily and incidentally during the course of the work. It was an "arrangement as to the mode of performing" the original contract. Those acting for appellant in doing the work must be treated as experts; and while the hotel manager may have been the only one present

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

at the work who knew when the main or any duct had been cleaned, he was not asked about it, and there was no evidence that he had knowledge of the risk, and proof of his having such knowledge was upon appellant. The duty was upon appellant to take reasonable precautions against injury to the premises and respondent was entitled to rely upon appellant doing so. (*The Nautilus Steamship Co. Ltd.* v. *David and William Henderson & Co. Ltd.*, 1919 Sess. Cas. 605, and other cases, cited).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Plaxton J.) gave judgment for the plaintiff for the sum of $6,149.80 for damage caused by a fire in the plaintiff's hotel, which fire started while certain work was being done in the course of removing certain cooking equipment in the kitchen of the hotel. The defendant had agreed with the plaintiff to remove a range and canopy in the said kitchen and install certain other cooking equipment. The Court of Appeal held that the work being done when the fire started was part of the work undertaken by the defendant and was under its charge, that it did the work negligently and was responsible for the damage. Against these holdings (and also against the amount of damages given) the defendant appealed to this Court.

T. N. Phelan K.C. for the appellant.

F. J. Hughes K.C. for the respondent.

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

RAND J.—As Mr. Phelan fairly and frankly put it, the issue in this appeal is whether the application of the acetylene cutting torch to the pipe or small duct that led from the body of the canopy over the stove to the main duct was or was not the act of the appellant. The contract to install the cooker included the work of removing the canopy but the means were to be of the appellant's choosing. Was the "canopy" merely the overhanging frame designed to collect the fumes and smoke arising from the stove and to lead them to an orifice through which they might be taken away by other means or did it embrace also the small ducts that carried the smoke and fumes to the discharges into the main duct? Mr. Hughes

(1) [1944] O.R. 273; [1944] 2 D.L.R. 698.

1945

AGA HEAT (CANADA) LTD. v. BROCKVILLE HOTEL CO.

Rand J.

contended that the canopy was, in fact, an inverted funnel with the pipe as a stem, an apparatus not only to gather but to carry to a point of delivery. He suggested that if the appellant had undertaken to move the canopy from one part of the kitchen to the other, obviously the connecting leads would have been a necessary part of the removal. But while this is far from being conclusive, it does emphasize the fact that the question is by no means free from doubt.

In that situation, the manager of the hotel was told that it was the intention to sever the leads within a few inches of the roof of the canopy. This would have left the two disconnected ducts projecting four or five feet each from the main duct. He thereupon intimated to the representative of the appellant that he wanted them severed near the main duct, pointing out, what was obvious, that anything else would greatly mar the appearance of the kitchen. No more labour in the one case than in the other was involved: possibly it would have been more convenient at the main duct than elsewhere. Shortly afterwards, but in the absence of the manager and at the direction of the appellant's representative, the workman using the torch proceeded to cut one of the leads at the point suggested, in the course of which accumulated oil and grease in the main duct and possibly in the smaller one was set on fire.

Admittedly the small ducts had to be severed. This might have been at the one point or the other and to the appellant it was clearly a matter of indifference. In the circumstances in which the work was carried out, I have no doubt that the act was done and intended to be done as in performance of the contract; and whether or not it was at a point originally not strictly within the contract, there was sufficient doubt as to what was intended to render the acquiescence in the manage's suggestion a specification of the precise point of the severance. But even if the parties had looked upon it as a modification of the bargain, the appellant's representative treated the act as performance under the contract, and that he had the implied authority of his principal to modify such an insignificant detail of performance, while keeping within

the general scope of the work, having regard to the interest of the appellant in a satisfied customer, I have no doubt.

Mr. Phelan also contended that the damages proved amounted to considerably less than the sum estimated by the trial judge. While I agree with the latter that the evidence as to damages was in some respects vague, I am not prepared to disagree with his estimate and its confirmation by the Court of Appeal.

The appeal should be dismissed with costs.

The judgment of Taschereau and Estey JJ. was delivered by

ESTEY J.—The appellant, Aga Heat (Canada) Limited, accepted an order dated May 12th, 1941, from the respondent, Brockville Hotel Company Limited, which so far as material to this action reads as follows:

> Aga Cooker delivered and erected and including flue material to connect to chimney duct and removal of range and canopy.

This action is brought by respondents to recover damages caused by a fire which occurred while the appellant was in the course of effecting the "removal of range and canopy." Two ducts lead from the canopy over the kitchen range to a main duct, and to remove the canopy it was necessary to sever these two ducts.

On the evening in question, and about the time these ducts were to be severed, Mr. Duby, the hotel manager, came into the kitchen where the appellants were carrying on their work of removing the range and canopy, when he and Mr. Craig, who was in charge for the appellant, had a conversation as a consequence of which these two ducts were to be severed close to the main duct. At once a workman using an oxy-acetylene torch proceeded to sever the first duct. "It was a boxlike affair, and he cut along the bottom," and as he started making a vertical cut up the side, Mr. Craig deposes, "We heard a roaring in the duct which indicated trouble—fire."

It is contended that this fire was a result of the instructions given by Mr. Duby, manager of the hotel company, as otherwise the ducts would have been severed where Mr. Craig had in mind nearer the canopy.

1945

AGA HEAT (CANADA) LTD. v. BROCKVILLE HOTEL CO.

Estey J.

Upon this point Mr. Craig deposed:

Q. Then what was the next step that you contemplated in the operation of this work?

A. To disconnect the duct from the canopy.

Q. And where in your judgment was the disconnection going to be made?

A. Right at the canopy.

* * *

Mr. Duby remarked he thought the appearance would not be very good to have that duct hanging down there in that condition and he wished the cut to be made at a point nearer—which he indicated of course with his finger—at a point nearer the main duct.

Q. Yes, and what did you say to that?

A. I said, "That is entirely up to you, Mr. Duby, if you wish to instruct Henry & Company to cut it there, go ahead, sir."

Q. Having told Mr. Duby to go ahead what occurred between him and Henry's men?

A. Well, we were all standing together and it was, I guess, implied—

Mr. HUGHES: I am objecting, my Lord.

Mr. PHELAN: Q. Don't guess what was implied; just tell us what Mr. Duby said when you told him to "go ahead, sir." What was said?

A. He indicated what he wished.

Mr. HUGHES: I object.

WITNESS: He indicated where he wished the cut to be made.

Mr. PHELAN: Q. And that you have already said was in the lead duct adjacent to the main duct?

A. That is right, sir.

Mr. Duby deposed:

Q. Instead of cutting them off at the canopy and leaving these two unsightly ducts projecting into the room you say they were cut off flush with the main duct?

A. Yes, sir.

His LORDSHIP: Q. Under whose instructions?

A. Under my instructions, sir.

Mr. Duby went out of the kitchen at once and was actually in his room in another part of the hotel by the time the fire started.

The learned trial judge has found:

On the evidence, I find that the cutting which caused the fire was directed by the servant of the plaintiff, Mr. Duby, the manager of the hotel, who, in giving such direction, was, in my view, acting within the scope of his authority as manager.

* * *

In the present instance, on the evidence, Mr. Duby, the general manager of the plaintiff company's hotel, undertook to interfere, with the acquiescence of Mr. Craig, the defendant's employee, and did interfere, in the work of severing the lead ducts by the use of oxy-acetylene torch. He directed that the ducts should be severed flush with the main duct and not at the point where Mr. Craig intended to sever them, viz. immediately at the point where they were connected with the canopy.

Duby admitted he knew the main duct had not been cleaned out since its installation fourteen years before; and he, alone of those present, knew, or ought to have known, that the point where he directed the cut to be made was, in the circumstances of the case, a dangerous point at which to use an oxy-acetylene torch. His negligence, and his alone, was, in my view, the cause of the casualty which occurred.

With deference to the learned trial judge, I do not think Mr. Duby "undertook to interfere." The duct had to be severed, and the agreement did not specify at what point. These lead ducts were of the same material and dimensions throughout and there is no suggestion that the cutting at one point involved more labour or inconvenience than at any other point. Mr. Craig had in mind cutting these ducts near the canopy, but Mr. Duby suggested the cutting near the main duct. Mr. Craig immediately acquiesced, and gave Mr. Duby permission to instruct Mr. Henry, who was actually doing the cutting, and Mr. Duby gave his instructions there in the presence of Mr. Craig, and immediately went out.

This is neither a variation, alteration nor something outside of the contract. It is rather an item within the terms of the contract which came up necessarily and incidentally during the course of the work. It had not been specifically dealt with and when now mentioned the parties, in the language of Brett J. (as he then was) in *Plevins* v. *Downing* (1), made an "arrangement as to the mode of performing" the original contract.

Under the terms of the contract the Aga Heat (Canada) Limited had expressly agreed to complete the removal of "range and canopy" and to install the equipment they had sold. In all this they were pursuing their usual course of business. Mr. Craig on behalf of the appellants inspected the premises, examining particularly the canopy as to the presence of grease because he appreciated the possibility of fire. Mr. Craig employed Henry & Company who in their business use oxy-acetylene torches. Mr. Henry discussed the fire hazard, and as a result fire extinguishers were obtained. Moreover the company, in its letter of January 6th, 1939, described the canopy as "a harbour for dirt and grease", and referred to the ventilator fan. The evidence refers to the cleaning of the ducts from time to time. Here and there

(1) (1876) L.R. 1 C.P.D. 220.

1945

AGA HEAT (CANADA) LTD. v. BROCKVILLE HOTEL CO.

Estey J.

throughout the ducts dirt and grease would be expected particularly by those familiar with the equipment. Notwithstanding all this, when it was decided to cut the lead ducts close to the main duct, no questions were asked and no precautions were taken and they proceeded forthwith to use the oxy-acetylene torch.

It was for the experts in work of this kind to satisfy themselves that the work could be carried on with reasonable safety, taking precautions such as the course of the work admitted of.

Viscount Finlay in *H. & C. Grayson Ltd.* v. *Ellerman Line Ltd.* (1). In the doing of this work the appellants must be treated as experts, and while it is true that Mr. Duby may have been the only one present at this work who knew when the main or any duct had been cleaned, there is no evidence that he had knowledge of the risk, and it was for the appellants to prove that the respondents "knew the dangers attending the use of their machines." *The Nautilus Steamship Co. Ltd.* v. *David and William Henderson & Co. Ltd.* (2).

The appellant, as was its right under the contract, had selected this oxy-acetylene torch, which in operation generates a heat of over 6,000 degrees and sends out quantities of sparks. The operation of this torch in such circumstances as we have in this case creates a possibility of fire and requires on the part of those operating it that reasonable precautions should be taken to avoid fire. In this case there were no precautions taken at or near the point of severance and, in my opinion, the duty to do so rested upon the appellants who had undertaken the work, provided the equipment, and employed the men. The respondents on their part had a right to regard the appellants as competent both to do their work and to take reasonable precautions that the premises would not be injured as a consequence of their failure to do so. *The Nautilus Steamship Co. Ltd.* v. *David and William Henderson & Co. Ltd.* (2); *H. & C. Grayson Ltd.* v. *Ellerman Line Ltd.* (3); *The Pass of Ballater* (4); *Honeywill & Stein Ltd.* v. *Larkin Bros. Ltd.* (5).

Counsel for the appellant pressed that the finding of damages should be reduced. The learned trial judge found the

(1) [1920] A.C. 466, at 476.
(2) 1919 Sess. Cas. 605.
(3) [1920] A.C. 466.
(4) [1942] P. 112.
(5) [1934] 1 K.B. 191.

1945

AGA HEAT (CANADA) LTD. v. BROCKVILLE HOTEL CO.

Estey J.

evidence with respect to damages "vague in some respects," and in view of all the circumstances I agree with the disposition of the damages made by the Court of Appeal.

In my opinion this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Phelan, Richardson, O'Brien & Phelan.*

Solicitors for the respondent: *Hughes, Agar, Thompson & Amys.*

EAST CREST OIL COMPANY LIMITED ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1944

*Oct. 18

1945

*Feb. 6

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Negligence—Child drowned in oil well—Charge against owner of failing to guard the well adequately—Criminal Code, ss. 247, 284, 287 (b)—Child a trespasser—Duty and responsibility of owner of well.

The appeal was from the conviction of appellant by the Appellate Division, Alberta, [1944] 2 W.W.R. 503 (which set aside the judgment of acquittal at trial), under ss. 247, 284 and 287 (*b*) of the *Criminal Code,* of failing to guard adequately the cellar of an oil well of appellant, in consequence whereof a child of tender years was drowned therein. The well was not, and for some time had not been, in use, and there had been erected a structure around and over it as a guard against danger. The child, in company with other children, had climbed on the structure and in walking along was accidentally pushed off by an older boy into the water below.

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

Per the Chief Justice and Rand J.: Secs. 247 and 284 embody the common law rule and, under them, apart from s. 287, appellant could not in the circumstances be held criminally responsible for the accident. The child was a trespasser. Children were not tolerated about the well, there was no practice of playing there, and on the occasions

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

1945

EAST CREST OIL CO. LTD. v. THE KING

when a few played there, they were, if seen, warned off by the owner's employees, chiefly because of danger from gas and fire and the pressure in the pipes. There was no object of fascination alluring children nor active conduct by the owner in disregard of children's known or necessarily apprehended presence. In such circumstances the rule at common law that (with certain exceptions not present here) an owner of land is entitled to do with it what he pleases, and that trespassers move at their own risk and peril, is as applicable to children as to adults (*Holland* v. *Lanarkshire,* 1909 Sess. Cas. 1142, and other cases, cited). As to s. 287 (*b*), assuming the excavation here to be within its scope, what is there contemplated, as indicated by its language, is the prevention of injury from hidden openings; the required fence or guard must protect the unwary; but when the existence of the opening is made evident (as in this case) the purpose of the fence or guard is accomplished; the owner must protect the trespasser on the land from a trap, but he is not called on to protect against a subsequent danger from trespassing on the guard itself raised against that trap; and the scope of the duty is as limited in relation to children as to adults.

Per Kerwin and Estey JJ.: The evidence supports the trial Judge's finding that the child was a trespasser; and, under the common law rule, of which s. 247 of the *Criminal Code* is a restatement, appellant, in the circumstances of this case, would not be liable to trespassers, including children (*Hardy* v. *Central London Ry. Co.,* [1920] 3 K.B. 459, at 473, and other cases, cited); the precautions taken and the warning and chasing away of children exonerated appellant from any suggestion of intention to injure or trap or of callous or wanton disregard of consequences.

As to respondent's contention (in the Appellate Division and in this Court) that the facts disclosed an offence under s. 287 (*b*) (under which the charge was not laid and which was not brought to the trial Judge's attention) and that by virtue of ss. 951, 1013 (5) and 1016 (2) a conviction should now be directed—It is doubtful if the offence under s. 287 could, within the meaning of those sections, be an offence so included under s. 247, both because of the essentials required to constitute the offence and because it is a summary conviction rather than an indictable offence. Apart from these considerations, the evidence did not disclose that an offence was committed under s. 287, as the excavation was so far guarded that instead of accidentally falling therein within the meaning of s. 287 (*b*), the children climbed over the barrier.

Per Taschereau J.: The Appellate Division erred in finding a breach of the duty imposed by s. 287 (*b*). The duty imposed by s. 287 (*b*) is to fence the excavation in such a manner that a person riding, driving or walking shall not fall therein accidentally. It would unduly stretch the scope of s. 287 (*b*) and do violence to its text, to hold that the fence must be so built that entrance is impossible. What is contemplated is to protect a motorist or pedestrian from a danger of which he is unaware and which may accidentally cause his death; it does not apply to the present case, where a trespasser succeeded in making his way to the excavation where the danger was obvious and was accidentally pushed into the water by a companion.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), which (setting aside the judgment of acquittal by Ives C.J.T.D.) convicted the present appellant

> For that it * * * being then the owner and operator and having under its charge and control an oil or gas well * * * the maintaining whereof in the absence of precaution or care, might endanger human life, and being under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, did omit, without lawful excuse, to perform such duty in that it failed to place adequate fencing around or covering over the cellar of the said well and did permit the said cellar to become full of water and gas, with the result that the said opening was dangerous to members of the public and particularly to children who might come on the said well site and in consequence whereof one John Douglas Stevenson, a child of tender years, was drowned as a result of falling into the said cellar.

for which offence it was adjudged that the present appellant forfeit and pay to His Majesty the King the sum of $1,000.

J. J. Saucier for the appellant.

H. J. Wilson K.C. for the respondent.

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

RAND J.—This is an appeal from a conviction for criminal negligence under sections 247 and 284 of the *Criminal Code*. The negligence was charged as permitting an oil well not then in use to remain unfenced or otherwise guarded, as a result of which a young child of about four years of age was drowned.

The well was approximately 250 feet from a highway and some greater distance from a small number of occupied houses. It had been temporarily discontinued under a conservation order issued by the provincial government. Centered around it was a pit ten feet square and eleven feet or so below the ground level, boxed in apparently to a distance of about two feet above the ground. It was within a larger area set with concrete pillars at the corners, four or five feet high. Between the pillars, on the north and south sides, were concrete walls about two feet in height. Supported on them were two large stringers twenty-four inches square running north and south about four feet apart and passing over

(1) [1944] 2 W.W.R. 503; [1944] 3 D.L.R. 535; 82 Can. Crim. Cas. 77.

1945

EAST CREST OIL CO. LTD. v. THE KING

Rand J.

the pit approximately one foot from each side. Lying longitudinally on each was a timber fourteen inches square. Across these was another lying transversely over the pit about two feet from the northerly side and extending well towards the sides of the larger square. From the east there was a sloping mound of earth which approached the northerly concrete pillar to within a few inches of its side and about one and a half feet from its top. Two loose planks lay across the easterly pillars, the inner of which passed close to the end of the transverse timber over the pit. In the pit was about nine feet of water, the surface of which was then seven feet or so from the top of the timbers. Access to this top could be gained by going up the mound from the east, onto the pillar and then by means of the planks to the timbers. The size of the opening into the pit inside the timbers was approximately six feet in length by four feet in width.

The young child had made his way to the top in company with three other children, two boys aged seven and eight years and a young girl of six, and in walking along was accidentally pushed off by the oldest boy into the water below. The other boy fell in also but he was able to save himself.

The well had been brought in about twelve years before and had been closed down for a year and a half. Children had from time to time played about it and in several instances had been seen by employees of the appellant. One of these latter had brought what he considered the danger of the well to the attention of the manager. He was prompted to this by a recent loss of two grandchildren by drowning; and with the permission of the manager he had secured the well by means of boards and fencing in a manner which he thought sufficient for all reasonable purposes. This was in the autumn of 1941. He considered the top of the structure—the timbers—to be beyond the reach of children too small to look after themselves. No doubt the well with its pillars and beams carried some degree of attraction to children from a point where they had a right to be, but in the local surroundings probably any visible structure would have done so. A small quantity of gas bubbled out through the water but this could be seen only at the well.

The trial judge dismissed the charge. On appeal the court found the accused guilty under the sections mentioned by reason of a breach of the duty prescribed by section 287 (*b*), and a fine of $1,000 was imposed.

Sections 247 and 284 embody the Common Law rule and, under them, apart from section 287, the owners of the well could not in the circumstances have been held criminally responsible for the tragic mishap. The trial judge found the child to be a trespasser on the land and I do not see how he could have done otherwise. Trespass does not depend on intention. If I walk upon my neighbour's land, I am a trespasser even though I believe it to be my own, and this rule is as applicable to children as to adults. There was no evidence of license: that goes to the mind of the licensor either actual or as drawn from his actions. But here there was not only no willingness on the part of the owner that the children should play on this property but unequivocal demonstration to the contrary. Although children had, over the twelve years, played occasionally about the well, their numbers were few, they did not make a practice of it and, whenever seen by employees of the owners, they had been warned off, in one case somewhat vigorously. What was done made it perfectly clear that they were not being tolerated about the well. This was not wholly or even chiefly because of any special danger from the exposed pit, but rather the danger from gas and fire and the pressures in the pipes.

With certain exceptions, not present here, an owner of land is entitled, at common law, to do with it what he pleases: *Jordin* v. *Crump* (1); trespassers move at their own risk and peril; and in the absence of an object of fascination drawing children to their injury or of active conduct by the owner in disregard of their known, or necessarily apprehended, presence, that rule is as applicable to them as to adults. No such allurement was present here, nor is the case within the second qualification of the rule.

The facts are almost identical with those present in *Holland* v. *Lanarkshire Middle Ward District Committee* (2). There the defendants were the owners of a piece of ground which contained a disused and unfenced quarry,

(1) (1841) 8 M. & W. 782. (2) 1909 Sess. Cas. 1142.

1945

EAST CREST OIL CO. LTD. v. THE KING

Rand J.

with high and precipitous banks and containing water, at one point, eleven feet deep. A young child six years of age had gained access to the quarry through a defective fence from a strip of waste ground on which children were in the habit of playing. The child was drowned but the Court of Session held that no duty on the part of the owner had been shown. In the language of the Lord President (Lord Dunedin):

> It is a new and unheard of proposition that, if you have something on your ground as to which there is no duty of fencing, and someone else makes use of his ground in some particular way, a duty is thereby imposed upon you of doing what you were under no duty to do before, a duty, namely, of fencing. I know of no authority for such a proposition. The quarry here was old and disused long before this strip of ground had become open to the use of the children, and that, I think, ends the question.

And in this respect the law of England is the same as that of Scotland (*Addie's* case (1)). Cleasby, B., ruled to the same effect in a prosecution for manslaughter of the owner of an abandoned coal mine down the open shaft of which a trespasser had accidentally fallen: *Reg.* v. *Gratrex* (2).

But the conviction is placed on a violation of the duty imposed by section 287 (*b*) of the Code, which is as follows:

> 287. Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour, or both, who
>
> * * * * * *
>
> (*b*) being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which there is any excavation of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein.

Harvey, C.J., delivering the judgment of the Court, considered this language to be so precise in its delineation of the duty as to exclude any question of degree of fault or lack of care, and in effect to require such a fence or guard as must in any event prevent a person from falling into the well or opening; and in the case of young children, this would take into account their natural and likely behaviour in such situations as a circumstance to be anticipated in the measures of security taken.

(1) *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck*, [1929] A.C. 358, at 371.

(2) (1872) 12 Cox C.C. 157.

1945

EAST CREST OIL CO. LTD. v. THE KING

Rand J.

But, assuming the excavation here to be within the scope of the subsection, does that interpretation pay sufficient regard to the purpose of the legislation as indicated by the language, "to prevent any person from *accidentally* riding, driving, walking or falling therein"? What is contemplated is the prevention of injury from hidden openings; the fence or guard must protect the unwary; but when the existence of the opening is made evident, the purpose of the fence or guard is accomplished. The owner must protect the trespasser on the land from a trap, but he is not called on to protect against a subsequent danger from trespassing on the guard itself raised against that trap. The duty is not to prevent a person from falling into an opening but from falling in "accidentally", that is, accidental as to the existence of the thing holding the threat. It is to safeguard against a concealed danger; but if the thing becomes known, it ceases to be the accidental circumstance; and the accidental may, as here, become a consequential circumstance, as the jostling of the older boy in the course of walking on the guarding structure.

A young child may not, of course, appreciate the danger; but we are dealing here with objective causation toward persons without rights: and if, considering the object of the legislation, the scope of the duty is clear, it is as limited in relation to a child as to a grown person. A child, as he plays or trudges over a field, may accidentally fall into an open shaft; against this the owner must provide a safeguard. It is quite another matter that the owner, otherwise blameless, should be called upon to afford physical security against apparent dangers to children who ought not to be on his land at all. Does such a rule protect the child within the precincts of his own home? Is such a responsibility placed upon those charged with his care? It would come as a shock to a parent to find himself guilty of manslaughter because he had failed to provide barriers to keep his child from climbing into a well in the farmyard.

The legislation is not specially intended for the protection of children, and we cannot allow sympathy to stretch its scope. The conditions in which we live bristle with hazards for the young but, from the standpoint of safeguarding them, there is no more reason to treat the

1945

EAST CREST OIL CO. LTD. v. THE KING

Rand J.

patent danger of such an opening as *malum prohibitum* than that of many other accessible structures or conditions equally dangerous. The balance between the responsibilities of owners of property and guardians of children is too close in accepted considerations of policy to justify our going beyond what the legislation has fairly indicated; and however poignant the death of a child in such circumstances may be, it is still one of the unhappy risks of living in this imperfect world, and not a happening to call for the infliction of punishment on others.

Having reached this conclusion on the scope of the duty under section 287 (*b*) and that the death of the child could not be charged to neglect of it, I do not find it necessary to consider the view of the Appeal Court that there could be no question of degrees of care in the performance of it. This would be to make it absolute against certain consequences and to rule out *mens rea*. It will be sufficient, of course, to deal with a case within the section when it arises but I desire to guard myself against being taken to assent to that interpretation of the obligation created.

I would allow the appeal and quash the conviction.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.—The accused company was tried before the Chief Justice of the Trial Division in Alberta without a jury, at Calgary, on a charge containing two counts, the first charging an offence contrary to the provisions of secs. 247 and 284, and the second an offence contrary to sec. 222, of the *Criminal Code*. At the conclusion of the hearing, the learned Chief Justice dismissed both charges and delivered the following oral judgment:

> There is not any doubt that the condition existing there with that ten by ten cellar, containing from eight to ten feet of water, and open at the top, irrespective of the dispute about its approach on the four sides under the timbers, but open on the top so that the child if he made a mis-step while walking on these timbers, would fall in the water and probably drown, or possibly drown, and it is quite clear from the evidence that there was nothing done to prevent children reaching the top of those timbers or stringers. That is the situation. It is quite clear that that could have been remedied by a fence around

the open cellar or well, or by the top being planked over. Either of those acts would have made it safe as regards children. That is the fact that I am bound to find.

I do think that the law is decidedly against the Crown obtaining a verdict of guilty. No doubt the law is, in my opinion, this child, however unreasonable you may think it or I may think it, was a trespasser. He had no right there. It does not matter whether he could read the sign or not, according to the best statements of the law in my opinion, and no duty was owed to that child or to the other children or to anyone else to fence that property or to plank that cellar, on ground in proper and legal occupation of the accused. Both charges will be dismissed.

Upon appeal to the Appellate Division of the Supreme Court of Alberta, the dismissal of the charge under sec. 247 was set aside and a verdict of guilty directed.

Section 247 is a restatement of the common law. *Union Colliery Co.* v. *The Queen* (1); *The King* v. *Baker* (2). The learned trial judge found the child to be a trespasser, and the evidence supports that finding.

The duty which at common law rested upon a landowner towards trespassers is stated by Scrutton, L.J., in *Hardy* v. *Central London Railway Company* (3):

> If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers.

In that case, "whenever servants of the company saw the children, they either drove them away or told them to go away," and they apparently went away but repeatedly returned. Upon this evidence the Court of Appeal refused to find permission express or implied and therefore held the children to be trespassers rather than licensees, as the learned trial judge had held them to be.

The authorities are reviewed in *Canadian Pacific Ry. Co.* v. *Anderson* (4), where Chief Justice Duff at p. 218 states:

> The respondent is precluded from recovering by reason of the fact that, being a trespasser, the only duty owing to him is that explained in *Barnett's case* (5), not intentionally to injure him or "not to do a wilful act in disregard of humanity towards him," "not to act with reckless disregard of the presence of the trespasser."

(1) (1900) 31 Can. S.C.R. 81.
(2) [1929] S.C.R. 354.
(3) [1920] 3 K.B. 459, at 473.
(4) [1936] S.C.R. 200.
(5) *Grand Trunk Ry. Co.* v. *Barnett*, [1911] A.C. 361.

1945

EAST CREST OIL CO. LTD. v. THE KING

Estey J.

It is sometimes suggested that a landowner is under an obligation to take special precautions with respect to children, but so long as the children remain trespassers the law seems to be settled that in principle there is no difference between a child and an adult.

It is recognized that where, as in cases of licensees and invited guests, a duty is placed upon a party in possession of land, from similar facts different inferences may be drawn where children rather than adults are involved, but the principle of legal responsibility is the same regardless of age. *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (1), where at p. 376 Viscount Dunedin states as follows:

> The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is the trespasser. It is quite otherwise in the case of licensees, because there you are brought into contact with what is known as trap and allurement.

In this case there is no suggestion of any intention to injure the children or to place a dangerous trap or any trap for them. From time to time the children did play about this well, but whenever observed were always warned and chased away by both the employees of the accused company and by nearby residents. Mr. F. C. Tuckett was in charge of the property in question for the accused company over a period of years. He deposed that in 1941 two of his grandchildren were drowned in the Elbow River at Calgary, as a result of which he discussed the possibility of such a fatality at this well, and was then instructed by the company to fix it so as to keep small children out. He obtained material and did what he thought was sufficient, and the well remained substantially as he left it up to the time of the fatality that led to these proceedings. The taking of such precautions does not create any obligation towards trespassers but it does exonerate the accused from any suggestion that it intended to injure or to trap, and indeed any suggestion that it had acted with a callous or wanton disregard of consequences.

A tragedy such as this, that takes away a very young child, arouses our feelings of sympathy. However deep and strong these feelings may be, they must not influ-

(1) [1929] A.C. 358.

ence one either in ascertaining the law or in the application thereof to the facts and circumstances of a given case. If children in this case had been licensees or invitees, the obligation and responsibility of the accused company would have been very different.

The respondent contended before the Court of Appeal of Alberta and this Court that the facts disclosed an offence under sec. 287 (*b*), and by virtue of the provisions of secs. 951, 1013 (5) and 1016 (2) a conviction should now be directed. It is doubtful if the offence under sec. 287 can within the meaning of these sections be an offence so included under sec. 247, both because of the essentials required to constitute the offence and because it is a summary conviction rather than an indictable offence. Apart from these considerations the evidence does not disclose that an offence was committed under sec. 287. Under that section the accused can be convicted only when the excavation is left "unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein." The evidence here discloses that the excavation in question was so far guarded that instead of accidentally falling therein, the children in question climbed over some obstruction which they described as a fence. Counsel contended it was not actually a fence, but, however styled, it did constitute a barrier. Two of the children were called as witnesses. Bennett Keith deposed as follows:

Q. Was there a fence all around the well?
A. Yes.
Q. Did you and Doug. and Spike and Jane climb over the fence?
A. Yes.

* * *

Q. Just tell me this, how did Douglas get on to the plank? How did he get over the fence you are talking about?
A. He just climbed over.
Q. Did he climb over it by himself?
A. Yes.

The other boy, Gordon Earl Andrews, deposed:

Q. How did you get up on to this plank? How did you get there?
A. We climbed up.
Q. Climbed up. What did you climb?
A. A plank.

* * *

1945

EAST CREST OIL CO. LTD. v. THE KING

Estey J.

Q. Now there is a fence around the well, is there not?
A. It is around the back part of it.
Q. Did you climb over the fence this day?
A. Yes.
Q. And did Doug. and Jane and Benny?
A. Yes.

Upon this evidence the children encountered the obstacles erected by the company to prevent people from getting into the well.

The charge was not laid under sec. 287 (*b*) and at the trial this section was not brought to the attention of the learned Chief Justice. His finding of fact must be read in relation to the issues raised before him. It is obvious that, had he been asked to find the accused guilty under sec. 287 (*b*), he would have dealt with the facts in the light of the provisions of that section, as well as the requirements of secs. 247 and 284.

The evidence is clear that the concrete posts on which the stringers rest extend about five feet above the ground. Photographs show that between the posts boards had been placed to prevent persons getting into the well. The stringers are on top of these posts. On the east side there are one or two mounds of earth which one might walk up and reach the top of these posts. The distance from the mounds to the top of the posts is a point upon which there is some conflict in the evidence but it is clear there is some distance; and some effort must be made to pass from the mounds of earth to the top of the stringers. The evidence also discloses a place or two where children and others by crawling under the boards might reach the well. In either case a party to get into the well must put forth an effort towards that end. These facts negative the commission of an offence under sec. 287, which requires only such protection as will prevent persons from "accidentally riding, driving, walking or falling therein."

In my opinion, the judgment of the Court of Appeal should be reversed, the conviction there directed quashed, and the judgment of the trial judge restored and the charge dismissed as against the accused.

TASCHEREAU J.—I believe that this appeal should be allowed and the conviction quashed.

The appellant was acquitted by the trial Judge, but the Court of Appeal found a breach of the duty imposed by section 287 (*b*) of the *Criminal Code,* and fined the appellant $1,000.

This section is to the effect that whoever is the owner, manager or superintendent of any abandoned mine or quarry in which there is an excavation of a sufficient area to endanger human life, must not leave the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein.

The duty imposed by this section is, therefore, to fence the excavation in such a manner that a person riding, driving or walking shall not fall therein accidentally.

We would, I believe, unduly stretch the scope of this section and go further than the legislator did and, therefore, do violence to the text, if we held that the fence must be built in such a way that entrance to the premises is made impossible.

The law contemplates to protect a motorist or a pedestrian from a danger of which he is unaware, and which may accidentally cause his death. It does not apply, as in this case, to a trespasser who succeeds in making his way to the excavation where the danger is obvious, in the manner described by my brother Rand, and who is accidentally pushed in the water by a companion.

The judgment of the Court of Appeal should be set aside and the order of acquitment made by the trial Judge should be restored.

Appeal allowed.

Solicitors for the appellant: *Hannah, Nolan, Chambers, Might & Saucier.*

Solicitor for the respondent: *H. J. Wilson.*

1945

*Feb. 13, 14
*Feb. 27

ARTHUR HENRY OATWAY (PLAINTIFF) ..... } APPELLANT;

AND

THE CANADIAN WHEAT BOARD (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Appeal—Leave to appeal granted by appellate court—Motion to quash maintained by this Court—Appeal "manifestly devoid of merit and substance"—No issue left to be decided between the parties—Court declining to hear appeal—Action by wheat producer against the Canadian Wheat Board for an accounting of operations of the Board—Orders in Council passed under War Measures Act, when matter before appellate court, removing substratum of plaintiff's claim.

The appellant, a producer of wheat in Manitoba, who had delivered and sold wheat to the Canadian Wheat Board, brought an action against the Board, on behalf of himself and other producers, before the Court of King's Bench, asking among other relief for an accounting of the operations of the Board during the crop years of 1938 to 1942 both inclusive. The Board, besides submitting a statement of defence on different points of law and facts, launched a motion for an order dismissing appellant's action on the ground that, the Board being a servant or agent of the Crown, the Court of King's Bench had no jurisdiction, and, in the alternative, that the action was frivolous and vexatious. The motion was dismissed and the appellant appealed to the Court of Appeal. While the matter was still before that court, an Order in Council was passed under the *War Measures Act*, reciting that there was no surplus in either of the first two years and providing for the distribution of the surplus in each of the other three years. The majority of the Court of Appeal, later, held that the Board was an agent of the Crown and that the appellant's action could not be brought in the provincial court (1). The appellant appealed to this Court upon special leave granted by the Court of Appeal. The respondent Board moved to quash the appeal on the grounds that the appellant's claim and appeal were without substance and merit and that the appeal was wholly academic and futile, because, among other reasons, by the terms of the *Canadian Wheat Board Act* and the Order in Council, the appellant had and has no right to sue.

Held that the motion of the respondent Board should be allowed and the appeal dismissed.

The Supreme Court of Canada will entertain favourably a motion to quash an appeal to this Court, if such appeal, though within the jurisdiction of the Court, is manifestly entirely devoid of merit and substance. *National Life Assurance Co. of Canada* v. *McCoubrey* ([1926] S.C.R. 277), and judgments therein referred to; *De Bortoli* v. *The King* ([1927] S.C.R. 454, at foot of 457 and at 458); *Bowman* v. *Panyard Machine & Mfg. Co.* ([1928] S.C.R. 63); *Cameron* v.

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

(1) [1944] 3 W.W.R. 337.

Excelsior Life Ins. Co. ([1937] 3 D.L.R. 224); *Laing* v. *The Toronto General Trusts Corporation* ([1941] S.C.R. 32) and *Temple v. Bulmer* ([1943] S.C.R. 265). More particularly, the recent decision of this Court in *Coca-Cola Co. of Canada* v. *Mathews* ([1944] S.C.R. 385) is conclusive, where this Court held that it should decline to hear an appeal when there was no issue before it to be decided between the parties.

In this case, the Order in Council has removed the substratum of the appellant's claim, even if the matter could be brought before the ordinary courts at all and should not have been initiated in the Exchequer Court of Canada.

No opinion was expressed by this Court upon the judgment of the majority of the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for Manitoba (1), reversing the judgment of Donovan J. and maintaining a motion by the respondent Board for an order dismissing the appellant's action on the ground that the Board was an agent of the Crown, was not suable in a provincial court and the action should have been taken before the Exchequer Court of Canada, after a *fiat* had been granted.

J. B. Coyne K.C. for the motion.

C. E. Finkelstein contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—This is a motion on behalf of the Canadian Wheat Board to quash and dismiss an appeal from a judgment of the Court of Appeal of Manitoba. Counsel for the Wheat Board was also authorized to appear on behalf of the Attorney General of Canada so that we are at liberty to deal with the appellant's contention that certain Orders in Council hereafter referred to are invalid.

The motion is

to quash and dismiss the appeal herein on the ground that, without reference to the basis of decision in the Court of Appeal, the plaintiff's claim and appeal are plainly unfounded and without substance or merit, and the appeal is wholly academic and futile, because, among other reasons: since the action began, Orders in Council have provided for the distribution of the surplus monies resulting from operations of the Board including the sale of all wheat delivered to the Board, in respect of the crop years in question herein, being the

(1) [1944] 3 W.W.R. 337.

1945

OATWAY v. CANADIAN WHEAT BOARD

Rinfret C.J.

relief claimed in this action, and have disposed of any issue which may have existed between the parties; and, by the terms of The Canadian Wheat Board Act and the Order in Council, the plaintiff had and has no right to sue.

Copies of the record in the courts below, including the pleadings and the reasons for judgment of the Court of Appeal, were placed before the Court in what was designated "Appeal Book".

The Canadian Wheat Board was established in 1935 under *The Canadian Wheat Board Act,* chapter 53 of the Dominion statutes of that year. Its purpose, among others, was

> to undertake the marketing of wheat in interprovincial and export trade,

the Board buying from producers only and having

> to sell and dispose of all wheat which the Board may acquire, for such price as it may consider reasonable, with the object of promoting the sale and use of Canadian wheat in world markets.

The plaintiff is a producer of wheat, residing in the province of Manitoba, who delivered and sold wheat to the Board. He bases his claim upon *The Canadian Wheat Board Act.*

The Board is a body corporate. The action was brought against the Board as if it were "an ordinary trading corporation", in the language of Richards J.A.

The plaintiff issued a statement of claim against the defendant

> on behalf of himself and all other producers who are holders of producers certificates issued by the defendant for the crop years of 1938, 1939, 1940, 1941 and 1942.

He asked, among other things, for an accounting of the operations of the Board and of the wheat received by it during the said crop years, of all receipts and expenditures in connection therewith; for an order that the Board pay and distribute to the producers what shall be found due to them on the taking of accounts; and for a reference and for other relief.

The Board submitted in its statement of defence that the action was bad in law, in that it did not allege a reasonable or any cause of action against the Board; and, moreover, that if any cause of action against the Board was stated in the statement of claim, which was denied, then it was not a cause of action in which under the law and practice an action could be commenced and continued

without a *fiat* from the Crown, which had not been granted, and that, even if a *fiat* had been granted, there was no cause of action stated against the Board. Under the reserve of these and all other objections to the sufficiency in law of the statement of claim, the Board then pleaded on the merits.

On the 27th of November, 1943, the Board launched a motion for an order dismissing plaintiff's action, on the ground that the Court of King's Bench had no jurisdiction to hear a trial or determine the matters at issue in the action. The Board alleged in support of its motion that it is an instrument of the Government of Canada, or, alternately, an emanation of the Crown, or, in the further alternative, a servant or agent of the Crown, and that it had acted solely in the capacity aforesaid for His Majesty in the right of the Dominion. In the alternative, the Board asked that the action be dismissed as frivolous and vexatious. In support of this motion an affidavit of William Aitken, accountant of the Canadian Wheat Board, of the city of Winnipeg, Manitoba was filed.

The motion was heard by Donovan J., of the Court of King's Bench, who dismissed it with costs. The Board thereupon appealed to the Court of Appeal and the appeal was allowed and the statement of claim in the action was struck out. The judgment is grounded upon a holding by a majority of the Court that the Canadian Wheat Board is an agent of the Crown in the matters in question and that this precludes the plaintiff's suit in the provincial court.

On the 21st of November, 1944, the Court of Appeal granted to the appellant (plaintiff) special leave to appeal to this Court from the last mentioned judgment.

As already stated, the Board now moves for an order to quash and dismiss the appeal herein, on the ground that the plaintiff's claim and appeal are plainly unfounded and without substance and merit, and the appeal is wholly academic and futile, because, since the action began, Orders in Council have given to the appellant, and all those whom he claims to represent, the relief prayed for in this action, and have disposed of any issue which may have existed between the parties.

1945

OATWAY v. CANADIAN WHEAT BOARD

Rinfret C.J.

The Board's motion is supported by affidavits by Thomas William Grindley, secretary of the Canadian Wheat Board, and Henry B. Monk, barrister, of the city of Winnipeg.

The Canadian Wheat Board Act was amended in 1939, chapter 39; in 1940, chapter 25; and in 1942, chapter 4. Part II of the Act, added in 1940, was repealed by Order in Council P.C. 5844 of 1941, under the *War Measures Act*. It is apparent that this Act is part of the effort to solve economic and political problems, particularly of Western agriculture, and financial problems which deeply involved the Dominion government, all of which were then acute by reason of the depression, low prices, drought, a small international market, and other factors. These efforts culminated at that time in the adoption of *The Canadian Wheat Board Act*.

After 1941, due to the war, a large number of Orders in Council have been enacted, under the *War Measures Act*, directing operations of the Board and conferring upon the Board additional powers, generally subject in their exercise to approval by the Governor in Council.

The purposes of *The Canadian Wheat Board Act* were many, but two of them were:—

(1) To create a corporation for the purpose of liquidating an obligation of the Dominion of Canada amounting to more than one hundred million dollars which arose from a guarantee by the Government to the banks of the huge indebtedness of the Wheat Pools to the banks which had been a problem of the Government since 1931, and, for that purpose, to dispose of approximately two hundred million bushels of wheat which were held by the banks as security for the indebtedness. Sections 7 (*f*) and 8 (*c*) of the original Act providing for this were repealed in 1940 when this obligation had been liquidated.

(2) To put a floor under wheat prices.

In the original Act, and in the amendments thereto, other wide powers were conferred, as for instance, the regulation of delivery of grain of all kinds by producers, whether the producers were delivering and selling wheat to the Board or not, investigation of operations of grain exchanges, regulation of storage and transport generally

of grain from barn to exportation, collection of a Processing Levy on all wheat products and prohibition and regulation of imports.

The Board may accept delivery of wheat from producers and may purchase, sell, store and transport such wheat.

During the five year period involved in this action every producer had the option to deliver and sell to the Board, or to sell on the open market. As was natural, comparison of the prices paid by the Board on delivery and the price on the open market determined his course. In one year the Board handled practically no wheat, and in another year practically the whole marketed crop. If the producer delivered to the Board, he was, of course, governed by the terms of the Act, and more particularly the provisions above referred to.

When a producer delivers wheat to the Board, the Board is authorized to make a cash payment to the producer of a fixed amount, according to grade and quality, less freight and other charges to shipping port terminal. At the time of purchase and down payment, the Board, under subsection (*f*), is to issue to producers "certificates", indicating the number of bushels purchased, the grade and quality, which certificates

> entitle the producers named therein to share in the equitable distribution of the surplus, if any, of the operations of the Board with regard to wheat delivered in any crop year, it being the true intent and meaning of this Act that each producer shall receive for the same grade and quality of wheat the same price on the Fort William-Port Arthur or Vancouver basis.

The Act gives the Board power generally to do all such acts and things as may be necessary for the purpose of giving effect to its intent and meaning.

Section 12 (1) of the Act provides that

> the Board shall, with the approval of the Governor in Council, provide for the form and contents of certificates * * *

Section 8, (subsections (*d*) to (*g*)), provide that the Board shall set up a proper system of accounting, appoint responsible outside auditors, make weekly audited reports of its operations to the Minister and any other reports he may require, all of which has been done, according to the affidavit of William Aitken.

1945

OATWAY v. CANADIAN WHEAT BOARD

Rinfret C.J.

Section 13 (1) provides that

> as soon as the Board has received payment in full for all wheat delivered during any crop year, there shall be deducted from the receipts all monies, disbursed by or on behalf of the Board;

and then, by subsection (2),

> the balance shall be distributed *pro rata* among the producers holding certificates * * * in accordance with regulations of the Board approved by the Governor in Council.

In short, a system of pooling wheat was set up by the Act. A farmer delivering wheat to the Board received the sum which the Board was authorized to pay and a certificate showing grade, quality and quantity, and the Board marketed all the wheat received. If as a result of its operations there was a surplus, the statute entitled the certificate holder to share in it *pro rata* with other producers delivering grain of the same grade and quantity. If there was a loss, as happened in 1938 and 1939, it was met by the Government.

At the time the appellant commenced his action (October 18th, 1943), no regulations had been made for distribution under subsection (2) of section 13, or otherwise (affidavit of W. T. Grindley).

The plaintiff's claim in this action is set out in paragraph 23 of the statement of claim:—

(*a*) That an account may be taken of the operations of the defendant and of the wheat received by it during the crop years of 1938, 1939, 1940, 1941 and 1942, and of all sums of money received by, or come to the hands, of the defendant and of the application thereof and of the expenses disbursed by the defendant and all dealings and transactions of the defendant.

(*b*) That a determination be made by this Honourable Court of what should be the proper expenses and disbursements chargeable against the receipts, within the meaning of the said Act and the respective crop years to which such expenses and disbursements are properly chargeable.

(*c*) That a determination by and a declaration of this Honourable Court be made of the amounts of the proper surpluses to which the plaintiff and the other producers are entitled to for each of the crop years 1938, 1939, 1940, 1941 and 1942 respectively.

(*d*) That the defendant may be ordered to pay and distribute to the plaintiff, and to all other producers on whose behalf this action is brought, what, on taking such accounts, shall be found due from the defendant to the plaintiff and such other producers.

One of the grounds of the motion to dismiss the action made by the Board was that it was an agent of the Crown and was not suable in the provincial courts and that if

any action could be taken it must be in the Exchequer Court of Canada. It was on this ground that the Court of Appeal struck out the statement of claim, and it is against that judgment that this appeal has been taken to this Court.

While the matter was before the Court of Appeal, that is, before argument was concluded, an Order in Council was passed under the *War Measures Act*, P.C. 3541 of 1944. This Order recites that there was no surplus in either of the first two years in question in this action, but that there was a surplus in each of the other three years and it provides for the distribution of the surplus in each case.

The *War Measures Act* provides in section 3 (2):—

All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe.

There is also section 8 (*h*) of *The Canadian Wheat Board Act*, already mentioned, which provides that

it shall be the duty of the Board to give effect to any Order in Council that may be passed with respect to its operations.

By paragraph two of the Order in Council,

The Canadian Wheat Board shall distribute the surpluses (after deducting expenses as provided by section 13 of *The Canadian Wheat Board Act*, 1935), resulting from its operations during the three years commencing in 1940 by paying to each certificate holder for each bushel of wheat of the grade and quality stated in his certificate the specific sum of money set out in the Order (subsection (*a*));

and it provides that

the Board and Governor in Council should similarly distribute the surpluses of the succeeding two years by determining the appropriate sum for each grade and quality of each year (subsection (*b*) and section 3).

By section 4,

the Canadian Wheat Board shall not make any distribution or payment under the *Canadian Wheat Board Act* or otherwise in respect of certificates issued with regard to the wheat delivered to it in the five crop years commencing in 1938 and ending in 1943, except the distribution and payments provided for in section 2 of this Order;

and it further provides that

there shall be no liability in respect of such certificates except as provided in this Order.

In September, 1944, Order in Council P.C. 6898 was made in accordance with paragraphs 2 (*b*) and 3 of P.C. 3541 fixing the amount payable in respect of grades and qualities in the remaining two years.

1945

OATWAY v. CANADIAN WHEAT BOARD

Rinfret C.J.

It was urged by the Board (respondent), on the authority of the *Gray* case (1), and the *Reference re Chemicals* (2) that Orders in Council adopted under the *War Measures Act* are equivalent to statutes; that the Orders in Council referred to completely cover the field of distribution of the surplus in respect of the years in question in the action, and any right that the plaintiff has to receive any sums of money from any surplus in the years in question is such sum as he may be entitled to under these Orders in Council.

It was, therefore, argued that any issue between the parties in this case has disappeared and that accordingly the appeal should be quashed and dismissed. For authorities the respondent referred to *Cameron* v. *Excelsior Life Ins. Co.* (S.C.C.) (3); *Attorney General of Alberta* v. *Attorney General of Canada,* (4); *Coca-Cola Company of Canada* v. *Matthews* (5).

In the *Alberta* case (4) a reference had been made to this court in respect of an Alberta statute and that statute was repealed after judgment was rendered by this Court. The Privy Council declined to hear the appeal on the ground, as stated in the W.W.R., at p. 341:—

> It is contrary to the long established practice of this Board to entertain appeals which have no relation to existing rights.

The Court was informed at bar that there are more than two hundred thousand holders of certificates interested in the distribution about which this action was brought, and that over one million certificates have been issued by the Board in connection with crop years mentioned in the action. This shows the great importance of the matter and the undoubted urgency for an early decision by this Court.

As the appellant argued that a matter of this kind should not be summarily disposed of on a motion, the Court offered to extend the motion so that it might be heard, at the same time as the merits of the case, during the present sittings; but, as the appellant insisted that the matter should go over until the April sittings, which would have meant a delay of at least three months, the

(1) In re George Edwin Gray (1918) 57 Can. S.C.R. 150.
(2) [1943] S.C.R. 1.
(3) [1937] 3 D.L.R. 224.
(4) [1939] A.C. 117; [1938] 3 W.W.R. 337.
(5) [1944] S.C.R. 385.

Court decided to hear the respondent's motion immediately, and counsel on both sides were given full opportunity to be heard on all the points raised, and they availed themselves of the opportunity.

It is far from being the first time that this Court has been called upon to decide in such a way appeals which, on their face, appear either to be devoid of any substance or merit, or to require a speedy decision. It is not necessary to advert beyond the year 1926 when this Court, in *National Life Assurance Co. of Canada* v. *McCoubrey* (1), held that if an appeal, though within the jurisdiction of the Court, be manifestly entirely devoid of merit or substance, the Court will entertain favourably a motion to quash it.

In that case, the plaintiff sued to recover the amount of a policy of insurance and interest thereon, and, having begun action by a specially endorsed writ, moved before a judge in chambers for speedy judgment under Order XIV, r. 1 of the Rules of the Supreme Court of British Columbia, and it was ordered that judgment be entered for the plaintiff for the sum mentioned in the policy and that the action should proceed as to the demand for interest. The order was affirmed by the Court of Appeal for British Columbia. It was held that the order did not amount merely to an exercise of judicial discretion within the purview of section 38 of the *Supreme Court Act;* and that grounds urged against the defendant's right of appeal to the Supreme Court of Canada were not maintainable; but the Court, applying the principles above stated, quashed the appeal on the ground that it was manifestly devoid of merit. In the course of delivering the judgment of the Court, Anglin C.J.C. said, at p. 283:—

> After full consideration we are satisfied that the appeal lacks merit and that interference with the order for judgment, unanimously affirmed by the provincial appellate court, would be clearly unjustifiable.

It was said that

> every Court of justice has an inherent jurisdiction to prevent such abuse of its own procedure;

and an appeal

> having such manifest lack of substance as would bring it within the character of vexatious proceedings designed merely to delay

(1) [1926] S.C.R. 277.

1945

OATWAY v. CANADIAN WHEAT BOARD

Rinfret C.J.

should not be entertained. The following judgments were referred to: *Fontaine* v. *Payette*, (1); *Reichel* v. *McGrath*, (2); *Schlomann* v. *Dowker*, (3); *Angers* v. *Duggan*, 19 Feb., 1907, Cameron, 3rd Ed., p. 92; *Moir* v. *Huntingdon*, (4); *Assn. Pharmaceutique* v. *Fauteux*, 20 Feb., 1923.

The Chief Justice added:—

This court will entertain favourably a motion to squash * * * as a convenient way of disposing of the appeal before further costs have been incurred.

The same principle was again affirmed and applied in this Court in *De Bortoli* v. *The King* (5); *Bowman* v. *Panyard Machine & Mfg. Co.* (6); *Cameron* v. *Excelsior Life Ins. Co.* (7), where Sir Lyman P. Duff C.J.C. said:—

We have come to the conclusion that this appeal ought not to be permitted to proceed further. We have before us all the material necessary to enable us to decide whether, if the appeal were allowed to continue in the usual course, there is any reasonable probability that the appellant could succeed. After a full examination of all the pertinent considerations, we are satisfied that to interfere with the judgment of the Court of Appeal would be clearly unjustifiable; and that in this case we ought to exercise the well-established jurisdiction to quash summarily an appeal where, to quote the expression employed in the judgment of this Court in *National Life Ins. Co.* v. *McCoubrey* (8), it is "manifestly entirely devoid of merit or substance".

Again, in *Laing v. The Toronto General Trusts Corporation* (9), Sir Lyman P. Duff C.J.C. said:—

We have come to the conclusion that this is one of those cases in which it is plain that if the appeal came on for hearing in the ordinary way it could not be entertained by the Court, conformably to the course of the Court with regard to such matters * * *

It is the settled course of this Court that when on a motion to quash it plainly appears to the Court that the appeal is one which, if it came on in the regular and ordinary way, must be dismissed, the Court will on that ground quash the appeal.

The same reasoning was followed in *Temple* v. *Bulmer* (10). And, of course, the respondent was perfectly justified in referring to the recent judgment of this Court in *Coca-Cola Co. of Canada Ltd.* v. *Matthews* (11), where several other judgments of this Court to the same effect are referred to, and more particularly the judgment of the House

(1) (1905) 36 Can. S.C.R. 613, at 615.
(2) (1889) 14 App. Cas. 665.
(3) (1900) 30 Can. S.C.R. 323, at 325.
(4) (1891) 19 Can. S.C.R. 363.
(5) [1927] S.C.R. 454, at foot of 457 and at 458.
(6) [1928] S.C.R. 63 at 64.
(7) [1937] 3 D.L.R. 224.
(8) [1926] S.C.R. 277; [1926] 2 D.L.R. 550, at 554.
(9) [1941] S.C.R. 32, at 33.
(10) [1943] S.C.R. 265.
(11) [1944] S.C.R. 385.

of Lords in *Sun Life Assurance Co. of Canada* v. *Jervis* (1), and the judgment of the Privy Council in *Attorney-General for Ontario* v. *The Hamilton Street Railway Co.* (2).

We express no opinion upon the judgment of the majority of the Court of Appeal which deals with the status of the appellant to invoke the jurisdiction of the courts, if there were such jurisdiction. As was said by the former Chief Justice of this Court in *Temple* v. *Bulmer* (3):—

> That is a question which we shall be free to consider whenever it may be necessary to pass upon it.

The ground upon which we think the motion of the respondent ought to be allowed is the same as that in the *Coca-Cola case* (4). We should decline to hear the appeal because there is no issue left to be decided between the parties. We are bound by our judgment in that case to the effect that this Court will not decide abstract propositions of law, even if to determine the liability as to costs; and such a situation is not affected by the fact that the provincial court of appeal has granted leave to appeal to this Court.

In the premises, the Orders in Council have removed the substratum of the plaintiff's claim, even if the matter could be brought before the ordinary courts at all and not before the Exchequer Court of Canada or if it could be said that this is a matter upon which any court is competent to pronounce.

We have stated, in the course of the present judgment, the conclusions of the plaintiff's action and the relief sought by him. The Orders in Council provide that the Canadian Wheat Board shall not make any distribution or payment under the *Canadian Wheat Board Act* or otherwise in respect of certificates issued with regard to the wheat delivered to it in the five crop years mentioned in the action, except the distribution and payments provided for in section (2) of the Order (that is to say, distribution and payment in connection with the questions raised in the action), and "there shall be no liability in respect of such certificates except as provided in this Order" (P.C. 3541, section 4). It is true that the appellant is not granted

(1) (1944) 113 L.J. K.B. 174.
(2) [1903] A.C. 524.
(3) [1913] 1 S.C.R. 265.
(4) [1944] S.C.R. 385.

1945

OATWAY v. CANADIAN WHEAT BOARD

Rinfret C.J.

an accounting by the Orders in Council but they unequivocally determine the only bases upon which payments to holders of producers' certificates may be made.

Then the Canadian Wheat Board, having been empowered by Order in Council 3541, with the approval of the Governor General in Council, to determine and fix the amounts to which producers were entitled per bushel according to grade and quality, under Producers' Certificates issued in respect of wheat delivered to the said Board commencing in 1941 and 1942, His Excellency the Governor General in Council, on the recommendation of the Acting Minister of Trade and Commerce and under and by virtue of the powers conferred under the *War Measures Act*, and otherwise, was, by the subsequent Order in Council P.C. 6898, pleased to approve and did approve the said amounts to be paid to producers as aforesaid as determined and fixed by the said Board and set forth in the schedules attached to the two Orders in Council.

While it was competent for this Court to take judicial notice of these Orders in Council, as a matter of fact, they formed part of the material placed before the Court accompanying the motion to quash and dismiss the appeal. It is abundantly evident that these Orders in Council disposed of the whole case and

> that no further *lis* exists between the parties and that they leave nothing for them to fight over. (*Coca-Cola case*, (1)).

Of course, the appellant urged that the Orders in Council were *ultra vires*, but, in order to dispose of that argument, it should be sufficient to refer to the decisions of this Court in the *Gray* case (2), and the unanimous judgment of this Court *In the matter of a Reference as to the validity of the Regulations in relation to Chemicals enacted by the Governor General of Canada on the 10th of July, 1941, P.C. 4996* (3).

Accordingly, the motion of the respondent should be allowed and the appeal dismissed. In the special circumstances, there will be no order as to costs in this Court.

Motion allowed, appeal dismissed, no costs.

(1) [1944] S.C.R. 385, at 386.
(2) (1918) 57 Can. S.C.R. 100.
(3) [1943] S.C.R. 1.

JOSEPH BREAULT (DEFENDANT) APPELLANT;

AND

ADÉLARD TREMBLAY (PLAINTIFF). RESPONDENT.

1944
*Nov. 2, 3
1945
*Feb. 6

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

Contract—Lease with promise of sale—Farm land—Rent when fully paid to be deemed sale price—Lessor then to execute deed of sale with warranty of clear title—Loan guaranteed by hypothec—Payment of loan spread over a period of 25 years—Offer by lessee of balance due under lease—Lessor requested to give title—Refusal by lessor owing to existence of hypothec—Special clause in the agreement—Whether lessor bound to pay balance due on hypothec or lessee obliged to wait until last payment due on hypothec before obtaining title—Articles 1021, 1091, 1493, 1535 C.C.

The respondent, in July 1943, entered into an agreement, a lease with promise of sale, whereby he took possession of a farm land belonging to the appellant, including buildings, stock and equipment. The rent was fixed at $13,000, $6,500 to be paid in cash at the signing of the agreement and the balance payable by annual instalments of at least $500, with privilege of pre-payment. The agreement also stipulated that, when the rent had been fully paid, it was to be deemed the sale price and then the appellant bound himself to execute in favour of the respondent a deed of sale of the property (*un bon contrat de vente*) with warranty of clear title (*avec guarantie de titres clairs*). The farm was one of two parcels of land formerly owned by the appellant, on both of which there had been placed by him in 1936 a hypothec for $4,000 in favour of the Agricultural Loan Commission, and the payment of that loan was spread over a period of twenty-five years. The appellant had in 1938 sold the other parcel to his son who had assumed the entire hypothecary debt and bound himself to his father to pay it. A special clause of the agreement, upon whose interpretation rests the decision of this case, stipulated *inter alia* that the respondent would not be obliged to pay the balance of the purchase price to the appellant as long as the hypothec due to the Commission would not have been paid by the appellant's son or by the appellant, the latter binding himself to request (*devant faire demande*) the Commission to consent to give a discharge (*main-levée*) of the hypothec and to retain its privilege only on the parcel owned by the son; and, in case of refusal by the Commission, the respondent then would be allowed (*pourra*) to retain in his hands an amount of the annual payments equal to the balance then due on the hypothec. A further payment of $1,500 having been made, the respondent on the 11th of March, 1944 offered to the appellant the sum of $5,163.92 being the balance in capital and accrued interest and called upon him to execute an appropriate deed of sale; but the appellant refused. The respondent then brought an action against the appellant asking that he be condemned to sign such deed and, in default thereof, that the judgment to be rendered serve as title.

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

1945

BEAULT
v.
TREMBLAY

The appellant, in his plea, submitted that he was not able to give clear title to the respondent owing to the hypothec of the Commission which, he alleged, it was agreed the appellant would not be obliged to pay and contended that all the respondent could do, as long as that hypothec existed, was to retain into his hands an amount of instalments equal to the amount of the unpaid portion of the hypothec. The respondent replied that the appellant has always been able to give discharge of the hypothec by paying the Commission a sum of $464.52, which the Commission declared in writing it was ready to accept. The respondent's action was dismissed by the Superior Court; but that judgment was reversed by a majority of the appellate court.

Held, affirming the judgment appealed from, Rand J. dissenting, that the respondent's action should be maintained. The stipulations contained in the special clause were exclusively for the benefit of the respondent and for his own protection, so as to allow him to suspend the annual instalments due by him until the property would be cleared of the Commission's hypothec; the respondent was the only party having the right to invoke that clause, but he was not bound to take advantage of it. There was nothing in the agreement to show that the respondent should wait until the last payment due to the Commission would be made before being able to obtain a title; while, on the other hand, there was nothing to lessen the obligation of the appellant to execute a deed of sale with warranty of clear title as soon as the respondent would have paid the full amount due by him. Moreover, as a fact, the Agricultural Loan Commission had no objection to give a discharge of its hypothec and had declared it was ready to do so on payment of a sum of $464.52. The appellant had only to pay that amount in order to get a main-levée and he was bound to do it.

Per Rand J. dissenting.—The appellant, during such time as the obligation to the Commission was being performed according to its terms, was to be protected under the terms of the special clause against being called on to pay any of the moneys owing under it. The language of that clause necessarily imparts the following interpretation: on the land there is a hypothec which must run according to the terms of the obligation of a third party unless the hypothecary creditor will voluntarily release it; in case he refuses, the completion of the agreement must await the performance of that obligation language of that clause necessarily imports the following interpreon the balance of the rent—a significant provision—but since the appellant cannot give title before the maturity of the obligation; he can neither compel the payment of that balance nor be compelled to accept it as performance by the respondent entitling him to demand the contract of sale during that period of suspension.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, White J. and maintaining the respondent's action *en passation de titre.*

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

C. Gervais K.C. and *E. Veilleux* for the appellant.

J. C. Samson for the respondent.

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

THE CHIEF JUSTICE: Par acte passé à Coaticook le 31 juillet 1943, l'appelant s'est engagé à vendre avec garantie de titres clairs à l'intimé pour la somme de $13,000.00, dont $6,500.00 ont été payés comptant lors de la signature de l'acte, une terre au canton de Barnston, décrite à l'acte, avec bâtisses y érigées, ainsi que les animaux, gréments de ferme, etc., tel que le tout est plus au long énuméré à l'acte.

Cet acte peut être considéré comme étant un bail avec promesse de vente par l'appelant à l'intimé. En vertu de cet acte, il fut convenu que l'intimé aurait la possession de l'immeuble et des objets en question pour le prix et loyer mentionné, et que la balance encore due de $6,500 serait payée à l'appelant par versements annuels et consécutifs d'au moins $500 chacun, avec privilège pour l'intimé de faire des paiements partiels d'au moins $100 en aucun temps, avec intérêt au taux de 5% par an sur toute balance due. Une des obligations de l'appelant était que, si l'intimé payait bien son loyer et remplissait bien toutes les autres obligations auxquelles il était tenu, le loyer ainsi payé serait alors pris et considéré comme le prix de vente de la propriété et l'appelant serait

obligé d'en passer un bon contrat de vente à l'intimé ou à ses représentants légaux, mais non autrement ni auparavant.

Dès le début de l'acte, l'appelant y déclarait qu'il louait avec promesse de vente à l'intimé " avec garantie de titres clairs ".

Il suit de là que l'intimé avait droit de la part de l'appelant à un titre clair à la propriété vendue, dès qu'il avait effectué le paiement intégral de la somme de $13,000 et qu'il avait en outre accompli toutes les autres obligations qui apparaissent à cet acte de bail-vente.

1945

BREAULT v. TREMBLAY

Rinfret C.J.

Le 8 mars 1944, l'intimé, par l'entremise de ses procureurs, fit savoir à l'appelant qu'il entendait lui payer immédiatement la balance due en capital et intérêt, et qu'il désirait avoir un contrat clair de toute hypothèque. Il ajoutait que l'appelant n'aurait qu'à se présenter chez le notaire Normandin, à Coaticook, et que l'argent serait là pour le payer en complet règlement.

L'appelant se rendit chez le notaire, mais il refusa de signer le contrat franc et quitte, en prétendant qu'il ne pouvait ainsi consentir un acte clair et libre de toute hypothèque, vu que la Commission du Prêt Agricole Canadien lui avait, le 7 février 1936, fait un prêt de $4,000, en garantie duquel il avait hypothéqué, entre autres, l'immeuble qui faisait l'objet du contrat entre l'appelant et l'intimé. Il ajouta que depuis lors il avait vendu à son fils, Victorien Breault, l'un des immeubles hypothéqués en faveur de la Commission du Prêt Agricole Canadien, que son fils s'était chargé de payer les différentes échéances de cet emprunt au fur et à mesure qu'elles devenaient dues, et que tout ce que l'intimé pouvait exiger c'était de garder entre ses mains les versements annuels en capital qu'il s'était engagé à payer en vertu de l'acte de bail-vente.

Sur ce, l'intimé, par l'entremise de son notaire, fit régulièrement mettre l'appelant en demeure d'accepter la balance du prix de vente de l'immeuble, et de lui consentir un acte de vente avec titres clairs, dont le projet fut en même temps soumis à l'appelant, qui persista dans son refus.

La clause de l'acte de bail-vente que l'appelant invoqua à l'appui de la position qu'il prenait doit être ici reproduite en entier, vu que de son interprétation dépend la décision qu'il nous faut rendre. Elle se lit comme suit: —

Le bailleur déclare que sa propriété est hypothéquée en faveur de la Commission du Prêt Agricole Canadien, suivant acte d'obligation passé devant le notaire soussigné, le sept février mil neuf cent trente-six, enregistré à Coaticook, dans le Reg. B, Vol. 46, No. 19341, la balance encore due sur ce prêt a été assumée par Victorien Breault, en vertu de la vente du 18 novembre 1938, sus-mentionnée, laquelle balance de prêt est due et payable par ledit Victorien Breault, et le locataire aura droit d'exiger à avoir communication des reçus chaque année, pour établir que les versements annuels dus à la Commission sont payés, et il ne sera pas obligé de payer la balance revenant audit bailleur en vertu des présentes, tant que l'hypothèque due à la Commission du Prêt Agricole Canadien n'aura

pas été payée par ledit Victorien Breault ou par le bailleur; le bailleur devant faire demande à la Commission du Prêt Agricole, afin qu'elle consente main-levée d'hypothèque sur le terrain présentement loué et qu'elle garde son privilège et hypothèque seulement sur la terre dudit Victorien Breault. Au cas où la Commission n'accorderait pas cette main-levée, le locataire pourra garder entre ses mains, les versements annuels en capital au cas où sa balance de prix serait aussi élevée que le montant dû à la Commission, le locataire payant seulement ses intérêts à chaque année dans tel cas.

C'est là-dessus que le litige s'est engagé.

L'intimé poursuivit l'appelant en passation de titre. Il consigna au greffe de la Cour la balance qui était due en vertu de l'acte de bail-vente, il produisit le projet d'acte de vente qui avait été préparé et il conclut à ce que l'appelant fut condamné à le signer, ou à ce qu'à défaut par lui de ce faire, jugement à intervenir équivaille à titre et en ait tous les effets légaux.

Par son plaidoyer écrit, l'appelant répéta de nouveau qu'il n'était pas capable de donner des titres clairs, à cause de l'hypothèque de la Commission du Prêt Agricole, et il invoqua la clause ci-dessus reproduite, en prétendant qu'en vertu de cette clause tout ce que le demandeur pouvait exiger c'était de garder l'argent jusqu'à ce que l'hypothèque de la Commission du Prêt Agricole fut disparue.

Par sa réponse à ce plaidoyer, l'intimé soumit que la stipulation contenue dans la clause était exclusivement pour sa protection à lui, afin de lui permettre de suspendre les paiements annuels qu'il s'était obligé de faire jusqu'à ce que l'immeuble eût été libéré de l'hypothèque; que rien dans l'acte de bail-vente ne diminuait l'obligation de l'appelant de lui consentir un acte de vente avec garantie de titres clairs, dès que l'intimé lui payait toute balance due; et que d'ailleurs, en fait, la Commission du Prêt Agricole ne refusait pas d'accorder main-levée de cette hypothèque sur l'immeuble en question, et qu'elle s'était déclarée prête à la consentir sur paiement par l'appelant d'une somme de $464.52.

En Cour Supérieure, l'appelant réussit à faire rejeter l'action de l'intimé, mais la majorité de la cour d'appel infirma ce jugement et accueillit l'action de l'intimé suivant ses conclusions, avec dépens; les honorables juges E. M. McDougall et S. McDougall étaient cependant dissidents.

1945

BREAULT v. TREMBLAY

Rinfret C.J.

Nous sommes d'avis que l'intimé, dans sa réponse au plaidoyer écrit de l'appelant, a exactement défini la véritable situation des parties dans les circonstances.

A notre humble avis, et conformément à ce qu'en dit l'honorable juge Bissonnette dans ses notes à l'appui du jugement de la cour d'appel, la convention entre les parties, et en particulier la clause qui fait l'objet de la discussion, n'est " ni ambiguë ni équivoque ".

L'appelant s'est engagé à consentir à l'intimé un acte de vente franc et quitte de toutes charges et hypothèques dès que l'intimé aurait rempli toutes ses obligations et lui aurait payé toute balance due sur le prix convenu. C'était là son obligation principale, et il était tenu de l'accomplir dès que l'intimé aurait rempli sa part d'obligations.

L'appelant s'était engagé à obtenir la main-levée de la Commission du Prêt Agricole Canadien.

D'autre part, l'appelant, en déclarant dans la clause précitée que sa propriété était ainsi hypothéquée, ajoutait que l'intimé ne serait pas obligé de payer la balance qui lui revenait tant que cette hypothèque n'aurait pas été payée soit, d'après les termes de la clause, " par ledit Victorien Breault ou par le bailleur " (c'est-à-dire par l'appelant).

L'appelant s'engageait à faire la demande à la Commission du Prêt Agricole Canadien, afin qu'elle consente main-levée d'hypothèque et qu'elle garde son privilège et hypothèque seulement sur la terre du fils Victorien Breault.

Et la clause ajoute:

> Au cas où la Commission n'accorderait pas cette main-levée, le locataire (l'intimé) pourra garder entre ses mains les versements annuels en capital au cas où sa balance de prix serait aussi élevée que le montant dû à la Commission, le locataire payant seulement ses intérêts à chaque année dans tel cas.

Il n'y a rien là qui dit que l'intimé sera tenu d'attendre pour avoir son titre. C'est une stipulation en faveur de ce dernier, et qui est édictée à son bénéfice. Il est seul à avoir le droit de l'invoquer, mais il n'est pas tenu de s'en prévaloir.

En vertu du contrat, l'intimé avait le droit d'anticiper les versements du prix de vente; il avait le privilège de faire des paiements partiels en aucun temps, et sur le paiement de la balance du prix de vente il avait droit d'exiger son titre clair.

Cela n'était d'ailleurs que raisonnable, parce que s'il lui eut fallu attendre que l'appelant ou son fils Victorien Breault eussent fini de payer la Commission du Prêt Agricole Canadien suivant les versements prévus à l'acte d'obligation en faveur de cette dernière, il fut resté sans titre pendant encore une période de 17 ans au minimum, et pendant encore plus longtemps si l'appelant ou son fils avaient fait défaut d'effectuer ces versements.

Suivant l'article 1091 du Code civil, le terme est toujours stipulé en faveur du débiteur, à moins qu'il ne résulte de la stipulation ou des circonstances qu'il a été aussi convenu en faveur du créancier. Or, ici, bien loin de trouver une stipulation contraire, on voit, en fait, que le contrat de bail-vente accorde à l'intimé le privilège de compléter ses paiements " en aucun temps ".

L'intimé a donc agi suivant son droit strict, et l'appelant pouvait vainement prétendre qu'il était incapable d'obtenir de la Commission du Prêt Agricole Canadien la main-levée de son hypothèque; tout ce qu'il avait à faire était de payer le prêt agricole pour obtenir cette main-levée, et c'était son devoir de le faire. La clause elle-même qu'il invoque, comme on l'a vu, s'exprime comme suit:

tant que l'hypothèque due à la Commission du Prêt Agricole Canadien n'aura pas été payée par ledit Victorien Breault ou par le bailleur.

Il ne pouvait donc se retrancher derrière la prétention que son fils avait assumé les paiements en faveur de la Commission du Prêt Agricole; il continuait d'avoir lui-même l'obligation de faire ces paiements. Et d'ailleurs, l'intimé n'était nullement concerné par les arrangements que, sans sa participation, l'appelant avait faits avec son fils. Vis-à-vis de l'intimé, l'appelant continuait seul d'être responsable des engagements qu'il avait pris.

Mais il y a plus; il était inexact de prétendre que la Commission du Prêt Agricole Canadien refusait d'accorder main-levée. Elle avait déclaré, dans sa lettre du 10 mars 1944, qu'elle a d'ailleurs confirmée lors de l'enquête en cette cause, qu'elle serait prête à consentir cette main-levée sur paiement de la somme de $464.52. Tout ce que l'appelant avait à faire pour obtenir la main-levée requise était donc de payer cette somme. En la payant, il se trouvait par le fait même subrogé dans tous les droits de la Commission

1945

BREAULT v. TREMBLAY

Rinfret C.J.

contre son fils. Nous n'avons pas à entrer dans la considération qui a été suggérée, que peut-être il aurait des difficultés à se faire rembourser cette somme par son fils à cause des liens de famille, etc. Cela n'a rien à voir dans l'examen des droits de l'intimé.

Mais je ne puis m'abstenir de remarquer, après monsieur le juge Bissonnette en cour d'appel, combien tout ce litige est déconcertant et jusqu'à quel point il possède la saveur des traditions normandes les mieux caractérisées.

Dès le début, il eut été des plus facile pour l'appelant d'éviter ce procès coûteux en prenant, à même les offres que l'intimé lui a faites, la somme requise pour payer à la Commission du Prêt Agricole le montant qu'elle demandait pour accorder la main-levée nécessaire. De cette façon, il eut régularisé sa position et il eut pu consentir " avec garantie de titres clairs " le " bon contrat de vente " qu'il s'était engagé à donner à l'intimé. Mais il s'est entêté et, par là, il a été la cause de ce long litige inutile pour lui.

Il a refusé de remplir, vis-à-vis de son acheteur, la première et la plus essentielle des obligations d'un vendeur, qui est la délivrance de la chose qu'il a vendue conformément à l'article 1493 du code civil.

Il s'est arc-bouté derrière ce qu'il a compris comme étant ses droits stricts, et il a insisté, suivant un mot célèbre, pour exiger " his pound of flesh ".

Il ne pouvait en aucune façon refuser de se conformer à ce que désirait l'intimé, qui ne consiste après tout que dans la demande la plus simple que peut faire un acheteur, soit d'obtenir son contrat de vente sur paiement du prix stipulé.

Il s'est retranché derrière la clause déjà citée qui ne comporte nullement pour lui le droit qu'il a invoqué dans sa défense.

En effet, en déclarant que son immeuble était hypothéqué en faveur de la Commission du Prêt Agricole, il n'a rien fait autre chose que de dévoiler à son acheteur ce qu'il était de son devoir absolu de lui déclarer.

Il a ajouté que la balance encore due sur l'obligation qu'il avait consentie à la Commission du Prêt Agricole, avait été assumée par son fils, Victorien Breault.

Ensuite, cette clause déclare que l'intimé aurait le droit d'exiger qu'on lui communique les reçus chaque année pour établir que les versements annuels dus à la Commission étaient payés. Cette autorisation ainsi donnée à l'intimé était tout naturellement pour lui permettre de vérifier si les paiements dus à la Commission étaient rencontrés à échéance, parce que, s'ils ne l'étaient pas, la Commission aurait pu en poursuivre le recouvrement même par voie d'action hypothécaire dirigée contre la propriété vendue à l'intimé.

La clause procède ensuite à dire que l'intimé ne serait pas obligé de payer la balance revenant à l'appelant tant que l'hypothèque due à la Comission du Prêt Agricole n'aura pas été payée. C'était là insérer dans l'acte même la reconnaissance du droit auquel pourvoit l'article 1535 du Code civil. Il ne peut y avoir d'objection à ce que les parties au contrat insèrent dans celui-ci une condition établie par le code. D'autant plus que cet article 1535 reconnaît ce droit à l'acheteur, "à moins d'une stipulation contraire".

C'est là une façon de procéder habituelle dans les transactions de la province de Québec, en conformité avec l'article 1021 du code civil en vertu duquel les parties jugent à propos de transformer une obligation résultant de la loi en une obligation conventionnelle, "pour écarter le doute".

Que l'on remarque d'ailleurs que cette partie de la clause mentionne que l'intimé

ne sera pas obligé de payer la balance revenant (à l'appelant) en vertu des présentes tant que l'hypothèque due à la Commission du Prêt Agricole Canadien n'aura pas été payée par ledit Victorien Breault ou par le bailleur.

C'était là reconnaître dans la clause elle-même que, pour les versements annuels à faire à la Commission, l'intimé pouvait compter non seulement sur Victorien Breault, mais également sur le bailleur, *id est* sur l'appelant.

Puis la clause poursuit:

Le bailleur devant faire demande à la Commission du Prêt Agricole afin qu'elle consente main-levée d'hypothèque sur le terrain présentement loué et qu'elle garde ses privilège et hypothèque seulement sur la terre dudit Victorien Breault.

1945

BEAULT v. TREMBLAY

Rinfret C.J.

L'appelant devait donc adresser à la Commission cette demande de main-levée en vertu de l'acte d'obligation du 7 février 1936. La Commission n'était pas obligée d'accorder cette main-levée. Il n'est dit nulle part dans la clause, ni d'ailleurs dans l'acte entier, que l'appelant ne serait tenu d'obtenir la main-levée de l'hypothèque que dans le cas où la Commission se déclarerait prête à la donner sans conditions.

Il n'y a rien d'extraordinaire dans une clause de ce genre entre vendeur et acheteur. Si, au lieu d'un bail avec promesse de vente que nous avons ici, il s'était agi d'une vente pure et simple, l'acheteur eut été tenu au moment même de cette vente d'obtenir de la Commission la main-levée de l'hypothèque qui affectait l'immeuble vendu. Il eut été tenu de l'obtenir en vertu de la loi et sans qu'il fut nécessaire d'insérer cette obligation dans l'acte. Il est évident que les parties ont convenu d'agir comme elles l'ont fait ici parce que, tant que leurs relations demeuraient celles de promettant-vendeur et de promettant-acheteur, il importait peu que l'hypothèque subsistât sur l'immeuble qui faisait l'objet de ce contrat. Mais, dès que le promettant-acheteur, comme il en avait le droit, s'est déclaré prêt à payer la balance du prix mentionné dans le contrat, le devoir absolu du promettant-vendeur était de faire disparaître l'hypothèque conformément à son obligation, résultant tant de la loi que de la convention, de vendre " avec garantie de titres clairs " et qui exigeait qu'il transmît à son acheteur " le bon contrat de vente ".

Enfin, toujours, la même clause ajoute que

au cas où la Commission n'accorderait pas cette main-levée, le locataire pourrait garder entre ses mains les versements annuels en capital, au cas où sa balance de prix serait aussi élevée que le montant dû à la Commission, le locataire payant seulement ses intérêts à chaque année, dans un tel cas.

C'est là une stipulation uniquement en faveur de l'intimé. Comme on l'a déjà fait remarquer, il n'était pas nécessaire de l'insérer dans l'acte parce que l'intimé aurait eu ce droit quand même, en vertu de l'article 1535 du code civil. L'intimé ayant alors

juste sujet de craindre d'être troublé par une action hypothécaire,

il aurait pu conformément à cet article,

différer le paiement du prix jusqu'à ce que le vendeur fasse cesser ce trouble ou lui fournisse caution.

D'autre part, il était utile et prudent d'insérer cette condition dans l'acte à cause des mots qui terminent l'article 1535 C.C. " à moins d'une stipulation contraire ".

Les parties à l'acte auraient donc pu stipuler que, nonobstant le fait que l'intimé serait devenu exposé à une action hypothécaire de la part de la Commission du Prêt Agricole, il serait quand même tenu de continuer ses paiements; mais il ne pouvait y avoir d'objection à ce que les parties conviennent, ainsi que le code le permettait à l'acheteur, de dire expressément que si Victorien Breault et l'appelant négligeaient de rencontrer leurs obligations vis-à-vis de la Commission, l'intimé pourrait

garder entre ses mains les versements annuels en capital au cas où sa balance de prix serait aussi élevée que le montant dû à la Commission.

La phrase ajoute que, dans cette dernière hypothèse, le locataire paiera cependant ses intérêts à chaque année. Cela est tout naturel puisqu'il restait quand même en possession de l'immeuble et qu'il devait compenser l'avantage ou les avantages résultant de cette position par le versement des intérêts. Mais, nous le répétons, le droit pour l'intimé de garder entre ses mains les versements annuels en capital était une condition uniquement stipulée en faveur de l'intimé. Elle présentait cependant pour lui un désavantage parce que " dans tel cas ", cela éloignerait l'époque où il pourrait obtenir son " bon contrat de vente ".

Mais d'autre part, cette condition à son égard n'était que facultative. Il est dit: " le locataire pourra garder ". Il n'est pas obligé de le faire. Il peut lui aussi, ainsi que l'appelant lui en a donné l'exemple, exiger l'exercice de ses droits stricts. Il peut décider de ne pas se prévaloir de ce droit et se déclarer prêt, comme il l'a fait, à effectuer le paiement de la balance du prix de vente en demandant " un bon contrat de vente " avec " garantie de titres clairs ".

L'intimé a décidé de demander ce " bon contrat de vente " et, puisque l'appelant le lui a refusé, nous ne voyons pas sur quoi les tribunaux se baseraient pour ne pas lui accorder cette demande. Il n'y a absolument rien dans le contrat entre l'appelant et l'intimé qui puisse autoriser le refus d'accorder les conclusions de l'intimé.

La clause, sur laquelle l'appelant s'appuie, ne lui reconnaît aucun des droits qu'il a invoqués pour refuser de se conformer à la demande de l'intimé.

1945

BREAULT v. TREMBLAY

Rinfret C.J.

Sur le tout, nous sommes donc d'avis que l'appel doit être rejeté et que le jugement de la Cour du Banc du Roi (en appel) doit être confirmé, avec dépens.

Rand J. (dissenting)—This action was brought by the respondent as purchaser under a lease dated July 31st, 1943, with promise of sale, (avec garantie de titres clairs) of a farm, stock and equipment belonging to the appellant. The rent was $13,000 payable half in cash and the balance in annual instalments of not less than $500 with interest at 5 per cent. payable annually. When the rent had been fully paid, it was to be deemed the sale price, and the lessor bound himself thereupon to execute "un bon contrat de vente" of the property.

The farm was one of two parcels of land formerly owned by the lessor, on both of which there had been placed by him in 1936 a hypothec for $4,000 in favour of the Agricultural Loan Commission. Payment of the loan was spread over a period of twenty-five years. The other parcel the lessor had in 1938 sold to his son who had assumed the entire debt and bound himself to his father to pay it. At the time of the lease, therefore, both portions were bound by the hypothec but as to that now in question, the appellant was in the position of a surety and entitled to exoneration from the charge.

That situation was fully disclosed to the lessee and was dealt with by a clause reading as follows:

Le bailleur déclare que sa propriété est hypothéquée en faveur de la Commission du Prêt Agricole Canadien, suivant acte d'obligation passé devant le notaire soussigné, le sept février mil neuf cent trente-six, enregistré à Coaticook, dans le Reg. B, Vol. 46, No. 19341, la balance encore due sur ce prêt a été assumée par Victorien Breault, en vertu de la vente du 18 novembre 1938, sus-mentionnée, laquelle balance de prêt est due et payable par ledit Victorien Breault, et le locataire aura droit d'exiger à avoir communication des reçus chaque année, pour établir que les versements annuels dus à la Commission sont payés, et il ne sera pas obligé de payer la balance revenant audit bailleur en vertu des présentes, tant que l'hypothèque due à la Commission du Prêt Agricole Canadien n'aura pas été payée par ledit Victorien Breault ou par le bailleur; le bailleur devant faire demande à la Commission du Prêt Agricole, afin qu'elle consente main-levée d'hypothèque sur le terrain présentement loué et qu'elle garde son privilège et hypothèque seulement sur la terre dudit Victorien Breault. Au cas où la Commission n'accorderait pas cette main-levée, le locataire pourra

garder entre ses mains les versements annuels en capital au cas où sa balance de prix serait aussi élevée que le montant dû à la Commission, le locataire payant seulement ses intérêts à chaque année dans tel cas.

In October of the same year, 1943, the respondent took up with the Commission the matter of raising a loan to pay off the balance of the rent. The loan was intended to be secured in part by a hypothec on the leased lands which involved a release of them by the Commission from the existing hypothec. The Commission agreed to advance $5,000. Later on, in March, 1944, this offer was increased to $6,000, and the Commission intimated its willingness to discharge the hypothec from the leased lands on the special payment of $464.52 in addition to the regular instalments. The result of this would be to reduce the obligation to $2,800, the maximum sum which the Commission was willing to carry on the son's property alone.

Armed with this arrangement, the respondent required the lessor to make provision for the payment to the Commission of $464.52 and to complete the promise of sale by the execution of a contract with the title freed from the hypothec. The lessor refused to do that for this reason; he was being required to pay out money on an obligation which was recognized by the lease as being primarily his son's; and since the son was not in default, and unless the payment were made, the hypothec would not be discharged, he was not then in a position to execute a contract of sale with an unencumbered title. A formal tender of the balance of the rent was made and a contract presented for execution, and on the refusal of the lessor to sign that instrument, these proceedings were brought to compel the specific performance of the agreement.

The point of controversy is very narrow and it is this: was the lessor bound under the lease to do more for the purpose of obtaining a release of the land from the hypothec than simply to make a request to the Commission to that effect; was he bound, in addition, upon tender of the balance of the rent, to do whatever might be necessary, even to the extent of paying off the obligation in full, to clear the hypothec from the leased land?

1945

BREAULT v. TREMBLAY

Rand J.

The lease was contained in a standard printed form to which were added certain special typewritten clauses, including that quoted. Towards the end of the document and in ordinary printing was the following clause:

Mais si le locataire paie bien son loyer et remplit bien toutes les autres obligations sus-mentionnées, il est convenu et entendu que ledit loyer ainsi payé sera alors pris et considéré comme le prix de vente de ladite propriété et le bailleur sera obligé d'en passer un bon contrat de vente audit locataire, ou à ses représentants légaux, mais non autrement ni auparavant.

Under the obligation with the Commission, the lessor was entitled to pay off the balance of the loan at the date of maturity of any instalment, February 7th in each year, in accordance with the regulations of the Commission, subject, however, to a bonus of 5½ per cent. of that balance by way of liquidated damages for the loss of interest for the full term of twenty-five years. There is nothing to show that the regulations placed a further burden upon the exercise of that power.

The contention of the respondent is that, by virtue of this title clause, the lessee had the right at any time, as he did, to tender the balance of the rent and require from the lessor a contract such as demanded. On that view there was really no purpose served by the special typewritten clause. Section 1535 of the Civil Code would have afforded the lessee as full protection against the hypothec as he now claims to be the sole effect of that provision.

An examination of its language indicates clearly to me that during such time as the obligation to the Commission was being performed according to its terms, the lessor was to be protected against being called on to pay any of the moneys owing under it. The significant words are these:

le bailleur devant faire demande à la Commission du Prêt Agricole, afin qu'elle consente main-levée d'hypothèque sur le terrain présentement loué et qu'elle garde son privilège et hypothèque seulement sur la terre dudit Victorien Breault. *Au cas où la Commission n'accorderait pas cette main-levée,* le locataire pourra garder entre ses mains les versements annuels en capital au cas où sa balance de prix serait aussi élevée que le montant dû à la Commission, le locataire payant seulement ses intérêts à chaque année dans tel cas.

Several observations are to be made on this language. In the first place, it is beyond dispute that the hypothec and the accompanying obligation are contemplated to continue after the leased land has been discharged. By the previous language of the same paragraph, the parties identify the hypothec with the obligation: "tant que l'hypothèque due à la Commission"; and the words, "son privilège et hypothèque", make that fact perfectly clear. Equally clear is the fact that the request may be made at a time when the instalments of the rent are still in the future and to be paid. And finally, the request is not intended to be in the exercise of any power to compel the Commission to give the discharge. The Commission may refuse, and that means, rightly refuse.

Now, what, in the light of the language used, could be intended to follow from the proper refusal of the Commission to discharge if it were not that the parties would, in the performance of the agreement, be bound by that refusal and would adjust the performance accordingly? They are in fact treating the hypothec as an encumbrance irremovable without the consent of the Commission. The lessor must request the Commission to release the land. Why such a provision if the lessee can at any time demand a clear title? Why make the request obligatory? What could be more absurd than expressly to provide that the lessor must make such a request when, by the same instrument, he must, on tender of the balance of rent, furnish a good title. The lessor makes that request. The Commission places a condition on the release; the clause does not call upon the lessor to meet any condition. Why should a duty to do so be implied? The view urged by the respondent would mean that within a month from the date of the lease, say on August 31st, 1943, the lessee could have tendered the balance of the rent and demanded a contract of sale with clear title. This, as both parties knew, the lessor did not possess the legal right or power to enable him to give, and he could, therefore, on the refusal of the Commission, have been put in a default which would give rise to a right of resolution of the agreement on the part of the lessee. In other words, the parties, with full

1945

BEAULT v. TREMBLAY

Rand J.

knowledge of the facts, enter into an agreement which one of them, the lessee, can virtually repudiate the next day. The elaborate special clause designed to meet that precise situation turns out to have had only the very different result of securing to the lessee the protection already afforded him by law. But it is the result that follows from a refusal by the Commission of main-levée that determines the proper interpretation of the special clause; and it is this aspect of the agreement that Bissonette J., in his analysis, does not appear to have considered.

The effect of the special clause may also be put thus: when the lessee tenders the balance of the rent, the lessor is bound to try to obtain a release of the hypothec and he must do everything necessary to bring it about. That cannot include the exercise of the reserved power to pay off the obligation in full, because "request" in such a case is quite inappropriate: his power does not require a request. In any event, it could be exercised only as of February 7th in any year. If the Commismission refuses to give the discharge, the lessee must await the time when the obligation either is performed according to its terms or by virtue of the power reserved. The duty to make the request would, therefore, be operative only at a time other than the maturity dates for the instalments under the obligation. On those dates, the lessor must exercise his right to pay the obligation off in full, not merely request "main-levée"; but at all other times of the year he is exposed to a refusal by the Commission which, in turn, becomes obligatory on the lessee.

On that construction it will be said that, on the request, the Commission did not refuse and that consequently the lessor was bound to make the payment required. But the release contemplated by the clause is partial: the hypothec was to continue and likewise the son's obligation. At least, therefore, the lessor was not intended at such a time to be bound to pay off the whole of the obligation: that would contradict the necessary implication of the language used. But if not bound to pay all, then how much? If not $3,200, why $464? Where is the limit to be placed? There can be none; his lia-

bility must be to pay all or nothing and, since it is not the former, it must be the latter. This confirms the plain language dealing with the request, that the Commission be asked to be satisfied with the son's property; if the Commission in unwilling, the consequences already dealt with then follow.

Although the power under the obligation to pay off the loan in full on any maturity date has been treated as involved in the clauses in question, I am not to be understood as assenting to the view that a tender by the respondent would compel the appellant to exercise it. On the contrary, I think the language of the special clause is as clearly against that as against payment at any other time.

I am therefore, unable to treat the special clause as being wholly futile and abortive. What the language necessarily imports is this: that on the land there is a hypothec which must run according to the terms of the obligation of a third party unless the hypothecary creditor will voluntarily release it; in case he refuses, the completion of the agreement must await the performance of that obligation according to its terms; in that event, the lessee will pay interest on the balance of the rent—a significant provision—but since the lessor cannot give title before the maturity of the obligation, he can neither compel the payment of that balance nor be compelled to accept it as performance by the lessee entitling him to demand the contract of sale during that period of suspension.

The document must be read and construed as a whole. The general clause providing for completion by the passing of a contract of sale must be reconciled with this special stipulation dealing with a particular feature of the arrangement. When the general clause creates the right of the lessee to a contract of sale upon payment in full of the rent, it means payment in accordance with the preceding clauses, payment at a time or in circumstances in which the lessor must accept it as an act in performance calling for a reciprocal performance on his part. But the special clause provides that this final act of performance by the lessor will not be compellable while the hypothec

1945
BREAULT
v.
TREMBLAY
Rand J.

remains; and it must be consistently with this that the payment for the purposes of the general clause can be made. If there should be doubt, however, which I do not entertain, of what the language intends, it is pre-eminently a case for the application of section 1013 of the Civil Code.

I would allow the appeal and restore the judgment of the Superior Court.

Appeal dismissed with costs.

Solicitors for the appellant: *Gervais & Veilleux.*

Solicitor for the respondent: *J. C. Samson.*

1944
*Oct. 25, 26, 27, 30
1945
*Feb. 6

JAMES KUCHMA ..... APPELLANT;

AND

THE RURAL MUNICIPALITY OF TACHE ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipalities—Highways—By-law of Rural Municipality for closing of road—Validity—Application to quash—Municipal Act, R.S.M. 1940, c. 141—Period within which application to quash must be made (s. 389 (1))—Approval of Minister (Municipal Commissioner) (s. 473)—Jurisdiction of courts—Allegations that by-law not in the public interest nor passed in good faith—Onus of proof—"Excluded from ingress or egress" (s. 468)—Compensation (s. 468) not dealt with in by-law.

The appeal was from the judgment of the Court of Appeal for Manitoba (51 Man. R. 314) which (reversing the judgment of Donovan J., *ibid*) dismissed the present appellant's application for the quashing of a by-law of a Rural Municipality (the present respondent) for the closing of part of a government road allowance within the municipality.

This Court now affirmed the dismissal by the Court of Appeal of the application to quash the by-law.

Per the Chief Justice and Hudson, Taschereau and Estey JJ.:

(1) The period of one year within which, under s. 389 (1) of *The Municipal Act*, R.S.M. 1940, c. 141, such an application must be made is to be computed from the date of the passing of the by-law by the

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

municipality, not from the date of approval of the by-law by the Minister under s. 473 (before which date it does not come into force).

(2) Though such a by-law has been approved by the Minister under s. 473 (and notwithstanding that, under s. 473, it "when so approved shall be valid, binding and conclusive, and its validity shall not thereafter be questioned in any court * * *"), the courts have jurisdiction to pass upon its validity. S. 473 does not authorize the municipality to go beyond its statutory powers, nor permit it to exercise its powers otherwise than in the public interest and in good faith.

(3) A by-law passed by a municipality, if not passed in good faith and in the public interest, is a nullity, and is not made otherwise by lapse of time, approval, registration or promulgation.

(4) The onus of proving that a by-law was not in the public interest or passed in good faith is upon the applicant moving to quash it.

(5) Courts have recognized that the municipal council, familiar with local conditions, is in the best position of all parties to determine what is or is not in the public interest and have refused to interfere with its decision unless good and sufficient reason be established.

(6) The mere fact that the closing of a highway benefits some and adversely affects others does not determine the question of public interest. All the circumstances must be surveyed. In the present case, regard should be had to the scheme of settlement that obtained in the municipality, the limited use of the highway in question, the fact that the municipality did not close all of the highway because of its desire to leave a way of ingress and egress to and from the applicant's land, and particularly the fact that the controversy had continued over a period of years during which the municipal council had had the question brought before it at the instance of both groups (those for and those against the closing) upon many occasions.

(7) The evidence did not establish that the members of the municipal council had acted, as alleged, "not in the public interest" or "in bad faith and through fraud and partiality."

(8) As the closing was only of the easterly mile and a half of the road, leaving open the half mile passing westward along the north of the applicant's property, thereby preserving his way of ingress and egress westward to a north-south highway, he could not successfully contend that, within the meaning of s. 468 of said Act, he "will be excluded from ingress or egress" so as to require provision for "some other convenient way of access".

(9) The compensation or provision therefor, mentioned in s. 468, need not be dealt with in the by-law itself. The omission to do so does not affect the rights of the applicant with respect to any claim that he may have for compensation.

(10) On the evidence it must be held that the Minister approved the by-law with full knowledge of the position taken by the municipality with respect to a certain other road which it had been suggested should be made passable as an alternative road to that closed.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

(11) A finding by the trial Judge and facts in evidence disposed in the Minister's favour of any question of bad faith or misconduct on his part. There was no evidence to suggest any collusion whatever between the municipal council and the Minister.

(12) Sec. 7 (1) of *The Manitoba Expropriation Act* (R.S.M. 1940, c. 68) provides a method of closing highways (not required as such) of the Province's own initiative and without any consultation with the municipalities. It has no application in the present case.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) reversing (Robson J.A. dissenting) the judgment of Donovan J. (2) quashing on the ground of illegality a certain by-law of the Rural Municipality of Tache (the present respondent) for the closing of a part of a certain government road allowance within the municipality. The Court of Appeal set aside the judgment of Donovan J. and dismissed the application made by the present appellant for the quashing of the by-law.

The material facts and questions in issue are stated in the reasons for judgment now reported.

Leave to appeal to this Court was granted by the Court of Appeal for Manitoba.

R. Quain K.C. for the appellant.

J. T. Beaubien K.C. for the respondent.

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

ESTEY J.—This appeal involves the validity of a by-law closing one and a half miles of highway in the Rural Municipality of Tache in the Province of Manitoba.

The by-law in question is No. 752 as passed by the Rural Municipality of Tache on the 11th day of August, 1941. It closes a portion of a road allowance passing east and west, south of sections 1 and 2, Township 9, Range 5, East of the 1st Meridian. James Kuchma, a resident of the municipality, by a notice of motion dated February 1st, 1943, and returnable on March 1st, 1943, moved to quash the said by-law. The motion was heard by Mr. Justice Donovan, who granted the application and quashed the by-law.

(1) 51 Man. R. 314; [1944] 1 W.W.R. 321; [1944] 2 D.L.R. 41.
(2) 51 Man. R. 314, at 317-321; [1943] 3 W.W.R. 357.

The Appellate Court in Manitoba, Mr. Justice Robson dissenting, allowed an appeal for the reason, among others, that the application to quash was not made within the statutory period of one year, as required by sec. 389 of *The Municipal Act,* being ch. 141, R.S. of Manitoba, 1940. This section reads in part as follows:

389 (1) No such application shall be entertained unless it is made within one year from the passing of the by-law.

The appellant contends that this statutory period should be computed from the date the by-law was approved by the Minister under sec. 473, on the 3rd day of September, 1942, instead of from the date of the passing of the by-law by the Municipality of Tache on the 11th day of August, 1941. Sec. 473 reads in part as follows:

473. Every by-law

(*a*) for opening, establishing, widening, enlarging, altering, diverting, or closing a highway;

* * *

(*d*) for selling, conveying, leasing, or vesting any highway closed or altered by any municipal corporation,

shall, before it comes into force, be approved by the minister, and such a by-law when so approved shall be valid, binding and conclusive, and its validity shall not thereafter be questioned in any court or any proceedings unless the minister, upon due cause being shown, orders that the by-law be set aside or opened up for reconsideration.

("minister" at all times material to this case means the Municipal Commissioner.)

Upon this point there has been a difference of judicial opinion in the courts below. The learned judges who have held that the application is in time have relied upon *City of Winnipeg* v. *Brock* (1). There by-law No. 4264 provided for the closing of certain streets and was passed on Sept. 30th, 1907. It contained the following provision:

6. This by-law shall come into force and effect on the execution of the supplementary agreement dated the twenty-fourth day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council.

Subsequently, on July 20th, 1908, the council passed by-law No. 5050, which contained the following provision:

2. By-law No. 4264 is hereby ratified and confirmed, and declared to be now in force.

(1) (1911) 45 Can. S.C.R. 271.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

It was held that the statutory period should be computed from the passing of the last by-law, that is, No. 5050. Mr. Justice Anglin at p. 290 stated as follows:

> In my opinion the phrase "the passage of the by-law" in subsection *c* (1), of section 708, of the Winnipeg Charter (3 & 4 Edw. VII. ch. 64, sec. 15 (Man.)), means a final enactment of the by-law by the municipal council such that no further action by it in the nature of confirmation or ratification is requisite in order to make the by-law operative or effective. Where a by-law provides that it shall come into force only upon its being subsequently ratified or confirmed by the council "the passage of the by-law" is consummated only when such ratification or confirmation is had.

This decision, with deference to the learned judges who have held otherwise, in my opinion determines that the statutory period must be computed from the date of the passing of the by-law by which the municipality finally attains its objective, even if the by-law may not be brought into force until a later date. This is in accord with the decisions to the effect that statutory provisions requiring further acts such as registration or promulgation before a by-law becomes effective and binding do not extend the time within which the application to quash may be made. *Harding* v. *Corporation of Cardiff* (1); *Re Chinara and City of Oshawa* (2); *Wanderers Investment Co.* v. *City of Winnipeg; McPherson* v. *City of Winnipeg* (3).

A perusal of sec. 473 leads to the same conclusion. It provides that before any by-law "comes into force" it shall be "approved by the minister," and then provides,

> when so approved, shall be valid, binding and conclusive, and its validity shall not thereafter be questioned in any court or any proceedings unless the minister, upon due cause being shown, orders that the by-law be set aside or opened up for reconsideration.

There can be no doubt that the intent of these provisions of sec. 473 is to restrict rather than to extend the period of one year as fixed by sec. 389. In fact, it might well be that in some cases the Municipal Commissioner might withhold his approval in order to give the parties an opportunity to contest the by-law in the courts within the one year period.

It is also contended that under the provisions of sec. 473, the Commissioner having granted his approval, the courts have no jurisdiction to pass upon the validity of this by-law. This and similar provisions are embodied

(1) (1882) 2 Ont. R. 329.
(2) (1928) 35 O.W.N. 30.
(3) (1917) 27 Man. R. 450.

in municipal Acts to restrict, if not to eliminate, the "supervisory and paternal jurisdiction" that has been exercised by the courts over municipal corporations, even when the enactment before the courts was admittedly within the competence of the municipal corporation, was enacted in good faith and in the public interest. Meredith and Wilkinson—Canadian Municipal Manual, 46.

These provisions of sec. 473 do not authorize the municipality to go beyond the powers granted by the legislature, nor do they permit the municipality to exercise its powers otherwise than in the public interest and in good faith. Any other view would enable the municipal corporation, with the approval of the Municipal Commissioner under sec. 473, to enlarge its powers beyond the express intention of the legislature and in effect to nullify many sections of the same statute. It has always been the function of the courts to pass upon questions of jurisdiction, good faith and public interest, and legislatures pass this and similar legislation in the expectation that the courts will continue to pass upon and determine such questions.

This construction does not nullify the plain language of sec. 473, but merely restricts the application of its curative provisions to those enactments of a municipal corporation which are made within the limits of its jurisdiction, in good faith and in the public interest.

These conclusions, however, do not dispose of the case. A by-law which has not been passed by a municipal corporation in good faith and in the public interest, when passed is a nullity, and cannot be changed or made otherwise by lapse of time, approval, registration or promulgation. *Canada Atlantic Railway Co.* v. *Corporation of the Township of Cambridge* (1).

The appellant here contends that the "by-law is not in the public interest" and further, that the council acted "in bad faith and through fraud and partiality". The authorities are clear that the onus of proving these allegations rests upon the applicant. They are equally clear that if the applicant succeeds in proving these allegations, the by-law is invalid.

(1) (1888) 15 Can. S.C.R. 219.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

It therefore becomes necessary to examine these proceedings upon the merits. The road in question was a highway in the Dominion Government's Survey of Western Lands. Since the transfer of the natural resources to the Province, these lands are vested in the Province (ch. 148, R.S.M. 1940). The legislature of Manitoba has by secs. 2 (1) (*d*) and 450 of *The Municipal Act* (ch. 141, R.S.M. 1940) included this road as a highway and by sec. 456 of the same Act, vested in the municipal corporations jurisdiction over highways in the following language:

> 456. Every municipal corporation shall, subject to the provisions of "The Goods Roads Act, 1914" and "The Highway Traffic Act" and the exceptions hereinafter contained, have jurisdiction over the highways within the limits of the corporation.

Section 459 gives the possession of every highway within the limits of a municipal corporation to that corporation; and sec. 467 vests in municipal corporations the authority to close highways, and does not expressly contain any limits thereon material to these proceedings. This section in part reads as follows:

> 467. Every municipal corporation may pass by-laws
>
> (*a*) for opening, establishing, making, preserving, maintaining, improving, repairing, widening, enlarging, altering, diverting or closing highways within its jurisdiction, and for entering upon, breaking up, taking or using any land in any way necessary or convenient for the purposes, subject to the restrictions in this Act contained, and for preventing and removing any obstruction upon any such highways.

Beyond the memory of any person now living in the area people settled in and built their homes along the Seine River. Their farms, in contrast with those under the quadri-lateral plan of the prairies, are long and relatively narrow strips extending back from the Seine River varying distances, approximating one and a half miles. They constructed a highway along the river which has no relation to the federal government's surveyed roads. It is along this river road the public move east and west. The same scheme of settlement obtains west of the area in question and also in that immediately north of the river, but does not obtain eastward in the adjoining municipality.

These long farms of the settlers cut across the highway in question, and, speaking generally, they have been farming this surveyed highway since they went there; some have even fenced the portion immediately adjoining their farms. The one and a half miles in question have never been improved as a highway and were but very slightly if ever used as such.

The applicant purchased land south of the highway in question in 1924, has been residing there since 1926 and has been the leader, particularly since 1935, in an effort to have the road opened by the removal of the fences placed across the highway and discontinuance of farming operations thereon by the settlers.

Since 1935, the matter has often been before the council. In that year, a petition was presented to the council asking that the road be opened. In 1936, the council passed a resolution asking that the fences across this road allowance be moved. In 1937, a petition was presented to the council asking that the road be closed. In March of 1941, another petition was presented to Council, asking that the road be kept open. On June 9th, 1941, at the council meeting, both parties were represented (in fact had often attended and presented their views on previous occasions), when the council passed a resolution that the road should be closed on the condition that the adjoining owners purchase the road at $25 an acre before any action is taken. Finally, on August 11th, 1941, after having again heard all parties, and all the members of the council being in attendance, the by-law, the subject of these proceedings, was passed closing one and a half miles of the road.

This by-law closed the easterly mile and a half and leaves open the half mile passing westward along the north of the appellant's property, thereby preserving the way of ingress and egress that he has always had westward to the north-south highway. It is important to notice that one cannot travel further westward from this north-south road because from there on the road has been closed, the same type of settlement having developed there as obtains in the area in question. That area is similarly divided and the residents there use the river road. These facts, and indeed the evidence throughout

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

the proceedings, would indicate that the general public, apart from those whose lands abut upon this particular two miles, have little if any interest in its use. Of those whose lands abut upon this part of the highway, a majority favour closing the road as provided by the by-law.

The learned trial judge felt that the facts of this case brought it within the decision of *In re Knudsen and the Town of St. Boniface* (1). In that case, the by-law was quashed because it was not passed in the public interest. There, the by-law closed a street at the instance of a Mr. Marion, who, along with others, had subdivided an area into lots and blocks and registered the plan showing streets and lanes in the subdivision. On the basis of this plan, Marion sold certain lots. The learned trial judge states:

> I think the purpose of the council in closing and selling the street was, as indicated by the above, to aid Mr. Marion in retaking the land comprised in it or obtaining the proceeds of a sale of it.

It was also pointed out that while the municipal corporation gave as its reason for closing the street that it was of no public interest and was a cause of useless expense, it only three months later "passed another by-law to open a lane where this street ran and to buy the land for the purpose".

> This is sufficient of itself to show that there was something behind the action of the council in closing the street, and that the by-law now attacked was not passed in the public interest.

With deference to the learned trial judge, it appears to me that the facts in the present case are such as to distinguish it from the *Knudsen* case (1).

The by-law passed by the Rural Municipality of Tache in one sense continued what had existed in practice prior to the present controversy without objection. This controversy arose out of that scheme of settlement which had obtained there since beyond the memory of any living person. The parties affected had taken sides and at times a show of force had been made. Any compromise or adjustment suggested by the council had proved to be of no avail, and therefore the council quite properly concluded that in the public interest it should now deter-

(1) (1905) 15 Man. R. 317.

mine the question. In doing so, it has effected a compromise; it retained Mr. Kuchma's way of ingress and egress to the west and closed the one and a half mile to the east.

Upon the question of public interest, courts have recognized that the municipal council, familiar with local conditions, is in the best position of all parties to determine what is or is not in the public interest and have refused to interfere with its decision unless good and sufficient reason be established.

Jones v. *Township of Tuckersmith* (1); *In re Inglis & City of Toronto* (2); *Re Mills & City of Hamilton* (3); *Hurst* v. *Township of Mersea* (4).

Immediately associated with this question, is the allegation that the council acted "in bad faith and through fraud and partiality."

It is not contended that the council acted hastily or without giving all parties an opportunity to be heard. In fact all parties were heard upon many occasions; even upon the date of the passing of the by-law on August 11th, 1941, those opposing the closing of the road were heard. On September 6th, the Secretary-Treasurer of the municipality advised the applicant that further protests must be made to the Municipal Commissioner. Further, the correspondence between the council and the Municipal Commissioner indicates good faith when, as late as March 14th, 1942, the Secretary-Treasurer of the municipality wrote to the Deputy Municipal Commissioner in part as follows:

> There are two sides to this question, one favours the closing of the road, the other wants it to be left open. At nearly every council meeting one side or the other comes up and wants this and wants that.

There is an incident between an official of the municipal council and the son of the applicant which is stressed by the appellant's counsel. The conduct of this official upon that occasion cannot be commended, but when the question came before the council, his conduct was not approved. If any conclusion can be drawn from this incident, it would be that the council was desirous of pursuing a fair and reasonable course.

(1) (1915) 33 O.L.R. 634.
(2) (1905) 9 O.L.R. 562.
(3) (1907) 9 O.W.R. 731.
(4) [1931] O.R. 290.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

Changes with respect to highways invariably assist some more than others, and often some are adversely affected. The mere fact that it benefits some and adversely affects others does not determine the question of public interest. All of the circumstances must be surveyed. In this case, regard should be had to the scheme of settlement that obtains in the Municipality of Tache, the limited use of the highway in question, the fact that the municipality did not close all of the two miles because of its desire to leave a way of ingress and egress to and from the applicant's land, and particularly that this controversy had continued over a period of years during which the council has had the question brought before it at the instance of both groups upon many occasions.

Similar issues were raised in *United Buildings Corporation, Ltd.* v. *City of Vancouver* (1). There, upon the petition of the Hudson's Bay Company, the Corporation of the City of Vancouver closed a portion of a public lane. Some of the people affected opposed it and others supported it. It was contended that the closing of the lane was not in the interest of the public but was solely in the interest of the Hudson's Bay Company. Accusations of bad faith were made against the council. The case eventually went before the Privy Council where the action of the Vancouver council was upheld. Lord Sumner, at p. 350, states:

> It is easy, especially for those who conceive themselves to be sufferers by it, to suspect and to suggest and even to argue with some plausibility that such a transaction cannot have been carried through without some improper or sinister motive on the part of those members of the corporation who voted for it, and in this case all who were voting; and, since opinions differed on this question in the Court below, their Lordships freely recognize that it might bear one aspect or the other, but judging it, as they must do, upon a judicial survey of the whole proved materials, with the experience of men of the world and the full persuasion that such a charge must be proved by those who make it, their Lordships are unable to differ from the opinion of those members of the Court below who held that the transaction was free from impropriety or bad faith.

Again at p. 353:

> But though the operation of a by-law benefits one or more persons more than others, it does not follow that by enacting it a corporation must be taken to "give any bonus" within the Municipal Act, 1906, sec. 194, nor can a by-law be said to be outside the powers

(1) [1915] A.C. 345.

conferred by sec. 125 of the Vancouver Act, 1900, merely because steps taken in the public interest are accompanied by benefit specifically accruing to private persons.

See also *Re Howard and City of Toronto* (1).

In my opinion, the evidence does not establish that the members of the Council of the Rural Municipality of Tache have acted either "not in the public interest" or "in bad faith and through fraud and partiality."

On behalf of the applicant, it was pressed that the common law rule is "once a highway, always a highway". However much that may be, we are dealing with statutory provisions that, subject to the limitations imposed by law, vest the power to close the highways in the municipal corporations. These statutory provisions supersede the common law and cannot be repealed or amended by the court.

It is further alleged that the by-law in question is invalid because sec. 468 is not complied with, in that the by-law does not contain a provision for compensation nor some other convenient way of access to the applicant's land:

> 468. No municipal corporation shall close up any original road allowance or highway, legally established, whereby any person will be excluded from ingress or egress to and from his lands or place of residence over such highway, unless in addition to compensation it also provides for the use of such person some other convenient way of access to his lands or residence.

The learned trial judge states as follows:

> It does not seem to me that the exclusion from ingress or egress provided against by that section has to be absolute before it applies.

With deference to the learned trial judge, it appears to me that the essential purpose of the section is to preserve to the occupant a way of ingress and egress, and if the closing of a highway by the municipality means that the occupant "will be excluded from ingress or egress", then and in that event only must "some other convenient way of access" be provided. If, as in this case, the closing of the road to the east left the road to the west open, and this latter provided ingress and egress, then the occupant cannot successfully contend that within the meaning of the section he "will be excluded from ingress or egress."

(1) (1928) 61 O.L.R. 563.

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

In *White* v. *The Rural Municipality of Louise* (1), upon an application to quash a by-law, the corresponding section of an earlier Manitoba statute was reviewed and Taylor C.J., at p. 237 states as follows:

> Reading that section as it stands, it seems to me the reasonable construction is, that it is only where a person would be, by the closing of the road, excluded from all ingress and egress to or from his land, that he can demand some other convenient road or way of access.

A similar view is expressed in *Re The Credit Foncier Franco-Canadien and The Village of Swansea* (2), where Robertson, C.J.O., states at p. 56:

> It is only when the "effect of the by-law will be to deprive any person of the means of ingress and egress" that the subsection applies. It seems that it is plain when the statute speaks of the means of ingress and egress what is contemplated is a property having only one means of ingress and egress, and of that one means the land-owner will be deprived by the by-law

Exception is taken that no compensation was paid nor provision made therefor in the by-law. The question is dealt with in the cases already cited, and it appears to be well established that compensation need not be dealt with in the by-law itself. The omission to do so does not affect the rights of the applicant with respect to any claim that he may have for compensation.

The applicant further alleges that the by-law was approved by the Municipal Commissioner in bad faith and through collusion with the said council. The learned trial judge upon this point states:

> Although counsel for the applicant in speaking of the failure of the Commissioner to give them that opportunity was critical of the later attitude of the Commissioner, I think it was probably only by an oversight that they were not given a chance to make further presentation to him of their case.

The learned judge then proceeds to hold:

> In my opinion it is clear from the evidence, and especially from Ex. 30, that the Commissioner gave final approval only on the understanding that the council had committed itself to making the alternative road passable in accord with the condition which he had attached from the first.

This refers to a road south of section 35. This point is covered by correspondence, the relevant portions of which are as follows:

On June 9th, 1942, the Secretary-Treasurer of the municipality wrote to the Municipal Commissioner in part as follows:

(1) (1891) 7 Man. R. 231. (2) [1940] O.W.N. 53.

At its meeting held yesterday, June 8th, the Council passed the following motion:

Winther-Legal: "That this Council refuse to open (that is cut the brush and grade the road) the mile of road between Sections 26 and 35-8-5 because of the cost of such opening and of the building of a bridge over the Desorcv Coulee."

Carried unanimously.

On July 18th, the Secretary to the Minister wrote to the Secretary-Treasurer of the municipality in part as follows:

I believe that at the time the Reeve visited at the office, the Minister agreed to approve of the by-law providing the Municipality opened an alternative road and had another vote of the Council on the by-law. Failing this he did not see how he would be justified in closing the present road.

On July 23rd, 1942, the Secretary of the municipality replied to the Secretary to the Municipal Commissioner in part as follows:

My letter of June 9th, which you must have, gives you the reaction of the Council.

On August 11th, the Secretary of the Municipality wrote to the Municipal Commissioner in part as follows:

As for the road south of 35-8-5 it is clear that there may be a request at any time to make it passable. Being a section road it is legally opened and on request of some ratepayers the Council will have to make it passable. This was pointed out to Councillor Reimer at yesterday's meeting. Naturally if there is no request for this on the part of the ratepayers, the Council will not proceed on its own.

A perusal of this correspondence, with deference, leads me to the conclusion that the Commissioner approved of this by-law on September 3rd, 1942, with full knowledge of the position of the municipality with respect to the road south of section 35.

The finding of the learned trial judge, the fact that the Commissioner accorded to the parties an opportunity to be heard, inspected the premises and obviously endeavoured to assist in the solution of this controversy, disposes in his favour of any question of bad faith or misconduct on his part. There is no evidence that suggests any collusion whatever between the council and the Municipal Commissioner.

It has been suggested that the approval of the Lieutenant-Governor in Council under sec. 7 (1) of *The Manitoba Expropriation Act,* R.S.M. 1940, ch. 68, in addition

1945

KUCHMA v. RURAL MUNICIPALITY OF TACHE

Estey J.

to the proceedings taken herein was necessary in order to make the by-law valid. This section provides as follows:

7. (1) Where any highway is not required as such, the Lieutenant-Governor-in-Council may, on the report and recommendation of the minister, by order-in-council, close and stop up such highway or any portion thereof.

(2) A certified copy of the order-in-council shall be registered in the registry office or land titles office for the registration district or land titles district in which the highway is situated.

With great respect to the learned judge who holds that view, a perusal of this section, in my opinion, indicates that the province is there providing a method of closing highways (not required as such) of its own initiative and without any consultation with the municipalities. One can quite understand the reason for this and therefore it has no application to proceedings such as are considered in this case.

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

RAND J.—I concur in the result.

Appeal dismissed with costs.

Solicitors for the appellant: *Stubbs, Stubbs & Stubbs.*

Solicitor for the respondent: *J. T. Beaubien.*

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LIMITED (DEFENDANT) ..... APPELLANT;

AND

CANADA AND DOMINION SUGAR COMPANY LIMITED (PLAINTIFF).. RESPONDENT.

1944
*Nov. 7, 8
1945
*Feb. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Claim for damaged cargo—Estoppel—Cane sugar bags stored in old open wharf—In bad condition before loading—Bill of lading—Goods shipped "in apparent good order and condition"—Margin notation "Signed under guarantee to produce ship's clear receipt"—Whether shipowner prevented from proving bad conditions of goods—Proper stowage of cargo on ship—Examination on discovery—Transcription merely returned to trial court and deposited before judge—Should be disregarded before this Court.

The respondent company, by a written contract dated January 25th, 1938, purchased through brokers from B. & Co., who also acted as agents for the appellant company, 1,150 long tons of raw cane sugar, which were to be shipped to Montreal by the ship *Colborne* owned by the appellant company. The bags of cane sugar came from various plantations and were stowed in tiers on an old wooden public wharf in Georgetown, British Guiana. The wharf was built on piles and with large seams between the planks which in places were broken; the height of the wharf over the water at high tide was two to three feet at the cap of the wharf and within a few inches at the end of the foreshore; there was a corrugated iron roof, but otherwise it was an open wharf; the front end of the bags came to the edge of the roof, but were not otherwise protected. The bags had been on the wharf for from four to nine weeks when the *Colborne* proceeded to the wharf to load. The season of 1938 had been unusually wet, as a result of which and of the condition of the wharf about twenty-five per cent. of the bags were in bad condition, some being stained and some torn and re-sewn, when the loading begun on June 12th and was concluded late on the 13th or early in the morning of the 14th. The stained bags were stowed and scattered all over the four hatches. The ship was seaworthy in every respect, as the trial judge found. As the bags were loaded, a tally was kept by representatives of B. & Co., the shippers-sellers, and the results of the tally were noted on a sheet which was dated at the top June 10th and addressed to the *Colborne*. That document was endorsed, on June 13th, by the chief tally clerk: "Correct. Many bags stained, torn and re-sewn", that signature was followed by that of the chief officer of the ship and, at the very bottom, was stamped the signature of B. & Co. as agents for the appellant. A received for shipment bill of lading, dated June 13th, was issued by the appellant through its agents B. & Co., stating that the appellant had received "in apparent good order and condition "from B. & Co. for shipment 10,350 bags of cane sugar; and in

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

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

the margin appeared the stamped notation: "Signed under guarantee to produce ship's clean receipt." The *Colborne* arrived at Montreal on July 3rd, where, upon usual examination by the Deputy Port Warden and after chemical analysis, it was ascertained that the cargo was damaged and that one-third of the bags were badly stained. The respondent company then sued the appellant company for damages and based its claim on two grounds: first, that the appellant was estopped from relying upon the true facts by reason of its own statement in the bill of lading that the cargo was in apparent good order and condition when received for shipment; and, secondly, that in any event the cargo was improperly stowed in that wet bags were mixed with dry bags, which consequently damaged what otherwise would have been sound cargo. The appellant company contended that there was no unqualified statement in the bill of lading that the sugar was shipped in apparent good order and condition, upon which the respondent company could, or did, rely; and also contested the second ground of action raised by the respondent. The trial judge held that a clean bill of lading had been issued by the appellant at a time when the actual condition of the goods was known and that the appellant was estopped from setting up that the goods were not in good order and condition; he found the appellant company responsible for the damaged condition of the bags and directed a reference to determine the quantum of damages. The appellant company appealed to this Court.

Held that the shipowner, the appellant company, under the circumstances of this case, was not estopped as against the holder of the bill of lading, the respondent company, from proving that the bags were not in good condition when shipped. More specially, the effect of the stamped notation on the bill was that the bill contained a qualified statement as to the condition of the goods and the first element in estoppel was therefore lacking. But, even if the bill could be construed as containing an unqualified statement, the respondent never relied on it. *Silver* v. *Ocean Steamship Co.* ([1930] 1 K.B. 416) disc.

Held, also, that the cargo was properly stowed and that, in any event, even if the stowage was improper, the stained wet bags did not damage what otherwise would have been sound cargo.

An officer of the respondent company was examined on discovery on behalf of the appellant. A transcription of the examination was returned to the trial court and deposited on the judge's desk with other papers. The only use made of it was a reference to it by counsel for the appellant in a written argument after the closing of the evidence. Later, when settling the case for this Court, the trial judge, upon an application by the appellant, allowed the inclusion of the examination in the case.

Held that the examination on discovery should be disregarded by this Court.

Per The Chief Justice and Kerwin, Taschereau and Estey JJ.:—The mere fact of the transcription of such examination being returned to the trial court and deposited before the judge did not make it evidence. Under Rule 75 of the Rules in Admiralty, only such

parts of an examination for discovery as are actually read at the trial become part of the record. Also, in an Admiralty case in the Exchequer Court of Canada, article 288 of the Quebec Code of Civil Procedure does not apply although the action was commenced and tried in that province.

Per Kellock J.:—The examination on discovery has not been put in at the trial; and, under the provisions of section 68 of the *Supreme Court Act*, there is nothing which authorizes a judge settling the case to include items which do not form part of the proceedings in the court below.

The appeal should be allowed and the respondent company's action dismissed.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Cannon J., maintaining the respondent company's action for damages to cargo and ordering the usual reference, with the assistance of merchants, to establish the quantum of the respondent company's damages.

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

Lucien Beauregard K.C. for the appellant.

C. Russell McKenzie K.C. for the respondent.

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

KERWIN J.:—This is an appeal by the defendant, Canadian National (West Indies) Steamships Limited, from a judgment of the District Judge in Admiralty for the Quebec Admiralty District of the Exchequer Court of Canada which declared that the respondent plaintiff, Canada and Dominion Sugar Company Limited, was entitled to damages, ordered an accounting with the assistance of merchants, and condemned the appellant to pay such damage with interests and costs. The respondent sues as the owner of a cargo of sugar and as the holder of a bill of lading issued by the appellant covering the cargo shipped on board the appellant's steamship *Colborne* at Georgetown, British Guiana, for carriage to Montreal.

By a written contract, dated January 25th, 1938, the respondent purchased through brokers from Booker Bros., McConnell & Co. Ltd., 1,150 long tons of Demerrara raw

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

Kerwin J.

cane sugar to be shipped to Montreal by the SS. *Colborne*, or substitute boat, scheduled to sail on or about June 16th, 1938. Other terms requiring consideration will be referred to later. To fulfil its contract, Booker Bros., McConnell & Co. Ltd. secured bags of Demerrara raw cane sugar from various plantations. Some came by estate punts down the tidal Demerrara river, a distance of about eight miles, and others by estate sailing punts along the Atlantic coast, a distance of from twelve to one hundred and sixty miles. The bags were stowed in tiers on an old wooden public wharf in Georgetown known as Garnett's, built on piles and with large seams between the planks which in places were broken. The height of the wharf over the water at high tide was two to three feet at the cap of the wharf and within a few inches at the end of the foreshore. There was a corrugated iron roof but otherwise the wharf was an open one. The front ends of the bags came to the edge of the roof. The bags had been on the wharf for from four to nine weeks when, on the 12th June, 1938, the *Colborne* proceeded to the wharf to load.

The season of 1938 had been unusually wet in British Guiana as a result of which and of the condition of the wharf many of the bags (about twenty-five per cent. of the total, according to Leslie, the ship's mate) were in bad condition when the loading commenced. As the bags were loaded into the ship, a tally was kept by Hinckson, the Chief Tally Clerk of the shippers-sellers, and his assistants. The sellers were also the agents for the appellant. The results of the tally were noted on a sheet which is dated at the top June 10th, 1938, and addressed to SS. *Colborne*:—

Please receive on board the following packages, ex. Garnett Wharf.

Then follows the plantation marks with the number of bags from each plantation, and showing that 10,348 bags were destined for the respondent in Montreal. There were also 1,716 bags for another consignee and after the total of 12,064 appears the following:—

Correct. Many bags stained, torn and re-sewn.
J. Hinckson
Tally Clerk 13/6/38
a/c Booker Bros., McConnell & Co. Ltd.

A little further down, the mate of the ship signed as follows: "Leslie c/o".

At the very bottom of the document is stamped:—

Booker Bros., McConnell & Co. Ltd.
Agents, Canadian National Steamships.

Attention is drawn to the fact that the original of this sheet shows that it is dated the 13th of June and not the 12th, and this is confirmed by the evidence of Hinckson taken on commission. The master of the ship, referring to the ship's log or scrap log, testified at the trial that this was the last cargo loaded at Georgetown and that the ship left Garnett's Wharf at 4.26 a.m. on June 14th, 1938, to go to sea. From this I take it that the loading was continued until late on the 13th or early in the morning of the 14th of June.

A received for shipment bill of lading was issued by the appellant through its agents, Booker Bros., McConnell & Co. Ltd. The practice of shippers in Georgetown was to have received for shipment bills of lading ready to go by mail on the ship carrying the cargo, and where the ship, as in this case, sailed in the early morning hours, the mail at the post office would close about 5 p.m. on the previous day. The bill of lading in question bears date June 13th and while C. M. F. Bury, a merchants' attorney in the employ of Booker Bros., McConnell & Co. Ltd., testified in his evidence, taken on commission, that the sugar was on board before the bill of lading was issued, it appears to me, considering all the other admissible evidence in the record, that this cannot be so and that the appellant was correct in alleging in its statement of defence that the bill of lading was signed before the sugar was received on board the *Colborne*. In the view I take of the legal position of the parties, this is perhaps immaterial but I mention it because the trial judge stated that the present appellant staked its whole case on a well-recognized practice of the shipping trade in British Guiana under which a clean bill of lading is issued in order to expedite matters prior to loading of the goods and subject to the later issuance of a ship's receipt on which is noted the actual condition of the goods. The learned trial judge also states that the mate's receipt was issued and signed on the 12th of June, but, as has been shown above, the actual date was the 13th. He then finds that a clean bill of lading was issued on the 13th of

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

Kerwin J.

June and after the actual conditions of the goods was known. In his factum, counsel for the appellant states that he did not, and does not, rely only on the one ground mentioned by the trial judge. As a matter of fact the factum assumes that the bill of lading was signed after the cargo had been received on board the *Colborne*. I have already indicated my reasons for considering that this did not occur but, however that may be, the appellant is entitled to succeed on other grounds.

The respondent bases its claim to succeed in its action on two grounds: (1) That the appellant was estopped to deny its own statement in the bill of lading that the cargo was in apparent good order and condition when received for shipment: (2) That the cargo was improperly stowed in that wet cargo was stowed with dry cargo, which consequently damaged what otherwise would have been sound cargo. I deal with these contentions in order.

The bill of lading states that the appellant had received in apparent good order and condition from Booker Bros., McConnell & Co. Ltd., for shipment in the steamship *Colborne,* 10,350 bags of Demerrara raw can sugar but in the margin appears the stamped notation: "Signed under guarantee to produce ship's clean receipt."

Clause 27 of the bill of lading reads as follows:—

> In cases where the clean Bills of Lading are signed, subject to Mate-receipt, the Consignee and/or Consignor to be bound by any notations and/or exceptions on such Mate's receipt, as though the notations and exceptions had been placed on the Bill of Lading itself, it being recognized that clean Bills of Lading have been surrendered before the exceptions (if any) were known, in order to facilitate the business of the shipper or other party directly interested in the goods.

The "Mate-receipt" is the same as the "ship's * * * receipt" mentioned in the marginal note.

The appellant contends that there was no unqualified statement in the bill of lading, that the sugar was shipped in apparent good order and condition, upon which the respondent could, or did, rely. The evidence of W. F. Rowell at the trial shows that when he took up the bill of lading and other documents in Montreal, on behalf of the respondent, he saw the notation stamped in the margin of the bill of lading. The effect of that notation is that there was no such statement contained in the document, and the first element in estoppel is therefore

lacking. In this aspect of the matter, clause 27 of the bill of lading may be disregarded whereas, in my view of the time at which the bill was signed, it serves to strengthen the same conclusion.

In this connection the respondent relies upon Rules 3 and 4 of Article 3 of the Rules scheduled to the Carriage of Goods by Sea Ordinance of British Guiana, which is admitted to be the same as the Canadian *Water Carriage of Goods Act, 1936,* and scheduled Rules. So far as material these read as follows:—

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things,

* * * *

(*c*) the apparent order and condition of the goods.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (*a*), (*b*), and (*c*).

There would appear to be no question but that the issuance of a received for shipment bill of lading complies with the Rules because by Rule 7 of Article 3, the carrier, master or agent of the carrier, shall, if the shipper so demands, issue to him a "shipped" bill of lading. If the bill of lading as actually issued did not comply with the Rules, the shipper was entitled to demand one that would. That, I think, is the only relevant effect of non-compliance with the Rules so far as a bill of lading is required to show the apparent order and condition of the goods, where the document is accepted by the shipper. I assume, without deciding, that the bill of lading in this case did not comply with the Rules in that respect. It is unnecessary to construe Rule 3 of Article 3 or to express any opinion as to the decision in *Silver* v. *Ocean Steamship Co.* (1), except that I agree that *prima facie,* Rule 4 of Article 3,

has not the effect of allowing the ship-owner to prove that goods which he has stated to be in apparent good order and condition on shipment were not really in apparent good order and condition as against people who accepted the bill of lading on the faith of the statement contained in it.

There was no statement that the goods were received in apparent good order and condition but, even if the bill of lading could be construed as containing such a statement, the respondent never relied on it. It is true that Mr.

(1) [1930] 1 K.B. 416.

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

Kerwin J.

Rowell states he relied on it but it appears that the contract for the sale and purchase of the cargo is in a standard form generally used by the respondent, and, later in his evidence, Mr. Rowell testified that the respondent always chose to pay for cargo shipped in accordance with such a contract as sound, relying upon the policies of insurance taken out by the sellers and sent with the bill of lading and other documents. The contract here, as was usual, after providing for the price per pound, stated that it was on a basis of 96 per cent. average outturn polarization. Polarization was explained in the evidence as a test which is made in order to determine the amount of sugar present in raw sugar. The name apparently comes from the polariscope, the practical working of which is based upon the property of sucrose to rotate a ray of polarized light to the right, and the greater to the right the greater the concentration.

The agreement further provided that samples were to be drawn, at the time and place of discharge from ocean carrier, by the buyers and sellers, and that three tests were to be made of each sample, one by the sellers' chemist, one by the buyers' chemist, and one by the New York Sugar Trade Laboratory, the average of the two nearest tests to be taken as a final test. Settlement was to be made on the accepted average polarizations with an allowance of ·025c. per pound per degree above the selling basis up to 99, or ·05c. per pound per degree below the selling basis down to 94, and ·075c. per pound per degree below 94 per cent. down to 93 per cent.; fractions in proportion, but no sugar was to be delivered below 93 unless on discount terms mutually satisfactory to buyers and sellers. Polarization in excess of 99 was to be regarded as 99. Payment was to be made in Montreal in Canadian currency for 95 per cent. of provisional invoice amount on account on presentation of shipping documents in Montreal, and any balance to be paid after final settlement of weights and tests. Complete Canadian documents, in triplicate, were to accompany bills of lading. There was a marine insurance clause reading as follows:—

Marine Insurance from shore to shore, including risk of lighters at ports of loading and discharge, to be effected by Sellers on usual W.P.A. terms including Lloyd's Institute clauses, for invoice amount

plus 5 per cent.; any sum insured in excess to be for Seller's account and benefit. In the event of any low test being attributable to damage during the transit insured and directly caused by one of the perils insured against in the policy, Sellers to have full rights under the Marine Insurance policy to collect total depreciation in value for their own account, unless Buyers take such damaged sugar at full value of sound sugar. Any claim for loss in weight and/or return of premium is to be for Sellers' account.

It will be noticed that by this clause insurance was to be provided for both parties and that in the event of any low test being attributable to damage during the transit insured and directly caused by one of the perils insured against, the *sellers* were to have full rights under the policy to collect total depreciation in value for their own account *unless buyers take such damaged sugar at full value of sound sugar.* As I have already stated, the respondent, as buyer, always accepted cargoes as sound sugar. It is quite true that the bill of lading and other documents were produced before the ship arrived at Montreal and, and in accordance with the contract, 95 per cent. of the *pro forma* invoice was paid before the condition of the goods upon discharge could be known but it is perfectly clear that the respondent so acted because of its usual practice and because of its knowledge that there were always stained and wet bags in shipments of Demerrara raw cane sugar.

The trial judge made no finding as to the second claim advanced by the respondent, which is based upon Rule 2 of Article 3:—

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

In the early stages of the trial some confusion arose as to what was meant by the terms "wet", "stained", "dripping wet", but that was cleared up satisfactorily with the result that it appears that no dripping wet bags were allowed on the boat, and the ship's officers followed the usual practice in stowing wet and stained bags of cargo next to dry bags. If it were a bad practice, the mere fact that it had been long followed would not, of course, validate it but even Mr. Hayes, called in rebuttal by the respondent, admitted that there were stained bags of sugar in every cargo and that the usual practice was a

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

Kerwin J.

proper one and that he did not know, in this case, the proportion of stained bags which were wet. It may be added that at the trial an attempt was made to show that the goods were damaged in transit by salt water but this attempt failed. It was shown that Demerrara raw cane sugar always contains a proportion of salt, and the preponderance of the expert evidence is that the proportions at the commencement and end of the voyage were the same. All precautions were taken and from the time the ship received the cargo, the latter was not touched by water. Mr. Jacobs, an expert called by the respondent, places the proportion of damaged sugar upon unloading at Montreal at about the same as Leslie when the bags were being put on board the ship. The proper finding is that the cargo was properly stowed and that, in any event, even if the stowage were improper, the stained wet bags did not damage what otherwise would have been sound cargo.

I desire to make it clear that I have disregarded the examination for discovery of Mr. Rowell. The mere fact that a transcription of this examination was returned to the Court and was deposited on the trial judge's desk with the other papers, did not make it evidence. Rule 75 of the General Rules and Orders Regulating the Practice and Procedure in Admiralty Cases in the Exchequer Court of Canada is as follows:—

> 75. Any party may, at the trial of an action or issue, use in evidence any part of the examination on discovery of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

This means that only such parts of an examination for discovery as are actually read at the trial become part of the record. It is only then that counsel for the opposite party knows what is being offered as evidence and has an opportunity of suggesting that explanatory questions and answers be added. There is no basis for the suggestion that in an Admiralty case in the Exchequer Court of Canada, commenced and tried in Quebec, Article 288 of the Quebec Code of Civil Procedure applies so as to make an examination for discovery part of the record and evidence without any other formality.

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

Kellock J.

The appeal should be allowed and the action dismissed, with costs throughout.

KELLOCK J.:—This is an appeal by the defendant from a judgment of Cannon J., District Judge in Admiralty for the Quebec Admiralty District of the Exchequer Court of Canada, pronounced the 9th day of June, 1944 in favour of the plaintiff, in an action for damages in respect of certain sugar carried in one of the appellant's steamships from British Guiana to Montreal. The facts as found by the learned trial judge are, in part, as follows:

On the 25th of January, 1938, the respondent entered into a contract with Messrs. H. E. Hodgson and Company Limited, brokers, whereby these brokers sold to the respondent for the account of Messrs. Booker Bros., McConnell & Company Limited, of Demerara, British Guiana, eleven hundred and fifty tons of sugar to be shipped by the R.M.S. *Colborne*, propery of the defendant, for delivery in Montreal. The ship arrived at Demerara on the 11th of June, 1938, and on the following day proceeded to load the raw sugar in question from a wharf known as Garnett's wharf. Booker Bros., McConnell & Company Limited, the sellers of the sugar, were also acting as steamship's agents for R.M.S. *Colborne*. The bags of sugar cane came from various plantations; some had come by estate punts down the Demerara River; others had come by estate sailing punts along the Atlantic Coast, a distance of from 12 to 160 miles. Garnett's wharf is a wooden wharf built on piles; the wooden flooring is old, there are large seams between the planks which are broken in places. The height of the wharf over the water at high tide is perhaps from 2 to 3 feet at the cap of the wharf and within a few inches at the foreshore end. There is a corrugated iron roof, but otherwise it is an open wharf. The bags were stowed in tiers which would come to the edge of the roof. The front ends of the bags were not otherwise protected. These bags had been lying on the wharf for a period extending from four to nine weeks. All these facts were established by the witnesses who were heard upon rogatory commission. The season of 1938 had been unusually wet, and many of the bags were in bad condition when the loading began on the afternoon of June 12th and was concluded on June 13th. There were five tally clerks present at the loading, besides the ship's Officers. All these clerks and officers testified that a great number of the bags which were loaded were stained, some were torn and re-sewn. All the stained bags were stowed and scattered all over the four hatches as they came on board the ship. After the cargo was loaded, the hatch covers were put on, and three good tarpaulins were placed over the hatch covers, properly secured and made water tight. The ship was seaworthy in every respect. Before the cargo had been taken in the hold, it was examined and found dry and in good condition, and fit to receive cargo. The trip was uneventful, and good weather was enjoyed all through the voyage. The *Colborne* finally arrived in Montreal on the 3rd of July. The Deputy Port Warden made the usual examination of the hatches, noticed that there were signs of slight sweating. He found that there were stained bags throughout the stowage. Upon examination, and after chemical analysis, it was conclusively found that the cargo of sugar was damaged and one-third of the bags were badly stained.

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

Kellock J.

A document bearing date at the top June 10th, 1938 and known as a ship's receipt or mate's receipt was made out by Messrs. Booker Bros. as agents of the appellant. This document is in the form of a request directed to the ship to receive on board the sugar which is therein described, namely, 10,348 bags destined for the respondent and a number of other bags destined elsewhere. This document is endorsed

Correct—Many bags stained, torn and re-sewn. Signed J. Hinckson 13.6.38 Tally Clerk.

Hinckson was the chief tally clerk in the employ of Booker Bros. His signature is followed by that of one Leslie, the Chief Officer of the ship. My brother Kerwin has pointed out that the printed appeal case erroneously shows "12.6.38" instead of "13.6.38". Hinckson, in his evidence, establishes that the 13th is the correct date, as an inspection of the original document itself shows. The appellant in its factum adopts this error as does the learned trial judge in his judgment.

On the 13th of June, Messrs. Booker Bros., McConnell and Company Limited issued a bill of lading, in which they acknowledged receipt for shipment of 10,350 bags of Demerara Royal Cane Sugar "in apparent good order and condition." This bill of lading they signed as agents for the appellant. The bill contains in its margin the following endorsement—"Signed under guarantee to produce ship's clean receipt". Among the printed conditions is the following:

27. In cases where the clean bills of lading are signed, subject to Mate-Receipt, the consignee and/or consignor to be bound by any notations and/or exceptions on such Mate-Receipt as though the notations and exceptions had been placed on the bill of lading itself, it being recognized that clean bills of lading have been surrendered before the exceptions (if any) were known, in order to facilitate the business of the shipper or other party directly interested in the goods.

The learned trial judge, on his view of the facts that the ship's receipt was dated prior to the bill of lading, held that the latter part of condition 27 rendered the condition inapplicable in the circumstances and came to the conclusion that the bill of lading was a "clean" bill, and the appellant was estopped from setting up that the goods were not in good order and condition when shipped. He accordingly held the appellant responsible for the dam-

aged character of the sugar on its arrival in Montreal. A reference was directed to determine the quantum of damage.

The respondent resists the appellant's attack upon the judgment on the grounds upon which it was decided, and also upon the further ground that, in any event, wet bags were stowed with dry bags by reason of which the latter were damaged.

I read the reasons of the learned trial judge as a finding that the damage of which the respondent complains was not due to anything which occurred during the voyage, but that it existed at the time the sugar was placed on board the ship. The question of stowage was not dealt with in the judgment below, and there is no finding as to how far, if at all, the method of loading caused further damage. In my opinion, the finding of the learned trial judge is amply supported by the evidence, which satisfies me that, insofar as the shipment of sugar had moisture in it at the time of its arrival at Montreal, that moisture had existed in the bags of sugar prior to shipment. All the evidence points to the accuracy of the evidence of Captain Murray, the Deputy Port Warden of the city of Montreal that, apart from evidence of slight sweat on the opening of the hatches, which did not "amount to any damage", no water had entered any of the holds at any time.

The respondent's contention then is that the appellant is estopped from relying upon the true facts, by reason of the statement with which the bill of lading begins, that the goods were received in apparent good order and condition. To quote from the judgment of Lord Russell of Killowen in *Nippon Menkwa Kabushiki Kaisha* v. *Dawson's Bank Limited* (1).

> Estoppel is not a cause of action. It may (if established) assist the plaintiff in enforcing a cause of action * * * by preventing a defendant from asserting the existence of some fact, the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorized agent of his to the plaintiff or someone on his behalf (*b*) with the intention that the plaintiff should act upon the faith of the statement and (*c*) the plaintiff does act upon the faith of the statement.

The bill of lading contained not only the opening words already mentioned but also condition 27 and the endorsement set out above. When the respondent inspected it at

(1) (1935) 51 LL. L.R. 147, at 150.

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

Kellock J.

Montreal before taking it up, it had no information as to whether or not the bill of lading had been issued before the ship or its agents were aware of the facts contained in the notation on the mate's receipt. I think anyone in the position of the respondent, inspecting the bill of lading without the information to which I have referred, would take from it by reason of the endorsement "Signed under guarantee to produce ship's clean receipt", that the bill of lading had been in fact issued before the ship's receipt. One of the most usual things ("notation" or "exception" in the language of the bill of lading) which one expects to find noted on a mate's receipt is the apparent condition of the goods if, in fact, anything out of the way should be noticeable in their condition. The respondent must take the whole of the bill of lading with the result that, while at the beginning it acknowledges the receipt for shipment of the sugar in apparent good order and condition, the endorsement indicates that the bill which is a "received for shipment" and not a "shipped" bill, was issued before the mate's receipt, and condition 27 makes the bill subject to whatever notations or exceptions may be upon the ship's receipt when produced. The respondent, therefore, when it inspected the bill on June 29th, was not in the position of having had made to it an unqualified statement as to the apparent order and condition of the goods.

Mr. McKenzie contended that the bill of lading in question was a "clean" bill of lading and that, therefore, the case was governed by the decision in *Silver* v. *Ocean Steamship Co. Ltd.* (1). In Scrutton, 14th ed. p. 181, the authors state with reference to the usual statement in a bill of lading, that the goods covered thereby are received in apparent good order and condition, that

> a mate's receipt or bill of lading which qualifies this admission is not a "clean receipt" or "clean bill of lading",

and they refer to *Armstrong* v. *Allan* (2) and *Restitution S.S. Co.* v. *Pirie* (3). In *Arrospe* v. *Barr* (4), the Lord President was of opinion that the words "clean bill of lading" had no settled meaning applicable to every conceivable case. He said

> it appears to me that a clean bill of lading must be construed with reference to the circumstances of each particular case. If there is a matter in dispute between parties as to the conditions on which the voyage

(1) [1930] 1 K.B. 416.
(2) (1892) 8 T.L.R. 613.
(3) (1889) 61 L.T.R. 330, at 333.
(4) (1881) 8 R. 602.

is to take place and the goods are to be carried and delivered, then a "clean" bill of lading will have reference to the subject of that dispute and the meaning of it will be that the master will not cumber his bill of lading with any allusion to it.

Lord Mure said

I am rather inclined to think, if we are forced to decide the general question, that a clean bill of lading must mean a bill in the ordinary uniform style recognized in all ports in this country, and without any special stipulations different from that ordinary style.

Lord Shand said,

if you have conditions referred to which can only be ascertained by reference to another document * * * then it appears to me that in the ordinary sense that would not be a clean bill of lading.

This is particularly applicable to the case at bar. It is quite true that condition 27 contemplates that a bill of lading endorsed as here is a "clean" bill. It is so, in the sense that it contains no express "exception". However, once the endorsement is made upon it, it does not contain any unqualified statement as to matters which may later be exceptions, and from that standpoint, the bill is not a clean bill.

In my opinion, it would not help the respondent if the fact be that the bill of lading was issued after the ship's receipt came into existence and after the apparent order and condition of the goods were known. If the respondent is to make out a case of estoppel, it must make it out on the basis of what was told to it by the bill of lading at the time it was inspected on the 29th of June, 1938 and taken up.

Mr. McKenzie further contended that the *Water Carriage of Goods Act of Canada (1936)* (which was agreed to be in terms the same as that of British Guiana) by Rule 3 (*c*) of Article III requires that the bill of lading which the carrier is thereby required to issue on demand of the shipper, shall show the apparent order and condition of the goods, and that therefore, the respondent was entitled to disregard the endorsement.

It may be noted at once that the bill of lading dealt with by rule 3 is one to be issued by the carrier on *demand* of the shipper: *Vita Food Products* v. *Unus Shipping Company* (1). The vendors of the sugar were Booker Bros., McConnell & Co. and they it was who signed the bill as

(1) (1839) 55 T.L.R. 402, at 484.

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

Kellock J.

agents of the carrier. All of this was apparent to the respondent from the contract of purchase of the sugar and the bill of lading. Booker Bros., as shippers, apparently did not see fit to demand from themselves as ship's agents the document to which as shippers they may have been entitled under the Act, i.e. one of which did show unqualifiedly the apparent order and condition of the goods. They were content with the document here in question. Ordinarily, a shipper insisting, would no doubt be entitled to obtain a bill of lading complying with the statute or be entitled to the return of his goods: *Peek* v. *Larsen* (1); *Jones* v. *Hough* (2). However that may be, I see nothing in the Act or the Rules which entitles the respondent to found a case of estoppel upon ignoring what was actually upon the face of the bill of lading when presented, even though it did not meet the statutory requirements.

Mr. McKenzie also argued that the endorsement could be ignored by the respondent as being restricted to an obligation between the shipper and the appellant merely, a breach of which would give rise to a right of action for damages as against the shipper but to no other right. I do not think that effect should be given this contention. Although the endorsement is not in the exact language of condition 27 in that the words "subject to" are not used, I think that, in the business community in which these documents are current, the endorsement would be understood as operating within the condition and I so hold.

For these reasons, I am of opinion that the respondent failed to establish the first requirement for an estoppel. The case *Silver* v. *Ocean Steamship Company Limited* (3) is quite distinguishable, as that case and other cases cited by the respondent are based upon the existence of an unqualified statement in the bill of lading.

There remains the second contention raised on behalf of the respondent, that the damage occurred during the voyage as the result of bad or faulty stowage, in respect of which the respondent alleges it is entitled to recover. The respondent relies upon the admission of the ship's master, Captain Hubley, to the effect that if wet bags were stowed next to dry bags, it was possible that these wet bags would damage the dry, and the further admission that

(1) (1871) L.R. 12 Eq. 378.
(2) (1879) L.R. 5 Ex. D. 115.
(3) [1930] 1 K.B. 416.

there were some wet bags in the cargo. Captain Hubley did not specify how many wet bags there were at the time of loading. The chief tally clerk, Hinckson, also admitted that stained bags in a wet condition would damage unstained bags, but he said that as far as he could remember, there were no bags shipped which were so wet as likely to stain other bags. It is significant that it was Hinckson who placed the notation on the mate's receipt as to the stained bags. This notation says nothing about wet bags. Leslie, the chief officer of the ship, whose duty it was to watch the loading of the cargo, said that if a wet bag were seen, it would be rejected, but there were no rejections in the case of this particular cargo. He admitted that he did not see all the bags. Captain Murray, the Deputy Port Warden, who examined the sugar on arrival, said there were bags which were badly stained, but these were not running or dripping and that their stowage with the other bags would, in his observation, not affect the dry bags, beyond sticking to the burlap of the dry bags or causing a slight stain. Henry, the third officer of the ship, testified that the condition of the bags when unloaded in Montreal was the same as when they were loaded. Evidence on behalf of the respondent was given by the witness Irons that there were wet bags on delivery, but the witness did not particularize. Jacobs, another witness for the respondent, gave evidence that he had examined certain samples of the shipment including bagging which he had received from Irons, and that the sugar was very wet and the bagging was soaking. According to him, this was due to sea water. According to the findings of fact of the learned trial judge, this, if accurate, could not have occurred during the voyage and the learned trial judge does not seem to have accepted the evidence of this witness to the full extent, as the finding of fact is that

> upon examination and after a chemical analysis, it was conclusively found that the cargo of sugar was damaged and one-third of the bags were badly *stained*.

All the witnesses, including the witness Hayes called on behalf of the respondent, agreed that in every cargo of sugar, there are stained bags and that it is the practice to stow stained bags with sound bags, as it would make the loading of vessels too costly if the stained bags had to be segregated. Hayes did not approve of the stowing of wet

1945

CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD.

Kellock J.

sugar with dry sugar, but he said it was a matter of degree. The preponderance of evidence establishes that the stowage was proper. Any bags there may have been, sufficiently wet to cause damage, would seem to have been so few in number as to be regarded *de minimis*.

In considering this case, I have not made use of the examination of W. R. Rowell, an officer of the respondent company, for discovery, as that examination was not put in at the trial. It appears that an application was made to the learned trial judge under section 68 of the *Supreme Court Act* and that an order was made overruling the respondent's objection, to the inclusion of this examination in the case. It is not necessary to consider the question as to whether Rule 75 of the Rules in Admiralty authorizes the use as evidence of the examination of an officer of a corporation for discovery where the corporation is a party to the proceedings, nor whether, if it does not, by reason of Rule 215, the latter portion of Rule 138 of the General Rules and Orders of the Exchequer Court of Canada becomes applicable to a proceeding in Admiralty, as the examination for discovery here in question was not put in. This fact is clearly disclosed by the record of the proceedings at the trial and counsel agree that while a transcript of the examination was physically in Court and with the papers in the possession of the registrar, no use was made of it until counsel for the appellant made reference to it in his written argument after the taking of evidence had been concluded. Under the provisions of section 68 of the *Supreme Court Act*, there is nothing which authorizes a judge settling the case to include items which do not form part of the proceedings in the court below. As the record shows that the examination was not used, I do not think there was any jurisdiction to make the order referred to and it should be disregarded. I would allow the appeal and dismiss the action with costs here and below.

Appeal allowed and action dismissed with costs.

Solicitors for the appellant: *Beauregard, Laurence & Brisset.*

Solicitors for the respondent: *Montgomery, McMichael, Common & Howard.*

IN THE MATTER OF THE ESTATE OF ARTHUR GILL WITHYCOMBE, DECEASED 1944 *Oct. 23, 24

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA... APPELLANT; 1945 *Feb. 6

AND

THE ROYAL TRUST COMPANY, THE ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF ARTHUR GILL WITHYCOMBE, DECEASED..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Succession duty—Valuation of property for—Land with theatre building thereon—Leased for term of years—Factors and considerations in determining value—Capitalization of revenue method in valuing land—Whether wrong principle applied in the circumstances—Amount determined by Commissioner, reduced by Court of Appeal, restored by this Court.

The dispute was as to the value of certain land in Edmonton, Alberta, for purpose of succession duty. The owner died in 1942. He had granted a lease of the land in 1918 for 35 years, at fixed rentals, which increased by $937.50 every five years, starting at $5,625 per annum and ending at $11,250 per annum. The lessees were to erect and furnish, at approximate costs respectively of $48,000 and $20,000, a theatre building on the land, to insure it, keep it in repair, and pay taxes, and had the right at end of the term to remove all fixtures (repairing any damage thus caused). On assignment to an assignee who assumed liability under the lease, the lessees were to be discharged from liability. The building had been erected and the rent paid. Alterations had been made in the building in 1928 and 1939 at costs, respectively, of about $128,000 and from $80,000 to $90,000.

A Commissioner appointed under s. 28 of *The Succession Duty Act*, R.S.A. 1942, c. 57, determined the value at $108,300. On appeal on behalf of the owner's estate, the Supreme Court of Alberta, Appellate Division, by a majority, fixed the value at $65,000 ([1944] 1 W.W.R. 385). On appeal by the Attorney General of Alberta, this Court now restored the amount determined by the Commissioner.

Principles to be applied and factors to be considered in determining the value of such property under the circumstances, discussed, and authorities cited.

Per the Chief Justice and Rand J.: It may be that the true basis of valuation is the "exchange value" (what could be got in the open market), but this can only be so when such "exchange value" can be ascertained, and in this case it could not be obtained; there was no real evidence of any such value. The Commissioner had to value the

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

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

land and the building *qua* theatre as it was at the time of the owner's death, and he had to take the conditions as he found them as of that date. It was proper for him to take into consideration the revenue-producing qualities of the property, and the value of the lease in effect at the date of the owner's death. The capitalization of revenue method (using 8 per cent. as an interest factor, and allowing a discount for contingencies) used by him in determining the land value should not be held to be a wrong principle, in the circumstances with which he was faced as a result of the evidence before him. As it could not be said that he had acted on any wrong principle of law, and as his valuation was supported by evidence, his finding should not have been disturbed.

Per Hudson and Taschereau JJ.: In the circumstances of this case, the capital value must in large measure be determined by reference to revenue-producing capacity of the property. Factors tending to reduce the value attributable to the lease were taken into account by the Commissioner and a generous allowance made in respect thereof. Agreement was expressed with his finding.

Per Estey J.: The Commissioner did not adopt a wrong principle in arriving at his valuation. He would seem to have appreciated that he had to determine the market or exchange value. He had to determine the market value, and when, as in this case, no market existed, it was his task (a difficult one) so far as possible to construct a normal market and determine the value by taking into account all the factors which would exist in an actual normal market (one not disturbed by factors similar to either boom or depression and where vendors, ready but not too anxious to sell, meet with purchasers ready and able to purchase). A perusal of his report indicated that he had exhaustively studied the evidence and carefully examined the factors and had reached a reasonable conclusion, which should be sustained. (Opinion expressed that the Commissioner was in error in considering "fixtures", which the lessees had right to remove at end of the term, to mean furnishings; which error would lead to placing a slightly higher valuation on the building; but, as there was no evidence as to what the fixtures were, or were worth, and as so much of the valuations were and must be approximations, the error did not justify any revision).

APPEAL by the Attorney General of Alberta from the judgment of the Supreme Court of Alberta, Appellate Division (1), rendered upon an appeal to it from the report of a Commissioner appointed under s. 28 of *The Succession Duty Act*, R.S.A. 1942, c. 57, to determine the value of certain property in Edmonton, Alberta, for succession duty purposes. Under said s. 28 (subss. 8 and 9, and amendment in 1944, c. 29), the Commissioner's report, on being filed in the Supreme Court of Alberta, became a judgment of that Court, and subject to appeal. The Commissioner determined the value of the property at $108,300. On appeal, taken by the present respon-

(1) [1944] 1 W.W.R. 385; [1944] 2 D.L.R. 189.

dent, the administrator with will annexed of the estate in question in Alberta, the Appellate Division fixed the value at $65,000 (Harvey C.J.A. and Lunney J.A., dissenting, would have dismissed the appeal). From that judgment the Attorney General of Alberta appealed to this Court (having obtained leave to do so from the Appellate Division, Alta., "in so far as special leave to appeal is necessary and this Court has jurisdiction to grant the order"). (A motion to quash the appeal to this Court for want of jurisdiction was dismissed by a previous judgment in this Court (1)).

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

C. Robinson for the respondent.

(*S. Quigg K.C.* held watching brief for the Taxation Division of the Department of National Revenue).

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

THE CHIEF JUSTICE—Arthur Gill Withycombe, of Bournemouth, England, died on or about the 23rd of January, 1942. Probate of his will was granted to Lloyds Bank, Limited, of Salisbury, on the 18th of May, 1942.

At the time of his death the deceased owned property in Edmonton, Alberta, and on the 28th of January, 1943, letters of administration with the will annexed were granted by the District Court of Northern Alberta, to the Royal Trust Company, attorney for Lloyds Bank, Limited.

Inventory "A" to the succession duty affidavit filed by the Royal Trust Company with its application for letters of administration with the will, disclosed some real property situate in Edmonton and a value of $61,300 was placed thereon by the Royal Trust Company.

A question having arisen as to the value of such real property, the Attorney General of Alberta appointed Mr. G. M. Blackstock, K.C., as a Commissioner to determine the value of this property. The appointment was made pursuant to the provisions of section 28 of *The Succession Duty Act* (R.S.A. 1942, c. 57).

(1) [1944] S.C.R. 243.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

Mr. Blackstock, after hearing the evidence, made a report to the Attorney General, in which he determined the value of the real estate to be $108,300. His report was filed with the Supreme Court of Alberta and, under *The Succession Duty Act,* section 28, subsections 8 and 9, on being so filed the report of the Commissioner became a judgment of the said Supreme Court, subject to appeal as of any judgment.

An appeal was taken to the Court of Appeal of Alberta, which reversed, by a majority, the decision of the Commissioner and fixed the value of the real estate at $65,000, the Chief Justice and Mr. Justice Lunney dissenting.

Following this judgment, the Attorney General of Alberta applied to the Court of Appeal for an order for special leave to appeal to the Supreme Court of Canada, and also applied to dispense with security for costs on the ground that this is an appeal by or on behalf of the Crown.

On the 16th day of March, 1944, the Court of Appeal of Alberta ordered that, in so far as special leave was necessary and that Court had jurisdiction to grant the order, the special leave prayed for should be granted and the Attorney General should be allowed to lodge his appeal without security, pursuant to section 70, subsection 2, of the *Supreme Court Act* (ch. 35, R.S.C. 1927).

The respondent moved to quash, but his motion was dismissed (1), and this Court then heard the appeal on the merits.

As would be expected, the case turns on a question of fact: whether the special Commissioner correctly appreciated the value of the property disclosed in the inventory, within the meaning of subs. 7 of sec. 28 of the Act.

The Commissioner, in the present case, made an elaborate report, going minutely into the details and circumstances and weighing very conscientiously the evidence adduced before him.

It appears that by lease dated the 8th of June, 1918, the deceased granted this property to Allen Brothers for a term of thirty-five years from the 2nd day of November, 1918, the principal material terms of the lease being:—

(1) [1944] S.C.R. 243.

The rents reserved were:

	per anuum
(1) from 2nd Nov. 1918 to 1st Nov. 1923....	$ 5,625.00
(2) from 2nd Nov. 1923 to 1st Nov. 1928....	6,562.50
(3) from 2nd Nov. 1928 to 1st Nov. 1933....	7,500.00
(4) from 2nd Nov. 1933 to 1st Nov. 1938....	8,437.50
(5) from 2nd Nov. 1938 to 1st Nov. 1943....	9,375.00
(6) from 2nd Nov. 1943 to 1st Nov. 1948....	10,312.50
(7) from 2nd Nov. 1948 to 1st Nov. 1953....	11,250.00

It will be noted that the total rent payable under the lease for the whole term of thirty-five years is $295,312.50, representing an average annual rental of $8,438 per annum.

The lessees agreed to erect a theatre building on the property at an approximate cost of $48,000 and thereafter to furnish the same at an approximate cost of $20,000. They had to insure the property against loss by fire and to pay the premiums therefor; and, at the expiration of the term, the lessees had the right to remove their fixtures, repairing any damage caused by such removal. They were to keep the building in repair.

A special clause is to the effect that, if any assignee agrees to assume liability under the lease, the lessees shall be discharged of all liability in respect of the lease, "save and except such liability as is assumed by them in connection therewith under an indenture bearing even date herewith, and made between the Lessor of the one part and the Lessees of the other part." The indenture was not produced in the record and we have no knowledge of its provisions.

The lease was assigned to Famous Players Canadian Corporation, Limited, and this company is now the holder of a leasehold title.

A theatre building was erected in accordance with the terms of the lease and in 1928 alterations were made at a cost of approximately $128,000, and again in 1939 alterations were made at a cost from $80,000 to $90,000.

It is common ground that the rent had been paid regularly up until the death of Mr. Withycombe.

The property is assessed by the City at $85,750 for the land and $100,000 (full value) for the building, making a total assessed value of $185,750.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

The Commissioner stated that, in order to determine the fair value of the property as at the date of death of Mr. Withycombe, he had to deal with the land and the buildings separately, as different considerations applied to each of them.

He also stated that the usual rate for physical depreciation was not the proper rate to apply to a building of this type for the purposes of his enquiry and under the conditions there present, since alterations had been made twice in the past fifteen years at a total cost of approximately $200,000, indicating a high degree of obsolescence in theatre buildings.

He considered that, in view of the original cost of $48,000 and the amount expended in the intervening years, the 1939 City assessment of $100,000 for the building appeared to him to be fair and reasonable and could be adopted as a starting point.

He referred to the evidence of one of the witnesses, Mr. Teasdale, who used the cube method with a 30c. factor, and who came to the conclusion that the replacement value was $100,674. The Commissioner said that, although he did not consider that the cube method could be scientifically accurate, it confirmed his opinion that $100,000 was fair and reasonable. His view was that the combined depreciation and obsolescence factor should not be less than four per cent. per annum and should be applied from the year 1939, when the last assessment was made.

Using that factor, he thought the value of the building in 1953, when the lease expires, would be $40,000, and, on the basis of eight per cent., he placed the present worth of the building to the estate at $15,884.

In determining the land value, he used the capitalization of revenue method, which, as appears from the evidence, was also used by all the witnesses. However, he disregarded the different factors used by them in arriving at their final figures, stating that, when revenue is definitely known or can be predicted with reasonable accuracy, capitalization is considered to be a preferred method.

He remarked that of the witnesses heard, Mr. Teasdale used six per cent. as his interest factor; Mr. Lloyd used eight per cent., and Mr. Watson used twelve per cent.

Both Mr. Lloyd and Mr. Teasdale were heard for the Attorney General and Mr. Watson for the Withycombe estate. He then stated that, in dealing with a property of this class, he considered that six per cent was too conservative, but that twelve per cent. was too generous, and that the proper factor in the circumstances was eight per cent.

He then goes on to say that the term of years unexpired at the date of death was eleven years and nine months; but that the lease was assignable without leave and the lessee can be discharged of liability thereunder, which imports some element of hazard, a hazard which might very well be increased if a new theatre should be built on the adjoining site—of which contingency some evidence was adduced before the Commissioner. He provided for this and all other contingencies by allowing a discount of thirty per cent., which, in his opinion, was ample.

The total rent payable from the date of death to the expiry of the lease is $124,218.75, yielding an average annual rent of $10,560. This amount, capitalized at eight per cent., gives a valuation of $132,000 and, after applying the discount aforesaid, leaves a net value of $92,400.

No evidence was given before the Commissioner as to any available present market; but, the property being a productive one, there were some known proven factors which the Commissioner could take as a guide and, having arrived at a basic value of $40,000 for the building, after applying what he thought a generous depreciation and obsolescence factor by taking the present worth of that sum, and by allowing a liberal discount of thirty per cent. on the capitalized value of the future rents, he felt that he had applied the prudent investor rule in arriving at his determination of the value of the property, which he determined at the sum of $108,300.

To reach that conclusion he relied on certain principles, accepted and applied and in particular in *Pearce* v. *City of Calgary* (1), which case concerned the assessment for taxation of subdivided land on the outskirts of the City of Calgary; in *Bishop of Victoria* v. *City of Victoria* (2), and in *Forman and Fowkes* v. *Minister of Finance* (3).

(1) (1915) 9 W.W.R. 668.
(2) [1933] 3 W.W.R. 332.
(3) [1937] 2 W.W.R. 428.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

The Supreme Court of Alberta (Appellate Division), Mr. Justices Ford, Ewing and Howson forming the majority, allowed the appeal and fixed the value of the property at $65,000, with costs of the appeal against the Attorney General. Ford J.A. was of the opinion that the learned Commissioner had, throughout (what he called) "his carefully reasoned judgment", used the wrong "method of approach" to the problem before him; that he had applied inaccurately the principle by which, in England, compensation to the owner of land is determined when it is compulsorily taken from him under the authority of an expropriation Act, rather than the standard which must be applied in fixing the value of land for purposes of succession duty. In the former, he said, the value of the land is the value of the land to the owner, while, in the latter, the value "must necessarily be the price which it will command in the open market"; the price it will bring "when opposed to the test of competition"; the "exchange value". He referred to *Pearce* v. *City of Calgary, supra; Grierson* v. *City of Edmonton* (1); *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (2); *Pastoral Finance Ass'n. Ltd.* v. *The Minister* (3).

In his opinion, the Commissioner had paid too much attention to the revenue anticipated to be derived from the lease; and these prospective profits could only be considered in so far as they furnish material for estimating what was the real value of the land to the estate, which, in his view, was a very different thing from saying that the capitalized value of this prospective revenue was the true value, even to the estate.

He expressed the view that the evidence for the estate showed there was a market for the Jasper Avenue property (where the present one is situated) and it was this value that it was the Commissioner's duty to find.

Further, Ford J.A. agreed with Ewing J.A. that the judgment of the Commissioner was not to be treated as the award of an arbitrator and that the municipal assessment was not a true starting point as to the land.

Ewing J.A. observed that there was no evidence that the Commissioner inspected the property in question here, nor did he base his findings in any way on any inspec-

(1) (1917) 58 Can. S.C.R. 13.
(2) [1935] S.C.R. 304.
(3) [1914] A.C. 1083.

tion made by him. He referred to what was said by Sir Lyman Duff, then Chief Justice of Canada, in *Canadian Northern Railway Co.* v. *Billings* (1), and in *Montreal Island Power Co.* v. *The Town of Laval des Rapides, supra,* where the Chief Justice quoted with approval a passage from the judgment of Lord MacLaren in *Lord Advocate* v. *Earl of Home* (2).

He remarked that the Commissioner did not place any reliance on the sales of property in the neighbourhood, as disclosed in the evidence of Mr. Bagley (the other witness heard on behalf of the estate), because, in the Commissioner's opinion, it was difficult to find any basis upon which a proper comparison could be made with the Capitol Theatre (the property with which we are now concerned).

Ewing J.A. thought the capitalization of revenue method used by the learned Commissioner was wrong, and that the proper method was to estimate, in the words of Lord MacLaren, quoted by Chief Justice Duff, in *Lord Advocate* v. *Earl of Home supra*:—"only the price which the property will bring when exposed to competition."

He then criticized the use made by the Commissioner of the municipal assessment as a very unsatisfactory basis of value; and, although there was no evidence to that effect, he thought it was notorious that the municipal assessment often bears little relation to the value of the property.

Then he went on to say that the operation of a theatre is a highly specialized business and that, in his view, the Commissioner had proceeded on a wrong principle in the meaning which he attributed to the term "fixtures".

As a result of his consideration of the case, he thought the value of the property could not be determined by a mere mathematical calculation based upon existing rentals; and, again referring to the evidence of Mr. Bagley, who spoke of a well-built three-storey brick building across the street from the property in question and which was sold in 1939 for $40,000, Ewing J.A. referred to the opinion expressed by Mr. Bagley that the property thus sold was more valuable than the property now in question.

(1) (1916) 19 C.R.C. 193.

(2) (1891) 28 Sc. L.R. 289, at 293.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

Then he pointed to what he called the "infirmities of the lease" and said that, in his view, whenever it would be in the interests of Famous Players Corporation to abandon the lease, the lease would be abandoned. If that should happen, or when the lease expired, the property would revert in value to something approximating the neighbouring property which, with buildings, was stated to have been recently sold for $17,000 (so, making the necessary adjustment for additional frontage, this would be about $25,500).

In conclusion, he expressed the view that the very large rentals payable under the lease, to which the taxes paid by the lessee ought to be added, led him to think that Mr. Bagley had not made sufficient allowance for the value of the lease. The amount to be allowed was highly speculative, according to him, just as the deduction of thirty per cent. made by the Commissioner in respect of hazards and contingencies was highly speculative, and he would place the total value of the property at the date of the decease at $65,000.

Howson J.A. agreed, as already mentioned, with Ford J.A. and Ewing J.A.

As for the dissenting judgments. The Chief Justice thought the most cogent evidence that could be produced was the revenue producing quality of the property as evidenced by the terms of the lease.

He pointed to the fact that the Administrator had a valuation made on which he based the amount of $61,300 as the valuation for the purpose of administration and succession duty, but that in doing so the valuator who gave this valuation, and who testified before the Commissioner, had considered only the past revenue and disregarded the prospective revenue and considered the building of no value.

Then the only other witness for the Administrator, who put the value of $50,000, disregarded the lease and the revenue from it entirely.

On the other hand, the witnesses called by the Attorney General arrived at their conclusion of $125,000 and $162,411 by, what the learned Chief Justice considered, a somewhat involved capitalization of the rentals for the

whole term and the present worth of the building which would become the property of the estate at the expiration of the term.

It was not, said the Chief Justice, the Court's duty to ascertain the real value but merely to decide whether it could be said that the Commissioner was clearly wrong in the conclusion he reached. It seemed to him quite impossible to hold that he was clearly wrong, as he had ample evidence to support a conclusion of even a higher amount, since the risks that were taken into account by the Commissioner, and for which he made certain allowances, appeared to have been much magnified. It was not on remote possibilities but on reasonable probabilities that one should make one's calculations for the future. The fact that the lease could be assigned and the lessees could free themselves from further liability might, in some cases, depreciate the value of the lease, but, in the premises, Famous Players, who took over the lease from the original lessees, has spent nearly $300,000 in building and equipment and has paid the rent regularly. The other fact, that another moving picture concern was contemplating building a theatre next door and this event would depreciate the value of the Withycombe property, seemed to him impossible to understand. If the other concern proposed to build alongside the present theatre, it must be because it thought it a desirable site, even next door to an established theatre, and he failed to see why it should make the present one less desirable. In the opinion of the Chief Justice, there was no ground for interfering with the judgment of the Commissioner.

As for Mr. Justice Lunney, he was of opinion that the valuation arrived at by the Commissioner was a fair and reasonable one, and he agreed with his findings.

I have arrived at the conclusion that even if the reasons given by the Commissioner were not altogether to be commended, yet the amount at which he estimated the value of the property for succession duty purposes ought to be confirmed. Perhaps what was called the "exchange value" may be the true basis of the valuation which must be arrived at in a case like the present one, but this can only be so when such "exchange value" can be ascertained, and in this case it could not be obtained.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

The Commissioner had to value this land and the building *qua* theatre as it was at the time of the death of Mr. Withycombe. He had to take the conditions as he found them as of that date. The lease had several years to run and there was no justification in assuming that the present lessees were going to assign it to a straw lessee. Indeed, that might well be held as a fraud upon the lessor.

The method adopted by the Commissioner was equally adopted by the witnesses heard in this case and, among them, Mr. Watson, the witness for the respondent; and, while the majority of the Appellate Division maintained the appeal on the ground that capitalization was a wrong method, yet it was the method put forward by the respondent himself in the evidence adduced before the Commissioner.

Even taking into consideration the rental at an average of $7,036 per annum, as Watson did, and comparing it with the true average of $10,000 between the date of death and the expiration of the lease, this would give a total of $88,000, to which $15,000 should be added for the value of the reversion, bringing it to a total of $103,000.

The rentals were net, since the lessees paid the taxes and insurance premiums over and above them. They undoubtedly would represent much more than a capital of $65,000.

Large amounts were expended on alterations and improvements since the present lessees have been in possession, and, even if you conceded that some of these amounts may have been invested in an unsound way, they certainly cannot be altogether disregarded and a large portion of them ought to be taken into consideration.

The "exchange value" referred to what the vendor would get in the open market, but there was no real evidence of any such value. Whatever there was of it offered in testimony was that of Bagley, who himself stated, in the course of his evidence, that, although he took into consideration for the purposes of his valuation his knowledge of sale values of property on Jasper Avenue, the only value he placed upon the lease was a "gambler's value", and that he had not attempted to work out any actual monetary value of the lease—that he "did not go into it that far".

There was no evidence before the Commissioner that the locality was being abandoned, or that there was any likelihood that the lease would be given up; and the witnesses heard on behalf of the estate seemed to have assumed either such abandonment, or the obligation for the lessor, after reversion of the property, to create out of their building a new utility.

There was no evidence that the Administrator ever offered the property for sale. As to this point, in *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (1) *supra,* at p. 306, Chief Justice Duff stated:—

> Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other indicia may be resorted to. There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value.

The *Montreal Island Power* case, of course, was a case of the assessment of a property for taxation purposes; and the majority of the Appellate Division in the present case alluded to what they said was "notorious", that municipal valuation was rarely to be relied upon as representing the fair or true value of a property.

In the case at bar there was no evidence that the property in question had ever been offered for sale and the Commissioner had to rely on the other indicia, referred to by Chief Justice Duff in the passage of his judgment above quoted. He very properly took into consideration what seems to me the most important indicia, to wit: the revenue producing qualities of the property. An examination of the evidence of Mr. Bagley shows that he entirely disregarded that factor (but his method of valuation appears to have been accepted by all the members of the Appellate Division who delivered the majority judgment), thus failing to adequately take into account the revenue producing quality of the property and to give consideration to the value of the lease in effect at the date of the death of Mr. Withycombe.

(1) [1935] S.C.R. 304.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

With due respect, it seems to me that the majority of the Appellate Division were in error in holding that the lease was of very little value because it could be assigned, or because, according to them, the revenue resulted from a "highly specialized business and is subject to a dangerous flaw."

We would agree with the learned Chief Justice of the Appellate Division where he says that the risks spoken of appeared to have been much magnified and that the Court should not enter into the realm of speculation as to what future action may be taken by the lessee.

In Wooley, "Death Duties", 4th Edit., the author, in giving illustrations of the method of valuation used by the Commissioners in England, states at page 79:—

> In the case of reversions to houses, let at a ground rent on the usual terms, with a long period of the term unexpired, the valuation is simply a matter of arithmetic.

See also *Ashby's Cobham Brewery Company* (1), at pp. 761 *et seq.*, where the valuation of licensed premises is based on the capitalization of the annual revenue.

Cozens-Hardy, M.R., in *Inland Revenue Commissioners* v. *Earl Fitzwilliam* (2), a judgment of the Court of Appeal of England, took rental value as a method of reaching the true value of a property and as a test under the Finance Act. The judgment in that case was that in estimating the total value of land for the purpose of assessing the reversion duty payable under sec. 13 of the Finance Act, on the determination of a lease, the fact that premises on the land are licensed for the sale of intoxicating liquor, and that the value of the land is thereby enhanced, is an element to be taken into consideration. See also Webb, "Valuation of Real Property", p. 13, and Dymond on "Death Duties", 9th Edit., p. 207.

It may be further stated that this basis of valuation of land, subject to a ground lease, appears to have been generally accepted by a number of American courts.

As already pointed out, Mr. Watson himself, produced as a witness on behalf of the estate, capitalized the average rent payable under the lease, but he did so only from the

(1) [1906] 2 K.B. 754. (2) [1913] 2 K.B. 593.

commencement of the lease up to the date of death, and for no discernible reason failed to take into account the future revenue to be received under the lease.

Now, if a finding of a Commissioner as to valuation can be supported by evidence and it cannot be shown that he acted on a wrong principle of law, as to my mind is the case here, his findings ought not to have been disturbed by the Appellate Division. *Canadian Northern Railway Co.* v. *Billings* (1), *supra; In re Canadian National Railways Co. and Terwindt* (2); *Montreal Island Power Co.* v. *Town of Laval des Rapides* (3), *supra; Pearce* v. *The City of Calgary* (4) *supra,* where the Chief Justice of this Court stated:—

> In these circumstances, I am satisfied that Judge Carpenter, sitting in appeal from the Court of Revision, with his wide local knowledge and experience in ascertaining the prices of real estate, was in much better position to judge of the value of the property than I can assume to be, and I adopt his conclusion.

For my part, I fail to see why the capitalization method used by the Commissioner in this case should be held a wrong principle, in the circumstances with which the learned Commissioner was faced as a result of the evidence given before him; and I am unable to agree with the majority of the Appellate Division that there was any legal ground on which the assessment and judgment of the Commissioner could be interfered with. There being no principle of law upon which the Commissioner may be stated to have acted wrongly, the Court of Appeal should not have interfered in the amount at which he placed the value of the property. To my mind, the Commissioner acted upon proper principles, he did not misdirect himself on any matter of law, and, the amount arrived at being supported by the evidence, the Appellate Division should not have disturbed his finding (*The King* v. *Elgin Realty Co. Ltd* (5)).

For these reasons, I would allow the appeal and restore the judgment resulting from the filing of the report of Commissioner Blackstock (*The Succession Duty Act,* cap. 57, R.S. Alberta, 1942, subs. 8 of sec. 28), with costs throughout.

(1) (1916) 19 C.R.C. 193.
(2) [1930] 3 W.W.R. 345.
(3) [1935] S.C.R. 304.
(4) (1915) 9 W.W.R. 668.
(5) [1943] S.C.R. 49.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Hudson J.

The judgment of Hudson and Taschereau JJ. was delivered by

HUDSON J.—The Court here is called on to decide the value which should be placed for succession duty purposes on certain real property in the City of Edmonton.

The property was valued by the respondents in their application for letters of administration at $61,300. This valuation was not acceptable to the Minister in charge of the administration of *The Succession Duty Act* (R.S. Alberta, 1942, cap. 57) and under section 28 of that Act he appointed Mr. G. M. Blackstock, K.C., as a Commissioner to determine the value.

The Commissioner, as required by the Act, heard the parties and their witnesses and then gave a carefully considered judgment, finding the value to be $108,300. From this decision the respondent company appealed to the Court of Appeal and that Court, by a majority of three to two, reduced the amount to $65,000.

The property in question is situate on the south side of Jasper Avenue, a short distance easterly from the intersection of the two principal business streets in the city. It has a frontage of seventy-five feet, and a depth of one hundred and fifty feet. It is wholly covered by a theatre building and two stores situate one on each side of the main entrance.

The property is assessed by the City at $85,750 for the land, and $100,000 (full value) for the building, making a total assessed value of $185,750.

No evidence was given of the original price paid for the land by the late Mr. Withycombe, nor was there evidence of any offer to purchase or sell the land. The first dealing of which we are informed is a lease made by Mr. Withycombe to Allen Brothers, Theatre Proprietors, in 1918. From the terms of this lease it would appear that the property possessed special advantages as a site for a theatre or similar place of entertainment because the lease provided for the demolition or removal of the buildings then on the property and the erection of a new building at the expense of the lessees, to cost $48,000. It was for a term of thirty-five years and the initial rental was $5,625 per annum payable monthly, to be increased every five years by an additional annual sum of

$937.50, making the rental for the final five years of the term $11,250 per annum. The rental was to be paid free from all taxes, Dominion, Provincial and municipal, and at the end of the term the property was to be surrendered to the lessor in good repair.

That the faith and judgment of the parties was well founded appears from the fact that the original building at the contemplated cost of $48,000 was duly erected, that in 1928 alterations and improvements were made by the lessees at a cost of $128,000, and that again in 1939 further alterations were made at an additional cost of from $80,000 to $90,000.

The lease was assigned by the original lessee to Famous Players Corporation Limited who now hold the leasehold title. Meanwhile, throughout the years the terms of the lease were carried out by the lessees or their assignees and the rental paid according to the covenant.

Apart from revenue under the terms of the lease the relevant factual evidence of value is meagre. Evidence was given as to the sale of certain properties in the general neighbourhood, but the Commissioner was of the opinion that these did not provide any fair basis of comparison. Opinion evidence was given by witnesses, both for the Attorney General and for the respondent. The learned Commissioner who heard these witnesses cast no reflection upon the integrity of any one of them but at the same time does not accept the conclusions of any.

The principles upon which value should be established in assessment cases cannot be better stated, I think, than was done by Sir Lyman Duff, then Chief Justice, in the case of *Montreal Island Power Company* v. *The Town of Laval des Rapides* (1). At page 305 he quotes from a judgment of Lord MacLaren in *Lord Advocate* v. *Earl of Home* (2):

> Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business comunication or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition.

(1) [1935] S.C.R. 304. (2) (1891) 28 Sc. L.R. 289, at 293.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Hudson J.

Continuing, Duff C.J. says:

> When used for the purpose of defining the valuation of property for taxation purposes, the courts have, in this country, and, generally speaking, on this continent, accepted this view of the term "value".

He then proceeds at page 306:

> Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other indicia may be resorted to. There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value.

It appears to me, then, that the capital value must in large measure be determined by reference to revenue-producing capacity of the property. Since the lease was made the property has brought the owners a net annual rental steadily increasing from $5,625 per annum for the first five years to $9,375 per year current at the time of the late Mr. Withycombe's death, and to be increased thereafter to a sum of $11,250 during the final five years. During the term the lessees invested in buildings on the property about $250,000. These buildings have been kept insured and will become the property of the owners at the termination of the lease. There is no suggestion that the land itself has depreciated in value, nor that it has become less attractive as a site for a theatre or other place of entertainment. To minimize the value attributable to the lease, it was pointed out on behalf of the respondent that the term expired in about eleven years from Mr. Withycombe's death and that there was a possibility of the lessees assigning to a straw man before that date and thus evading personal responsibility for the rent; that depreciation and obsolescence were exceptionally high in buildings of this character and that there was a threat of serious competition by another strong motion picture company.

All these factors were taken into account by the Commissioner and what I think to be a generous allowance made in respect of same. The majority of the Court of Appeal, in my opinion and with respect, seemed to have placed far too much weight on the danger of competition. The fact that a new and what was said to be a very strong

company should choose to take a ninety-nine year lease on the adjoining property is confirmatory evidence of the value of the site for theatre purposes, and the tendency of places of entertainment to draw together as cities grow larger is common knowledge. The proximity of another good theatre might well provide a stabilizing factor for the respondent's property as the years go by.

I agree with the finding of the learned Commissioner and would allow the appeal with costs.

ESTEY J.—The valuation for succession duty purposes of a theatre property in the City of Edmonton described as Lot 4 and the west half of Lot 5 in River Lot 6, Plan "F", in the City of Edmonton, constitutes the problem of these proceedings. Mr. G. M. Blackstock, K.C., appointed Commissioner under the provisions of sec. 28 of *The Succession Duty Act* of the Province of Alberta, determined the value of this property after hearing a number of witnesses, at $108,300. An appeal to the Appellate Court of Alberta resulted in the majority of the learned judges of that Court reducing this valuation to $65,000, while the minority supported the finding of the Commissioner.

By an agreement in writing dated June 8th, 1918, the late Mr. A. G. Withycombe as owner leased this property to Allen Brothers for a period of thirty-five years from the 2nd day of November, 1918. This lease provided for an increase in rent at the conclusion of each five-year period. The first five years the rent was fixed at the rate of $5,625 per annum, and in the last five years at the rate of $11,250 per annum; a total rent provided for thirty-five years of $295,312.50, and a balance to be paid from the date of Mr. Withycombe's death of approximately $123,400.

Under the terms of the lease the lessees agreed to erect a theatre building on the property at a cost of about $48,000 and to furnish same at an approximate cost of $20,000. The lessees undertook to keep the building in repair, and at the conclusion of the term to remove their fixtures and repair any damage caused by such removal. It was a term of the lease that the lessees might assign the lease at any time and upon doing so they were re-

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Estey J.

lieved from further liability thereunder. The lessees made substantial alterations in the building in 1928 at a cost approximating $128,000, and again in 1939 at a cost approximating $80,000, or a total expenditure upon the building in excess of $275,000.

At the time of Mr. Withycombe's death, January 23rd, 1942, the lessees' interest was held by the Famous Players Canadian Corporation Limited, and all the covenants and conditions of the lease had been performed as required as of that date. The premises had been equipped and were being used as a moving picture theatre and the lessees had given no intimation of any contemplated change with respect to this use.

The Commissioner, after reviewing the evidence, in which there was a great divergence of views, and applying certain recognized tests, fixed the value of the building at $100,000. He then took into account the nature and purpose of the building, the substantial alterations that had been made from time to time, and after allowing a combined depreciation and obsolescence of four per cent. per annum, fixed the value of the building to the estate at the date of death at $15,884.

The value of the land the Commissioner computed at the sum of $132,000 by capitalizing the revenue from the lease, using an eight per cent factor. He then states as follows:

> The term of years unexpired at the date of death was eleven years and nine months; the lease is assignable without leave and the lessee can be discharged of liability thereunder, which imports some element of hazard, a hazard which might very well be increased if a new theatre should be built upon the adjoining site. To provide for these and all other contingencies, a discount should be allowed, and in my opinion, thirty per cent is ample.

Allowing for this discount, he determined the value of the land to the estate at $92,400, or a total value of land and building of $108,284.

It is suggested that in arriving at this valuation the Commissioner has acted upon a wrong principle, that he has not determined the market or exchange value but rather a value, as that term is used in expropriation proceedings. In such proceedings

> The person whose property is taken is entitled to be compensated for the loss he has suffered by being deprived of his land compulsorily; the value of the land for the purpose of ascertaining such compensation, is the value of the land to him.

Duff, C.J., in *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (1). It seems to me from a perusal of his report and particularly the quotations which he adopts from the cases he cites, as well as his method of computation, that the Commissioner appreciated that he had to determine the market or exchange value. In his own words, the Commissioner states: "I feel that I have applied the prudent investor rule in arriving at my determination of the value of this property." I am therefore of the opinion, with deference to those of the learned judges who hold to the contrary, that the Commissioner has not adopted a wrong principle in arriving at his valuation.

The authorities are clear that under such statutory provision as we are here concerned with, value means market value as that term is properly understood.

> The value with which we are concerned here is the value at Untermyer's death, that is to say, the then value of every advantage which his property possessed, for these advantages, as they stood, would naturally have an effect on the market price. * * * The sum of all these advantages controls the market price, which, if it be not spasmodic or ephemeral, is the best test of the fair market value of property of this description.

Mignault J., in *Untermyer Estate* v. *Attorney General for British Columbia* (2). The Commissioner had a difficult task, but an examination of the evidence and his report will indicate how well he has succeeded in the performance of that task.

The evidence with respect to value was most contradictory. Four witnesses were called. Their values were as follows: $50,000; $61,300; $131,396.40; and $162,411. The two factors that appeared to present the greatest difficulties were the provisions that the lessees might assign the lease at any time and thereby relieve themselves of liability, and that the building would become the property of the estate at the expiration of the lease in 1953.

This thirty-five year lease had over eleven years of the term left and if it continued as to the date of death it would return a revenue of about $123,400. The witness who fixed the lowest value stated that this lease had "just a gambler's value." It is true that before actually fixing this valuation he does allow $10,000 for the lease, an

(1) [1935] S.C.R. 304, at 307. (2) [1929] S.C.R. 84, at 91.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Estey J.

amount less than it would return in any one of the last ten years of its existence. The witness who valued the property at $61,300 stated that a purchaser "is not going to consider that lease for one moment."

Then, with respect to the building constructed and twice altered by the lessees at a total cost in excess of $275,000, and which will become the property of the estate in 1953, these two witnesses, because in their opinion the building cannot be utilized for any other purpose than a theatre, ignore the possibility of it being again so leased, and treat the building as of no value if, in fact, not a liability to the estate at the expiration of the lease. These witnesses entirely ignore any possibility favourable to the estate, notwithstanding their own evidence that this is a good theatre section in the City of Edmonton, and that the possibilities of a competing theatre, even granting this can be as disastrous to the theatre in question as they suggest, would not be realized until the competing theatre was constructed, and this would not be permitted until the war regulations are relaxed or repealed. It seems to me that they have construed the contingencies too severely against the estate and completely ignored any possibilities such as this building being again leased or sold for theatre purposes.

It is probably true that the two witnesses who have valued the property at $131,396.40 and $162,411 were too optimistic in their values, and these were not adopted. It is not suggested that the Commissioner has overlooked any factor that ought properly to have been taken into account in determining the value of the property. He had to determine the market value and when, as in this case, no market exists, it is the task of the Commissioner, so far as he can, to construct a normal market and to determine the value by taking into account all the factors which would exist in an actual normal market—a market which is not disturbed by factors similar to either boom or depression, and where vendors, ready but not too anxious to sell, meet with purchasers ready and able to purchase. Such a task is often very difficult, and this case is no exception. A perusal of this report indicates that the Commissioner has exhaustively studied the evi-

dence and carefully examined the factors and has reached a reasonable conclusion, which, in my opinion, should be sustained.

The lease provided that at the expiration of the term the lessees have the right to remove their fixtures. In my opinion, the Commissioner was in error in considering the word "fixtures" to mean furnishings, and this error would lead him to place a slightly higher valuation upon the building than might otherwise be; but there is no evidence as to what the fixtures are nor what they are worth, and, having regard to the fact that so much of the valuations were and must be approximations, I do not think this error justifies a revision of the valuations as fixed by the Commissioner.

In my opinion, this appeal should be allowed with costs, and the judgment (see sec. 28, subs. 8, ch. 57, R.S.A. 1942) of the Commissioner restored.

Appeal allowed with costs.

Solicitor for the appellant: *H. J. Wilson.*

Solicitors for the respondent: *Newell, Lindsay, Emery & Ford.*

THE NEW YORK LIFE INSURANCE COMPANY (DEFENDANT) ..... APPELLANT;

AND

HENRY PETER SCHLITT, IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF GEORGE E. ROSS, DECEASED (PLAINTIFF) ..... RESPONDENT.

1944
*Oct. 19
1945
*Feb. 27

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Life insurance—Provision in policy for "double indemnity" if insured's death resulted from "external, violent and accidental" cause, but not applicable in case of suicide—Insured burned to death in fire in his barn—Whether death "accidental"—Onus of proof—Presumption against suicide—Inferences from facts in evidence.

Plaintiff, administrator of the estate of R., deceased, sued to recover under a "double indemnity" clause in a policy issued by defendant insuring R.'s life (the amount payable simply on death had been paid). The

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

1945

NEW YORK LIFE INS. CO. v. SCHLITT

"double indemnity" was payable "upon receipt of due proof" that R.'s death "resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause". It was not payable if R.'s death resulted from (*inter alia*) self destruction or any violation of law by him. He was a successful farmer. He had an asthmatic condition but otherwise was well. On the day before the day on which he died, his wife, during a quarrel, threatened to leave him (as she had threatened in quarrels on previous occasions), and the next morning, on his asking if she still "figured on leaving him", she replied "yes" (though she had made no preparations to leave), and, according to her evidence, he said it would spoil his life, he "couldn't face it". Shortly afterwards his barn was found to be on fire; it was completely destroyed, and his remains were found in its ruins.

The trial Judge dismissed the action ([1944] 1 W.W.R. 129), finding, in view of R.'s said statements, that he had committed suicide. That judgment was reversed by the Appellate Division, Alta, ([1944] 2 W.W.R. 68). Defendant appealed.

Held (affirming the judgment of the Appellate Division), that plaintiff should recover under the double indemnity clause. Rand J. dissented.

Per the Chief Justice and Kerwin J.: It is evident from the trial Judge's reasons that, but for R.'s said words on the morning of the fire, he would have concluded that R.'s death was due to an accident within the meaning of the policy. An appellate court is in as good a position as the trial Judge, in such a case, to draw the proper inference; and, under all the circumstances, the evidence did not lead to a finding of suicide. There is a presumption against the imputation of crime. That presumption is not overcome merely by proof of motive (also, there was no reasonable motive suggested in this case).

The burden upon plaintiff to show that R.'s death came within the terms of the double indemnity clause did not require plaintiff to show that the fire itself was started accidentally. Plaintiff was required only to produce such evidence as would warrant a court in finding that R.'s death, which undoubtedly occurred by reason of the fire, resulted from a bodily injury that was effected solely through an accidental cause (no question arises as to the cause being external and violent). The fire may have been started innocently by R. or innocently or intentionally by some one else; so long as R. did not start the fire with intention of committing suicide or place himself in the barn with that intention after a fire had been otherwise started, plaintiff must succeed.

Per Taschereau J.: Plaintiff had satisfied the burden upon him to show that R.'s death resulted from an "external, violent and accidental cause" within the meaning of the double indemnity clause. All the circumstances as revealed by the evidence (and bearing in mind that courts act upon the "balance of probabilities") lead to that conclusion. The case is one where an appellate court may draw its own inferences from the proven facts. Suicide is a crime and there is a legal presumption against the imputation of crime. Motives are very unreliable and cannot be classified as an accurate determining cause

of human deeds, which they often influence in different ways; taken alone, they have very little probative value; and those alleged in this case do not rebut the presumption against suicide.

Per Estey J.: The case is one in which an appellate court is in the same position as the trial Judge as to drawing inferences of fact. R.'s words to his wife on the morning of the fire, when read in relation to all the other facts, do not justify an inference of suicide. On the issue of "accidental" death, plaintiff was entitled to invoke the inference against suicide, which inference was not "destroyed or attenuated" by R.'s said words. On the evidence it must be found that the cause of death was the fire and that that was an "external, violent and accidental cause" within the meaning of the double indemnity clause.

Per Rand J., dissenting: To recover under the double indemnity clause, plaintiff must show death by accident. That onus remained on him; and if, with the presumption against suicide and its underlying probative force properly applied, the evidence compels the Court to say that on the whole case the probabilities of accident or suicide are in equal balance, plaintiff must fail. The presumption against suicide arises from mankind's experience that a human being normally and instinctively shrinks from it. That general reaction the Court, in considering all facts before it, will keep in mind; but it, treated as a fact, is to be looked upon as any other circumstance in the particular situation. In the present case there was in the whole of the circumstances, including the weight of the factors in experience, sufficient to leave the Court in doubt whether R.'s death was brought about by his intentional act or by accident; and in that state of things plaintiff's burden had not been discharged. The Appellate Division had acted upon inferences which the undisputed facts did not warrant and at the same time had applied them to a burden of proof on defendant which the issue between the parties did not raise. The action should be dismissed.

APPEAL by the defendant from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of O'Connor J. (2) dismissing the action, which was brought to recover, under a double indemnity provision in an insurance policy issued by the defendant, a further sum than that which the defendant had paid under the policy.

The plaintiff sued in his capacity as administrator of the estate of George E. Ross, deceased, who died on April 27, 1942, in a fire which burned his barn. The defendant had issued a policy dated December 28, 1925; which insured the life of the said Ross.

(1) [1944] 2 W.W.R. 68; [1944] 2 D.L.R. 660.

(2) [1944] 1 W.W.R. 129.

1945

NEW YORK LIFE INS. CO. v. SCHLITT

By the policy the defendant had agreed to pay $6,850 (the face of the policy) upon receipt of due proof of the death of said Ross, or $13,700 (double the face of the policy) upon receipt of due proof that his death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and that such death occurred within 90 days after sustaining such injury, subject to all the terms and conditions contained in sec. 2 of the policy. Said sec. 2 provided that the said provision for double indemnity benefit would not apply if the insured's death resulted from (*inter alia*) self-destruction, whether sane or insane, or any violation of law by the insured.

The defendant paid the sum of $6,850. The plaintiff brought action to recover the further sum of $6,850 under the said double indemnity provision, alleging that the death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and occurred within 90 days from the injury and that due proof of such death, etc., had been supplied to or acquired by the defendant. The defendant denied the allegations of fact upon which the plaintiff based his claim (except the covenant in the policy) and further pleaded in the alternative the provision in the policy that the double indemnity benefit would not apply if the death of Ross resulted from self destruction, whether sane or insane, and alleged that his death resulted from self-destruction.

The trial Judge dismissed the action, finding that Ross had committed suicide. That judgment was reversed by the Appellate Division, which directed that judgment be entered for the plaintiff for the said sum of $6,850. The defendant appealed to this Court.

The facts and circumstances of the case are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was dismissed with costs, Rand J. dissenting.

N. D. Maclean K.C. and *H. G. Johnson* for the appellant.

J. N. McDonald K.C. for the respondent.

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

KERWIN J.—The appellant Company is the defendant in an action brought by the administrator of the estate of George E. Ross upon a policy of insurance issued by the Company to Ross as the insured. The Company agreed to pay $6,850 upon receipt of due proof of Ross' death

or thirteen thousand seven hundred Dollars upon receipt of due proof that the death of the Insured before the maturity date resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause.

Ross died on April 27th, 1942. The Company paid $6,850 but declined to pay the additional sum that was claimed by virtue of the clause referred to.

Mr. Justice O'Connor, the trial judge, dismissed the action, as he came to the conclusion that Ross had committed suicide. The Appellate Division of the Supreme Court of Alberta reversed this judgment, as the five members of that Court came to the conclusion that the insured had not committed suicide. Both Courts treated that as being the only substantial one in question, but counsel for the appellant argued that they had not dealt with another issue raised by the Company. This matter will be adverted to later, but the evidence relating to Ross' death and to the relevant circumstances prior thereto must first be stated.

Ross was born on February 11th, 1893, and at the time of the issue of the policy, December 9th, 1925, was a bachelor. The beneficiary mentioned in the policy was his mother but this was changed on November 12th, 1937, to the executors, administrators or assigns of the insured. In 1938, as a result of correspondence through what is called a friendship column in a newspaper, Ross became acquainted with Susie Klassen. She became his housekeeper on his farm and in about three months they were married. Some time after the marriage quarrels arose over her claim that her husband and the hired man, Robert Thomas, tracked mud into the house and while on several occasions she threatened to leave, at no time did she make any preparations to carry out these threats.

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Kerwin J.

On Sunday, April 26th, 1942, another quarrel occurred over the same matter and she told her husband that she was going to leave. In cross-examination she stated that she meant it at the time and that he must have known that she meant it but "she did not know." Thomas, who had worked for Ross for some years and for Ross' father before that, was present during this quarrel and, according to his evidence, he told Ross that it was time he was quitting. The two of them went out of the house together; Thomas intimated to Ross that either he or Ross' wife would have to leave; Ross asked Thomas not to quit but to wait a few days, to which Thomas agreed. (At some stage but whether in Thomas' presence or not is not quite clear, Mrs. Ross complained that she was working too hard while her husband intimated that she had not been working as hard as his mother.) Thomas went to visit a neighbour, not because of the quarrel but because he very often went there or to the houses of other neighbours, and did not return until Monday morning.

On that Monday morning, Ross rose about six o'clock and went to do the chores. His wife prepared his breakfast and then went back to bed. Ross returned to the house, ate his breakfast and then went to the bedroom to inquire if Mrs. Ross were ill. She replied that she was not, but that she was trying to get some sleep since she had not slept during the night. He again left the house. After an interval she arose and had started washing the dishes when he returned and on asking if she still "figured on leaving him", she replied "Yes". According to her evidence, he said that "It would spoil his life if I left him; he couldn't face it; and things like that he was telling me; and talking about other things, too" and he then went out of the house. She had not commenced to pack any of her effects nor had she asked him to drive her to town. About ten minutes after Ross left, his wife went to the porch of the house and saw smoke coming out of all parts of the barn. She went out into the yard, towards the barn, and shouted for him but, not getting any answer, returned to the house and telephoned for assistance. So far as she could see, all the doors in the barn were closed. She opened one door, the one on the

south side, and left it open. The barn and the contents burned, Ross' body was found in the debris and there is no doubt that he died as a result of the fire.

The barn was a frame building about eighty feet wide, running east and west, by about forty feet. There was a double door in the west part of the barn with a strip of cement about fifteen feet wide leading from this double door northerly across the barn, on either side of which strip of cement were the stalls, which had been planked. Otherwise the earth formed the ground floor of the barn. There was one stairway in the building, leading to the loft which extended over the whole area, and in the loft there were about eight tons of hay. The barn was wired for electricity, the power for which was generated outside. There were three or four gasoline cans on the premises, one of which was kept in a shed where the gasoline pump was. After the fire, one can was found by Thomas on the floor of the barn about fifteen feet from Ross' body. There was no gasoline in the can and the top was screwed on tightly. Thomas drove a tractor over this, flattened it and threw it on a junk pile, and it was only later that it was discovered by a policeman who then ascertained from Thomas what the latter had done. The fuse in the shed was intact.

Ross did not smoke and, therefore, did not always have matches with him but, on some occasions, Thomas had secured matches from him. It appears to be common ground that Ross had been in the loft and had fallen where he had been overcome. While the evidence is not clear, it seems to have been taken for granted, at the trial, that because of what was found in the stalls, Ross had harnessed a team of horses and had probably used them to bring some feed, which, however, was not brought in the barn but was left outside. There is also evidence that gasoline was used occasionally to shine the harness.

There was no contradictory evidence and while the trial judge described the widow as giving her evidence with a fatuous grin, he believed her testimony. Part of that testimony, however, was an opinion expressed by her that her husband had committed suicide and a statement that she did not want the double indemnity and would refuse to accept it. As to the first part, the evi-

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Kerwin J.

dence was inadmissible as that was the very point the Court was asked to determine. As to the second part, counsel for the administrator stated before the Appellate Division that the widow had concurred in the instructions by the administrator to prosecute the appeal. There might also be mentioned the evidence of Thomas that he acted as he did in connection with the gasoline can because he feared that it might be considered Ross had committed suicide. His opinion on that point was also inadmissible.

It is evident from the reasons of the trial judge that if it had not been for the evidence of the widow that her husband had said he could not face it, etc., Mr. Justice O'Connor would have come to the conclusion that Ross' death was due to an accident within the meaning of the policy. An Appellate Court is in as good a position as the trial judge, in such a case, to draw the proper inference: *Dominion Trust Co.* v. *New York Life Insurance Co.* (1). I agree with the Appellate Division that under all the circumstances and bearing in mind that no question as to financial difficulties could arise as Ross' estate was valued at about $40,000 with current debts of $400, the evidence does not lead to a finding that Ross committed suicide. There is a presumption against the imputation of crime: *London Life Insurance Company* v. *Trustee of the Property of Lang Shirt Co.* (2); and motive can never be of itself sufficient: *Dominion Trust Co.* v. *New York Life Insurance Co., supra.* The only motive suggested in this case—that Ross, being timid as far as public opinion was concerned and not liking to be teased or made to feel ridiculous, would commit suicide rather than have it said that his wife had left him—cannot be taken seriously.

The other point mentioned earlier and on which counsel for the appellant relied was that the plaintiff had to bring himself within the terms of the policy. No doubt that is so and there must be evidence that Ross' death resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause. It was suggested that this required the plaintiff to show that the fire itself was

(1) [1919] A.C. 254. (2) [1929] S.C.R. 117.

started accidentally. This is a fallacy. The plaintiff was required only to produce such evidence that would warrant a court in finding that Ross' death, which undoubtedly occurred by reason of the fire, resulted from a bodily injury that was effected solely through an accidental cause; no question arises as to the cause being external and violent. The fire may have been started innocently by Ross, or innocently or intentionally by some one else. So long as Ross did not start the fire with the intention of committing suicide or place himself in the barn with that intention after a fire had been otherwise started, the plaintiff must succeed.

The appeal should be dismissed with costs.

TASCHEREAU J.—The plaintiff, Henry Peter Schlitt, is the administrator of the estate of George E. Ross who died in tragic circumstances, and, in such capacity, he brought action against The New York Life Insurance Company, and based his claim on the following relevant paragraphs of the insurance policy, issued by the appellant on the life of the deceased:—

NEW YORK LIFE INSURANCE COMPANY
A MUTUAL COMPANY
AGREES TO PAY

to Lottie Ross, mother of the insured (with the right on the part of the Insured to change the Beneficiary in the manner provided in Section 7) Beneficiary Sixty-Eight Hundred Fifty Dollars (the face of this Policy) upon receipt of due proof of the death of George E. Ross the Insured before December 9th, 1957 (hereinafter called the maturity date); or Thirteen Thousand Seven Hundred Dollars (Double the face of this Policy) upon receipt of due proof that the death of the Insured before the maturity date resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and that such death occurred within ninety days after sustaining such injury, subject to all the terms and conditions contained in Section 2 hereof.

* * *

SECTION 2—DOUBLE INDEMNITY

The provision for Double Indemnity Benefit on the first page hereof will not apply if the Insured's death resulted from self-destruction, whether sane or insane; from any violation of law by the Insured; from military or naval service in time of war; from engaging in riot or insurrection; from war or any act incident thereto; from engaging, as a passenger or otherwise, in submarine or aeronautic operations; or directly or indi-

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Taschereau J.

rectly from physical or mental infirmity, illness or disease of any kind. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

* * *

SECTION 7

* * *

Self-Destruction.—In the event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more.

* * *

The appellant paid the sum of $6,850, but refused to pay the double indemnity on the ground that George E. Ross had committed suicide, and that under the terms of the policy, his death had not "resulted directly from bodily injury effected solely through external, violent and accidental cause." The trial Judge found that Ross had committed suicide and dismissed the action, but the Court of Appeal reversed this judgment and the Insurance Company now appeals to this Court.

Ross was a farmer domiciled in Wainwright, Alberta, where for many years he carried successfully his farming operations with the help of one man named Robert Thomas. The evidence reveals that he was a good worker, leading a retired life, that he was active and robust, except for an asthmatic condition of the lungs that occasionally required the care of Dr. Wallace, who was the family physician.

Ross's farm was highly mechanized, and he was the owner of a fine herd of cattle and of one team of horses, and he was very particular about his property which he kept in very good condition. The barn was equipped with an electric system.

In 1938, when he reached the age of approximately forty-five, as the result of an advertisement called "Friendship Group", which he had seen in the local newspaper, he met one Susie Klassen, who for three months acted as his housekeeper, and then became his wife. Until the date of his death, he had on several occasions quarrelled with her and although the differences seemed to be of a minor character, she threatened to leave him; but Ross's

matrimonial troubles, if serious at all, did not appear to affect him, for his friends testify that he looked quite happy and pleased about his marriage.

The day previous to his death, an insignificant happening arose about the hired man who came into the house with muddy boots, to which Mrs. Ross objected strenuously, so that Thomas left the house momentarily, and was not present when the next morning the tragedy happened.

That morning Ross got up at about six o'clock, and went out doing the chores, after which he came home and had his breakfast. He then went in his wife's room and, seeing that she was in bed, asked if she was sick. He went back to the barn and returned later, asking his wife if she still had the intention of leaving him, and, receiving an affirmative reply, he said it would spoil his life and that he could not face it. His wife testifies that he talked also of different other things, that he did not look cross at all, but she could see that he felt bad. Ten minutes after he had left, the wife, who was washing her dishes, walked into the porch and saw smoke coming out of the barn, which she says was all on fire. She went to the barn, which was located at a distance of approximately seventy-five yards from the house, and shouted for her husband, but did not get any answer. She opened one of the doors, but she could not go in because the smoke was too thick. She then telephoned for help, and the first to arrive was Mr. Mudles, with some other neighbours. Corporal Miller of the Royal Canadian Mounted Police was also called, as well as Corporal Francis.

When they arrived all the upper part of the barn was burned, and, towards the south end near the centre, they found the dead body of Ross. It was lying on prairie wool and underneath it were pieces of what appeared to be parts of the ceiling, leaving the impression that the body had fallen from the loft. Although it was in a charred condition, it was identified as being the body of Ross. The two horses and the other animals were also burned, but calcinated strips of leather were on the remains of the horses, evidence that they had recently been harnessed. A gasoline can was found in the barn

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Taschereau J.

after the fire. It was empty, but the top was screwed on, and when Addison Thomas, the help, discovered it, he thought he would destroy it, so he ran the tractor over it and threw it in the junk pile.

With this evidence, the trial Judge found that the plaintiff as administrator of the estate was not entitled to the double indemnity, because he thought that Ross had committed suicide, but the Court of Appeal reached a different conclusion.

It was undoubtedly upon the respondent to show that Ross's death was the result of "an external, violent and accidental cause". This, I think, he has established, although the trial Judge found otherwise. This is a case where a Court of Appeal is at liberty to draw its own inferences from the proven facts, and is not bound to accept the findings of the Judge in the original Court. (*Dominion Trust Co.* v. *New York Life Ins. Co.*). (1).

All the circumstances of the case, as revealed by the evidence, lead me to the conclusion that the respondent has brought himself within the provisions of the double indemnity clause of the policy. In *Jerome* v. *Prudential Insurance Company of America* (2), Rose C.J. said: "Nothing, practically, can be proved to a demonstration, and courts act daily, and must act, upon a balancing of probabilities".

And some time before, in *Richard Evans & Co. Ltd.* v. *Astley* (3), Lord Loreburn had also said: "Courts like individuals, habitually act upon a balance of probabilities".

Here in this case, the balance of probabilities is in favour, I think, of George E. Ross having met a violent, external and accidental death, by burning in the fire which destroyed his barn.

The appellant company has alleged in its plea that Ross perished as a result of self-destruction. Suicide, although not punishable, is nevertheless a crime, and the law of evidence is that there is a legal presumption against the imputation of crime. In *London Life Insurance Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.* (4), Mr. Justice Migneault said:

(1) [1919] A.C. 254.
(2) (1939) 6 Ins. L.R. 59.
(3) [1911] A.C. 674, at 678.
(4) [1929] S.C.R. 117, at 125-126.

That there is, in the law of evidence, a legal presumption against the imputation of crime, requiring, before crime can be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made, does not appear to admit of doubt.

In the same case, *Lang Shirt Co.'s Trustee* v. *London Life Ins. Co.* (1), Latchford C.J., in his judgment at page 95 stated and quoted the law as follows:—

It is, I think, settled law that, when the death is explicable in two ways and the circumstances are equally consistent with accident or suicide, as, for instance when the assured is found drowned, without any explanation of how he happened to get into the water, the presumption against crime applies, and the insurers are therefore liable as for death by accident: Welford, Accident Insurance (1923), p. 211.

The same principle has also been applied in *Harvey* v. *Ocean Accident and Guarantee Corporation* (2), where it was held:—

If a man is found drowned, and certainly drowned either by accident or by suicide, and there is no preponderance of evidence as to which of the two caused his death, is there any presumption against suicide which will justify a jury or an arbitrator in finding that the death was accidental and innocent, and not suicidal and criminal? In my opinion there clearly is such a presumption. (3).

The appellant submitted that it has established a motive which would show that death was self-inflicted by the deliberate intention of the deceased. It is said that Ross, being of a timid and retired nature, would be unable to bear the loss of his wife and the ridicule that would fall upon him, if she left him. The threats which never materalized, made by Mrs. Ross that she would leave her husband, must not be given too much weight. Motives are indeed very unreliable, and they cannot be classified as an accurate determining cause of human deeds, which they too often influence in different ways. Taken alone, and not coupled with other extraneous evidence, they have very little probative value, and surely those that are alleged in the case at bar do not rebut the presumption against suicide. As Lord Dunedin said in *Re Arnold Estate* (4):—

Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction being contrary to human instincts is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

(1) 62 Ont. L.R. 83.
(2) [1905] 2 Ir. R.
(3) The quotation is from p. 29.
(4) (1918) 44 D.L.R. 12, at 16.

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Taschereau J.

Ross was a prosperous farmer who left an estate of over $40,000, and who had no financial troubles. His affection for his wife had, since a certain time, cooled down to a stage of indifference, and the grief due to the possible loss of her companionship and the alleged ridicule that her departure would cast upon him, appear to be mere conjectures that cannot allow me to say that he sought an end to his sorrows and fears in self-destruction.

I would dismiss this appeal with costs.

RAND J. (dissenting)—This action was brought for $6,850 on a policy of life insurance providing what is known as a double indemnity on death arising from accident. Liability for death alone was admitted and payment made but as for accidental death it was denied and these proceedings resulted. The trial judge found the deceased had brought about his own death and dismissed the claim. On appeal this was reversed and judgment given for the amount claimed.

The facts are somewhat meagre. At the time of his death on April 27th, 1942, the deceased was forty-nine years of age. He was a farmer in the Wainwright district of Alberta and left property consisting of more than six quarter sections of land, buildings, farm implements, cattle, etc., of the net value of approximately $42,000. The farm had been his father's and apparently he had always lived on it. He had remained unmarried until 1938. In that year he replied to an advertisement for a place as housekeeper by the woman he later married; and, after the exchange of two or three letters, she came to his home in March or the early part of April of that year. The letters on the part of the deceased had been written by Robert Thomas, a hired man, who had evidently worked on the farm continuously from some years before the death of the father. On July 31st, 1938, the deceased married the housekeeper and from then until his death they lived together, with Thomas a member of the household.

Those best acquainted with the deceased, his doctor, Thomas and others, agree in describing him generally as a capable farmer but somewhat reserved and retiring:

a quiet man, who did not do much talking. He had enjoyed good health until three or four years before his death when "he seemed to get kind of asthma effects of some kind: got short of wind." The doctor described him as a "timid soul". He was peculiarly sensitive to ridicule and to neighbourhood talk, and in relation to women was shy and hesitant. He could not stand "guying" and was "touchy". We have not much to indicate the attitude or feeling between him and his wife but, from her account, their life together had been disappointing. She thought his affections had cooled towards her and at times he looked "despondent and down-hearted and fed up with life."

On several occasions she had threatened to leave but nothing of that sort actually took place. It is probably a fair inference that the wife on the one side and the deceased and the hired man on the other had gradually grown on each other's nerves. Their untidiness was evidently a source of irritation to her, which she did not hesitate to express to the hired man. On the Sunday preceding the death there was a flare-up between them on his coming into the house, as she complained, with too much dirt on his boots. He denied that and resented it. The wife declared she would leave and the hired man likewise. After a long talk with the deceased, however, he finally agreed to stay on for a few days at least. On that morning, with his work finished, he went over to friends about six miles distant, intending to return at night, but on account of rain he put off returning until the next morning. That was not unusual, however, and carried no significance.

Evidently the deceased and his wife did not speak again that day or night, although they occupied the same bed. About six o'clock the next morning, as was his practice, he got up and went outdoors, doubtless to do the chores. His wife, who had not slept during the night, prepared his breakfast and then went back to bed. The deceased returned to the house and, after eating breakfact, came to the door of the bedroom and enquired if his wife was ill. She replied no, that she was trying to get some sleep, upon which he again went out of the house.

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Rand J.

About nine o'clock his wife rose, dressed and started to wash up the breakfast dishes. While at this, the deceased came in and they had a serious discussion. He asked her if she intended to leave and she answered that she did. He spoke of the work about the house and contrasted what she did with what his mother used to do. He did not appear angry "but I could see he felt bad." Finally, "he said he couldn't—it would spoil his life and he couldn't face it" (her leaving). From these few details we must surmise his state of mind as he left her. The talk lasted but a few minutes and as he closed the door of the house again, it was the last seen of him alive.

About ten minutes later his wife, happening to go out to the back porch, saw smoke coming from all parts of the barn. She ran out, calling her husband, and went as far as the barn door which she opened but, in the thick smoke that met her, left it, turned back to the house and telephoned for help.

In the barn, which was 60′ by 30′, were a team of horses, two calves and three pups. The horses were in a double stall next to the double doors which opened towards the house. The loft had a good flooring throughout and was reached by a stairway running to the back, the northerly side, along the westerly wall. In it were seven or eight tons of hay, some of which was known as prairie wool. There were doors between the sections below through which the stairway could be reached from any part.

The fire consumed the barn and contents. The body of the deceased was found near the easterly side of the double doors and underneath it were some unburned prairie grass and a small portion of the floor of the loft. The head as well as the arms and legs had been entirely burned off and identity was in part established by a watch found near the remains.

The hired man had heard of the fire and reached the home between ten and eleven o'clock at a time when the barn was still burning. In looking through the ruins he came across a can which he recognized as one which had been used for gasoline and kept in a small building between the barn and the house and a bit to the east,

which housed a gasoline engine and water pump. This can lay twelve feet or so in a cross direction from the body of the deceased. Thomas had never seen it in the barn before. He picked it up and two or three days later ran a tractor over it and threw it on the junk pile. There is no doubt of his reason for so doing. When he had picked it up, however, he was not alone and some time later, in August, upon being questioned about it by the Mounted Police he produced it to them.

There was no doubt, either, in the mind of the widow as to the cause of the fire and up to and including the trial she disclaimed the insurance monies. The first coroner called was a friend of the deceased and certified the death as from accident. The matter was not allowed to rest there, however, and an enquiry later held by another coroner found death by suicide.

From the moment when the deceased left his house for the last time with the words "it would spoil his life and he couldn't face it" on his lips, until his charred remains were found in the ruins, we are left to conjecture. What actually took place was hidden behind the closed doors of the barn.

The trial judge took the issue to be whether or not the deceased committed suicide, with the onus of establishing it on the appellant. He found a motive in the fact that "he had met his wife in a rather unorthodox way which no doubt caused considerable gossip in the neighbourhood and many dire predictions of unhappy married life, now likely to be fulfilled," and he was strongly influenced by the last conversation in part quoted: that it would spoil his life if his wife left him and that he could not face it. "I take his last words to mean that he could not face the disgrace of his wife's desertion and would end his life. I find he did." In the Court of Appeal the reasons of Ford, J.A., were concurred in by Harvey, C.J.A., Howson J.A. and Shepherd J. In them the controlling view of the facts is, I think, indicated by the references to the incident of the gasoline can and the cause of the fire. Speaking of the former, Ford J.A., says:

> There are, I think, many other inferences to be drawn from what the hired man did with the gasoline can he says he found in the ruins than the one that he was endeavouring to protect the reputation of his

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Rand J.

employer from the odium attached to suicide. He says that he found an empty gasoline can, which had been usually kept elsewhere, in the ruins of the barn, and that he ran the tractor over it. This action on his part as well as the expressed opinion of the widow on whose farm he and she are still living, may have been done and expressed to protect some one other than Ross as the incendiary and killer.

And of the fire:

> The fact that it was not more than ten minutes after Ross is said to have left the house that the barn was on fire, with smoke coming out of every crack, the fact that it is clear that he had gone to the loft and, that if he is the one who set the fire, must have made other preparations for his alleged act, unless he had previously prepared the setting for his death, should lead to the conclusion that it was someone else who set the fire or that the fire was itself accidental. The possibility, if not probability, of the fire itself being accidental is stated in the reasons for judgment of the learned trial Judge.

There is also this observation on the possibility of suicide:

> Here the "method of death," which it is said is what should be found to have been adopted by Ross, is so fantastic that it is almost unbelievable that such a man as Ross is said to have been would have planned and adopted it as the means of escape from his troubles.

Lunney J.A. reached the same conclusion. It was assumed, as a result of the presumption against it, that the onus lay upon the appellant to prove suicide in order to defeat accident.

In dealing with these speculations I should first remark that we are not at liberty to question the testimony of the widow. The trial judge, in a case in which he would properly subject her and her testimony to a keen scrutiny, believed her and, although he mentions an unattractive mannerism, he had no doubt of her veracity. As to the hired man, Thomas, not the slightest justification appears for any question of his honesty or truthfulness. We cannot, therefore, disregard their testimony or assume facts contradictory of it.

The vital question of fact meets us at the threshold of the enquiry: what or who caused the fire? If the barn was on fire when the deceased reached it, a distance of about seventy-five yards from the house, would he, without a word or call of alarm, have entered it, closed the door behind him and gone to the loft? Not, surely, unless he was bent on his own destruction. With no such intent, would he not have made some attempt to save the horses? Opening the westerly half of the main doors

he was immediately at their side in the double stall; but we know that the doors were closed and that the horses died there with their harness on. Then, let us assume the fire to have started after he entered the barn. It was lighted by electricity and, if there had been a short circuit in the wiring, the fuse would have burned out, but the fuse was found intact; he did not smoke; there is not a word to support the possibility of spontaneous combustion in seven or eight tons of hay at that time of year; and that at that particular moment he, a careful farmer, would be moving, or looking or searching around hay in a loft with two windows and an electric light, with a burning match in his hand, and so set the fire and become his own victim, must, I think, be rejected out of hand. What could have been the purpose of the can in the barn? It was suggested that the gasoline might be used to clean harness; but the only use shown was by Thomas, to put a shine on the horses; the deceased was "not much for slicking up his horses." No other possible cause has been mentioned.

On the other hand, a fire in hay generally does and can easily be made to give off dense smoke and, when first seen by the wife, smoke was pouring from all openings in the barn; the deceased was asthmatic and peculiarly susceptible to suffocation; given a will to suicide, here was a means at hand, swift, and with an effect perhaps not unfamiliar to his imaginings. But that same susceptibility would have tended, from the first contact, to cause him to seek his own safety and that of the animals in the barn, had he been so disposed.

The double indemnity is an insurance against death by accident. There are other qualifying characteristics but they are not material to this controversy. The onus of proof of accidental death is on the plaintiff: the question of suicide does not, as a plea, arise. If the action had been brought as a claim upon death only, the defendant must have raised that question as a defence and would, conversely, have carried the burden of that issue.

A presumption requires the court or jury to assume a fact material to an issue before it until evidence has been presented which, to a degree fixed in each case by law, destroys or sufficiently qualifies it. The presump-

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Rand J.

tion may depend upon the proof of a special fact or it may accompany certain evidentiary matters whenever they appear. A primary question in each case is whether the presumption raises an onus of proof or, as it is sometimes called, persuasion, on the party against whom it operates, or requires merely the neutralizing of the fact presumed in the framework of the existing onus. That the same presumption in its application to different circumstances may give rise to either of these, is illustrated in the consideration of the question in *United Motors Service Inc.* v. *Hutson* (1).

Does, then, the presumption against suicide as it arises in this case throw upon the appellant the burden of establishing it by the preponderance of probability, or does the onus remain that of establishing death by accident? I have no doubt it is the latter; and if, with the presumption and its underlying probative force properly applied, the proof in rebuttal brings the court to the point where on the whole case it must say that the probabilities are in equal balance, the respondent must fail.

In the conception of a function of requiring a quantum of proof, the presumption plays no part in the drawing of conclusions from the facts presented in rebuttal, and this circumstance has made a generous contribution to the confusion and difficulty which surround the practical application of this very necessary device.

Presumptions may be raised primarily from considerations of convenience bearing little or no relation to the logic of proof, but they may also be the legal crystallizations of inferences from experience. There can be little doubt that the rule with which we are dealing is of the latter class. It is the experience of mankind that a human being normally and instinctively shrinks from the act of his own destruction. But we know that suicide does take place, and unpredictably: and when in a given controversy circumstances appear pointing to such a conclusion, what, in fact, is the rôle of the presumption?

The clue to that lies in the distinction between the presumption in its legal requirement and the matter in experience out of which it has arisen. In the consideration of all facts before it, a court or jury will inevitably

(1) [1937] S.C.R. 294.

keep before itself that basic datum, in this case the general repugnance to self-slaughter. That instinctive reaction, treated as a fact, is to be looked upon as any other circumstance in the particular situation. The distinction is indicated by Lord Dunedin in *Dominion Trust Company* v. *New York Life Insurance Company* (1):

> Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction, being contrary to human instincts, is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

And these circumstances, in turn, run the gauntlet of the factors underlying that inference in the process of interpreting them.

When a point has been reached at which suicide becomes a reasonable conclusion or counter-balances accident, the legal effect of the presumption is exhausted. The cardinal question in any case is whether the evidence offered in rebuttal warrants a finding of that degree of probability. The crux lies in defining practical formulas for determining that question. Middleton J.A., dealing with the presumption as against crime, where the onus of proof must be met, lays down this test:

> While the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal, the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act but that the facts are such as to be inconsistent with any other rational conclusion than that the evil act was in fact committed.

(*Lang Shirt Co.'s Trustee* v. *London Life Ins. Co.* (2)).

But that passage is dealing with a "right" or a "defence". The only right here is asserted by the respondent; the suggestion of suicide arises in the proof of "accident", the basis of the right, and not by way of "defence" in the sense there intended.

In this case, therefore, the facts and the inferences which may fairly be drawn, including not merely the motive but the intention implied in fact from the language accompanying the first step towards the final act, brought into juxtaposition with the elements in experience giving rise to the presumption, must, to defeat the claim, bring about in the mind of the court or jury an impasse of

(1) [1919] A.C. 254. (2) (1928) 62 Ont. L.R. 83, at 93.

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Rand J.

balanced probabilities. Obviously, if they are inconsistent with accident, the claim fails; but having regard to the factors to be taken into account, I see no reason why, under such an onus, inconsistency must be shown. An equal consistency reached after giving full effect to the presumption as fact is the same as a balance of probability; and unless there is some rule of policy that will otherwise control it, the party carrying the onus must necessarily fail. I know of no such rule.

It is no doubt settled that where death is explicable in two ways and the circumstances are equally consistent with suicide or accident, as in the case where a person is found drowned and there is no explanation of how he got into the water, the presumption prevails. This assumes a simplicity of facts and an evaluation of them uninfluenced by the instinctive bias against suicide, which are not present or possible here: we have not an "equal consistency": and the presumption in some form must descend into the facts. The same probative requirement is observed in either form of the statement but, in my opinion, it comports more nearly with the actual processes of judging such an issue that the underlying factors and the surrounding circumstances be conceived in reciprocal effect upon each other; and not that the presumption as a neutral arbiter should be called in to tip the scales of balanced fact.

The ruling of this Court in *The London Life Insurance Company* v. *Trustee of the Property of Lang Shirt Company Limited* (1) was pressed upon us and is taken as governing in the Courts below. In the main action of that appeal, suicide was raised as an affirmative plea; in the other two actions, in which claims were for death by accident, it was apparently conceded—as it was in the Court below—on the argument, and certainly assumed, that as to the alternative of suicide, the onus likewise was on the defence. But, as I have already indicated, the issue before the trial judge in the present case was not suicide: it was accident, with the onus on the respondent: and that onus has not been displaced by any effect of the presumption. I find nothing in the rule of law laid down by Mignault J. in conflict with what I have said here.

(1) [1929] S.C.R. 117

I think it clear that there is in the whole of the circumstances before us, including the weight of the factors in experience, sufficient to leave the court in doubt whether the death was brought about by the act of the deceased or by accident. That, against years of external routine, this climax of depression, emotional disturbance, motive, intention, fire and death, crowded into the space of ten minutes, should be accepted as pure coincidence, is too great a strain on credulity. In that state of things the burden on the respondent has not been discharged.

With the greatest respect, I am forced to the opinion that the Court of Appeal has acted upon inferences which the undisputed facts do not warrant and at the same time has applied them to a burden of proof on the defendant which the issue between the parties did not raise.

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

ESTEY J.—The respondent (plaintiff), Henry Peter Schlitt, in his capacity as Administrator of the Estate of George E. Ross, claims under a policy of insurance with the appellant (defendant), The New York Life Insurance Company. The policy contains the usual coverage upon the life of the late Mr. Ross, in the sum of $6,850, and this amount the company has paid. In addition thereto this policy has a double indemnity clause, under which the company refused to make payment, and this action is for the recovery thereof. The parts of the policy material to this action are as follows:

* * * Thirteen Thousand Seven Hundred Dollars upon receipt of due proof that the death of the Insured before the maturity date resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause * * *

Section 2—Double Indemnity

The provision for Double Indemnity Benefit on the first page hereof will not apply if the Insured's death resulted from self-destruction * * *

It is incumbent upon the plaintiff to establish that the death of George E. Ross "resulted * * * from bodily injury effected solely through external, violent and accidental cause." *Ocean Accident and Guarantee Corporation* v. *Fowlie* (1). *Wadsworth* v. *Canadian Railway Accident Insurance Co.* (2).

(1) (1902) 33 Can. S.C.R. 253. (2) (1914) 49 Can. S.C.R. 115.

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Estey J.

There is no question of credibility nor controversy with respect to the facts and this is therefore a case in which the appellate is in the same position as the original Court with respect to drawing inferences of fact. *Per* Lord Halsbury in *Montgomerie & Co. Ltd.* v. *Wallace-James* (1).

It is established that on Monday, April 27, 1942, the death of George E. Ross resulted from bodily injuries caused by a fire which was an "external and violent cause" within the meaning of the policy. In order for the plaintiff to recover, it must also be found that this fire was an accidental cause. The cause of this fire constitutes the important issue in this appeal.

Mr. Ross lived on a farm near Wainwright, and after doing his chores came into the house about nine o'clock Monday morning, where he had a conversation with his wife, and went out again. Ten minutes later Mrs. Ross, from the porch of the house, saw smoke coming out of the barn "from every crack I could see". She ran outdoors, called to Mr. Ross, who did not answer. She opened the barn door, and finding the barn full of smoke, she hastened to telephone neighbours. The barn was completely destroyed and Mr. Ross' remains were found in the ruins of the barn.

The learned trial judge states: "If it were not for the wife's evidence as to Ross' last words to her, I would agree with Dr. Wallace"; and further stated: "I take his last words to mean that he could not face the disgrace of his wife's desertion and would end his life. I find he did". Dr. Wallace had deposed, as coroner: "I closed the case as accidental death due to burning."

On Sunday morning Mrs. Ross objected to Mr. Ross and the hired man, Thomas, walking into the house with muddy boots. Words followed, and Mrs. Ross threatened to leave, as did the hired man. The quarrel apparently ended with Mr. Ross and the hired man going out of the house. Outside they had a conversation of some length, and the hired man reiterated his statement that he thought he should leave. Mr. Ross counselled him to remain a few days and he promised to do so. Immediately after this conversation, the hired man left, not

(1) [1904] A.C. 73, at 75.

because of the quarrel, but to visit a friend about three miles away. Because of rain, he did not, as he had intended, return that evening and was not on the farm again until he came in response to a telephone call about the fire.

After the quarrel on Sunday, Mr. and Mrs. Ross did not speak to each other; they did, however, have their meals together and slept together that night. He got up Monday morning early as usual and completed his chores. He harnessed his team of horses, and whether he had already used them to haul feed, or intended to use them, we do not know, but he left them in the barn with the harness on.

Mrs. Ross had not slept well, and after Mr. Ross had gone out the first time, she got up, prepared his breakfast and went back to bed. Mr. Ross came in, ate his breakfast, went to the bedroom and inquired if she was ill, to which Mrs. Ross replied she was not but was merely catching up on her sleep. Mr. Ross went out of the house again. When he came back about nine o'clock, he found Mrs. Ross washing the dishes. As to what then took place, Mrs. Ross deposes as follows:

> After a little, I got up and started doing my dishes, and then after a little while he came in again, and he asked me if I still figured on leaving him. I said: "Yes". He said it would spoil his life if I left him; he couldn't face it; and things like that he was telling me; and talking about other things, too. A little while after that, he went out and I never seen him again.

She also deposes, with regard to Mr. Ross at that time:

> He didn't look to be cross at all, but I could see he felt bad, you know.

Again, she says:

> He came in and we were talking together.

This was Mr. Ross' last conversation which so influenced the learned trial judge. He went out and ten minutes later the barn was seen to be on fire.

The evidence would indicate that ever since their honeymoon in 1938 Mr. and Mrs. Ross from time to time would have differences and Mrs. Ross would threaten to leave, but she had never left. No particulars of these previous difficulties are given, but Mr. Schlitt, the administrator, who was "fairly intimately" acquainted with Mr. Ross, deposes:

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Estey J.

In fact right up until a few weeks before his death he quite often mentioned his marriage to me, and he always seemed to be—you know —rather happy about it.

A gasoline can was found near the northwest corner of the ruins. It was empty and the top screwed on tight. Thomas, the hired man, when he found this gasoline can was so wrought up that he later ran a tractor over it and threw it on the junk pile. He could not positively identify it, and there were two others upon the premises. It is suggested that it came from the pump-house where it was used as a gasoline container, but it should be noted that they "used gasoline to clean up the horses."

Mr. Ross' body was found in the south half "towards the centre" and on the east side of a cement walk running north and south through the barn, resting upon some "prairie wool" and "pieces of what appeared to be ceiling or loft flooring, which gave the appearance that the body fell from the loft." Mr. Ross was working around the barn that morning and Thomas, the hired man, when asked if Mr. Ross was in the habit of going into that hayloft replied: "Oh, yes; oh, yes, he went in there quite often."

This barn was about 30′ x 60′, well built, with cement floor and equipped with electric lights. The evidence is to the effect that the electric wiring was not responsible for the fire and the current was generated by a wind-charger apart from the barn. At the time of the fire his horses, with the harness on, and some calves were in the barn and all were burned to death.

Mr. Ross was 49 years of age, had resided there for many years, and at the time of his death was farming more than six quarter-sections of land, to all of which he had clear title. He died intestate and his estate was valued at $42,000.

He was a quiet, level-headed and successful man; not given to worry and throughout there is no suggestion of any unusual or abnormal conduct on his part. On Sunday he apparently remained the coolest of the three, as evidenced by his conversation with Thomas when the latter suggested that he should leave and Mr. Ross coun-

selled him to wait a few days, to which Thomas agreed. On Monday morning, during the conversation in question, it is evident that there was no heated discussion.

This expression "he could not face it" is similar to many used by persons upon occasions of disappointment, sorrow or distress. As a rule they do not lead to any immediate course of conduct. In this case the words refer not to the moment of conversation, but to the time Mrs. Ross may leave. Mr. Ross knew that Mrs. Ross had made no preparation to go and to outward appearances she was proceeding with her housework. He had left her just catching up on her sleep and now she was doing the dishes. Under these circumstances he asked the question and she repeated her intention to leave; in effect the same statement she had made the day before when he apparently treated it as upon previous occasions.

Now twenty-four hours after the trouble, during which time Mrs. Ross had made no preparation to leave and was apparently resuming her normal routine about the house, we are asked to conclude, because in reply to the oft repeated threat to leave Mr. Ross said, in part: "If I left him, he couldn't face it", that he thereby indicated an intention to voluntarily end his life; that he forthwith carried out that intention by going to the barn and setting fire thereto. Up to that moment he followed the regular routine of the morning chores. There was nothing new about the threat, but we are asked to conclude that now this successful, quiet type of man at once acts in a manner entirely different to his conduct on any previous occasion. In my opinion, and with greatest respect to the learned trial judge, when those words are read in relation to all the other facts, they do not justify such an inference.

The issue of accident raises at once, apart from any affirmative defence, the question of intention in the sense that if an act is intended, it cannot be accidental. The only intent here suggested is that Mr. Ross intended voluntarily to end his life. In the determination of this issue the plaintiff is entitled to invoke the inference against voluntary death. This inference may be "destroyed or attenuated" by evidence of motive, as sug-

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Estey J.

gested by Lord Dunedin in *Dominion Trust Company* v. *New York Life Insurance Co.* (1), where he states as follows:

> Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction, being contrary to human instincts, is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

In my opinion, the words attributed to Mr. Ross, read in relation to the other facts, do not "destroy or attenuate" that inference.

If I have properly construed the last words attributed to Mr. Ross, then it seems to me the case may be regarded as similar to *Boyd* v. *Refuge Assurance Co. Ltd.* (2); *Harvey* v. *Ocean Accident & Guarantee Corp.* (3); and *Wright* v. *The Sun Mutual Life Insurance Co.* (4). If these last words have some evidential value the case is similar to *London Life Insurance Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.* (5); *Fowlie* v. *The Ocean Accident & Guarantee Corp.* (6), and *New York Life Insurance Co.* v. *Gamer* (7). In either case, on the facts as I view them, the authorities indicate that judgment should be in favour of the respondent.

The appellant then contends: "He (Mr. Ross) might have attempted to put out the fire and in so doing was overcome by the smoke or flames. If this were the 'natural and direct consequences' of his actions, having regard to his asthmatic condition, it would not be accidental."

In support of this contention the appellant cites: *Scarr* v. *General Accident Assurance Corp.* (8); *Harmon* v. *Travelers Insurance Co.* (9); *Sloboda* v. *Continental Casualty Co.* (10).

The policy makes no reference to asthmatic or any kindred bodily condition. It does provide that the double indemnity shall not be recovered if the death results

(1) [1919] A.C. 254, at 259.
(2) (1890) 17 Sess. Cas. 955.
(3) [1905] 2 Ir. R. 1.
(4) (1878) 29 U.C.C.P. 221.
(5) [1929] S.C.R. 117.
(6) (1902) 4 O.L.R. 146, affirmed 33 S.C.R. 253.
(7) (1938) 303 U.S. 161.
(8) [1905] 1 K.B. 387; 74 L.J. K.B. 237.
(9) [1937] 1 W.W.R. 424.
(10) [1938] 2 W.W.R. 237.

"directly or indirectly from physical or mental infirmity." In my opinion, the cause of death was the fire; if it had not been for the fire he would have continued his normal duties. Periodically during the last three or four years he had consulted Dr. Wallace, his physician. Dr. Wallace stated that Mr. Ross had an asthmatic condition and was short of breath. As a consequence he was "troubled a great deal with dust during haying and threshing" operations, but he does not suggest that he ever advised Mr. Ross not to engage in these operations. Further, Dr. Wallace stated: "Smoke-fumes would have much the same effect on him as dust or any irritating substance, he would breathe in." Mr. Ross was otherwise healthy. This asthmatic condition may have caused him to succumb or become unconscious more quickly than some other person, but cannot, under the circumstances, be described as the cause of his death. Moreover, the policy does not indicate that either of the contracting parties intended that the protection purchased by the assured should turn upon any such inquiry or refinement of the assured's health.

Moreover, a man who finds himself in a position such as Mr. Ross, where, finding his barn afire, he must act instantly, is not required to stop, deliberate and consider whether such a condition as asthma would require him to adopt one or another course. It is enough if he follows one, which under the circumstances is a reasonable course.

All of the foregoing cases cited by the appellant upon this issue have this in common: the assured deliberately, and with ample time to arrive at a decision, selected a course that eventually led to the injury which caused death. In *Harmon* v. *Travelers Insurance Co.* (1), the plaintiff had been warned of his heart condition a few months before the injury. Notwithstanding the advice he then received, he did engage in a curling bonspiel and because of the sweeping suffered a heart attack. The cause was held not to be accidental. In *Sloboda* v. *Continental Casualty Co.* (2), the "light dressy pair" of shoes used for

(1) [1937] 1 W.W.R. 424. (2) [1938] 2 W.W.R. 237.

1945

NEW YORK LIFE INS. CO. v. SCHLITT

Estey J.

walking in March over rough country roads for three and one-half miles to the post office and back developed a blister:

> In the present case not merely was the wearing of the shoes deliberate and intended but the consequence was natural and direct and moreover at some time at least before the walk was concluded must have appeared to the insured as the probable consequence.

In *Scarr* v. *General Accident Assurance Corp.* (1), the insured there sought to remove a drunken man who offered only passive resistance. His own effort brought on the condition which caused his death and it was held not to be accidental.

The appellant also pleaded the affirmative defence of suicide. The only evidence supporting this plea was also tendered to defeat the plaintiff's plea of accident. It failed to do so and *a fortiori* does not establish suicide.

In my opinion, Mr. Ross' death resulted from the fire, which, within the meaning of the policy, was an "external, violent and accidental cause." The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

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

---

(1) [1905] 1 K.B. 387; 74 L.J. K.B. 237.

VICTOR WRIGHT..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1945

*Feb. 19
*Mar. 12

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Criminal law—Trial on charge of rape—Question whether trial judge should have charged jury as to possible alternative findings of lesser offence—Question whether failure of accused to testify was made subject of comment, contrary to Canada Evidence Act, R.S.C. 1927, c. 59, s. 4 (5).

The appeal was from the judgment of the Supreme Court of Nova Scotia *en banc* dismissing appeal from appellant's conviction on a charge of rape. The appeal to this Court was on two questions of law on which there was dissent in said Court *en banc,* in connection with the trial Judge's charge to the jury, it being contended: (1) He erred in failing to instruct them as to possible alternative findings of a lesser offence, there being evidence to warrant such a finding. (The trial Judge withdrew from the jury a count of indecent assault contained in the indictment and stated, according to an affidavit offered to the Court *en banc,* that they "must find a verdict of rape or nothing"; and he directed his charge only to the count of rape). (2) The failure of the accused to testify was made the subject of comment, contrary to s. 4 (5) of the *Canada Evidence Act,* R.S.C. 1927, c. 59. (The trial Judge stated: "* * * You heard the story of this woman * * * and her evidence is not denied * * * I can see nothing in the conduct of this woman that day, according to her evidence—and that is the only evidence we have as to her conduct excepting the other witnesses that came in here to tell the story of what she told them * * * It was his doing, according to the evidence and the only evidence we have * * *").

Held: The appeal should be dismissed (Taschereau J. dissented).

Per the Chief Justice, Kerwin and Hudson, JJ.: As to the first contention: On the evidence (discussed), the only evidence of the actual commission of the crime, on which the jury could reasonably have returned a verdict of guilty, pointed only to rape, if the jury believed the victim's story, or not guilty, if they did not believe her; and the trial Judge's charge in this respect was justified. As to the second contention: The trial Judge's remarks complained of could not be taken to have had any effect on the jury as being a comment obnoxious to s. 4 (5) of the *Canada Evidence Act.* (It was remarked that said words "her evidence is not denied" were no doubt referring to statements made by the victim, after the occurrence, to other persons, who gave evidence) (*Rex* v. *Gallagher,* 37 Can. Cr. C. 83, and *Bigaouette* v. *The King,* [1927] S.C.R. 112, discussed and distinguished. Opinion expressed that the latter case went as far on the subject in question as this Court would care to go).

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

1945

WRIGHT
v.
THE KING

Per Taschereau J., dissenting: As to the first contention (the second one is not dealt with): It was open to the jury upon the evidence to find, if they saw fit, that the accused was guilty only of an attempt to commit rape (a lesser offence included in the major charge of rape), and the failure of the trial Judge to instruct them that such a verdict was open to them and that it was within their power to find the accused guilty of a reduced offence was fatal to the legality of the verdict, and therefore the conviction should be quashed and a new trial directed. (The facts were not sufficiently clear to allow an appellate court to substitute, for the verdict found by the jury, a verdict of guilty of a lesser offence, as may be done in certain cases under s. 1016 of the *Criminal Code*).

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* dismissing appeal from the conviction of appellant, at trial before Carroll J. and a jury, on a charge of rape. There was dissent in the Supreme Court of Nova Scotia *en banc* on certain questions of law in connection with the trial Judge's charge to the jury, which questions are set out and discussed in the reasons for judgment in this Court now reported. The appeal to this Court was dismissed, Taschereau J. dissenting.

R. A. Ritchie for the appellant.

R. M. Fielding K.C. for the respondent.

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

THE CHIEF JUSTICE.—The appellant was, by a jury, found guilty of rape and, on appeal, the Supreme Court of Nova Scotia, sitting *en banc,* affirmed his conviction.

In the order dismissing the appeal, Smiley J. is stated to have dissented on questions of law, to wit:—

(1) That the learned trial Judge erred in failing to instruct the jury as to possible alternative verdicts.

(2) That the failure of the person charged to testify was made the subject of comment by the learned trial Judge contrary to Section 4, sub-section 5, of the *Canada Evidence Act.*

On the first point. Although Doull J., who sat in the Court of Appeal, is not stated in the formal judgment to have actually dissented, if we look at the learned Judge's reasons we find that, as he expressed it:—

Giving the accused the benefit of every argument, I proceed to give effect to the doubtful opinion which I have that the verdict of an attempt

was open to the jury. No reasonable jury could in my opinion have found a verdict of anything less than attempted rape and it seems to me that a new trial is a most undesirable outcome of this prosecution.

On the actual findings, it appears that the jury must have been satisfied of facts which proved the accused at least guilty of an attempt. The court should therefore substitute a verdict of guilty of attempted rape and pass a sentence of four years' imprisonment in Dorchester Penitentiary.

We take that to be a dissenting opinion by Doull J., more particularly since the sentence against the appellant on the charge as brought was for five years. The point would be in respect of the failure of the learned trial Judge to charge the jury as to lesser offences. In the opinion of Smiley J., "there was evidence in this case from which the jury might reasonably have inferred that the accused was guilty of a lesser offence, not necessarily that contained in the second count". The learned Judge referred to Sections 949 and 951 of the *Criminal Code,* which read as follows:—

949. When the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly.

951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

We omit paragraphs (2) and (3) of section 951, as they deal with counts charging murder, or manslaughter, and have no application here.

The indictment in the present case contained two counts, the first being that of rape, and the second that of indecent assault. The learned trial Judge withdrew from the consideration of the jury the second count in the indictment and directed his charge to the first count only, on which the jury returned a verdict of guilty.

It is said that the trial Judge, when he announced that he was withdrawing the count of indecent assault from the jury, added that he "was going to instruct them that they must find a verdict of rape or nothing", and that counsel should confine himself to the question of rape. This is based on an affidavit offered to the Court of Appeal by Mr. Norman D. Murray, Barrister at Law, who acted

1945

WRIGHT v. THE KING

Rinfret C.J.

as counsel for the appellant upon his trial. Nothing to that effect is to be found in the charge itself; but, as two of the learned Judges of Appeal based their dissenting opinions on that point, we think we ought to consider it in the present judgment.

The contention is that, by force of Sections 949 and 951, reproduced above, a jury properly instructed might have found the accused guilty only of an attempt to commit the offence, or of the lesser offence of indecent assault, notwithstanding that the latter charge was already contained in the second count of the indictment and the learned trial Judge had withdrawn that count from the jury.

The only evidence at the trial pointing to the guilt of the accused was as to his being guilty of the crime of rape. That was the story of the victim, Mrs. Myrna D. Bosma.

No doubt in a crime such as the one under consideration, the initial step might be stated to be an indecent assault, followed by the subsequent step which might be described as an attempt to rape; but, when once the rape is stated to have taken place, there no longer remains any question of indecent assault, or attempted rape, if the story of the victim is believed.

In her testimony, Mrs. Bosma definitely states that she was raped by the appellant. In the words of Sir Joseph Chisholm, C.J.:—

> She said the appellant had tried to rape her—a quite correct statement—and she followed that answer with the direct statement that he did commit the offence of rape. I do not think that any jury could reasonably, from the fragment on which the contention is based, conclude that the offence was merely an attempt, nor do I think that the first answer should be weighed in isolation from the second. It was as if she exclaimed in her excitement: "He tried to rape me and he succeeded".

It is true that when she was on her way back to Halifax she told Mr. Murdock Bell, who testified to that effect:—"She said she had been attacked". But, of course, it was not to be expected that she would, in her conversation with Mr. Bell, go into the details of what had taken place and the word "attacked" is quite apt to include the fact of the rape itself.

Then when the victim spoke to her housekeeper, Mrs. Marion Marriott, she first mentioned that the appellant had "mistreated her". Mrs. Marriott was then asked whether the victim described the mistreatment in any way,

and she said that she did and that the description which she gave of the mistreatment was "that he had tried to rape her". The next question was:—"Did she say that he did?", and the answer is "Yes, after she was upstairs, she said that he did." Again the question is put to Mrs. Marriott:—"And she said that he had raped her?", and the answer is "Yes".

Even if the testimony of Mr. Bell and of Mrs. Marriott was to be taken as evidence of the commission of the offence itself, it will be seen that in both instances the statements made by Mrs. Bosma to them could not convey the idea that the accused had stopped at mere indecent assault, or at attempted rape, but, on the contrary, they would tend to show that actual rape was consummated. But it is not to be forgotten that Mrs. Bosma's statements, either to Mr. Bell or to her landlady, were not admissible for the purpose of proving the crime; they were merely evidence of the complaints subsequently made by Mrs. Bosma in order to show that her acts and statements after the commission of the offence were consistent with her evidence as to the actual facts that had taken place at the appellant's house on the occasion where rape is alleged to have been committed by the appellant upon Mrs. Bosma.

So that the only evidence there is in the record of the actual commission of the crime, on which the jury could reasonably have returned a verdict of guilty, pointed only to rape, if they believed the story of Mrs. Bosma, or not guilty, if they did not believe her.

We, therefore, think that the learned trial Judge, even if he did not actually say so in his charge, was justified in withdrawing from the jury the count relating to indecent assault, and also in telling the jury that, in the circumstances shown in the evidence properly admissible, the only verdict could be either guilty of rape or not guilty. This was the view of the majority of the Supreme Court of Nova Scotia *en banc,* and we cannot agree with the learned dissenting Judges that, in doing what he did, the learned trial Judge erred in such a way as to justify the contention that the jury might have found the accused guilty of a lesser offence and that, on account of this failure, a new trial should be ordered.

1945

WRIGHT
v.
THE KING

Rinfret C.J.

Dealing now with the second point. The portions of the charge, to which objection is made, are as follows:—

> Now, he is charged with rape and I tried to define what rape is to you. You heard the story of this woman, who came on the witness stand here, and her evidence is not denied.

And later the trial Judge said:—

> Now Gentlemen, I am not going into the sordid things that took place there, but I can see nothing in the conduct of this woman that day, according to her evidence—and that is the only evidence we have as to her conduct excepting the other witnesses that came in here to tell the story of what she told them—I see nothing in her conduct that day that should make the jury detract from the truth of anything that she said.

And then again:—

> It was his doing, according to the evidence and the only evidence we have * * *

On that point, as already stated, the majority of the Court of Appeal was of the opinion that the remarks complained of do not in effect amount to such comment that they may be regarded as obnoxious to the statutory direction.

Doull J., in that regard, in the course of his reasons, said:—

> I certainly dissent from any pronouncement that a statement of a judge that certain evidence is "not denied" or is "uncontradicted" without more is a sufficient ground for setting aside a verdict. The words "subject of comment" mean something more than a reference to evidence as "uncontradicted". There must be something which pointedly draws the attention of the jury to the fact that there is evidence which the accused could give and which he has failed to give.

For his dissenting opinion on that point, Smiley J. relied on the judgment of the Appellate Division of the Supreme Court of Alberta in *Rex* v. *Gallagher* (1), and on the judgment of this Court in *Bigaouette* v. *The King* (2). He also said that in the *Bigaouette* case a certain part of the statement of Stuart J.A. in the *Gallagher* case was quoted with approval in this Court.

In the *Gallagher* case (1), the trial Judge in his charge to the jury suggested that evidence ought to have been given which only the accused could have given. The actual words by him were (p. 85):—

> Now then, though we have the evidence which we have that the defendant was the last person seen in the company of the murdered man, the circumstantial evidence that he was killed at a certain time after-

(1) (1922) 37 Can. Cr. C. 83. (2) [1927] S.C.R. 112.

wards and the circumstantial evidence as to the possession of these bullets and the possession of the firearm or firearms and that is not denied by the defendant, it would still seem to leave room for a reasonable doubt as to whether or not he was the person who committed this crime. . . . . .

There is no suggestion of anything else, he either went down that path towards his own home or he went on with the car and there is no suggestion from the defence or any other person that he could have gone any other way.

It will be seen that there the trial Judge in his charge to the jury offended, unwittingly no doubt, against the provision contained in subsection (5) of Section 4 of the *Canada Evidence Act* that:—

The failure of the person charged * * * to testify, shall not be made the subject of comment by the judge * * *

There the defendant, in the first part of the portion of the charge objected to, was specifically mentioned, and in the second part of it was referred to in such a way that it could not apply to anybody else but the defendant.

In the *Bigaouette* case (1), the learned trial Judge said:—

Le docteur Marois a fait l'autopsie à trois heures et quart, et si vous croyez son témoignage (c'est un homme dont le témoignage a du poids), il a déclaré que la mort avait dû arriver à sept heures, ou à six heures et même avant, du matin.

Voilà les circonstances qui enveloppent la mort de la défunte.

Si la mort, mes amis, remonte à six heures ou à sept heures du matin, où était l'accusé à ce moment-là, vers sept heures ou six heures du matin, même plus à bonne heure? A la maison. A la maison, car, d'après sa propre déclaration, il n'est sorti qu'à huit heures du matin.

Il était donc seul avec sa mère à la maison quand la mort est arrivée et si l'accusé était seul avec sa mère quand elle a été tuée et égorgée, la défense aurait dû être capable d'expliquer par qui ce meurtre a été commis. Car une pareille boucherie n'a pas dû se faire, sans que l'accusé en eut connaissance.

As was said by Duff J., as he then was, delivering the judgment of the Court:—

It seems to be reasonably clear that, according to the interpretation which would appear to the jury as the more natural and probable one, the comment implied in this passage upon the failure of *la défense* to explain who committed the murder would, having regard to the circumstances emphasized by the learned trial judge, be this, namely, that it related to the failure of the accused to testify upon that subject at the trial. It is conceivable, of course, that such language might be understood as relating to a failure to give an explanation to police officers or others; but the language of the charge is so easily and naturally capable of being understood in the other way, that it seems plainly obnoxious to the enactment referred to, subs. 5 of s. 4, R.S.C., c. 145.

(1) [1927] S.C.R. 112.

1945

WRIGHT v. THE KING

Rinfret C.J.

Smiley J., as already adverted to, said that the latter part of the statement of Stuart J.A., in *Rex* v. *Gallagher* (1) had been approved by this Court in the *Bigaouette* case (2), but the words which were approved as correctly stating the law are quoted in the judgment of this Court and they only expressed a general view of the law without in any way applying them to the particular facts of the *Gallagher* case (1). They are merely to the effect that, even if the language used is just as capable of one meaning as the other, the position would be that the jury would be just as likely to take the words in the sense in which it was forbidden to use them, as in the innocuous sense, and in such circumstance the error was thought fatal.

We have nothing of the kind here. The accused appellant was no where mentioned in those portions of the charge which are objected to. In the last two paragraphs above mentioned the only statement in the charge is that the evidence of the victim is "the only evidence we have"; and, as to the first statement: "her evidence is not denied", the learned Judge no doubt was referring there to the fact that, in the course of Mrs. Bosma's evidence, she said that on her way back to Halifax she had told Mr. Bell that she had been attacked and Mr. Bell confirmed that; also that when she reached her house she had told Mrs. Marriott that she had been mistreated and had described such mistreatment by saying that the appellant "had tried to rape her" and "she said that he did". Not only was that not denied, but it was confirmed by Mrs. Marriott.

We think the *Bigaouette* case (2) certainly goes as far on that subject as this Court would care to go and, like the majority of the Court of Appeal, we are unable to find that the remarks here complained of could have any effect on the jury as being a comment "obnoxious to the statutory direction".

We think, therefore, that the appeal should be dismissed.

TASCHEREAU J. (dissenting)—The appellant was indicted for rape and indecent assault. In the course of the address of defendant's counsel, the presiding Judge withdrew the count of indecent assault, and left the jury with the only

(1) (1922) 37 Can. Cr. C. 83. (2) [1927] S.C.R. 112.

alternative of finding the accused "guilty" or "not guilty" of rape. A verdict of "guilty" was returned, and the appellant was sentenced to five years in the penitentiary.

His appeal to the Supreme Court of Nova Scotia was dismissed, Justices Doull and Smiley dissenting. The former thought that a verdict of attempted rape was open to the jury, and was of opinion that such a verdict should be substituted to the one given by the jury. The latter reached the conclusion that there was evidence from which the jury might reasonably have inferred that the accused was guilty of a lesser offence, nor necessarily that contained in the second count, and he was also of opinion that certain comments made by the trial Judge might have been considered by the jury as relating to the failure of the accused to testify. He would have granted a new trial.

Before this Court, it is submitted on behalf of the appellant that the learned trial Judge erred in failing to instruct the jury as to possible alternative verdicts, and that the failure of the appellant to testify was made the subject of comment in the charge to the jury.

It is undisputed and undisputable that the offence of rape for which the appellant was charged, is one of those offences which may be reduced, and that the accused, if the evidence does not warrant a conviction for the major offence, may be found guilty of a lesser one. Under the *Criminal Code,* (949-951), every count is deemed divisible, and when the offence charged includes all the elements of a lesser offence, the person accused may be convicted of the offence as charged, or may be convicted of an attempt to commit the offence charged, or he may be convicted of the lesser offence or of an attempt to commit it. In the case of rape, the possible verdicts which in law may be found, are, therefore, attempted rape, indecent assault, common assault, or attempt to commit one of these lesser offences. In the case at bar, the charge of indecent assault in a separate count was quite unnecessary, as it was included in the major charge of rape.

Of course, it cannot be contended that all these intermediate verdicts are open to the jury in all cases. They will receive the sanction of the courts only if there exists a foundation of facts which would justify a reasonable jury, properly instructed, to reach such a conclusion. In

1945

WRIGHT v. THE KING

Taschereau J.

other instances a trial Judge will, therefore, be well advised to instruct the jury that the only possible verdict is "guilty" or "not guilty" of the major offence which is charged, and that there is no room for any other finding. The facts of each particular case must be considered, but whenever there is evidence, the jury must be free to weigh it, to consider it in the light of all the circumstances of the case, and all the possible verdicts must be left open to them, even if it is unlikely that they will reach some of them.

And if any authority is needed to substantiate these propositions, I may refer to the cases of *The King* v. *Hughes* (1); *The King* v. *Hopper* (2); *Rex* v. *Roberts* (3).

It follows that it is the imperative duty of the trial Judge to instruct the jury as to all the verdicts which they have the right to find, and that he may not impose his personal views upon them, by withdrawing from their consideration certain verdicts which they could reach if they accepted a certain view of the facts as revealed by the evidence that would reasonably justify them to find the accused guilty of a lesser offence.

In the present case, I do not find it necessary to deal with the question of there being any evidence on which the jury might find indecent or common assault. A graver offence may have been committed, but I strongly disagree with the view that it was necessarily rape, and that the jury, if left free, had not before them the necessary foundation of facts to reach the conclusion, if they found fit, that the appellant was guilty of attempted rape. I do not say that such would have been their verdict, but I am of opinion that it was for them to decide.

It fell within their province after weighing the surrounding circumstances of the evidence, to say if all the necessary steps towards the full execution of the criminal purpose had been completed, or if they were interrupted before the act, which the appellant had in mind, had been totally accomplished within the meaning of the *Criminal Code*. If this last hypothesis had been accepted by the jury, a verdict of attempt to commit rape could not have been qualified as perverse and would have undoubtedly been left undisturbed by the courts, if challenged by the Crown.

(1) [1942] S.C.R. 517, at 525.
(2) [1915] 2 K.B. 431.
(3) [1942] 1 All E.R. 187.

1945

WRIGHT v. THE KING

Taschereau J.

But the jury were not instructed that such a verdict was open to them, and that it was within their power to find the appellant guilty of a reduced offence. The failure to give such a direction was, I think, fatal to the legality of the verdict, and it should therefore be quashed. In view of this conclusion, it is useless to discuss the second point raised by the appellant.

Section 1016, *Cr. Code,* is drafted in terms broad enough to allow a court of appeal in certain cases, to substitute for the verdict found a verdict of guilty of a lesser offence. But I do not think that in the present case such a course should be followed. I am not satisfied that the facts are sufficiently clear to allow me to make such a substitution, without assuming the rôle which belongs exclusively to the jury. This course may be adopted when it appears to a court of appeal that the jury must have been satisfied of facts which proved the accused guilty of the lesser offence, but such a situation does not arise in the present case.

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

RAND J.—I concur in dismissing the appeal.

Appeal dismissed.

Solicitor for the appellant: *N. D. Murray.*

Solicitor for the respondent: *R. M. Fielding.*

ROBERT HALBERT AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

NETHERLANDS INVESTMENT COMPANY OF CANADA LIMITED (PLAINTIFF) ..... RESPONDENT.

1945

*Feb. 14, 15

*Mar. 23

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Debtor and creditor—Mortgages—Foreclosure action—Authorized by permit of Debt Adjustment Board—Permit cancelled after action brought —Whether any effect from cancellation—Period of redemption shortened by order nisi—Whether order interlocutory or final—Jurisdiction

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

1945

HALBERT ET AL. v. NETHERLANDS INVESTMENT CO. OF CANADA LTD.

of judge making it—Judicature Act, section 34 (f)—Interpretation of sub-paragraphs (ii) and (iii)—Judicature Act, Amendment Act, R.S.A., 1942, c. 129.—Roy v. Plourde ([1943] S.C.R. 262) referred.

The respondent was granted a permit by the Debt Adjustment Board to commence and continue a foreclosure action against the appellants. Aside from filing and serving the statement of claim, no further steps were taken until after the cancellation of the permit by the Board. Immediately thereafter the appellants filed their statement of defence alleging the cancellation of the permit and that no permit authorizing the commencement or continuation of the action was outstanding as required by the *Debt Adjustment Act of 1937*. The respondent then moved for an order striking out the statement of defence and fixing the amount owing under the mortgage and a period within which the appellants might redeem. Upon the return of the motion, Sheperd J. found a sum of $9,246.69 to be due, fixed a redemption period of four months and directed that in default of payment the property might be offered for sale. No appeal was taken from that order and, upon default of payment, O'Connor J. directed a final order vesting the property in the respondent, which order was affirmed by the appellate court. The appellants contended before this Court that they have been improperly denied the benefits of the *Judicature Act Amendment Act*, 1942, whose provisions stipulating a redemption period of one year were alleged to be mandatory. The judgments of the Courts below were rendered at a time when that Act had been declared *ultra vires* by the Appellate Division and, subsequently, the Act was held by this Court to be *intra vires*. The appellants also contended that the cancellation of the permit placed them in a position as if no permit had ever been issued; that, the order nisi having been made without giving effect to the Act, such error vitiated the right to make the final order of foreclosure and vesting, and that the respondent had not made the required specific application to shorten the period of redemption fixed under s. 34 (*f*) of the Act.

Held that the appeal should be dismissed with costs.

Held, also, that the order nisi cannot be regarded as an interlocutory order within the meaning of Alberta Rule No. 609, as it finally disposed of the rights of the parties. The order being valid and subject to appeal and no appeal having been taken, the final and vesting order was therefore validly made.

Per the Chief Justice and Estey J.—Section 34 (*f*) of the *Judicature Act Amendment Act*, 1942, does not apply to the respondent's action. Sub-paragraph (iii) (*b*) of paragraph (*f*) expressed in clear terms that such paragraph does not apply to "any action authorized by a permit granted by the Debt Adjustment Board."

Per the Chief Justice and Estey J.:—The use of the words "any action authorized" in sub-paragraph (iii) (*b*) refers to the commencement as distinguished from a step in, or a continuation of the action. The respondent's action, when commenced, was authorized by a permit, and the cancellation of the permit did not place the appellants in a position as if no permit had ever been issued.

Per the Chief Justice and Estey J.—Section 34 of the Amendment Act merely gives direction with respect to the terms to be granted in certain orders nisi, but it does not purport to confer jurisdiction on the judge. Any failure to follow or misconstrue its provisions is a mistake in law which would provide a proper basis for an appeal, but does not involve any question of jurisdiction.

Per the Chief Justice and Kerwin and Estey JJ.—The judge at the time he made the order nisi for sale, was bound by the judgment of the Appellate Division declaring the Amendment Act *ultra vires,* and accordingly paid no attention to it.

Per Kerwin J.—However, he had power on an "application" to decrease the period of redemption, having regard to certain circumstances set out in the enactment; he did in fact decrease the period and whether he did so on "application" is immaterial as his order was not appealed from.

Per Kerwin and Hudson JJ.—Even if this Court had power on this appeal to alter the terms of the order nisi, this case in view of its circumstances is not one where that should be done.

Per Kellock J.—The order cannot be treated as no order, but should be treated as an order made under the jurisdiction which in fact existed.—The fact that the proviso in paragraph (*f*) of section 34 applies to clauses (i) and (ii) renders clear the meaning of the words "on application" in the proviso. Where the case is one within clause (i), a special application must be made because the order nisi has already been made; while, if the case is within clause (ii), there is no good reason why the jurisdiction given by the proviso cannot be exercised on the application for the order nisi. The notice of motion given by the respondent entitled the judge hearing the application to abridge or enlarge the period of one year under the jurisdiction given to him by the proviso.

Judgment of the Appellate Division ([1943] 3 W.W.R. 669; [1944] 1 D.L.R. 300) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of O'Connor J. who had made a vesting order in an action brought by the respondent for foreclosure under a mortgage.

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

J. P. McCaffery and *M. C. Shumiatcher* for the appellants.

J. E. A. Macleod K.C. for the respondent.

(1) [1943] 3 W.W.R. 669; [1944] 1 D.L.R. 300.

1945

HALBERT ET AL. v. NETHERLANDS INVESTMENT CO. OF CANADA LTD.

Estey J.

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

ESTEY J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta dismissing the appellant's appeal to that Court from a vesting order made by Mr. Justice O'Connor.

The respondent, under date of May 27, 1940, was granted a permit by the Debt Adjustment Board of Alberta permitting it

> to commence and continue an action against Robert Halbert to foreclose a mortgage dated the 13th day of March, 1920, covering the Northeast quarter of 33 and the Northwest of 34 in 32-24-4,

on the condition that the final order for foreclosure should not be taken out until the 15th of November, 1940.

The action was commenced on May 29, 1940, but aside from filing and serving the statement of claim no further steps were taken until after the cancellation of the permit by the Debt Adjustment Board on January 27, 1941. Immediately thereafter the appellants filed their statement of defence alleging the cancellation of the permit and that no permit authorizing the commencement or continuation of the action was outstanding as required by the *Debt Adjustment Act* of 1937. Then on February 17, 1941, the respondent filed an amended statement of claim under Rule 259 (now 191) of the Alberta Rules of Court.

Under date of September 21, 1942, the respondent moved for an order striking out the appellants' statement of defence, fixing the amount owing under the mortgage and a period within which the appellants might redeem.

Upon the return of that motion, counsel for the respondent appeared and read material disclosing, among other facts, that the appellants had made application under the *Farmers' Creditors Arrangement Act* of 1934 and thereby in 1935 their then indebtedness was reduced to $6,500 upon terms of repayment with interest thereafter at the rate of 6 per cent. per annum from the 1st of August, 1935. Interest only was payable during the years 1935, 1936 and 1937, and thereafter the sum of $250 on the principal sum and interest on the 1st of December in each year 1938 to 1947 inclusive. That during the period August 1, 1935, to December 1, 1941, the appellants made but one payment of $130 on December 1, 1935.

It does not appear that the appellants filed any material upon this motion. The learned judge found the sum of $9,246.69 to be due and owing, computed as follows:—

Principal, as fixed by Board of Review	$6,500.00
Interest	2,725.45
Advance of	21.24
	$9,246.69

He fixed a period of four months within which the appellants might redeem, and directed that in default of payment the property might be offered for sale by tender, subject to certain specified conditions.

No appeal was taken from this order and upon default of payment, an attempted sale proving abortive, Mr. Justice O'Connor, under date of February 22, 1943, directed a final order vesting the property in the respondent.

The appellants appealed from this vesting order to the Appellate Division of the Supreme Court of Alberta. That Court unanimously affirmed the vesting order made by Mr. Justice O'Connor, and this further appeal is taken therefrom.

The appellants complain that throughout this action they have been improperly denied the benefits of the provisions of the *Judicature Act Amendment Act, 1942,* (1942 Alta. Statute, ch. 37, sec. 2, now 1942 R.S.A. 129, sec. 34). They point out that both the order nisi and the vesting order were made after that amendment was declared *ultra vires* by the Appellate Division in *Plourde* v. *Roy* (1), and before that decision was reversed in this Court (2), and therefore the learned judges, in directing these orders, did not give effect to the provisions of that amendment. In this regard the appellants are under a misapprehension as this amendment never did apply to a case authorized by a permit granted by the Debt Adjustment Board. The legislature, in defining the limits within which this amendment should apply, provided by sec. 34 (*f*) (iii):

> Nothing in this paragraph shall apply to,—
>
> * * *
>
> (*b*) Any action authorized by a permit granted by the Debt Adjustment Board.

(1) [1942] 2 W.W.R. 607; [1942

(2) [1943] S.C.R. 262.

1945

HALBERT ET AL. v. NETHERLANDS INVESTMENT CO. OF CANADA LTD.

Estey J.

In this amendment the legislature has clearly expressed its intention, and it is the duty of the Court to give effect to that intention. As was stated by the Lord Chancellor in *Brophy* v. *Attorney General of Manitoba* (1):

> The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact * * * those, who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judically to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said.

I am, therefore, in agreement with the Appellate Division of Alberta disposing of the case upon this ground. I have not overlooked the suggestion relative to this clause (iii) based upon certain passages in *Plourde* v. *Roy* (2) in this Court. These passages were not essential to the decision of the issues before the Court, and in the result the entire Act was declared *intra vires*.

The appellants also contend that the cancellation of the permit by the Debt Adjustment Board on January 27, 1941, placed them in a position as if no permit had ever been issued; or in other words, placed them in a position where this was not an "action authorized by a permit granted by the Debt Adjustment Board." In my opinion this contention is not well-founded. The use of the words "any action authorized" refers to the commencement as distinguished from a step in, or a continuation of, the action. The word "action" appears several times throughout the amendment and always refers to the whole action as distinguished from a step in the action. Then too, the word "action" is defined in the *Judicature Act*, sec. 2 (*a*) as:

> "Action" means a civil proceeding commenced in such manner as may be prescribed by Rules of Court, and shall include a suit.

In my opinion the action was commenced but once, May 29, 1940, when it was authorized by the permit.

Even if the provisions of the *Judicature Act Amendment Act* of 1942 were applicable, the defendants encounter certain insurmountable difficulties. They contend that because Mr. Justice Sheperd did not

(1) [1895] A.C. 202, at 215. (2) [1943] S.C.R. 262.

give effect to the provisions of the *Judicature Act Amendment Act* of 1942 * * * by the order nisi * * * by reason thereof the same error vitiated the right to make the final order of foreclosure and vesting herein.

It should be observed that both the order nisi and the vesting order were made prior to the decision of this Court in *Plourde* v. *Roy* (1), April 2, 1943, and after the decision of the Appellate Division in the same case (2), and therefore upon dates when both the learned judges were bound by the decision of the Appellate Division that the *Judicature Act Amendment Act* of 1942 was *ultra vires*. This is so even if it be taken into account that the vesting order was neither directed nor entered until March 8, 1943, but dated February 22, 1943.

This amendment does not purport to confer jurisdiction on the judge. His jurisdiction is determined apart from the provisions of this amendment, which merely gives direction with respect to the terms to be granted in certain orders nisi. It places some limitation upon the discretion the judge previously exercised in fixing the period for redemption, but does not affect his general jurisdiction to hear and determine the application. Any failure to follow or misconstrue the provisions of this amendment is a mistake in law which would provide a proper basis for an appeal, but does not involve any question of jurisdiction. Therefore, the appellants' contention that the order nisi was invalid, and therefore the final order of foreclosure and vesting order was, by reason thereof, invalid, cannot be maintained.

This appeal may be disposed of on a further ground.

While the appeal is from the final and vesting order, the appellants' real effort is to make this an appeal from the order nisi and have directed their attack upon that order. They reason that:

(1) The learned trial judge erred in failing to give effect to the provisions of *The Judicature Act Amendment Act*, 1942, Alberta, Cap. 37, and in particular section 2 (*ddd*) (ii) thereof, now herein quoted as R.S.A 1942, cap. 129, section 34 (*f*) (ii), by arbitrarily shortening the statutory time fixed for redemption by the order nisi in complete disregard of the mandatory statutory requirements, and that by reason thereof the same error vitiated the right to make the final order of foreclosure and vesting herein.

(1) [1943] S.C.R. 262.

(2) [1942] 2 W.W.R. 607; [1942] 3 D.L.R. 646.

1945

HALBERT ET AL. v. NETHERLANDS INVESTMENT CO. OF CANADA LTD.

Estey J.

The provisions of this amendment of 1942 are restricted to the order nisi, and if the appellants are to obtain the benefits of that amendment, they realize that somehow they must get back to a consideration of that order. They recognize that no appeal was taken from the order nisi, that the time for appeal therefrom has long since passed, and therefore appreciate the difficulties which they must overcome in order to succeed.

They therefore appeal from the final and vesting order and rely upon Rule 609 of Alberta Rules of Court to raise upon this appeal issues which must be dealt with upon the application for order nisi. Rule 609 reads as follows:

> No interlocutory order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving such decision upon the appeal as may be just.

Is, therefore, this order nisi an interlocutory order within the meaning of Rule 609? The word "interlocutory" is variously used, and in determining its meaning regard must be had to the context. It is recognized that in one sense no order or judgment is final until the time for appeal therefrom is exhausted. *In Re The Child Welfare Act; In Re Shand Infants* (1).

Again it is usual to provide a different time or procedure for appeals from final and interlocutory judgments, and therefore it often becomes necessary to determine whether an order is final or interlocutory. In this regard Lord Alverstone C.J., in determining whether an order is final or interlocutory, applied this test:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

Bozson v. *Altrincham Urban District Council* (2).

The test above quoted has been adopted by the Appellate Division in Alberta when determining whether an order is final or interlocutory under section 47 of the *District Courts Act*, R.S.A. 1942, chap. 121. There it is provided that an appeal may be taken:

> * * * from every decision or order made in any cause or matter disposing of any right or claim, if such decision or order is in its nature final and not merely interlocutory.

(1) [1943] 1 W.W.R. 269.

(2) [1903] 1 K.B. 547.

Bennefield v. *Knox* (1), *Roeske* v. *Senerius* (2), *Wagar* v. *Little* (3), *Pomfret* v. *Morie* (4).

A similar provision is found in the Ontario *Judicature Act*, (1937) R.S.O., chap. 100, sec. 24. In that province the same test is applied. *Hendrickson* v. *Kallio* (5).

Upon the application for order nisi in this action, the rights of the parties were substantially determined; the defence filed by the appellants was struck out; the amount due under the mortgage was determined; the time was fixed within which the appellants might redeem. This order disposed of the issues raised by the parties in this litigation, and this is the general practice whether the order nisi is directed after a trial or in chambers.

It is true that the foregoing decisions are not under the Alberta Rule No. 609, but it does seem that as both provisions deal with questions of appeal the same interpretation ought to be adopted.

In my opinion the order nisi was, for the reasons indicated, not an interlocutory order.

It may be added that this Rule 609 is almost identical with the English Rule No. 878. Under the latter it has been stated that it never was the intention that the time for an appeal from an interlocutory order should be extended by this provision, nor did it provide a collateral appeal from the interlocutory order. *White* v. *Witt* (6). See also *Beynon & Co.* v. *Codden & Son* (7).

In dealing with a somewhat similar question, Anglin J. (later Chief Justice) stated:

> To permit the review of interlocutory judgments on appeals from the final judgments in actions brought in provinces in which legal procedure is based on the English system would tend to unduly prolong litigation and to enormously increase its expense. *Hasseltine* v. *Nelles* (8).

In my opinion this appeal should be dismissed with costs.

KERWIN J.—While in form this is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta affirming a vesting order made by a judge of the Trial Division on March 8, 1943, in an action for fore-

(1) (1914) 17 D.L.R. 398.
(2) [1922] 2 W.W.R. 977.
(3) (1923) 20 Alta. L.R. 47.
(4) [1931] 3 D.L.R. 557.
(5) [1932] O.R. 675.
(6) (1877) 5 Ch. D. 589.
(7) (1878) 4 Ex. D. 246.
(8) (1912) 47 Can. S.C.R. 230, at 242.

1945

HALBERT ET AL. v. NETHERLANDS INVESTMENT CO. OF CANADA LTD.

Kerwin J.

closure of a mortgage, in reality what the appellants object to are the terms of an order nisi for sale, dated September 28, 1942, by which a period of four months was given the appellants to redeem. At that time, there was on the statute books of Alberta an amendment to the *Judicature Act* which came into force on March 19, 1942. On August 7, 1942, in *Plourde* v. *Roy* (1), the Appellate Division held this amendment to be *ultra vires,* and while that judgment was reversed by this Court on April 2, 1943 (2), the judge of the Trial Division was, of course, bound, in the meantime, by the judgment of the Appellate Division. Accordingly he paid no attention to the amendment to the *Judicature Act.*

However, he had power on an "application" to decrease the period of redemption, having regard to certain circumstances set out in the enactment. He did in fact decrease the period and whether he did so on "application" is immaterial as his order was not appealed from.

Even if we had power on this appeal to alter its terms, this is not a case where that should be done. The mortgage in question was given in 1920. Under *The Farmers' Creditors Arrangement Act, 1934,* the sum due under the mortgage amounting, as at March 3, 1935, to $8,477.70, was reduced to and fixed at $6,500, as at August 1, 1935, payable with interest at six per cent. per annum as follows:— Interest only on December 1, 1935, 1936 and 1937; thereafter $250 on account of principal, with accrued interest, on December 1, 1938 to 1947, inclusive, and the balance on December 1, 1948. The first four months interest, which accrued on December 1, 1935, was paid but nothing further, either on principal or interest. The mortgaged lands not having been redeemed within the four months allowed by the order nisi for sale of September 28, 1942, and the sale thereby ordered having proved abortive, the respondent applied for the usual final foreclosure order by which the mortgaged property would be vested in it. This application was adjourned one week and after the respondent, at the request of the presiding judge, had agreed to lease the lands to the appellant Robert Halbert for one year at a one-third crop rental, the order was made. The mortgaged lands are now in the name of the respondent as registered owner and in accordance with its agreement, the respondent

(1) [1942] 2 W.W.R. 607; [1942] 3 D.L.R. 646.

(2) [1943] S.C.R. 262.

executed a lease, which was accepted by the appellant Robert Halbert without prejudice to his right to appeal from the vesting order. Whether anything has been paid under the lease, we do not know but certainly nothing further has been paid on account of the amount of the mortgage.

The appeal should be dismissed with costs.

HUDSON J.—The facts in this case are fully set forth in the judgments of my brothers Kellock and Estey which I have had an opportunity of reading. I agree with them that the appeal should be dismissed with costs. This conclusion might be supported on a number of grounds. I shall refer only to one. Mr. Justice Shepherd had jurisdiction to consider the application made by the respondents for the order nisi and to make an order thereon. When such order was made it was a final order within the meaning of Rule 609 of the Alberta Rules of Court and, therefore, subject to appeal, but no appeal was taken. Once it is accepted that the order nisi was valid, there is no objection to the final vesting order from which the appeal was taken to the Appellate Division. I think the Appellate Division was right in dismissing such appeal, and none the less because the conduct of the appellants throughout does not warrant any indulgence beyond that given by a strict adherence to the rules of law.

KELLOCK J.—This is an appeal by the defendants from the order of the Appellate Division of the Supreme Court of Alberta dated December 15, 1943, dismissing an appeal by the appellants from a vesting order made in the action, which was brought by the respondent for foreclosure under a mortgage dated the 13th of March, 1920. The order, which was made on the 22nd of February, 1943, followed an order nisi dated the 28th of September, 1942, by which the time for redemption was fixed at four months from the date of service of the order. The action itself was commenced on the 29th of May, 1940.

On the 19th of March, 1942, an amendment to the *Judicature Act* came into force. This amendment, enacted by chapter 37 of the 1942 statutes, section 34, provided

1945

HALBERT ET AL. v. NETHERLANDS INVESTMENT CO. OF CANADA LTD.

Kellock J.

that, as therein set forth, in actions for foreclosure of a mortgage commenced either before or after the passing of the Act, the time to be fixed for redemption by the order nisi should be one year, provided that upon certain evidence, this time might be abridged or extended. On the 7th of August, 1942, before the order nisi here in question was made, the Appellate Division had held in *Plourde* v. *Roy* (1) that the *Judicature Act Amendment Act 1942* was *ultra vires*. On the 2nd of April, 1943, after the vesting order, this judgment was reversed by this Court (2), the legislation being held *intra vires*.

The appellants contend that the provisions of the *Judicature Act Amendment Act 1942* were ignored by the learned judge who made the order nisi, owing to the mistaken view of the law which prevailed at that time, and which continued to prevail at the time of the final order. The appellants submit that the order nisi should have prescribed a period of one year for redemption, and that its failure to do so should have been adjusted, on the making on the final order, and that this would have been done had the judge making that order correctly applied the law.

Section 34 reads in part as follows:

(i) Notwithstanding the terms of any order nisi heretofore granted in an action for foreclosure of a mortgage or of any order for specific performance heretofore granted in an action in respect of any agreement for sale of land in any case where no final vesting order or cancellation order has been granted the time for redemption under any such order shall be extended for a period of one year from the date of the coming into force of this Act;

(ii) In any action for foreclosure of a mortgage * * * commenced before or after the passing of this Act, the time to be fixed for redemption by the order nisi in the case of a mortgagee * * * shall be one year from the date of the granting of the order. Provided, however, that in any action coming under the provisions of clauses (i) or (ii) of this paragraph, the judge may, upon application, decrease or extend the said period of redemption having regard to the following circumstances:

(*a*) In case the action is in respect of a security on farm lands, the ability of the debtor to pay the value of the land including the improvements made thereon, the nature, extent and value of the security held by the creditor, and whether the failure to pay was due to hail, frost, drought, agricultural pests or other conditions beyond the control of the debtor.

The notice of motion for the order nisi was dated the 21st of September, 1942, and in addition to other relief, asked for an order

(1) [1942] 2 W.W.R. 607; [1942] 3 D.L.R. 646.

(2) [1943] S.C.R. 262.

fixing a time within which the defendants may redeem, and in default of redemption within the time so fixed, ordering sale of the mortgaged premises.

This notice of motion was supported by an affidavit of the general manager of the respondent company, which produced the mortgage and established the default. There was also an affidavit of value of the mortgaged premises, in which it was stated that the mortgaged premises had a value at a forced sale of $6,500 on terms and of $5,500 for cash. Apart from the mortgaged premises themselves, the only assets of the appellants were some stock and implements. While the mortgage had been originally given to secure the sum of $4,000 payable on the 1st day of November, 1924, the principal had been allowed to remain outstanding and there were substantial arrears. On the 5th of August, 1935, under the provisions of the *Farmers' Creditors' Arrangement Act,* the amount then outstanding was reduced to $6,500, the interest rate being cut from 8 per cent. to 6 per cent. per annum, interest only to be paid in the years 1935, 1936 and 1937 and $250 of principal on the 1st of December in each of the years 1938 to 1947, the balance of the principal to be paid on the 1st of December, 1948. Apart from taxes, the only payment made was interest of $130 which fell due on the 1st of December, 1935. At the time of the application for the order nisi, the amount outstanding on the mortgage was in excess of $9,000.

The Appellate Division held that the learned judge who made the order nisi had in fact abridged the time provided by the proviso to clause (ii) of the amending section, and that if the proper procedure was not followed by way of a special application for an order abridging the time, this was an irregularity which could be waived, and the appellants had not appealed from the order.

While the appeal is from the final order, the appellants found their appeal upon an attack upon the order nisi. Appellants' argument is that (1) the order nisi is void because it is contrary to the amendment to the *Judicature Act* and (2) that by reason of the provisions of rule 609 of the rules of the Supreme Court of Alberta, the judge hearing the application for the final vesting order was not

1945

HALBERT ET AL. v. NETHERLANDS INVESTMENT CO. OF CANADA LTD.

Kellock J.

bound by the order nisi and should have refused to grant a final order. They submit, therefore, that the Appellate Division ought to have set aside the final order.

With respect to the first ground, the appellants submit that the provisions of clause (ii) of the amending paragraph providing for a period of one year for redemption are mandatory and any order made ignoring its provisions is a nullity. They submit that the proviso to clause (ii) is to be left out of account, as no application was actually made under it. It is said that the words "on application" in the proviso require a special notice of motion apart from any notice which is appropriate under the earlier part of the clause, or else if one notice of motion is sufficient, it must specially ask for an order to abridge the period of one year.

When it is seen that the proviso applies to clauses (i) and (ii), the meaning of the words "on application" becomes clear. Where the case is one within clause (i), a special application must be made because the order nisi has already been made. When the case is within clause (ii), however, there is no good reason why the jurisdiction given by the proviso cannot be exercised on the application for the order nisi, and in my opinion the notice of motion given in the case at bar entitled the judge hearing the application to abridge or enlarge the period of one year under the jurisdiction given to him by the proviso. I do not think, therefore, the order nisi can be treated as no order, but that it should be treated as an order made under the jurisdiction which in fact existed: *Ex Parte May* (1). Any objection on evidentiary grounds does not go to the question of jurisdiction: *Rex* v. *Nat. Bell Liquors Ltd.* (2); *The Colonial Bank of Australasia* v. *Willan* (3).

As to the second ground of objection, I think the provisions of rule 609 do not apply. The order not only fixed the amount of the debt, the period of redemption and provided for a sale, but struck out the statement of defence, which had set up the *Debt Adjustment Act 1937* and the

(1) (1884) 12 Q.B.D. 497.
(2) [1922] 2 A.C. 128, at 151 and 152.
(3) (1874) L.R. 5 P.C. 417, at 443.

lack of a permit thereunder. The order finally disposed of the rights of the parties and cannot be regarded as an interlocutory order within the meaning of the rule. The authorities are referred to in the judgment of my brother Estey.

I would dismiss the appeal.

Appeal dismissed with costs.

1945

HALBERT ET AL. *v.* NETHERLANDS INVESTMENT CO. OF CANADA LTD.

Kellock J.

Solicitor for the appellants: *J. P. McCaffery.*

Solicitors for the respondent: *Macleod, Riley, McDermid & Dixon.*

STANLEY ALEXANDER THOMPSON, PERSONALLY AND AS EXECUTOR OF HARRY ALCROFT THOMPSON, DECEASED, AND JOHN A. NORRIS..... APPELLANTS;

AND

EDYTHE G. LAMPORT

AND

CHARTERED TRUST AND EXECUTOR COMPANY AND STANLEY ALEXANDER THOMPSON, SURVIVING EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALEXANDER MONTGOMERY THOMPSON, DECEASED ..... RESPONDENTS.

1944

*Nov. 16, 17

1945

*Feb. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Costs—Trustees—Executors—Direction in will that fund be set apart for benefit of testator's daughter—Executors and trustees of the will also trustees of the fund—Unsuccessful action by daughter against the executors and trustees with regard to the fund as set up—Question out of what fund (said fund or the residuary estate, or both) the solicitor and client costs incurred by the executors and trustees in said action (to the extent that they exceeded the party and party costs) should be paid.

By his will, T., who died in 1929, appointed his two sons and a trust company to be executors and trustees and gave to them all his estate upon trusts, one trust being to set apart for the benefit of his daughter, L., the sum of $100,000, revenue from which was to be paid

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

1945

THOMPSON ET AL. v. LAMPORT ET AL.

to her during her life (should she become a widow she was to receive the corpus). The residue of the estate was to go to T.'s two sons. In 1937, L. brought action against said executors and trustees, as such and also personally, complaining of the inclusion, in a partial setting up of said trust fund in 1929, of a certain mortgage. She asked (*inter alia*) for relief with regard to the inclusion of that mortgage; that an agreement made in 1931, which was in the nature of a family settlement in regard to matters in dispute, and which contained an approval by her of said partial setting up of the fund, be set aside; damages against the executors and trustees personally; and their removal as trustees of said trust fund and the appointment of new trustees. She was unsuccessful in that action. The question now in issue was, out of what fund the solicitor and client costs incurred by the executors and trustees in that action (to the extent that the same exceeded their party and party costs) should be paid. Barlow J. held ([1944] O.R. 31) that they should be paid out of the capital of the said trust fund. The Court of Appeal for Ontario held ([1944] O.R. 290) that they should be paid out of the capital of the residuary estate. The question was brought to this Court.

Held (the Chief Justice and Kerwin J. dissenting): The solicitor and client costs in question should be spread over the capital of the estate, including said trust fund; and should be paid out of the trust fund and the residuary estate proportionately according to their respective values.

Per Hudson J.: It was essential to the success of L.'s action that said agreement of 1931 should be set aside. The Court is now entitled to assume that that agreement served the best interests of all parties, and was not disadvantageous to the trust fund set up especially for L.'s benefit. Under all the circumstances, the executors and trustees were justified in defending the action on behalf of both funds (said trust fund and the residuary estate) as well as on their own behalf.

Per Rand and Estey JJ.: The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly. If the acts of the executors and trustees challenged in said action were properly done within their duty, they were entitled to indemnity for the costs in question within that general principle, without the need of a finding that, in addition to propriety, there was a benefit to the fund as against what was alleged ought to have been done. The indemnity should extend to their whole costs incurred, as their defence personally was merely incidental to that in their representative capacity.

Per the Chief Justice and Kerwin J., dissenting: The solicitor and client costs in question should be paid out of the capital of the residue of the estate. In said action, though the executors and trustees were made defendants both as executors and trustees of the will and as trustees of the fund, any claim set up against them as trustees of the fund should be considered as negligible. If the

action had succeeded, the residue of the estate would have been adversely affected; and the defence was really taken to protect that residue. The principle which determines when liability lies for costs incurred by trustees applies to determine where such liability lies; and an estate which derives the benefit from a defence by trustees ought to bear the expense incurred by it; it would be inequitable to impose the expense of litigation, conducted for the benefit of one estate or fund, upon another.

APPEAL from the judgment of the Court of Appeal for Ontario (1) which allowed an appeal from the judgment of Barlow J. (2) upon an application made in the Supreme Court of Ontario by the surviving executors of the will of Alexander Montgomery Thompson, deceased, for the opinion, advice and direction of the Court upon certain questions.

The said deceased died on or about October 18, 1929. By his will he appointed his two sons: Harry Alcroft Thompson and Stanley Alexander Thompson, and The Chartered Trust and Executor Company, to be the executors and trustees of his will, and gave to them all his estate upon trusts. One of the trusts was to set apart for the benefit of the testator's daughter, Edythe G. Lamport, the sum of $100,000 and to keep the same invested in good legal securities and pay to her $2,500 per year out of the net revenue thereof for ten years, and after the expiration of said ten years she was to receive the full revenue from the $100,000 so set apart for her together with any increase that there might be to the same owing to her receiving only a portion of the net revenue therefrom for the said ten years. The last mentioned full net revenue was to be paid to her for the balance of her natural life only. Should she become a widow she was to receive the corpus of her share in the estate. After her death prior to becoming a widow, the above bequest so set apart for her benefit should revert and become part of the residue of the testator's estate and should be divided equally between the testator's said two sons. The will directed that, after setting apart for the benefit of the testator's said daughter the above bequest of $100,000, all the rest and residue of his estate should be divided between his said two sons in equal shares.

(1) [1944] O.R. 290; [1944] 3 D.L.R. 74.

(2) [1944] O.R. 31; [1944] 1 D.L.R. 354.

1945

THOMPSON ET AL. v. LAMPORT ET AL.

In December, 1929, assets representing the sum of $60,000 were set apart as part of the said Edythe G. Lamport trust fund. (The whole of the trust fund was completed in 1936).

There was an agreement dated August 7, 1931, which was in the nature of a family settlement in regard to matters in dispute, and which contained an approval by Edythe G. Lamport of said partial setting up of the fund.

The said Edythe G. Lamport, on March 19, 1937, brought action in the Supreme Court of Ontario against "Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company, executors and trustees of the last will and testament of Alexander M. Thompson, deceased, and trustees of the Edythe G. Lamport Trust, and the said Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company", complaining of the inclusion in the said partial setting up of the trust fund in December, 1929, of a certain mortgage for $30,000, which she alleged was not a proper security to have been included therein. She asked (*inter alia*) for relief with regard to the inclusion of that mortgage; that the said agreement of August 7, 1931, be set aside, for the reason that, as alleged, she did not have independent advice and was not aware, when she executed the agreement, of the state or condition of the property covered by the said mortgage; damages against the defendants personally; and their removal as trustees of the said trust fund and the appointment of new trustees. In that action she was unsuccessful, at trial and on appeal to the Court of Appeal for Ontario and on appeal to this Court (1). During the course of that litigation the said Harry Alcroft Thompson died, on May 16, 1939, and the said Stanley Alexander Thompson was appointed administrator *ad litem* of his estate.

The party and party costs of the defendants against the plaintiff, Edythe G. Lamport, in that action were taxed (and were being paid by the said plaintiff who was personally liable for them). The solicitor and client costs of the solicitors for the defendants were also taxed (in the presence

(1) [1914] S.C.R. 503, where also the citation is given of the report of the judgments below in that action.

of counsel for the said Edythe G. Lamport, who, however, took the position that there was no right to charge any part of such costs against the trust fund), and exceeded the said party and party costs by $6,596.23. The question arose out of what fund or funds this should be paid.

The present proceedings were begun in the Supreme Court of Ontario by notice of motion on behalf of the surviving executors of the said will, for the opinion, advice and direction of the Court upon questions which in effect were as follows:

(1) Are the executors entitled to recoup themselves in respect to the solicitor and client costs of their solicitors in connection with the aforesaid action, as taxed, out of the income or out of the corpus or out of both the income and the corpus, of the Edythe G. Lamport trust?

(2) If the answer to question (1) is that the executors are entitled to recoup themselves out of both the income and the corpus of the said trust, then on what basis or in what proportions are said costs to be apportioned as between income and corpus?

(3) Are the executors entitled to recoup themselves in respect to said solicitor and client costs, as taxed, out of the income or out of the corpus, or out of both the income and corpus of the residuary estate of the said testator?

(4) If the answers to both question (1) and question (3) are in the affirmative, then on what basis or in what proportion are the said costs to be apportioned as between the said trust and the residuary estate of the said testator?

Barlow J. held that the solicitor and client costs of the executors (over and above the party and party costs, which were being paid as aforesaid) should be paid out of the capital of the Edythe G. Lamport trust. But, on appeal by the said Edythe G. Lamport, the Court of Appeal for Ontario held that they should be paid out of the capital of the residue of the estate of the said testator. The said Stanley Alexander Thompson, personally and

1945

THOMPSON ET AL. v. LAMPORT ET AL.

as executor of the said Harry Alcroft Thompson, deceased, (and John A. Norris, an assignee of certain interests under the will) appealed to this Court.

F. J. Hughes K.C. for the appellants.

J. R. Cartwright K.C. for Edythe G Lamport, respondent.

R. F. Wilson for the executors, respondents.

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

KERWIN J.—This is an appeal from a judgment of the Court of Appeal for Ontario reversing the order of Barlow J. on an originating notice launched by Stanley Alexander Thompson and Chartered Trust and Executor Company, the surviving executors of the estate of Alexander Montgomery Thompson, asking the opinion, advice and direction of the Court upon four questions arising in the administration of the estate.

By his last will and testament, Alexander Montgomery Thompson appointed his two sons, Harry Alcroft Thompson and Stanley Alexander Thompson, and the Chartered Trust and Executor Company to be executors and trustees. He gave to them all his real and personal estate upon trust, *inter alia,* to set apart for the benefit of his daughter, Edythe G. Lamport, the sum of $100,000, and to keep the same invested in good legal securities, and to pay to her the sum of $2,500 per year out of the net revenue thereof, for the first ten years after the testator's death, and thereafter to pay her the full revenue from the $100,000 together with any increase that there might be, owing to her receiving only a portion of the net revenue for the first ten years. It was provided that should his daughter become a widow, then she should receive the corpus of her share in the estate, and that after her death, prior to her becoming a widow, "the above bequest so set apart for her benefit shall revert and become part of the residue of my estate, and shall be divided equally between" the two sons. After the setting apart of the $100,000, the rest and residue of the estate was to be divided between the two sons in equal shares.

1945

THOMPSON ET AL. v. LAMPORT ET AL.

Kerwin, J.

Mrs. Lamport brought an action in the Supreme Court of Ontario against Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company as executors and trustees of the last will and testament of Alexander Montgomery Thompson and as trustees of the Edythe G. Lamport Trust, and the said Harry Alcroft Thompson, Stanley Alexander Thompson and Chartered Trust and Executor Company personally. The defendants severed in their defences, Harry Alcroft Thompson and Stanley Alexander Thompson being represented by one firm of solicitors, and the Trust Company by another. Harry Alcroft Thompson died but proceedings were continued against the remaining defendants and also Stanley Alexander Thompson as administrator *ad litem* of his brother's estate. The Thompsons by their defence denied that they ever were trustees of the fund while the Trust Company pleaded that the trust fund had been duly and properly completed pursuant to the terms of the will and of a certain family settlement. It must now be taken that the trust fund was duly set apart and that the Thompsons and the Trust Company were trustees thereof as well as executors and trustees of the will.

Mrs. Lamport failed in her action, at the trial, in the Court of Appeal for Ontario and in this Court, with the result that she found herself obligated to pay the party and party costs of the defendants. On the taxation of these costs, it was determined ultimately by the Court of Appeal that the severance by the defendants in their defences was justifiable. The total amount of the party and party costs either have been paid or will be paid by Edythe G. Lamport or from her income from the trust fund. Each set of defendants, however, had a solicitor and clients' bill of costs, and the total of these, after crediting the party and party costs, amounts to $6,596.23.

The questions asked on the originating notice were whether this sum should be paid out of the Edythe G. Lamport Fund or the residue of the estate of Alexander Montgomery Thompson and in either case whether it should be paid out of capital or income. Barlow J. and the Court of Appeal determined that this sum really belonged to the category of costs, charges and expenses

1945

THOMPSON ET AL. v. LAMPORT ET AL.

Kerwin, J.

which the trustees were entitled to charge against the capital of the residuary estate or of the trust fund, as they were entitled to defend Mrs. Lamport's action. No doubt has been raised before us as to the correctness of these findings. However, Barlow J. further held that, while the trustees' defence to the action was for the benfit of the estate, it would be inequitable that the residue should bear the costs since the litigation was with respect to the fund. He directed that the questions be answered accordingly and that the costs of all parties of the motion be paid out of the capital of the fund, those of the executors to be taxed and allowed as between solicitor and client.

The Court of Appeal allowed an appeal by Mrs. Lamport and directed that the sum of $6,596.23 be paid out of the capital of the residue of the estate and that the costs of all parties of the motion and appeal be paid out of that capital, those of the executors to be taxed and allowed as between solicitor and client. They decided that the principle which determines when liability lies for costs incurred by trustees applies to determine where such liability lies; that an estate which derives the benefit from the proceedings defended by trustees ought to bear the expense of them, and that it would be inequitable to impose the expense of such litigation, conducted for the benefit of one estate or fund, upon another. With that determination I agree, and also with the statement that the very essence of Mrs. Lamport's action was to impeach the family settlement made between Mrs. Lamport, her brothers, and the executors of the will (whereby the partial setting up of the fund had been approved), and that, if that action had succeeded, the residue of the estate would be adversely affected.

The trustees for the fund were the same as the executors and trustees of the estate. Counsel for the appellants suggested that if there had been a separate trustee for the fund, it could not be argued that at least the costs, charges and expenses of that trustee could be charged otherwise than to the fund itself. However, if there had been a separate trustee, he might not have been made a party or, if so, only *pro forma*. As it was, the main claims were in connection with the setting up of the trust fund and the approval of part of it by the family settlement and, although the same individuals who were executors and

trustees of the will were made parties as trustees of the fund, any claim set up against the latter should be considered as negligible. The steps taken by the executors and trustees of the will were really taken to protect the residue of the estate.

The case of *In re Chennell* (1) was relied on. There, however, to refer to the headnote, a mortgagee of a share of the proceeds of a real estate devised in trust to sell and to invest the proceeds in government or real securities commenced an action against the mortgagor and the trustee of the will alleging that the money had been invested upon improper securities. Shortly after an order had been made directing accounts and inquiries, and reserving further consideration, the trustee paid into court the amount of the mortgaged share and paid to the other beneficiaries their shares. The plaintiff mortgagee was a solicitor and the way in which the action was looked upon may be gauged by the remarks of Lord Justice James in the Court of Appeal, at page 509, where he says, referring to the plaintiff:—

> He would, I am satisfied, have had his full share of the money without the slightest difficulty and without any expense; and I believe that this action would not have been brought if he had not read some books on trusts, and thought that he, being a solicitor, would make a little profit out of it.

When the matter was before Vice-Chancellor Hall, he stated, at page 499:—

> But, having regard to the form of the order taken by the plaintiff, I do not conceive that he took an administration which applied to the whole of the trust estate, or that he put the estate in a position of having the whole of the accounts gone into.

In the Court of Appeal, the Master of the Rolls remarked at page 508:—

> Now, the Vice-Chancellor came to the conclusion that the action was hastily and improperly instituted, and also was not properly conducted. Having arrived at that conclusion he gave the defendant his costs as against the plaintiff by allowing them to be deducted out of the share to which the plaintiff was entitled.

The decision is not an authority for anything to the contrary of what has been stated.

In the Court of Appeal for Ontario, the decision of the Judicial Committee in *Patton* v. *Toronto General Trusts Corporation* (2) was referred to as indicating that

(1) (1878) 8 Ch. D. 492. (2) [1930] A.C. 629.

1945

THOMPSON ET AL. v. LAMPORT ET AL.

Kerwin, J.

the Edythe G. Lamport Fund could not be made liable for the costs in question because there would be thereby indirectly imposed on Mrs. Lamport an obligation which could not properly have been imposed in the action. The reference is apparently to the following statement at page 639:—

> As for an order directing the appellant to pay any costs of the executors as between solicitor and client, their Lordships know of no principle upon which such an order could have been supported. As against an opposite party executors are no more entitled to solicitor and client costs than is an individual litigant.

This was said in connection with proceedings which had commenced with an originating notice for construction of a will and in which no order had been made that the appellant should pay the costs of the executors as between solicitor and client. In the present appeal we have not to consider the bearing of this dictum because all the judgments in Mrs. Lamport's action directed only party and party costs. In view of several decisions as to the power of a court of equity in certain circumstances to direct payment by a party to litigation of solicitor and client costs, I reserve my opinion until the occasion should arise, as to the extent to which the statement referred to may be applicable.

The appeal should be dismissed, with the costs of all parties to be paid out of the residue of the Alexander Montgomery Thompson estate, those of the executors to be taxed as between solicitor and client.

HUDSON J.—I have had an opportunity of reading the judgment prepared by my brother Rand and concur in his proposal for the disposition of this appeal.

It was essential to the success of Mrs. Lamport's action that she should first set aside the agreement between her and her brothers and the trust company.

This agreement was in the nature of a family settlement of matters which had been long in dispute. It was arrived at after prolonged negotiations and with independent advice. There is no finding that it was unfair or unreasonable and I think we have a right to assume that it served the best interests of all parties. The fact

that Mrs. Lamport, some years later, sought to set it aside, is not convincing evidence that it was not advantageous to the trust fund set up especially for her benefit.

Under all the circumstances, it seems to me that the trustees were justified in defending the action on behalf of both funds as well as on their own behalf.

The remarks of Lord Lindley in *In re Beddoe* (1) seem to me to be pertinent. He said at page 558:

> Such an indemnity [meaning costs paid out by the executor for the defence of an action against the fund] is the price paid by *cestuis que trust* for the gratuitous and onerous services of trustees; and in all cases of doubt, costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred".

I do not see that there is anything in this view that is in conflict with the decision of the Court in the case of *Walters* v. *Woodbridge* (2).

The judgment of Rand and Estey JJ. was delivered by

RAND J.—This appeal concerns the recoupment of the excess of solicitor and client costs over party and party costs in an action against executors and trustees by the *cestui que trust* of a special trust fund of $100,000 which under the will was to be set up from assets of the estate. The action was brought by the respondent Lamport against the appellants, her brothers, and the Trust Company, the executors and trustees. The relief claimed was, (*a*) the setting aside of an agreement made in 1931, two years after the death of the testator, which both modified the terms of the will and confirmed certain action of the executors, with relation to the special trust and the respondent as beneficiary thereunder, and specifically made the remaining assets of the estate, placed in the hands of the Trust Company, a security for the completion of the fund; (*b*) a direction to the executors and trustees "to set apart and appropriate out of the assets of the estate" the full amount directed for the trust; (*c*) a further direction to them to fulfil the covenant of the testator in a mortgage which formed the largest item of the assets appropriated to the trust; (*d*) damages

(1) [1893] 1 Ch. 547. (2) (1878) 7 Ch. D. 504.

1945

THOMPSON ET AL. v. LAMPORT ET AL.

Rand J.

against them personally for any ultimate deficiency; (*e*) and finally, an order for their removal and the appointment of new trustees of the special trust. All of this relief except the last item depended upon getting rid of the agreement: part of the relief, therefore, items (*a*) and (*e*), the vital part, was in respect of the trustees and the special trust and could have been made the subject matter of an independent action; item (*c*) called for action by the trustees against the residue; item (*b*) for the further appropriation of assets from the residue to the trust; and (*d*) concerned the executors and trustees personally. The action was dismissed with costs. The main ground of the judgment, affirmed both in the Court of Appeal and in this Court, was section 46 of *The Limitations Act* which required, as a condition of relief under it, that the interest of the beneficiary should have been in possession. It was held that that possession was present in the life interest of the respondent in the special trust funds. The estate as a whole, including the special trust, was, therefore, in the litigation and it was with reference to that entirety that the court was asked to act.

By the terms of the special trust, the respondent was to be paid the sum of $2,500 a year for ten years and thereafter the entire income from the fund during her lifetime. If she survived her husband, the corpus was to go to her but, if she predeceased him, the capital was to revert to the residue, of which the appellant brothers were the sole legatees.

The costs were taxed as between party and party against the respondent and they are in fact being paid out of the income accruing to the respondent from the special trust. The solicitor and client costs were also taxed and it was proposed that the difference between the two amounts should be recouped out of the trust funds. On the objection of the respondent, these proceedings were launched by originating summons. It came on before Barlow J., who held the executors and trustees entitled to recover the excess out of the capital of the special fund; on appeal, this was reversed and reimbursement directed out of the residue, and from that order the question is brought to this Court.

The judgment of the Court of Appeal is based upon these assumptions: there were two distinct funds, the residue and the special trust; that is was the duty of the appellants and the Trust Company to defend the residue and themselves; in contesting the litigation successfully, the appellants had benefited the residue which should, therefore, bear the expense; and to permit solicitor and client costs to be recovered against the sister by resorting to the trust funds of which she was the beneficiary, would be to condemn her to solicitor and client costs in violation of the rule laid down in *Patton* v. *Toronto General Trusts Corporation* (1).

The position of the residue at that time should perhaps be stated. The action was brought more than seven years after the death of the testator. So far as appears from the record, the duties of the executors had at that time been fully discharged. The accounts were then before the Surrogate Court and the order made on March 30, 1937, about eleven days after the issue of the writ, declared the fulfilment of the direction to set up the trust and provided for allowances to the executors. It seems to be clear, too, that the appropriation to the trust was completed in 1936. From 1931 until that year the duty of the Trust Company towards the assets of the estate had been largely, if not wholly, that appropriation for which, under the agreement, it held the assets in its own name as a special security for the trust. What then remained was simply property owned jointly by the appellants. But, on the other hand, the legal title and possession continued in the executors, including the Trust Company, and the property was, therefore, exposed to any residuum of duty which, in such an action as was brought, might be held by the court to be outstanding towards the trust.

It is desirable also, I think, to keep in mind the precise relation of the executors towards the estate assets vis-à-vis the special trust. By the terms of the will they were bound to set up the trust from those assets. Their paramount duty was towards the respondent, the sole beneficiary, subject to the contingent interest of the appellants. That duty dominated their dealings with the assets: the question was whether they had discharged it:

(1) [1930] A.C. 629.

1945

THOMPSON ET AL. v. LAMPORT ET AL.

Rand J.

they must exercise it against the residue: they could not, of course, go beyond it: but their defence was an assertion of the fulfilment of their duty to the trust rather than a performance of any duty to protect the residue.

Nor can I quite appreciate the reference to a duty to "defend themselves". Certainly it was their interest to do so, but the word in such a context can scarcely carry a fiduciary signification.

The rule laid down in the Court of Appeal was that a trustee must show that his action is for the "benefit" of a trust before his expenses can be recouped from it and that here the only benefit from his resistance to the claims made accrued to the residue. The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly. The original jurisdiction in equity in unsuccessful suits against a trustee went so far as to enable the court to give a personal judgment against not only the *cestui* but third persons for solicitor and client costs. This is put beyond doubt by *Andrews* v. *Barnes* (1); and from the authorities there cited, in proceedings by the *cestui* charging misconduct against the trustee, in the absence of special circumstances, such an order followed where there was no fund. By reason of special statutory provisions as to costs, the jurisdiction of the Supreme Court of Ontario does not apparently extend to such a power (as to which I express no opinion), but a trustee's rights to allowances out of trust funds are in no respect abridged.

The rule applied is based upon *Walters* v. *Woodbridge* (2), the facts of which were somewhat similar to those here. The trustees had obtained from the court approval for the sale of a partnership interest, owned by the testator, to the surviving party, the proceeds of which were then to be held subject to the trusts of the will. A bill was subsequently filed by certain of the beneficiaries to have the decree set aside, alleging that the approval of the

(1) (1888) 9 Ch. D. 133. (2) (1878) 7 Ch. D. 504.

court had been obtained by misrepresentation. This bill was dismissed with costs. They were taxed and execution issued, to which *nulla bona* was returned. An application was then made to have costs in the suit, as between solicitor and client, taxed and paid out of the estate. Lord Romilly considered he had no jurisdiction to make such an order for the reason that the suit was defended by the trustee to clear his own character. On appeal that holding was reversed and, in his reasons, James, L.J., used this language:

> It is agreeable to me personally that we are not obliged to put a trustee in a position which would be disgraceful to the administration of justice. The Court is very strict in dealing with trustees, and it is the duty of the Court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust. Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts; and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs.

It will be seen that it was the challenged act that carried the advantage and not the mere result of the trustee's successful defence of an adverse proceeding: and that the relief sought was the direct setting aside of the trustee's act.

Now, what are the characteristics of this benefit? There the proposed sale required the prior approval of the court, and the effect of the judgment dismissing the bill was to confirm that approval. But what of the case where the trustee carries through a transaction which does not require such an approval? What is to be the measure or test of benefit? Can it be anything more than that the act was properly done within the duty of the trustee? Must the court examine the details of the transaction challenged and find not only propriety but a "benefit" as against what is alleged ought to have been done?

Where the trustee is resisting the assertion of a right by a third person against the trust estate, obviously his action is for its benefit. But a new element is introduced when the complaint is by the beneficiary for a breach of duty, such as fraud or negligence. In that case

1945

THOMPSON ET AL. v. LAMPORT ET AL.

Rand J.

the trustee is in fact defending both his administrative act and his own interest. In the latter aspect, he has no special privilege in costs over an ordinary litigant: he is in the same position as any other person improperly accused of a wrong, and any outlay over the costs allowed by law must be borne by himself as the price of his own vindication. The question in such cases is whether the personal defence is incidental to that in his representative capacity: if it is, the costs will not be split.

From this the Court of Appeal has drawn the conclusion that in suits by beneficiaries it must appear that the defence is for the benefit of the trust in virtually the same sense as in cases brought by third persons: that the trustee is warding off an attack upon his funds: and the court in fact looked upon the litigation as essentially, if not exclusively, a claim against the residue. But, with the utmost respect, that is not, in my opinion, the principle of *Walters* v. *Woodbridge* (1) where, as here, the court is called upon to determine whether an act or transaction carried through by the trustee can be said to have been done within his authority and duty: and where the undoing of the act is the direct object of the litigation. Stirling J., in *In re Llewellin, Llewellin* v. *Williams* (2), uses this language:

> A trustee is entitled in an ordinary case to recover out of the trust estate, as charges and expenses properly incurred, all his costs of an action which he has properly defended; of which the case of *Walters* v. *Woodbridge* (1) is a very strong illustration.

And the same rule was applied in *In re Chennell, Jones* v. *Chennell* (3), and *Bartlett* v. *Wood* (4).

There remains the question of the effect of the *Patton* judgment (5) mentioned in the reasons of Laidlaw J.A. In that case it had been suggested in the courts below that an order could properly have been made giving solicitor and client costs to the executors against one who claimed to be a legatee. In the Privy Council this legatee succeeded in his contentions but it was there intimated that there would have been no more authority to award to executors such costs than to an ordinary litigant. There was no question, however, of strictly equitable costs out

(1) (1878) 7 Ch. D. 504.
(2) (1887) 37 Ch. D. 317, at 327.
(3) (1878) 8 Ch. D. 492.
(4) (1860) 30 L.J. Ch. 614.
(5) [1930] A.C. 629.

of funds. As *Walters* v. *Woodbridge* (1) shows, party and party costs can be supplemented out of the trust estate, and as Mellish L.J., in *Mordue* v. *Palmer* (2) observes,

> The Common Law Courts have no power to give costs between solicitor and client * * * But it is otherwise with Courts of Equity.

A fortiori those costs can be charged as expenses upon trust assets.

The property concerned was that in existence on March 19, 1937, when the proceedings were commenced. Anything beyond that was personal liability of the executors and trustees. The capital of the estate, including the special trust, has remained intact to the present time, and the indemnity must be spread over it. Taking all circumstances into account, the two funds are roughly in the relation of four to one and in these proportions should the costs be borne.

The appeal should, therefore, be allowed and judgment go declaring the difference between party and party and solicitor and client costs of the trustees and executors in the previous action as well as all costs of all parties to these proceedings (as between solicitor and client in the case of the executors and trustees) be payable four-fifths out of the capital of the trust fund and one-fifth out of the residue.

Appeal allowed. Judgment declaring the difference between party and party and solicitor and client costs of the trustees and executors to be payable out of the capital of the two funds, as well as the costs in all Courts of all parties to these proceedings (the executors' and trustees' costs to be as between solicitor and client) in the proportion of four-fifths out of the trust fund and one-fifth out of the residue.

Solicitors for the appellants: *Hughes, Agar, Thompson & Amys.*

Solicitors for the respondent Lamport: *Lamport, Ferguson & Co.*

Solicitors for the respondent Executors: *Day, Ferguson, Wilson & Kelly.*

(1) (1878) 7 Ch. D. 504.

(2) (1870) L.R. 6 Ch. App. 22, at 32.

1945

*Feb. 20, 21
*Mar. 23

J. J. HOEFLE (PLAINTIFF)..... APPELLANT;

AND

BONGARD & COMPANY (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Construction—Alleged breach—Whether contract ambiguous—Extrinsic evidence—Conduct of parties—Party not replying to letters from other party which assumed rights consistent with latter's contention as to effect of the contract.

The action was for damages for alleged breach of agreement.

Plaintiff had long been a customer of defendants, a firm of brokers. At the time of the agreement in question defendants had been carrying an account in plaintiff's name on which there was a debit balance of $180.11, but in respect of which they held 500 shares of a mining stock owned by plaintiff. They had also been carrying an account in the name of W., who, though she might herself instruct defendants, had authorized them to accept instructions from plaintiff on her behalf. In W.'s account there was an unsecured debit balance of $687.40, for payment of which defendants were pressing. Defendants held from each of them a "customer's card" authorizing defendants to sell securities without notice whenever they deemed that necessary for their own protection.

On May 18, 1940, plaintiff addressed to defendants a document as follows: "This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of [W.]. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of [W.] without my instructions and consent, and that no further obligation be presumed against me in any way whatever". Defendants transferred plaintiff's account (including the debit balance against plaintiff and said shares) into the account of W. At that time the market value of the shares was approximately equal to the said debit balances now consolidated.

The market price of said shares declined. On May 30, 1940, defendants wrote to plaintiff that at the then market price of the shares W.'s account showed a certain deficit and "no doubt you will wish to adjust this, as well as supply some margin for" the shares. On June 18, 1940, defendants wrote to plaintiff: "We have for some time now been carrying a deficit in the account of [W.] which was occasioned by your request to not sell the [said shares] which you gave to the [W.] account. Had we sold it at the time you deposited this stock as collateral to the account there would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately if there is to be no further action taken in this regard". On July 19, 1940, defendants wrote notifying W. that as she had not responded to their margin calls, they would handle the liquidation of said shares at their absolute

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

discretion, looking to her for any remaining deficit. Plaintiff received said letters to him, and a copy of said letter to W.; but made no reply. On July 27, 1940, defendants sold the shares. Plaintiff was notified of this, and wrote to defendants protesting against the sale as being contrary to the agreement expressed in said document of May 18, and asked defendants to replace the shares into the W. account. In May, 1941, he sued defendants for damages. His action was dismissed at trial and the dismissal was affirmed (by a majority) by the Court of Appeal for Ontario, and he appealed to this Court.

Held (affirming the judgments below): The action should be dismissed. Rand J. dissented.

Per Kerwin and Taschereau JJ.: The provision against further "alterations or dealings", in said document of May 18, meant that plaintiff desired to protect himself against the possibility of W. indulging in future trading. On the only reasonable construction of the document, defendants were entitled at any time to sell the shares under their general powers under said "customer's card" signed by W.

Per Kellock J.: When said document of May 18 is brought into relation with the circumstances existing at its date, an ambiguity is produced as to whether the sale by defendants was or was not a violation of its terms. In such case extrinsic evidence was admissible for solving such ambiguity; and did so in defendants' favour: the reasonable inference from plaintiff's failure to reply to defendants' said letters between May 18 and July 27 is that plaintiff put the same construction upon the document of May 18 as he knew they were putting upon it.

Per Estey J.: The effect of the agreement made by said document of May 18 and its acceptance, in the light of the facts and circumstances in evidence, was that thereafter all dealings on the account would be by plaintiff only, acting under his authority from W.; that the shares were held as security for the total of both debit balances, and were subject to the terms of the "customer's card" signed by W., and could be sold as they were sold by defendants. If the document of May 18 be regarded as ambiguous, as it might well be, the subsequent conduct of the parties might be examined to assist in construing it; and in the light of defendants' said letters, which indicated their belief in their right to sell, and the ignoring of them by plaintiff, the effect of said document of May 18 and its acceptance must be taken to be as above stated.

Per Rand J., dissenting: On the proper construction of said document of May 18, the account of W., after plaintiff's account, including the security, was transferred to it, was in its entirety to remain as it was; the prohibition against "further alterations or dealings" extended not only to action by W. but to action by defendants in relation to the security. As to defendants' said letters to plaintiff: that of May 30 contains no reference to sale without consent; that of June 18, written from defendants' head office in Toronto whereas plaintiff's dealings had been with their branch office at Windsor, was evidently, from circumstances appearing in the evidence, written merely on the assumption of a case of ordinary collateral and the usual power of sale, and was not intended to indicate an interpretation of the docu-

1945

HOEFLE v. BONGARD & COMPANY

ment of May 18; also, to consider such communications as raising an obligation to reply on pain of an adverse inference is, in the particular situation, a perversion of the rule by which conduct may be shown; the rule that conduct in performance of a contract participated in by both parties may be used to resolve ambiguity, can have no application to the facts here. There was an "alteration" and "dealing" by defendants in violation of the agreement, and plaintiff was entitled to damages. (Rules and considerations in determining damages in such a case, and with regard to the position and conduct of the parties, discussed. Plaintiff should have judgment for the value of the shares at the time of trial plus the amount of a dividend paid on the shares, less the total indebtedness of the W. account with interest thereon).

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario dismissing (*per* Riddell and Fisher JJ.A.; Laidlaw J.A. dissenting) his appeal from the judgment of Plaxton J. at trial dismissing his action for damages for alleged breach of a certain agreement. The agreement, together with other facts and circumstances of the case, are set out in the reasons for judgment in this Court now reported. Leave to appeal to this Court was granted by the Court of Appeal for Ontario. The appeal to this Court was dismissed with costs, Rand J. dissenting.

S. L. Springsteen K.C. for the appellant.

G. D. Watson for the respondent.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.—This appeal is concerned with the proper interpretation of a document signed by the appellant on May 18th, 1940, and addressed to the respondent in the following terms:—

> This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of Hazel G. Weeks. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent, and that no further obligation be presumed against me in any way whatever.

If the meaning of this document is clear, we need not then concern ourselves as to the admissibility and effect of certain evidence introduced by both parties, but it is of importance to understand the circumstances under which the document was given by the appellant and accepted by the respondent.

Bongard and Company is a firm name under which a brokerage business is carried on, with offices in Toronto and Windsor, in the Province of Ontario. The appellant resides in Detroit and for a number of years has carried on an extensive business with the respondent at its Windsor office. Before that, he had been himself connected with a brokerage firm in the United States, and there is no doubt that he is thoroughly familiar with stock exchange transactions. Mrs. Hazel G. Weeks, also residing in Detroit, was a friend of the appellant, whom he introduced to the respondent some years ago, and thereafter Mrs. Weeks traded extensively on the stock exchange through Bongard and Company's Windsor office. By May 12th, 1940, Mrs. Weeks' account with the respondent showed a debit balance of $19,196.27 against which the latter held shares of stock. These shares were sold by the respondent under its general powers and the net result, after these sales and a further debit of $974, was that at the close of business on May 17th, 1940, Mrs. Weeks owed the respondent the sum of $561.77 and interest of $125.63, making a total of $687.40. As of the same date the appellant owed the respondent $180.11, as security for which the respondent held 500 shares of a stock known as San Antonio.

The appellant was the only person who gave evidence at the trial, and, according to his testimony, the respondent made a demand upon Mrs. Weeks for the payment of the amount owing by her and "she at that time was financially quite embarrassed and hardly in a position to take care of it." There was no market in the United States for the San Antonio shares and under Canadian regulations the appellant could not sell them unless he purchased other shares in Canada. Under these circumstances, the appellant told the Windsor Manager for Bongard and Company "that I would make a gesture myself that might satisfy everybody by simply transferring my 500 shares of San Antonio into the account of Mrs. Weeks", and the document of May 18th, 1940, was then written out by the appellant and signed by him.

There is no doubt that this document authorized the respondent to transfer to Mrs. Weeks' account the debit balance against the appellant and also the San Antonio

1945

HOEFLE v. BONGARD & COMPANY

Kerwin J.

shares. This the respondent did, and whether the result was that Bongard and Company had thereby given up its right to claim payment from the appellant of the sum of $180.11, certainly the shares were then held by the respondent as security for the total debit balance of Mrs. Weeks' account, which as a result of the transfer was increased to $867.51.

On May 30th, 1940, the respondent wrote the appellant as follows:—

With San Antonio quoted at $1.35, Mrs. Hazel G. Weeks' account shows a deficit of around $75 and no doubt you will wish to adjust this, as well as supply some margin for the 500 San Antonio.

You will have noticed that since we were obliged to take action on this account and sell out the securities Ventures has been selling at times under $2. Therefore, if Mrs. Weeks is in a position to raise funds there has been plenty of opportunity to repurchase this stock at lower levels than prices which we obtained when selling out this security.

Trusting you may be in a position to supply trading funds again for this account, and with kindest personal regards, believe us

Yours faithfully,

On June 18th, 1940, the following letter was sent by respondent to appellant:—

We have for some time now been carrying a deficit in the account of Mrs. Hazel Weeks which was occasioned by your request to not sell the San Antonio which you gave to the Weeks account. Had we sold it at the time you deposited this stock as collateral to the account there would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately if there is to be no further action taken in this regard.

Will you please give this matter your usual courteous and early attention, and oblige.

On July 19th, 1940, the respondent wrote Mrs. Weeks the following letter:—

As you have not responded to our margin calls, we beg to notify you that we will handle the liquidation of San Antonio at our absolute discretion.

Certainly if this stock approaches a price that will liquidate the deficit in your account we shall take full advantage of it, but this will not prevent us from liquidating the stock, as above stated, at our absolute discretion, and looking to you for any remaining deficit.

Please be governed accordingly.

The appellant admitted that he received the first two letters and that he was aware that Mrs. Weeks had received the one addressed to her. He made no reply and it was only after the respondent had sold the shares on July 27th, that

he complained that the respondent had no authority to sell them. Some time later, this action was brought for specific performance of the agreement of May 18th, 1940, or for damages. The claim for specific performance was definitely abandoned before us but the claim for damages was pressed.

It was argued that as the word "account" in the appellant's authorization to the respondent to transfer "my account in its entirety as it stands to-day" included the San Antonio shares, the word "account" when used in the second sentence whereby the provision or condition upon which the transfer was authorized "that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent" must have the same meaning. I cannot agree. No doubt both the appellant and Mrs. Weeks were hopeful that prices on the stock exchange would shortly become more favourable. The fact that Mrs. Weeks' account showed a debit of $867.51 is no argument against properly construing the words "alterations or dealings" as meaning that the appellant desired to protect himself against the possibility of Mrs. Weeks indulging in future trading as a result of her supplying funds to Bongard and Company or of the appreciation in value of the San Antonio shares. While some time before Mrs. Weeks had authorized the appellant to give instructions to the respondent to buy and sell on her account, she still had the right, which she had exercised from time to time, of giving instructions herself to the respondent.

It was also argued that the only effect of the letter of May 18th, 1940, was to authorize the respondent to add the appellant's debit of $180.11 to Mrs. Weeks' debit of $687.40 and to retain as security for the payment of this sum the San Antonio shares. The respondent could never, it was said, use those shares for any purpose without the appellant's consent, which consent might never be given.

It is impossible, in my view, so to construe the document. While undoubtedly the respondent hoped to retain the appellant (if not Mrs. Weeks) as a customer and both parties expected that the respondent would in the future treat the appellant fairly, if not generously, as it had in the past, the only reasonable construction of the document, in my opinion, is that the respondent was entitled at any time to

1945
HOEFLE
v.
BONGARD
&
COMPANY
Kerwin J.

sell the San Antonio shares under the general powers that it had by virtue of the usual Customer's Card, signed by Mrs. Weeks. If it did not have that power, the document was a futile gesture on the part of the appellant.

In this view it is unnecessary to say anything on the questions of evidence referred to at the commencement of this judgment except that even if the document of May 18th were ambiguous the respondent's inter-office correspondence does not bear the construction put upon it by the appellant. The appeal should be dismissed with costs.

RAND J. (dissenting)—The circumstances of the transaction giving rise to this litigation were these. The plaintiff, appellant, was on May 18th, 1940, indebted on a general balance to the defendants, stock brokers, at their branch office in Windsor, Ontario, for $180.11. This was secured by five hundred shares of San Antonio mining stock, then selling on the market at $1.80 a share. At the same time an account was being carried for a Mrs. Weeks which, during a week or so before, in a period of price slump, had been closed out by a sale of collateral which had had an original market value of about $34,000. There remained a debit balance of approximately $675, for which the defendants had only the personal liability of Mrs. Weeks, and it is not suggested that, at the moment at least, any value was placed on that. The plaintiff had had a general power of attorney in relation to the Weeks account, and was evidently desirous both to save Mrs. Weeks the embarrassment of being pressed by her creditors and to give to the latter some tangible assurance that their debt would ultimately be paid. He agreed, therefore, after discussion, that his account and security should be transferred to the Weeks account and a document was signed by him reading as follows:—

Bongard & Company, May 18, 1940.
Windsor, Ontario.
Gentlemen:

This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of Hazel G. Weeks. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent, and that no further obligation be presumed against me in any way whatever.

Yours truly,
John J. Hoefle.

No restriction was placed on action by the defendants against Mrs. Weeks.

On July 27th, 1940, the defendants sold the shares without the plaintiff's consent for a sum which realized less than one dollar more than what was then due in the consolidated account. The plaintiff protested this action by a letter written on August 8th in which he requested the stock to be restored to the account. On November 14th a further demand was made that the stock be replaced and that a dividend declared in the meantime be credited to that account. In May, 1941, the writ was issued; the statement of claim was delivered in November, 1941, and the trial took place in September, 1943.

Both the plaintiff and Mrs. Weeks had signed the general security form of the defendants, relating to their individual accounts. The question is whether the transfer of the security to Mrs. Weeks' account brought it immediately under that general power to sell or whether the defendants were restricted to a sale with the consent of the plaintiff either by the terms of the memorandum or otherwise.

The first question is whether the transfer of the security is within the language of the memorandum. If it is not, then the terms on which it was made were oral and on the evidence of the plaintiff, which is all we have, his contention is established.

But the respondents agree that it is covered by the memorandum and that the word "account" as used in relation to the plaintiff must be taken to include "security." Obviously the words "in its entirety" go to that scope; and just as clearly "the account of Hazel G. Weeks" carries the same signification. That was the holding of Laidlaw J.A. in the court below and I agree with him that it determines the issue; but, in view of differences of opinion, a somewhat close analysis of the language of the memorandum, though distasteful, seems to be desirable.

The word "account" may refer either to the written record of transactions between the parties, ledger or other form, with its incidents such as security, power of sale, etc.; or to the written record alone. The former needs no elaboration but I should observe that only in this sense could the power of sale given by Mrs. Weeks be connected

1945

HOEFLE v. BONGARD & COMPANY

Rand J.

with the plaintiff's security. The scope of the latter is shown by the account actually kept by the respondents. It was as follows:—

BONGARD & COMPANY
80 King Street West
Toronto 2, Canada

To:
Mrs. Hazel G. Weeks

Date	Bot	Sold	Stock	Price	Debit	Credit	Balance
May			* * *				
20	500		San Antonio— Transf'd from J. J. Hoefle a/c		180.11		
			Tax re above transfer		2.50		
			Int. 5½% to May 15th		125.63		125.63
							687.40
							870.11
June 15			Int. 5½%		10.59		880.70
July 15			Int. 5½%		3.98		884.68
27		500	San Antonio	1.80		887.50	
30			Int. 5½%		2.00		Cr. .92

POSITIONS:

May 13th, 1940,
Long: 8900 Ventures
Short: 500 San Antonio

July 30th, 1940,
Flat.

From this it will be seen that, when transferred, the shares of San Antonio were entered in the "bot" column, and that, upon the sale, an entry was made both in the "sold" and in the "credit" columns. The shares themselves and the dealings in them were thus made part and parcel of the account in both aspects and the language used by the appellant was in strict accordance with brokerage nomenclature.

There are, then, the remaining words of the memorandum, "no further alterations or dealings." The word "alterations" in either sense of "account" presents no difficulty. "Dealings" in the "account (including security)" is likewise free from doubt; and, in the aspect of record only, a moment's examination will show it to be equally so. In that sense, "alterations" and "dealings" are correlatives; the former refers to the written entries,

the latter to the transactions giving rise to them. But as the "account" contains the record of transactions in the security as well as in share trading, the scope of "dealings" is likewise fixed.

What the memorandum provides is, therefore, this: there are to be no further alterations or dealings in the "account (including security)"; or, in the second aspect, no alterations in the record, or dealings in the transactions recorded. Apart from the general power of sale, these alternatives equally distribute the entire field.

Now, can it be seriously suggested that "dealings," in its plain and ordinary sense, cannot apply appropriately to transactions in the security? And, if not, what more is there to be said as to the effect of the memorandum? There is said to be ambiguity. I venture to suggest that, if the letters, to which I shall refer later, were not before the court, we would not have heard of ambiguity. But it has been raised and I deal with it.

So far as I understand it, the equivocal word is "dealings", and the equivocation between either trading transactions or security transactions, the answer to which is that it applies to both; or between both and trading transactions exclusively, to which I should say that, if the term can fairly apply to both, which I consider indisputable, the alternative is purely gratuitous.

The opposite view appears to be this: "dealings" is the dominant word; it means "trading transactions": it controls "alterations"; and the latter must, therefore, be limited to accounting changes in relation to trading transactions. But why not the converse? Can we not "deal" with the security? What is there in the words or the context to attribute dominance to the one or the other? If there was the slightest doubt whether "dealings" extends to all transactions—a possibility which I reject—I should have thought, on the contrary, that the ordinary meaning of "alterations," being perfectly clear, and applying to all items, would have determined the sense in which "dealings" was used; that the scope of the former being unquestionable, the latter as a complementary term and conceivably doubtful, would be resolved as equally extensive. But the converse process is used; the doubtful term gives limitation to the certain.

1945

HOEFLE v. BONGARD & COMPANY

Rand J.

But the assumption that "dealings" is dominant arises in fact only after we have gone outside of the memorandum and decided that what the parties really intended to do was only to restrict "trading transactions" on the part of Mrs. Weeks. Having so determined that intention, we impose it on the essential words and distort the plain meaning of both of them in the course of doing so. But we must ascertain the intention of parties from the language they have used, not fix the meaning of that language by a predetermination of what they really had in mind.

The inference against the plaintiff is drawn from his failure to reply to two letters sent him by the respondents. The first, dated May 30th, contains not the slightest reference to sale without consent. It is a request for further security and an invitation to further trading. The second, of June 18th, is as follows:—

> We have for some time now been carrying a deficit in the account of Mrs. Hazel Weeks which was occasioned by your request to not sell the San Antonio which you gave to the Weeks account. Had we sold it at the time you deposited this stock as collateral to the account there would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately if there is to be no further action taken in this regard.

These letters, I do not doubt, are in the true tradition of brokers. Both of them were written from the head office at Toronto. It is evident that that office had either overlooked the memorandum of May 18th or had not received it. On August 9th the Windsor branch had wired Toronto: "Frey has Hoefle's letter re Weeks in his personal correspondence". On the 10th this message followed: "Frey has no letter from Hoefle re Weeks account in his personal file. He says must have been sent to you if received here." It seems clear, therefore, that the second letter was not intended to indicate an interpretation of the memorandum: it assumed ordinary collateral and the usual power of sale. Hoefle's dealings had been with Frey, to whom the memorandum had been given and who knew what the arrangement was. Head Office was overreaching itself and could be ignored.

The letters as such are inadmissible. It is only in relation to conduct of the plaintiff evoked by them that they can be offered to the court. But that communications

of this sort can raise an obligation to reply on pain of an adverse inference is, in the particular situation, a perversion of the rule by which conduct may be shown: *Richards* v. *Gellatly* (1): Wiles J.:

> It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded and the absurdity of acting upon it demonstrated.

And in *Wiedemann* v. *Walpole* (2), Bowen L.J., puts the ground of admission in these words:

> Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.

There is no duty on debtors to instruct creditors as to their rights and, while conduct in performance of a contract participated in by both parties may be used to resolve ambiguity, that rule can have no application to the facts here. And it would be exceedingly dangerous to permit an entirely proper disregard of characteristic importunities and impositions to be used as an admission for the interpretation of engagements of the party making them.

That the plaintiff was clear in his understanding of the arrangement is shown by his immediate answer of August 8th to the notice of sale:

> I am just in receipt of copy of your letter of July 29 to Mrs. Hazel G. Weeks, in which you advise the sale of 500 shares of San Antonio, and I presume this is the same 500 shares that I allowed you to place into her account by my letter of May 18, 1940.
>
> If I am correct in this, it seems you have made a mistake in disposing of this stock, as my authorization specifically stated that nothing was to be done with the San Antonio without my instructions and consent, and you accepted it on those terms.
>
> Therefore, I am requesting that you replace this stock into the Weeks account without delay, and that no expense accrue to Mrs. Weeks through your oversight.

The argument on this view is, I think, concluded by the fact that there never was a moment's apprehension of the sufficiency of the security for the $180 balance and that the case for the respondents involves the conclusion, as the letter of June 18th implies, that the moment after the security had been given they could have sold it for the primary purpose of clearing off the Weeks indebtedness.

(1) (1872) L.R. 7 C.P. 127. (2) [1891] 2 Q.B. 534.

1945
HOEFLE
v.
BONGARD
&
COMPANY
Rand J.

The plaintiff's intention in that case was, in effect, in view of the market, to surrender his property for immediate realization by the brokers to pay another's debt; but he could have brought that about himself without the empty formality of the memorandum: and such an intention would have been a flat contradiction, not only of the receipt taken by him from Mrs. Weeks on May 22nd by which the stock was "to be returned to John J. Hoefle immediately upon its release from my Bongard account," but of every interest and consideration which lay behind his action.

The account in its entirety was, therefore, to remain as it was; the prohibition extended not only to action by Mrs. Weeks but to action by the brokers in relation to the security. There was admittedly a vital alteration in transferring the 500 shares from the "bot" to the "sold" column and in entering the price realized. There was just as clearly a prohibited dealing in the security.

The question remains, then, of damages. The conversion by the bailee here is a breach of a contract and it is the damages resulting from that breach which we are to find.

A preliminary question is whether the sale rescinded the bailment so as to deprive the defendants of their security and this in turn depends upon the nature of the interest which they had in the shares. The transaction contemplated a possible sale with consent and a payment of the Weeks indebtedness out of the proceeds. That, I think, created an interest greater than mere possession and it must be taken to have been equivalent to that of a pledge with a restriction upon the power to sell. In such case, the authorities seem to hold that the conversion does not destroy the interest and that in the damages the debt secured must be taken into account. The principle of this rule is not wholly clear: but the statement of Blackburn, J., in *Donald* v. *Suckling* (1): "that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it," places it where it seems properly to belong, within the general rules governing breaches of contract. There is created an interest coupled with a power under a limitation, but to say that this is a *jus in re* does not carry us much nearer the true basis of determining the contractual result of the

(1) (1866) L.R. 1 Q.B. 585, at 617.

conversion. In that conception the rule must apply whether the debt is that of the owner or a third person. What is recoverable is, then, the value of the interest remaining in the owner, the appellant.

One consideration may be cleared away. It is not a case for any rule of mitigation. The broker is in as good a position as the owner to redeem the situation or to mitigate the consequences: Grose, J. in *Shepherd* v. *Johnson* (1)

The object of damages is to restore the owner as nearly as possible to the same position as if the terms of the bailment had been respected. What he would have done in the intervening time, if the security had remained, is the speculative basis from which the inferences must be drawn. We cannot say that he would have sold at the highest or at the lowest price or that he would have sold at all. But so far as the circumstances permit, they are to be the ground of conclusions of probability: *Williams* v. *Peel River Land and Mineral Company Ltd.* (2) The case is analogous to that of a breach of covenant to re-deliver shares and *prima facie* the defendants are held to have prevented the shares from remaining the property of the plaintiff up to the trial: Best C.J, in *Harrison* v. *Harrison* (3):

> I think the fair rule is, to take the damages at the price of yesterday or to-day. When you had the money, you promised to restore the stock. Justice is not done, if you do not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is,—you have effectually prevented him from doing so.

Owen v. *Routh* (4) treats the rule as absolute.

What, then, was the conduct of the plaintiff in relation to the shares? On August 8th and November 14th, when their price ranged around the point at which they had been sold, he called upon the defendants to restore the security to the account. By that act he affirmed the contract; and, in the statement of claim, among the items of relief sought is an order for specific performance, i.e., restoration. In view of these demands, the plaintiff could not thereafter

(1) (1802) 2 East 211; 102 E.R. 349.
(2) (1886) 55 L.T. 689, at 693.
(3) (1824) 1 Car. [and] P. 412; 171 E.R. 1253.
(4) (1854) 14 C.B. 327, at 339-340; 139 E.R. 134, at 140.

1945
HOEFLE
v.
BONGARD
&
COMPANY
Rand J.

have complained of action taken by the defendants in accordance with them: he had committed himself to retention. At no time did he make any offer to discharge the Weeks indebtedness. These considerations entitle us to say that the furnishing of the stock at the time of trial, even had the market value dropped, would, subject to costs, have been an answer to the damages recoverable. The risk of the value at the time of trial was taken by the plaintiff.

It is agreed that that value was $4 a share, with a total price of $2,000. There was collected in 1940 a dividend of $250. The total indebtedness of the Weeks account at the time of the sale was $886.68. Interest on this at 5½ per cent. until September 30th, 1943, would be $156, making a total credit of $1,042.68. The balance, $1,207.32, represents the plaintiff's interest in the property, and his loss through the breach of contract.

I would allow the appeal and direct judgment for the plaintiff for that amount with costs throughout.

KELLOCK J.—This is an appeal from the order of the Court of Appeal for Ontario dated February 4th, 1944, dismissing an appeal from the judgment at trial, by which the appellant's action was dismissed. The action was for damages in respect of the sale of certain shares in breach, as it was alleged, of an agreement between the parties. The respondent, a firm of brokers, had for some time prior to the 18th of May, 1940, been carrying two accounts, one in the name of the appellant in which on that date there was a debit balance of $180.11 but in respect of which the respondent held 500 shares of a mining stock known as San Antonio. The other account was in the name of Hazel G. Weeks, in which on the said date there was a debit balance of $687.40, as against which the respondent held no collateral. This last mentioned account, with respect to which the appellant had authority from Hazel G. Weeks to give instructions to the respondent, had immediately prior to the above date been active, but had been closed out by the respondent by forced sales resulting in the debit balance already mentioned. As to both these accounts, the respondent was authorized by the customers in writing, to sell any securities without notice.

On the 18th of May, after some previous discussion between the appellant and one Frey, the respondent's local manager at Windsor, the appellant wrote and mailed a letter to the respondent. This letter, which is the subject of the controversy between the parties, is as follows:

Bongard & Company, May 18, 1940.
Windsor, Ontario.

Gentlemen:

This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of Hazel G. Weeks. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent, and that no further obligation be presumed against me in any way whatever.

Yours truly,
John J. Hoefle.

The respondent sold the San Antonio shares on the 27th of July following. The appellant's position is that this sale was wrongful. He contends that the words "no further alterations or dealings in the account of Hazel G. Weeks" prohibited the respondent from selling these shares. The respondent's position is as set out in paragraph 7 of the statement of defence,

that the said shares were held by the defendant as collateral security for the debit balance of the account carried in the name of Hazel G. Weeks and subject to the right of the defendant to deal with such collateral as circumstances might require from time to time.

The respondent contends that the words "no further alterations or dealings in the account of Hazel G. Weeks" have no application to the shares, but prohibit the respondent from acting on any instructions from Hazel G. Weeks, if they desired to continue to have any claim upon the shares.

If the language of the letter in question is unambiguous, effect must be given to it and parol evidence would not be admissible with respect to its interpretation. Neither party seeks rectification and each contends that the language is not ambiguous, but is clear in accordance with their respective contentions. Each contended, however, and still contends that if there be ambiguity, the ambiguity should be resolved in his favour, and each introduced parol evidence to that end.

It may be pointed out at once that the appellant was, as he expressed it, "intimately familiar" with the practices prevailing between brokers and their clients. He had

1945
HOEFLE
v.
BONGARD
&
COMPANY
Kellock J.

devoted his entire time for some years to trading in securities and to advising other persons with respect to the same kind of transactions. There were other accounts carried by the respondent with respect to which the appellant was advising the clients, and he had been engaged as an employee of other brokers at an earlier period, in charge of considerable transactions.

The evidence establishes that, after her collateral was sold out, Hazel G. Weeks had no assets in Canada, but she did have certain stocks in Detroit. If she had attempted to realize upon them, to pay what she owed the respondent, however, it would have been embarrassing to her, and the appellant requested the respondent to give her time. It was in these circumstances that the letter of the 18th of May, 1940, was written by the appellant.

It is also to be observed that when the consolidation of the accounts was made, the San Antonio shares at the then market were approximately equal in value to the total of the debit balances in the two accounts before consolidation. It is also a fact that by reason of the regulations of the Foreign Exchange Control Board, while the appellant, prior to the arrangement of the 18th of May, might, upon paying his debit balance to the respondent, have taken delivery of the shares, he could not market them in the United States, as they were not listed on any exchange there, but that if instead of doing that, they had been sold by the respondent, he was not free to take the surplus out of Canada.

When the letter of the 18th of May is brought into relation with the circumstances existing at its date, in my opinion an ambiguity is produced as to whether the sale made by the respondent was or was not a violation of its terms. There are considerations which point both ways. If I had to choose between the conflicting submissions of counsel, apart from extrinsic evidence, I would be disposed to the view that the language used points rather to the prohibition of transactions on the initiative of the named client Hazel G. Weeks, rather than to transactions on the initiative of the broker. Perhaps the difference of opinion in the courts below on the question may be said to support the view that ambiguity exists. This ambiguity is produced by the application of the

language to the circumstances. In the language of Lord Wrenbury in *Great Western Railway and Midland Railway* v. *Bristol Corporation* (1):

> Extrinsic evidence has created the ambiguity, and extrinsic evidence is admissible to resolve it.

Again, at 430:

> The question is not what the parties meant as distinguished from what they have said, but what is the meaning of that which they have said. If the language used be ambiguous, the reader is entitled to be assisted in his task by the guidance afforded by a knowledge of the object which appears, from the circumstances, to be that which the parties had in view. But if it is not ambiguous he has to ascertain the intention from the words and from nothing but the words.

In *Doe dem. Pearson* v. *Ries* (2), Tindal C.J., at 181, said:

> Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties.

Again the same learned judge in *Chapman* v. *Bluck* (3), said:

> There is no better way of seeing what they [the parties] intended than seeing what they did, under the instrument in dispute.

An illustration of the application of the principle is to be found in *Manning* v. *Carrique* (4). Reference may also be made to *Bank of New Zealand* v. *Simpson* (5) and *Charrington & Co. Ltd.* v. *Wooder* (6).

In my opinion, extrinsic evidence was properly admitted in the case at bar, and, when reference is had to it, the ambiguity is resolved in favour of the respondent. On the 30th of May, the respondent addressed a letter to the appellant pointing out that the market price of San Antonio had fallen substantially, leaving a deficit in the account, and saying: "no doubt you will wish to adjust this, as well as supply some margin for the 500 San Antonio". A stock held by a broker in connection with a client's account, with respect to which the broker has no right to sell without the client's consent, does not require margining. The appellant made no reply to this letter.

(1) (1918) 87 L.J. Ch. 414, at 429.
(2) (1832) 8 Bingham 178.
(3) (1838) 4 Bingham N.C. 187, at 193.
(4) (1915) 34 Ont. L.R. 453.
(5) [1900] A.C. 182.
(6) [1914] A.C. 71.

1945

HOEFLE v. BONGARD & COMPANY

Kellock J.

Mr. Springsteen argues that when the accounts were consolidated on the 18th of May, as the debits were approximately equal to the market value of the shares, if the respondent had the right to sell the shares, it would have done so immediately. The fact that it did not, he argues, indicates that it did not have that right. I think the respondent's conduct in not selling is satisfactorily explained by its letter to the appellant of the 18th of June, 1940, to which again he did not reply. This letter reads in part:

> We have for some time now been carrying a deficit in the account of Mrs. Hazel Weeks which was occasioned *by your request* to not sell the San Antonio which you gave to the Weeks account. Had we sold it at the time you deposited this stock *as collateral to the account* there would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately *if there is to be no further action taken in this regard.*

Not only did the appellant not reply to this letter, but in the witness box he did not suggest that the letter contained any inaccuracy. This letter and the appellant's failure to reply satisfy me that the conduct of the respondent in carrying the account through the falling market subsequent to the 18th of May was due to the appellant's request, to which it was willing to accede owing to its long relationship with him as a customer which extended back to the year 1929. The phrase "as collateral to the account" is also significant, taken with the concluding language of the letter.

Again, on the 19th of July, the respondent wrote Mrs. Weeks and sent a copy of the letter to the appellant, advising that as no response had been made to their margin calls, they would "handle the liquidation of San Antonio at our absolute discretion" and the letter went on to make it clear that they proposed to sell. The appellant admits the receipt of this letter, but again did not reply. I think the reasonable inference from the appellant's failure to reply to the respondent's correspondence subsequent to the 18th of May and prior to the actual sale on the 27th of July, is that he put the same construction upon the letter which he had written them as he knew they were putting upon it.

I do not think that there is anything in what passed between Frey and his employers in the same period which is inconsistent with the view that the respondent considered

it had the right to sell. On the other hand, it would appear from the inter-office communication of the 28th of June, which was put in by the appellant, that he, when approached by Frey, had told the latter that "he was out of money and had no stock" and that the same applied to Hazel G. Weeks.

I would dismiss the appeal with costs.

ESTEY J.—The appellant (plaintiff) alleges that the respondent (defendant) sold 500 shares of common stock in San Antonio Gold Mines Limited in breach of the agreement that existed between them. The relationship of customer and broker had existed between these parties for a period of fifteen years, subject to the terms of the "customer's card", signed by the appellant, and which reads in part as follows:

> Whenever you shall deem it necessary for your protection to sell any or all of the securities or other property which may be in your possession, or which you may be carrying for me/us (either individually or jointly with others), or to buy in any securities, commodities or contracts for commodities, of which my/our account or accounts may be short, in order to close out my/our account or accounts in part or in whole, such sale or purchase may be made according to your judgment and may be made at your discretion on the exchange or other market where such business is then usually transacted, or at public auction or private sale, without advertising the same and without notice to me/us and without prior tender, demand or call of any kind upon me/us, it being understood that a prior tender, demand or call, or prior notice of the time and place of such sale or purchase shall not be considered a waiver of your right to buy or sell any securities and/or other property held by you at any time, as hereinbefore provided.

The appellant resides in Detroit and his business with the respondent had been carried on through the latter's branch office at Windsor, Ontario. On May 18th, 1940, the appellant's account showed a debit balance of $180.11, as security for which the respondent held 500 shares of San Antonio Gold Mines Limited.

He was familiar with the customs prevailing between brokers and customers, and acted in an advisory capacity to more than one of the respondent's customers, including Mrs. Weeks, for whom he had a power of attorney and under which he negotiated transactions on her account with the respondent. Mrs. Weeks also negotiated transactions, independent of the appellant, on her account with the respondent.

1945

HOEFLE v. BONGARD & COMPANY

Estey J.

On the same date (May 18th, 1940), Mrs. Weeks, whose account was subject to a "customer's card", had an unsecured debit balance of $687.40. Under the authority of her "customer's card", the respondent had already, in the month of May, sold all of her securities held in this account and thereby reduced her debit balance by an amount in excess of $26,000. The appellant's account was in good shape, but that of Mrs. Weeks showed an unsecured debit balance and the brokers were pressing for payment.

The appellant deposed that Mrs. Weeks:

> * * * had some stocks over there [Detroit] that had likewise been mutilated by that drastic market drop; if she had liquidated them to pay this it would only have added to her financial distress, * * *

He spoke to Mr. Frey, branch manager for the respondent at Windsor, and in part said:

> "Now," I said, "here is what you can do: you can sue this woman if you want to, and that is going to cost you a lot of money to go over there to Detroit to do it and it will be embarrassing financially to everybody."

It was as a consequence of this conversation that the appellant typed, signed, and delivered to the respondent the letter dated May 18th, 1940. This letter reads as follows:

> This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of Hazel G. Weeks. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent, and that no further obligation be presumed against me in any way whatever.

Upon accepting this letter the respondent transferred the appellant's "account in its entirety" to that of Mrs. Weeks.

The market continued to drop, and after repeated requests to the appellant for additional margin had been ignored, the respondent, on July 27th, 1940, sold the 500 shares, realizing sufficient to pay the balance owing and leaving a credit of less than $1 in Mrs. Weeks' account.

Under date of July 29th, 1940, the respondent advised the appellant of the sale, and as of August 8th, 1940, the appellant complained that these shares were improperly disposed of inasmuch as it was done "without my instructions and consent."

The rights of the parties in this litigation are ascertained by the determination of what, if any, change was effected in their relationship, as established under the "customer's card", by the letter of May 18th, 1940. In particular, was the position of these 500 shares, which up to the acceptance of the letter were admittedly subject to the provisions of his "customer's card", and could be sold under the terms thereof by the respondent to liquidate his personal indebtedness, changed or altered by this letter?

The letter makes no reference to the "customer's card" nor the 500 shares, nor does it use the word security, collateral, or any similar term. The mere closing of the account of the appellant, the transferring of his balance and security therefor to Mrs. Weeks' account would not cancel his indebtedness, nor effect a change with respect to the 500 shares.

It was common ground at the trial that the position of the 500 shares was changed by the acceptance of that letter. As to what that change was, there was an entire disagreement. Both parties contended the letter was perfectly plain in its meaning, but here again as to its meaning there was an entire disagreement.

The appellant contends that the letter dated May 18th, 1940, cancelled the right of the respondent to sell the 500 shares under the "customer's card"; that thereafter these shares were held as security for both balances, but on a new and more restricted basis. He contends that when the respondent accepted this letter these shares could not be sold to realize either balance, nor could they be sold for the sum total of these balances; they were held as security for both balances until such time as he gave them permission to sell the shares, or until the balance of the two accounts in the sum of $867.51 was paid; that after the acceptance of that letter, all the respondent could do by way of enforcing collection was to enter suit against the appellant and Mrs. Weeks for their respective balances. No time limit is fixed, and presumably suit could have been entered the next day.

The appellant contends that the phrase "no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent" should be construed to give effect to the foregoing, and therefore prohibit the sale of the 500 shares.

1945

HOEFLE v. BONGARD & COMPANY

Estey J.

The respondent's contention is that the two accounts were merged into one, and the 500 shares were then held as security for the total balance of $867.51; that the words "no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent" prohibited the respondent taking any further instructions from Mrs. Hazel G. Weeks; that thereafter all dealings on this account would be by the appellant, acting under his power of attorney from Mrs. Weeks; that the 500 shares of San Antonio were held as security for the total of both balances under the "customer's card" signed by Mrs. Weeks.

The letter of May 18th, 1940, is written by the appellant, who is familiar with the brokerage business, and, while it is in general terms, there is no surplus of words. He first authorizes the transfer of "my account in its entirety", and both parties admit that this included the ledger account as well as the security therefor. In fact, the account was transferred on this basis. It is then significant to note that, in referring to Mrs. Weeks' account into which his account is to be transferred, and where there is no security, he merely speaks of it as "the account of Hazel G. Weeks". Then, after the merger of these two accounts, and in connection with the prohibition, he says, "that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions". It therefore appears that, while he prohibited alterations or dealings in the account, he did not prohibit the selling of the securities under the "customer's card", which, after the merger, must be Mrs. Weeks' card; that in fact the prohibition was against the brokers taking further orders with respect to the account from Mrs. Weeks. The omission of any reference to the "customer's card" leads me to conclude that the shares were still held subject thereto.

Then, the words "further obligation" must mean an obligation different from, or other than that which existed theretofore. Again that appears to be admitted, but disagreement obtains with respect to the nature of that further obligation. The appellant contends that this further obligation placed the 500 shares where they were held as security for both balances, but could not be sold and therefore not subject to the "customer's card". The respondent contends that the 500 shares were held subject

to the "customer's card". They agree that the shares were now held as security for both balances, and again it seems to me that the omission of any reference in the letter to the "customer's card" leads to the conclusion that these shares were still held subject to the terms of that card.

In *Bank of New Zealand* v. *Simpson* (1), a case where the contract was arrived at in a somewhat similar manner, the Privy Council held "extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about."

At the trial appellant deposed that he told Mr. Frey, before this letter was given, " 'I don't want you selling my securities to pay her debts.' " That statement, he says, was made during the conversation pursuant to which this letter was given. It would seem to me, if that statement was correct, the thought embodied therein would have been uppermost in his mind as he wrote the letter of May 18th, and it would have been stated therein specifically and clearly. Moreover, when the learned trial judge confronted him with this fact, he replied: " * * * I thought I had made it plain enough. I can see that now that I didn't, * * * "

Further, if the appellant, an experienced broker, intended that letter to take these 500 shares out from under the operation of the "customer's card", he would have said so in language plain, if not emphatic.

If the letter be regarded as ambiguous, as it may well be, the subsequent conduct of the parties may be examined to assist in construing the same.

Re Labrador Boundary (2). *Matthews* v. *Good* (3).

Between the giving of this letter and the sale of the shares on July 27th, there were letters mailed to the appellant asking for more margin and dealing specifically with this account. The first request in writing for margin was under date of May 30th, 1940. There was another letter, dated June 18th, 1940, which reads as follows:

We have for some time now been carrying a deficit in the account of Mrs. Hazel Weeks which was occasioned by your request to not sell the San Antonio which you gave to the Weeks account. Had we sold it at the time you deposited this stock as collateral to the account there

(1) [1900] A.C. 182.
(2) [1927] 2 D.L.R. 401, at 422.
(3) (1924) 56 N.S.R. 543.

1945

HOEFLE v. BONGARD & COMPANY

Estey J.

would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately if there is to be no further action taken in this regard.

Will you please give this matter your usual courteous and early attention, and oblige.

Under date of July 19th, the respondent wrote to Mrs. Weeks and forwarded a copy of that letter to the appellant. This letter reads as follows:

As you have not responded to our margin calls, we beg to notify you that we will handle the liquidation of San Antonio at our absolute discretion.

Certainly if this stock approaches a price that will liquidate the deficit in your account we shall take full advantage of it, but this will not prevent us from liqudating the stock, as above stated, at our absolute discretion, and looking to you for any remaining deficit.

Please be governed accordingly.

He admits he received all these letters, but that he ignored them, and probably threw them in the scrap basket.

While it is true that subsequent conduct of the parties cannot add to, or alter the terms of a contract, *North Eastern Ry. Co.* v. *Lord Hastings* (1), nevertheless, "where a document is ambiguous, evidence of a course of conduct which is sufficiently early and continuous may be taken into account as bearing upon the construction of the document." *Re Labrador Boundary* (2).

All three of the letters indicate that the respondent believed the usual relationship of broker and customer continued, and particularly the last two definitely indicate no such restrictions upon the selling of the 500 shares as the appellant now contends for. In spite of this, he ignores these letters and does not protest against what he says is an entirely improper interpretation of the letter dated May 18th, 1940. In fact, he did nothing about it until after the respondent advised him that the shares had been sold.

The conduct of the respondent, including the writing and sending of the above quoted letters, is consistent with his contention, and in view of the language of the letter, and the fact that the appellant took no exception to the plain language of the two above quoted letters, leads, in my opinion, to the conclusion that the respondent's contention must be accepted.

(1) [1900] A.C. 260. (2) [1927] 2 D.L.R. 401, at 422.

The appellant's counsel, in the course of an able argument, pressed that certain statements made by Mr. Frey, in the course of inter-office communications, supported his contentions. These, however, are all consistent with the desire of Mr. Frey to treat the appellant, who had been a valued customer over a period of many years, with every consideration.

An examination of the letter of May 18th, 1940; the dealings between the parties; the conversations leading up to the delivery and acceptance of the letter, and the subsequent letters in which the respondent made it very clear that if the appellant did not provide further margin the shares would be sold, together with the fact of no protest or suggested correction from the appellant, lead me to conclude as above stated, that the respondent's contention must be accepted. It sems to me that the respondent had the right to sell the shares as they were sold, and therefore the appeal must be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Smith, Rae, Greer & Cartwright.*

THE ATTORNEY GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

WESTERN HIGBIE AND ALBION INVESTMENTS LTD. (DEFENDANTS) ..... RESPONDENTS;

AND

THE ATTORNEY GENERAL FOR BRITISH COLUMBIA ..... INTERVENER.

1944
*Oct. 5, 6, 10
11, 12, 13

1945
*Mar. 23

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Foreshore—Public harbour—Dispute between Dominion and Province as to ownership—Provincial order in council recognizing Dominion's right—Power to pass—Validity of—Whether author-

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

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

izing legislation necessary—Admission of fact contained in order in council—"Public Harbour" in B.N.A. Act—Whether Coal Harbour a "public harbour"—Transfer of Crown land by Province to Dominion—Residuum of royal prerogative—Crown grant of land "with appurtenances"—Land or foreshore not included in—Prescription—Nullum Tempus Act—Riparian rights—Erection of building and making of fill on foreshore—Whether mesne profits due the Crown.

The Attorney General of Canada, on behalf of the Dominion Crown, sued to recover possession (and mesne profits) of the foreshore of a lot fronting on an indentation of Burrard Inlet, known as Coal Harbour, in British Columbia. The action was maintained by the trial judge; but that judgment was reversed by a majority of the Court of Appeal.

Held that the judgment appealed from ([1944] 1 W.W.R. 615) should be set aside and that the judgment at the trial, declaring the ownership and right of possession of the foreshore to be in the appellant and that the respondents were liable for mesne profits to the Crown, should be restored.

Controversy over harbours in British Columbia and disputes as to the ownership of the foreshores, as between the Dominion and the Province, were resolved in 1924 by a provincial order in council (a reciprocal Dominion order in council being also passed in practically identical terms) made without legislative authority or ratification, whereby it was agreed that six harbours therein mentioned, including Burrard Inlet, were declared to be public harbours within the meaning of schedule 3 of the B.N.A. Act, that they became the property of Canada thereunder and that the Province transferred to the Dominion any interest which it might have in the foreshores of these six harbours. The appellant contended that the executive authority of the Province had power to pass the order in council, while the respondents argued that it was lacking in legislative authority or statutory ratification.

Held, per the Chief Justice and Kerwin, Hudson and Taschereau JJ., that the Provincial order in council must be held as valid to the extent that it contains an unequivocal admission of fact that every piece of foreshore in every part of Burrard Inlet was at the relevant time used for public harbour purposes and thus became the property of the Dominion. There is nothing to prevent the Executive of the Province to make such admission. *Tweedie* v. *The King* (52 Can. S.C.R. 197) ref.

Per the Chief Justice and Taschereau J.:—The Provincial order in council, moreover, contained a valid recognition from the Province to the Dominion of the latter's jurisdiction over Burrard Inlet including Coal Harbour and its foreshore.

Per Rand J.:—The Provincial executive cannot transfer "property" of the Province, without legislative sanction, to another executive and legislative administration. The provincial function is exercised under provincial legislative control and that authority, in the absence of legislation, cannot extend to an act merely of transferring its own proper subject-matter to another executive: it would rather be a surrender than an exercise of function. But, where the situation of fact is, in the opinion of the government concerned,

one of doubt and uncertainty, it lies within the authority of the provincial executive to give formal binding recognition to a claim asserted by the Dominion. The effect of the order in council is therefore limited to an agreement or acknowledgment of boundary at high water, and, as between the two jurisdictions, such an acknowledgment concludes the question. But as to private rights different considerations arise; and in some cases, a third person remains entitled to contest the fact of Crown right ownership. The respondents may be entitled to advance their claim on the footing of the fact as found in the action, but they are entitled to no more; and where, in such case, they fail to establish a prescriptive right against either the Province or the Dominion, as here, they fail likewise in an answer to the claim of the appellant.

Per the Chief Justice and Taschereau J.:—The orders in council, either from the Dominion or the Province, may not be lacking in legislative authority or ratification in view of certain statutory enactments referred to by the appellant; but, even if they were, these orders in council were Acts of the highest authority and they were acted upon by both parties to them for more than seventeen years when this action was instituted. They constitute, as already stated, an unequivocal admission that these harbours became the property of the Dominion, not only at the date of the orders in council, but also in 1871 at the time when British Columbia entered Confederation.

Per the Chief Justice and Taschereau J.:—The orders in council may also be upheld as valid, because both Governments, in acting as they did, were exercising powers which are part of the residual prerogative of the Crown, or because the transfer from one Government to another is not appropriately effected by ordinary conveyance: His Majesty the King does not convey to himself.—If, however, it had to be assumed that the orders in council were invalid without legislative approval, it should be pointed out that "The Land Act" of British Columbia imposed no restrictions on a transfer from the Province to the Dominion—When the Crown in right of the Province transfers land to the Crown in right of the Dominion, there is no real conveyance of property, since His Majesty The King remains the owner in either case and, therefore, it is only the administration of the property which passes from the control of the Executive of the Province to the Executive of the Dominion.

Per the Chief Justice and Taschereau J.:—Coal Harbour was part of a "public harbour" in 1871 and, as such, it came under the jurisdiction of the Federal Government. The particular spot of the foreshore, in this case, is within the ambit of the harbour and forms a part of it. The trial judge so found, and that finding, coupled with that made by Duff J. in 1904 (*Atty. Gen. for B.C.* v. *C.P.R. Co.* 11 B.C.R. 289, at 291) should be given preference over the decision of the Court of Appeal.

Per Kerwin and Hudson JJ.—Upon the evidence alone, it cannot be found that the foreshore in question formed part of that public harbour, were it not for the two orders in council. In the *Canadian Pacific Railway* case (*supra*), it is apparent that the question of fact was confined to the particular piece of foreshore there in question.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

The respondents also contended that, even if the order in council was effective without legislative approval, it was nevertheless subject to a prior grant from the Crown provincial to the respondents' predecessors in title, that the grant was of an upland lot "with appurtenances" and that, these words being ambiguous, the intention of the Crown must have been to pass title to the foreshore.

Held that the foreshore did not pass to the respondents under the grant. The language of the description in the grant is clear and the intent unambiguous. There was no express grant of the foreshore and it is not to be implied. Standing alone, the word "appurtenances" does not include land: land cannot be appurtenant to land.

Held also that the respondents have not discharged the onus of establishing acquisitions of the foreshore by prescription. The evidence is not sufficient under the *Nullum Tempus Act* (9 Geo. III, c. 16) to establish that the respondents and their predecessors in title have had such possession of the foreshore as is sufficient to oust the title of the Crown.

Held that this Court does not concur in the holding of the trial judge, that the respondents "have never had any riparian rights over the said land arising out of their title to (their) lot or otherwise".

Held, per the Chief Justice and Kerwin, Hudson and Taschereau JJ.:—The erection by the respondents of a substantial structure and the making of a fill on part of the foreshore adjoining their lot cannot be justified as the exercise of riparian rights arising out of their title. The respondents are therefore liable for mesne profits to the Crown appellant.

Per Kerwin, Hudson and Rand JJ.:—It cannot be inferred from what was shown that by their acts the respondents intended to surrender rights attaching to their upland property.

Per Rand J.:—In the circumstances, the appellant is entitled to mesne profits if any can be shown; but they must be profits arising beyond that use of the foreshore which may be found to be within the exercise of riparian privileges.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Manson J. (2) and dismissing the appellant's action.

F. P. Varcoe K.C., A. M. Russell and *D. W. Mundell* for the appellant.

C. H. Locke K.C. and *T. G. McLelan* for the respondents.

Eric Pepler K.C. for the intervener.

(1) [1944] 1 W.W.R. 615; [1944] 2 D.L.R. 425.

(2) [1942] 1 W.W.R. 253; [1942] 3 D.L.R. 66.

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

THE CHIEF JUSTICE—The Attorney General of Canada sues on behalf of His Majesty the King in right of His Dominion of Canada to get possession of the land covered by water in the bed of Coal Harbour, in Burrard Inlet, in the harbour of Vancouver, in front of that certain parcel or tract of land situate, lying and being in the city of Vancouver, in the province of British Columbia, known and described as Lot Six (6), Block Sixty-four (64), District Lot One Hundred and Eighty-five (185), Group One (1), New Westminster District, Plan Ninety-two (92).

The contention is that His Majesty the King, before the month of July, 1928, was in possession of the said land covered by water and that, on or before that time, one George F. Johnson, who was then the owner, unlawfully took possession of the said land; and that in or about the month of June, 1936, Johnson sold to the respondent Higbie, who wrongfully took and still wrongfully keeps possession of the said land in contempt of His Majesty and to His great loss and damage.

The conclusions of the statement of claim are for possession of the said land, for mesne profits from the month of June, 1936, at the rate of $300.36 per annum, and the costs of the action.

The action was at first directed against Higbie alone, but, as it was found later that he had sold to the other respondent, Albion Investments Ltd., the latter was subsequently added as a party defendant.

Higbie is a hotel keeper, proprietor of Lynwood Inn, in North Vancouver.

His Majesty's claim is for the legal and beneficial interest of the land in question, having an area of 30,036 square feet, and it is alleged that His Majesty took possession in 1792 and kept it continuously until 1928 when Johnson unlawfully took possession, although His Majesty had never made any conveyance of it.

It would appear that originally, in 1938, the claim was only for possession, but in 1941 ownership of the Crown was asserted.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

The points in issue are as follows:—

(1) Whether His Majesty in right of the Dominion of Canada has title to, or is entitled to possession of, the foreshore as against the respondents. The respondents deny His Majesty's right in connection therewith.

(2) Whether the respondents by the grant of land with appurtenances to their predecessors in title made in 1867 and by subsequent deeds thereof acquired title to the foreshore, being the land lying between mean high water mark and the low water mark. The respondents' contention is that Higbie had such title during the whole period in which he was the owner of Lot 6, and that Albion Investments Ltd. now has title to the said foreshore.

(3) Alternatively, whether the respondents acquired title to the said foreshore by prescription.

(4) Whether an artificial fill has been made in front of Lot 6, and that the mean high water mark is below the old mean high water mark said to constitute the northerly boundary of said Lot 6. The respondents contend, while denying that there is any artificial fill lying to the north of the mean high water mark as of the date of the grant to Brighouse et al., that if there is any such fill it is upon the foreshore of which the respondent company has title by conveyance as aforesaid. Moreover, the respondents say that, if the present mean high water mark lies to the north of such former mean high water mark, such change and any accretions have been caused by the natural action of the sea, or arise from a fair use of the Upland, and that the respondent company, as the owner of the Upland, is entitled to any such accretions.

(5) Whether the respondents have or ever had any riparian rights over the said foreshore arising out of their title to Lot 6 or otherwise. The respondents contend, in the alternative to their claim that they respectively acquired title to the foreshore, that the respondent Higbie had, and Albion Investments Ltd. now has, all the riparian rights incidental to the ownership of an Upland Lot fronting on tidal waters, and that they have not exceeded such rights in their use of the foreshore.

In the Supreme Court of British Columbia, Manson J. gave judgment in favour of the appellant, but in the Court of Appeal his judgment was reversed by the majority of that Court, McDonald C.J.B.C., with whom Robertson J.A. concurred, while Sloan J.A. would have affirmed the judgment of the trial judge.

The points in respect of which error is alleged in the judgment of the Court of Appeal are as follows:—

(1) In holding that the Provincial order in council was of no effect and that the lands in question could be disposed of by the legislature of British Columbia and in no other manner.

(2) In interpreting the judgment of Mr. Justice Newcombe in *The Saskatchewan Natural Resources Reference* (1) to mean that an order in council or despatch to effectuate the purpose intended in this case must always have legislative authority upon which His Majesty's Ministers may act.

(3) In holding that the lands in question could not be granted by the Crown in exercise of its prerogative.

(4) In holding that the Imperial statute (1874) 37-38 Vict., cap. 92, being *An Act to provide for the transfer to the Admiralty and the Secretary of State for the War Department of Alderney Harbour and certain lands near it* supported the argument as to the necessity of legislation.

(5) In holding that the transfer in question implies a diminution in provincial territorial limits contrary to the *British North America Act, 1871,* being 34 Vict., cap. 28, sec. 3.

In this Court it was further submitted that the appeal should be allowed for the following reasons:—

(1) Prior to 1871 title to public lands of the Colony of British Columbia was vested in the Crown and it so remained without any change after the Province entered Confederation in 1871, and accordingly the prerogative of the Crown to deal with the same remained unaltered subject to any statutory provisions binding the Crown.

(2) The order in council in question was made and the transfer effected by virtue of the prerogative power of the Crown.

(1) [1931] S.C.R. 263.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

(3) The transfer in question was properly made by order in council.

(4) The appeal should be allowed for the reasons given by Mr. Justice Sloan.

The respondents specifically deny that Coal Harbour is in Burrard Inlet, or in the Vancouver Harbour area, and, accordingly, that it ever formed part of a public harbour previous to the 20th of July, 1871, when British Columbia came into the Confederation. They also claim title, through a Crown grant, to District Lot 185 unto Sam Brighouse, William Hailstone and John Morton, dated the 20th of May, 1867, or alternatively through prescription; and they also contend that anything done by them on the foreshore in question was done exclusively in the exercise of their riparian rights.

According to them, the chain of titles was as follows:—

John Morton, having acquired the interests of Brighouse and Hailstone, to whom the Crown grant had been jointly made with himself, conveyed to Sir Donald A. Smith and Richard B. Angus on December 2nd, 1887. Sir Donald Smith, having become Lord Strathcona, and R. B. Angus conveyed to George Frederick Johnson on the 3rd of August, 1899. Johnson conveyed to Higbie and the latter to Albion Investments Ltd. Higbie owned Lot 6 from June, 1936 to November, 1939, when he conveyed to the other respondent.

The Crown grant was of

> all that parcel or lot of land situate in the District of New Westminster said to contain Five hundred and fifty (550) acres and numbered Lot One Hundred and eighty-five (185), Group One (1), on the official plan or survey of the said District in the Colony of British Columbia: to have and to hold the said parcel or lot of land, and all and singular the premises hereby granted with their appurtenances.

The conveyance in 1885 from Brighouse and Hailstone to Morton was only of certain portions of the said Crown granted property, with appurtenances thereto.

Then, in 1887, the conveyance from John Morton to Sir Donald Smith and R. B. Angus conveyed a subdivision thereof, being Lot 6, Block 64, District Lot 185, Group 1, New Westminster District, Plan 92, with appurtenances thereto; and the conveyance to George Frederick Johnson was in similar terms.

The facts are that on the foreshore in question Higbie put, and the other respondent still has, a small wooden float, consisting of logs with planking on top of them, three to four feet in width and extending in length some three or four hundred feet. It is built in sections and supported by piles to keep it in place. It is tied to the piles, and floats up and down with the tide. It is the common kind of floating wharf which one sees up and down the coast. There is an open shed, a kind of dry-dock, and there is a slip which runs out from that for probably two hundred or three hundred feet, the slip having little rails along it. The witnesses called them "marine ways".

Moreover, as found by the learned trial judge, on a certain point there is a fill four or five feet high, consisting of several loads of material. It was described by the witness McElhanney, who was asked by the Court to make a special visit for that purpose, as amounting to ten waggon loads, 40 or 50 yards of earth, and sufficient to stop the water coming in.

> It consists of bricks, scrap iron shavings, old rags, a certain percentage of dirt—common soil—and the usual collection of waterfront rubbish that you find under sheds * * * The slipways forms a sloping roadway in the centre, and the shed is perhaps 10 or 12 feet clear on each side in which the rails or gangway don't operate,

according to the witness Kerr. All this was done by the respondents without any formal protest, or objection, being forthcoming on behalf of the Crown.

In the particulars to their statement of defence, the respondents stated that their acts of possession consisted of:—

(*b*) (1) Maintaining a log boom and grounding logs.
(2) Anchoring and grounding small craft.
(3) Preventing the intrusion of the public or the embarking or disembarking of the public over the foreshore.
(4) Removal of sand and rocks and deposit of filling materials.
(5) Building and maintaining floats and slipways.
(6) Consenting to the deposit of suitable materials on the foreshore and by objecting to and preventing the deposit of unsuitable material.
(7) Depositing suitable material and dredging a slipways.
(8) Erection of groins and jetties and the driving or piling.
(9) The building and repair of small boats.

(*c*) All acts of and incidental to the ownership of said land.

(*d*) A slipway and piling.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

(e) Boom piling by the original Crown Grantees in 1867 and a slip-way and piling by George F. Johnson in 1900.

(f) This Defendant, his predecessors and successor in title have been in continuous possession of the whole of the said land.

It was claimed, however, in this Court, that the question of the artificial fill was neither pleaded nor raised, although found by the trial judge, who, according to the respondents, should not have dealt with it. It was said further there was no evidence to support the finding of the learned trial judge on that point, and indeed, on the evidence, that it was doubtful whether there was any such fill.

At all events, counsel for the respondents argued that there was no intention on their part to convert into hinterland that particular part of the foreshore, or to abandon their riparian rights.

On the other hand, the appellant's contention is that there was ample evidence to justify the finding of the trial judge on that point.

Certain admissions were made by the parties to the effect that the land in question in this action was the property of the Crown Imperial in or about the year 1792, and that, in the event of a decision in favour of His Majesty the King, whereby it would be held that he is entitled to possession of the land claimed and has sustained loss because of the wrongful deprivation of the beneficial use of said land, then said loss would be the mesne profits computed on a fair rental value; that in all the conveyances forming the chain of title either the words "with their appurtenances" occur in the description of the property conveyed, or, by virtue of the *Land Registry Act* and the *Short Form of Deeds Act* and its predecessors, the effect of such conveyances is the same as if such words were included therein; and finally that Higbie was the owner in possession of Lot 6, Block 64, District Lot 185, Group 1, New Westminster District, Plan No. 92, with appurtenances thereto, from June, 1936 until the month of November, 1939.

The other defendants, Marine Sales and Service Ltd. and Vancouver Shipyards Ltd., were added subsequent to the service of the action, but without prejudice to the plea of prescription. Judgment went by default against them and no appeal was taken by them from that judgment.

It may be mentioned also that the judgment of Manson J. ordered that there should be no costs to any of the parties in this action. The appellant, brought in the Court of Appeal by the present respondents, entered a cross-appeal praying that Higbie and Albion Investments Ltd. do pay the present appellant the costs of the action. The Court of Appeal adjudged that the cross-appeal be dismissed with costs. In this Court no reference was made to the cross-appeal in the course of the argument.

We may now deal with the several points in issue in the case, and the first question is whether His Majesty in right of the Dominion of Canada has title to, or is entitled to possession of, the foreshore as against the respondents.

There is no doubt that prior to the time when British Columbia entered Confederation in 1871 the foreshore was Crown property of the Colony, now the province of British Columbia and, therefore, in order to succeed, the appellant had the onus of proving that it had since passed to His Majesty in right of the Dominion of Canada.

The appellant endeavoured to establish his title upon two grounds:—

(1) He said that in 1871, on the date when British Columbia became part of the Dominion of Canada, Coal Harbour, on which Lot No. 6 abuts, was part of Burrard Inlet and of the harbour of Vancouver, which was then a public harbour, and that it passed to the Dominion of Canada under section 108 of the *British North America Act*, whereby the public works and property of each province enumerated in the third schedule to the Act became the property of Canada. (Public harbours in that schedule are included as No. 2).

(2) As the result of certain orders in council adopted simultaneously by the Government of the province of British Columbia on May 6, 1924 and by the Government of the Dominion of Canada on June 7, 1924.

It is now well settled by decisions of the Privy Council (The Fisheries case, *Attorney General for Canada* v. *Attorney General for Ontario* (1); *Attorney General for British Columbia* v. *Canadian Pacific Railway Co.* (2);

(1) [1898] A.C. 700, at 712. (2) [1906] A.C. 204, at 209.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

Attorney General for Canada v. *Ritchie Contracting and Supply Co.* (1)) that the questions whether a certain area was a public harbour, within the meaning of the Schedule, at the time of Confederation, and also whether a certain particular point of that area formed part of the harbour, stand to be decided as questions of fact.

The learned trial judge found, upon all the evidence, that, notwithstanding it was contended by the defendants that Coal Harbour was not part of Burrard Inlet,

> all the evidence is to the contrary. It is simply an indentation along the westerly reaches of Burrard Inlet to the north of the peninsular * * * and to the east of Stanley Park.

This finding is in accord with that of Duff J., as he then was, in *Attorney General for British Columbia* v. *Canadian Pacific Railway* (2), where he observed:—

> * * * at the time of the admission of British Columbia into Canada that part of Burrard Inlet between the First and Second Narrows was a public harbour * * *

That finding of fact was not disturbed on appeal to the Full Court of British Columbia (3).

Manson J. concluded that part of his judgment by saying:—

> Coal Harbour was part of a public harbour on 20th July, 1871, and as such became by virtue of S. 108 of the B.N.A. Act, 1867, the property of Canada.

However, on behalf of the respondents, it was urged that there is no sufficient evidence to support that finding; and for that view it must be said that the respondents may rely on the judgment of the Court of Appeal where even Sloan J., the dissenting judge, agreed that the area in question was not proven to have been, prior to 1871, a harbour and in use as such by vessels engaged in commerce.

There is no doubt that it was not easy for the appellant to find witnesses who could testify as to the state of things more than seventy years before the trial. Those who were heard on that point had to rely upon plans, photographs and charts, as well as descriptions contained in, for instance, an extract from "A Voyage of Discovery to the North Pacific Ocean and Round the World", by

(1) [1919] A.C. 999, at 1003, 1004.

(2) (1904) 11 B.C.R. 289, at 291.

(3) (1904) 11 B.C.R. 289, at 291.

Captain George Vancouver, or "British Columbia Pilot, volume 1", containing sailing directions for the coasts of Vancouver Island and part of British Columbia.

The chart most relied on was that which was published under the orders of the Honourable the Minister of Mines and Resources for Canada, as a result of surveys made by Mr. H. D. Parizeau, Mr. W. K. Willis and assistants, 1920-29. It shows an anchorage in the vicinity of Coal Harbour.

There was also another chart prepared by Captain Richards in 1858, and several other plans, or sketches, were put in as evidence.

Although such evidence was admissible as being no doubt the best evidence available (*The King* v. *The Ship "Emma K" et al.* (1), and further as there was no objection to their production at trial, it must be admitted that these plans, charts, and the testimony of the witnesses referring to them, leaves the matter in a somewhat unsatisfactory state; but the finding, already referred to, of Mr. Justice Duff, as he then was, in *Attorney General for British Columbia* v. *Canadian Pacific Railway Co.* (2) may not be disregarded. Even if it was made in a case between parties different from those in the present case, it is, nevertheless, a finding upon facts and circumstances identical with those in this case; and I cannot see why the question whether Vancouver Harbour and Burrard Inlet constituted a public harbour in 1871 should have to be reopened every time the question comes up before the courts. The decision of Mr. Justice Duff was upheld by the Privy Council (3), and the question whether there was, or there was not, a public harbour in 1871 within that particular area, should, in my opinion, be considered as established once and for all.

Of course, there remains the further question whether the particular spot with which we are concerned in the premises is within the ambit of the harbour and forms a part of it (*Attorney General for Canada* v. *Ritchie Contracting and Supply Co.* (4); *His Majesty the King* v. *The Attorney General of Ontario and Forrest* (5)).

(1) [1936] S.C.R. 256.
(2) (1904) 11 B.C.R. 289.
(3) [1906] A.C. 204, at 209.
(4) [1919] A.C. 999.
(5) [1934] S.C.R. 133, at 145.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

As to that point, the present case went to trial more than seventy years after the pertinent date of July 20, 1871, and it was inevitable that the evidence should be lacking, at least in some particulars. We have, however, the finding of the learned trial judge, while the Court of Appeal was of opinion that the area in question was not proven to have been, prior to 1871, a public harbour and in use as such by vessels engaged in commerce. But we would be inclined to hold that the finding of the learned trial judge, coupled with that made by Mr. Justice Duff in 1904, should be given preference, having regard to the fact that it can only be expected so long after the material date, and more and more as we get further from 1871, that the evidence will be harder to obtain (if indeed not altogether impossible to get) from witnesses who are still living and who have had occasion of acquainting themselves with the situation as it then was.

In the case Mr. Justice Duff so expressed himself, the action was for a declaration that the public had a right of access to the waters of Vancouver Harbour through certain streets, that the streets at the time of the construction of the Canadian Pacific Railway were public highways extending to low water mark and that the public right of passage over said highways existed at the time of the admission of British Columbia into Canada, but that these public rights had been extinguished or suspended by reason of the construction of the railway. The decision was that the foreshore of Vancouver Harbour is under the jurisdiction of the Parliament of Canada, either as having formed part of the harbour at the time of the union of British Columbia with the Dominion, or by reason of the jurisdiction of the Dominion attaching at the Union. It was also decided that the Act respecting the Canadian Pacific Railway, 44 Vict., cap. 1, should not be construed in the same way as an ordinary Act of incorporation of an ordinary railway, but that it should be interpreted in a broad spirit, and bearing in mind the objects sought to be accomplished.

Mr. Justice Duff's decision was affirmed by the Full Court of British Columbia sitting in appeal.

These decisions, both from Mr. Justice Duff and from the Full Court of British Columbia, were upheld by the Privy Council. (*Attorney General for British Columbia* v. *Canadian Pacific Railway* (1)). They were rendered in a case where the province of British Columbia had full opportunity to submit all the facts and arguments on the particular question with which we are now dealing; they declared that the foreshore of Vancouver Harbour passed under the jurisdiction of the Parliament of Canada at the time of Union, and it should not be open to individuals, such as the respondents in the present case, to ask the courts to again review that question. It should be regarded, it seems to me, as having been decided as against the whole of the public, including the parties in the present case, and as having been definitely settled.

For those reasons, I would think that the learned trial judge was right in holding that Coal Harbour was part of a public harbour in 1871 and, as such, that it came under the jurisdiction of the Federal Parliament, at least for the purposes with which we are concerned here.

But there is, to my mind, a further reason why we should so hold, and it is to be found in the two orders in council respectively from the Government of British Columbia and the Government of Canada in 1924. They are worded in practically identical terms. They begin by referring to section 108, schedule 3 of the *British North America Act,* and to the Order of Her late Majesty in Council, dated the 16th May, 1871, and stating that public harbours in British Columbia became the property of Canada as of the 20th day of July, 1871. They proceed to say that some doubt has existed as to what is comprised in the expression "public harbours" in schedule 3 of the *British North America Act,* and that it has been held by the Judicial Committee of the Privy Council that the question whether any harbour or any particular part thereof is included is a question of fact dependent upon the circumstances of each case, but that a natural harbour not actually used for harbour purposes at the date of the Union is not included.

Then they state that it is desirable in the public interest that the property which belongs to Canada under the designation "public harbours" should be definitely ascertained,

(1) [1906] A.C. 204.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

and negotiations have accordingly been carried on between the Dominion and Provincial Governments with a view to reaching a settlement of all outstanding questions between the two governments in this connection and agreeing upon certain defined areas as being the property of Canada under said designation.

That as the result of conferences between the representatives of the two Governments it has been mutually agreed that the harbours of Victoria, Esquimalt, Nanaimo, Alberni, Burrard Inlet and New Westminster, as described in the schedule attached to the order in council and marked "A", and as shown by the respective maps annexed thereto, were and are public harbours within the meaning of schedule 3 of the *British North America Act* and became and are the property of Canada thereunder.

That it has been further agreed between the two Governments that the ownership of all other ungranted foreshore of tidal and non-tidal waters and lands covered with water in British Columbia, except any foreshore and lands covered with water within the Railway Belt, belong to and are vested in the Province.

That is has been further agreed that any grants or transfers by one government to the other shall not be affected by this Order, and all such grants and transfers which may have been made prior to the date hereof shall be ratified and confirmed by this Order, and moreover that nothing herein contained shall affect the title of the Dominion to any lands or property acquired under any other provisions of the *British North America Act,* or otherwise than by virtue of the designation "public harbours" in the said Act.

That it has been further agreed that where the Dominion Government has, prior to the date of this Order, treated as a public harbour other than Victoria, Esquimalt, Nanaimo, Alberni, Burrard Inlet and New Westminster, the Government of the province of British Columbia will consider the transfer of such part or parts of such harbour as may reasonably be required by the Dominion Government for public purposes * * * and that the Province will furnish to the Dominion full particulars of all grants, quit claims and leases or other concessions which may have been granted by the Prov-

ince in respect of foreshore or lands covered with water in British Columbia and being within the limits of the said six public harbours hereinbefore defined, for the purpose of enabling the Dominion to consider and determine the terms and conditions upon which any such grant, quit claim or concession should be confirmed prior to confirmation of the said grant, quit claim or concession by the Dominion.

The orders in council conclude by stating that the agreement above recited is hereby ratified and confirmed, and that all the right, title and interest, if any, of the Dominion in any ungranted foreshore of tidal or non-tidal waters and lands covered with water in British Columbia outside the boundaries of the six harbours above mentioned, as defined by the said description and plans, and outside the Railway Belt, shall be and the same is hereby transferred to the province of British Columbia, and that a certified copy of the Order shall be transmitted to the Provincial Government and a copy shall be filed in the office of the Registrar of Titles in Vancouver, New Westminster, Victoria, Prince Rupert, Kamloops and Nelson.

In the schedule referred to in the orders in council, Burrard Inlet is described as comprising

all the foreshore and bed of Burrard Inlet and the area adjacent to the entrance thereto lying east of a line drawn south astronomically from the southwest corner of the Capilano Indian Reserve Number Five (5) to high water mark of Stanley Park.

It is common ground that the above description includes Coal Harbour and, accordingly, the foreshore at present in question between the parties in this case.

A map of Lot 185 in Liverpool (Vancouver) and Plan No. 92, to which reference has several times been made in the course of the present reasons for judgment, are there referred to.

On behalf of the respondents, it is argued that these orders in council are invalid, because they lack statutory sanction and because Coal Harbour is said to be simply an indentation of Burrard Inlet.

It cannot be said that the orders in council, either from the Province or from the Dominion, are lacking in legislative authority, or ratification. Counsel, both for the

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

appellant and for the province of British Columbia (intervener), were able to point to some statutes giving more or less legislative authority, or ratification, to what was being done through those orders in council by both the Province and the Dominion. But, even if the argument on that point might be said not to be altogether convincing, there remains that these orders in council were acts of the highest authority and they were acted upon by both parties to them for more than seventeen years when the present action was instituted. They constitute an unequivocal admission that these harbours, including the spot now under discussion, became the property of the Dominion, not only at the time when the orders in council were adopted respectively by the interested parties, but also in 1871 at the time when British Columbia entered Confederation.

Of course, it was urged by counsel for the respondents that the Government of British Columbia had no power to make admissions as are contained in the order in council which it passed; but I must confess my inability to accept the argument made on behalf of the respondent on that point.

The orders in council may be upheld as valid, because both Governments, in acting as they did, were exercising powers which are part of the residual prerogative of the Crown, or because the transfer from one Government to another is not appropriately effected by ordinary conveyance. His Majesty the King does not convey to himself. As to that proposition, reference may be made to *Attorney General for British Columbia* v. *Attorney General for Canada* (1); *Esquimalt and Nanaimo Railway Co.* v. *Treat* (2); *Saskatchewan Natural Resources Reference* (3). In the latter case, Mr. Justice Newcombe, delivering the judgment of this Court, stated, among other things, as follows (p. 275):—

> It is objected that, although the Territories were made part of the Dominion and became subject to its legislative control, there was no grant or conveyance of the lands by the Imperial Crown to the Dominion; but that was not requisite, nor was it the proper method of effecting the transaction. It is not by grant *inter partes* that Crown lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provision, sometimes by order in council, sometimes by despatch. There is only

(1) (1887) 14 Can. S.C.R. 345, at 357; (1889) 14 A.C. 295.

(2) [1919] 3 W.W.R. 356.

(3) [1931] S.C.R. 263, at 275.

one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service. I will quote the words of Lord Davey in *Ontario Mining Company* v. *Seybold* (1) where his Lordship, referring to Lord Watson's judgment in the *St. Catherines Milling* case (2), said:—

"In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the *British North America Act, 1867*, 'it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.' Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province."

It is needless to mention here that, although this was not a judgment in the true sense of the word, but merely what is sometimes referred to as an opinion made in a Reference to this Court by the Governor General in Council as provided for by section 55 of the *Supreme Court Act* and the special jurisdiction therein given to this Court, we should regard an opinion of that kind as binding upon this Court and, moreover, one which, in the particular circumstances and in view of the wide experience in these matters which must be recognized to Mr. Justice Newcombe, cannot be held but as having the greatest weight and authority.

In the circumstances, we should hold that the orders in council are valid as a conveyance from the Province to the Dominion and, reciprocally, from the Dominion to the Province, of the several lands which are the subject matter thereof and, as a consequence, as a valid conveyance, from the province of British Columbia to the Dominion, of Burrard Inlet, including Coal Harbour and its foreshore; and, moreover, that they constitute an admission by the Province; and we fail to see why such an admission should not be accepted by the courts as a valid recognition of the rights and the jurisdiction of the Dominion in the premises.

(1) [1903] A.C. 73, at 79. (2) (1888) 14 A.C. 46.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

Let us suppose that, instead of having been made by the means adopted by the interested parties, the admission was made by counsel in a case where the question would be in issue. In such a case I cannot see for what reason such an admission would not be accepted by the courts and why it should not be taken as definitely defining the respective rights of the Province and of the Dominion in that regard. It would follow that it is admitted by the province of British Columbia that the Dominion held the foreshore of Coal Harbour as owner since 1871.

Nor can we accept the suggestion made by counsel for the respondents that Mr. Justice Newcombe, in what he said, was dealing only with the form of the conveyance and not with the authority to convey, always provided there was legislative authority upon which His Majesty's Ministers may act.

The passage in question is not qualified by any restriction and I would hold that the orders in council, therefore, were effective to transfer both the property and the jurisdiction to the Dominion of Canada.

If, however, it had to be assumed that the orders in council were invalid without legislative approval, it should be pointed out that *The Land Act of British Columbia,* (1936) R.S.B.C., cap. 144, imposed no restriction on a transfer from the Province to the Dominion. After all, there is no real conveyance of property, since His Majesty the King remains the owner in either case and, therefore, it is only the administration of the property which passes from the control of the Executive of the Province to the Executive of the Dominion. When the Crown, in right of the Province, transfers land to the Crown, in right of the Dominion, it parts with no right. What takes place is merely a change of administrative control. *Theodore* v. *Duncan* (1); *Burrard Power Co. Ltd.* v. *The King* (2). In *Theodore* v. *Duncan* (1) Viscount Haldane delivering the judgment, stated at p. 706:—

> The Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States. The question is one not of property or of prerogative in the sense of the word in which it signifies the power of the Crown apart from statutory authority, but is one of Ministerial admin-

(1) [1919] A.C. 696, at 706. (2) [1911] A.C. 87, at 95.

istration, and this is confided to the discretion in the present instance of the same set of Ministers under both Acts. With the exercise of that discretion no Court of law can interfere so long as no provision enacted by the Legislature is infringed. The Ministers are responsible for the exercise of their functions to the Crown and to Parliament only, and cannot be controlled by any outside authority, so long as they do nothing that is illegal.

In *Burrard Power Co. Ltd.* v. *The King* (1), Lord Mersey, delivering the judgment, observed (p. 95):—

> Before the transfer they were public lands, the proprietary rights in which were held by the Crown in right of the Province. After the transfer they were still public lands, but the proprietary rights were held by the Crown in right of the Dominion * * *

And in *Esquimalt and Nanaimo Railway Co.* v. *Treat* (2), Viscount Haldane, dealing with a conveyance, from the province of British Columbia to the Dominion, of the railway belt, observes at p. 360:—

> In an instrument which in reality did no more than operate as a transfer by the Crown of administration in right of the Province to administration in right of the Dominion * * *

In *St. Catherine's Milling & Lumber Co.* v. *The Queen* (3), Lord Watson, in delivering the judgment, said at p. 56:—

> In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

The legislature of the province of British Columbia has not as yet by any statutory enactment exercised control with respect to the transfer of land from the Province to the Dominion. If it has, the only enactment of the Province empowers the Province to transfer land to the Dominion by order in council.

Moreover, the words "subject to the control of its legislature" do not appear in section 109, and they are simply a statement of the law that the provincial legislature may legislate with respect to such lands.

That the admissions of fact made in the orders in council must be noticed by the courts, and relied on for the purpose of their decisions, would follow from *Tweedie* v.

(1) [1911] A.C. 87.
(2) [1919] 3 W.W.R. 356.
(3) (1889) 14 A.C. 46.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

The King (1). See what is said in that regard by Mr. Justice Duff at pp. 210 and 211. At the foot of page 211 he says:—

> This instrument constitutes an admission touching the title to the lands in question made by the only executive authority competent at the time to make admissions on that subject on behalf of the Crown; and, therefore, as an admission on behalf of the Crown it is admissible in my opinion in evidence against the plaintiff in this proceeding.

In the Deadman's Island case (2), the transfer to the Dominion was by special grant or by despatch, referred to by Mr. Justice Newcombe in the passage quoted in the *Saskatchewan Natural Resources Reference* (3); and the rights of the Dominion Government derived therefrom were recognized by this Court in *Attorney General of Canada* v. *Cummings et al.* (4) and also in the *Gonzalves* case, which is merely referred to in the same volume (3), p. 51. The transfer was made by despatch and was upheld as valid and effective by this Court. This cannot be ascertained from the report itself, which is a mere note of the judgment rendered in the case, but a reference to the book in that case shows that the judgment was rendered in reference to an order in council which included Burrard Inlet.

Referring again to the Provincial *Land Act,* cap. 144, R.S,B.C. 1936, it may be verified that section 70 relates to lands granted by the Crown and that the statute may be regarded as authority to the Government to act by order in council.

It happens that the province of British Columbia was given the right to intervene in this Court and the Attorney General of that province gave his full and complete support to the argument of the Attorney General for Canada, and more particularly to the contention that the orders in council were valid, adding that it should be considered no title passed by them to the Dominion Government and that it was merely a matter of a change of administrative control.

(1) (1915) 52 Can. S.C.R. 197.
(2) Atty. Gen. of B.C. v. Atty. Gen. of Canada [1906] A.C. 552, at 558.
(3) [1931] S.C.R. 263, at 275.
(4) [1926] 1 D.L.R. 52.

Both the trial judge, Manson J., and Mr. Justice Sloan (now Chief Justice of British Columbia) in the Court of Appeal came to the conclusion which I have just mentioned, and I fully agree with their conclusion.

Mr. Justice Sloan added that land vested in the Crown, that is to say in His Majesty the King, may, in the absence of restrictive statutory provisions binding the Crown, be alienated by His Majesty in virtue of the Royal prerogative and, according to conventional constitutional custom, through his delegate, and upon the advice of his Ministers. He referred to what was said by Lord Watson in *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (1):—

> * * * in *Attorney General of Ontario* v. *Mercer* (2), *St. Catherines Milling & Lumber Co.* v. *The Queen* (3) and *Attorney General for British Columbia* v. *Attorney General for Canada* (4) their Lordships expressly held that all the subjects described in section 109, and all revenue derived from these subjects continued to be vested in Her Majesty as Sovereign head of each Province.

And in the same case, in a different passage of his judgment, Lord Watson said (1) (at p. 441):—

> Their Lordships do not think it necessary to examine in minute detail the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces.

Reference should also be made to what was said by Strong J., as he then was, in *The Queen* v. *Bank of Nova Scotia* (5):—

> The most careful scrutiny of that statute will not, however, lead to the discovery of a single word expressly interfering with those rights, and it is a well settled axiom of statutory interpretation, that the rights of the Crown cannot be altered to its prejudice by implication, a point which will have to be considered a little more fully hereafter, but which, it may be said at present, affords a conclusive answer to any argument founded on the *British North America Act*. Putting aside this rule altogether, I deny, however, that there is anything in the Imperial Legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of Confederation, in any province becoming a member of the Dominion, were intended to be in the slightest degree affected by the statute; it is true, that the prerogative rights of the Crown were by the statute apportioned between the provinces and the Dominion, but this apportionment in no sense implies the extinguishment of any of them,

(1) [1892] A.C. 437, at 444.
(2) (1883) 8 App. Cas. 767.
(3) (1889) 14 App. Cas. 46.
(4) (1888) 14 App. Cas. 295.
(5) (1885) 11 Can. S.C.R. 1, at 18, 19.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

and they therefore continue to subsist in their integrity, however their locality might be altered by the division of powers contained in the new constitutional law.

In *Attorney General for Canada* v. *Attorney General of Ontario* (1), Strong C.J. said:—

That the Crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them seems to be a well recognized constitution canon.

The Royal authority of the Crown in the right of the Province is delegated to and vested in the Lieutenant Governor in Council, so far as the Province is concerned, and, as was said by Lord Watson in *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (2).

A Lieutenant Governor when appointed is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion Government.

In the province of British Columbia the rule, as expressed by section 35 of *The Interpretation Act,* is that

no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby;

and, therefore, the prerogative of the Crown cannot be affected, except by clear legislative enactment.

The authority of the Government of the province of British Columbia to act as they did flows from the residuum of the Royal prerogative, which is unaffected by statute. That is undoubtedly the effect of the judgment of this Court in the *Saskatchewan Natural Resources Reference* (3), and which was affirmed by the Judicial Committee of the Privy Council when that *Reference* came before it (4). Lord Atkin, delivering the judgment, said (at p. 40):—

Their Lordships entirely agree with the reasoning of the judgment of Newcombe J. in the Supreme Court.

The whole of the judgment is that the effect of the order in council in question therein, whereby Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada, and of s. 5 of the *Rupert's Land Act,* 1868, was that the lands therein which

(1) (1894) 23 Can. S.C.R. 458, at 469.
(2) [1892] A.C. 437, at 443.
(3) [1931] S.C.R. 263.
(4) [1932] A.C. 28.

were then vested in the Crown, and now are within the boundaries of the province of Saskatchewan, became so vested in the right of the Dominion, and the Dominion was given full control to administer them for the purposes of Canada as a whole, not merely for the inhabitants of the area.

Reference might also be made to the Deadman's Island case (1), already referred to, where the transfer by despatch was held to be valid without assent or confirmation by Parliament and declared to be effective notwithstanding the absence of legislative approval. (See also *Leamy* v. *The King* (2); *Attorney General for Canada* v. *Attorneys General for Ontario, Quebec and Nova Scotia* (3); *Holdsworth's "History of English Law"*, vol. 10, pp. 282, 339, 363, 366, 469; *American and English Encyclopedia of Law*, second edition, p. 213; *Dicey's "The Law of the Constitution"*, 8th edition, p. 421; (1) *Blackstone's Commentaries on the Law of England* (Lewis Ed.) pp. 261, 262 and 264; *British North America Act 1867*, sections 12 and 65).

Finally, the argument of the Attorney General of Canada on this point receives support from *An Act to provide for the Government of British Columbia* (1858) (Imp.) cap. 99, and the instructions to James Douglas, Esq., who was appointed Governor and Commander-in-Chief in and for the Colony of British Columbia and its dependencies (which may be found in the appendix to the Revised Statutes of British Columbia, 1871); from a proclamation by Governor Douglas on December 2, 1858 and a further proclamation on February 14, 1859, as well as from the ordinance of April 30, 1866, which, although repealed by the ordinance of the 1st of June, 1870, did not, however, affect the prerogative.

Up to the time when British Columbia entered Confederation the title to public lands was in the Crown, and the latter's prerogative in respect thereof was in full effect. The Crown lands remained vested in His Majesty in right of the Province and His Royal prerogative to deal therewith remained unaltered, subject to any provincial statutory provisions binding the Crown, of which there were none.

(1) [1906] A.C. 552.
(2) (1916) 54 Can. S.C.R. 143, at 158.
(3) [1898] L. J. P.C. at 91.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

I find it unnecessary on that point to again refer to Lord Watson in *Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick* (1) and to Lord Dunedin in *Attorney General for British Columbia* v. *Attorney General for Canada* (2).

After all the true words for "prerogative" in modern expression are "executive power". (*Bacon's "Abridgment"*, pp. 383, 384 and 385; Holdsworth's "History of English Law", pp. 341 and 362; *Williams* v. *Howarth* (3); *In re Silver Bros. Ltd.* (4)).

The *Land Act* of 1911, R.S.B.C. cap. 129, s. 58, contains no restrictive section. Its history goes back, in its present form, to the statute of 1884, cap. 16, s. 88, and the Crown, although not mentioned in it, could, no doubt, take advantage of it. *Peter Zakrzewski* v. *The King* (5); *The Queen* v. *Cruise* (6). The Crown may take advantage of the act, although not mentioned.

We do not agree with the contention of counsel for the respondents that the Royal prerogative is vested in the legislature and we think it is vested in the Executive. Crown lands are vested in His Majesty the King; and there is no difference in quality between the Crown acting under its prerogative, or under a modern statute. It must be so *a fortiori* when the exercise of the prerogative is not in respect of an alienation of lands, but merely in respect of a transfer of the administration to the best available use.

It was stated in the judgment of the majority of the Court of Appeal (7) that under the *British North America Act*, 34 Victoria, cap. 28, s. 3, the Parliament of Canada could from time to time, with the consent of the legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such province; and it was deduced from that that the legislature alone could transfer the lands covered by water, now in question. But, of course, we do not agree that the orders in council constituted a transfer. In our view, they constituted only a change of administrative control. Besides that, they contained admissions that the transfer had really been made

(1) [1892] A.C. 437.
(2) (1888) 14 App. Cas. 295.
(3) [1905] A.C. 551, at 554.
(4) [1932] A.C. 514, at 523, 524.
(5) [1944] Ex. C.R. 163, at 168, 169.
(6) (1852) 2 Ir. Ch. Rep. 65, at 67.
(7) [1944] 1 W.W.R. 615.

automatically by force of the *British North America Act* of 1871, as forming part of a public harbour at the time when British Columbia came into the Confederation. Moreover, a transfer such as this does not affect provincial limits; and it is sufficient to think of a case where certain land is used by the Dominion Government to build a courthouse, or a post office, or such other things, to indicate that the transfer in question does not alter the limits of the province within the meaning of section 3 of chap. 28 of the statute 34-35 Victoria, being the *British North America Act* of 1871. The lands remained within the provincial territorial limits.

Having come to the conclusion that the Dominion of Canada became the owner of the land covered by water, with which we are dealing here, and that the latter passed under federal jurisdiction in 1871, or at least in 1924 through the orders in council, there remains to be considered the defence made by the respondents on the grounds that they acquired the foreshore, now in discussion, either by Crown grant or by prescription.

The Crown grant invoked by the respondents was a conveyance from the Crown of Lot 185, Group 1, on the official plan or survey of the district of New Westminster in the Colony of British Columbia, on the 20th day of May in the year 1867. It did not in terms include the foreshore in front of the said lot. There was no express grant of the foreshore and it is not to be implied. Moreover, the grant itself does not purport to convey the land down to the low water mark; and it must be remembered that the soil here is *prima facie* in the Crown. (*The Queen* v. *Musson* (1), per Lord Campbell, C.J.; *Lord Fitzhardinge* v. *Purcell* (2), per Parker J.; *Attorney General for Nigeria* v. *Holt & Co.* (3) per Lord Shaw).

The description in the grant has already been adverted to. It reads:—

> All that parcel or lot of land situate in the District of New Westminster said to contain Five Hundred and Fifty (550) acres and numbered Lot One Hundred and Eighty-five (185), Group One (1), on the official plan or survey of the said District in the Colony of British Columbia: to have and to hold the said parcel or lot of land and all and singular the premises hereby granted with their appurtenances.

(1) (1858) 120 English Rep. 336, at 338.
(2) [1908] 2 Ch. 139, at 146.
(3) (1915) 84 L.J. P.C. 98, at 102.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

The language is clear and the intent is unambiguous. For the purpose of construing it, I see no reason to refer to cases which, in any event, have no application to the present one, since it is evident that the language of a particular document cannot be interpreted by reference to different language; and the decisions can be of some use only if the wording is absolutely identical.

In this case the sketch attached to the grant is the best available evidence of the boundary. As shown by the copy of the sketch, Lot 185 was bounded on the north by the waters of Coal Harbour and on the south by English Bay. The location of Lot 6, fronting on Coal Harbour, is shown on Plan 92. It will be noticed that the description does not limit the area by reference to high water mark or low water mark, or otherwise. In support of their contention, the respondents did not rely on the description itself, which, in effect, was confined to an argument that title to the foreshore passed to them under the grant on account of the use therein of the words "with their appurtenances". Their claim was that these words included the foreshore.

We do not think that that contention is sound. Standing alone the word "appurtenances" does not include land. *Lister* v. *Pickford* (1); *Cuthbert* v. *Robinson* (2); See *Chitty's "Prerogatives of the Crown"*, p. 392.

Land cannot be appurtenant to land. *Leamy* v. *The King* (3); Coulson and Forbes on "Waters", 5th ed. at p. 27; Moore's "History of the Foreshore", 3rd ed. at pp. 781, 782 and 783; *Neaverson* v. *Peterborough Rural District Council* (4); *Wood* v. *Esson* (5), the judgment of Henry, J., p. 253; *In re Provincial Fisheries* (6).

We find an elaborate reference to the meaning of the word "appurtenance" by Idington J. in *Vaughan* v. *Eastern Townships Bank* (7). He begins by saying that the statute in that particular case did not in terms, or by any reasonable implication, make the grant of a water record appurtenant to some specific land. Then the learned judge tests that interpretation by asking what would be the

(1) (1865) 34 L.J. Ch. 582, at 584.
(2) (1882) 51 L.J. Eq. 238, at 240, 241.
(3) (1916) 54 Can. S.C.R. 143, at 176.
(4) [1902] 1 Ch. 557.
(5) (1884) 9 Can. S.C.R. 239.
(6) (1897) 26 Can. S.C.R. 444, at 547.
(7) (1908) 41 Can. S.C.R. 286, at 299.

result of such a conveyance of land. He refers to the definition of the word in Bouvier's Dictionary (vol. 1, p. 158):—

> Things belonging to another thing as principal, and which pass as incident to the principal thing.

He refers also to Burton on Real Property (8th edit.), p. 353, par. 1145, repeating Coke on Littleton:—

> In general everything which is appendant or appurtenant to land will pass by any conveyance of the land itself, without being specified, and even without the use of the ordinary form "with the appurtenances" at the end of the description.

Then, says the learned judge, you find the interpretation given by authorities cited in Gould on Waters (3rd edit.), p. 465, dealing with similar legislation, stated as follows:—

> The ditch when completed is not a mere easement or appurtenance.

He goes on to say that the cases of *Strickler* v. *City of Colorado Springs* (1), and *Bloom* v. *West* (2), are well worth looking at, and he mentions that in those cases it was held as just quoted by him from these several authors. He concludes by these words:—

> The greater part of the land might be granted, one part to one, another to another, or for some other purpose to which this never could be supposed to be appurtenant.
>
> Or as intensive farming progressed, a few acres of a whole section might require all the water so granted. Yet, if anything in the theory that it was appurtenant, a man may have, after spending large sums of money on such improvements, his whole property tied up in an undesirable way.

It will be seen, therefore, that the words, "with their appurtenances", are quite inadequate to include the foreshore in the grant, and the plea of the respondents on that score cannot be maintained.

Nor do the respondents fare better on their claim of prescription. As expressed in the statement of defence, the respondent contended that they had been in possession, or through their predecessors, from 1867; but, upon the evidence, it is quite impossible to say that, during the years mentioned, there was continued and uninterrupted ownership of the foreshore by the grantees

(1) (1891) 16 Col. 61. (2) (1893) 3 Col. App. Rep. 212.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

and their successors, or that there was usage of a kind to justify the claim that ownership was acquired by prescription.

The learned trial judge found that prescription was not established and that the evidence did not substantiate the claim that there was uninterrupted use or occupation of the foreshore in front of Lot 6, as far back as 1881, the year from which it was incumbent upon the respondents to show such use or occupation as would form the basis of a claim of prescription of sixty years, that period of time being the length required for prescription against the Crown. In fact, the finding of the learned trial judge on this point was that the evidence indicated that there was no use or occupation for some years after 1881. This finding ought to be read in connection with what Sir Arthur Wilson said in the Judicial Committee of the Privy Council when delivering the judgment in *Attorney General for British Columbia* v. *Canadian Pacific Railway* (1):—

> Prior to the time when British Columbia entered the Confederation in 1871, the foreshore in question was Crown property of the Colony, now the Province of British Columbia.

On this point, like Sloan J. in the Court of Appeal, we would not disturb the finding of the trial judge. Indeed that finding was not disturbed even by the majority of the Court of Appeal; and it should not be forgotten that the onus of establishing acquisition by prescription was on the respondents. This statement does not require the citing of authorities, which are abundant; and we may say, moreover, that the proposition is self-evident.

Counsel for the respondents practically admitted that the evidence which he was able to adduce at the trial fell far short of establishing the necessary use or occupation by the respondents. He suggested that the use having been proven for forty years, as he contended, the Court should infer previous use for the required number of years, but we do not see our way clear to found our judgment on this point upon any such contention.

By the provisions of the *Nullum Tempus Act*, 9 George III, c. 16:—

(1) [1906] A.C. 204, at 208.

The Crown shall not sue any person for or in any wise concerning any lands or hereditaments (other than liberties or franchises), or the rents and profits thereof, by reason of any right or title which has not first accrued within sixty years next before the commencement of the suit, unless the Crown or its predecessors in title have been answered by force of any such right or title the rents or profits thereof (or the rents or profits of any honour, manor, or other hereditament whereof the premises in question are part) within the said space of sixty years (or that the same have been duly in charge to the Crown or have stood insuper of record within such space).

Rinfret C.J.

See Lightwood on the Time Limit of Actions, pp. 143 and 148 and *Attorney General of Canada* v. *Cummins et al.* in this Court (1).

We would refer to what was said by Mr. Justice Anglin, as he then was, in *Tweedie* v. *The King* (2):—

From a continuous user of upwards of forty years (such as has been actually proved in this case) an earlier like user may readily be inferred. *Chad* v. *Tilsed* (3). This, coupled with the lease of 1818 and subsequent documents indicative of the character of the right asserted (*Re Alston's Estate* (4)), in my opinion suffice to support the defendant's claim to a possessory title under the New Brunswick statute, 6 Wm. IV., ch. 74 (now C.S.N.B., ch. 139, sec. 1).

But it must be noticed that Mr. Justice Anglin refers to a continuous user of upwards of forty years "such as has been actually proved in this case"; and, accordingly, the evidence in that case cannot establish a precedent for the present case. Moreover, the learned judge added

coupled with the lease of 1818 and subsequent documents indicative of the character of the right asserted.

It is impossible, in the circumstances, to compare what Mr. Justice Anglin said in the *Tweedie* case (2) with what has been proven in the present case, not to say anything of the fact that, outside of what verbal evidence there is here, there are no "documents indicative of the character of the right asserted". Moreover, what was said by Mr. Justice Anglin, as above reproduced, expressed only his own opinion and was not concurred in by the other members of the Court so that, although, of course, having all the weight of an opinion of such a learned judge, the statement he made does not constitute the decision of the Court in

(1) [1926] 1 D.L.R. 52, at 53, 54.
(2) (1915) 52 Can. S.C.R. 197, at 219.
(3) (1821) 2 Brod. & B. 403, at 408.
(4) (1856) 28 L.T. (O.S.) 337.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

the *Tweedie* case (1) and cannot be accepted in favour of the respondents' argument as a precedent and an authority which would bind this Court.

At all events, with due respect, I cannot come to the conclusion that, in a case like this, evidence of a user of forty years, such as is claimed here, will justify the inference that the property has also been used in a similar way for the twenty year period next preceding in a manner to satisfy the Court that prescription has been acquired by the full possession of sixty years required by the statute.

The conduct of the respondents and of their predecessors may not be interpreted to vary the terms of the grant. Mere unilateral acts on the part of the grantees would not be sufficient. There is no evidence relating to the period prior to 1881. In fact, the evidence is that in the earliest period there was no such user; and evidence of a user in 1900 is quite inadmissible to justify any inference for the period anterior to that year.

Perhaps it might be mentioned in passing that in 1924, the year when the orders in council were adopted by the Province and by the Dominion, the sixty years had not yet been reached. The date of the amended claim is February 27, 1941.

Then if the respondents had adduced sufficient evidence, they would still have had to meet the consideration that the Dominion kept records since 1928, in which the property in question appeared as being in the ownership of the Dominion and under the jurisdiction and control of the federal authorities; and we would have to consider the question whether that alone would not be sufficient to interrupt any pretended prescription. In order so to interrupt prescription, the record may only show that the Crown claimed to be the owner.

It is necessary to make a mere reference to a further contention of the Crown in respect to the question of prescription. On March 1, 1939, Johnson, the predecessor of the present respondents, paid to the National Harbours Board the sum of five hundred dollars ($500) "in settlement in full of all claim the Board may have against me personally" in connection with the occupancy of the

(1) (1915) 52 Can. S.C.R. 197.

water lot in front of the property prior to the time that he sold the Upland property to Higbie. The Crown advanced the argument that that payment had the effect of interrupting any prescription that may have been current at the time. But it is shown by the letter written by Mr. Johnson, accompanying the payment of the five hundred dollars ($500) that he did so without prejudice "in order to avoid any court action and rather than fight the case". Apparently the National Harbours Board intended to commence action against Higbie. It appeared that the Attorney General for Canada hardly insisted on the effect that such a payment might have. It was made without prejudice and it was so accepted by the Board in its reply to Johnson's letter.

In addition to that, when Johnson made the payment he was no longer in possession of the land. (See Phipson on Evidence, 8th edit., p. 225; *Dysart Peerage,* (1881), 6 A.C. 489, at 499 and 500.) Such an admission, therefore, could hardly be held against Higbie and the Albion Investments Ltd.

We have, no doubt, said enough to indicate that in our view the plea of prescription entirely fails. (*Attorney General for Canada* v. *Cummings et al.* (1); *The King* v. *Attorney General of Ontario and Forrest* (2).

Finally, the respondents raised the question of their riparian rights. They said that, as riparian owners of the Upland lot, they were entitled to the beneficial use of the land covered by water in front of it and that, in the exercise of those rights, they had rightly built and maintained thereon shipways and floats to facilitate access to the navigable water, adding that what they had done did not interfere with the public right of navigation.

Now, the action on behalf of His Majesty the King in the right of Canada originally prayed for the possession of the said land covered by water and later, in an amended statement of claim, a declaration that the appellant was the legal and beneficial owner of the said land. A declaration that the respondents have certain riparian rights on the water covered land in front of Lot No. 6 would not

(1) [1926] 1 D.L.R. 52. (2) [1934] S.C.R. 133.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rinfret C.J.

be a bar to the determination of the right of possession, or of ownership of the Dominion, as prayed for in the action.

The judgment may decide that the use being made by the respondents of the foreshore and land below high water mark is a trespass on Crown lands and is not justified by their riparian rights. The trial judge held that they were trespassers and liable for mesne profits to the Crown. He ordered a reference to the District Registrar of the Court to take an account of the mesne profits due from the respondents to the appellant; and upon the evidence we think that holding and that order of reference were rightly made. (See *Cedar Rapids Mfg. and Power Co.* v. *Lacoste* (1)), where Lord Dunedin, delivering the judgment of the Judicial Committee said:—

> The River being a navigable river, the bed belongs, according to the law of Canada, to the Crown and no riparian owner can construct works in the bed without the consent of the Crown.

(See also *Arsenault* v. *The King* (2)).

The uses made by the respondents of the foreshore would be in excess of their legal riparian rights, even if we assume that they have any, as to which, consideration would have to be given to the facts referred to in the evidence that an artificial fill was made by the respondents or their predecessors which had the effect of converting into hinterland what the Court thought might have been looked upon as riparian land. (See *Lord Fitzhardinge* v. *Purcell* (3)).

It may well be that Lot No. 6 is no longer a riparian lot, and the learned trial judge so held on the evidence adduced before him at the trial, as well as upon consideration of the particulars delivered by both respondents. (*Davie* v. *Bentinck* (4); *O'Kelly* v. *Downey* (5); *Roblin Rural Credits Society* v. *Newton* (6); *Krawczuk* v. *Ostapovitch* (7); *Gautret* v. *Egerton* (8).

(1) [1914] A.C. 569, at 575.
(2) (1917) 32 D.L.R. 622, at 623.
(3) [1908] 2 Ch. 139 at 165, 166.
(4) [1893] L.R. 1 Q.B.D. 185, at 187, 188.
(5) (1913) 5 W.W.R. 859, at 865, 866.
(6) [1927] 1 D.L.R. 105, at 114.
(7) [1921] 2 W.W.R. 534, at 537.
(8) (1867) L.R. 2 C.P. 371.

We repeat that the learned trial judge found that Lot No. 6 was no longer a riparian lot. The point was not discussed in the Court of Appeal, as the case was decided on other grounds.

Suffice it to say, in conclusion, that in our view the buildings and other constructions made by the respondents, or their predecessors, cannot be looked upon as a mere assertion of their alleged riparian rights. They go much further. It is impossible to assert that the exclusive possession which these buildings and constructions constitute ought to be regarded as the mere exercise of so-called riparian rights.

It is not sufficient to say that these constructions are no impediments to navigation, or that it is not alleged or contended that they constitute a nuisance.

We cannot accede to the contention of the respondents that buildings and constructions of the nature as proven in this case can be maintained on the mere assertion of what the respondents called their riparian rights; and we think that the learned trial judge was perfectly right in dealing with this particular matter as he did in his judgment.

For all these reasons we think the appeal should be allowed and the judgment at the trial restored, with the following restriction:—

The clause of the judgment to the effect that

> none of the defendants have or ever had any riparian rights over the said land arising out of their title to the said lot (6) or otherwise,

should be deleted. The appellant is entitled to his costs on the main appeal both here and in the Court of Appeal. No costs should be allowed to the intervenant, nor to the appellant on his cross-appeal in the Court of Appeal.

The judgment of Kerwin and Hudson JJ. was delivered by

KERWIN J.:—In this action, commenced in the Supreme Court of British Columbia, the Attorney General of Canada (on behalf of His Majesty the King in the Right of Canada) sued to recover possession (and mesne profits) of the foreshore in front of Lot 6, Block 64, District Lot 185, Group 1, New Westminster District, Plan 92.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Kerwin J.

This foreshore is in what is known as Coal Harbour and according to the maps and testimony, Coal Harbour is part of, and is stiuate in, an inlet of the sea known as Burrard Inlet in the province of British Columbia. As stated in the Precious Metals case, *Attorney General of British Columbia* v. *Attorney General of Canada* (1):—

> The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the province before its admission into the Federal Union.

Included in these public lands is the foreshore in Coal Harbour.

The first question is whether the particular piece of foreshore with which we are concerned became the property of Canada under section 108 of the *British North America Act, 1867,* and Item 2 "Public Harbours" in the third schedule to that Act. This section and item, by article 10 of the Terms of Union scheduled to the Order of Her Majesty in Council of May 16, 1871, admitting British Columbia to the Union, became applicable to the Province as of July 20, 1871. The latest pronouncement upon such a question is contained in the judgment of the Judicial Committee in *The King* v. *Jalbert* (2).

It was there pointed out by Lord Wright that it had been repeatedly held by the Board, and by this Court, that it is not desirable to attempt a precise or exhaustive definition of the words "public harbour" but that some guiding limitations and rules had been established which are useful in considering such a question as the one under consideration. Merely because the foreshore on the margin of a harbour is Crown property does not mean that it necessarily forms part of the harbour. It may, or may not, do so according to circumstances: *Attorney General of Canada* v. *Attorney General of Ontario et al.* (3) (the first Fisheries case). It is a question of fact whether the foreshore at the place in question forms part of the harbour: *Attorney General of British Columbia* v. *Canadian Pacific Railway Company* (4) (the Street Ends case having to do

(1) (1889) 14 App. Cas. 295, at 310.

(2) [1938] 1 D.L.R. 721.

(3) [1898] A.C. 700.

(4) [1906] A.C. 204, at 209.

with part of Burrard Inlet). "Public Harbour" means not merely a place suited by its physical characteristics for use as a harbour but a place to which on the relevant date the public had access as a harbour and which they had actually used for that purpose. In this connection the actual user of the site, both in its character and extent, is material: *Attorney General of Canada* v. *Ritchie Contracting and Supply Co.* (1), where it was held that English Bay, the bay forming the outer approach to Burrard Inlet, was not a public harbour. A small island in Goderich Harbour in Ontario was held by this Court not to form part of what was a public harbour under the Act: *The King* v. *Attorney General of Ontario and Forrest* (2).

At page 726 of the report in the *Jalbert* case (3), Lord Wright continues:—

> It is clear from these decisions that if what is in question is a particular piece of the foreshore, the issue is not decided by determining whether the harbour is a public harbour but is decided by considering whether even if there is a public harbour within the ambit of which the piece of foreshore is, the piece of foreshore has been actually used as a place of public access for the loading or unloading of ships or similar harbour purposes at the material time. This is a question of fact, not to be concluded by general consideration, such as whether or not there are public works upon it.

Subject to the effect of the Dominion and Provincial orders in council of 1924, referred to later, there is no evidence in this case that the foreshore with which we are dealing had been actually used as a place of public access for the loading and unloading of ships, or similar harbour purposes, on or before June 20, 1871. It was contended that the issue of fact was determined by Mr. Justice Duff (the trial judge in the Street Ends case (4)) when he stated at page 291:—

> I am, however, of the opinion that the lands in question here passed to the Dominion under section 108 of the B.N.A. Act. I find, as a fact, that at the time of the admission of British Columbia into Canada, that part of Burrard Inlet between the First and Second Narrows was a public harbour, and that the parts of the foreshore subject to the public rights of passage referred to were in use as, and were in fact part of the harbour; as was the whole of the foreshore adjoining the townsite of Granville.

(1) [1919] A.C. 999.
(2) [1934] S.C.R. 133.
(3) [1938] 1 D.L.R. 721.
(4) (1904) 11 B.C.R. 289.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Kerwin J.

In the judgment in the Privy Council in that case (1) Sir Arthur Wilson, after referring to the ruling in the first Fisheries case (2) proceeds:—

> In accordance with that ruling the question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact, and evidence was given bearing upon it directed to shew that before 1871, when British Columbia joined the Dominion, the foreshore at the point to which the action relates was used for harbour purposes, such as the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when the harbour was in so early a stage of its commercial development. The evidence satisfied the learned trial judge, and the Full Court agreed with him. Their Lordships see no reason to dissent from the conclusions thus arrived at.

The trial judge in that case, when Chief Justice of Canada, states in the *Forrest* case (3), at page 139:—

> *Attorney General for British Columbia* v. *Canadian Pacific Railway Company* (1) was concerned with the title to a very limited part of the foreshore of Burrard Inlet. In that case, evidence was adduced to show that the part of the Inlet adjacent to the part of the foreshore in controversy was in use for harbour purposes in the strictest sense, and the foreshore also, at and prior to the date of the admission of British Columbia into the Union. The finding of fact in that case was based upon that evidence.

It is apparent that the question of fact was confined to the particular piece of foreshore there in question.

While, therefore, I am satisfied that in 1871 Burrard Inlet was a public harbour and that Coal Harbour was a part of it, I would be unable to find that the foreshore in question formed part of that public harbour were it not for the two orders in council mentioned above and which now require consideration. Before dealing with them, there should be mentioned the decision of the British Columbia Court of Appeal in *Hadden* v. *Corporation of the city of North Vancouver* (4). It was there held that as it was not shown that the north shore of the first narrows of Burrard Inlet was part of a public harbour in 1871, a grant from the Dominion Government to the Vancouver Harbour Commissioners and a lease from the latter to the plaintiff conveyed no title.

It thus is evident that as time passed it was becoming increasingly difficult, if not impossible, to show that any particular bit of foreshore was part of a public harbour at

(1) [1906] A.C. 204.
(2) [1898] A.C. 700.
(3) [1934] S.C.R. 133.
(4) (1922) 30 B.C.R. 497.

the relevant date. This fact was realized, and on March 6, 1924, a provincial order in council was passed based upon the report of the Minister of Lands. After referring to the difficulties inherent in the problem, the Minister reported by paragraph 4:—

4. That as the result of conferences between the representatives of the two Governments (Dominion and Provincial) it has been mutually agreed that the harbours of Victoria, Esquimalt, Nanimo, Alberni, Burrard Inlet and New Westminster, as described in the schedule attached hereto marked "A" and as shown by the respective maps annexed thereto, were and are public harbours within the meaning of schedule 3 of the B.N.A. Act and became and are the property of Canada thereunder.

It also appeared that it was further agreed between the two governments that the ownership of all other ungranted foreshore of tidal and non-tidal waters and land covered with water, in the province, except any foreshore and lands covered with water within the Railway Belt, belonged to and were vested in the province. Paragraph 13 reads as follows:—

13. That all the right, title and interest, if any, of the Province of, in and to the foreshore and lands covered with water within the boundaries of the six harbours above mentioned, as defined by the said descriptions and plans, be and the same is hereby transferred to the Dominion.

Among the plans attached to the order in council is one showing Coal Harbour as part of Burrard Inlet, and the description of the latter in the schedule is sufficient to include the former.

The Dominion order in council, dated June 7, 1924, was based upon a report from the Minister of Fisheries. Paragraphs 4 and 5 are the same as paragraphs 3 and 13 of the provincial order in council and annexed are plans and descriptions similar to the ones attached to the Provincial order in council.

The question immediately arises as to the power of the executive authority of British Columbia to pass the Provincial order in council. For the appellant and intervenant, it was argued that such authority may be found in the *British Columbia Land Act,* which at the date of the order in council was chapter 129 of the Revised Statutes of British Columbia, 1911. Section 7 provides that the right of certain persons to preempt

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Kerwin J.

any tract of surveyed, unoccupied and unreserved Crown lands should not extend to the foreshore and the tidal lands, and section 50 enacts:—

> 50. There shall not be granted under the provisions of this Part of this Act any foreshore lands, tidal lands, the bed of the sea, or lands covered by any navigable water, quarries, or lands suitable for fishing-stations or cannery-sites, except by a special order of the Lieutenant-Governor in Council, and upon such terms and conditions as may be therein specified.

Part III of the Act, in which section 50 is found, deals with the sale and free grants of Crown lands. The word "granted" in section 50 is not apt to authorize the Lieutenant-Governor in Council to proceed as in this case and a reading of the Act makes it clear that such a transfer is not contemplated by, or provided for, in the statute.

Mr. Locke referred to the constitutional development in England since the reign of Queen Anne, upon whose accession to the throne the Act which settled the revenue for her reign restrained the Crown, for that and all future reigns, from alienating the Crown lands (Anson's Law and Custom of the Constitution, 4th ed., vol. 2, pt. II, p. 169). He also referred to facts as summarized in the 7th edition of Keith's Constitutional Law at page 381:—

> Since the accession of George III, in 1760, it has been customary for succeeding Sovereigns to surrender the hereditary revenues to the nation, to be paid into the Consolidated Fund, in return for a fixed income known as the Civil List, the statutes by which this is effected, termed Civil List Acts, containing a clause preserving the rights of the Crown to the hereditary revenues, and being made to take effect for the life of the reigning Sovereign and six months after.

To the same effect is article 970 of 6 Halsbury, page 722, where it is also pointed out that in return for this surrender, in addition to allowances made to certain members of the Royal family, His Majesty receives a fixed annual income, still known as the Civil List, although now clear of all charges for the Civil Service and other public expenses which are thrown directly on the Consolidated Fund.

How far these matters may require to be considered in Canada is a question that should be left until the occasion arises. In dealing with the words "the property of"

or "belonging to" the Dominion or a province, as used in the *British North America Act, 1867*, Lord Watson in *St. Catherine's Milling and Lumber Company* v. *The Queen* (1), states at p. 56:—

> these expressions merely import that the right to its (public lands) beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

If the words "and is subject to the control of the legislature" are more than *obiter dicta* they might be taken as referring merely to that control which a provincial legislature may undoubtedly exercise and not that it is the sole branch of a Provincial Government to act under all circumstances. Indeed in *Ontario Mining Co.* v. *Seybold* (2), Lord Davey, after setting out, at page 79, an extract from Lord Watson's judgment including that copied above, continues:—

> Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

These words in themselves might be taken as expressing the opposite view but Lord Davey may have intended only to emphasize that the Sovereign's representative could not act except upon the advice of his constitutional advisers.

Counsel for the appellant and for the intervenant treated the matter as an example of the royal prerogative which persists, they contended, in the absence of any statutory restriction upon its exercise. For that they relied generally upon the judgment of Sloan J.A., now Chief Justice of British Columbia. As an exemplification of their argument they point to the following passage in the judgment of Mr. Justice Newcombe, speaking on behalf of the Court, in *Re Saskatchewan Natural Resources Act* (3):—

> It is objected that, although the Territories were made part of the Dominion and became subject to its legislative control, there was no grant or conveyance of the lands by the Imperial Crown to the Dominion; but that was not requisite, nor was it the proper method of effecting the transaction. It is not by grant *inter partes* that Crown

(1) (1889) 14 App. Cas. 46.
(2) [1903] A.C. 73.
(3) [1931] S.C.R. 263, at 275.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Kerwin J.

lands are passed from one branch to another of the King's government; the transfer takes effect, in the absence of special provisions, sometimes by Order in Council, sometimes by despatch. There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them and the exercise of their beneficial use may, from time to time, as competently authorized, be regulated upon the advice of different Ministers charged with the appropriate service.

This judgment was expressly approved in the Privy Council (1). As to this, however, I agree with the late Chief Justice of British Columbia that *Rupert's Land* Act, c. 105 of the Imperial Statutes of 1868 authorized the order in council by which the Northwest Territory was admitted into and became part of the Dominion, and that Mr. Justice Newcombe was dealing with the operative transfer which was, of course, the order in council, but which had been authorized by statute.

These considerations indicate that in a case of this character, the Court should not go beyond what is necessary for the determination of the points at issue. Nothing therefore is said upon the broad question raised by these arguments and their applicability to Canada. It is sufficient to refer to paragraph 4 of the provincial order in council. That is an admission by the executive authority of British Columbia that the harbours mentioned were "Public Harbours" within the meaning of Item 2 of Schedule 3 of *The British North America Act, 1867*, and that by virtue of section 108 of the Act they became, as of July 20, 1871, the "property" of Canada. As explained in the *St. Catherine's Milling Company* case (2), this expression merely means that the right to the beneficial use of public land or its proceeds has been appropriated to the Dominion. In view of the judicial decisions as to what is necessary to transfer the administrative control in any particular part of the foreshore of a public harbour from the Province to the Dominion, the admission contained in paragraph 4 must be taken as an admission of fact that every piece of foreshore in every part of Burrard Inlet was at the relevant time used for public harbour purposes. This is reinforced by the fact that the Attorney General of British Columbia was permitted to intervene in the proceedings in this Court and counsel representing him set up, and relied upon, this admis-

(1) [1932] A.C. 28. (2) (1889) 14 App. Cas. 46.

sion to defeat the claim of the respondents. There is nothing to prevent the Executive of the Province, under the circumstances of this case, to make such an admission. See Duff J. in *Tweedy* v. *The King* (1). In this view, paragraph 13 may be treated as either complementary to paragraph 4 or superfluous.

The appellant is therefore entitled to succeed in its claim for possession unless the respondents are able to defeat that claim by some other defence. One is based upon a grant under the Great Seal of the Colony of British Columbia, dated May 20, 1867, whereby there was granted unto Sam Brighouse, William Hailstone and John Morton, their heirs and assigns,

all that parcel or Lot of Land situate in the District of New Westminster said to contain Five hundred and fifty acres and numbered Lot One Hundred and eighty-five Group One on the official Plan or Survey of the said District in the Colony of British Columbia to Have and to Hold the said parcel or lot of land, and all and singular the premises hereby granted with their appurtenances unto the said Sam Brighouse, William Hailstone and John Morton, their heirs and assigns for ever.

"The official Plan or Survey" is apparently not now available but, as shown by the sketch attached to the grant, Lot 185 was bounded on the north by the waters of Burrard Inlet and on the south by English Bay. Lot 185 was subsequently subdivided and included therein is what is now known as Lot 6, Block 64, District Lot 185, Group 1, New Westminster, Plan 92. It is admitted that the title to Lot 6 passed by a valid chain of title from Brighouse et al. to the defendant, Albion Investments Limited, and that in all of the conveyances forming such chain either the words "with their appurtenances" occur in the description of the property conveyed by such conveyances, or, by virtue of the *Land Registry Act* and of *The Short Form of Deeds Act* and its predecessors, the effect of such conveyances is the same as if such words were included therein.

The entire argument on this branch of the case is based on the words in the original grant "with their appurtenances". It is said they are ambiguous and that, therefore, considering the nature and location of Lot 185 in 1867 the intention of the Crown must have been to pass title to the foreshore; and that the user of the fore-

(1) (1915) 52 Can. S.C.R. 197, at 210, 211.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Kerwin J.

shore made by the owners of the upland from time to time was admissible to show that the grant was so construed by them. The argument fails in limine as the words are not ambiguous so far as it is sought to make land appurtenant to land. As put by Sir John Romilly in *Lister* v. *Pickford* (1):—

> It is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land.

The next defence is that a title by prescription had been acquired. The evidence on this branch of the case is not sufficient under *The Nullum Tempus Act* (9 Geo. III, c. 16) that the defendants and their predecessors in title have had such possession of the foreshore as is sufficient to oust the title of the Crown. This conclusion is arrived at without reference to the inadmissible evidence that in 1939, after he had sold Lot 6 to the respondent Higbie, Johnson paid $500 to the National Harbours Board in settlement of a claim for rent made against him, and without reference to the effect of entries made in the records of the Vancouver Harbour Commissioners and the National Harbours Board.

The contention of the respondents that the erection of a substantial structure and the making of a fill on part of the foreshore adjoining Lot 6 could be justified as the exercise of riparian rights arising out of their title to Lot 6 is clearly untenable. Furthermore, the effect of the fill was not to form an accretion to Lot 6 so that the finding of the trial judge is correct,—

> that an artificial fill has been made in front of said Lot 6 on the said land and that the present mean high water mark is below the old mean high water mark which constitutes the northerly boundary of said Lot 6.

On the other hand, the trial judge gave effect to the appellant's contention that as a result of the fill, Lot 6 ceased to be a riparian lot. As to this, it might be sufficient to say that the point was not raised by the appellant's pleadings but, in any event, the making of the fill does not warrant a finding that the respondents thereby intended it to operate as an abandonment of riparian rights over the land reclaimed. *Attorney General of Southern Nigeria* v. *Holt* (2).

(1) (1865) 34 L.J. Ch. 582. (2) [1915] A.C. 599, at 621.

The appellant is, therefore, entitled to mesne profits which, in accordance with the admissions agreed upon between the parties, is to be equivalent to the rental of the land occupied by the respondents. If this cannot be agreed upon, there must be a reference to the District Registrar of the Supreme Court of British Columbia at Vancouver, as directed by the judgment at the trial. In determining the rental the Registrar will, of course, take into consideration the proper use the respondents were entitled to make of the foreshore as riparian owners of Lot 6.

In the result the order of the Court of Appeal should be set aside and the judgment at the trial restored with the exception of the following clause:—

> And this court doth further adjudge and declare that none of the Defendants have or ever had any riparian rights over the said land arising out of their title to the said Lot 6 or otherwise;

The respondents should pay the present appellant the costs of the appeal to the Court of Appeal and of the appeal to this Court. No order should be made as to the costs of the intervenant, or as to the costs of the cross-appeal on the question of costs to the Court of Appeal.

RAND J.—This action was brought by the Attorney General of Canada against the respondents for possession of certain foreshore of Vancouver Harbour and for mesne profits. The adjoining upland was originally granted in 1858 by the Provincial Crown as part of a lot of an official survey, the plan of which showed it to be bounded on that part of the waters of Burrard Inlet which later became known as Coal Harbour. In subsequent conveyances to predecessors of the respondents the boundary was specifically described as the high water mark. The grant as well as the later instruments carried all appurtenances.

The respondents set up a number of defences. They deny the title of the Dominion; they claim title in themselves under the grants and by prescription, and that in any event the use to which they are putting the land is within the scope of their rights as riparian owners.

The title of the Dominion is placed first on the ground that the foreshore is part of a public harbour which,

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rand J.

upon the admission of British Columbia to the Confederation, became vested in the Dominion under section 108 and schedule 3 of the *British North America Act;* and alternatively that the interest of the Province, if any existed, was transferred to the Dominion by an order in council of the Provincial Government in 1924. As, in the conclusion which I have reached, the real issue revolves about the latter transaction, I will deal first with two of the subsidiary questions.

I agree with the trial judge that the original grant did not carry to low water mark either by its referential description or by its inclusion of "all appurtenances." Although foreshore may be a royalty, it retains the character of land, and I think it beyond dispute that land, as distinguished from incorporeal rights in land, cannot be appurtenant to land: *Buszard* v. *Capel* (1). I agree likewise that a title by prescription has not been established. The remaining point of riparian rights can better be considered after the main questions have been disposed of.

Coming, then, to those issues, I am in agreement with the Court of Appeal that the Crown has not proved the foreshore to have been part of a public harbour at the time, in 1871, when the Province entered the Dominion. The necessity for this proof follows from the authoritative interpretation placed on section 108 of the Act. It must be shown as fact that the land about which the question arises was at the time of union in actual use in the public commerce of a harbour: The Fisheries case (2); *Attorney General of Canada* v. *Ritchie* (3). The notion that a natural harbour, once shown to have been used for commercial purposes along some part of its shore, is a Dominion public harbour as to all of its shore is erroneous.

Disregarding any question of the nature or extent of ownership below low water mark, logically it would be necessary to traverse the whole shore bordering on such a body of water as Burrard Inlet and to establish in fact for each segment the required use. Precise limits or boundaries from such a use are out of the question. Unless characterized in its practical application by broad

(1) (1928) 8 B. & C. 141.
(2) [1898] A.C. 700.
(3) (1919) 88 L.J. P.C. 189.

considerations of convenience, as undoubtedly the decisions mentioned contemplate, this rule might work out a patchwork of ownership both inconvenient and embarrassing.

Without some action by the Dominion, fully equipped commercial ports or harbours do not appear to be within the powers of the province to set up. In view of the Dominion control over shipping, navigation, navigation aids, trade and commerce, customs and defence, the province in its ownership of foreshore would not seem to be in much better position than a private individual. And with the property in a public harbour below low water mark generally in the Dominion, the Provincial and Dominion ownership of sections of foreshore, isolated from upland, with occasional private ownership annexed to upland, presents a mosaic which I will not further complicate by suggesting a possible parcelling of ownership of the harbour bed itself.

Now, that was the situation confronting the Dominion and the Province when in 1924 they took steps to settle the controversy over harbours in British Columbia. They agreed that six of these, including Burrard Inlet and its arm, Coal Harbour, "were and are" public harbours within schedule 3 and that the ownership of all other ungranted foreshore was in the Province: and the Province transferred to the Dominion, as in the nature of quit claim, any interest which it might have in the foreshore of the six harbours named. The question before us, then, is whether that arrangement in any aspect, in the absence of provincial legislation authorizing it, is sufficient for the purposes of the Dominion in this proceeding.

The Confederation Act was enacted with the background of the constitutional development in the older provinces; and in this the control of public land and their revenues played a major part. There are two aspects of that control, however, and they must be distinguished. The public lands in the Province are vested in the Sovereign in his body politic, in right of the Crown; but the right and power to deal with them by grant, lease or other mode and to dispose of their revenue is, by the prerogative, as full as if they were held in his personal capacity. In England these revenues are the sub-

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rand J.

ject of a statutory surrender at the beginning of each reign in exchange for the so-called civil list. On the other hand, the alienation of public lands has been the subject of a series of restrictive statutes, the most important of which is 1 Anne St. 1 c. 7. The distinction adverted to is illustrated in legislation in relation to the Province of Canada. By 3 and 4 Vic., chapter 35, section 54, the casual and territorial revenues were surrendered to the legislature; but, by section 42, every provincial bill affecting the prerogative touching the granting of waste lands of the Crown must have been laid before both houses of parliament before receiving the royal assent.

By section 126 of the Act of 1867, the revenues from public lands form part of the Consolidated Revenue Fund of the Province which, of course, is committed to the appropriation of the legislature.

Then by section 109, all public lands and royalties are declared to be the property of the Province. This is part of the general distribution of property between the Province and the Dominion. Associated with it is the distribution of legislative jurisdiction and sections 91 (1) and 92 (5) provide that the Dominion and the Province may make laws in relation to the "public property" in the case of the Dominion and to the "management and sale of public lands" in that of the Province. I take the latter to include foreshore generally.

By "property" of the Province or the Dominion is meant only that the right to its beneficial use or its revenues has been appropriated to the Province or the Dominion as the case may be; the land in all cases remains vested in the Crown. With a specific allocation of public lands to the Province and a like investment of legislative jurisdiction to make laws in relation to them, can it be said that there remains any residual prerogative right in the Provincial Crown to transfer any part of that property to the Dominion? In the absence of legislation, such a residue may remain in relation to dealings with them in a provincial aspect. But a transfer effects a change not only in beneficial interest but also in legislative jurisdiction. By this means the Provincial Crown would bring about a redistribution of assets and legislative authority over them contrary to the allocation made by the statute. Certainly it is not

contemplated that particular property may not pass between the two jurisdictions but the distribution made by the Act can be altered only in accordance with the powers, express or implied, which the Act itself provides; and here I find no means provided except legislative.

But when we speak of the prerogative, it is well to keep in mind the different aspects in which it is to be viewed. The restrictions on alienation had to do with the divesting of the Crown's ownership and the investment of the subject. But the prerogative, as it existed in England, was single and entire. There could be no question as to a transfer between executive advisers because there was only one council known. It was not until the creation in 1867 of a federal organization in government that the point with which we are concerned could have arisen. Strictly, therefore, we cannot accurately speak of the prerogative in relation to the transfer purported to be made in 1924.

But it is put as within the general power to alienate and it is argued that, if the Crown can transfer title to a subject, a fortiori can it effect a transfer to the administrative control of another group of constitutional advisers. But the argument, in my opinion, is unsound. The power of the provincial executive must obviously be looked upon as being fundamentally in relation to provincial administration and correspondingly that of the Dominion. This is necessarily involved in a federal distribution of plenary powers. The provincial function is exercised under provincial legislative control and I am unable to see how that authority, in the absence of legislation, can extend to an act merely of transferring its own proper subject-matter to another executive and legislative administration. That is rather a surrender than an exercise of function and I cannot agree that it is within the scope of the powers to which the statute gives rise, or the division of which it effects.

It is urged that the imperial executive could transfer, and has in fact transferred, subject-matter in Canada to the Dominion, as in the case of the military reserve of Deadman's Island: *Attorney General of British Columbia* v. *Attorney General of Canada* (1). But the imperial prerogative is under no such statutory distributive restriction as in Canada. Moreover, it was an exercise of power in a

(1) [1906] A.C. 552.

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rand J.

situation to which different considerations apply. The prerogatives, in relation to colonial administration, exercised originally under advice of the imperial government, became the subject of a progressive devolution by executive action and by statute, to the present constitutional relation of Dominion to Crown. The transfer, therefore, was merely an irrevocable delegation of residual administrative control of the sort contemplated in the evolution of colonial self-government, to an executive deriving its existence and powers from an imperial statute.

Then, reliance is placed on some observations of the late Newcombe J., of this court, used by him in the reference *Re Saskatchewan Natural Resources* (1). But what his language deals with is not the power or authority of transfer: it is simply the mechanics by which the transfer is made. He was distinguishing action by order in council between co-ordinate advisers and action by grant under letters patent between Crown and subject.

There is finally an observation by Lord Davey in *Ontario Mining Co.* v. *Seybold* (2). In the *St. Catherine's Milling* case (3), Lord Watson had used this language:

> It must always be kept in view that wherever public lands with its incidents is described as "the property of" or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.

After quoting this, Lord Davey adds:

> Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

But it is clear that Lord Davey was there dealing only with the question of the particular executive by whose action an alienation to a subject could be made; there is no reference, nor in that case could occasion for it have arisen, to the actual authority of the executive in any

(1) [1931] S.C.R. 263, at 275.
(2) [1903] A.C. 73.
(3) (1889) 14 App. Cas. 46.

case to make a grant and much less the question of authority of the executive to make a jurisdictional transfer.

But the order in council of the Province does more than purport to transfer an interest to the Dominion. The pertinent recitals are these:

3. That it is desirable in the public interest that the property which belongs to Canada under the designation "public harbours" should be definitely ascertained, and negotiations have accordingly been carried on between the Dominion and Provincial Governments with a view to reaching a settlement of all outstanding questions between the two Governments in this connection and agreeing upon certain defined areas as being the property of Canada under said designation.

4. That as the result of conferences between the representatives of the two Governments it has been mutually agreed that the harbours of Victoria, Esquimalt, Nanaimo, Alberni, Burrard Inlet and New Westminster, as described in the schedule attached hereto marked "A" and as shown by the respective maps annexed thereto, were and are public harbours within the meaning of schedule 3 of the B.N.A. Act and became and are the property of Canada thereunder.

5. That it has been further agreed between the two Governments that the ownership of all other ungranted foreshore of tidal and non-tidal waters and lands covered with water in British Columbia, except any foreshore and lands covered with water within the Railway Belt, belong to and are vested in the Province.

Here the distribution of public property by the confederating Act to the Province or Dominion depends upon a question of fact to be proved as any other fact: was this foreshore used for public harbour purposes in 1871? Now, undoubtedly the executive of the Province must deal with such a question. If proceedings were brought, would legislative authority be necessary to consent to a declaration of ownership in the Dominion? In them the Province would be represented by its constitutional officer, the Attorney General, and his act, certainly with the approval of the executive council, must bind the Province. But that such a question could be settled only by or in the course of judicial proceedings is, I think, a misconception.

Where, therefore, the situation of fact is, in the opinion of the government concerned, one of doubt and uncertainty, it lies within the authority of the provincial executive to give formal binding recognition to a claim asserted by the Dominion. It is analogous to agreement on a conventional boundary between lands of their respective

1945

ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. & ATTORNEY GENERAL FOR BRITISH COLUMBIA

Rand J.

jurisdictions. The effect of the order in council is, in this view, limited to an agreement or acknowledgment of boundary at high water mark arising from the fact of actual user of foreshore within the legal requirements for public harbours under schedule 3.

As between the two jurisdictions, such an acknowledgment concludes the question but as to private rights different considerations arise. Ordinarily third persons would not be concerned with either Crown right in ownership or legislative jurisdiction. But the Province could not bind its own prior grantee as to his own title by such an acknowledgment: and where accrued rights are claimed not derived from the Province, as by prescription, the third person likewise cannot be prejudiced by provincial action of that nature. In each case, he remains entitled to contest the fact of Crown right ownership. Whether if, for instance, the law of prescription as against the Province was more favourable to the subject than that in relation to the Dominion, the order in council could affect the result of a possession continuing after the acknowledgment, it is not necessary to decide. At most, the right would be placed on provincial law. The respondents may be entitled to advance their claim on the footing of the fact as found in the action; but they are entitled to no more; and where in such case they fail to establish a prescriptive right against either the Province or the Dominion, as here, they fail likewise in an answer to the claim of the appellant.

There remains the question of riparian rights. The issue is as to the legal possession of the land. Riparian rights, as the name indicates, do not carry exclusive possession; they exist as incorporeal rights arising from ownership, in the nature of servitudes, among other things, over foreshore. They are not, therefore, a defence to a claim for possession. The trial judge held the land of the respondents, by reason of an artificial fill made on the foreshore, to be no longer riparian but I cannot draw the inference from what was shown that by any act of this nature the respondents intended to surrender rights attaching to their upland property. What was done was rather to facilitate the exercise of those rights.

There is no counter claim by which the respondents seek a declaration of the existence or scope of those rights. But as seems to be implied in the case of *Attorney General of Southern Nigeria* v. *Holt* (1) 84 L.J. P.C. 98, they are involved in the question of mesne profits. In the circumstances the appellant is entitled to such profits if any can be shown: but they must be profits arising beyond that use of the foreshore which may be found to be within the exercise of riparian privileges.

I would, therefore, allow the appeal and confirm the trial judgment declaring the ownership and right of possession of the foreshore to be in the appellant. As the parties have agreed that the gross mesne profits are represented by the rental value of the land occupied by the respondents, there should be a reference to determine the extent, if any, to which that value is affected by riparian rights. The appellant will have its costs in this Court and in the Court of Appeal except as to the cross appeal. There will be no costs to the intervenant.

Appeal allowed with costs.

Solicitor for the appellant: *A. M. Russell.*

Solicitor for the respondents: *T. G. McLelan.*

Solicitor for the intervener: *R. V. Prenter.*

(1) (1915) 84 L.J. P.C. 98.

1945

*Feb. 9, 12, 13
*Feb. 20

WILLIAM SCHMIDT..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Trial—Evidence—Appeal from affirmance by court of appeal of conviction for murder—Appellant and others jointly indicted and tried together—Written confessions by other accused admitted in evidence—Sufficiency and timeliness of warning by trial Judge to jury that confession put in is evidence only against person making it—Defining "murder" to the jury—Criminal Code, s. 259 (a) (b)—Criminal Code, s. 69 (2) (several persons forming common intention to prosecute unlawful purpose, etc.)—Inapt illustration to jury—Application of the law to the evidence—No substantial wrong or miscarriage of justice (Criminal Code, s. 1014 (2)).

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming (Laidlaw J.A. dissenting) the conviction of appellant on a charge of murder. The appeal to this Court was dismissed.

C. L. Yoerger for the appellant.

C. L. Snyder K.C. and *N. L. Croome* for the Attorney General of Ontario.

The judgment of the Court was delivered by

KERWIN J.—William Schmidt appeals against the affirmance of his conviction for murder by the Court of Appeal for Ontario based on the dissenting opinion of Mr. Justice Laidlaw. By section 1023 of the *Criminal Code* our jurisdiction is limited to any question of law expressed in such dissent.

Schmidt was jointly indicted and tried, together with three other persons. Two of the latter (as well as the accused) had made written confessions which, after the usual inquiry by the trial judge, were admitted in evidence. Mr. Justice Laidlaw's first matter of dissent is that the trial judge "ought to have warned the jury immediately each statement was admitted, to not pay any attention or give any weight whatsoever to that evidence except as against the person who made the

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

(1) [1945] 1 D.L.R. 136; 82 Can. Cr. C. 296.

statement." This is an advisable practice but there is no such absolute rule. A trial judge, during the course of the trial of two or more persons jointly indicted and tried, must make it clear to the jury that a statement by one of the accused is evidence only against him. This, as will appear, the trial judge did in the present case.

It is doubtful if Mr. Justice Laidlaw was of the opinion that, although no application for a separate trial was made, one should have been directed by the trial judge *proprio motu* at some late stage of the trial, but certainly he was of opinion that there was "a prejudice and substantial injustice" to Schmidt. The trial judge, of course, exercised no discretion because he was not asked to do so. Assuming that when that occurs a Court of Appeal may set aside a conviction and direct a separate trial if it is of the opinion that an appellant has not had a fair trial, and assuming that a dissent on a matter of that kind is a question of law, this is not a case where such an order is warranted. The record discloses that, after the trial judge had passed upon the admissibility of the confessions and they were about to be placed in evidence before the jury, the following occurred:—

Mr. FITCH [who was counsel for Schmidt]: My Lord, I would suggest that it should be made perfectly plain that these statements made by Tillonen and Tony [meaning Anthony Skrypnyk] are evidence as against them and not against Schmidt.

His LORDSHIP: The jury will so be instructed, Mr. Fitch.

Mr. FITCH: I mean, it is going in as if it was evidence against all the defendants, when it is not.

His LORDSHIP: Quite right.

On three occasions in his charge, the trial judge referred to this matter as follows:—

I should tell you further, as has been mentioned by some of the defence counsel in addressing the jury, that the statement made by each of the accused is only evidence against that accused. Whatever he may have said in that statement against the other accused, it is not evidence against such other. In dealing with those statements I trust that you will keep that in mind.

* * *

Now, Anthony Skrypnyk made a statement. As I said before, these statements are only evidence against the person making them.

* * *

Tillonen also made a statement, only evidence against himself.

We are unable to agree in Mr. Justice Laidlaw's description of these references as "meagre" or that the appellant did not have a fair trial.

1945

SCHMIDT v. THE KING

Kerwin J.

The next matter of dissent is that "the learned trial judge did not properly define 'murder' as applicable to the case against the appellant Schmidt." While the trial judge did not read section 259 of the *Code* to the jury, it is plain that he did refer to the necessary elements of the crime of murder in the only applicable paragraphs thereof, (*a*) and (*b*). The other relevant sections were read to the jury but it is said the illustrations of the application of subsection 2 of section 69, given by the trial judge, were misleading. We agree that they were not apt as regards the case made against Schmidt under that subsection. It is true that later in his charge the trial judge stated the law correctly but he did not apply the law to the evidence as fully as he might have done. However, on the whole of the record, we agree with the majority of the Court of Appeal that within the meaning of subsection 2 of section 1014 no substantial wrong or miscarriage of justice has occurred.

The meaning of these words has been considered in this Court in several cases, one of which is *Gouin* v. *The King* (1), 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* (2), 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 in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

In this case a reasonable jury on a proper direction would have undoubtedly convicted Schmidt and the appeal is therefore dismissed.

Appeal dismissed.

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

Solicitor for the respondent: *C. P. Hope.*

(1) [1926] S.C.R. 539. (2) [1944] A.C. 315.

L. V. WOLFE AND SONS AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

DAVID J. GIESBRECHT AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1945

*Feb. 15, 16

*Apr. 24

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Jury trial—Automobile collision—Highway covered with smoke—Driver turning to left to avoid government truck—Head-on collision with approaching car—Finding of jury as to negligent act of appellants' driver—Whether it comes within allegations of negligence in statement of claim—Charge to jury as to respective duty of drivers—Trial judge reading from reported judgments—Mis-direction—Issues between parties not adequately presented nor sufficiently tried—New trial.

The respondent's car, in which the other respondents were passengers, was being driven southwards when the driver noticed a cloud of smoke being carried across the highway about a mile ahead of him, the smoke covering about 150 feet of the length of the highway. As he approached the smoke, he noticed just ahead of it a government truck which was collecting weeds in the ditch to have them burned; and, when near the truck, the respondent's driver had observed another car in front of him drive around it and enter the smoke, and he proceeded to do likewise. He successfully passed the truck, but beyond it his automobile came into collision with the appellants' oil truck and trailer proceeding from the south. Neither driver saw the other by reason of the smoke until the vehicles were a very short distance apart. As a result of the collision, the respondent and the occupants of his car were injured and an action was brought for the resulting damages. In answer to a submitted question, the jury found that the appellants' driver was negligent because "he should have stopped before entering smoke and determined the cause of smoke, especially in view of the nature of his load"; and they found also that there was no contributory negligence on the part of the respondent's driver. The Court of Appeal held that the trial judge had mis-directed the jury and ordered a new trial. The appellants limited their appeal to this Court to that part of the judgment whereby their application for dismissal of the action was refused. They contended that the answer of the jury was not responsive to any of the allegations of negligence pleaded by the respondents and that the finding of the jury (if the jury found that the appellant's failure to stop before entering the smoke caused the accident) in that respect was perverse; and they urged that the respondents' action should have been dismissed as no other finding of negligence had been made. The respondents cross-appealed, asking that the judgment of the trial judge in their favour be restored.

Held that the appeal and the cross-appeal should be dismissed and that the judgment appealed from ([1944] 1 W.W.R. 634) be affirmed.

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

1945

WOLFE
v.
GIESBRECHT

On the appeal:

Per Hudson, Taschereau and Estey JJ.—It is unnecessary to decide the issue raised by the appellants' submission. If it be decided that the answer of the jury is responsive and not perverse, a new trial must still be had because there has been no appeal from that part of the judgment of the Court of Appeal which has so decided. If it be decided that the answer is not responsive and perverse, it is an answer of a jury deliberating under the influence of a misdirection. A plaintiff's action should be dismissed upon such a basis, only if the charge of the trial judge has adequately placed the issues involved before the jury or if the Court finds that there is no evidence to support a verdict even if the charge had been without objection; and the present case cannot be so regarded.

Per Rand and Kellock JJ.—The answer of the jury with respect to the negligence of the appellant driver cannot be regarded as a finding which does not come within the allegations of negligence in the statement of claim. There may be some surplusage in the answer, but, regarded reasonably, these allegations were sufficiently wide to include what the jury has found.

On the cross-appeal:

Held that the judgment of the Court of Appeal ordering a new trial should be affirmed.

Per Hudson, Taschereau and Estey JJ.—The pleadings of both appellants and respondents specifically raised issues as to the manner and position upon the highway in which the respective cars were driven; and each claimed that the negligence of the other caused the accident and adduced evidence in support of their respective contentions. These facts and these issues have not been adequately presented to the jury by the trial judge.

Per Rand and Kellock JJ.—The trial judge, from the reading of his charge, seems to have directed the attention of the jury to the conduct of the appellants' driver in proceeding into and continuing in the smoke as being conduct which the jury might well consider to be negligent, while he treated the conduct of the respondents' driver, if the jury considered it in any respect negligent, as though it did not matter, being something which the appellants' driver ought to have anticipated and guarded against. Both what the trial judge said himself and what he read from the reported judgments had the effect of taking away from the jury the issue of negligence, on the part of the respondent driver, as being essentially irrelevant. The result has been that the issues between the parties have not been tried.

Judgment of the Court of Appeal ([1944] 1 W.W.R. 634) affirmed.

APPEAL and CROSS-APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge, Anderson J. with a jury, which had maintained the respondents' action for dam-

(1) [1944] 1 W.W.R. 634; [1944] 2 D.L.R. 564.

ages arising out of a collision between the appellants' and respondent's automobiles. The Court of Appeal had ordered a new trial.

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

E. M. Hall K.C. for the appellants.

G. H. Yule K.C. for the respondents.

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

ESTEY J.—This action arises out of a collision between appellants' (defendants) truck and respondents' (plaintiffs) automobile, before noon on the 2nd day of June, 1942, on a highway running north from the city of Saskatoon and described throughout the proceedings as Avenue "A".

Men operating government equipment were burning grass and weeds in the western ditch of Avenue "A" that morning, and because of the prevailing wind, the smoke, in varying and changing degrees of density, was blowing across the road in a south-easterly direction. The collision was either well within the smoke field, or at its northern edge or fringe.

The learned trial judge submitted certain questions and answers to the jury, and upon these answers gave judgment for the respondents (plaintiffs). The appellants (defendants) appealed to the Court of Appeal for Saskatchewan, and that Court held the learned trial judge had misdirected the jury and ordered a new trial,

limited to the question of the liability of the parties for the damages already found.

The appellants now appeal to this Court, but limit their appeal

to that part of the judgment of the Court of Appeal for Saskatchewan whereby the defendants' application for dismissal of the action was refused.

The appellants' submission is that

the finding made by the jury was not a finding of negligence which was an effective cause of the accident and no other finding of negligence having been made by the jury judgment should have been entered for the defendants dismissing the action. The said answer was not responsive

1945

WOLFE v. GIESBRECHT

Estey J.

to any of the allegations of negligence pleaded by the plaintiffs and the finding of the jury (if the jury found that Wolfe's failure to stop before entering the smoke caused the accident) in that respect was perverse.

In my view it is unnecessary to decide the issue raised by this submission. If it be decided that the answer is responsive and not perverse, a new trial must still be had because the Court of Appeal has so decided and the applicants have not appealed from that part of the judgment. The cross-appeal of the respondents questions that judgment, but for the reasons hereinafter discussed, I am of the opinion that the judgment of the Court of Appeal should be affirmed.

If it be decided that the answer is not responsive and perverse, it is an answer by a jury deliberating under the influence of a misdirection which the Court of Appeal has held amounts to a substantial wrong or miscarriage of justice (Rule 40 of the Rules of the Court of Appeal in Saskatchewan). It appears to me that a plaintiff's action should be dismissed upon such a basis, only if the charge of the learned trial judge has adequately placed the issues involved before the jury, or if the Court finds that there is no evidence to support a verdict even if the charge had been without objection. This cannot be regarded as such a case.

In *Andreas* v. *Canadian Pacific Railway Co.* (1), the jury were properly instructed and this Court dismissed the action on the basis that there was no evidence to support the verdict; whereas in *Jamieson* v. *Harris* (2), which is perhaps more in point, at p. 634 Nesbitt J. states as follows:

> We are, therefore, unable to say that the jury have found any negligence causing the death for which, in our opinion, the defendant, on the evidence, can be said to be liable.

And again at p. 635:

> We cannot find the evidence went this length but point to it as shewing that the attention of the jury was not closely drawn to what we conceive to be the vital point in issue.

Notwithstanding the jury's findings did not constitute negligence causing the death, because there had been misdirection by the learned trial judge a new trial was ordered. See also *McLaughlin* v. *Long* (3); *Antaya* v. *Wabash R.R. Co.* (4).

(1) (1905) 37 Can. S.C.R. 1.
(2) (1905) 35 Can. S.C.R. 625.
(3) [1927] S.C.R. 303.
(4) (1911) 24 O.L.R. 88.

That there was evidence upon which the jury should properly deliberate both with respect to negligence and contributory negligence is not questioned.

This is the only issue raised by the appellants, and for the foregoing reason, in my opinion, the appeal must be dismissed with costs.

The respondents cross-appeal and ask that this Court reverse the decision of the Court of Appeal for Saskatchewan and reinstate the judgment of the learned trial judge in favour of the plaintiffs.

The charge to the jury must be read and considered as a whole. *Jones* v. *Canadian Pacific Railway Co.* (1). When this charge is read as a whole, the conclusion arrived at by the Court of Appeal that the learned trial judge presented this as a case of ultimate negligence appears to be well founded. It is true that he makes reference to the possibility of concurrent and continuing negligence on the part of these parties, but he so minimizes the importance of these considerations that in effect he withdraws them from the jury. His repetition and the emphasis he placed upon the conduct of Wolfe before he entered the smoke field, and that of Giesbrecht as he went around the government truck in effect excluded all other issues from the minds of the jurymen as they retired to deliberate. As far as Wolfe's conduct is concerned, at the very conclusion of his charge, in response to a request from counsel that he specifically deal with the point of impact, the learned trial judge in part uses the following language:

> Well, gentlemen, in regard to where the accident happened * * * I have my own view on it, but I don't know that it is particularly important. * * * And, as I say, even if that is so, that does not seem to me to go to the crux of the case at all * * * because, even supposing Wolfe was on his own side of the road, that would not be sufficient—or that might not be sufficient. Was it his duty, as a reasonable man, to stop before he ever went into that smoke? If he had, it would never have occurred.

A jury listening to the charge as a whole would conclude, as this jury apparently did, that there were but two issues. First, was the defendant Ernest Rudolph Wolfe negligent before he entered the smoke field in not stopping, getting out of his car and going to see? Second,

(1) (1913) 83 L.J. P.C. 13.

1945

WOLFE v. GIESBRECHT

Estey J.

did Giesbrecht proceed in a reasonably careful manner as he went around or passed the government truck? Even with respect to one of these questions the learned trial judge goes so far as to say:

> Was Wolfe negligent in not stopping his car before he got into that smoke? Because once he got into the smoke he incapacitated himself from avoiding the consequences of any negligence that the plaintiff might have been guilty of in getting where he was. And I will leave that with you. That is for you to decide.

The comment of Mr. Justice Mackenzie, on behalf of the Court of Appeal, seems particularly apt:

> This seems to pose the difficult question as to what there was left for the jury to decide after the learned judge had told them that Wolfe had incapacitated himself from avoiding the consequences of any negligence on the part of the plaintiff.

The pleadings of both parties raised other issues as to where upon the highway and in what manner they were proceeding immediately before and at the moment of impact. The trial continued for five days, and evidence was adduced to support these issues. Many witnesses gave evidence, and the physical facts as evidenced by the marks on the highway and the damaged vehicles were canvassed with care. There was disagreement and contention upon vital points which in the opinion of the parties had a bearing upon this case, some of them so important that counsel immediately asked that the jury be specifically instructed with regard to them.

The smoke covered "at least a quarter of a mile" of the highway. As one proceeded his field of vision varied. At times he could see some distance, and at times no distance. The smoke passed over the road in gusts. Even if the appellant did get out and look, he still was under a duty to proceed with due care, and likewise the respondent, even after he got by the government truck, he was under the same duty to use due care.

In my opinion to the moment of impact the position of the vehicles upon the highway, both in relation to the centre line and the distance south of the government truck; the speed of the respective vehicles, particularly in relation to the range or field of vision of their drivers; and the ability of the drivers to stop in the event of an emergency, are all important factors for the consideration of the jury under instructions from the learned trial judge that clarify the issues and explain the relevant law

in relation to the facts as adduced in evidence by the parties. *Tart* v. *G. W. Chitty and Co. Ltd.* (1), and *Baker* v. *E. Longhurst and Sons Ltd.* (2); *Tidy* v. *Battman* (3).

The pleadings of both plaintiffs and defendants specifically raised issues as to the manner and position upon the highway in which the respective cars were driven. Each claimed that the negligence of the other caused the accident and adduced evidence in support of their respective contentions. In my opinion, and with deference to the learned trial judge, these facts and the issues were not adequately presented to the jury.

The language of Nesbitt J., in *Jamieson* v. *Harris* (4), as above quoted, is particularly appropriate:

* * * that the attention of the jury was not closely drawn to what we conceive to be the vital point in issue.

And then again, that of Lord Watson in *Bray* v. *Ford* (5):

Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal.

In view of the foregoing, it is unnecessary to specifically discuss the other points dealt with by the Court of Appeal and counsel upon this appeal, and because there must be a new trial, I refrain from discussing the evidence adduced by the parties.

Counsel for the respondents contended that even if the charge was subject to objection, there has been no wrong or miscarriage of justice and therefore that under Rule 40 of the Rules of the Court of Appeal for Saskatchewan a new trial should not be ordered. This rule is similar to English Rule 556, and in my opinion is answered by the observations of Lord Halsbury, L.C.:

It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant. *Bray* v. *Ford* (6).

Hutcheon v. *Storey* (7).

The appeal and the cross-appeal should be dismissed with costs, and the judgment of the Appellate Court for Saskatchewan affirmed.

(1) [1933] 2 K.B. 453.
(2) [1933] 2 K.B. 461.
(3) [1934] 1 K.B. 319.
(4) (1905) 35 Can. S.C.R. 625.
(5) [1896] A.C. 44, at 49.
(6) [1896] A.C. 44, at 48.
(7) [1935] S.C.R. 677.

1945

WOLFE
v.
GIESBRECHT

Kellock J.

The judgment of Rand and Kellock JJ. was delivered by:

KELLOCK J.—This is an appeal by the defendants from the judgment of the Court of Appeal for Saskatchewan dated the 10th day of March, 1944 allowing an appeal by the defendants from the judgment at trial in favour of the plaintiffs and directing a new trial. The appeal is upon the ground that the action should have been dismissed on the answers made by the jury. The respondents cross-appeal, asking that the judgment at trial be restored. The facts may be sufficiently stated as follows: On the morning of the 2nd of June, 1942, the respondent Giesbrecht was driving his motor car, in which the other respondents were passengers, southerly on the highway known as Avenue "A" running into the city of Saskatoon from the north. This highway is paved and the pavement is about 21 feet wide. As the respondents approached the airport north of the city, smoke was seen to the south, blowing across the highway in a southeasterly direction. This smoke was occasioned by the operation of a Provincial Government truck which was proceeding northerly on the westerly side of the highway, dragging behind it, but in the westerly ditch, a set of harrows by which weeds in the ditch were being collected and as collected were being burned.

As Giesbrecht approached this truck, he had observed another car in front of him drive around it and enter the smoke and he proceeded to do likewise. He successfully passed the truck, but beyond it at some point, and this is the subject of dispute, his automobile came into collision with the appellants' oil truck and trailer proceeding from the south. Neither driver saw the other by reason of the smoke until the vehicles were a very short distance apart. As a result of this collision, Giesbrecht and the occupants of his car were injured and the action was brought for the resulting damages, including damage to Giesbrecht's car. It may be noted that the respondent Mary Adrian recovered damages to an amount which does not permit of an appeal.

The respondents allege that the accident was due to the negligence of the driver of the appellants' truck in a num-

ber of particulars, namely excessive speed, failure to keep the truck under proper control, failure to keep a proper lookout, failing to turn seasonably to the right of the centre of the highway when meeting the respondent Giesbrecht and to drive nearer to the shoulder than the centre of the highway when about to pass the Giesbrecht car (section 117 (1) of the *Vehicles Act*, R.S.S. c. 275). By amendment at the trial, a further allegation of driving the truck into the smoke covered area of the highway with heedless inattention as to the consequence of injuries to the plaintiff and others on the highway, was set up. These allegations of negligence were denied by the appellants who, on their part, alleged that the respondent Giesbrecht could, by the exercise of reasonable care, have avoided the collision and that the collision was caused solely by negligence on the part of Giesbrecht in that, knowing that his vision was obscured by smoke, he drove his automobile on the east side of the highway when he ought to have anticipated northbound traffic without taking any precautions to ascertain that there was no traffic approaching from the south, and without satisfying himself that it was safe to drive upon the east side, failing to return to the west side after he had passed the Government truck, excessive speed, failure to keep a proper or any lookout and failing to turn seasonably to the right of the centre of the highway when meeting the appellants' truck, and to drive nearer to the west shoulder than the centre of the highway when about to pass the truck. By way of reply, the respondents alleged that if there were any negligence on the part of Giesbrecht, then the driver of the appellants' truck could, by the exercise of reasonable care, have avoided the collision.

As indicated by counsel for the respondents in opening, the respondents contended that Giesbrecht had passed the Government truck and had got back to his own side of the road without having entered the smoke area, when the appellants' truck appeared out of the smoke and the two vehicles came together. The position taken by the appellants on the contrary was that the appellants' truck was always east of the centre line of the highway and that the collision had taken place much farther

1945

WOLFE v. GIESBRECHT

Kellock J.

south than the respondents alleged and well within the smoke covered area. Evidence was led in support of these contentions.

Counsel at the trial agreed that on the evidence, the case was not one of ultimate negligence, and in my opinion, that is clearly so. As to whether the collision took place north or near to the north edge of the smoke area or much farther south, or east or west of the centre of the highway, were matters for the determination of which the jury, properly directed, was the proper tribunal. The learned trial judge submitted questions to which the following answers were made:

1. Was there negligence on the part of Ernest Rudolf Wolfe which caused the accident?

Answer: Yes.

2. If your answer is in the affirmative, state in what that negligence consists?

Answer: He should have stopped before entering smoke, and determined the cause of smoke, especially in view of the nature of his load.

3. Was there contributory negligence on the part of D. J. Giesbrecht?

Answer: No.

4. If your answer is in the affirmative, state in what the contributory negligence consists?

Answer:

As the new trial ordered was with respect to liability only, it is not necessary to refer to the questions dealing with damages.

A new trial was directed by the Court of Appeal because, in its view, the charge of the learned trial judge was defective in the following respects, briefly put:

1. That the learned trial judge had read to the jury certain extracts from judgments in reported cases which included not only statements of principle but references to the parties and the facts in those cases, so that the jury may well have applied what they heard, both of fact and law, too literally.

2. That the learned trial judge failed to instruct the jury as to the duty of the respondent Giesbrecht when undertaking to pass the Government truck.

3. That the jury were instructed that Giesbrecht, when confronted by the Government truck, had no alternative but to turn to the left side of the road or otherwise the truck would have run into him.

4. That taken as a whole, the charge on the question of liability was erroneously predicated upon the assumption that this was a case of ultimate negligence in which responsibility for avoiding the accident was entirely on the appellant driver.

It may be pointed out that at the time when this action was tried, contributory negligence was a defence in the province of Saskatchewan. The respondents other than the respondent driver, however, were not identified with his negligence, if the jury came to the conclusion that there was any negligence on his part: *Canadian Pacific Railway* v. *Smith* (1). The principles of law, applicable to the discharge of the jury's duty in such a case as the present, are not in doubt, and the duty of the learned trial judge is equally clear. His duty was to direct the jury as to the law applicable and as to how that law was to be applied to the facts before them according as they might find them. The degree in which it is important to point out these matters expressly must always depend upon the circumstances of the case: *Spencer* v. *Alaska Packers Association* (2). To adopt the language of Lord Watson in *Bray* v. *Ford* (3), cited by Nesbitt J. in the *Spencer* case (2) at page 367:

> Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal.

The learned trial judge in the early part of his charge told the jury more than once that the real problem, taking all of the evidence into consideration, was who really was the cause of the accident, and he quoted extracts from a number of judgments to that effect. He then proceeded, however, to read expressions from some judgments applicable, in the opinion of the judges who there presided, to the facts under consideration in those cases. These judgments dealt with cases where the negligence, if any, on the part of the plaintiffs in those cases was, in the

(1) (1921) 62 Can. S.C.R. 134.
(2) (1904) 35 Can. S.C.R. 362.
(3) [1896] A.C. 44, at 49.

1945

WOLFE v. GIESBRECHT

Kellock J.

opinion of the judges there presiding, mere narrative, the negligence on the part of the defendants being the effective cause of the accident. As I read the charge of the learned trial judge, he directed the attention of the jury to the conduct of the appellants' driver in proceeding into and continuing in the smoke without being able to see or knowing whether or not there was traffic on the road in front of him, as being conduct which the jury might well consider to be negligent, while he treated the conduct of Giesbrecht, if the jury considered it in any respect negligent, as though it did not matter, being something which the appellants' driver ought to have anticipated and guarded against. In my opinion, both what the learned judge said himself and what he read from the decided cases had the effect of taking away from the jury the issue of negligence on the part of the respondent Giesbrecht. I quote one extract:

> Here is another excerpt from one of the judgments: It is a principle of law which you can apply to this case—"if one of the parties in a common law action is not in fact aware of the other party's negligence"—that is, supposing a man is going along, as in this case, the plaintiff being in the smoke, and the defendant doesn't know that the plaintiff is in the smoke—"if he could by reasonable care have become aware of it and could by exercising reasonable care have avoided causing damage to the other negligent party, he is solely responsible if he fails to exercise such care".
>
> The law is this: if one party is not in fact aware of the other party's negligence, but if he could by reasonable care have become aware of it, and by the exercise of reasonable care have avoided causing damage to the other, he will be responsible. Let me put it this way, gentlemen: the plaintiff can be negligent, but if the defendant by exercising reasonable care could have avoided doing damage to the plaintiff, then the negligence of the defendant is the real cause of the accident.

After reference to the fact that Wolfe may have been on the right side of the road, but that that might not be all the care that he should have taken, the learned judge proceeded:

> That is, there is a duty to take reasonable care to avoid acts and omissions which could be reasonably foreseen to bring injury to the other party, that is to say, let us suppose that the plaintiff was negligent, and that Wolfe, by being careful, by reasonable carefulness, could have avoided the results of what Giesbrecht did, then Wolfe is the cause, the real cause of the accident.

That is to say, if both drivers proceeded into the smoke and came together, the one, although on his proper side of the road, is solely responsible because he should have anticipated the possibility of the other driver being negligently, or otherwise, in front of him, while the latter need not do so and can recover. I do not think it necessary to refer at further length to the charge. There are other illustrations to the same effect which could be given. I think that the result has been that the issues between the parties have not been tried.

In his factum, counsel for the respondents has referred to section 131 of the *Vehicles Act,* R.S.S. c. 275, which provides that—

> Every person in charge of equipment used in connection with the maintenance of provincial highways may at such times as he deems it expedient to do so, affix thereto a red flag and, while such flag is so affixed, he shall have the right of way over every person operating or driving a vehicle on the public highway.

Basing himself on this provision, counsel for the respondents contends that—

> Under this section, Giesbrecht was bound to give way to the Government outfit, and, as he says, "I thought I had to give him the road".

Giesbrecht said that, as he approached the Government truck the wheels were slowly turning and that he had to give it the road, so he turned to the left and passed the truck, in low gear at about 5 miles an hour. He said the Government truck was moving at a speed slower than a man would walk, that he saw no flags on it and that he was about 20 or 25 yards north of the truck when he saw that it was moving.

It is not necessary to consider what bearing section 131 might have as between Giesbrecht and the Government truck, had there been a collision between these vehicles. That is not the question here. If, in the opinion of the jury, Giesbrecht had safely passed the Government truck and the accident took place at a point south of the truck where Giesbrecht's course ceased to be affected by the presence of the Government truck on the highway, it is difficult to see that section 131 could have any operation whatever. On the other hand, if the jury accepted the view that the accident took place at a point where

1945

WOLFE v. GIESBRECHT

Kellock J.

Giesbrecht's course was still affected by the presence of the Government truck on the road, questions would still arise as to whether or not, in the first place, the jury believed Giesbrecht when he said he thought he had to give the Government truck the road, and in the second place, whether there were not other alternative courses open to him than the course he actually followed in continuing past the truck and putting himself into the path of traffic approaching from the south which he could not see and which could not see him.

I do not think that effect should be given to the contention of the appellants that the action should be dismissed. The argument is that the charge was defective in that it was unfavourable to the appellants, but that that is immaterial, if, as the appellants contend is the case, the answer of the jury with respect to the negligence of the appellant driver does not come within any of the allegations of negligence pleaded, all other allegations of negligence being impliedly negatived. I do not think, however, that it can be said that the answer to the second question is a finding of negligence, which does not come within the allegations of negligence in the statement of claim. There may be some surplusage in the answer, but regarded reasonably, I think the allegations of negligence in the statement of claim are sufficiently wide to include what the jury has found.

The appeal and cross-appeal must accordingly be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants: *Hall & Maguire.*

Solicitor for the respondents: *G. H. Yule.*

JOHNSON *v.* JOHNSON

1945

*May 2

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Dispute between husband and wife as to ownership of land—Findings of fact below—Evidence—Accounting.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *in banco* (1) dismissing his appeal from the judgment of Archibald J. dismissing his action and allowing the defendant's counterclaim. The plaintiff claimed that his wife, the defendant, held certain land as trustee for him. The defendant, besides disputing the plaintiff's claim, counterclaimed for an accounting in respect of moneys alleged to have been collected by the plaintiff as manager or agent of the defendant.

R. A. Ritchie for the appellant.

G. R. Ramey and *F. W. Bissett* for the respondent.

At the conclusion of the argument, the judgment of the Court was delivered orally by Kerwin J., dismissing the appeal with costs, subject to a variation (consented to by counsel for the parties) by striking out from the order of Archibald J. a certain part of it (being that part which ordered an accounting and a reference for taking accounts). On the question of the ownership of the land, this Court was of opinion that it could not interfere with the findings of fact below; and that, as to certain questions not permitted to be asked at the trial (and which, it was now admitted, should have been permitted), they would, if they had been answered, have had no effect upon the result.

Appeal dismissed with costs, subject to the variation aforesaid.

Solicitor for the appellant: *R. A. Ritchie.*

Solicitor for the respondent: *F. W. Bissett.*

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

(1) [1945] 1 D.L.R. 404.

1945
*May 2, 3
*May 3

CANADIAN PACIFIC EXPRESS COMPANY AND NOVA SCOTIA LIGHT AND POWER COMPANY LIMITED (DEFENDANTS) ..... } APPELLANTS;

AND

JAMES A. LEVY AND LILLIAN LEVY (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Damages—Personal injury—Amount awarded by jury held to be so large that a jury appreciating the evidence could not reasonably have awarded it—New assessment ordered.

APPEALS by the defendants from the judgment of the Supreme Court of Nova Scotia *in banco* (1) dismissing (Graham J. dissenting) their appeals from the judgment of Smiley J., given at trial on the findings of a jury in answer to questions put to them. The action was for damages by reason of personal injury to the plaintiff Lillian Levy caused by a collision between a tram car of the defendant Nova Scotia Light and Power Co. Ltd., in which she was a passenger, and a truck of the defendant Canadian Pacific Express Company. By the accident a leg of the said plaintiff was practically severed near the foot. The jury found that there was negligence on the part of each defendant which caused or contributed to the accident, and awarded damages, to the plaintiff James A. Levy (husband of the said plaintiff Lillian Levy) special damages $3,270.35 and general damages $2,500, and to the said Lillian Levy general damages $37,500; on which verdict the trial Judge made an order for judgment against both defendants for $5,770.36 in favour of the plaintiff James A. Levy and for $37,500 in favour of the plaintiff Lillian Levy. In the Supreme Court of Nova Scotia *in banco,* which court dismissed the defendants' appeals, Graham J. dissented, holding that in the circumstances the damages awarded were so excessive that the jury's findings as to the amounts should be

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

(1) [1945] 1 D.L.R. 322.

set aside "because the jury must have taken into account matters which they ought not to have considered and measures of damages which they applied erroneously", and that the case should be sent back to be heard again.

The defendants' appeals to this Court were confined to the question of the quantum of damages.

H. P. MacKeen K.C. for the appellant Canadian Pacific Express Company.

J. E. Rutledge K.C. for the appellant Nova Scotia Light and Power Co. Ltd.

Russell McInnes K.C. and *N. Green* for the respondents.

The judgment of the Court was delivered by

KERWIN J.—We are all of opinion that there must be a new assessment of the general damages of the plaintiff Lillian Levy. The amount awarded under this head, $37,500, is so large that a jury appreciating the evidence could not reasonably have awarded that sum. Whatever the evidence, if any, in the new assessment may be as to another operation, any expenses in connection therewith have been included in the award of $2,500 to the plaintiff James A. Levy, so that, in any event, the plaintiff Lillian Levy would be entitled in that connection only to an allowance for pain and suffering.

The appellants are entitled to their costs in this Court. The respondents are entitled to their costs up to and including the trial, and two-thirds of the costs of the appeal to the Supreme Court of Nova Scotia *in banco*. The costs of the new assessment may be dealt with by the judge presiding thereat.

Appeals allowed with costs, and new assessment of the general damages of the plaintiff Lillian Levy ordered.

Solicitor for the appellant Canadian Pacific Express Company: *C. B. Smith.*

Solicitor for the appellant Nova Scotia Light and Power Co. Ltd.: *J. E. Rutledge.*

Solicitor for the respondents: *Russell McInnes.*

1945

*Feb. 26, 27, 28
*Mar. 1
*May 15

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

AND

NORTHUMBERLAND FERRIES LIMITED (CLAIMANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Compensation—Appropriation of ships by the Crown for naval services—Reference to Exchequer Court under s. 7 of War Measures Act, R.S.C. 1927, c. 206, to determine compensation—Principles applicable in determining compensation—"Value of the vessel" in s. 5 (1) of The Compensation (Defence) Act, 1940 (c. 28).

Appeal—Jurisdiction—Award on reference to Exchequer Court under s. 7 of War Measures Act—Whether appeal lies to Supreme Court of Canada—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19, 37, 82—Supreme Court Act, R.S.C. 1927, c. 35, ss. 35, 44—Contention that Exchequer Court was curia designata—Effect of provision for choice of court, etc., in making reference under s. 7 of War Measures Act.

Under s. 7 of the *War Measures Act*, R.S.C. 1927, c. 206, the Minister of Justice referred to the Exchequer Court respondent's claim for compensation in respect of two ships, the *Seaborn* and the *Sankaty*, appropriated and acquired for naval services by the Crown. In the Exchequer Court ([1944] Ex. C.R. 123) Angers J. awarded $100,000 for the *Seaborn* and $205,000 for the *Sankaty*. Against the amounts of such awards the Crown appealed to this Court. Respondent moved to quash the appeal for want of jurisdiction, mainly on the ground that the Exchequer Court was *curia designata* and, no appeal being provided by the *War Measures Act*, there was no right of appeal. Argument was heard both on the motion to quash and on the merits of the appeal.

Under said s. 7, if the compensation is not agreed upon, the claim shall be referred by the Minister of Justice "to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court".

Under s. 5 (1) of *The Compensation (Defence) Act, 1940* (c. 28), the compensation shall be "a sum equal to the value of the vessel * * * no account being taken of any appreciation due to the war".

Held: (1) This Court had jurisdiction to hear the appeal. (Cases discussed.)

Per the Chief Justice: It is to be noted that, along with the authority or jurisdiction to each of the courts enumerated in s. 7 of the *War Measures Act* or to a judge thereof, there is not given special and independent powers. When once the reference is made, the court or

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

the judge is to deal with the matter in the ordinary way and according to the powers vested in the court by the general Act and the inherent powers already possessed. Parliament's intention was clearly that the Exchequer Court, in a reference to it as in the present case, should act as a court in accordance with the provisions of the *Exchequer Court Act* and that all the provisions of that Act should apply to the reference. The jurisdiction of the Exchequer Court, through the reference, was one "in any manner vested in the Court" within s. 82 of the *Exchequer Court Act,* and under said s. 82, read in connection with s. 44 of the *Supreme Court Act,* there was a right of appeal to the Supreme Court of Canada.

Per Kerwin J.: S. 82 (1) of the *Exchequer Court Act,* taken in conjunction with ss. 35 and 44 of the *Supreme Court Act,* conclusively gives a right of appeal in this case. The words "in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court" in said s. 82(1) are broad enough to include the present reference. S. 7 of the *War Measures Act* provides for the very vesting required by said s. 82(1). The option given to the Minister in making the reference under said s. 7 is not a ground for holding against a right of appeal in the present case. If a reference were made to a provincial superior or county court or a judge thereof, then whether any appeal would lie from the ensuing judgment would depend upon the ordinary jurisdiction of such court and the provisions made as to appeals from judgments thereof.

Per Hudson, Taschereau and Kellock JJ.: The option given under s. 7 of the *War Measures Act* as to the court or judge to whom the reference shall be made, is not a ground for holding against a right of appeal in the present case (*James Bay Ry. Co.* v. *Armstrong,* [1909] A.C. 624, at 630).

Per Hudson J.: S. 44 of the *Supreme Court Act,* read with s. 82 of the *Exchequer Court Act,* is ample to vest jurisdiction in this Court in this appeal. The matters referred to the Exchequer Court fell well within those comprised in its ordinary jurisdiction; and the procedure followed in that Court was in accordance with the normal practice of a suit carried on therein.

Per Taschereau J.: The trial Judge did not exercise any special jurisdiction with an appropriate machinery for that particular purpose, but dealt with the matter as a judge of the Court in the discharge of his ordinary judicial functions.

Per Rand J.: A reference to the Exchequer Court under s. 7 of the *War Measures Act* is not to be taken in any other sense than a reference by a departmental head (as under s. 37 of the *Exchequer Court Act*) and the effect of the reference is to place the claim within the ordinary procedure of the Court. (Whether a similar reference allowed to a provincial county or superior court carries with it the ordinary rights of appeal under provincial law, it is not necessary to decide. The language "or to a judge of any such court" in said s. 7 contemplates a judge exercising the original jurisdiction of his court). The present proceeding was in the Exchequer Court as such, and therefore an appeal lies under s. 82 of the *Exchequer Court Act.*

Per Kellock J.: S. 7 of the *War Measures Act* vests jurisdiction in the Exchequer Court within the meaning of s. 82 of the *Exchequer Court*

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Act, conditional only upon the exercise by the Minister of the power of reference given him by the *War Measures Act;* and the combined effect of s. 82 of the *Exchequer Court Act* and s. 44 of the *Supreme Court Act* is to authorize an appeal to this Court.

(2) On the merits of the appeal: As to the *Seaborn,* the compensation should be reduced to $92,764.93 (the amount tendered by the Crown) (The Chief Justice and Kerwin and Taschereau JJ., dissenting, would have affirmed the judgment at the trial, except as to the rate of interest allowed). As to the *Sankaty,* the case should be sent back to the Exchequer Court for re-assessment.

The meaning of "value of the vessel" within s. 5(1) of *The Compensation (Defence) Act, 1940,* and the principles to be applied and factors to be considered in determining that value, discussed, and cases referred to.

As to the *Seaborn:*

Per Hudson J.: The award below failed to give due weight to the cost of the vessel to respondent, which, though not necessarily evidence of value, was, under the circumstances, practically the only evidence of value before the Court within the prescription of s. 5 of *The Compensation (Defence) Act, 1940.* Also there were errors in amounts in items considered in reaching the award. It is a case where this Court is justified in modifying the award and it should be reduced as aforesaid.

Per Rand J.: The purchase by respondent of the *Sankaty,* admittedly much more suitable than the *Seaborn* for respondent's service, excludes any special value of the *Seaborn* to respondent as of the time of acquisition. In all the circumstances, the general market value must govern the determination of the value of the *Seaborn.* But the trial Judge, in reaching his award, included items irrelevant to market value; and also indicated a regard to considerations of realized special adaptability, and no such element was admissible. There was not in the evidence sufficient to bring the market value to more than the sum tendered by the Crown, which, though relatively not much less than that awarded below, was so generous as to prevent this Court from exceeding it.

Per Kellock J.: There was no evidence which enabled the trial judge, consistently with the proper principles to be applied, to assess the value of the *Seaborn* at any amount beyond that tendered by the Crown.

Estey J. agreed in the conclusion of Rand and Kellock JJ.

Per the Chief Justice (dissenting): There was evidence upon which the trial judge could make the award he made; and, even though this Court might, in its own view, think there was possibly a small error of valuation, this Court should not, under the circumstances, interfere.

Per Kerwin J. (dissenting): It does not appear that the trial judge failed to observe the applicable principles and it cannot be said that the sum awarded was excessive so as to justify alteration of it.

Per Taschereau J. (dissenting): The trial judge did not misdirect himself on the principles to be applied and took into account the proper elements in reaching his award, which was not clearly excessive; and therefore this Court should not interfere with his finding.

As to the *Sankaty: Per Curiam:* The trial judge erred in applying the principle of "replacement value" or "reinstatement" in reaching his award, as that was a method not in accordance with the direction in said s. 5 (1) of *The Compensation (Defence) Act, 1940,* on which the award must be based; and, as the evidence was not sufficient to enable this Court to ascertain the value on the proper basis, the case must be returned to the Exchequer Court for that purpose.

APPEAL by the Crown from the judgment of Angers J. in the Exchequer Court of Canada (1) on a reference to that Court by the Minister of Justice under the provisions of s. 7 of the *War Measures Act,* R.S.C. 1927, c. 206, to determine the compensation payable by the Crown to the respondent in respect of the acquisition by the Crown of the title to two ships owned by the respondent and known respectively as the *Seaborn* and the *Sankaty.* The said ships were appropriated by the Crown for naval services. Angers J. determined the compensation payable to be $100,000 for the *Seaborn* and $205,000 for the *Sankaty.* The Crown appealed to this Court against the amounts of such awards.

There was a motion by the respondent to quash the appeal for want of jurisdiction, on the ground that the Exchequer Court was *curia designata,* and, no appeal being provided by the *War Measures Act,* that Court's determination was final and not appealable. Another ground taken was that it was the intention of the parties, as shown by a certain letter from the Minister of National Defence for Naval Services to the respondent's solicitor, that the determination of the amount of the respondent's claim was to be by the Exchequer Court as arbitrator and was to be final and not appealable.

Argument was heard both on the motion to quash and on the merits of the appeal.

By the judgment of this Court now reported, the motion to quash was dismissed with costs; on the merits, the appeal was allowed, with costs in this Court to the appellant; in respect of the *Seaborn,* the judgment of the Exchequer Court was modified and the compensation reduced to $92,764.93, the amount tendered and paid by the appellant (the Chief Justice and Kerwin and Taschereau JJ., dissenting, would have affirmed the judgment at the trial, except that interest should have been

(1) [1944] Ex. C.R. 123; [1944] 4 D.L.R. 449.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

allowed at three instead of four per centum per annum); in respect of the *Sankaty*, the case was to be sent back to the Exchequer Court for the purpose of re-assessment; the costs of all proceedings below to be as directed by the Judge presiding at the re-assessment; such re-assessment to be made by the Exchequer Court in accordance with the principles and directions laid down in the reasons for judgment on the appeal in this Court.

J. G. Fogo K.C. and *C. Stein* for the appellant.

W. F. Schroeder K.C. and *G. J. Tweedy K.C.* for the respondent.

THE CHIEF JUSTICE.—The judgment now submitted to this Court was rendered by the Exchequer Court of Canada on a reference by the Honourable the Minister of Justice under section 7 of the *War Measures Act* (R.S.C. 1927, c. 206). It had to do with a claim of the respondent, Northumberland Ferries Limited, for compensation in respect of the ships *Seaborn* and *Sankaty* appropriated by His Majesty the King, for naval services.

Northumberland Ferries Limited is a company incorporated under the laws of the Province of Nova Scotia, and authorized to do business in the Province of Prince Edward Island. It was organized for the purpose of operating a proposed ferry service for the carriage of passengers, freight and motor cars and trucks, between Woods Island, P.E.I., and Caribou, N.S.

This ferry service was operated by the respondent in the years 1941 and 1942.

The *Seaborn* had been purchased by the respondent on or about July 14th, 1939. The purchase price was stated to be $80,000, made up of $30,000 in cash, $25,000 in second mortgage bonds and the remaining $25,000 by the issue of 500 shares of the company without par value, at $50 per share.

The bonds and shares were subsequently repurchased from the vendor by the group promoting the company for $25,000. It was also subsequently disclosed in the prospectus of the company that Mr. W. MacDonald, through whose agency the purchase was carried out, had made a commission of $15,000 on the transaction.

The *Seaborn* was a pleasure yacht built in 1925, of 495 tons gross tonnage. Delivery was taken at New London, Connecticut, and certain expenses for fitting out and fuel oil were incurred in bringing the vessel to Halifax, from which she was taken to the Halifax Shipyards Limited with a view to alterations for conversion into a ferry boat.

Before, however, any alterations were commenced, the *Seaborn* was first requisitioned for war purposes by the Director of Marine Services on the authority of the Minister of National Defence for Naval Services, and she was finally acquired by His Majesty the King, acting through the same Minister, for war purposes. In the company's balance sheet as at December, 1939, the cost of that ship was shown as $79,500 to which there are added charges for maintenance ($6,505.14) and other expenses directly applicable ($6,759.49), or a total of $92,764.63.

By Order in Council passed on March 20th, 1941, authority was given to pay to the respondent the sum of $92,764.63, being the valuation made by the Advisory Board, Atlantic Coast, as compensation for the *Seaborn*.

The payment of that amount was recommended by the Minister and it was made without prejudice to any claims which the respondent might submit to the Exchequer Court for additional compensation in respect of the acquisition of the said vessel, and also without prejudice to the right of the Government to set up any defence including the terms of *The Compensation (Defence) Act, 1940,* against any such claims for additional compensation.

On December 12th, 1939, the respondent purchased the steamer *Sankaty* from Washington Trust Company, for a total of $4,500 American funds, or approximately $4,995 in Canadian money. The *Sankaty* was built in 1911, had a gross tonnage of 677 tons and drew 187 feet in length.

An amount of $6,342.45 had to be expended at Stamford to get the ship ready for the voyage to Halifax. The accounts of the Halifax Shipyards Limited for work done on the vessel after arrival at Halifax, amounted to $56,736.72. There were certain other expenditures charged to the account of the vessel and the learned trial judge found the cost of it to the respondent to have been then $71,226.14. In addition, it was estimated that a further sum of $20,000 would have had to be spent to complete the repairs and alterations.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

Before the commencement of these proceedings, the appellant paid the company as compensation in respect of the acquisition of the *Sankaty,* $83,900 under the same conditions as the payment made for the *Seaborn.*

Subsequently, the respondent submitted a claim for $475,000 for the two vessels, giving credit for the amounts already received and claiming a balance of $298,335.35.

The claim was referred to the Exchequer Court by the Minister of Justice, under section 7 of the *War Measures Act,* and the reference came on for hearing before the Honourable Mr. Justice Angers at Charlottetown, P.E.I., in June, 1942.

The learned trial judge in his judgment awarded the respondent in respect of the *Seaborn* the sum of $100,000 and in respect of the *Sankaty* the sum of $205,000, or a total of $305,000, from which was to be subtracted the sum of $176,664.63 already paid to the respondent.

He directed that the respondent should recover the balance, $128,335.37, with interest at four per cent. from March 1, 1941, to the date of the judgment with costs.

From the foregoing decision, the appellant now appeals.

The respondent made a motion to quash the appeal apparently based on two grounds: (1) that the Exchequer Court acted as a *curia designata* in this case, under the authority of section 7 of the *War Measures Act,* and that no right of appeal is given by that Act. (2) That there was a binding agreement between the appellant and the respondent to treat the decision of the Exchequer Court as final and conclusive.

The hearing on the motion, when it was presented, was adjourned to be disposed of at the same time as the merits of the appeal; and it was so heard. The points raised by the motion must first be disposed of.

The reference in this case was in these terms:

> Under the powers conferred by section 7 of the War Measures Act, or otherwise existing in this behalf, I hereby refer to the Exchequer Court of Canada for adjudication the annexed claim of Northumberland Ferries Limited for compensation in respect of the ships *Seaborn* ("Charles A. Dunning") and *Sankaty* appropriated for naval services by His Majesty The King.
>
> Dated at Ottawa this 7th day of June, A.D. 1941.
>
> (Signed) ERNEST LAPOINTE,
> Minister of Justice.

Section 7 under which the reference is made reads as follows:

> Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

Then *The Compensation (Defence) Act, 1940,* section 5, relating to the compensation payable for the acquisition of a vessel (on which the present claim is based) is as follows:—

> 5. (1) The compensation payable in respect of the acquisition of any vessel or air-craft shall be a sum equal to the value of the vessel or air-craft, no account being taken of any appreciation due to the war, and shall, subject to the provisions of this Act, be paid to the person who is then the registered owner of the vessel or air-craft; provided that, for the purpose of assessing any compensation under this section, no account shall be taken of any compensation under paragraph (*a*) or paragraph (*c*) of subsection one of section four hereof which may have become payable in respect of the requisition of that vessel or air-craft.

It was argued on behalf of the respondent, that the Exchequer Court or the Superior or County Court, or the Judge of any such Court, acting under the provisions of section 7 above quoted, act as *persona designata* and that therefore there exists no right of appeal from the decision rendered by either of them.

In support of that contention, the respondent referred to a number of decided cases which are later examined; but it relied primarily on section 82 of the *Exchequer Court Act* and section 44 of the *Supreme Court Act.*

Section 44 states that the Supreme Court of Canada shall have jurisdiction as provided in any other Act confering jurisdiction.

Section 82 of the *Exchequer Court Act* reads as follows:—

> Any party to any action, suit, cause, matter or other judicial proceeding in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as a judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

The respondent laid emphasis on the word "vested" in the above section.

It contended that the jurisdiction exercised in the premises by the Exchequer Court was not "vested in the Court" under the provisions of the *Exchequer Court Act;* that it was conferred upon the Court by force of section 7 of the *War Measures Act* and as a consequence of the reference made by the Minister of Justice; that therefore the present proceedings did not come within section 82 of the Act, and that accordingly there was no right of appeal, since the Court did not decide the matter in virtue of its ordinary jurisdiction but acted as *curia designata.*

I do not think the argument is well founded.

When all is said and considered, the question of whether a court or judge indicated in a statute is intended as a *persona designata* depends upon the construction to be given to the statute wherein the said court or judge is indicated; and, in the present instance, there is a strong presumption that Parliament meant the appointed court or judge to act in its judicial capacity.

It is to be noticed that the statute giving the authority or jurisdiction to each of the courts enumerated in section 7 or to a judge thereof, does not purport to grant or to give special and independent powers either to the court or to the judge to whom the reference is made. It says that the Minister of Justice should refer the matter of compensation to the court or to a judge thereof, without more.

When once the reference is made, the court or the judge is to deal with the matter in the ordinary way and according to the powers vested in it by the general Act and the inherent powers which it already possesses. Indeed, if the court or judge chosen by the Minister of Justice were not to resort to the powers vested in them by the general Act and in the ordinary way, it would seem that the exercise of its jurisdiction would be practically unworkable.

The intention of Parliament was clearly, in this instance, that the Exchequer Court to which the reference has been made, should act as a Court in accordance with the provisions of the *Exchequer Court Act* and that all the provisions of that Act should apply to the reference thus made by the Minister of Justice.

Now, section 82 of the *Exchequer Court Act* read in connection with section 44 of the *Supreme Court Act,* is to the effect that any final judgment given by the Exchequer Court "in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court" is appealable to the Supreme Court of Canada.

Even if, as contended by the respondent, the jurisdiction herein exercised is not to be held "vested in the Court" under sections 18 and following of the *Exchequer Court Act,* it is not to be doubted that, upon any view of the matter, the jurisdiction here is given to the Exchequer Court by force of section 7 of the *War Measures Act,* through the reference made to that Court by the Minister of Justice. It is a jurisdiction "in any manner vested in the Court" at least as a result of the application of the *War Measures Act* and therefore "vested" within the meaning of section 82.

The consequence is unavoidable that the latter section applies to the reference and that a right of appeal is thereby given to the Supreme Court of Canada.

A great number of judgments were referred to by counsel of both parties in this case; but, as usual, very few of them have real application to the question now under discussion, because these judgments dealt with questions different from those which are raised in the motion to quash, and statutes differently worded. In the cases referred to, the courts were called upon to interpret statutes differing in language or in aim from the Acts now before this Court. (See Lord Davey in *Commissioners of Taxation* v. *Kirk* (1)).

Let us take, for example, *Valin* v. *Langlois* (2). In that case, Parliament had conferred upon provincial judges in Dominion Controverted Elections cases an exceptional jurisdiction with a special procedure and with all powers material for exercising such jurisdiction and having nothing in common with the provincial courts. It was held that these judges and courts were merely utilized outside their respective jurisdiction to deal with this purely Dominion matter.

(1) [1900] A.C. 588 at 593.

(2) (1879) 3 Can. S.C.R. 1.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

Again in *Canadian Northern Ontario Railway Company* v. *Smith* (1) it was pointed out that the judge to whom the application was made under the Dominion *Railway Act* was, it is true, a judge of the Superior Court of the Province, but, for the purposes of that application, his jurisdiction was "special and peculiar, distinct from, and independent of any power or authority with which he is clothed as a judge of that court"; the Act conferring jurisdiction upon him provides all necessary material for the full and complete exercise of such jurisdiction in a very special manner, wholly independent of, and distinct from, and at variance with, the jurisdiction and procedure of the court to which he belongs.

Duff J. (as he then was), at page 480, expresses the view that the jurisdiction created by section 196 of the *Railway Act* (c. 37, R.S.C., 1906) was not "a jurisdiction given to the Superior Court or County Court as the case may be, but to the judge or judges of those courts"; and he added, "in other words, when acting under that section the judge does not exercise the powers of the court as such but the special powers given by the Act".

Of all the other cases relied on by the respondent, in his motion to quash, I find it necessary to refer only to the following:

Warner Quinlan Asphalt Company v. *The King* (2). This was a case initiated under section 7 of the *War Measures Act*. The judgment of the Exchequer Court was affirmed and the decision of this Court was rendered on the merits of the case.

Idington J. questioned whether any right of appeal existed and he referred to *Gosnell* v. *Minister of Mines* (3) and *Wigle* v. *The Corporation of the Township of Gosfield* (4). He declined, however, to dispose of the case on the question of jurisdiction and he said that, after hearing a very elaborate argument on the merits of the case, he had come to the conclusion, for the reasons assigned by the learned trial judge with which he agreed, that his judgment was right and that the appeal should be accordingly dismissed.

(1) (1914) 50 Can. S.C.R. 476.
(2) [1924] S.C.R. 236. (3) (1913) 2 Cameron S.C. Practice, p. 21.
(4) (1913) 2 Cameron S.C. Practice, p. 23.

Duff J. (as he then was), with whom Sir Louis Davies, C.J., Mignault and Malouin JJ. concurred, after stating that the question whether section 7 of the *War Measures Act* contemplated "a determination by the court to which the claim is referred to be final and non-appealable" was one "of some little difficulty", said that he had come to a clear opinion upon the merits of the claim advanced by the appellant and that therefore he did not propose to consider the question of jurisdiction.

The question was therefore left undecided.

Consolidated Wafer Company Limited v. *International Cone Company Limited* (1). The judgment of the Exchequer Court had ordered, under section 40 of the *Patent Act,* on appeal from the Commissioner of Patents, the Consolidated Wafer Company Limited to grant a licence to the International Cone Company to make and use a machine covered by the Wafer Company's patent at a licence fee fixed by the judgment. It was held that the Supreme Court of Canada had jurisdiction to hear the appeal and the judgment was affirmed.

His Majesty the King v. *MacKay* (2). The Crown, in April, 1918, pursuant to Order in Council passed under the *War Measures Act, 1914,* requisitioned the respondent's ship. The Exchequer Court of Canada fixed the compensation at $11,000 as being the ship's value at time of requisition, with interest thereon from the date of the requisition to the date of the judgment. The Crown appealed against the allowance of interest. The case was heard on its merits in this Court and the appeal allowed without any question being raised on the jurisdiction of this Court.

The Sun Life Assurance Company of Canada v. *The Superintendent of Insurance* (3). This was an appeal to the Exchequer Court under the provisions of subsections 5 and 6 of section 68 of the *Insurance Act* from a ruling of the Superintendent of Insurance. The ruling was upheld by the Exchequer Court and then came the appeal to this Court. The appeal was dismissed on its merits, Newcombe J. agreeing with the conclusion of the judgment of Chief Justice Anglin with whom Cannon J. also concurred, while Duff and Smith JJ. dissented.

(1) [1927] S.C.R. 300. (2) [1930] S.C.R. 130.
(3) [1930] S.C.R. 612.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

Chief Justice Anglin and Cannon J. were of the opinion that the Supreme Court of Canada was without jurisdiction to entertain the appeal, as no actual amount was in controversy and no tangible property possessing a money value was at stake in the appeal, nor would the rights of shareholders be legally affected by its determination. (Sections 82 and 83 of the *Exchequer Court Act*). They thought that moreover, by giving under subsection 5 of section 68 of the *Insurance Act* a right of appeal to the Exchequer Court (in a summary manner) from the ruling of the Superintendent of Insurance, the Parliament intended to make that Court *curia designata* for the purpose of supervising acts of an official and the summary jurisdiction to be thus exercised by the Court so designated should be final and conclusive.

On the other hand, Duff and Smith JJ. held that an appeal lay to this Court from the judgment of the Exchequer Court. In their view, the right of appeal from that Court does not exist only when the judicial proceeding involves a pecuniary demand; the construction of section 82 of the Act should be determined by the decisions rendered by this Court under section 46 of the old *Supreme Court Act;* and it has been held that, when the matter in controversy was, for example, the right to pass a by-law and so to nullify a contract, there was jurisdiction if the right immediately involved amounted to $2,000. Moreover, the proceeding in the Exchequer Court was a "judicial proceeding" and the adjudication by that Court was a "judgment within the meaning of sections 82 and 83 of the *Exchequer Court Act*".

Thus, upon the question of jurisdiction, two of the judges of this Court were of opinion that jurisdiction lay, while two other judges held that it did not; and the case was disposed of on its merits, with Newcombe J. concurring in dismissing the appeal.

The *Sun Life* case went to the Judicial Committee of the Privy Council (1). Before the Board, the question of the jurisdiction of the Supreme Court to consider the judgment of the Exchequer Court was given up and the only question argued before the Board was on the merits of the case: the ruling of the Superintendent of Insurance amend-

(1) [1931] 4 D.L.R. 43.

ing the annual company's report under the provisions of the *Insurance Act*; it did not afford any authority on the point we are now discussing, except to the extent that their Lordships agreed with the dissenting judges in the Courts below on the merits of the appeal and they ordered the remittance of the case to the Exchequer Court so that it may direct the Superintendent of Insurance to restore the figure of $4,000,000 in the return by the Sun Life Assurance Company as the authorized capital of the Company.

The only further case to which I care to refer, is that of *The James Bay Railway Company* v. *Armstrong* (1). This was an appeal from a decision of the Chief Justice of the Common Pleas Division of the High Court of Justice for Ontario, increasing the award of arbitrators in proceedings for expropriation of plaintiff's land by the James Bay Railway Company.

Under section 168 of 3 Edward VII, c. 58, amending the *Railway Act*, 1903, if an award by arbitrators on expropriation of land by a railway company exceeded $600, any dissatisfied party could appeal therefrom to a Superior Court, which, in Ontario, meant the Court of Appeal and the High Court of Justice. It was held that if, under that section, an appeal from an award was taken to the High Court, there can be no further appeal to the Supreme Court of Canada, which cannot even give special leave.

Reference was made to *Ottawa Electric Company* v. *Brennan* (2).

The case of *Birely* v. *Toronto, Hamilton and Buffalo Railway Company* (3) was there referred to with approval, in which it was held "that no appeal lay from the judgment of the High Court to the Court of Appeal in such a case, both those courts being designated by the statute as special tribunals, to either of which the appellant might resort".

In the Privy Council (4), the appeal was dismissed. It was held that according to the true construction of section 168 of the Canada *Railway Act*, 1903, the appeal

(1) (1907) 38 Can. S.C.R. 511.
(2) (1901) 31 Can. S.C.R. 311.
(3) (1898) 25 Ont. A.R. 88.
(4) [1909] A.C. 624.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

given to a Superior Court from an award under that Act, lies, in the province of Ontario, to either the Court of Appeal or the High Court of Justice at the option of an appellant; but that in case of appeal to the High Court, inasmuch as it is not the Court of last resort in the province within the meaning of the *Supreme and Exchequer Courts Act,* (R.S.C. 1886 c. 135, section 26), there was no appeal therefrom to the Supreme Court of Canada.

The ground upon which the judgment of the Privy Council was based was, therefore, that there was no right of appeal from the judgment of the High Court of Ontario because that Court is not, within the meaning of section 36 of the *Supreme Court Act,* "the highest court of final resort" established in the province of Ontario; and that an appeal lies to the Supreme Court of Canada only from such highest court of last resort. That is not a decision which can be of any help to the appellant in the premises.

On this point, I am of opinion that the respondent fails on his motion to quash.

So far as the letter of the Minister of National Defence for Naval Services dated March 12th, 1941, is concerned, I do not think it has the meaning ascribed to it by the respondent; and, moreover, the letter was filed only in this Court in support of the motion to quash. It was not put or invoked before the learned trial judge in the Exchequer Court and was not referred to in any way while the case was before that Court. The letter itself was by no means resorted to for the purpose of referring the matter to that Court nor can it be interpreted as intending to make the Exchequer Court a mere arbitrator between the parties.

By the very terms of the reference, the matter was brought to the Exchequer Court under section 7 of the *War Measures Act,* through the intervention of the Minister of Justice, and it was as a consequence of the reference so made that jurisdiction in the matter was vested in the Exchequer Court. I cannot accede to the contention of the respondent that this had the effect that the determination of the amount of the respondent's claim

by the Exchequer Court was to be final and non-appealable, as that appeal is provided by the provisions of section 44 of the *Supreme Court Act*.

The respondent's motion to quash for want of jurisdiction ought, therefore, to be dismissed with costs.

I shall now take up the judgment on the merits of the adjudication which it has made, and for the purpose of this discussion, the award in respect of the *Seaborn* must be envisaged separately from that with regard to the *Sankaty*.

Very little need be said about the *Seaborn*. She was entered in the balance sheets of the respondent as representing a value of $92,764.63, as we have already seen. That figure included $79,500 for the "vessel at cost", $6,505.14 for maintenance and $6,759.49 for "expenses directly applicable". By Order in Council, the Minister was authorized to pay the sum of $196,377.55 for the acquisition and charter hire of the two vessels stated. The sum was made up as follows:—

Advisory Board valuation of *Seaborn*..	$92,764.63
Charter hire payable on *Seaborn*.....	8,200.00
Advisory Board valuation of *Sankaty*..	83,900.00
Charter hire payable on *Sankaty*.....	11,512.92
	$196,377.55

Such was the sum paid to the company and detail of the amount so paid.

Thus, disregarding the $8,200 for charter hire of the *Seaborn*, the actual figure tendered and paid for the acquisition of that vessel is therefore the last sum entered in the balance sheet of the respondent as at December 31, 1939. Therefore the Government paid for the cost, for the maintenance and for the expenses directly applicable as entered in the books of the company.

Then if we look at the reasons for judgment of the learned trial judge, we find the following:—

The proof shows that the cost of overhauling her [the *Seaborn*] and bringing her from New London, Conn., to Halifax and the cost of her maintenance until she was requisitioned totalled $16,651.94. It is also established that the structural changes, which were effected on her but

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

were not completed on account of her being taken over by the [appellant, His Majesty the King], cost $2,181.73. These various items [including $80,000 for the purchase price of the *Seaborn*] form a total of $98,833.67.

And the learned judge concludes:—

After taking into consideration the various elements hereinabove referred to, I have reached the conclusion that the value of the *Seaborn* * * * to her owner, Northumberland Ferries Limited, during the summer of 1939, before the declaration of war, was $100,000.

Under the circumstances, I do not feel that this Court would be justified in interfering with the award made by the learned judge in respect of the *Seaborn*. It need only be said that there was undoubtedly evidence upon which the learned trial judge could make the award he made. It would be asking too much from an Appellate Court to nullify the judgment of the learned trial judge in expropriation matters, merely because in its own view the Court might think that, on a total award of $100,000, there might be a possible error of valuation amounting to $1,166.33.

Only in two respects could the correctness of the award be disputed.

(1) On the ground that the learned trial judge would appear to have taken the purchase price of the *Seaborn* to have been $80,000, of which $30,000 was paid in cash, $25,000 by shares, and $25,000 by two mortgage bonds of the Company; and it was argued by the appellant that the shares and the bonds should not be considered at their face value, because they were subsequently acquired by other interested parties for the sum of $25,000.

But the learned trial judge was perfectly justified to decide that the subsequent sale of the shares and bonds was not made at their true value. Several reasons may have prompted the vendor to accept that sum as being in exchange for the shares and bonds. So far as the respondent was concerned, he undoubtedly continued to be responsible for the full amount of $25,000 represented by the second mortgage bonds and it cannot be assumed that the shares were valueless, in the absence of any evidence to that effect.

Moreover, the purchase price of a ship does not necessarily represent the value of that ship. Such value may be either less or more than the purchase price, according

to the circumstances under which the purchase on the one part and the sale on the other were made. I do not think that the allowance made in the judgment for the value of the *Seaborn* was successfully challenged by the appellant.

(2) So far as the inclusion of a certain amount for the cost of the maintenance of the *Seaborn* until she was requisitioned is concerned, I would have been of the opinion that it should not have been included in the allowance that was made, but it is apparent that the appellant accepted the item of maintenance as being properly claimed by the respondent and, in fact, he has actually included it in the payment made by it as a consequence of the Order in Council.

The validity of that payment is not questioned by the appellant and it was no longer an issue when the reference was made to the Exchequer Court.

I think, therefore, that the award of $100,000 for the *Seaborn* should stand.

But it is different so far as the award for the *Sankaty* is concerned. The trial judge awarded $205,000, while the Advisory Board valuation was only $83,900.

The learned trial judge, as a reason for his valuation, said that the award in respect of the *Sankaty* should be made on the replacement basis and he gave three alternatives of the way in which such replacement value might be arrived at:—

One was for the cost of buying a new ship to replace the *Sankaty*; another was for the purchase of the *Fishers Island* for which her owner asked the price of $285,000, representing $316,550 in Canadian funds, from which should be deducted an appreciation of 33⅓% representing the increased value due to the existence of the war, leaving a balance of $210,900; and the third alternative was that the respondent might have purchased another vessel of the type of the *Prince Nova*, which the respondent had acquired after the *Sankaty* was requisitioned.

This would have meant, in the view of the learned trial judge, an expenditure in round figures of $92,000, bringing the price of the two vessels purchased to replace the *Sankaty* to an amount of $184,000.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rinfret C.J.

With these two vessels, in the view of the learned trial judge, the respondent would not have been in as advantageous a position as with the *Sankaty*, seeing that the operation of two vessels would have involved heavier overhead expenses.

And the learned trial judge added:—

> After perusing the evidence carefully, listening attentively to and later reading the exhaustive argument of counsel and examining the various acts relied upon and studying the precedents invoked, I have reached the conclusion that in order to put the claimant in as favourable a position financially as it was in before the taking of the *Sankaty* by the respondent and to enable it to obtain a suitable substitute for the said vessel, of approximately the same size and carrying capacity, it must be granted a compensation of $205,000.

The judgment appealed from quoted several authorities in support of the proposition that, in a case such as the present one, there was justification for applying the principle of the replacement value in the premises.

But the authorities referred to in the judgment, as well as all those to which the learned counsel for the respondent drew our attention either in his factum or in the course of his argument before the Court, have to do with the application of statutes worded differently from the statutes which are applicable in the present case and therefore they cannot support either the judgment or the argument put forward by the respondent on that point.

Here, the statute and the only statute applicable, is *The Compensation (Defence) Act, 1940,* assented to on August 7th, 1940; and section 5 of that statute, relating to the compensation payable for the acquisition of a vessel, is the one on which the allowance is based and must be based.

That section says that:—

> The compensation payable in respect of the acquisition of any vessel * * * shall be a sum equal to the value of the vessel * * * no account being taken of any appreciation due to the war.

It is idle, therefore, to resort to any other statute or to the judgments rendered on the interpretation of other statutes for the purpose of ascertaining what, in the present case, the compensation should be.

Section 5 is very clear: "the compensation shall be a sum equal to the value of the vessel, no account being taken of any appreciation due to the war".

What the Court must do, therefore, to estimate the compensation to be allowed, is merely to find out the value of the vessel requisitioned, without taking into account any increased value resulting from the existence of a state of war.

It seems clear that that is not what the learned trial judge has done, in basing his award upon what it would have cost, either to build a new ship or to purchase other ships in order to replace the *Sankaty*.

If I found in the evidence taken before the Exchequer Court the elements enabling this Court to establish the value of the *Sankaty* in accordance with the directions contained in section 5 of *The Compensation (Defence) Act, 1940,* I would probably have endeavoured to arrive at the right figure within the meaning of that statute and to substitute it to the amount allowed in the judgment appealed from.

Unfortunately the necessary elements are not to be found in the record now before us and there is no other course opened to this Court but to return the case to the Exchequer Court with a direction that there should thereby be proceeded to an estimation of the value of the *Sankaty* at the time of its requisition, without taking into account any increased value which she might have acquired as a result of the existence of a state of war.

It follows that, in my view, an order should go to the effect just mentioned and that the appeal should be allowed to that extent, the appellant being entitled to two-thirds of the cost of this appeal, as I consider that the appeal in respect of the *Seaborn* did not represent more than one-third of the appeal costs.

So far, however, as the *Seaborn* is concerned, the judgment should stand.

As to the costs at the trial, the respondent should get one-half its costs against the appellant; the remaining one-half and the costs of the new trial should be in the discretion of the Judge presiding thereat. The respondent is, therefore, entitled to be paid by His Majesty the King the sum of $7,235.37, with interest thereon at the rate of three per cent. per annum in accordance with Order in Council 529 of January 22nd, 1943.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

KERWIN J.—This is an appeal by His Majesty the King from a judgment of the Exchequer Court that the respondent was entitled to recover from the appellant the sum of $128,335.37, being the balance of the compensation payable by reason of the appropriation by the appellant of the title to two vessels owned by the respondent, and interest at 4 per centum per annum from March 1st, 1941, the date of appropriation.

The respondent was the owner of the motor vessel *Seaborn* (afterwards known as the *Charles A. Dunning*) and the S.S. *Sankaty*. Under the provisions of section 3 of the *War Measures Act*, R.S.C. 1927, c. 206, the Crown, after the outbreak of the present war, requisitioned the use of these vessels and subsequently, on March 1st, 1941, compulsorily acquired the ownership thereof. Certain amounts as charter hire for the use of the vessels were paid and no question arises thereon but the parties were unable to agree as to the amount to be paid for the acquisition of title. A sum considered adequate by the appellant was paid therefor in pursuance of an arrangement set forth in a letter of March 12th, 1941, from the Minister of National Defence for Naval Services and addressed to the respondent's solicitor. That letter refers to the solicitor's suggestion that the respondent was prepared to accept the amount paid as on account, leaving the final determination of the amount payable to be settled by the Exchequer Court and concludes:

> In view of these considerations I am preparing to recommend, and I am recommending, that a cheque be forwarded to you for the amount of $196,377.55, leaving to the determination of the Exchequer Court of Canada the question whether any further sum is due, and if so, in what amount.

It was first argued that the Exchequer Court had been named as arbitrator, from whose decision there was no appeal. The Minister's letter, however, is only a reference to the power conferred upon the Minister of Justice under section 7 of the *War Measures Act* and which power was in fact exercised and in pursuance of which the proceedings were taken. This section provides:

> 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by

the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

It was under this section that the Minister of Justice on June 7th, 1941, referred to the Exchequer Court for adjudication the claim of the respondent for compensation in respect of the two ships appropriated for naval services by His Majesty the King.

The respondent takes the further point that the Exchequer Court was *curia designata* and that no appeal lies from its adjudication. This is based upon a number of decisions to the effect that where a judge is *persona designata,* there can be no appeal. So far as this Court is concerned, the first statement of such a principle appears in the judgment of Sir William Ritchie in *Valin* v. *Langlois* (1). Leave to appeal from the decision of this Court was refused by the Privy Council (2). The precise question did not actually arise because a section of the Supreme Court Act provided for an appeal to this Court, but the statement of the Chief Justice was afterwards approved and adapted by Sir Charles Fitzpatrick in *Canadian Northern Ontario Railway Company* v. *Smith* (3). This statement is as follows:

> Reading these special provisions in connection with the Act of 1873, and what has been said of the Act generally, I think it is not arriving at a forced or unnatural conclusion to say that that Parliament intended to establish Dominion Tribunals exceptional in their jurisdiction, perfect in their procedure, and with all materials for exercising such jurisdiction, and having nothing in common with the Provincial Courts; that these judges and courts were merely utilized outside their respective jurisdictions for giving full effect to these statutory tribunals to deal with this purely Dominion matter.

Next in order is *Canadian Pacific Ry. Co.* v. *The Little Seminary of Ste. Thérèse* (4), where two things were held. One was that the Judge in Chambers in Quebec, before whom certain proceedings under the Dominion *Railway Act* originated, was not a Superior Court, and the second, that such Judge was a *persona designata.* All the judges agreed, but the ground for decision on the second point is perhaps made clearer in the judgment of Mr. Justice Patterson where, referring to various functions assigned to the Judge mentioned in the Act, he states (pp. 618-619):

(1) (1879) 3 Can. S.C.R. 1 at 33, 34. (2) (1879) 5 App. Cas. 115.
(3) (1914) 50 Can. S.C.R. 476. (4) (1889) 16 Can. S.C.R. 606.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

They are functions which from their nature and object must be intended to be exercised in a summary manner and not liable to the delay incident to the appeals from court to court. From these considerations, as well as from the language of the statute, it is plain that the judge acts as *persona designata* and does not represent the court to which he is attached.

—referring to *Re Sheffield Waterworks* (1).

The *Ste. Thérèse* case was distinguished in *City of Halifax* v. *Reeves* (2). There, under a section of the charter of the City of Halifax, any person intending to erect a building upon or close to the line of the street was first to cause such line to be located by the city engineer and obtain a certificate of the location; and if a building were erected upon or close to the line without such certificate having been obtained, the Supreme Court of Nova Scotia or a Judge thereof might, on petition of the Recorder, cause it to be removed. In *North British Canadian Investment Company* v. *The Trustees of St. John School District* (3), it was held that the confirmation of a tax sale transfer by a judge of the Supreme Court of the Northwest Territories under a section of the *Land Titles Act, 1894,* was a matter or proceeding originating in a Court of superior jurisdiction and an appeal would lie to this Court from the final judgment of the full Court affirming same. The majority of the Court were unable to distinguish the case from that of *City of Halifax* v. *Reeves* (*supra*).

In *St. Hilaire* v. *Lambert* (4), there had been an application for the cancellation of a liquor licence issued under the Alberta *Liquor Licence Act* to a judge of the Supreme Court of Alberta in chambers, who granted an originating summons ordering all parties concerned to attend before him, and after hearing the parties who appeared, refused the application. The full Court of Alberta reversed this order and cancelled the licence. The majority of this Court were of the opinion that the case came within the principle decided in the *Ste. Thérèse* case (5). In *Canadian Northern Ontario Ry. Co.* v. *Smith* (6), the Chief Justice, Sir Charles Fitzpatrick, with whom Idington J. agreed, adapted the quotation from Sir William Ritchie's judg-

(1) (1865) L.R. 1 Ex. 54.
(2) (1894) 23 Can. S.C.R. 340.
(3) (1904) 35 Can. S.C.R. 461.
(4) (1909) 42 Can. S.C.R. 264.
(5) (1889) 16 Can. S.C.R. 606.
(6) (1914) 50 Can. S.C.R. 476.

ment referred to, and considered that the case came clearly within the rule in the *Ste. Thérèse* and *Lambert* cases (*supra*). Mr. Justice Duff stated the principle which, I think, is the proper one to be applied in such cases in the following words:

> The jurisdiction created by section 196 of the *Railway Act* is not, I think, a jurisdiction given to the Superior Court or County Court as the case may be, but to the judge or judges of those courts. In other words, when acting under that section the judge does not exercise the powers of the court as such, but the special powers given by the Act.

The other three members of the Court disposed of the matter on the ground that there was nothing in the record to show that the amount in dispute was $2,000 or over, and that, therefore, the appeal failed.

In *Calgary and Edmonton Railway Company* v. *The Saskatchewan Land and Homestead Company* (1), the majority of the Court determined that a judge, when taxing costs under a section of the *Railway Act,* acted as *persona designata* and that no appeal lies from his decision. In *Consolidated Wafer Company Limited* v. *International Cone Company Limited* (2), it was held that this Court had jurisdiction to hear an appeal from the Exchequer Court's judgment delivered on an appeal from the Commissioner of Patents under section 40 of the *Patent Act.* In *Sun Life Assurance Company of Canada* v. *The Superintendent of Insurance* (3), the majority of the Court considered that no actual amount was in controversy in an appeal from the Exchequer Court's decision on an appeal from a ruling of the Superintendent of Insurance under the provisions of the *Insurance Act;* and that furthermore, in giving a right of appeal to the Exchequer Court in what was deemed to be a summary manner, Parliament intended to make that Court *curia designata* and that no further appeal could be had. Two of the Judges were of opinion that there was jurisdiction. When the case went to the Privy Council (4), the question of jurisdiction was abandoned and, on the merits, the judgment of this Court was reversed. I have only to add that

(1) (1919) 59 Can. S.C.R. 567.
(2) [1927] S.C.R. 300.
(3) [1930] S.C.R. 612.
(4) [1931] 4 D.L.R. 43.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

in my view, the decision of this Court in *James Bay Railway Company* v. *Armstrong* (1), and of the Privy Council (2), has no bearing upon the point under consideration.

The effect of these decisions and the many others referred to is that in any particular case, the relevant statutory enactments must be read to ascertain the nature of the jurisdiction conferred. In the present case, subsection 1 of section 82 of the *Exchequer Court Act*, R.S.C. 1927, c. 34, is conclusive when taken in conjunction with sections 35 and 44 of the *Supreme Court Act*. The latter provide:

> [Section 35] The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada. [Section 44] Notwithstanding anything in this Act contained the court shall also have jurisdiction as provided in any other Act conferring jurisdiction.

Subsection 1 of section 82 of the *Exchequer Court Act* reads as follows:

> Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as a judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

The words "in virtue of any jurisdiction now or hereafter in any manner vested in the Court" are sufficiently broad to include the reference by the Minister of Justice under the *War Measures Act*. It is suggested that only Parliament has the power to vest jurisdiction in the Exchequer Court, but by section 7 of the *War Measures Act*, Parliament has provided for the very vesting required by subsection 1 of section 82 of the *Exchequer Court Act*. It was further contended that it could not be presumed that Parliament intended to permit the Minister of Justice to refer one dispute to a Court from which there would be an appeal to this Court, and another to a Superior or County Court of the Province within which the claim arose, with the possible result that there would be no appeal

(1) (1907) 38 Can. S.C.R. 511. (2) [1909] A.C. 624.

at all. There might very well be cases, however, where only small amounts were involved and where the Minister would consider it proper to refer the claims to one of the last mentioned courts "or to a judge of any such court."

The point now taken was advanced on behalf of the Crown in *Warner Quinlan Asphalt Co.* v. *The King* (1). None of the judges dealt with the point except Mr. Justice Idington who, while disposing of the appeal on its merits (as did the others), was inclined in favour of the argument on the ground that if the reference had been made to any of the judges of the courts referred to, except the Exchequer Court, it could not be contended that an appeal would lie by either party from his disposition of the claim. With respect, I am of a contrary opinion. If a reference were made to a provincial, superior or county court or a judge thereof, whether any appeal would lie from the ensuing judgment would depend upon the ordinary jurisdiction of such court and the provisions made as to appeals from judgments thereof. While it is true that section 9 of the *War Measures Act* gives a court power to make rules, none have been made by the Exchequer Court and, so far as known, by any other court. Even if they had, it would be almost impossible for any court or judge to proceed with a reference unless the aid of all the relevant statutory provisions dealing with such court could be invoked. This being a case or matter in which the Exchequer Court has given a final judgment in virtue of the jurisdiction vested in it by section 7 of the *War Measures Act* and the Minister's reference, an appeal lies to this Court. The motion to quash is dismissed with costs.

We are now in a position to discuss the merits of the appeal. The provisions of *The Compensation (Defence) Act, 1940,* are to be observed in fixing the compensation for the "acquisition" of the two vessels, which term in relation to any vessel or aircraft means (s. 2 (*a*)) the appropriation by or on behalf of His Majesty of the title to or property in the vessel or aircraft. It was recognized that by reason of the actual and threatened destruction of vessels by the enemy in the present war the available tonnage would be considerably lessened, and it was deemed

(1) [1924] S.C.R. 236.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

only proper that the owner of any vessel acquired by the Crown in the stress of war should not have the advantage of the resulting higher prices of ships. Therefore, by subs. 1 of s. 5 it is provided that the "compensation" payable in respect of the acquisition shall be a sum "equal to the value of the vessel or aircraft, no account being taken of any appreciation due to the war."

The term "value of a ship" occurs in the British *Merchant Shipping Act, 1854,* c. 104, s. 504, this being one of the earliest Merchant Shipping Acts in which permission was granted the owner of a ship to limit his liability to the value of the ship. Counsel for the appellant argued that decisions under that section were relevant to the ascertainment of "value" in the *Compensation (Defence) Act,* and also the authorities as to the amount recoverable arising out of the total loss of a ship due to collision, and in the matter of the ascertainment of the value of a ship for the purposes of determining the loss in a case of marine insurance. The provision in the *Merchant Shipping Act* was enacted for an entirely different purpose and the other decisions referred to proceed upon a principle that is not applicable to subs. 1 of s. 5 of the *Compensation (Defence) Act.*

Were it not for that Act, the subject of an enquiry such as this would be the "compensation" to be made under section 7 of the *War Measures Act;* and, that enactment being *in pari materia* with the Dominion *Expropriation Act,* the expression "compensation" should, so far as possible, be given the same meaning in the two enactments. In some respects but not all, "value" as used in subs. 1 of s. 5 of the *Compensation (Defence) Act* means the same as "compensation" in the Dominion *Expropriation Act.* Thus an owner of a ship acquired by the Crown is entitled to be paid the value of the vessel to him, not to the Crown. In *Lake Erie & Northern R. Co.* v. *Brantford Golf and Country Club* (1), a case of compulsory taking of land under the *Railway Act,* Duff J., at p. 228, states what, with appropriate changes, is applicable here:—

> The phrase "the value of the land to them" has most frequently been made use of to emphasize the fact that it is not the value of the land arising in consequence of the requirements of the undertaking for which it is taken that is to determine the scale of compensation.

(1) (1916) 32 D.L.R. 219.

It is needless to emphasize perhaps that the phrase does not imply that compensation is to be given for "value" resting on motives and consideration that cannot be measured by any economic standard.

That it is not necessarily the market value appears from a further quotation from the same judgment which immediately follows:

It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in *Pastoral Finance Ass.* v. *The Minister* (1) has given what he describes a practical formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.

The shipowner is also entitled to be paid the present value of the vessel (as of a date immediately prior to the outbreak of war), including the future advantages of the ship but only insofar as they help to give it that present value. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (2), and *The King* v. *Elgin Realty Co. Ltd.* (3) in which latter case the following extract from the judgment of the President of the Exchequer Court was quoted with approval as an accurate statement of the law:—

I do not mean to say that the defendant, by reason of the special adaptability of its property for particular purposes on account of its size, shape and location, is thereby entitled to a hypothetical or speculative value which has no real existence, and therefore any remote future value must be adequately discounted.

The learned trial judge awarded as the value of the *Seaborn* the sum of $100,000, of which $92,764.63 had already been paid. In arriving at this amount, he stated that the respondent did not base its claim, and he did not rest his judgment, on the doctrine of reinstatement, so that we need not presently consider it. It should be explained that in 1938 an agreement was made between the Minister of Trade and Commerce and Farquhar Steamships Limited whereby the latter agreed that on May 1st, 1939, they would place the motor-ship *Djursland* or a suitable substitute vessel to be built subject to the

(1) [1914] A.C. 1083, at 1088. (2) [1914] A.C. 569.
(3) [1943] S.C.R. 49.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

approval of the Minister, on a route between Wood Island, Prince Edward Island, and Caribou, Nova Scotia, for the carriage of passengers, freight, motor cars and motor trucks from May 1st to November 30th in each year for a period of five years. The service to be given and the fares to be charged were particularized. In return a subsidy of $28,000 per year was to be paid. The *Djursland* disappeared from the picture and the Farquhar Company's rights were transferred to the respondent which, to fulfill its accompanying obligations, purchased the *Seaborn*.

The *Seaborn* was originally an ocean-going pleasure yacht, built in 1925 in Scotland and lengthened in the United States, at a total cost of about $400,000. While it had not been used for some years prior to its purchase by the respondent, it had not been dismantled but, on the contrary, always had a skeleton crew on board to look after it. As a yacht it was in first class shape but when the respondent purchased it in July, 1939, expensive yachts were a drug on the market. The price paid by the respondent was $80,000 payable $30,000 in cash, $25,000 in second mortgage bonds, and the remaining $25,000 by the issue of five hundred shares of the respondent company without par value at $50 per share. The bonds and shares were subsequently repurchased from the vendor by the group promoting the company for $25,000. While it has been argued by the appellant that the net purchase price was really $55,000, the respondent contends that so far as the company is concerned it was $80,000. I am inclined to think that the true explanation appears in the following question and answer in the cross-examination of Robert E. Mutch, the President of the respondent company, at page 81 of the record:

> Q. And the purpose of issuing the second mortgage bonds was to enable this to be done, to repurchase for $25,000 securities to the value of $50,000, and put them back in the hands of people putting up $25,000?
>
> A. The reason for it was this, that when we bought the boat our first mortgage bonds were not ready for issue and Miss Morrison, or whoever was the American party to the deal, agreed to give the boat and accept this as protecting her until such time as funds were available and in the meantime the Maritime Trust Company were preparing the trust deed and the advertising of the sale of the bond issue to the public. I do not know that the Maritime Trust Company was selling the bond issue but I rather think it was some St. John firm that was selling it.

Whatever the original cost, certain repairs were made and expenses incurred. The company carried the ship on its books at varying amounts but a letter dated May 10th, 1940, from it to the Director of Shipbuilding of the Department of Munitions and Supply stating "the actual cash laid out at the time of purchase of the boat was $55,000" would indicate that the answer above quoted meant that the original cost was the amount stated in the letter.

In view of the conclusion at which I have arrived, the question of the discrepancy between that amount and $80,000 need not be further pursued. Negotiations took place as to the sum to be paid for the acquisition of the ship and at that time (March 29th, 1940) the respondent was willing to accept $65,000, while the department offered $50,000. On September 17th, 1940, an Order in Council was passed authorizing the payment of what is called "an agreed sum" of $58,000 and a bill of sale, dated October 11th, 1940, was executed by the respondent in which the consideration is stated to be $70,705. For some unexplained reason, this transaction was never completed. Unless the cost of the vessel to the respondent was intended to be taken by the appellant as $80,000, it is difficult to ascertain the basis upon which the amount finally offered and paid, $92,764.63, was arrived at. As a matter of fact, this amount appears under the heading "Fixed Assets" in the respondent's balance sheet, dated December 31st, 1939, made up as follows:—

Vessel (*Charles A. Dunning*) at cost	$79,500 00
Maintenance—*Charles A. Dunning*	6,505 14
Expenses directly applicable	6,759 49
	$92,764 63

In the balance sheet as of December 31st, 1940, appears the following:

S.S. *Charles A. Dunning* cost	$75,500 00
Maintenance	9,514 18
Expenses	7,531 19
	$92,545 37

Why the "cost" in these statements appears as $79,500 and $75,500 is not satisfactorily explained but, in any event, these are mere bookkeeping entries.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

The trial judge quite rightly considered that, while cost should be borne in mind, it was not conclusive and that the sums, which in March and October, 1940, the respondent was apparently willing to accept, were the result of the unfortunate financial position in which it found itself. I also agree that the suggestion made throughout the trial that the *Seaborn* was or would be unstable as a ferry is not borne out by the evidence. Two witnesses for the respondent placed the value prior to the war at $175,000 as being what a willing purchaser would pay to a willing vendor. Two witnesses for the Crown placed such value at $60,000. The trial judge fixed it at $100,000.

In the *Elgin Realty* case (1) it was said that in cases under the *Expropriation Act*, if a judge of first instance has acted upon proper principles, has not misdirected himself on any matter of law, and that if the amount arrived at is supported by the evidence, this Court ought not to disturb this finding. Later, in *Canadian National Ry. Co.* v. *Harricana Gold Mine Inc.* (2), it was stated that if these rules have not been infringed the Court will not interfere in such a case on a mere question of quantum, unless it is satisfied that the amount allowed was clearly excessive or just as clearly too small.

The mere fact that in a dispute as to the compensation to be paid for a ship, admittedly worth a very substantial sum, the amount awarded is approximately $7,200 over the amount tendered and paid would not be sufficient in itself to warrant this Court refusing to interfere. There was no real cross-examination of the witnesses as to how their estimates of $175,000 and $60,000 were arrived at but, in my view, that is no reason for interfering with the trial judge's finding based upon such evidence as the parties chose to place before him. From a careful reading of the reasons for judgment I am unable to find that the trial judge failed to observe the applicable principles and I cannot say that the sum of $100,000 is excessive so as to justify any alteration of it and I would, therefore, dismiss the appeal of the Crown so far as the *Seaborn* is concerned.

(1) [1943] S.C.R. 49.

(2) [1943] S.C.R. 382, at 393.

The *Sankaty* was built in 1911 and was purchased by the respondent on December 12th, 1939, from a United States Trust Company for approximately $4,995 in Canadian funds. While it was suggested at the trial that this was a forced sale, there is nothing in the evidence to substantiate the suggestion. An amount of $6,342.45 was expended at the point of purchase to get the ship ready for the voyage to Halifax, including wages, fuel and emergency repairs. Accounts for work done at Halifax amounted in all to $56,736.73 (or $56,876.73), certain other expenditures were charged to the vessel, and the trial judge fixed the total cost to the respondent at $71,226.14. It was estimated by John Paterson of Halifax Shipyards, Limited, a witness for the respondent, that a further sum of $20,000 would have been required to complete the repairs and alterations necessary to make the ship available for the ferry service between Wood Island and Caribou. The *Sankaty* was purchased after the use of the *Seaborn* had been appropriated by the Crown and in order that the respondent might fulfil its obligations under the agreement of 1938 with the Minister of Trade and Commerce.

The Crown appropriated the use of the *Sankaty* and ultimately, on March 1st, 1941, acquired the title thereto. Subsequently the respondent endeavoured to find a ship to replace the *Sankaty* and mention is made in the evidence of the *Fishers Island,* the *Red Star,* and *Erie Isle,* the latter of which was purchased by the respondent and renamed the *Prince Nova.* The trial judge examined at length the evidence as to the sums asked for the two first named vessels and as to the cost to the respondent of the *Prince Nova.* When dealing with the *Seaborn* he had not considered the replacement value, but that was the basis of his final allowance to the respondent as the value of the *Sankaty* of the sum of $205,000.

This is not the correct principle to apply. Value to the owner without any appreciation due to the war, which is the proper test, is far different from replacement value. As a matter of fact, on August 19th, 1941 (after the requisition of the two vessels) a new agreement was entered into between the respondent and the Minister of Trade and Commerce cancelling the previous agreement with

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kerwin J.

Farquhar Steamships, Limited, and providing that the contract should remain in force until November 30th, 1950. The same subsidy of $28,000 per year was promised. In this agreement, the *Prince Nova* is named as the motorship then in use and it was provided that the required service would be continued with that vessel, or a suitable substitute. Whatever might be said about the *Prince Nova*, it was apparently satisfactory to the Minister for the ferry service.

Under the *Expropriation Act*, damage to the owner is relevant and even there it is only in exceptional circumstances that it has been awarded: Cripps on Compensation, 8th Edition, pp. 180 and 181. But over and above that, the proviso in subs. 1 of s. 5 of the *Compensation (Defence) Act* prevents its application. How can the value of a ship be reinstated when the court is prohibited from giving any effect to appreciation due to the war? To do as the trial judge did—take a figure as representing what the cost of a similar ship would be in wartime and then deduct a percentage for such appreciation, is too uncertain. As Middleton J.A. put it in *Re Lennox and Toronto Board of Education* (1): "There are too many contingencies; too many factors to be considered, all of which rest on opinion, or, in other words, mere guessing."

The respondent rested its claim for the value of the *Sankaty* on the basis of replacement and the appellant on market value—instead of on the principles outlined above. It is with regret that I see no escape from the necessity of sending the case back for the reassessment of the value of the *Sankaty*. The appellant should have two-thirds of its costs of the appeal, against which may be set off one half the costs of the respondent of the trial. The remaining half and the costs of the new assessment should be in the discretion of the judge presiding thereat. The judgment *a quo* should be varied accordingly, and so far as the *Seaborn* is concerned the result is that, upon tthe respondent giving to the appellant a good and valid title thereto free from all charges and encumbrances whatsoever, it is entitled to be paid by His Majesty the King the sum of $7,235.37. The respon-

(1) (1926) 58 O.L.R. 427 at 441.

dent is entitled to interest thereon but it is agreed that under Order in Council 529 of January 22nd, 1943, the rate should be three instead of four per centum per annum.

HUDSON J.—On the 1st of March, 1941, His Majesty acquired for war purposes two ships designated respectively *Sankaty* and *Seaborn*. Both of these ships were the property of the respondents and they, as owners, claimed as compensation a larger amount than the Crown was willing to pay. The Minister of Justice thereupon referred such claim to the Exchequer Court for adjudication under the authority of section 7 of the *War Measures Act*.

This appeal is brought by the Crown from an adjudication by the Exchequer Court, that the respondents were entitled to an amount in excess of what the Crown had already paid. It is now objected by the respondents that this Court has no jurisdiction to entertain the appeal, on the ground that the Exchequer Court acted as a *curia designata* under section 7 of the *War Measures Act* and that there was no right of appeal provided for in such Act.

By the *Exchequer Court Act*, R.S.C. 1927, c. 34, it is provided:

18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

* * *

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council;

* * *

(*g*) The amount to be paid whenever the Crown and any person have agreed in writing that the Crown or such person shall pay an amount of money to be determined by the Exchequer Court,

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Hudson J.

or any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court.

From this it appears plainly that the matters here referred to the Court fell well within those comprised in its ordinary jurisdiction.

The adjudication which must be made under section 7 certainly calls for the exercise of judicial functions and necessarily involves the application of rules of law to facts adduced in evidence legally received. There is nothing in the section to indicate that it was intended to grant the court named by the Minister of Justice any arbitrary or discretionary powers.

The procedure followed in this instance was in accordance with the normal practice of a suit carried on in that court. There was a statement of claim, a statement of defence, discovery, examination and cross-examination of witnesses, and then a judgment was rendered in the form ordinarily used in disposing of cases in the Exchequer Court, including an award of costs as against the Crown.

In the case of *Mayor, etc., of Montreal* v. *Brown et al.* (1), the Judicial Committee, in dealing with a somewhat similar objection, strongly stressed the procedure adopted by the Superior Court in Quebec as evidence that the proceeding was a judicial proceeding with a final judgment and, as such, subject to appeal under Article 1115 of the *Code of Civil Procedure.*

It was further contended in argument that the fact that under section 7 the Minister of Justice is given an option of referring the matter to any one of a number of courts, is evidence that the court named by the Minister was not a court to exercise its ordinary jurisdiction, but one of special designation. This argument is adequately answered by a statement of Lord Macnaghten in the case of *James Bay Railway Co.* v. *Armstrong* (2):

The Supreme Court in the present case appear to think that this view is right [the view that there was no right of appeal from the High Court to the Court of Appeal in the case of railway awards.] It is, however, objected that, if the appellant has the option of going either to the High Court or the Court of Appeal, and if the Supreme Court is right in holding that no appeal lies from the High Court to the Supreme

(1) (1876) 2 App. Cas. 168. (2) [1909] A. C. 624, at 630.

Court, an appellant has the power of shutting out any further appeal at his own will and pleasure. No doubt that privilege, whether it be a benefit to the litigants or a calamity, is somewhat anomalous, but it does not seem to their Lordships that the anomaly is so great or so startling as to make it necessary or permissible to confine the expression "superior Court" to the Court of Appeal.

Section 82 of the *Exchequer Court Act* provides:

> Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as a judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

By the *Supreme Court Act,* R.S.C. 1927, c. 35, section 35, this Court is given a general appellate jurisdiction within and throughout Canada, and by section 44 it is expressly given jurisdiction as provided in any other Act conferring jurisdiction. In my opinion, section 44 read with section 82 of the *Exchequer Court Act* is in this instance ample to vest in this Court jurisdiction to hear and determine this appeal.

It was also objected that the reference was made as the result of an argeement between the parties and that, therefore, it should be regarded as in the nature of an arbitration. No such agreement was put in evidence at the trial and, even if it had been, I think the matter would clearly fall in the provisions for an appeal to this Court contained in section 82 of the *Exchequer Court Act.*

The amount to which the respondents are entitled for the two ships in question is prescribed by *The Compensation (Defence) Act, 1940,* chapter 28 of the Statutes of Canada, 1940. Section 5 of that Act is the section here relevant and is as follows:

> 5. (1) The compensation payable in respect of the acquisition of any vessel or aircraft shall be a sum equal to the value of the vessel or aircraft, no account being taken of any appreciation due to the war * * *

The "value of the vessel" referred to in the section is not further defined but the generally accepted rule of law is that when property is taken for public purposes the owner is entitled to a fair pecuniary equivalent.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Hudson J.

In ascertaining the amount, the well established rules in the case of expropriation of land provide a guide. It is the value to the owner, not to the Crown. It is the commercial value, including the present value, if any, of its future potentialities. Where it is possible to establish a market value, that would be most important (see *Cedars Rapids* v. *Lacoste* (1); *Pastoral Finance* v. *The Minister* (2)). It must be kept in mind, however, that these rules apply here subject to the restriction imposed by section 5 of the *Compensation (Defence) Act.*

With regard to the *Sankaty,* I agree with my Lord the Chief Justice that the learned trial judge was in error in accepting the replacement value as a proper test of compensation under the *Compensation (Defence) Act* and the circumstances here. For that reason, I would have the case sent back to the Exchequer Court for the purpose of reassessment.

The *Seaborn* was acquired by the respondent company in July, 1939, at a cost of $55,000, which sum included profits made by a promoter and its largest shareholder. Subsequently, they expended for refitting and maintenance less than $25,000.

On September 2nd, 1939, the vessel was requisitioned by the Crown, and thereafter, except for a period of less than three months, has been in the possession of the Crown and charter hire paid at an agreed rate until ownership was finally acquired by the Crown.

Early in 1940 negotiations were entered into between the owner and the Crown as to the price to be paid for acquisition. On March 29th the respondent company made a firm offer to accept $65,000. This was followed by a counter offer by the Crown of $50,000. Then, in September, 1940, a sum of $58,000 was agreed upon and an Order in Council was passed approving of the payment of this sum. However, such agreement was never carried out. Eventually, in March, 1941, the Crown paid the respondents $92,764.63, without prejudice to any claim which the respondents might submit to the Exchequer Court.

It appears from the Order in Council that it was made on the recommendation of an Advisory Board, but the report of such Board is not in evidence.

(1) [1914] A. C. 569. (2) [1914] A. C. 1083, at 1087.

The amount so paid corresponds very closely with the value of the *Seaborn* appearing on the balance sheet of the respondents. The only evidence given at the trial of a value higher than the sum paid is that of two experts who expressed an opinion that the *Seaborn* was worth $175,000 but gave no adequate reasons or facts to support such opinion; that they were not accepted by the learned trial judge is shown by the fact that his award was made for a round sum of $100,000.

With respect, I am of the opinion that this award failed to give due weight to the cost of the vessel to the respondents. It was acquired only a few months before the war, it was found to be unsuitable for the purpose for which it was purchased, at any rate without expensive or dubious alterations. It went into the possession of the Crown in the course of a few weeks. It is true that the price paid by the owner is not necessarily evidence of its value but, under the circumstances here, it seems to me that apart from the offers and counter offers of the parties it is the only real evidence of value which we have. All else is speculative and more or less influenced by war conditions, and excluded under section 5 of the *Compensation (Defence) Act*.

As pointed out by my brother Kellock, the learned judge has made errors of fact in several particulars, including items which were duplications. I think the case falls well within the exceptions to the general rules applicable to appeals from awards in cases of this kind, as set forth by this Court in a number of cases: *Vézina* v. *The Queen* (1), followed in *The King* v. *Elgin Realty Company* (2), and *Canadian National Railway Co.* v. *Harricana* (3). I would, therefore, modify the judgment of the Exchequer Court by fixing the compensation for the *Seaborn* at the sum already paid by the Crown: $92,764.63.

I would dismiss the motion to quash with costs, allow the appeal to this Court with costs to the appellant.

In respect of the *Sankaty*, the costs of all proceedings below should be as directed by the judge presiding at the reassessment.

(1) (1889) 17 Can. S.C.R. 1. (2) [1943] S.C.R. 49.
(3) [1943] S.C.R. 382.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Taschereau J.

TASCHEREAU J.—A preliminary objection to the jurisdiction of this Court was raised by the respondent. It has been submitted that the Exchequer Court of Canada, which determined the amount payable by the Crown for the acquisition of two vessels, the *Seaborn* and the *Sankaty*, was *curia designata*, and that its decision was final and not appealable.

It was under the provisions of section 3 of the *War Measures Act*, R.S.C. (1927), chap. 206, that the Crown requisitioned these two ships, and, under section 7 of the same Act, the matter of compensation was referred to the Exchequer Court.

The Supreme Court of Canada, in virtue of section 35 of its Act, holds an appellate, civil and criminal jurisdiction, within and throughout Canada. And section 44 of the same Act says that it "shall also have jurisdiction as provided in any other Act conferring jurisdiction."

The *Exchequer Court Act*, subsection 1 of section 82, reads as follows:—

> Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, *vested in the Court* and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as a judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

The Exchequer Court was undoubtedly vested with the necessary jurisdiction to hear this matter, in virtue of the reference made by the Minister of Justice, who was acting under the *War Measures Act*. The trial Judge did not exercise any special jurisdiction with an appropriate machinery for that particular purpose, but dealt with the matter as a judge of the court in the discharge of his ordinary judicial functions.

In support of his motion to quash, the respondent contended that there could be no appeal to this Court, because the Minister of Justice is at liberty to refer such a matter indifferently to the Exchequer Court or to a superior or county court of the province within which the claim arises, or to a judge of any such court. It is submitted that

no appeal to this Court would lie if the matter had been referred to a county court judge, and it cannot be assumed that there could be an appeal in one case and none in the other. The answer to this objection may be found in the reasons of my brother Kerwin, who says that there might very well be cases where only small amounts are involved and where the Minister would consider it proper to refer the claims to a different court, or to a judge of any such court.

I may add also that, in my judgment, the matter has been settled by the Privy Council itself in *James Bay Railway Co.* v. *Armstrong* (1), where it was held that, according to the true construction of section 168 of the Canada *Railway Act* (1903), the appeal given thereby to a superior court from an award under that Act, lies in the Province of Ontario to either the Court of Appeal or the High Court of Justice therein at the option of the appellant; but that in case of appeal to the High Court, inasmuch as it is not the court of last resort in the province within the meaning of the *Supreme and Exchequer Courts Act,* R.S.C. 1886, chap. 135, section 26, there is no appeal therefrom to the Supreme Court of Canada.

At page 630, Lord MacNaghten says:—

> It is, however, objected that, if the appellant has the option of going either to the High Court or the Court of Appeal, and if the Supreme Court is right in holding that no appeal lies from the High Court to the Supreme Court, an appellant has the power of shutting out any further appeal at his own will and pleasure. No doubt that privilege, whether it be a benefit to the litigants or a calamity, is somewhat anomalous, but it does not seem to their Lordships that the anomaly is so great or so startling as to make it necessary or permissible to confine the expression "superior Court" to the Court of Appeal.

The principles enunciated in that case are applicable here, and I believe that the option given to the Minister of Justice, to choose the court to which he may refer the matter, has not the effect of making that court a *curia designata.*

I have reached the conclusion that this Court is competent to hear this appeal, and that this preliminary objection should be dismissed with costs.

The learned trial judge in his judgment, rendered in November, 1943, awarded the respondent in respect of the *Seaborn* a sum of $100,000, and in respect of the *Sankaty*

(1) [1909] A. C. 624.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Taschereau J.

a sum of $205,000, a total of $305,000, from which must be deducted a sum of $176,664.63 paid to respondent. He directed that the respondent should recover the balance of $128,335.37, with interest at 4% from March 1st, 1941, to the date of the judgment, with costs.

The compensation for the acquisition of these two ships must be determined by *The Compensation (Defence) Act, 1940*. Subsection 1 of section 5 says that "the compensation * * * shall be a sum equal to the *value* of the vessel * * *, no account being taken of any appreciation due to the war".

I do not think that this Court ought to interfere with the finding of the trial Judge so far as the *Seaborn* is concerned. In its statement of claim, the respondent valued this ship at $175,000, and His Majesty the King offered $92,764.63. The learned trial Judge reached the conclusion that the value of this ship before the war in 1939 was $100,000. In order to reach this conclusion, he took into account various elements revealed by the evidence, as the purchase price, the cost of overhauling and bringing the ship to Halifax, the cost of maintenance and of structural changes.

He did not ignore the fact that the purchase price was low, but he added, and with this statement I fully agree, that the cost, although it may be an element of estimation in some cases, is seldom decisive, and particularly in the present case, where the owner, old and unable to use this ship, which was a pleasure yacht, had no other alternative but to put her for sale at whatever price could be obtained.

Although I entertain serious doubts that the cost of maintenance before the requisitioning should have been taken as an element in determining the value of the ship, I think it was properly considered by the learned trial Judge, owing to the fact that His Majesty the King agreed in his offer to pay this amount.

It has been the constant jurisprudence of this Court not to interfere with the finding of the Court below, in cases such as the present one, when the trial Judge has acted upon proper principles, has not misdirected himself on a

matter of law, unless it is satisfied that the amount allowed is clearly excessive. (*The King* v. *Elgin Realty Co. Ltd.* (1); *Canadian National Ry. Co.* v. *Harricana* (2)).

I agree with the view that the learned trial Judge has not misdirected himself in the principles to be applied, and that he has taken into account the proper elements in assessing the ship *Seaborn* which he valued at $100,000. I do not think that this Court would be justified to interfere with the finding that he has made.

As to the *Sankaty,* the principle of replacement value has been applied, and the trial Judge has reached the conclusion that, in order to put the claimant in as favourable a position financially as it was before the taking of this ship by the appellant, and to enable it to obtain a suitable substitute for the said vessel of approximately the same size and carrying capacity, it must be granted a compensation of $205,000.

Is this the true principle applicable? *The Compensation (Defence) Act, 1940,* chap. 28, sec. 5, para. 1, provides that:—

> The compensation payable in respect of the acquisition of any vessel or aircraft shall be a sum equal to the *value* of the vessel or aircraft, no account being taken of any appreciation due to the war.

The words used in the drafting of this section make it impossible, I think, to apply the principles of the reinstatement or replacement value. It is the real *value* to the owner of the ship requisitioned that must be determined, and the award cannot be based on what it would have cost to acquire another ship to replace the *Sankaty.* If this principle were to be adopted in the present case, and if the award were to be based on the value of substituted property, then, the respondent might obtain a larger amount than Parliament has decided he should get.

I agree that the case should be sent back to the Exchequer Court so that the value of the *Sankaty* be determined as above indicated. I adopt the proposition of my brother Kerwin as to the disposition of the costs.

RAND J.—This appeal concerns the matter of compensation for two vessels, called the *Seaborn* and the *Sankaty,* acquired by the Dominion Government under the *War*

(1) [1943] S.C.R. 49. (2) [1943] S.C.R. 382.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rand J.

Measures Act. Two questions are raised: jurisdiction to hear the appeal, and the basis of compensation to be applied.

The point of jurisdiction arises from the language of section 7 of the *War Measures Act*:

> Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

The contention is that each court and each judge of each court is constituted a *curia* or *persona designata* and, as no appeal is expressly provided, none lies. As Middleton J. A. in *Hynes* v. *Swartz* (1) observes, it was not until the middle of the 19th century that these terms, *curia designata* and *persona designata,* came into use in relation to courts or judges; they arose in the course of interpreting statutes granting powers for public undertakings in which provision was made for the summary determination of questions of compensation. They connote a judge or court in which limited powers have been vested in relation to subject-matter which in general is either justiciable or administrative. The question that arises in each case is whether the subject-matter has been placed within the ordinary jurisdiction of the court or judge, or whether a new and disparate tribunal has been set up for a special and limited purpose.

The subject-matter of compensation for property taken by the Crown is well known to the Exchequer Court; and references to the court to determine compensation, made by heads of government departments, a long-established procedure. Originally such questions were referred to what were known as official arbitrators, but their jurisdiction was transferred to the court upon its establishment. By section 19 (*h*) of the *Exchequer Court Act* (c. 34, R.S.C. 1927), the head of any department may refer the question of determining the value "of any real or personal, movable or immovable, property, or of any interest therein,

(1) [1938] 1 D.L.R. 29.

sold, leased or otherwise disposed of by the Crown, or which the Crown proposes to sell, lease or otherwise dispose of." By section 37,

> Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.
>
> 2. If any such claim is so referred no *fiat* shall be given on any petition of right in respect thereof.

Now, section 7 of the *War Measures Act* does not expressly give any right to compensation for property taken. Its language is, "and compensation is to be made therefor." Neither does the *Compensation (Defence) Act*, c. 28, Statutes of 1940. By section 19 of the *Exchequer Court Act*, that court shall

> have exclusive original jurisdiction to hear and determine the following matters:
>
> (*a*) Every claim against the Crown for property taken for any public purpose;
>
> * * *
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The latter paragraph has long since been held not only to give jurisdiction but to create the right against the Crown. Applying that principle, I have no doubt that when, by the authority of the *War Measures Act*, property is acquired by the Crown, a right to compensation arises under paragraph (*a*).

The mandatory effect, then, of section 7 is to deprive a subject of his right to bring a petition of right in the Exchequer Court and to give to the Minister of Justice a choice of courts; but that a reference to that Court by the Minister is to be taken in any other sense than one by a departmental head, or that it should be deemed to deprive the subject of statutory rights to which otherwise he would be entitled, are propositions with which I am quite unable to agree. The effect of the reference in each case is to place the claim within the ordinary procedure of the court. Whether a similar reference which, for obvious reasons of quantum and convenience, is allowed to the county or superior courts of a province, carries with it the ordinary rights of appeal under provincial law, it is not

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rand J.

necessary to decide. The language, "or to a judge of any such court," does not permit a reference to a particular judge. It contemplates a judge exercising the original jurisdiction of his court. The provision of section 9, which empowers the court to make rules of procedure for such a reference, is obviously necessary because of the unusual mode by which the matter is introduced to the court. The Crown in such case has no claim against the owner; the claim is against the Crown; and procedure is required to enable the claim to be placed in form to be adjudicated according to the ordinary course of the court. In the present case, for instance, the claimant has properly been made the plaintiff and the issue is on the claim which it is asserting against the Crown.

As the proceeding, then, is in the Exchequer Court as such, an appeal lies under section 82 of the Act governing the Court, and the preliminary objection fails.

The facts relating to the *Seaborn* have been stated and I shall not repeat them. To make that vessel suitable for the proposed service, alterations estimated to cost around $55,000 would have been required. Space for twenty-four automobiles and possibly three or four trucks was planned but there was serious doubt that the vessel so altered would be safe for operation at the maximum draught of 10½ feet. The only evidence on this point is that of a naval architect of the department, who had reported adversely on the vessel. There is nothing before the court to warrant the view that the company was settled upon proceeding with the alterations at the time of the requisition in December, 1939. To explain the delay in commencing the work, some suggestion was made of intimations from the department that the vessel would again be required, but that evidence is too vague and general to be regarded. On the other hand, it is clear that the company had been negotiating for the *Sankaty* before that time. In any event, the purchase of the *Sankaty,* admittedly a much more suitable vessel for the service, excludes any special value to the respondent as of the time of acquisition.

The general market value, then, must govern; but, as I read it, the judgment below does not confine the allowance to that. After dealing with the estimates of value made by

the witnesses and the items making up the total accounting charge of the respondent against the *Seaborn,* the trial judge states his conclusion in these words:

> After taking into consideration the various elements hereinabove referred to, I have reached the conclusion that the value of the *Seaborn,* rechristened the *Charles A. Dunning, to her owner,* Northumberland Ferries Limited, during the summer of 1939, before the declaration of war, was $100,000.

Besides the inclusion of items that are irrelevant to market value, the reference to the value "to the owner," otherwise unexceptionable, in the particular context indicates that considerations of *realized special adaptability* were in his mind: but no such element was admissible. I do not find in the evidence sufficient to bring the market value to more than the sum offered: and although the difference between that and the amount allowed is relatively small, what was tendered was, I think, so generous as to prevent us from exceeding it.

About a week after the requisitioning of the *Seaborn,* in December, 1939, the respondent acquired the somewhat larger vessel, the *Sankaty.* It was purchased apparently at a judicial sale for about $5,000 and was brought to Halifax for rehabilitation. It had been built in 1910 and needed extensive reconditioning before being fit for the service intended. For that service there were two governing features: the shallow draught already mentioned, and the desirability of a maximum capacity for automobiles and trucks. The necessary alterations and equipment were proceeded with and toward the end of June, 1940, the work was almost completed. The cost was in the vicinty of $56,000 and the total outlay up to that time was not more than $65,000. In that month the vessel was in turn requisitioned. This continued until March, 1941, when with the *Seaborn* she was acquired. The compensation was fixed at $205,000, and against this allowance the appeal is brought.

Evidence was given by a yacht broker of another vessel said to be the equivalent of the *Sankaty,* and purchaseable at a "rock bottom sum" of $285,000 in American funds, at an American port. Other evidence related to the cost of building a suitable vessel in the Halifax shipyards. Estimates had been made for the predecessor of the respondent of $200,000 for the hull and a minimum of $115,000 for

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Rand J.

the machinery, heating, lighting and other equipment: from this, deductions were made for depreciation and for increased value of materials and labour due to the war. But the principle applied was that of reinstatement, and whether that rule is applicable becomes the decisive question in the appeal.

The Compensation (Defence) Act, 1940 (c. 28), section 5 (1), provides that:

> The compensation payable in respect of the acquisition of any vessel or aircraft shall be a sum equal to the value of the vessel or aircraft, no account being taken of any appreciation due to the war * * *

The court is to determine, then, "the value of the vessel." Mr. Schroeder, in his thorough argument, urged two contentions which, as I understood him, he treated as two aspects of the same principle: the value to the owner, and the reinstatement cost. That the value is to be the value to the owner is, I think, incontestable, but what is that value? With special adaptability realized in the ownership from which it is expropriated, that value is the amount which a prudent man in the position of the owner would be willing to give for the property sooner than fail to obtain it: *Pastoral Finance Assn. Ltd.* v. *The Minister* (1): without realized special adaptability, it is market value—theoretical, if need be—which is the present value of all possible utility reached in a competitive field.

But reinstatement is something quite different: it is placing the owner from whom property is taken in a substantially equivalent condition by means of substituted property. The cost of furnishing that substitute might exceed by far the value which the owner would be willing to pay as the value of the property to him.

It is applied to determine the compensation to an owner arising from damages resulting from the exercise of statutory powers. Under both the *Lands Clauses Consolidation Act* (1845) and the *Railways Clauses Consolidation Act* (1845), in the interpretation of which principles of compensation were laid down which have been accepted in this country as governing under the *Expropriation Act* and the *Railway Act* (*City of Toronto* v. *Brown Co.*) (2), it has been treated as a proper measure in certain cases: but that it was damage which was being ascertained, and

(1) [1914] A.C. 1083, at 1088. (2) (1917) 55 Can. S.C.R. 153.

not merely value of property, was never questioned. The principle evolved as a measure of compensation where none had been laid down by the statute.

But under the enactment with which we are dealing, it is not a matter of damages generally; compensation, it is true, but the precise measure is prescribed: value to the owner. The replacement cost of the same vessel with a deduction for physical depreciation or obsolescence cannot be said to have no relevancy to market value; but it is simply one of the aggregate of elements that determines price. Estimates of market value should be made by those who, through experience or acquaintance with similar or analogous transactions, are capable of judgments cognate with those of prudent purchasers and susceptible of analysis and exposition; but this, though at times difficult, is scarcely satisfied by a melange of notions crowned with a guess. And, as laid down in *Pastoral Finance Assn. Ltd.* v. *the Minister, supra,* the special value to the owner is not a capitalized value of estimated savings or increased profits; it is an addition to the ordinary market price which a prudent purchaser, contemplating all of the risks and circumstances in which his investment and prospective use are to be placed, would, if necessary, be willing to pay.

As sufficient evidence was not presented to enable us to ascertain the value on the basis indicated, the appeal should be allowed and the case remitted to the Exchequer Court for the necessary finding. When that has been made, the total judgment will have regard to the reduction in the amount allowed for the *Seaborn* from $100,000 to $92,764.63. The appellant should have his costs of the appeal; the costs of all proceedings below will be as directed by the judge presiding at the reassessment.

KELLOCK J.—This is an appeal by the Crown from the judgment of the Exchequer Court of Canada, Angers J., pronounced November 24th, 1943, on a reference by the Minister of Justice dated June 7th, 1941, under the provisions of section 7 of the *War Measures Act,* to determine the compensation payable to the respondent in respect of the acquisition by the Crown of the title to two ships owned by the respondent, known respectively as the *Sea-*

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kellock J.

born and *Sankaty*. By the judgment in appeal, the compensation in respect of the first named ship was fixed at $100,000 and of the second ship, $205,000.

By the provisions of the *War Measures Act*, R.S.C. chapter 206, section 7, whenever any property or the use thereof has been appropriated by His Majesty under the provisions of the Act or of any Order in Council, order or regulation made thereunder and compensation is to be made therefor and is not agreed upon, the claim is to be referred by the Minister of Justice "to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court". Section 9 provides:

> Every court mentioned in the two sections last preceding may make rules governing the procedure upon any reference made to, or proceedings taken before, such court or a judge thereof under the said section.

The Compensation (Defence) Act, 1940, 4 Geo. VI, chapter 28, provides for the compensation payable in respect of the requisition or acquisition of a vessel by His Majesty. "Requisition" is defined by section 2 (*f*) as the appropriation of the use of a ship or requiring it to be placed at the disposal of His Majesty, and "acquisition" by section 2 (*a*) as appropriation by or on behalf of His Majesty of the title to the vessel. By section 5, subsection (1), the compensation payable in respect of the acquisition of any vessel "shall be a sum equal to the value of the vessel * * * no account being taken of any appreciation due to the war".

On the 7th of June, 1941, the Minister of Justice, acting under the provisions of section 7 of the *War Measures Act*, referred to the "Exchequer Court of Canada" for adjudication, the claim made by the respondent in respect of the acquisition of the two ships, and the judgment now in appeal was pronounced upon that reference. It is objected by the respondent that no appeal lies to this Court on the ground that the Exchequer Court was *curia designata*.

It may be pointed out that, were it not for the provisions of section 7 of the *War Measures Act*, it would seem that the respondent would have been entitled to proceed by

way of petition of right in the Exchequer Court, and that that Court would have had jurisdiction under the provisions of section 19 (*a*) and (*d*), or that the claim might have been referred to the Exchequer Court by the head of the department of Government concerned, under section 37, in either of which cases an appeal would have lain to this Court under section 82 of the *Exchequer Court Act* and section 44 of the *Supreme Court Act*. Is, then, section 7 of the *War Measures Act* intended to produce a different result where a claim is referred to the Exchequer Court under that section?

In support of the contention of the respondent, many authorities were referred to, including the reasons of Idington J. in *Warner Quinlan Asphalt Company* v. *The King* (1). The other members of the Court in that case did not express any opinion on the point. The question is always one of intention to be gathered from the provisions of the legislation in question, and, in my opinion, the objection is not well taken in the present case. It is argued that because the Minister of Justice has an option as to the court or judge to whom the reference shall be made, no appeal can be intended, as there can be no uniform procedure by way of appeal from these various tribunals.

In *James Bay Railway Co.* v. *Armstrong* (2), an appeal from an award of arbitrators under the provisions of the Dominion *Railway Act* was taken to the High Court in Ontario, the legislation providing for an appeal to a "superior court" which was defined as including the High Court and the Court of Appeal. It was held, following *Ottawa Electric Co.* v. *Brennan* (3), that no appeal lay to this Court. On a further appeal to the Privy Council (4), the judgment was affirmed, although the Judicial Committee entertained an appeal direct from the High Court pursuant to special leave which had been obtained. In giving the judgment of the Board, Lord Macnaghten, after referring to the relevant legislation, said at page 630:

It seems to follow that a party desirous of appealing from an award under the Canada Railway Act has in Ontario the option of going either to the High Court or to the Court of Appeal. This has uniformly been so held in Ontario, and it has also been held from the first that no

(1) [1924] S.C.R. 236.
(2) (1907) 38 Can. S.C.R. 511.
(3) (1901) 31 Can. S.C.R. 311.
(4) [1909] A.C. 624.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Kellock J.

appeal lies from the High Court to the Court of Appeal in Ontario in the case of railway awards: see *Birely* v. *Toronto, Hamilton and Buffalo Railway Co.* (1).

The Supreme Court in the present case appear to think that this view is right. It is, however, objected that, if the appellant has the option of going either to the High Court or the Court of Appeal, and if the Supreme Court is right in holding that no appeal lies from the High Court to the Supreme Court, an appellant has the power of shutting out any *further appeal* at his own will and pleasure. No doubt that privilege, whether it be a benefit to the litigants or a calamity, is somewhat anomalous, but it does not seem to their Lordships that the anomaly is so great or so startling as to make it necessary or permissible to confine the expression "superior court" to the Court of Appeal.

The basis for that part of Lord Macnaghten's judgment, which I have quoted, would appear to be that under the Dominion *Railway Act,* which provided for an appeal from the award, either to the High Court or to the Court of Appeal, at the option of the appellant, there was no provision for a further appeal from either Court, and that it was within the power of an appellant, by taking an appeal to the High Court, to shut off any further appeal, which he could not do if his appeal were taken to the Court of Appeal, as other Dominion legislation, namely the *Supreme and Exchequer Courts Act,* R.S.C. 1886, chapter 135, provided for an appeal from the Court of Appeal. At page 631, Lord Macnaghten said:

* * * except in certain specified cases within which the present case does not come, an appeal to the Supreme Court lies only from the Court of Appeal.

This was the view expressed by Osler, J.A., in *Birely* v. *Toronto, Hamilton and Buffalo Railway Co.* (2), and this would appear to be the view prevailing after the decision in the *James Bay* case (*supra*), as in *Ruddy* v. *Toronto Eastern Railway Co.* (3) an appeal from an award under the Dominion *Railway Act* was taken to the Appellate Division of the Supreme Court of Ontario and an appeal from the judgment of that Court was entertained without objection by this Court. Similarly, in *Standard Fuel Co.* v. *Toronto Terminals Railway Co.* (4), an appeal from an award was taken to the Court of Appeal in Ontario and a further appeal was had directly to the Privy Council.

In *Sun Life Assur. Co.* v. *Superintendent of Insurance* (5), the majority of the Court, in considering section 82

(1) (1898) 25 Ontario Appeal Reports 88.
(2) (1898) 25 Ont. A.R. 88, at 90.
(3) (1917) 33 D.L.R. 193.
(4) [1935] 3 D.L.R. 657.
(5) [1930] S.C.R. 612.

of the *Exchequer Court Act*, considered it legitimate to refer to the definition of "judicial proceeding" in section 2 (*e*) of the *Supreme Court Act* as indicating "the class of matters which Parliament thought should be excluded from the appellate jurisdiction of" this Court, and they held that the Exchequer Court was *curia designata*. On appeal to the Privy Council (1) the objection to the jurisdiction was given up and the appeal was heard and disposed of.

I do not think that there is any question but that the proceeding in the Exchequer Court in the case at bar was a judicial proceeding within the definition applied in the above case to section 82 of the *Exchequer Court Act*, nor that the judgment of Angers J. is a "judgment" within the meaning of that section. Accordingly, I think that the combined effect of that section and section 44 of the *Supreme Court Act* is to authorize an appeal to this Court. Section 7 of the *War Measures Act*, in my opinion, vests jurisdiction in the Exchequer Court within the meaning of section 82, conditional only upon the exercise by the Minister of the power of reference given him by the *War Measures Act*.

Turning to the merits, the first question for determination is as to the meaning of the phrase "the value of the vessel" as used in section 5 of *The Compensation (Defence) Act, 1940*. It is to be observed that the same language appears in clause (*d*) of subsection (1) of section 4, and that, although by subsection (6) of that section the expression "total loss" is to have the same meaning as it has for the purposes of the law relating to insurance, the Statute does not define the phrase "the value of the vessel".

The learned trial judge took the view that the principles applicable are those which have been applied in fixing compensation under section 23 of the *Expropriation Act*, R.S.C. 1927, chapter 64. Whatever may be the position under the *Expropriation Act*, it is erroneous, in my opinion, to apply the principles applicable under that Act, to a case arising under *The Compensation (Defence) Act, 1940*, the provisions of which are not the same but narrower in scope.

(1) [1931] 4 D.L.R. 43.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kellock J.

The comprehensive nature of the language used in the *Expropriation Act* is referred to by Maclean J., in *Federal District Commission* v. *Dagenais* (1), where he says that the

> "compensation money" does not appear to be limited by the statute to the "value" of the lands taken, in fact, I think, the word "value" is not once mentioned in the Act. The "compensation money", it seems to me, is to be the equivalent of the loss which the owner has suffered for any land "taken", and is not to be ascertained only by considering the "value" of the land.

In *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (2), Lord Dunedin, in delivering the judgment of the Privy Council, at page 576, approved of the judgments of Vaughan Williams and Fletcher Moulton L.JJ., in the case of *In Re Lucas and Chesterfield Gas and Water Board* (3), in which judgments the principles applicable in determining the value to the owner of land compulsorily taken are laid down. Where the value of the thing taken, whether it be land or other property, is being determined without regard to the question of damages suffered by the owner, over and above the value of the thing taken, as in the case at bar, the matter is governed, in my opinion, by those principles. The owner is entitled to the "value to him" of the property taken, as it existed at the date of the taking. There must be taken into consideration all advantages, present or future, which it possesses for other possible purchasers as well as for the owner himself, but there is to be excluded from consideration any special value to the person exercising the power of compulsory taking where that value exists only for him in connection with the scheme for which the property is taken. I am not intending to do anything more than to epitomize what is found in the authorities to which I have referred, as I understand them. Lord Moulton, in delivering the judgment of the Judicial Committee in *Pastoral Finance Association* v. *The Minister* (4), summed up the matter in this way:

> Probably the most practical form in which the matter can be put is that they [the owners] were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.

(1) [1935] Ex. C. R. 25, at 33.
(2) [1914] A.C. 569.
(3) [1909] 1 K.B. 16.
(4) [1914] A.C. 1083 at 1088.

The Statute there in question was the Statute of New South Wales (No. 26 of 1900, section 117) which provided as the basis for assessment "the value" of the land being acquired. The section also dealt with damage caused by severance, but that question did not arise in the case before the Board. Reference may also be made to *Lake Erie and Northern Ry. Co.* v. *Schooley* (1).

With respect then to the *Seaborn,* this ship was acquired by the respondent on the 14th of July, 1939, and it was requisitioned by the Crown on the 4th of September following. The Crown retained possession for a period not disclosed by the evidence, when the ship was then returned to its owners, with the intimation that it would be sooner or later again required. Subsequently, on the 2nd of December, 1939, the ship was requisitioned and its possession was retained until the acquisition of the title by the Crown on the 1st of March, 1941. The ship was built as a private yacht and at the time of its purchase by the respondent, had been out of commission for a few years, although it had been well taken care of. On its purchase, the respondent had done some refitting for the purpose of converting it for use as a ferry boat, the respondent at that time being the owner of a franchise expiring November 30th, 1943, for the operation of a ferry between Wood Island, Prince Edward Island, and Caribou, Nova Scotia. Although the franchise agreement called for the operation of this ferry from the 1st of May, 1939, the respondent had not operated the ferry and did not do so until sometime in 1941.

The respondent paid $30,000 in cash for the ship and in addition had issued $25,000 par value second mortgage bonds and 500 shares of its capital stock of no par value at $50 per share, there being in addition to these shares only three other outstanding shares issued for qualifying purposes. According to the evidence of the president of the respondent company "Miss Morrison, or whoever was the American party to the deal, agreed to give the boat" and accept the bonds and the shares "as protecting her until such time as funds were available". Later, the bonds and shares were acquired by an interested group for $25,000. The prospectus of the company filed with the Registrar of

(1) (1916) 53 Can. S.C.R. 416.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Kellock J.

Joint Stock Companies for the Province of Nova Scotia on May 1st, 1940, states that the *Seaborn* was purchased from Miss Morrison, who acted as agent for Mr. W. N. MacDonald of Sydney, Nova Scotia. The same document also states that "Mr. W. N. MacDonald, who negotiated the transaction [which refers to another ship, the *Sankaty*] has declared that he realized a gross profit of $15,000 in the purchase of the *Charles A. Dunning* [the *Seaborn*], out of which he paid his own expenses". Mr. MacDonald appears as the largest single shareholder and largest holder of second mortgage bonds of the company.

The American owner of the ship then sold it for $40,000 American funds. There is no difficulty on this evidence in concluding that the shares and second mortgage bonds issued in connection with the purchase of the ship did not, at that time, exceed $25,000 in value. It was stated by the president of the respondent company in evidence that each of the directors received a first mortgage bond of the company for their first year's services. The company was incorporated on the 10th of January, 1939. He went on to say that this bond, at the time, was not saleable and "perhaps not worth anything." *A fortiori,* neither the second mortgage bonds nor the shares could have differed much in value. The only asset of the company in September, 1939, was the *Seaborn* and the ferry franchise. This latter item does not appear in the balance sheet of the company of December 31st, 1939, and was of uncertain value, as the service had not been commenced. The subsidy payable by the Crown under the franchise amounted to $28,000, but under the provisions of the deed of trust securing the first mortgage bonds of $110,000, the subsidy was to be applied in paying the interest on outstanding bonds and the principal of maturing bonds.

The *Seaborn* underwent some refitting at New London for the purpose of making the ship fit for the voyage to Halifax and the expenditure under this head was $2,397.02. Fuel for the trip cost an additional $500. Apart from work done at Halifax for the purpose of reconverting the ship from a yacht to a ferry, the cost of which was $2,303.09, the expense applicable to this ship including maintenance to the end of 1939 was $13,264.63, against which must be set $500 realized on the sale of one of the ship's launches.

The total of these items, $79,567.72 plus exchange on $55,000, represents the full expenditure in connection with the ship, up until the time of its second requisition by the Crown in December, 1939.

The learned trial judge finds that the cost of the ship was $98,833.67, although at another place in his judgment, he states the amount as $93,264.63. In arriving at the higher figure, he takes the price of the ship as $80,000 and the cost of overhauling, bringing her to Halifax and maintenance until she was requisitioned at $16,651.94, to which he adds the cost of reconversion, $2,181.73. This last item is a duplication, as it is already included in the amount of $16,651.94. Exhibit "G", a letter written by the respondent company to the Director of Shipbuilding dated the 10th of May, 1940, shows that the $16,651.94 is made up as follows: $13,264.63—representing "maintenance and other expenses directly applicable to the boat, including cost of bringing it to Halifax"; $2,303.09—"most of which is represented by the bill presented by the Halifax Shipyards Limited for overhauling after arrival at Halifax"; $1,084.22—"expenses of the company for the period January 1st, 1940 to May 2nd, 1940 . . . a large part of which represents interest on borrowed money required to help finance the company".

Not only, therefore, must the item of $2,181.73 be deducted from the figure used by the learned trial judge, but also the item of $1,084.22, as this represents expenses after the 1st of January, 1940, when the ship was under requisition to the Government and earning hire. There must also be deducted $500 for the sale of the launch, as well as the difference between the purchase price of the ship in American funds and the $80,000 figure accepted in full by the trial judge.

Evidence was given casting doubt upon the suitability of the ship for reconversion as a ferry, owing to the fact that when converted to carry cars and trucks, its stability would be affected. The learned trial judge, in his reasons for judgment, refers to the "possible lack of stability of the *Seaborn* if converted into a ferry boat" and says "from the evidence adduced I am inclined to think that the *Seaborn* was not the right kind of vessel to use for the

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Kellock J.

carrying of trucks and automobiles, at least to carry the quantity which she was expected to carry". According to the president of the respondent company, when the company on the 12th of December, 1939, acquired the *Sankaty*, the respondent was agreeable to making a sale of the *Seaborn*.

The respondent called two experts, Jagle and Strang, each of whom placed a value of $175,000 on the ship as of September, 1939. Jagle gave no explanation as to the basis of his figure which he called an "appraised" value. This often means reconstruction cost less depreciation. It may have other meanings and the witness did not explain his meaning. There is nothing to indicate that the phrase was used to express the opinion of the witness as to the value of the vessel on the basis of the principles already referred to. In my opinion, such evidence is valueless. Strang said that in arriving at his figure, he did not calculate the amount by any method known to appraisers of vessels. He said his figure was based on the sale of two similar vessels, though of slightly different size, but he paid no attention to the fact that the ship was a yacht. He did not have in mind in any way the value of the ship for the purposes of a ferry, but he valued it "just as a vessel, without reference to any particular trade." He described his value as an "actual value" and said that he did not know the current prices in 1939, particularly in the case of yachts. It is evident, therefore, that the two similar vessels, to which he had already referred in his evidence, were not yachts. He went on to say that in 1939 the "market value" would be higher than the "actual value" because the owner of a vessel has to make a profit and the profit would have to be added to what he called the "actual value". This profit he described as 10 per cent, but he went on to say that if one knew the "market value" in 1939, the "actual value" could not be arrived at by deducting this profit. He also said that the "actual value" might be higher or lower than the "theoretical" sum which he called "market value". It is impossible, in my judgment, intelligently to place any value upon this evidence.

The Crown paid to the respondent in respect of the acquisition of the title to the *Seaborn*, the sum of $92,764.63, being the amount of the valuation made in

respect of this ship by an Advisory Board. It does not appear what evidence the Board had before it when this amount was arrived at, although it appears that this amount is the book value of the ship as it appears in the books of the respondent company. As already pointed out, the learned trial judge erred in his determination of the principle to be applied in assessing value under the provisions of section 5 of the *Compensation (Defence) Act*. Applying the principles to which I have referred, I am of opinion that there is no evidence which enabled the learned trial judge consistently with those principles to assess the value of the *Seaborn* at any amount beyond the amount paid by the Crown. It is not necessary to consider whether, consistently with those principles, the value should be determined at any lesser amount, as there is no complaint by the Crown except with respect to the excesses over and above the amount paid.

With regard to the *Sankaty*, this ship was purchased by the respondent on the 12th of December, 1939. At that time, she was an old boat, having been built in 1911. The purchase price was approximately $5,000. The ship being unseaworthy, it was necessary largely to rebuild her and some $6,300 was expended in rendering her capable of proceeding to Halifax. In Halifax, an additional sum of approximately $54,000 was spent upon her in the shipyards there, and approximately $2,500 in materials was supplied to employees of the respondent, who were also working upon her. The total expenditures up to the time the ship was requisitioned by the Crown on the 17th of June, 1940, according to the evidence, was approximately $67,800, there being still some $20,000 required to complete the work. Ultimately, the title to the *Sankaty* was acquired by the Crown on the 1st of March, 1941. According to the evidence of the secretary of the respondent company, it was as a result of both of these ships having been requisitioned that the respondent company decided to purchase another ship then known as the *Erie Isle* but whose name was changed on purchase to the *Prince Nova*. The cost of *Prince Nova*, which was a smaller ship than the *Sankaty*, was $92,000.

1945

THE KING
v.
NORTHUMBERLAND FERRIES LTD.

Kellock J.

In connection with the *Sankaty*, the learned trial judge, basing himself on the view that the principle applicable in cases arising under the *Expropriation Act* was equally applicable under the *Compensation (Defence) Act*, held that the doctrine of reinstatement applied and fixed the amount at $205,000. Reinstatement is not limited to the value of the property taken, but involves the substitution of other property and a consideration of its value or cost. It is applicable in cases where the principle *restitutio in integrum* governs, but it is quite inapplicable to cases such as the case at bar, for that principle is excluded by the terms of the governing Statute which confines the tribunal assessing compensation to a consideration of the value of particular property, without regard to other property which may be necessary to place the person whose property is taken in the same position in which he was immediately prior to the exercise of the compulsory powers. It may well be doubted whether the principle of reinstatement could in any event have any application to the case at bar, depending as it does for its application, in any given case, upon the existence of circumstances under which the obtaining of substitute property was made necessary by the forcible taking and the course followed in obtaining that property was reasonable: *A & B Taxis, Limited* v. *Secretary of State for Air* (1). It has not been shown in evidence that the purchase of the *Prince Nova* was rendered necessary by the acquisition of the title to the *Sankaty*. The exact date of the purchase of the *Prince Nova* is not established, although it appears to have been sometime in the early part of 1941. The *Sankaty* was then, and had been since June 17th of the previous year, under requisition and it is expressly stated by the witness McKay, the secretary of the respondent company, that it was as a result of the *requisitioning* of the *Sankaty* and the *Seaborn* that the decision to purchase the *Prince Nova* was made. It is not necessary to decide this point, however, as in my opinion, for the reasons mentioned, the doctrine of reinstatement has no application. I do not find it possible on the evidence to arrive at the proper value of the *Sankaty*, as, in my opinion, the evidence was not directed in accordance with the pertinent principles.

(1) [1922] 2 K.B. 328.

1945

THE KING v. NORTHUMBERLAND FERRIES LTD.

Kellock J.

The appeal should, therefore, be allowed and the case remitted to the Exchequer Court to determine the value of the *Sankaty* in accordance with the principles referred to, but the compensation allowed in respect of the *Seaborn* should be reduced to $92,764.63. The appellant should have the costs of the appeal. The costs of the former trial should be in the discretion of the Judge presiding at the new trial, who will have regard to the fact that the appellant has succeeded throughout with respect to the *Seaborn*.

Estey J.—I agree in the conclusion of my brothers Rand and Kellock.

Motion to quash dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Burchell, Smith, Parker & Fogo.*

Solicitor for the respondent: *George J. Tweedy.*

1945

*May 17
*June 4

DAME T. BALTHAZAR (PLAINTIFF)... APPELLANT;

AND

ROSARIO DROUIN (DEFENDANT)..... RESPONDENT.

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

Appeal—Jurisdiction—Conservatory attachment not accompanied with a principal demand for pecuniary condemnation—Judgment, dismissing action, affirmed by appellate court—No amount or value in controversy in the appeal—Supreme Court Act, s. 39.

The appellant's action was dismissed by the trial judge, on the ground *inter alia* that the conservatory attachment taken out by her was not accompanied with a principal demand for a pecuniary condemnation and that such a proceeding was a provisional remedy which cannot be taken out by itself without a claim, which is made the object of the principal demand. The judgment was affirmed by the appellate court and the plaintiff appealed to this Court.

Held that this Court has no jurisdiction to hear the appeal.—The moveables, on which the conservatory attachment was intended to be executed, even if they were of a value exceeding $2,000, are not in

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

1945

BALTHAZAR v. DROUIN

controversy in this appeal. The only matter in controversy is whether the Courts below rightly decided that a conservatory attachment is only an accessory procedure, which cannot be taken out alone; and such right is not appreciable in money. *Gatineau Power Company* v. *Cross* ([1929] S.C.R. 35) foll.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Archambault J. and dismissing a conservatory attachment taken out by the appellant on moveables in possession of the respondent.

Aime Geoffrion K.C. for the appellant.

Hector Langlois for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—The appellant's action contains only the following conclusions:—

Pourquoi la demanderesse conclut à ce que par jugement à intervenir il soit dit et déclaré: Que les effets et meubles meublants qui sont encore dans l'épicerie portant le N° 8071 de la rue St-Denis et qui sont mentionnés dans la déclaration, soient mis sous la garde de la justice; à ce que la saisie conservatoire faite en cette cause soit déclarée bonne et valable et à ce que le défendeur soit condamné aux fins des présentes. La demanderesse se réservant de prendre toutes conclusions ultérieures.

The action was dismissed by the Superior Court on the ground, amongst others, that the conservatory attachment is a provisional remedy and only a proceeding accessory to a principal demand based on a debt which is exigible, and that such a proceeding cannot be taken out by itself without a claim, which is made the object of the principal demand. That judgment was affirmed by the majority of the judges of the Court of King's Bench (Appeal Side), mainly on that ground.

The appellant now brings the case to this Court without special leave from the Court of King's Bench (Appeal Side).

It is apparent that, on the face of the conclusions, there is no amount or value in controversy in the appeal in accordance with the requirement of section 39 of the *Supreme Court Act*, and, therefore, there exists no foundation for the jurisdiction of this Court as of right.

The appellant accompanied his inscription in appeal with an affidavit to the effect that the moveables, on which the conservatory attachment was intended to be executed, were of a value of at least $2,500; but the moveables themselves, or their value, are not in controversy in this appeal. The only matter in controversy is whether the Courts below rightly decided that the appellant's proceedings could not be maintained in view of the fact that they were not accompanied with a principal demand for a pecuniary condemnation, or, in other words, that a conservatory attachment is only an accessory procedure, which cannot be taken out alone and without an accompanying principal demand. Such right is not appreciable in money (*Gatineau Power Company* v. *Cross*) (1).

Mr. Geoffrion, for the appellant, pointed to the fact that the respondent, whose effects had been seized, had the effects restored to him by giving the seizing officer, who was bound to accept them, good and sufficient sureties, who justify under oath to the amount indorsed upon the writ, with interest and costs, that he would satisfy the judgment that may be rendered; and that the sureties so given swore to an individual amount of $2,500, or a total of $5,000. This was done under article 938 of the Code of Civil Procedure; and he claimed that the sureties so given took the place of the effects that had been seized and that, accordingly, they fixed the amount or value in controversy in the appeal. We cannot accede to this ingenious argument. The total amount for which security was given is no more at stake in the present litigation than the goods themselves which it replaced in the eyes of the law.

The question at issue still remains whether the appellant was entitled to bring out a conservatory attachment without any principal demand and whether the two Courts below were right in holding that he was not. There is no amount or value in this matter and, as the appellant did not obtain, from the highest court of final resort having jurisdiction in the province of Quebec, a special leave to appeal from the judgment, the reversal of which he is now seeking, he has not succeeded in convincing us that we had jurisdiction to hear the appeal.

(1) [1929] S.C.R. 35.

1945

BALTHAZAR v. DROUIN

The point was not raised by the respondent and ordinarily under such circumstances the respondent would be entitled to the costs of a motion to quash. In some cases even, under similar conditions, the respondent was altogether denied any costs against the appellant. In the circumstances, however, the Court thought that the question of jurisdiction could not be disposed of without going into the merits of the case and, accordingly, decided that counsel on both sides should be heard on the whole case. In view of this, we think the respondent here should be allowed all his costs of the appeal. The present decision, of course, does not involve the approval or disapproval of the judgments of the Courts below on the merits.

The appeal should be quashed with costs as aforesaid.

Appeal quashed with costs.

Solicitor for the appellant: *Edgar Laliberté.*

Solicitor for the respondent: *Hector Langlois.*

1945

*May 14

*June 4

ERNEST FISET (DEFENDANT)..... APPELLANT;

AND

DONAT MORIN (PLAINTIFF)..... RESPONDENT.

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

Appeal—Jurisdiction—Judgment by appellate court quashing appeal—Pledge in money given in place of regular security—Not furnished in conformity with article 1215a C.C.P.—No amount or value in controversy—Supreme Court Act, section 39.

Proceedings in appeal brought by the appellant were quashed by the appellate court on the ground that the security given by him was irregular and illegal, because he had furnished, in lieu of the regular security required by article 1214 C.C.P., a pledge consisting of a sum of money which was not in conformity with the provisions of article 1215a of that code. The appellant appealed to this Court.

Held that there is no jurisdiction in this Court to entertain the appeal. —There is no amount or value in controversy in the appeal in accordance with the requirement of section 39 of the *Supreme Court Act.*

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

1945

FISET v. MORIN

MOTION to quash for want of jurisdiction an appeal from a decision of the Court of King's Bench, appeal side, province of Quebec, quashing an appeal to that Court for failure by the appellant to give security in conformity with the provisions of the Civil Code of Procedure.

Antoine Rivard K.C. for the motion.

Valmore Bienvenue K.C. contra.

The Court:—

L'appelant a inscrit cette cause en appel devant la Cour Suprême du Canada d'un jugement rendu par la Cour du Banc du Roi, division d'appel de la province de Québec, rejetant son appel devant cette dernière Cour sur le motif que le cautionnement fourni par l'appelant, à l'appui de son inscription en Cour du Banc du Roi, était irrégulier et illégal, en ce qu'il avait sans droit substitué au cautionnement qu'exige la loi un dépôt à faire en argent.

La Cour du Banc du Roi a décidé que ce n'est que par exception qu'il peut être dérogé aux dispositions de l'article 1214 du code de procédure civile, en suivant les exigences de l'article 1215a de ce code, à savoir:

que le montant du gage en argent doit être fixé par un juge de la Cour du Banc du Roi ou de la Cour Supérieure,

ce qui n'a pas été fait dans le cas actuel.

En l'espèce, la Cour du Banc du Roi s'est basée sur sa propre décision re: *Furois* v. *Cossette* (1).

Dans cette affaire de *Furois* (1), la Cour du Banc du Roi avait déclaré que le dépôt d'un montant en argent pour tenir lieu de cautionnement en appel, lorsque le montant n'a pas été au préalable fixé par un juge de la Cour du Banc du Roi ou un juge de la Cour Supérieure, doit être tenu pour nul et inexistant, sauf les cas où l'irrégularité aurait été commise de bonne foi et que, tel que fourni, ce gage serait par ailleurs substantiellement suffisant.

Nous n'avons pas à nous prononcer sur la valeur de cette décision de la Cour du Banc du Roi; nous n'avons qu'à décider si la Cour Suprême du Canada a juridiction, sans permission spéciale, pour connaître d'un appel au mérite en pareil cas.

(1) Q.R. [1943] R.B. 239.

1945

FISET
v.
MORIN

L'appelant a fait valoir que lorsqu'il s'est présenté devant le Protonotaire de la Cour Supérieure à Montmagny, dans le but de fournir cautionnement à l'appui de son appel à la Cour du Banc du Roi, il avait donné avis que, au lieu du cautionnement mentionné dans l'article 1214 du code de procédure, il donnerait, en nantissement, un gage suffisant en une somme d'argent au montant de $3,600.00.

Devant le Protonotaire, le procureur de l'intimé ne s'était objecté qu'au montant pour lequel avis avait été donné, sans s'opposer à ce que le cautionnement prenne la forme d'un gage en argent.

Il a alors prétendu que le montant devrait être de $3,900.00, sur quoi le Protonotaire décida qu'il serait suffisant de déposer $3,700.00.

C'est à la suite de cette décision du Protonotaire que l'intimé fit motion pour faire déclarer le cautionnement illégal, irrégulier et insuffisant, et pour demander que l'appel soit en conséquence rejeté avec dépens.

Cette motion de l'intimé fut accordée en entier par la Cour du Banc du Roi, et c'est ce jugement que l'appelant prétend maintenant porter en appel devant cette Cour.

L'appelant a invoqué l'article 33 du code de procédure qui, lorsqu'il n'y a pas de juge compétent à connaître d'une matière au chef-lieu d'un district, permet au Protonotaire d'en remplir les fonctions dans le cas de nécessité évidente, ou lorsque, à raison du délai, un droit pourrait autrement se perdre ou être en danger.

En pareil cas, l'ordonnance ou le jugement rendu par le Protonotaire peut être revisé par le tribunal, à la séance suivante, ou par un juge de la Cour Supérieure présent ensuite dans le district, pourvu que la partie qui se prétend lésée produise, sous trois jours, au greffe, une exception énonçant les motifs pour lesquels la revision est demandée.

La décision du tribunal ou du juge, annulant l'ordonnance ou le jugement du Protonotaire, remet alors les choses dans le même état qu'elles auraient été si l'ordonnance ou jugement n'avait pas été rendu.

Cet argument a été soumis par l'appelant à la Cour du Banc du Roi lors de l'audition de la motion de l'intimé, pour rejet de l'appel devant cette Cour, par suite de l'irrégularité du cautionnement qui était alors invoquée; mais le jugement sur la motion n'en parle pas, et nous devons en conclure que la Cour du Banc du Roi a été d'avis que cet argument ne pouvait sauver la procédure adoptée par l'appelant.

A tout événement, cette question ne pouvait être discutée devant nous que si nous avions juridiction pour entendre l'appel au mérite.

L'objection fatale, à l'égard de l'exercice de notre juridiction en cette matière, est qu'il n'y a, dans cet appel, aucun montant ou valeur en contestation.

Les restrictions de cette Cour sont clairement définies par l'article 39 de la *Loi de la Cour Suprême.* Il faut que la somme ou la valeur de l'affaire en litige dans l'appel dépasse $2,000.00, ou il faut qu'une permission spéciale d'appel ait été obtenue de la plus haute Cour de dernier ressort ayant juridiction dans la province où les procédures ont été instituées originairement.

L'article 41 permet, en outre, à la Cour Suprême d'accorder cette permission dans certains cas spéciaux énumérés dans cet article.

L'appel actuel ne présente aucun de ces cas spéciaux; et d'ailleurs, permission spéciale d'appel n'y a été accordée, ni par la plus haute cour de dernier ressort de la province, ni par notre Cour.

La seule cause de juridiction qui subsiste, c'est donc que la somme ou la valeur de l'affaire en litige dans l'appel dépasse $2,000.00.

Or il est évident que cette dernière condition n'existe pas.

Tout ce qui est en litige ici et tout ce que nous pourrions accorder par le jugement que nous serions appelés à rendre, c'est que la Cour du Banc du Roi en Appel a eu tort de décider que le cautionnement, en l'espèce, était irrégulier, illégal et nul; que, conséquemment, l'appel n'aurait pas dû être rejeté sur ce motif; et que le dossier doit donc être retourné à la Cour du Banc du Roi, pour qu'il y soit précédé à l'audition sur le mérite de la cause.

1945

FISET
v.
MORIN

Un cas à peu près semblable s'est présenté devant cette Cour, dans la cause de *Tremblay v. Duke-Price Power Co.* (1). Là, aucun cautionnement n'avait été fourni dans les délais prescrits (article 1213 C.P.C.) et l'intimé avait obtenu, du Protonotaire de la Cour Supérieure, un certificat du défaut de l'appelant de fournir tel cautionnement.

Il s'ensuivit que, en vertu de l'article 1213 du code de procédure, l'inscription en appel était censée désertée, sauf recours; et, par le jugement qui nous était soumis, l'inscription en appel avait été déclarée désertée, et une requête de l'intimé pour rejet d'appel avait été accordée avec dépens.

Cette Cour fit alors remarquer que la question de savoir si le montant ou la valeur de l'affaire en litige dans l'appel dépasse $2,000.00 dépendait non pas de la demande contenue dans l'action, mais de ce qui pouvait faire l'objet de la contestation dans l'appel projeté, (*Dreifus v. Royds* (2); *Jack v. Cranston* (3)). Elle ajouta que, dans cet appel de *Tremblay* (4), la seule affaire en litige était la question de savoir si la Cour du Banc du Roi avait correctement jugé que les procédures de l'appelant devaient être tenues pour avoir été désertées, à raison des articles du code de procédure civile.

Il fut alors décidé que cette question était vraiment réglée par l'arrêt re *Gatineau Power Company v. Freeman Cross* (5).

Dans la cause de *Gatineau Power Company* (5) la question en litige consistait dans le droit d'appel à la Cour du Banc du Roi, et il fut jugé que " such right was not appreciable in money ". La Cour ajouta que re *Tremblay v. Duke-Price Power Co.* (4) le seul point à décider était la régularité des procédures adoptées par l'appelant devant la Cour du Banc du Roi; son droit d'appel n'était pas mis en question; et que s'il était encore dans les délais requis, il n'était pas nécessaire de produire une nouvelle inscription, vu que ce recours lui était spécialement réservé par l'article 1213 du code de procédure civile.

(1) [1933] S.C.R. 44.
(2) (1922) 64 Can. S.C.R. 346.
(3) [1929] S.C.R. 503.
(4) [1933] S.C.R. 44.
(5) [1929] S.C.R. 35.

Donc, Tremblay, s'il était maintenant privé des moyens pour poursuivre son appel efficacement, ne devait pas attribuer cette situation au résultat direct du jugement dont il voulait appeler, mais seulement à une conséqence indirecte et collatérale dans les circonstances particulières où il se trouvait. *Bulger v. The Home Insurance Company* (1).

Le jugement qui a été rendu dans la présente cause est bien un jugement final, puisque l'appel a été rejeté. Dans ce sens, il pourrait être assimilé à la cause de *Ripstein v. Trower & Sons Limited* (2), où l'action avait été rejetée sur une exception déclinatoire. Dans cette cause, le demandeur avait inscrit en appel devant cette Cour, sans obtenir de permission spéciale d'appel.

Nous avons rejeté une motion pour casser l'appel pour défaut de juridiction, en invoquant le motif que l'action elle-même avait été renvoyée et que, par conséquent, c'était le droit même du demandeur d'instituer et de poursuivre son action qui était en litige. (Voir ce que dit Lord Watson, *Déchène v. City of Montreal* (3).

Le jugement sur la motion pour rejet d'appel pour cause de défaut de juridiction dans l'affaire de Ripstein, n'est pas rapporté. Seul le jugement au mérite se trouve au volume des rapports de cette Cour de 1942, à la page 107. Comme dans la présente cause, il s'agissait d'un jugement final. Mais, contrairement à l'affaire Ripstein, ici il n'y a pas de montant en jeu. Il y a bien le jugement que cette Cour a rendu dans l'affaire de *British American Brewing Company Ltd., v. His Majesty the King* (4), où juridiction a été admise à la suite d'un jugement rendu par la Cour d'Echiquier du Canada, et rejetant une action alors que l'avocat du pétitionnaire avait d'abord demandé la remise de la cause par suite de l'absence de ses témoins, que la Cour avait refusé cette remise et que, l'avocat du pétitionnaire ayant alors déclaré qu'il n'était pas en état d'offrir de preuves, la Cour d'Echiquier du Canada avait alors rendu le jugement en question.

A première vue, cet arrêt de notre Cour pourrait paraître présenter avec l'appel actuel certains points de similarité; mais, à y regarder de plus près, l'on s'aperçoit que

(1) [1927] S.C.R. 451, at 453.
(2) [1942] S.C.R. 107.
(3) [1894] A.C. 640, at 645.
(4) [1935] S.C.R. 568.

1945

FISET
v.
MORIN

le motif du jugement de cette Cour dans l'affaire *British American Brewing Company Ltd.* (1) est véritablement que, après tout, il s'agissait d'un cas où le fardeau de la preuve incombait au pétitionnaire et où la Cour d'Echiquier du Canada, siégeant au procès, avait rejeté la pétition pour le motif qu'il n'y avait devant elle aucune preuve justifiant son maintien.

En plus, dans cette affaire de *British American Brewing Company Ltd.* (1), l'appel était d'un jugement de la Cour d'Echiquier du Canada, et le droit d'appel dépendait de l'interprétation de l'article 82 de la Loi qui régit cette Cour.

Nous ne croyons pas qu'il faille assimiler un appel venant de la Cour d'Echiquier du Canada à un appel venant de la Cour du Banc du Roi de la province de Québec, et où nous sommes appelés à appliquer le code de procédure civile de cette province.

Sur les questions qui se soulèvent par suite de la motion de l'intimé, en l'espèce actuelle, il ne paraît pas possible de faire de distinction entre la présente situation et celle qui s'offrait dans la cause de *Tremblay v. Duke-Price Power Co.* (2) et nous devons suivre la direction qui a été donnée dans cette dernière affaire.

La motion de l'intimé pour casser l'appel doit donc être maintenue avec dépens.

IN RE FRED STORGOFF

1944

*Oct.13, 16
1945
**Feb. 6, 7, 8, 9
**Apr. 24.

Constitutional law—Criminal law—Habeas corpus—Conviction of applicant under Criminal Code—Application for habeas corpus granted by a judge of British Columbia—Appeal by Attorney General to Appeal Court—Jurisdiction to hear appeal—Appeal Court reversing judgment and ordering re-arrest—Provisions of section 6 of Appeal Court Act of B.C. granting right to appeal—Inoperative if applicant convicted for a criminal offence under Criminal Code—Exclusive jurisdiction of Federal Government to authorize such appeal—B.N.A. Act, sections 91 (27) and 92 (13).

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand JJ. and Thorson J. *ad hoc*.

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

(1) [1935] S.C.R. 568.

(2) [1933] S.C.R. 44.

The provisions of section 6 of the *Court of Appeal Act* of British Columbia (R.S.B.C. 1936, c. 57), granting a right to appeal to the Court of Appeal in a *habeas corpus* matter are inoperative, if the applicant for that writ is detained in custody by virtue of a conviction for a criminal offence under the Criminal Code.—The Chief Justice dissenting.

The Dominion Parliament has exclusive jurisdiction to authorize such an appeal under section 91 (27) of the *British North America Act, 1867* ("Criminal law * * *, including the Procedure in Criminal Matters"); and a Provincial Legislature has no such power under section 92 (13) of that Act ("Property and Civil Rights in the Province").—The Chief Justice dissenting.

MOTION before Mr. Justice Hudson in Chambers for the issue of a writ of *habeas corpus ad subjiciendum* referred by him to the full court.

The applicant Storgoff was convicted by police magistrate Wood, in the city of Vancouver, on a charge of "while nude being found in a public place", contrary to section 205A of the Criminal Code. He was sentenced to be imprisoned at hard labour in the British Columbia Penitentiary for a period of three years.

On the 30th of June, 1944, Coady J., in the Supreme Court of British Columbia (1), granted a motion for the discharge and release from custody of Storgoff, made on the return to a writ of *habeas corpus* which had previously issued. Storgoff was immediately freed from the penitentiary and set at liberty.

On the 18th of July, 1944, the Court of Appeal for British Columbia (2), on appeal by the Attorney General of that province, reversed the judgment of Coady J. and ordered the re-arrest of Storgoff, whereupon he was taken into custody under the judgment of the Court of Appeal and returned to the New Westminster Penitentiary.

Application was then made to Mr. Justice Hudson for a writ of *habeas corpus* under sections 57 et seq. of the *Supreme Court Act,* and the reference to the full court was directed.

(1) (1944) 60 B.C. Rep. 464; [1944] 2 W.W.R., 509; 82 Can. Cr. Cas. 111.

(2) (1944) 60 B.C. Rep. 464, at 468; [1944] 3 W.W.R. 1; 82 Can. Cr. Cas. 153; [1944] 4 D.L.R. 445.

1945

In re STORGOFF

On the first hearing, after argument by counsel for the applicant and for the Attorney General for British Columbia, the application was adjourned to the next session of the Court, and the applicant was ordered to notify the Attorney General of Canada and the Attorneys General of the provinces.

C. W. Hodgson for the applicant.

F. P. Varcoe K.C. and *W. R. Jackett* for the Attorney General of Canada.

J. W. de B. Farris K.C. for the Attorney General for British Columbia, (*E. Pepler K.C.* with him at the first hearing).

THE CHIEF JUSTICE (dissenting).—This is a Reference to the Full Court directed by Mr. Justice Hudson on the 1st day of October, 1944. On the 12th and 15th of October, 1944, the petition was partially heard by the Full Court. At that time, one Fred Babakaiff joined with Storgoff in the petition for *habeas corpus*, but the application was then denied as far as he was concerned, when the following judgment was delivered:—

"THE CHIEF JUSTICE.—(Orally, for the Court) We will dispose of the first part of this application, because we do not think it should stand in the way.

We look upon the motion on behalf of the two applicants as being divided and, so far as Babakaiff is concerned, the application for a writ of *habeas corpus* is denied. In our view, section 41 of the *Penitentiary Act* must be read in conjunction with section 705 of the Criminal Code and so read we have no doubt that the magistrate had power to sentence the accused to three years imprisonment in the penitentiary in accordance with the provisions of section 205 (*a*) of the Code.

As to Storgoff, the application will be adjourned to the next session of the Court. The applicant is to notify the Attorney General of Canada and the Attorneys General of the provinces. All parties will be at liberty to fyle factums. It is understood that that part of the petition will be heard *de novo;* otherwise the case will stand

adjourned until the next term, to be first on the list. It is to be stated that the adjournment is by consent of all parties."

The petitioner notified the Attorney General of Canada and the Attorneys General of the provinces, who were given leave to fyle factums, and the petition was heard *de novo* with respect to the part thereof which dealt with the re-arrest of Storgoff by order of the Court of Appeal for British Columbia after he had been discharged from custody under *habeas corpus* proceedings in the Supreme Court of British Columbia.

Fred Storgoff was convicted by H. S. Wood, Esquire, K.C., a Police Magistrate, in and for the city of Vancouver, on the 8th day of May, 1944, for that he:—

> At the said City of Vancouver, on the 7th day of May, A.D., 1944, while nude, was found in a public place, to wit, Stanley Park, in company with other persons.

He was sentenced to be imprisoned at hard labour in the British Columbia Penitentiary for a period of three years.

The sentence was under section 205 (*a*) of the Criminal Code, which in its relevant aspects reads as follows:—

> every one is guilty of an offence and liable on summary conviction to three years' imprisonment who, while nude, * * *
>
> (*b*) is found in any public place whether alone or in company with one or more other persons.

On the 30th of June, 1944, Coady J., in the Supreme Court of British Columbia, granted a motion for the discharge and release from custody of the said Storgoff made on the return to a writ of *habeas corpus* which had previously issued. Storgoff was immediately freed from the penitentiary and set at liberty.

On the 18th of July, 1944, the Court of Appeal for British Columbia, on appeal by the Attorney General of that province, reversed the judgment of Coady J. and ordered the re-arrest of Storgoff, whereupon he was taken into custody under the judgment of the Court of Appeal and returned to the New Westminster Penitentiary.

Application was then made to Mr. Justice Hudson for a writ of *habeas corpus* under sections 57 et seq. of the *Supreme Court Act*, and the reference herein before mentioned was directed.

1945

In re STORGOFF

Rinfret C.J.

The grounds urged for Storgoff's release were:—

(*a*) The commitment to British Columbia Penitentiary was bad and in excess of the Magistrate's jurisdiction. (But as aforesaid, this Court ruled against the application of Storgoff and Babakaiff on that ground.)

(*b*) The Court of Appeal for British Columbia lacked jurisdiction to hear the Attorney General's appeal and order Storgoff's re-arrest. The application of Storgoff is now renewed but on this ground alone.

The issues arising on the Reference may be stated as follows:—

(1) Did the Court of Appeal for British Columbia have jurisdiction to hear the appeal of the Attorney General of British Columbia?

(2) Is the assumption that *habeas corpus* is always a civil remedy, even where release is sought from imprisonment based on a criminal charge, correct?

(3) Does the *Court of Appeal Act* of British Columbia give appeals in *habeas corpus* matters generally or only in civil matters of *habeas corpus?*

(4) Can the *Court of Appeal Act* give an appeal in criminal matters of *habeas corpus* which arise under the Criminal Code?

The whole contention of the petitioner, Fred Storgoff, is that the Court of Appeal of British Columbia lacked jurisdiction to hear the appeal of the Attorney General for the province, and to order his re-arrest once he had been freed and set at liberty by order of Coady J., a judge of the Supreme Court of British Columbia, on *habeas corpus* proceedings.

Counsel for the petitioner stated that his contention could not be more clearly epitomized than in the words of McDonald C.J.B.C., in *Ex Parte Lum Lin On* (1):—

> The *Court of Appeal Act* purports to give an appeal in *habeas corpus* matters generally, but I think it is clear that the province cannot give an appeal in criminal matters that arise under the Code. All justifications that have been offered for holding that appeal lies in *habeas corpus* proceedings have been based on the assumption that *habeas corpus* is a civil remedy, even where release is sought from imprisonment based on a criminal charge.

(1) [1943] 59 B.C. Rep. 106, at 108.

The argument of the learned counsel for the petitioner was really based on the decision of the House of Lords in *Amand* v. *Secretary of State for Home Affairs and Another* (1). He contended that to hold *habeas corpus* is always a civil remedy is to differ from the House of Lords in that case; and he added that where English law has been settled by the House of Lords, and said English law prevails in Canada, then the decision of the House of Lords must be followed in Canada to the same extent as a decision of the Privy Council. For this principle counsel relied on the case of *Robins* v. *National Trust Co. Ltd.* (2).

The province of British Columbia, before it joined the Dominion of Canada in 1871, had adopted the laws of England as of the year 1858, and it was, therefore, urged before us that those laws prevailed in that province and the House of Lords decision in the *Amand* case (1) was binding upon this Court.

In the *Amand* case (1), Viscount Simon, L.C., at p. 383 stated:—

> The House, therefore, has to decide the question whether the judgment of the Divisional Court, refusing a writ of *habeas corpus,* was a judgment in a "criminal cause or matter".

And at p. 385 the noble Lord added:—

> This distinction between cases of *habeas corpus* in a criminal matter and cases when the matter is not criminal goes back very far. * * *
>
> The distinction is noteworthy. * * *
>
> It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test.

However, in that case the point which the House of Lords had to decide was neither of the nature, nor of the character, of the present proceedings. The issue was not whether *habeas corpus* proceedings were in relation to a criminal matter, but whether the antecedent cause or matter was criminal. As stated by Lord Wright at p. 387:—

> The cause or matter in question (under s. 31 (1) (*a*) of the *Judicature Act*) was the application to the court to exercise its powers under the *Allied Forces Act, 1940* * * * It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law.

(1) [1942] 2 All E.R. 381; [1943] A.C. 147.

(2) [1927] 1 W.W.R. 692; [1927] A.C. 515.

1945

In re STORGOFF

Rinfret C.J.

The immediate point involved in the appeal was whether or not the cause or matter of the application to the Court was in a criminal cause or matter, because, according as it was, or was not, there laid an appeal to the Court of Appeal in England, or no appeal laid. To quote Lord Porter at p. 389 in that case:—

> The question whether a right of appeal does or does not exist is now governed by the *Supreme Court of Judicature (Consolidation) Act, 1925*, s. 31 (1) (*a*). The wording is:—
>
> "No appeal shall lie except as provided by the *Criminal Appeal Act, 1907*, or this Act, from any judgment of the High Court in any criminal cause or matter".

That being the question in issue before the House of Lords, Lord Wright said, at p. 387:—

> The words "cause or matter" are, in my opinion, apt to include any form of proceeding. The word "matter" does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced in order to exclude any limited definition of the word "cause". In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers

(meaning s. 31 (1) (*a*) of the *Judicature Act*).

The cause or matter in question was the application to the court to exercise its powers under the *Allied Forces Act, 1940*, and the Allied Forces (Application of 23 Geo. V., c. 6) (No. 1) Order, 1940, and to deliver the appellant to the Netherlands military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter. The former class of cases was dealt with in the *Habeas Corpus Act, 1679;* the reforms of procedure in the latter class had to wait until the 1816 Act.

And Lord Porter, at p. 389, added:—

> Was then the application for the writ of *habeas corpus* in the present case made in a criminal cause or matter? Certain principles have been consistently followed in coming to a conclusion upon this question and are now, I think, too firmly established to be open to challenge. One such principle is that *mandamus* may be asked for either in a criminal or in a civil proceeding, and in any given case it must be determined whether or not the proceeding is criminal. This does not mean that the matter in order to be criminal must be criminal throughout: it is enough if the proceeding in respect of which *mandamus* is asked is criminal, e.g., the recovery of a poor rate is not of itself a criminal matter, but its enforcement by magistrates by warrant of distress is; and, if a case be stated by them as to their right so to enforce it and that case is determined by the High Court, no appeal lies (see *Seaman* v. *Burley* (1)). So, if the proceeding before

(1) [1896] 2 Q.B. 344.

the magistrate was a criminal proceeding, the decision of the High Court upon a writ of prohibition is a decision in a criminal matter whether the magistrate had jurisdiction or not. He purported to be exercising criminal not civil jurisdiction, and the decision of the High Court was given in that matter (see per Viscount Cave in *Re Clifford and O'Sullivan* (1)).

As long ago as 1888 it was unsuccessfully argued in *Ex parte Woodhall* (2), that the decision to be in a criminal cause or matter must deal with what was a crime by English law, and in the same case it was contended in vain that an application for *habeas corpus* was a separate proceeding from that which the magistrate dealt with in the case brought before him. That case has been consistently approved by the courts of this country and I think at least once by your Lordships' House: see *Provincial Cinematograph Theatres, Ltd.* v. *Newcastle-upon-Tyne* (3). The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought before the magistrate in jeopardy of a criminal charge: see *Ex Parte Pulbrook* (4) and *Rex* v. *Brixton Prison (Governor), Ex. Parte Savarkar* (5).

In the *Woodhall* case (6) referred to by Lord Porter, it had been decided that no appeal laid from the refusal of a *habeas corpus* by the High Court to a fugitive accused of an extradition crime committed to prison with a view to his surrender to a foreign state. And Lord Esher, M.R., there said at page 72:—

The words ("no appeal shall lie from any judgment of the said High Court in any criminal cause or matter" in section 47 of the *Judicature Act, 1873*) apply to any decision by way of judicial determination of any question with regard to proceedings, the subject matter of which is criminal at whatever stage it arises.

And Lindley, L.J. stated at p. 72:—

The object is to have the alleged criminal released from a prosecution for a criminal offence. If it is not a criminal case I do not know what it is. In cases of *habeas corpus* for the custody of infants and the like, there is jurisdiction, but in cases like this it is perfectly plain that there is none.

The Woodhall case (2) came up for discussion before the courts of the province of British Columbia. In 1925 it was followed and an appeal on a writ of *habeas corpus* for the release of an alleged criminal from a prosecution for a criminal offence was rejected. But in 1938 that decision was overruled.

(1) [1921] 2 A.C. 570, at 579.
(2) (1888) 20 Q.B.B. 832.
(3) (1921) 90 L.J. K.B. 1064.
(4) [1892] 1 Q.B. 86.
(5) [1910] 2 K.B. 1056.
(6) (1888) 57 L.J. M.C. 71.

1945

In re STORGOFF

Rinfret C.J.

It was in 1920 that the *Court of Appeal Act* was amended in British Columbia giving the right to appeal in *habeas corpus* proceedings in matters over which the legislature of that province had jurisdiction. The first reported case is *In re Wong Shee* (1). McDonald C.J.A., at p. 148, said:—

> The recent amendment of the Act, giving an appeal in a case like the present, is an amendment to the civil laws of this province. It has nothing to do with the criminal law or criminal procedure, and hence the preliminary objection must be overruled.

Then in 1925 came the decision in *Rex* v. *McAdam* (2), where it was held that an appeal from a refusal of a writ of *habeas corpus*, arising out of a criminal matter, is a criminal appeal, and falls within the heading Criminal Law assigned to the Dominion by s. 91 of the B.N.A. Act; and that, therefore, there was no right of appeal in such a case as none is granted by the Criminal Code. The *Woodhall* case (3) was applied. Martin, J.A., dissented in a very lengthy and learned judgment.

But in 1938 the Court of Appeal for British Columbia reversed its decision in *Rex* v. *McAdam* (2) in the case of *Ex parte Yuen Yick Jun* (4). O'Halloran J.A. concurred in by the other two judges constituting the Court, crystallized the *ratio decidendi* as follows p. 549:—

> The remedy of *habeas corpus* is not to supplant the procedure in or the trial of the issue in civil or criminal matters.

On the same page he quoted the language of Martin J. of the Quebec Court of King's Bench in *Rex* v. *Labrie* (5):—

> The great object of the writ is the liberation of those who may be imprisoned without sufficient cause and is the remedy which the law gives for the enforcement of the civil right of personal liberty.
>
> It is not a proceeding in the original criminal action or proceeding. It is in the nature of a new suit brought by the respondents to enforce a civil right which he claims as against those who are holding him in custody.

Thus Martin J.A.'s dissenting opinion in *Rex* v. *McAdam* (2) was finally approved by the Court of Appeal for British Columbia in the *Yuen Yick Jun* case (4).

(1) (1922) 31 B.C. Rep. 145.
(2) (1925) 44 Can. Cr. Cas. 155; [1925] 4 D. L.R. 33; 35 B.C. Rep. 168.
(3) (1888) 20 Q.B.D. 832; 57 L.J. M.C. 71.
(4) (1938) 54 B.C. Rep. 541.
(5) (1920) 61 D.L.R. 299, at 309.

In *Ex parte Lum Lin On* (1), the question again came before the Court of Appeal for British Columbia, but the majority of the Court came to the conclusion that the attack upon the jurisdiction of the convicting magistrate failed and the appeal was dismissed. In his reasons for judgment, McDonald C.J.B.C., referring to the two contrary decisions in that Court in the *McAdam* (2) and *Jun* (3) cases, said at pp. 108 and 109:—

> Although this Court has so held, overruling its own contrary decision, I think the matter must be considered *de novo,* in view of the House of Lords' recent decision in *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* (4), which I cannot read otherwise than as laying down that *habeas corpus* is always a criminal remedy when used to question imprisonment on a criminal charge.

But the other judges refrained from referring to the validity of the *Court of Appeal Act* in criminal matters, and O'Halloran J.A. stated that he persisted in the opinion that he had already expressed in the *Jun* case (3) "that the Court of Appeal had jurisdiction to hear this appeal".

Finally, in 1944, this matter again came before the Court of Appeal for British Columbia in *State of New York* v. *Wilby* (*alias Hume*) (5), the Court consisting of Sloan, O'Halloran and Sidney Smith JJ.A. The decision of the Court was delivered by Sloan J.A. The *Amand* case (4) was referred to. As a preliminary objection, counsel for the State of New York objected to the jurisdiction of the Court of Appeal to entertain the appeal, and Sloan J.A., delivering the judgment of the Court, said at p. 374 (5):—

> At the outset it must be restated, as our brother O'Halloran made clear in his judgment therein, that our jurisdiction to entertain the appeal in *Ex Parte Lum Lin On* (1), was never questioned by counsel in that case. Had it been otherwise, I would have concurred in the judgment of my brother O'Halloran at that time.
>
> It is our present view that our brother O'Halloran correctly stated the position when he said in the *Lum Lin On* case (1) (at p. 110):
>
> "* * * the *Amand* case (4) does not detract from or furnish any real ground for doubting the correctness of the reasoning which prompted the decision of this Court * * * in *Ex parte Yuen Yick Jun* (3) * * *".

(1) (1943) 59 B.C. Rep. 106.
(2) (1925) 35 B.C. Rep. 168.
(3) (1938) 54 B.C. Rep. 541.
(4) [1943] A.C. 147.
(5) (1944) 60 B.C. Rep. 370.

1945

In re

STORGOFF

Rinfret C.J.

In consequence we are of opinion that our jurisdiction to entertain this appeal cannot now be questioned. See also *The King* v. *Junior Judge of the County Court of Nanaimo and McLean* (1).

The preliminary objection is therefore overruled.

It may now be convenient to quote section (6) of the *Court of Appeal Act*, R.S.B.C. 1936, chap. 57, referred to in the case at bar:—

> The Court of Appeal shall be a Superior Court of Record, and, to the full extent of the power of the Legislature of the Province to confer jurisdiction, there shall be transferred to and vested in such Court all jurisdiction and powers, civil and criminal, of the Supreme Court and the Judges thereof, sitting as a Full Court, etc. * * * And without restricting the generality of the foregoing an appeal shall lie to the Court of Appeal;
>
> * * *
>
> (7) *Habeas Corpus:*
>
> And in any matter arising under sub-clauses (1) to (7), inclusive, in which the appellant is in custody, the Court of Appeal, if sitting, shall give the appeal precedence over every other appeal, and, if not sitting, shall promptly sit for the purpose of hearing such appeal; and in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person.

A short quotation from Halsbury, 2nd Edit., vol. 9, p. 701, par. 1200, may be in order:—

> 1200. The writ of *habeas corpus ad subjiciendum*, which is commonly known as the writ of *habeas corpus*, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the King has a right to inquire into the causes for which any of his subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released.

And in *Crowley's* case (2), referred to in the footnote of the above quotation, Eldon, L.C., said, at p. 48:—

> The doctrine originates in the maxim of law, that the writ of *habeas corpus* is a very high prerogative writ, by which the King has a right to inquire the causes for which any of his subjects are deprived of their liberty: a liberty most especially regarded and protected by the common law of this country.

At p. 708, par. 1209, of the same volume of Halsbury, the author adds:—

(1) (1941) 57 B.C. Rep. 52, at 58, 59.

(2) (1918) 2 Swan. 1.

As the *Habeas Corpus Act, 1679,* applied only to cases where persons were detained in custody for some criminal or supposed criminal matter, the benefit of its provisions in facilitating the issue of the writ did not extend to cases of illegal deprivation of liberty otherwise than on a criminal charge, as, for example, where children were unlawfully detained from their parents or guardians by persons who were not entitled to their custody, where a person was wrongfully kept under restraint as a lunatic, or where a person was illegally kept in confinement by another. In all such cases the issue of the writ during vacation depended solely upon the common law, and remained unregulated by statute until the year 1816, when the *Habeas Corpus Act, 1816* * * *

And at p. 713, par. 1214:—

The remedy by *habeas corpus* is equally available in criminal and civil cases, provided that there is a deprivation of personal liberty without legal justification * * *

In modern practice the purposes to which the writ is most frequently applied are (1) the testing of the regularity of commitments, and particularly in cases of the commitments for extradition and of fugitive offenders; and (2) the investigation of the right to the custody of infants.

And at p. 704 see footnote (*f*) *Rex* v. *Cowle* (1), per Lord Mansfield C.J., at p. 855, and then Halsbury continues as follows:—

The common law regards the King as the source or fountain of justice, and certain ancient remedial processes of an extraordinary nature which are known as prerogative writs have from the earliest times issued from the Court of King's Bench in which the Sovereign was always present in contemplation of law. The prerogative writs were issued only upon cause shown, as distinguished from the original or judicial writs which commence suits between party and party and which issue as of course * * *

In *Lorenz* v. *Lorenz et al.* (2), an appeal in a *habeas corpus* matter was brought before the Court of King's Bench (Appeal Side) and dismissed. This case is reported in the Canadian Abridgment, vol. 21, p. 510, as follows:—

The law respecting *habeas corpus* was not introduced into Quebec by the *Quebec Act* of 1774, but was adopted by a provincial ordinance, 1784, c. 1, which in all substantial provisions reproduced *The Habeas Corpus Act, 1679.* This legislation was confirmed by *The Constitutional Act, 1791* (Imp.), c. 31. *Habeas corpus* in civil matters was first introduced into Quebec by 1812, c. 8, which extended the remedy to any person "confined or restrained of his or her liberty, otherwise than for some criminal or supposed criminal matter". These provisions have been continued ever since, and are now to be found in art. 1114 of the Quebec Code of Civil Procedure. These later statutes merely introduced a form of the remedy which had long since been recognized by the law of England and English authorities are therefore applicable in Quebec to the writ of *habeas corpus* in civil as well as in criminal matters.

(1) (1759) 2 Burr. 834. (2) (1905) Q.R. 28 S.C. 330.

1945

In re STORGOFF

Rinfret C.J.

I think this ends the review which should be made of the several decisions to which this Court was referred by counsel for the petitioner.

With due respect, I do not think the *Amand* case (1) can be considered as an authority in the matter now before the Court. It is by no means the same kind of a case. As already pointed out, by reference to the judgment of Lord Porter, the question there was whether a right of appeal existed under the *Supreme Court of Judicature (Consolidation) Act, 1935*, s. 31 (1) (*a*). I fully agree with the remarks of O'Halloran J.A. in *Ex parte Lum Lin On* (2), at p. 110:—

> The point for decision in the *Amand* case (1) in the Court of Appeal and later in the House of Lords, as well as *In re Woodhall* (3), on which it is largely founded, was confined to the interpretation of an English statute which has no counterpart in this Province.

Moreover, the question now before our Court may not be discussed from the viewpoint of the English constitutional law. In this country we have to apply the B.N.A. Act and the Criminal Code, two statutes which, of course, do not apply in England and do not call for interpretation and application in the English courts. In addition to that, the Supreme Court of Canada is now the court of last resort in criminal matters; and although, of course, former decisions of the Privy Council, or decisions of the House of Lords, in criminal causes or matters, are entitled to the greatest weight, it can no longer be said, as was affirmed by Viscount Dunedin, delivering the judgment of their Lordships in *Robins* v. *National Trust Co. Ltd.* (4) at p. 519, that the House of Lords, being the supreme tribunal to settle English law, * * * the Colonial Court, which is bound by English law, is bound to follow it.

For all these reasons, my view is that Storgoff's case stands to be decided according to Canadian law and by the application of the relevant sections of the B.N.A. Act, the Criminal Code, and the statutory and common law of British Columbia.

When discussing the relative and distinctive meaning of the words "criminal and civil", we must take into consideration the text of sections 91 and 92 of our Constitutional Act, and more particularly, subsection 27 of

(1) [1942] 2 All E.R. 381.
(2) [1943] 59 B.C. Rep 106.
(3) (1888) 57 L.J. M.C. 71.
(4) [1927] A.C. 515.

section 91 and subsections 13 and 14 of section 92; also the text of the relevant sections of the Criminal Code and of the statutes of British Columbia.

Under section 91, head 27, of the B.N.A. Act,

The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters,

is assigned to the "exclusive Legislative Authority of the Parliament of Canada", whilst, under heads 13 and 14 of section 92,

Property and Civil Rights in the Province, and The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts

are assigned to the "exclusive jurisdiction of the Legislature in each Province".

It may be added that by force of head 15 of section 92,

The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section

are also "exclusively assigned to the Legislature in each Province".

Incidentally, it should not be forgotten that in several judgments of this Court, and of the Judicial Committee of the Privy Council, reference was made to what was there called "provincial criminal law", thus indicating that the distinction made in the *Amand* case (1), and other similar cases in England, between criminal or civil causes, or matters, cannot be made in this country in the interpretation, or discussion, of the law under which it is governed.

In the course of the very exhaustive and able argument made on behalf of the petitioner by the learned Deputy Attorney General of Canada and counsel for Storgoff, as well as by counsel for the Attorney General for British Columbia, it was conceded as being beyond question that in matters of *habeas corpus* as applied to a case, for example, of the custody of infants, or lunatics, or such other cases, the writ must be considered as being a civil matter. I suppose it should also be considered that, when issued in relation to a matter properly coming within the description of a "provincial criminal matter", the writ of

(1) [1942] 2 All E.R. 331

1945

In re STORGOFF

Rinfret C.J.

habeas corpus must necessarily be held to be a writ coming under the jurisdiction and the proper legislative authority of the legislature in each province.

The only field of *habeas corpus,* therefore, that could possibly be argued to belong to the jurisdiction of the Parliament of Canada must be the writ of *habeas corpus* issued for the release of a person detained as a consequence of a conviction under the Criminal Code. But, even then, it was argued on behalf of the Attorney General for British Columbia that, in that respect, it is an independent proceeding, unconnected with the criminal cause for which the commitment was ordered, and that the real subject matter of the proceeding, even in such a case, is the civil right of the individual or subject to his liberty.

In connection with that argument the Court was referred to Jenks "A Short History of English Law", where, at pp. 341, 342 and 343, the learned author, after outlining the writ of *habeas corpus* and pointing out that, although at first the writ was resorted to under the common law, there came subsequently the *Habeas Corpus Act of 1679* giving every prisoner an absolute right to have the validity of his imprisonment speedily raised and discussed by a superior Court in his presence, whether in Term time or vacation. If the authority under which he is imprisoned is lawful, as in the ordinary case of a prisoner committed for trial, with bail lawfully refused, the applicant will, of course, simply be remanded to prison.

And the author adds:—

This statute, re-inforced as it was by the civil remedies applied in the well-known "General Warrant" cases at the end of the eighteenth century, may be said to have definitely established in England that "Rule of Law" which is the chief guarantee of English liberty. For both statute and decisions are based upon the principle, that even an official acting under the authority of the Crown must show definite legal authority for any act which interferes with the personal freedom or domestic privacy of the ordinary citizen.

And in Halsbury's "Laws of England", 2nd edit., vol. 9, at p. 706, par. 1205, "Crown Practice", we read:—

1205. The right to the writ is a right which exists at common law independently of any statute, though the right has been confirmed and regulated by statute. At common law the jurisdiction to award the writ was exercised by the Courts of King's Bench, Chancery, and Common Pleas, and, in a case of privilege, by the Court of Exchequer. This jurisdiction is now exercised by the King's Bench Division and the judges of the High Court of Justice.

1945

In re STORGOFF

Rinfret C.J.

Then paragraph 1208 is in these words:—

1208. The operation of the *Habeas Corpus Act, 1679*, has at various periods been temporarily suspended by the legislature on the ground of urgent political necessity * * * Such an enactment, while it remains in force, in no sense abrogates or suspends the general right to the writ at common law.

A note at the foot of p. 707 adds:—

The writ in modern times is almost invariably issued by virtue of the common law jurisdiction, and not under the statute.

And par. 1226, at p. 719 of the same volume:—

1226. During the law sittings application for the writ of *habeas corpus*, whether at common law, as is the usual practice * * *

It is in order to read the above quotations with what Martin J.A., of the Quebec Court of King's Bench (Appeal Side), said in *Rex* v. *Labrie* (1);—

The first requirements to the validity of a judgment is that it should be rendered by a tribunal clothed with authority to render it, and if the Superior Court wrongfully usurped jurisdiction, surely there must be an appeal to this Court. I shall not repeat what was said by this Court in the cases of *McShane* v *Brisson* (2); *Dostaler* v. *Lalonde et al.* (3); *La Cité de Montréal* v. *Henault* (4).

But it is urged that these principles do not apply in the present case because we are dealing with *habeas corpus* in criminal matters. The expression "criminal matters" is not a happy one, though made use of in the Act.

The writ of *habeas corpus* is one of the prerogative writs. It is a civil writ issued out of a court of civil jurisdiction, and in the present case it relates to criminal matters only in so far as it goes to the cause of detention, which in this case is a conviction by a court of criminal jurisdiction, but the judgment or order of release is a judgment of the Superior Court. The great object of the writ is the liberation of those who may be imprisoned without sufficient cause and is the remedy which the law gives for the enforcement of the civil right of personal liberty.

It is not a proceeding in the original criminal action or proceeding. It is in the nature of a new suit brought by the respondents to enforce a civil right which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty and not by the Crown to punish him for his crime. The judicial proceedings under the writ is not to enquire into the criminal act of which he has been accused, tried and convicted, but into the right of liberty notwithstanding the criminal act and conviction. A judgment may be questioned anywhere for want of jurisdiction.

It is curious to note that a similar stand was taken by the United States Supreme Court in the case of *Ex Parte Tom Tong* (5), where the head note reads as follows:—

The proceedings under a petition for *habeas corpus* are in their nature civil proceedings, even when instituted to arrest a criminal

(1) (1920) 61 D.L.R. 299, at 309.
(2) (1890) M.L.R. 6 Q.B. 1.
(3) (1919) Q.R. 29 K.B. 195.
(4) (1919) 26 R.L. N.S. 270.
(5) (1883) 108 U.S. 556.

1945

In re STORGOFF

prosecution and secure personal freedom: and the appellate revisory jurisdiction of this court is governed by the statutes regulating civil proceedings.

Rinfret C.J.

And at p. 539 of the same report, Mr. Chief Justice Waite, delivering the opinion of the court, says, among other things:—

A question which meets us at the outset is whether we have jurisdiction, and that depends on whether the proceeding is to be treated as civil or criminal.

And later on the same page he adds:—

The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offence; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. This petitioner claims that the Constitution and a treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution. It was said by Chief Justice Marshall, speaking for the court, as long ago as *Ex parte Bollman & Swartwout* (1):—

"The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts."

Some interesting remarks in that connection were made by the former Chief Justice of this Court, Sir Lyman P. Duff, *In the Matter of Annie McNutt* (2), beginning at p. 270. At the foot of p. 271, Duff J., as he then was, states:—

Another point has been raised which was not taken by the counsel for the respondent and which it is necesssary to discuss. It is said that the offence with which the appellant was charged was a crime and the proceeding in which she was convicted a criminal proceeding and, consequently, that the judgment appealed from falls within the exception created by section 36 (*a*) which is in these words:—

(1) (1807) 4 Cranch 75, at 101. (2) (1912) 47 Can S.C.R. 259.

"There shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty."

The phrase "criminal charge" means of course a charge forming the foundation of a judicial proceeding which is criminal proceeding and the point for consideration is whether or not (using the word "criminal" in the sense in which it is used in this context) that word is properly descriptive of the proceeding in which the appellant was convicted.

The first question one naturally asks oneself is whether in the contemplation of the law of Canada such a proceeding is properly designated as a "criminal proceeding".

The law of England from which our criminal law is derived furnishes no infallible test by which for all purposes one can determine whether a given proceeding is civil or criminal.

In the earlier history of the law the point, if it arose, could present little difficulty. A criminal proceeding was a proceeding at the suit of the Crown having for its object the punishment of an offence against the law of the land and speaking generally in the case of a commoner it involved a trial by jury pursuant to indictment, presentment or information. In modern times a vast number of statutes affecting the conduct of people in a great variety of ways have frequently given rise to questions whether the summary proceedings taken with a view to punishing offenders or delinquents are or are not to be regarded as criminal proceedings for the purpose of applying some rule of law or some statutory provision. "It must always be", said Lord Bowen in *Osborne* v. *Milman* (1), at page 475 dealing with one of these questions, "a question on the construction of the particular statute whether an act is prohibited in the sense that it is rendered criminal, or whether the statute merely affixes certain consequences more or less unpleasant to the doing of the act", and decisions upon one statute must always be applied with caution as authorities for the construction of another. But these decisions do furnish us with illustrations of the criteria which have been applied by eminent judges in England in determining whether for some particular purpose a given proceeding under one of these modern statutes was to be regarded as a criminal proceeding or not; and where the proceeding is instituted for the punishment of an offence against an Act of the Parliament of the United Kingdom and instituted by the Crown *ad vindicatam publicam* then it has, I think, invariably been held that you have a criminal proceeding unless there is something in the Act to show that it is not to bear that character. It is characteristic of such proceedings that they are proceedings at the suit of the Crown in the public interest and that the sanctions sought to be enforced cannot be remitted at the discretion of any private person; or, in other words, where the sanction is remissible at all it is remissible at the discretion of the Crown.

When we come to apply these criteria in this country to summary proceedings taken under the authority of a provincial statute for enforcing penalties imposed by such statutes we are confronted with a

(1) (1887) 18 Q.B.D. 471.

1945

In re STORGOFF

Rinfret C.J.

difficulty. All such criteria contemplate an offence punishable and a proceeding taken under the sanction of a law-making authority having unfettered jurisdiction to make laws in respect of crimes and criminal proceedings. The language of Lord Bowen quoted above is of course used with reference to the enactments of a Legislature possessing such powers. When Littledale J. in *Mann* v. *Owen* (1), says in language often cited that a crime is "an offence for which the law awards punishment" he is not contemplating a rule of conduct which has force as law solely by the enactment of a legislative body that is destitute of all authority over the subject of the criminal law. And it may be added that when Austin asserts the characteristic of the criminal law to be that "its sanctions are enforced at the discretion of the Sovereign", he is not thinking of an authority which, while for some purposes it acts in the name of the Sovereign, has nothing whatever to do with the exercise of the Sovereign's prerogative of pardon in reference to crimes strictly so called.

By section 91, subsection 27, of the *British North America Act, 1867*, exclusive legislative authority upon the subject of the criminal law including the subject of criminal procedure is committed to the Dominion. The prerogative of Parliament in respect of criminal offences is under his instructions exercised in Canada by the Governor-General acting on the advice of His Majesty's Canadian Ministers acting under their responsibility to the Parliament of Canada. It is for the Parliament of Canada alone to say what acts the criminal law shall notice and punish as crimes and in what manner all criminal proceedings in Canada shall be conducted.

In *Attorney General of Ontario* v. *Hamilton Street Railway Co.* (2), at pages 528-9, the supreme judicial authority for Canada expounded the effect of section 91, subsection 27, of the *British North America Act;* "The criminal law in its widest sense is", said Lord Halsbury, delivering the judgment of the Privy Council, "reserved for the exclusive authority of the Dominion Parliament". His Lordship added that "the reservation * * * is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords."

By subsection 15 of section 92, the provinces are authorized to attach the sanctions of fine and imprisonment to acts or omissions in violation of their enactments; but it seems to be clear that consistently with the views thus expressed by Lord Halsbury acts or omissions struck at by such penal enactments cannot with strict propriety be described as crimes nor can the proceedings taken with a view to enforce the sanctions attached to them be properly described as criminal proceedings. Under a constitutional system such as ours that which the supreme legislative authority declares to be so, is so in contemplation of law; and in face of this declaration in the *British North America Act,* construed as it has been construed in the passages quoted, it cannot be said that, in the contemplation of the law of Canada, an act which is an offence against a provincial statute is for that reason alone a crime; and no definition of the terms "crime" and "criminal proceeding" which fails to take this circumstance into account, can be considered adequate with reference to the law of this country.

(1) (1829) 9 B. & C. 595, at 602. (2) [1903] A.C. 524.

I stop at this point of the already long quotation from the judgment of that great jurist, but the whole judgment is to be read as illustrating the very point made in another part of the present judgment to the effect that in discussing the true meaning of "criminal", under head 27 of section 91, the courts in Canada cannot be governed, without qualification, by judgments rendered in England where the jurisdiction in these matters is not divided, as it is here, under the *British North America Act* and where they have not, as here, a Criminal Code, which, of course, must be applied according to its text and not according to decisions rendered in different circumstances and under a law which may not always be the same.

Again in 1914 in *Quong-Wing* v. *The King* (1), Sir Lyman Duff says:—

> The enactment is not necessarily brought within the category of "criminal law", as that phrase is used in section 91 of the *British North America Act, 1867*, by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. The decisions in *Hodge* v. *The Queen* (2), and in the *Attorney General for Ontario* v. *The Attorney General for the Dominion* (3), as well as in the *Attorney General of Manitoba* v. *The Manitoba Licence-Holders' Association* (4), already mentioned, established that the provinces may, under section 92 (16) of the *British North America Act, 1867* suppress a provincial evil by prohibiting *simpliciter* the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable *milieu* for it, under the sanction of penalties authorized by section 92 (15).

See also *His Majesty the King* v. *Jeu Jang How* (5).

In view of what has already been said, I would hold that section (6) of chap. 57 of R.S.B.C. 1936, of the *Court of Appeal Act* of British Columbia, has application to an appeal from an order in a *habeas corpus* proceeding, releasing a prisoner from custody on a warrant of commitment on a conviction for a criminal offence on the ground that the Magistrate had no jurisdiction to issue the warrant; and that as such the section was within the competence of the legislature as being in relation to a matter within the class of subject Property and Civil Rights in the Province and was not legislation in relation to criminal law and procedure.

(1) (1914) 49 Can. S.C.R. 440, at 462.
(2) (1883) 9 App. Cas 117.
(3) [1896] A.C. 348.
(4) [1902] A.C. 73.
(5) (1919) 59 Can. S.C.R. 175.

1945

In re STORGOFF

Rinfret C.J.

Habeas corpus is the safeguard of personal liberty—the most important of civil rights. (See Blackstone's Commentaries, book one, ch. 1, cited by Martin J.A. in *Rex* v. *McAdam* (1). In that judgment the late Chief Justice Martin at pages 184 to 190 quoted from a wide range of authorities and judgments that the writ of *habeas corpus* is the great constitutional remedy protecting the rights of personal liberty.

Lord Halsbury in *Cox* v. *Hakes* (2), said:—

> For a period extending as far back as our legal history the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject.

Lord Birkenhead in *Secretary of State* v. *O'Brien* (3), said:—

> We are dealing with a writ antecedent to statute, and throwing its roots deep into the genius of our common law * * * It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward 1. It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

See also *Re George Edwin Gray* (4), where Sir Charles Fitzpatrick, C.J.C., says at p. 155:—

> Indeed, in any case of an application for this writ which, as is said in Maitland's Constitutional History of England, "is unquestionably the first security of civil liberty" * * *

Historically and constitutionally the writ is so firmly embedded in and recognized as the Charter of British Liberty and as the greatest of all Civil Rights, that its incidental and consequential relation to Criminal Law cannot uproot it from its real purpose nor tear it away from that which for centuries has been its pith and substance.

I would hold that the English decisions to which we have been referred were strictly limited to the application of section 31 (1) (*a*) of *The Judicature Act of England*:—

> No appeal shall lie from the judgment of the High Court in a Criminal Cause or Matter.

(1) 1925) 35 B.C. Rep. 168, at 177.
(2) (1890) 15 App. Cas. 506, at 514.
(3) [1923] A.C. 603, at 609.
(4) (1918) 57 Can. S.C.R. 150.

1945

In re STORGOFF

Rinfret C.J.

(*Quinn* v. *Leathem* (1)). They are inapplicable to the construction of section 91, head 27, and section 92, heads 13 and 15, of the *British North America Act.*

The question in the present case is not the scope of the criminal law, but whether the legislation is enacted in relation to the criminal law. (*Rex* v. *Daly* (2), re civil remedy.)

The illegal detention of the subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus,* and that is in relation to civil liberty and not to criminal law. The true test of the respective jurisdictions of the Parliament of Canada and of the provincial legislatures under sections 91 and 92 of the *British North America Act,* as invariably put in the decided cases both in this Court and in the Judicial Committee of the Privy Council, depends upon the distinction between legislation "affecting" civil rights and legislation "in relation to" civil rights. (*Gold Seal Limited* v. *Dominion Express Co.* (3); *Attorney General for Ontario* v. *Reciprocal Insurers* (4); *Lymburn* v. *Mayland* (5); *Attorney General for British Columbia* v. *Kingcome Navigation Co.* (6); *Shannon* v. *Lower Mainland Dairy Products Board* (7); *Reference re Debt Adjustment Act* (8)).

An instance of the application of the principle appears in *Union Colliery* v. *Bryden* (9), where the *Coal-mines Regulation Act* of the province was amended to prohibit Chinamen working underground in coal mines. The Privy Council came to the conclusion that the

> leading feature of the enactment consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia.

(1) [1901] A.C. 495, at 506.
(2) (1923) 55 O.L.R. 156, at 163, 164; and cited as *Attorney General for Ontario* v. *Daly,* [1924] A.C. 1011.
(3) (1921) 62 Can. S.C.R. 424.
(4) [1924] A.C. 328, at 345.
(5) [1932] A.C. 318, at 324, 325.
(6) [1934] A.C. 45.
(7) [1938] A.C. 708, at 719.
(8) [1943] A.C. 356, cited as *Attorney General for Alberta* v. *Attorney General for Canada.*
(9) [1899] A.C. 580, at 587.

1945

In re STORGOFF

Rinfret C.J.

The Judicial Committee held that in pith and substance the legislation related to aliens or naturalized subjects and consequently trenched on the exclusive authority of the Dominion.

But, in contrast to that, the section of the Act now under discussion is legislation in relation to the right of personal freedom and was not directed against criminal law as such. To collaterally inquire into the lack of jurisdiction in the Magistrate might incidentally affect the criminal law, but the real purpose of the Act was not in relation thereto. The pith and substance of the legislation was civil liberty and not criminal law. It is not aimed at criminal law, but is of general application to any case where the applicant's right of freedom is involved. In no sense is the lawful administration of the criminal law affected or interfered with by *habeas corpus*. An attempted exercise of a non-existing power by a Magistrate is not within the criminal law but is an interference with the civil right of liberty.

I feel it unnecessary to refer to all the judgments, either in this Court or in the Judicial Committee of the Privy Council, where the necessity to distinguish between legislation affecting civil rights and legislation in relation to civil rights was emphasized.

In any event, even if it should be conceded, for the purpose of argument, that the powers of the Court under *habeas corpus,* either by statute or at common law, could be dealt with by the Federal Parliament as a matter ancillary to criminal law and not as a substantive part thereof, it should be noted that there is no federal legislation repugnant to section 6 of the British Columbia *Court of Appeal Act* and, consequently, the section would not be *ultra vires* even in its application to appeals from *habeas corpus* where the detention was under a warrant for a criminal offence.

In the *Amand* case (1) in the House of Lords, the issue was not whether the *habeas corpus* proceedings were "in relation to" a criminal matter, but whether the antecedent cause or matter was criminal. Here, it being established that the British Columbia statute was enacted to enforce

(1) [1942] All E.R. 381.

the legal right to personal freedom, which, as such, is a civil right within the meaning of head 13 of section 92, it is immaterial that it incidentally affects criminal law.

In the *Amand* case (1) the *habeas corpus* was an intervening link, while in the case at Bar the proceedings in *habeas corpus* were after the criminal proceedings were completed and were extraneous. The writ was directed not to an inquiry as to the criminal proceedings, but as to the legality of the petitioner's subsequent detention. In the words of Mellish J., in *The King* v. *Morris* (2):—

> I do not think that legislation to secure the liberty of the subject from illegal imprisonment can properly be called legislation making, altering or affecting criminal law or criminal procedure.

And as was said by Chief Justice Meredith in *Rex* v. *Spence* (3):—

> It would not have been a step in a criminal proceeding in the matter of this criminal charge, but would be one quite without and only collateral to it.

To quote from the judgment of the Quebec court of appeal in *Moquin* v. *Fong* (4) where Cannon J. quotes from the judgment of Martin J. in *Rex* v. *Labrie* (5).

> It is not a proceeding in the original criminal action or proceeding. It is in the nature of a new suit brought by the respondents to enforce a civil right which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty and not by the Crown to punish him for his crime. The judicial proceedings under the writ is not to enquire into the criminal act of which he has been accused, tried and convicted, but into the right of liberty notwithstanding the criminal act and conviction.

We have already seen that the Supreme Court of the United States came to the same conclusion and we may add the following decisions: Re *Kurtz* v. *Moffitt* (6):—

> A writ of *Habeas Corpus,* sued out by one arrested for crime, is a civil suit or proceeding, brought by him to assert the civil right of personal liberty, against those who are holding him in custody as a criminal.

And *Re Farnsworth* v. *Territory of Montana* (7):—

> A writ of prohibition is a civil remedy, given in a civil action, as much so as a writ of *Habeas Corpus,* which this Court has held to be a civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution.

(1) [1942] All E.R. 381.
(2) (1920) 53 N.S.R. 525.
(3) (1919) 45 O.L.R. 391.
(4) (1928) Q.R. 44 K.B. 476, at 494.
(5) (1920) 61 D.L.R. 299, at 310; Q.R. 31 K.B. 47, at 60.
(6) (1885) 115 U.S. 487.
(7) (1889) 129 U.S. 104, at 113.

1945

In re STORGOFF

Rinfret C.J.

It follows that section 6 of the British Columbia *Court of Appeal Act* in its application to *habeas corpus* is *intra vires*, and that the Court of Appeal acted within its jurisdiction in setting aside the order of Coady J.

At Bar, Mr. Farris, acting for the Attorney General of British Columbia, stated that he did not intend to support that part of the *Court of Appeal Act, section* (6) (d) (vii), whereby

> in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may seem fit concerning the re-arrest of the accused person.

He said that it was surplusage or *ultra vires*. But, as I see this case, it is not necessary to pass upon the validity of that part of the Act.

I have already quoted from Jenks, "A Short History of English Law", the following passage at p. 343:—

> If the authority under which he is imprisoned is lawful, as in the ordinary case of a prisoner committed for trial, with bail lawfully refused, the applicant will, of course, simply be remanded to prison.

This result is, of course, what Mr. Farris meant by describing the provision for the "re-arrest of the accused person" as surplusage.

In the premises, the Court of Appeal must be taken to have given the judgment which Coady J. should have given. If the latter had quashed the writ of *habeas corpus*, or had refused to issue it, in the words of Mr. Jenks "the prisoner would have been remanded to prison". The effect of the judgment of the Court of Appeal in the present case must be exactly what the effect of the judgment of Coady J. would have been, if he had given the judgment he should have rendered, and logically the result must be the same. It is, therefore, immaterial whether the *Court of Appeal Act* empowered the British Columbia Court of Appeal to make an order concerning the re-arrest of the petitioner, and also whether such an order was made here.

By his petition for *habeas corpus*, the petitioner prayed that his detention be enquired into for the purpose of determining whether it was illegal and, if so, for an order that he should be given his liberty. The judgment being that his detention was legal, it follows, as a matter of course, that the petitioner did not succeed in establishing his right

to liberty, that he should remain imprisoned, and that if he has been temporarily set free, as a result of the erroneous judgment of the trial judge, he should merely be "remanded to prison".

I, therefore, conclude that the attack on the validity of the British Columbia statute fails and that, accordingly, the judgment of the British Columbia Court of Appeal was competently rendered; that the petition in this Court for a writ of *habeas corpus* should be refused, and that the petitioner should be remanded to prison.

In the circumstances, I would not think that either the Attorney General for Canada or the Attorney General for British Columbia would likely ask for costs, but in any event I do not think this is a case for costs against the petitioner.

Although my conclusion is that the writ of *habeas corpus,* sued out by the present petitioner in the British Columbia courts, must be looked upon as a civil suit or proceeding, nevertheless, the prayer in this court is for the issue of a writ "for the purpose of an inquiry into the cause of commitment in a criminal cause". Therefore, the petition comes within the wording of section 57 of the *Supreme Court Act* and this court has jurisdiction to hear and entertain the same, and is competent to dispose of it.

Of course, the question might arise whether, if I am right in my opinion that *habeas corpus ad subjiciendum* is always a civil writ, section 57 was competently inserted by the Dominion Parliament in the *Supreme Court Act.* Section 101 of the *British North America Act* provides for the

> Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Under section 57 of our Act Parliament purports to give to the Supreme Court of Canada original jurisdiction to issue the writ as a court of first instance. It does seem that this can hardly be authorized by section 101 of the *British North America Act,* for the power is neither given to the court as a court of appeal, nor can it be said that it is given to an additional court for the better administration of the laws of Canada, since the latter words "laws of Canada", under a well established and settled jurisprudence, are

1945

In re STORGOFF

Rinfret C.J.

accepted to mean only laws adopted by the Dominion Parliament and to exclude legislation properly coming within the jurisdiction of the legislature in each province.

It would follow that section 101 does not assign to the Parliament of Canada the authority to confer jurisdiction upon the Supreme Court of Canada to act as an original court of first instance in matters coming under the description of "Property and Civil Rights in the Province" (head 13 of section 92), or the

> Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts (Head 14 of section 91).

However, the point was neither argued nor raised before us, counsel evidently wishing to confine their argument to the main question whether the *Court of Appeal Act* of British Columbia was valid in conferring upon that court an appellate jurisdiction in *habeas corpus* matters, even when the purpose of the writ was an inquiry into the cause of commitment in a criminal case under an Act of the Parliament of Canada. For that reason, and also in view of the fact that the majority of this Court does not share my opinion in respect to the nature of the writ of *habeas corpus,* I do not deem it necessary to go into the discussion of this very important question.

Moreover, if the judgment had to pass upon that question, I think it would only be fair that the Attorney General of Canada should be given an opportunity of arguing the point before the Court—an opportunity which was not given to the Deputy Attorney General of Canada when he appeared before us. Under such circumstances this question, to my mind, should be left for decision in a future case where the point will arise and it will be found essential to decide it for the purpose of reaching a result in the judgment to be rendered.

KERWIN J.—An application was made to Mr. Justice Hudson in Chambers for a writ of *habeas corpus ad subjiciendum,* directed to the Warden of the British Columbia Penitentiary at New Westminster, to have before a judge of this Court the bodies of Fred Storgoff and Fred Babakaiff, prisoners detained in the Warden's custody,

so that there might be caused to be done thereupon what of right and according to law the court or judge should see fit to be done. This application was made under section 57 of the *Supreme Court Act* by which every judge of this Court has, with an immaterial exception, concurrent jurisdiction with the courts or judges of the several provinces to issue the writ for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada. Under Rule 72 the application was referred to the Court.

Upon the argument, the Court divided the motion. Babakaiff had been convicted and sentenced to imprisonment in British Columbia Penitentiary for an offence under the Criminal Code, and there he remained. His application was denied. Storgoff's application was adjourned and directions were given that the applicant should notify the Attorney General of Canada and the Attorneys General of the provinces. This was done but only counsel for the applicant, for the Attorney General of Canada and for the Attorney General of British Columbia appeared.

While the writ has not been issued and a return made thereto, it appears that Storgoff was convicted on May 8th, 1944, by Mr. H. S. Wood, a Police Magistrate in and for the city of Vancouver, of having been found, while nude, on May 7th, 1944, in a public place in company with others, contrary to section 205A of the Criminal Code. He was sentenced to imprisonment at hard labour in the British Columbia Penitentiary at New Westminster for three years. By warrant, dated May 8th, 1944, the magistrate commanded the constables or peace officers to take and safely convey Storgoff to the said penitentiary and there deliver him to the keeper, and commanded the keeper to receive Storgoff into his custody in the penitentiary and there to imprison and keep him at hard labour for the said term. Storgoff applied to Mr. Justice Coady, in the Supreme Court of British Columbia, for a writ of *habeas corpus*, and on June 30th, 1944, his discharge from custody was ordered and he was accordingly released on July 3rd.

The Attorney General of the province appealed from the order of Coady J. to the Court of Appeal under the provi-

1945

In re STORGOFF

Kerwin J.

sions of section 6 of the *Court of Appeal Act*, c. 57, R.S.B.C. 1936, the relevant parts of which are as follows:—

6. * * * an appeal shall lie to the Court of Appeal:—

* * *

(*d*) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court Judge, in any of the following matters, or in any proceeding in connection with them, or any of them:—

* * *

(vii) *Habeas Corpus:*

* * *; and in cases of *habeas corpus* in which Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person:

* * *

The appeal was allowed, the writ of *habeas corpus* was quashed, and the Court of Appeal ordered that Storgoff

be forthwith arrested and recommitted to the custody of the Warden of the British Columbia Penitentiary at New Westminster from which he was released by virtue of the said judgment.

On July 29th, Storgoff was rearrested by the provincial police and was taken and lodged in the British Columbia Penitentiary, where, it is not contested, he is being detained to complete the sentence of the magistrate. It is to test the legality of that detention that the present application is made.

We have had the advantage of a complete argument in which the question involved has been thoroughly canvassed. That question is whether under the *British North America Act, 1867*, the British Columbia legislature had the power to authorize an appeal by the Crown from an order made on a *habeas corpus* application discharging a prisoner from imprisonment resulting from his conviction of an offence against a section of the Criminal Code. Undoubtedly the Dominion Parliament had power to create as an offence under the Code the act of which Storgoff was convicted and to determine the punishment therefor but it was argued by Mr. Farris that *habeas corpus* is the safeguard of personal liberty, the most important of civil rights, and that there is no distinction between such an abstract right and the procedure to enforce it. He contended that the Provincial Legislature had the power to authorize the appeal under head 13 of section 92, "Property and Civil Rights in the Province" and head 14,

The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts;

and that Parliament had no such power under head 27 of section 91,

The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Before dealing with that proposition I might point out that for the determination of the question involved, it is not to the purpose to consider what are criminal causes or proceedings for or upon a writ of *habeas corpus* arising out of a criminal charge under section 36 of the *Supreme Court Act*. It is obvious that Parliament had power to restrict the jurisdiction of this Court as it saw fit and it has been held, in construing this section, that offences under provincial statutes were criminal matters although justifiable under head 15 of section 92,

The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

The King v. *Nat Bell Liquors* (1), where Lord Sumner, speaking for the Judicial Committee, approved the opinion expressed by three of six judges of this Court in *Re McNutt* (2), and by three out of five in *Mitchell* v. *Tracey* (3), the decision in the last of which was in fact followed by this Court when one of the appeals in the *Nat Bell Liquors* case (4) was before it. Decisions under section 36 of the *Supreme Court Act* are therefore not in point.

Nor are decisions as to the power of the Supreme Court of the United States to award the writ of *habeas corpus* applicable. Two were particularly referred to in the argument, *Ex parte Bollman and Swartwout* (5), and *Ex parte Tom Tong* (6). As to these, two observations may be made. First, the Constitution of the United States is so different from ours that very little, if any, assistance may be gained from decisions construing the relevant Articles. Second, as to the power actually given the Court by Congress within the ambit of the Constitution, care must be

(1) [1922] 2 A.C. 128.
(2) (1912) 47 Can. S.C.R. 259.
(3) (1919) 58 Can. S.C.R. 640.
(4) (1921) 62 Can. S.C.R. 118.
(5) (1807) 4 Cranch 75.
(6) (1883) 108 U.S. 556.

1945

In re STORGOFF

Kerwin J.

exercised in reading these decisions since Congress from time to time enlarged or restricted the Court's jurisdiction. In the latter of the two cases cited, Chief Justice Waite, referring to Tong, who was held under criminal proceedings states:—

> the prosecution against him is a criminal prosecution but the writ of *habeas corpus*, which he has obtained, is not a proceeding in that prosecution.

For that proposition, which he elaborates, he cites the judgment of Chief Justice Marshall in the earlier case. There the latter remarks:—

> It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.

The demonstration at the bar referred to by Chief Justice Marshall included a statement of the early jurisdiction of various courts in England. In view of the later researches of many eminent scholars, this statement must be taken with considerable qualification as will appear when we come to consider the case in the House of Lords of *Amand* v. *Home Secretary* (1).

Disregarding these decisions, therefore, and confining our consideration to the relevant provisions of the *British North America Act*, we may first notice section 129:—

> Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

It follows from this that the powers of the Provincial Courts of Appeal to hear appeals from orders granting writs of *habeas corpus* where the applicant has been imprisoned as a result of his conviction of an offence under the Criminal Code may vary in the four provinces. When the occa-

(1) [1943] A.C. 147.

sion arises it may be necessary to investigate why it was that *habeas corpus* Acts had been enacted by the law enacting bodies of some of these provinces before 1867; but in this case we are concerned with the province of British Columbia.

By proclamation, and then by statute or ordinance enacted March 6th, 1867, the civil and criminal laws of England as the same existed on November 19th, 1858, had been declared to be in force in British Columbia. The statutory provision is now found in section 2 of the *English Law Act,* R.S.B.C. 1936, chapter 88:—

> The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the geographical limits thereof.

Section 11 of the Criminal Code provides:—

> The criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far as it has not been repealed by any ordinance or Act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or of the colony of British Columbia passed since such union, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the province of British Columbia.

In England, rights had been conferred by Magna Charta, the Petition of Right, and the Bill of Rights, under which was established the Rule of Law. That part of the first named whereby no freeman was to be arrested, imprisoned, put out of his freehold, outlawed, exiled, destroyed, or put upon in any way except by the lawful judgment of his peers or the law of the land, may be taken either as the source of the writ of *habeas corpus* or as an admission by the Sovereign of its existence. Its exact origin is not wholly clear but that it was used in early days for purposes far removed from those with which we are familiar has been established beyond pre-adventure. There was a common law writ and it was not until the *Habeas Corpus Act* of 1679 that various abuses that had sprung up in connection with its issue were removed. This Act, however, guaranteed the citizen only against arbitrary arrest on a criminal charge and while

1945

In re STORGOFF

Kerwin J.

in some of the colonies as, for instance, in Lower Canada in 1812, similar improvements were effected in connection with imprisonment otherwise than for some criminal or supposed criminal matters, it was not until 1816 that the same improvements were effected in England.

The right to *habeas corpus* at common law and under these statutes existed in British Columbia at the date of its joining the Union, July 20th, 1871. There is not and never has been a *habeas corpus* ordinance or statute of the province or of the colonies of Vancouver Island or British Columbia. As of November 19th, 1858, there was no right of appeal in criminal or civil matters in England (and therefore in British Columbia) where a person in custody had secured his release through the instrumentality of the writ, *Cox v. Hakes* (1); *Secretary of State for Home Affairs* v. *O'Brien* (2). Such a right of appeal was never attempted to be given in British Columbia until 1920 when the forerunner of what is now section 6 (*d*) (vii) of the *Court of Appeal Act* and the authority to the Court of Appeal to rearrest was enacted.

What is the nature of the writ? Various views have been expressed by many eminent judges in Canada but nowhere have opinions fluctuated to such an extent as in the Court of Appeal for British Columbia. *In Re Wong Shee* (3), that Court allowed an appeal from an order discharging Wong Shee upon *habeas corpus* proceedings from the custody of the Controller of Chinese Immigration at Vancouver. The objection that there was no appeal from an order of *habeas corpus* releasing the person detained was overruled and it was held, following *The King* v. *Jeu Jong How* (4), that proceedings under the Federal *Immigration Act* were not of a criminal nature and that the amendment to the British Columbia *Court of Appeal Act* in 1920 was valid so as to permit of such an appeal. In *Rex* v. *McAdam* (5), the majority of the Court determined that no appeal was competent under the amendment, from the refusal of a writ of *habeas corpus* at the instance of a person arrested on a charge of rape. Martin J.A., in an exhaustive and learned judgment dissented. In *Ex*

(1) (1890) 15 App. Cas. 506.
(2) [1923] A.C. 603.
(3) (1922) 31 B.C. Rep. 145.
(4) (1919) 59 Can. S.C.R. 175.
(5) (1925) 44 Can. Cr. Cas. 155; [1925] D.L.R. 33.

parte Yuen Yick Jun (1), the Court was asked to review its judgment in the *McAdam* case (2), and it appears that at that time the Attorney General of Canada associated himself in that request. The Court declined to follow the earlier decision and the view of Martin J.A. (by then Chief Justice of British Columbia) prevailed and were enlarged upon in the judgment of Mr. Justice O'Halloran. In *Ex parte Lum Lin On* (3), an appeal from a refusal to release the applicant on *habeas corpus* proceedings was dismissed but Chief Justice Macdonald considered the matter *de novo* in view of the House of Lords' decision in *Amand's* case (4), which he stated he could not read otherwise than as laying down that *habeas corpus* is always a criminal remedy when used to question imprisonment on a criminal charge. Mr. Justice O'Halloran, who stated that the point had not been argued, considered that the *Amand* case (4) did not apply and that no reason had been shown to change the conclusion reached in the *Yuen Yick Jun* case (1).

Finally, in *State of New York* v. *Wilby* (*alias Hume*) (5), Sloan J.A., delivering the judgment of the Court, stated its current view that O'Halloran J. had correctly set out the position when he said in the *Lum Lin On* case, (3), at page 110:—

> The *Amand* case (4) does not detract from or furnish any real ground for doubting the correctness of the reasoning which prompted the decision of this Court * * * in *Ex parte Yuen Yick Jun* (1).

The basis of these decisions is that the right to *habeas corpus* is always a civil right and therefore within head 13 of section 92 and all the reasons advanced from time to time for that conclusion appear in the judgments of Martin J.A. and O'Halloran J.

With respect I find myself in disagreement with the later views of the British Columbia Court of Appeal and with those other judges who have expressed similar views. The writ of *habeas corpus* is indeed a writ to enforce a right to personal liberty but that right may have been infringed by process in criminal or civil proceedings and

(1) (1938) 54 B.C. Rep. 541.
(2) (1925) 44 Can. Cr. Cas. 155; [1925] D.L.R. 33.
(3) 1943) 59 B.C. Rep. 106.
(4) [1943] A.C. 147.
(5) (1944) 60 B.C. Rep. 370.

1945

In re STORGOFF

Kerwin J.

that distinction serves to indicate the dividing line between the power of Parliament and the British Columbia Legislature to legislate with reference to the writ. The matter does not fall within Property and Civil Rights. As Viscount Haldane stated in *John Deere Plow Company* v. *Wharton* (1):—

> The expression "civil rights in the province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of s. 92 and also to much of the field of s. 91. But the expression cannot be so interpreted and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words.

The matter is dealt with elsewhere and the real question is whether it is within head 27 of section 91 or head 14 of section 92. So far as it deals with appeals from orders granting the writ, where the applicant is detained under a conviction under the Criminal Code, it falls under the former.

The practice upon applications for *habeas corpus* differs in civil and criminal cases and, as pointed out by Anglin J. in *Rex* v. *Whitesides* (2) and by Osler J.A., speaking on behalf of the Court of Appeal of Ontario in the same case, the warrant of commitment in a criminal matter is sufficient to justify the prisoner's detention and the Court will not, on *habeas corpus,* inquire into any irregularity in his original caption. A number of the cases in England setting forth this distinction are referred to. Finally, in *Amand's* case (3), it is pointed out by Viscount Simon, with the concurrence of Lord Atkin and Lord Thankerton, at page 156:—

> The distinction between cases of *habeas corpus* in a criminal matter and cases where the matter is not criminal goes back very far;

and

> it is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test.

The actual decision in that case was that an appeal from an order of the Divisional Court, refusing to grant the writ, to the Court of Appeal, was an appeal from a judgment of the High Court in a criminal cause or matter within the meaning of section 31 of the *Supreme Court of Judicature (Consolidation) Act, 1925.* I quite agree that this decision and

(1) [1915] A.C. 330, at 340.
(2) (1904) 8 O.L.R. 622.
(3) [1943] A.C. 147.

the speeches of their Lordships must be applied with care to a question arising under the B.N.A. Act but the words quoted from Viscount Simon's speech are, I think, appropriate and significant as well as the statement of Lord Wright, at page 160, that "the writ is essentially a procedural writ", and the statement of Lord Porter that

> it was contended in vain (in *Ex parte Woodhall* (1)) that an application for *habeas corpus* was a separate proceeding from that which the magistrate dealt with in the case brought before him.

These passages indicate that, for the purpose of construing a statute giving a general right of appeal, their Lordships found it necessary to investigate the nature of the writ of *habeas corpus ad subjiciendum,* and decided that it was a step in the proceedings under which the applicant was imprisoned.

The application to Coady J. was a step in the criminal proceedings which resulted in Storgoff's imprisonment and it was, therefore, a matter of criminal law or procedure as to which the British Columbia Legislature had no power to legislate. Being a designated subject matter in section 91 of the B.N.A. Act, it is exclusive to the Dominion, and the right of a person imprisoned to test the legality of his incarceration when it is alleged to have followed a conviction of a crime, being one of the great constitutional rights of the subject, cannot be said to be merely ancillary and, therefore, subject to the power of the British Columbia Legislature in the absence of parliamentary action. "In such a case" to quote Viscount Maugham in *Attorney General of Alberta* v. *Attorney General of Canada* (2),

> it is immaterial whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament.

So far as it purports to authorize in such a case as the present, an appeal by the Crown from an order granting the writ, section 6 of the *Court of Appeal Act* is *ultra vires.* There being no authority in the Court of Appeal to set aside the order of Coady J. and direct the rearrest of the applicant, the application should be granted, and under section 58 of the *Supreme Court Act,* an order made for the release of Storgoff.

(1) (1888) 20 Q.B.D. 832.
(2) [1943] A.C. 356, at 370.

1945

In re STORGOFF

Hudson J.

HUDSON J.—The important question to be decided in this appeal is whether or not the Court of Appeal of British Columbia had jurisdiction to allow an appeal from an order releasing the appellant upon the return of a writ of *habeas corpus*, and directing his rearrest.

Storgoff was held in custody because of an offence or alleged offence under the Criminal Code of Canada. On the return of the writ he was set at liberty and remained at liberty until rearrested under the order of the Court of Appeal.

An appeal from an order discharging a prisoner on the return of a writ of *habeas corpus* is not authorized by Dominion legislation, nor is there any such right at common law. See *Cox* v. *Hakes* (1), and *Secretary of State for Home Affairs* v. *O'Brien* (2).

For this reason, the jurisdiction of the Court of Appeal, if any, must be found in valid legislation of the province of British Columbia. The provision relied upon by the Court of Appeal is section 6 of the *Court of Appeal Act*, c. 57 of the Revised Statutes of British Columbia 1936, which reads in part as follows:

6. * * * an appeal shall lie to the Court of Appeal:—

* * *

(*d*) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court Judge, in any of the following matters, or in any proceeding in connection with them, or any of them—

* * *

(vii) *Habeas corpus*:

* * *; and in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the rearrest of the accused person.

We are not concerned here with the validity or application of this statute in cases where the original detention did not arise in the course of the enforcement of the Criminal Code or other cognate laws of the Dominion.

The real point in dispute is whether or not the order setting aside the discharge and directing the rearrest of Storgoff falls within the "criminal law" or "procedure in criminal matters", as used in subsection 27 of section 91 of the *British North America Act*.

(1) (1890) 15 App. Cas. 506. (2) [1923] A.C. 603.

If so, then it was a matter in respect of which Parliament had exclusive legislative jurisdiction and no legislation of a province could confer jurisdiction on the Court of Appeal.

Storgoff was imprisoned through the operation of criminal laws of Canada; whether or not such imprisonment was lawful would depend in part on the regularity of the procedure followed.

It would seem to be logical that the legislature which has exclusive power to enact criminal law and prescribe procedure in criminal matters should also have the sole right to prescribe the means and methods by which the validity of such procedure should be tested.

Parliament has accepted this view and ever since Confederation exercised the right to make provision for appeals in criminal matters and prescribed the conditions under which such appeals were permitted and the courts to which they might be taken. (Sec. 1013 (4) Criminal Code). It is noteworthy that in 1887 the British Columbia legislature passed an Act providing that anyone aggrieved by any conviction made under a statute of Canada might appeal to any judge of the Supreme Court of British Columbia. On the recommendation of Sir John Thompson, then Minister of Justice, this statute was disallowed by the Governor General in Council: see *Canada Gazette* of 21st April, 1888, and referred to in Hodgins' Dominion and Provincial Legislation 1867-1895.

In addition to the provision for appeals, Parliament has enacted certain laws in respect of *habeas corpus* in the case of indictable offences (Sec. 1120 Criminal Code) but, so far, none in respect of those similar to the present, under summary conviction, except by authorizing the court to make certain rules not here material. (Sec. 576 Criminal Code.)

A writ of *habeas corpus* differs in many respects from an appeal but, in cases like the present, it is just another means of bringing in question the validity of proceedings in criminal matters. It would appear strange indeed if Parliament could provide for and control appeals but not interference with criminal administration by way of *habeas corpus*.

1945

In re STORGOFF

Hudson J.

The argument in support of the jurisdiction is that personal liberty is primarily a civil right and as such falls within the field of provincial legislative jurisdiction under section 92 (13) of the *British North America Act,* and further, that the remedy of *habeas corpus* is directed to the preservation or vindication of a right to liberty.

Section 92 (13) gives the provincial legislature exclusive power to make laws in respect of "13. Property and civil rights in the province". This must be read always as excluding from its application criminal law and procedure in criminal matters, in respect of which the Dominion powers are paramount. Criminal laws almost always interfere with personal liberty.

Moreover, this argument does not meet the present case. The Court here is concerned with the appeal, not with the writ. Storgoff enjoyed liberty when the appeal was launched. He lost his liberty as a consequence of the proceedings taken under provincial legislation. However one may choose to look at it, the appeal in question was a proceeding to enforce criminal law and not to secure liberty. This distinction is made very clear by the opinions of the learned law Lords in *Cox* v. *Hakes* (1). Lord Halsbury said at p. 514:

> For a period extending as far back as our legal history, the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might make a fresh application to every judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed.

Lord Herschell at pp. 527 and 528 uses the same language:

> A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question. There was no power in any court to review or control the proceedings of the tribunal which discharged him.

The opinion of Lord Herschell was concurred in by Lords Watson and Macnaghten. Some of the members of the Court expressly withheld any opinion as to a right of appeal where the prisoner had not been discharged.

(1) (1890) 15 App. Cas. 506.

On the interpretation of the words "criminal law" and "procedure in criminal matters" in relation to appeals from writs of *habeas corpus,* there has been a great diversity of opinion in the different provincial courts and particularly those of the province of British Columbia. I will not attempt to analyze these cases; none of them is binding on this Court and it seems to me that we must settle the case by the application of general principles.

In the English *Judicature Act* there is a provision that

> no appeal shall lie except as provided in the *Criminal Appeal Act, 1907,* or any Act, from any judgment of the High Court in any criminal cause or matter,

and this provision has been the subject of much discussion in the Courts in England. It is definitely settled now by a decision of the House of Lords in *Amand* v. *Home Secretary* (1), that this provision excludes an appeal from a decision in a case of *habeas corpus* where the original cause of arrest was in the nature of a criminal cause or matter. Some passages from their Lordships' opinions should be quoted. Viscount Simon L.C. at p. 155 states:—

> The law to be applied in connexion with appeals from decisions of the High Court, or of a single judge, on application for a writ of *habeas corpus ad subjiciendum* is well established. The speech of the Earl of Birkenhead in *Secretary of State for Home Affairs* v. *O'Brien* (2) described the nature and characteristics of the writ and laid it down—following the previous decision of this House in *Cox* v. *Hakes* (3) that "if the writ is once directed to issue, and discharge is ordered by a competent court, no appeal lies to any superior court".

Then follows a quotation from the speech of Lord Halsbury L.C. in *Cox* v. *Hakes* (2).

Viscount Simon also remarks that:

> It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test.

Lord Wright says at p. 160:

> It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter. The former class of cases was dealt with in the *Habeas Corpus Act, 1679;* the reforms of procedure in the latter class had to wait until the Act of 1816.

An opinion to the same effect was stated by Lord Porter.

(1) [1943] A.C. 147.
(2) [1923] A.C. 603, at 609.
(3) (1890) 15 App. Cas. 506.

1945

In re STORGOFF

Hudson J.

This decision may not now be binding on this Court but in interpretation of the words "criminal law" and "procedure in criminal matters" these opinions can hardly be questioned.

It is argued that the words used in the *Judicature Act* may not mean quite the same thing as when similar words are used in the *British North America Act*, but it seems to me that for the reasons already mentioned the words as used in section 91 (27) of the former Act should be given even a broader application than when used in the English *Judicature Act*. Uniformity of procedure in criminal matters throughout Canada is a cardinal principle of the Canadian constitution. A power in each separate province to provide a different means of testing the validity of such proceedings would be fatal to the maintenance of such principle.

For these reasons, I am of the opinion that an order should be made releasing Storgoff from custody.

TASCHEREAU J.—This is an application under section 57 of the *Supreme Court Act* for a writ of *habeas corpus ad subjiciendum*.

The applicant and one Fred Babakaiff were on the 8th of May, 1944, convicted in Vancouver on a charge of being found nude in a public place, contrary to section 205 (*a*) of the Criminal Code, and were sentenced to be imprisoned for a term of three years.

As a result of *habeas corpus* proceedings, the applicant Storgoff was, on the 30th of June last, discharged from custody by order of Mr. Justice Coady of the Supreme Court of British Columbia, and was immediately released. The Court of Appeal reversed this decision, and ordered Storgoff to serve his sentence of three years in the penitentiary.

Both Storgoff and Babakaiff applied to the Honourable Mr. Justice Hudson of this Court, for a writ of *habeas corpus*, but their applications were referred to the Full Court. On the first hearing, Babakaiff's application was refused, but as to Storgoff, this Court ordered that the Attorneys General of Canada and of all the provinces should be notified, in view of the points raised in the course of the argument.

1945

In re STORGOFF

Taschereau J.

The applicant submits that the Court of Appeal for British Columbia had no jurisdiction to hear the appeal of the Attorney General of that province, because the *habeas corpus* in the case at bar was a proceeding in a criminal matter, and the right of appeal could not be given by a provincial statute, but only by the Parliament of Canada. The second point raised is that the Court of Appeal lacked the necessary jurisdiction to order Storgoff's re-arrest once he had been freed and set at liberty by order of Mr. Justice Coady.

The appeal of the Attorney General to the Court of Appeal of British Columbia was brought in virtue of section 6 of the *Court of Appeal Act,* chapter 57 of the Revised Statutes of British Columbia, 1936, which reads in part as follows:—

6. * * * an appeal shall lie to the Court of Appeal:—

* * *

(*d*) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court Judge, in any of the following matters, or in any proceeding in connection with them or any of them:—

* * *

(vii) *Habeas Corpus*:

* * *; and in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person:

These provisions enacted by a provincial authority granting an appeal in matters of *habeas corpus* undoubtedly apply to the case at bar if we are dealing with a civil matter, but are obviously inoperative if an application for an *habeas corpus,* as the result of a criminal process, must be considered as a proceeding in a criminal matter. In the latter case, only the Parliament of Canada would be invested with the necessary powers to grant such an appeal, and no legislation to that effect has ever been enacted. The question, therefore, resolves itself as to whether the *habeas corpus* granted by Mr. Justice Coady was in a civil or in a criminal matter.

The Attorney General for British Columbia has submitted that it was within the competence of the Legislature to give an appeal in such a matter as being in relation to property and civil rights (B.N.A. section 92,

1945

In re STORGOFF

Taschereau J.

par. 13). He has forceably contended that *habeas corpus,* which is the safeguard of personal liberty, is essentially a civil writ even if issued as the result of criminal proceedings, the object of the writ being to enforce civil rights, having no relation whatever to the prosecution or the proceedings for the punishment of crimes. It is a new suit brought to enforce a civil right as against those who are holding illegally a person in custody.

Habeas corpus is one of the oldest writs known in the British law. Even at dates further back than the Magna Carta of Jean Sans Terre it was *jus non scriptum,* and it was only in 1679 that it appeared in the statutes of England.

This Imperial Act, (31 Charles II, chap. 2) is entitled *An Act for the better securing the liberty of the subject and for prevention of imprisonments beyond the seas,* and in 1896, by virtue of *Short Titles Act,* it was called the *Habeas Corpus Act.* This legislation clearly did not abolish the rights of the subject which existed under common law; it did not create *Habeas Corpus* which from time immemorial existed in England, but, it was merely a beneficial enactment to remedy some defects of the common law writ, which had become, as Hurd says:— "the subject of great abuses" (Habeas Corpus p. 81).

There can be no doubt that the common law writ, as amplified by the legislation of 1679, was a remedy available only to the subjects imprisoned as a result of a criminal process. The recital of the Act makes it clear that it is only in "criminal or supposed criminal matters" that the writ may be issued. We find also that it is issued

> for the prevention and more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters,

and that

> it shall be served upon the said officer or left at the jail or prison.

We further see that it contains dispositions such as these

> if any person or persons shall be or stand committed or detained as aforesaid for any crime, * * * some court that hath jurisdiction in criminal matters, etc. etc.

The use of these precise terms lead to the inescapable conclusion that this writ of *habeas corpus,* as completed by the Act of 1679, may be resorted to only when a person is kept in custody as a consequence of "a criminal or supposed criminal matter".

When the *Quebec Act* was passed by the Imperial Parliament in 1774, this "*Habeas Corpus* in criminal matters" was not introduced in that part of the country which at that time formed the whole colony, but it was only in 1784, by a proclamation of Haldimand, then Governor General, that it became the law of the land. This proclamation, known as 24 Geo. III, chap. 1, practically reproduces the Imperial Statute 31 Charles II and provides that:—

> Be it declared and enacted by His Excellency the Captain General and Governor-in-Chief of this Province, by and with the advice and consent of the Legislative Council thereof, and by the authority of the same, it is hereby declared and enacted, that from and after the day of the publication of this Ordinance, all persons who shall be or stand committed or detained in any prison within this Province, for any criminal or supposed criminal offence, shall of right be entitled to demand, have and obtain from the Court of King's Bench in this Province, or from the Chief Justice thereof, or from the Commissioners for executing the office of Chief Justice respectively or from any judge or judges of the said Court of King's Bench, the writ of *Habeas Corpus,* together with all the benefit resulting therefrom, at all such times, and in as full, ample, perfect and beneficial a manner, and to all intents, uses, ends and purposes, as His Majesty's subjects within the realm of England, who may be or stand committed or detained in any prison within that realm, are there entitled to that writ, and the benefit arising therefrom by the common and statute laws thereof.

The distinction between the writ of *Habeas Corpus* in criminal and civil matters is further emphasized by the fact that in 1812, in the province of Quebec, an Act was introduced, entitled: *An Act to secure the liberty of the subject by extending the Powers of His Majesty's Courts of Law as to Writs of Habeas Corpus ad subjiciendum.* It applied exclusively to persons restrained of their liberty, "otherwise than for some criminal or supposed criminal matter". It is known as 52 Geo. III, 1812, chap. 8, and as to the means of enforcing obedience to such writs, it says:—

> It is hereby enacted by the authority of the same, that when any person shall be confined or restrained of his or her liberty, otherwise than for some criminal or supposed criminal matter, it shall and may be lawful for the Chief Justice of the Province, and for the Chief Justice of the Court of King's Bench for the district of Montreal, and for any one of His Majesty's justices of the Court of King's Bench for the district of Quebec or of the Court of King's Bench for the district of Montreal, or of the Court of King's Bench for the district of Three-Rivers, and for the judge of the Provincial Court of Gaspe, within the limits of their respective jurisdiction, and they are hereby

1945

In re STORGOFF

Taschereau J.

required, upon complaint made to them by or on the behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation, in cases where by law an affirmation is allowed, that there is probable and reasonable ground for such complaint, to award, in vacation time, a writ of *Habeas Corpus ad subjiciendum*, under the seal of such Court whereof he shall then be one of the judges, or the judge, to be directed to the person or persons in whose custody or power the party so confined or restrained, shall be returnable, immediate, before the judge so awarding the same, or before any other judge of the Court, under the seal of which the said writ issued.

We now find these two different proceedings "Habeas Corpus in criminal matters" and "Habeas Corpus in civil matters" contained in the same pre-confederation statute —Cons. statute L. C. 1860, chap. 95—where the clear distinction is made between the "criminal and civil matter". Later after Confederation, the legislature of the province of Quebec enacted certain sections in its code of Civil Procedure dealing with *Habeas Corpus* in civil matters only, and leaving purposely to the proper authorities the care of enacting whatever laws they deemed fit, when the matter was "criminal or supposed criminal". The relevant section (1114 C.C.P.) in part reads as follows:—

> Any person who is confined or restrained of his liberty, otherwise than under any order in civil matters granted by a court or judge having jurisdiction, or than for some criminal or supposed criminal matter * * * may apply * * * etc.

Like *Habeas Corpus* in criminal matters, *Habeas Corpus* in civil matters was also merely *jus non scriptum* in England until 1816, when the first statute was enacted dealing with this subject of the law. It improved the common law remedy but could be resorted to, only in non criminal matters as the custody of infants or of a wife, the test of the legality of the detention of a lunatic, etc., etc.

Such was the state of the law in England after 1816, and it is the law as it existed at that time, that was imported in various parts of Canada. British Columbia did not enter Confederation before 1870, and until then, it was known as "Her Majesty's Colony of British Columbia and its dependencies". It was in 1858, that James Douglas, Governor of the Colony, issued a proclamation importing the civil and criminal laws of England as they existed at the date of the proclamation. In 1867, this proclamation was repealed, but this did not affect any

rights acquired or liabilities incurred or existing before such repeal, and was re-enacted in a different form by Governor Frederick Seymour.

The clear result of these enactments was that from 1858, the criminal and civil laws of England were by statute introduced in the Colony of British Columbia, including "*Habeas Corpus* in criminal matters", and "*Habeas Corpus* in civil matters".

When British Columbia joined Confederation in 1870, the same laws continued to be in force in the province, and the only legislation affecting *Habeas Corpus* enacted since, that I can find, is the one passed by the Legislature giving a right of appeal. In view of the distribution of powers by the B.N.A. the problem arose as to whether *Habeas Corpus* was a civil or criminal writ, and a great number of judgments have been rendered on the matter, in all parts of Canada.

It has been argued that *Habeas Corpus*, being a matter of civil right and property, is still within the jurisdiction of the Provincial Legislature although it may affect incidentally criminal law and procedure. On behalf of this contention, the respondent has cited many judgments making the necessary distinction between legislation affecting civil rights, and legislation in relation to civil rights. (*Gold Seal Limited* v. *Dominion Express Co.* (1); *Attorney General for Ontario* v. *Reciprocal Insurers* (2); *Attorney General for British Columbia* v. *Kingcome Navigation Company Ltd.* (3); *Shannon* v. *Lower Mainland Dairy Products Board* (4). *Reference re Debt Adjustment Act, 1937* (5). Of course, I do not quarrel with these very high authorities, but they would apply only if I thought that *Habeas Corpus* was a civil right, but I do not believe it is necessary to deal with this point in view of the conclusion which I have reached.

It has been held in many cases that *Habeas Corpus* is always a civil writ entirely independent of the proceedings at the trial, as a result of which a person is convicted. (*Le Roi* v. *Labrie* (6); *Léonard* v. *McCarthy*

(1) (1921) 62 Can. S.C.R. 424.
(2) [1924] A.C. 328, at 345.
(3) [1934] A.C. 45.
(4) [1938] A.C. 708, at 719.
(5) [1943] 1 W.W.R. 378, at 388.
(6) (1920) Q.R. 31 K.B. 47.

1945

In re STORGOFF

Taschereau J.

(1); *Regimbald* v. *Chong Chow* (2); *The King* v. *Morris* (3); *Ex parte Fong* (4)). In these cases it was held that *Habeas Corpus* was not a step in a criminal proceeding, but that it was an essentially new civil process.

In the United States, similar judgments were rendered, and the Supreme Court of the United States in the case of *Ex parte Tom Tong* (5), decided that the prosecution against the applicant was a criminal prosecution, but that the writ of *habeas corpus* which he had applied for was not a proceeding in that prosecution. Other American courts have reached the same conclusion. (*Kurtz* v. *Moffitt* (6); *Farnsworth* v. *Territory of Montana* (7)).

A different view was taken by other Canadian courts, and all these wide divergences of opinion give an indication of the difficulty which we have to meet. These judgments have held that *habeas corpus* proceedings may be either criminal or civil, depending on whether or not the detention of the person is based upon a crime. (*Vide King* v. *Barré* (8); *Veregin* v. *Smith* (9); *Miller* v. *Malepart* (10); *Perlman* v. *Piché* (11).

In *Rex* v. *McAdam* (12), the Court of Appeal of British Columbia, Mr. Justice Martin dissenting, decided that a writ of *habeas corpus* issued as a result of a criminal process, is a criminal proceeding. But the same court, in 1938, (*Ex parte Yuen Yick Jun* (13) reversed its own decision and decided that an *habeas corpus* was a proceeding for the enforcement of the civil right of personal liberty, and that the enquiry which it evokes is not into the criminal act, but into the right of the person in custody to his liberty notwithstanding the criminal act and conviction.

And finally, the late Chief Justice McDonald of the same court, in *Ex parte Lum Lin On* (14), expressing his personal views only, as the other members of the court did not pass on the point, considered the matter *de novo* in view of the House of Lords' decision in *Amand*

(1) (1926 Q.R. 42 K.B. 569, at 571:
(2) (1925) Q.R. 38 K.B. 440.
(3) (1920) 53 N.S. Rep. 525.
(4) [1929] 1 D.L.R. 223.
(5) (1883) 108 U.S. 556.
(6) (1885) 115 U.S. 487.
(7) (1889) 129 U.S. 104.
(8) (1905) 11 Can. Cr. Cas. 1.
(9) [1934] 1 W.W.R. 351.
(10) (1918) 32 Can. Cr. Cas. 208.
(11) (1918) Q.R. 54 S.C. 170.
(12) (1925) 35 B.C. Rep. 168.
(13) (1938) 54 B.C. Rep. 541.
(14) (1943) 59 B.C. Rep. 107.

v. *Home Secretary* (1), and said that *Habeas Corpus* is always a criminal remedy when used to question imprisonment on a criminal charge.

In reaching this last conclusion, the Chief Justice of British Columbia followed the recent decision of the House of Lords in *Amand* v. *Home Secretary* (1). The question raised in that case was whether the appeal from the Divisional Court to the Court of Appeal was an appeal from

a judgment of the High Court "in any criminal cause or matter" within the meaning of sec. 31 of the *Supreme Court of Judicature Act 1925.*

The House of Lords had to decide if the judgment of the Divisional Court refusing a writ of *habeas corpus* was a judgment in a "criminal cause or matter". The House held that it was, and that the Court of Appeal had no jurisdiction.

It was argued before this Court that when giving its decision, the House of Lords was dealing with a different statute and that the issue was not whether *habeas corpus* proceedings were in relation to a criminal matter, but whether the antecedent cause or matter was criminal.

In giving their decision, their Lordships dealt, in my opinion, with the very issue with which we are confronted. The English jurisprudence dealing with the nature of *habeas corpus* was reviewed by their Lordships who accepted the decision in *Ex parte Woodhall* (2) *and Ex parte Savarkar* (3). Viscount Simon expresses his views as follows in the *Amand* case (1), at page 156:—

This distinction between cases of *habeas corpus* in a criminal matter, and cases when the matter is not criminal, goes back very far. The *Habeas Corpus Act, 1679* (which improved the common-law remedy in various ways), applied only to cases where persons were detained in custody for some criminal matter. Similar statutory improvements in non-criminal cases were not made till the *Habeas Corpus Act, 1816.* The distinction is noteworthy, though in fact (as Blackstone, writing in 1768, points out (vol. III, p. 157)) in non criminal cases, the practice of judges, when granting writs of *habeas corpus* at common law, was to comply with the spirit of the Act of 1679. As regards the right to appeal, it has been consistently held that there is no right of appeal from the refusal of the writ in extradition proceedings * * * It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be "criminal" although he is not charged with a breach of our

(1) [1943] A.C. 147. (2) (1888) 20 Q.B.D. 832.
(3) [1910] 2 K.B. 1056.

1945

In re STORGOFF

Taschereau J.

own criminal law, and (in the case of the *Fugitive Offenders Act*), although the offence would not necessarily be a crime at all if committed here.

Although some aspects of the *Amand* case (1) may not altogether be similar to those submitted in the case at bar, their Lordships clearly laid down the principle that there was a difference between a writ of *habeas corpus* in criminal matters, and a writ of *habeas corpus* in civil matters. As Viscount Simon says at page 156:—

> It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.

Lord Wright expresses similar views at page 160:—

> The word "matter" does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word "cause". In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the *Allied Forces Act* and the order, and to deliver the appellant to the Dutch Military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter.

Lord Porter says at page 164:—

> As long ago as 1888 it was unsuccessfully argued in *Ex parte Woodhall* (2) that the decision, to be in a criminal cause or matter, must deal with what was a crime by English law and in the same case it was contended in vain that an application for *habeas corpus* was a separate proceeding from that which the magistrate dealt with in the case brought before him. That case has been consistently approved by the courts of this country, and, I think, at least once by your Lordships' House: see *Provincial Cinematograph Theatres, Ltd.* v. *Newcastle-on-Tyne Profiteering Committee* (3). The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought up before the magistrate in jeopardy of a criminal charge.

In view of this recent decision, and of the unequivocal language used by their Lordships, I believe it is settled law that *Habeas Corpus* is a procedural writ, and that it is not a new suit different from the one which has been

(1) [1943] A.C. 147. (2) (1888) 20 Q.B.D. 832.
(3) (1921) 90 L. J. (K.B.) 1064.

dealt with at the trial. It is not as contended, always a civil writ, the purpose of which is to enforce a civil right. In certain cases it is of a criminal nature, being a step in a criminal proceeding, and in other cases, when it is a step in a "civil cause or matter", it will have a civil character.

The judge, whose duty it is in a matter of *habeas corpus,* to examine if the magistrate who convicted had jurisdiction, or if the commitment is legal, does not of course sit as a court of appeal. But he must necessarily examine in one case, the legality of a detention in a criminal matter, the jurisdiction of the magistrate which is conferred upon him by the Criminal Code, and who is sitting in a criminal court; and in the other case, his investigation is in relation to a detention in a civil matter. The detention itself and the remedy available to have this detention enquired into, are so bound together, that it is, in my opinion, impossible to reach the conclusion, that they are of a different nature, that one could be criminal and the other civil. The proceedings that result in the conviction of a person may, of course, have some special peculiarities which are absent in the examination that is made of the legality of the detention, but these procedural variances do not mean that both have not the essential qualities which are necessary to give them the same fundamental character.

I believe that this decision in the *Amand* case (1) is in harmony and forms a consistent and orderly whole, with the various existing legislations in England, which have been imported in this country, and which have always distinguished between *habeas corpus* in criminal and civil matters. It would to my mind seem extraordinary, that the writ be always of a civil nature, as contended by the Attorney General of British Columbia, and yet, that the legislation dealing with it had made the distinctions which I have noted before.

In the present case, the applicant was convicted of a criminal offence under the Criminal Code of Canada, which is the necessary condition to give jurisdiction to this Court. On *habeas corpus* procedings, he was discharged from custody by Mr. Justice Coady, and ordered to serve his sen-

(1) [1943] A.C. 147.

1945

In re STORGOFF

Taschereau J.

tence of three years by the Court of Appeal of British Columbia. That court was dealing with a criminal matter, and as no right of appeal has been given by the Parliament of Canada, I come to the conclusion that this order must be set aside, and that the applicant should be released.

RAND J.—This appeal raises an important question of constitutional law. The applicant, Storgoff, was convicted in the Police Magistrate's Court of Vancouver, British Columbia, under Part XV of the Criminal Code, for being found nude in a public place in company with other persons, and was sentenced to three years in the penitentiary. A week or so later, on an application for a writ of *habeas corpus,* he was discharged by order of Coady J. on the ground that the magistrate had no jurisdiction to commit to the penitentiary for such an offence. The Attorney General appealed to the Court of Appeal which, holding the magistrate to have had jurisdiction, reversed the order of discharge and directed the rearrest and recommitment of the accused to serve out his sentence. An application for discharge on *habeas* is now made to this Court.

The appeal to the Court of Appeal was taken under section 6 (*d*) (vii) of the *Court of Appeal Act,* which is as follows:

> 6. An appeal shall lie to the Court of Appeal:—
>
> * * *
>
> (*d*) From every decision of the Supreme Court or a Judge thereof * * * in any of the following matters, or in any proceedings in connection with them, or any of them:—
>
> * * *
>
> (vii) *Habeas Corpus.*

And the question in controversy is whether that provision can be successfully invoked to support the order made in the appeal.

In this court the Attorney General for Canada intervened and took part in the argument. Both in British Columbia and in other provinces there has been a decided conflict of opinion as to whether provincial legislation in *habeas,* in relation to criminal matters, is competent. Mr. Farris, representing the Attorney General of British

Columbia, though he argued for the continued efficacy of the original commitment, conceded that he could not support the order for rearrest under the provincial legislation, an invalidity which might be sufficient to the appeal; but he pressed upon us the desirability of having the court pass upon the broader question of legislative jurisdiction, and in that Mr. Varcoe joined. This I think we should do, and having reached the conclusion that the order of the Court of Appeal was invalid *in toto*, I do not find it necessary to deal with the narrower ground. I should add that the able examination of the question by all counsel has made the task of reaching that conclusion much easier than otherwise it would have been.

As the matter presents itself, namely, a conviction for an offence in a proceeding under the criminal law of Canada and an application the purpose of which was to terminate the punishment imposed by reason of an illegality in that proceeding, the first impression that it lies within the field of criminal procedure accentuates the desirability that we have clearly in mind at the outset the conception of *habeas* in which this seemingly obvious conclusion is claimed to be unsound.

The case for the province is put thus: *habeas* creates a special right to be freed from illegal detention whether the detention is under process in law, civil or criminal, or by private act. It is an original and detached proceeding, set in motion by a prerogative writ, that stands apart from other proceedings the consequences of which it may affect. Not being linked to the cause of detention, it constitutes an independent enquiry in protection of a civil right as such, and by section 92 (13) of the *British North America Act*, the legislative power in relation to it has been committed to the exclusive jurisdiction of the province.

Undoubtedly the right to the writ, one of the most fundamental possessed by the citizen, is a civil right and extends to all illegal detention. Its beginnings are shrouded in the dim past, but that it was recognized and enforced at common law is unquestioned. It arose at a time when the individual was too often the victim of tyranny in public and private prisons and when the King

1945

In re STORGOFF

Rand J.

as the supreme lord might well be concerned about the fate of lieges. In 1679, to meet evasions and abuses that had grown up, the statute was passed with which the name of the writ is ordinarily associated but the procedure which it prescribed did not supersede that at common law with which it co-exists to-day. Its provisions dealt only with detention for certain crimes or alleged crimes; and it was not until 1816 that in England statutory provision supplemented the common law in relation to custody other than for crimes, debt or under process in a civil suit.

Section 92 (13) endows the province with exclusive power to make laws "in relation to * * * (13) property and civil rights in the province." "Civil rights" carries obviously the most general signification from which the several areas of specific and paramount legislation, by section 91 given to the Dominion, must be removed. It is necessary also to be precise in the concepts we attribute to it. We speak of a right in the individual to personal liberty, of a right to the issue of the writ of *habeas* and a right to be discharged from illegal detention. The basis for asserting freedom from restraint, whether conceived to be the creation of law or to be the result of an original absence of any warrant under law to interfere with liberty, is postulated as a primary right in the juridical system by which we are governed. In that sense, the positive law, in its relation to individual liberty, creates the justification for encroachments upon it. What is important here is the remedial civil right to protection against any other than those legal encroachments and the procedure by which it is enforced; and, within limits, that is what is furnished by the law of *habeas*. It is not, however, the abstract right to be free that is in question but the right to be free from the particular process.

The precise point for decision is, then, whether in the constitutional distribution of legislative power the law of *habeas* in cases of detention for crime is in relation to 91 (27) "the criminal law * * * including the procedure in criminal matters," or to 92 (13) "civil rights." It is no objection for the purposes of the former section merely that what is dealt with is a civil right. Criminal proceed-

ings abound with civil rights. Trial by jury is such a right but no one would suggest that in criminal matters it is not part of procedure or that it could be abolished by the province. The question of ancillary powers does not arise because parliament has not legislated for appeals on *habeas* nor for such features of it as would be inconsistent with appeals: and if the provincial legislation is not within the field of section 91 (27), there would not seem to be much doubt of the pith and substance of it or of the aspect in which it was enacted.

The nature of *habeas* and its relation to the proceedings in or by which the detention has been brought about are, therefore, the essential consideration of the enquiry. The question, is the detention legal? when asked of detention under the act of a court, goes to the sufficiency in law of the process. The decision in *habeas* is, therefore, a judicial determination of a question of law arising in or in relation to a criminal or a civil proceeding. In each instance it is a query of law put directly to steps in judicature. It is a question within the criminal or civil law and the court is asked to revise a judgment in that law. Certainly, then, the enquiry under the writ does, in a criminal case, relate to criminal law and procedure. Is the step itself within that procedure?

That the writ becomes in effect a step in, or takes on the character of, the cause or matter out of which the question to be determined arises, was, I think, established in *Ex parte Alice Woodhall* (1). In that case there was a commitment to prison under the *Extradition Act*. An application for a writ was refused. The applicant sought to appeal under section 47 of the *Judicature Act* which, giving a right to appeal generally, excepted an appeal "from any judgment of the High Court in any criminal cause or matter" and the question was whether the refusal was such a judgment. The Court of Appeal held that it was. Lord Esher uses this language:

> I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises. Applying that proposition here, was the decision of the Queen's Bench Division, refusing the

(1) (1888) 20 Q.B.D. 832.

1945

In re STORGOFF

Rand J.

application for a writ of *habeas corpus*, a decision by way of judicial determination of a question raised in or with regard to the proceedings before Sir James Ingham? I am clearly of opinion that it was, and I think it is impossible to say that what took place before him was not a proceeding the subject-matter of which was criminal.

Whether this treats the application for the writ as, in itself, the criminal proceeding by reason of its subject-matter being criminal, or as being "in" the proceeding below, i.e., in extradition, I shall consider later. Bowen L.J. adds:

> The questions, upon which the application for a writ of *habeas corpus* depends, are whether or not there was evidence before the magistrate of a crime, which would be a crime according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter; and it follows that the judgment given upon the application for a writ of *habeas corpus* is a judgment in a criminal matter.

In that case, as here, it was argued that the application was collateral and civil, but the fact that the judgment dealt with the refusal as in the criminal matter below, is referred to in *Amand* v. *Home Secretary* (1) by Lord Porter in his speech:

> As long ago as 1888 it was unsuccessfully argued in *Ex parte Woodhall* (2) that the decision, to be in a criminal cause or matter, must deal with what was a crime by English law and in the same case it was contended in vain that an application for habeas corpus was a separate proceeding from that which the magistrate dealt with in the case brought before him.

And Lord Wright expresses the same view:

> The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for habeas corpus may or may not be in a criminal cause or matter.

The sole controversy in that case was whether or not the cause or matter below was in fact criminal: it was assumed that the order refusing the writ was in it: and the language of the opinions makes it clear that the "criminal cause or matter" was the proceeding in which it was sought to hold the applicant subject to the Dutch military law. Lord Simon L.C.:

> It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be "criminal" although he is not charged with a breach of

(1) [1943] A.C. 147. (2) (1888) 20 Q.B.D. 832.

our own criminal law, and * * * although the offence would not necessarily be a crime at all if committed here. It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test.

Then Lord Wright:

The words "cause or matter" are, in my opinion, apt to include any form of proceeding. The word "matter" does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word "cause". In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the *Allied Forces Act* and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter.

And Lord Porter's language has already been quoted.

On the other hand, in *Clifford and O'Sullivan* (1), Lord Sumner, who dissented on the point whether the cause or matter was criminal, seems to take the view suggested by the language of Lord Esher in *Ex parte Alice Woodhall* (2):

My Lords, the question on the preliminary objection is whether the appeal, taken to the Court of Appeal in Ireland, was in a cause or matter which was criminal, or was in one which was not criminal, the "matter" being in either case the decision of Powell, J., to refuse the writ of prohibition.

* * *

An application for a writ of prohibition is in itself no more and no less criminal than it is the contrary. This quality of the matter of an application for that writ must be decided according to the subject-matter dealt with on the application.

* * *

I think the real test is the character of the proceedings themselves which are the subject-matter of the particular application, whatever it be, that constitutes the cause or matter referred to.

In *Rex* v. *Nat Bell Liquors Ltd.* (3), he had used this language:

Certiorari and prohibition are matters of procedure and all the procedural incidents of this charge (i.e., the charge in the original court) are the same whether or not, etc.,

which seems to imply that *habeas* should be taken as a procedural incident of the original proceeding.

But whether we take the concept to be that the application for the writ is a step in that proceeding, the character of which, whether criminal or civil, must be determined as in the *Amand* case (4), or that the appli-

(1) [1921] 2 A.C. 570.
(2) (1888) 20 Q.B.D. 832.
(3) [1922] 2 A.C. 128, at 168.
(4) [1943] A.C. 147.

1945

In re STORGOFF

Rand J.

cation is itself the cause or matter, the character of which in turn is to be taken from the proceeding below, which becomes the subject-matter of the application, is of no materiality for our purposes. In either case there is criminal procedure concerned with the same subject-matter.

It is of interest that on this subject we have an observation of a great legal historian, Maitland, who, in his Constitutional History of England, at page 538, uses this strikingly apposite language:

> A modern code-maker would very possibly not put the provisions of the *Habeas Corpus Act* into that part of the code which dealt with constitutional law—he would keep it for the part which dealt with criminal procedure—still we can see that the history of the writ is very truly part of the history of our constitution.

And in Bacon's Abr. vol. 4, p. 114:

> It is also in regard to the subject deemed his writ of right, that is, such an one as he is entitled to ex debito justitiae, and is in the nature of a writ of error to examine the legality of the commitment.

The same language is used by Hale C.J. in *Bushel's* Case (1):

> For a *certiorari* and an *habeas corpus,* whereby the body and proceedings are removed hither, are in the nature of a writ of error.

And in *Ex parte Bollman* and *Swartwout* (2), *Marshall* C.J.:

> The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus,* and this writ must always be for the purpose of revising that decision, and, therefore, appellate in its nature.

Habeas in this conception is an additional procedure akin to appeal or error by which restraints upon personal liberty must, under the law, be justified; and it takes its character from the proceeding into which it is introduced or which becomes its subject-matter.

Undoubtedly the interpretation of a provision for appeal in the *Judicature Act,* as in *Ex parte Woodhall* (3), is a different matter from that before us, but we are in fact dealing with a question of the scope of similar language in relation to the same procedure. "Criminal cause or matter" under the *Judicature Act* is given by the courts of England the broadest scope, just as "criminal law * * * including procedure in criminal matters" is

(1) (1674) 86 E.R. 777.
(2) (1807) 4 Cranch 75, at 101.
(3) (1888) 20 Q.B.D. 832.

interpreted as "criminal law in its widest sense": *Attorney General for Ontario* v. *Hamilton Street Railway Co.* (1). In the unitary legislation of Britain it is a question of the distribution of legislative subject-matter for the purposes of judicial action; under the federal scheme of the Dominion, it is one of distribution for the purposes of legislative action. Under section 47 the judgment of refusal must be "in a criminal cause or matter": under section 91 (27) the law of *habeas* must be "in relation to * * * procedure in criminal matters."

The exclusive power, then, to legislate

in relation to * * * the criminal law * * * including the procedure in criminal matters,

subject to section 92 (15), must, I think, extend to a procedural step "in a criminal cause or matter" of the nature of *habeas*. It follows that legislation in relation to the law of *habeas* in respect of criminal matters over which the Dominion has jurisdiction, must be deemed to be within the language of section 91 (27) and excluded from section 92 (13).

The soundness of this construction is supported by a consideration of the results which would follow from the contrary view. In the proceeding with which we are dealing, admittedly the order of rearrest is incompetent to the provincial legislature because it is a step in criminal procedure; but without that ancillary power, a declaratory jurisdiction would appear to be futile: *Cox* v. *Hakes* (2). Then, if each province could set up its own procedural machinery, I see no reason why it could not go further and enlarge the scope of enquiry. It might, for instance, permit the return to be traversed as does the Act of 1816, or an examination into matters dehors the commitment or judgment. The present limitations of the procedure do not follow necessarily from the general subject. There is nothing in the principle of a direct, immediate and summary challenge to detention to confine the examination by the court to the appearance of legality which the record on its face may present. But in any enlargement of that sort, the character of "criminal procedure" in the steps becomes self-evident: and at once it collides with grounds of appeal or error. *A*

(1) [1903] A.C. 524. (2) (1890) 15 App. Cas. 506.

1945

In re STORGOFF

Rand J.

fortiori would the interference with that law and procedure be apparent in the abolition or suspension of the writ by the province. These considerations demonstrate the incompatibility between jurisdiction over criminal law and procedure, on the one hand, and an independent civil jurisdiction over *habeas* even within its present limitations, on the other.

The *Court of Appeal Act* should not, therefore, be interpreted as applying to *habeas* in criminal matters within section 91 (27). The application should be allowed and the prisoner discharged.

KELLOCK J.—If the principle of the decision of the House of Lords in *Amand* v. *Home Secretary* (1) is applicable, as in my opinion it is, the question arising in the case at bar is concluded and the motion must succeed. The contention of the Attorney General for British Columbia is that the decision in *Amand's* case (1) is confined merely to the construction of an English statute and has no application to a question arising under the *British North America Act*. It is quite true that the decision referred to does arise under the *Supreme Court of Judicature (Consolidation) Act 1925*, but the question is, does it involve any principle pertinent to the decision of the case at bar. Before considering *Amand's* case (1), I desire to refer to some earlier authorities.

In *Clifford and O'Sullivan* (2) Lord Sumner in the course of his dissenting judgment said at page 586:

> An application for a writ of prohibition is in itself no more and no less criminal than it is the contrary. This quality of the matter of an application for that writ must be decided according to the subject matter dealt with on the application. The same is true of *certiorari* (*Regina* v. *Fletcher* (3), and *habeas corpus* (*Ex parte Woodhall* (4),.

The fact that Lord Sumner's judgment is a dissenting judgment is not here of importance. It is true that the question before the House was whether or not an appeal lay from the Court of Appeal in Ireland under legislation similar to that in question in *Amand's* case (1), but Lord Sumner in the passage cited is considering the basic nature of prohibition and of *habeas corpus*.

(1) [1943] A.C. 147.
(2) [1921] 2 A.C. 570.
(3) (1876) 2 Q.B.D. 43.
(4) (1888) 20 Q.B.D. 832.

In *Regina* v. *Fletcher* (1), the question involved was whether an appeal lay under legislation, the predecessor of that in question in *Amand's* case (2), from a decision of the Queen's Bench Division discharging a rule nisi for a *certiorari* to bring up a conviction in a criminal case for the purpose of quashing it for lack of jurisdiction. In the course of his judgment, Mellish L.J. said at page 45:

> This was a conviction for an offence under the criminal law, and although not commenced in the Queen's Bench Division, the proceeding in that Court, in order to obtain a *certiorari*, was a matter which was clearly criminal before the justices. If there is an appeal at all, it must be for both sides. Suppose the rule had been made absolute for a *certiorari* and a rule had also been made absolute to quash the conviction, surely the latter would have been a judgment in a criminal proceeding, and I can see no difference between an appeal from a rule to quash and an appeal from discharging a rule for a *certiorari*.

Brett L.J., as he then was, at page 46 said:

> There had been a conviction in a criminal matter by justices and a motion in the Queen's Bench Division for a *certiorari* for the purpose of determining whether that conviction is good or ought to be quashed; and the Queen's Bench has determined by discharging the rule for a *certiorari* that the conviction ought to stand; in other words, the Court has affirmed the conviction. If that is not a proceeding in a criminal matter, I am at a loss to see what is. It is in effect a judgment or decision on the question whether a man shall be fined or imprisoned or not.

Amphlett L.J., page 47, said:

> It is argued that this is really a civil proceeding for protecting the civil rights of a person who has a *bona fide* claim to the right of shooting. But that is not so; in substance as well as form, it is a criminal proceeding. If the man makes out *prima facie* that he is setting up a *bona fide* claim of right, the justices ought to hold their hands, and if they proceed to hear and convict notwithstanding, the Queen's Bench Division will grant a *certiorari*, even if *certiorari* is taken away in the particular case, because it is for the purpose of preventing the justices from proceeding without jurisdiction; and when it comes before the Court, the purpose is not to determine the civil right, but to determine whether or not the Magistrates had jurisdiction, or whether, as it were, the plea to the jurisdiction was a valid plea. It is, therefore, a proceeding in a criminal matter to determine whether the conviction can be sustained; and consequently there is no appeal.

In my opinion, all the members of the Court approach the matter first from the standpoint of the situation with regard to the nature of *certiorari* as it was understood before the *Judicature Acts* were passed, and they determine that its nature depends upon the character of the

(1) (1876) 2 Q.B.D. 43. (2) [1943] A.C. 147.

1945

In re STORGOFF

Kellock J.

earlier proceedings to which the proceeding by way of *certiorari* is directed. The same argument made in the case at bar with respect to the nature of *habeas corpus,* was made in *Fletcher's* case (1) with respect to *certiorari,* and rejected. This is clear from the above extract from the judgment of Amphlett L.J.

In *Ex parte Alice Woodhall* (2), the Court of Appeal had to consider the competence of an appeal from a decision of the Queen's Bench Division, refusing to grant an order nisi for the issue of a writ of *habeas corpus,* where the appellant had been brought before a Magistrate charged under the provisions of the *Extradition Act* as a fugitive criminal accused of having committed forgery in New York. It was argued on her behalf that an application for a writ of *habeas corpus* was not a criminal cause or matter within the meaning of section 47 of the *Judicature Acts,* but that such an application was a *collateral matter* not necessarily having reference to any criminal proceeding. In his judgment, Lord Esher M. R. referred to *Regina* v. *Fletcher* (1), as the case which furnished the most help in construing that section. He referred to portions of the judgments of Mellish L.J. and himself in that case, and then said that in order to make his meaning in the earlier case clear, section 47 applied to a decision by way of judicial determination of any question

raised in or with regard to proceedings, the subject matter of which is criminal, at whatever stage of the proceedings the question arises.

Applying that test, he held that the decision of the Queen's Bench Division refusing the application for the writ of *habeas corpus* was a decision by way of judicial determination of a question raised in or with regard to the proceedings before the magistrate, and consequently, there was no appeal.

It may be said that this judgment of Lord Esher is limited to mere construction of the language of the statute before him and that he employed language in paraphrasing that statute which is similar to the language employed in section 36 of the *Supreme Court Act*—

(except in criminal cases * * * for or upon a writ of *habeas corpus.* * * * arising out of a criminal charge),

(1) (1876) 2 Q.B.D. 43. (2) (1888) 20 Q.B.D. 832.

which is not to be found in section 91 (27) of the *British North America Act* and that therefore, his judgment can have no application to the last mentioned Act. It is to be observed, however, as already pointed out, that Lord Esher founds himself upon *Regina* v. *Fletcher* (1) and that in using the language which he did, he is expressing the effect of the decision in that case based as, in my opinion, it was based, upon a consideration of the nature of *certiorari* before the *Judicature Acts* were passed.

Lindley L.J., at page 836, said:

> Can we say that the application in the present case is not an application in a criminal cause or matter? I think that in substance it certainly is. Its whole object is to enable the person in custody to escape being sent for trial in America upon a charge of forgery.

Bowen L.J., at 838, said:

> The magistrate is charged with the duty of considering upon the evidence before him, whether that evidence is sufficient, according to English law, to justify the committal for trial of the accused person. How can the matter be other than criminal from first to last? It is a matter to be dealt with from first to last by persons conversant with criminal law and competent to decide what is sufficient evidence to justify a committal. The questions upon which the application for a writ of *habeas corpus* depend are wether or not there was evidence before the magistrate of a crime which would be a crime, according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter; and it follows that the judgment given upon the application for a writ of *habeas corpus* is a judgment in a criminal matter.

In my opinion, the substratum of the judgments in this case, as in *Regina* v. *Fletcher* (1) with respect to *certiorari,* is that the proceeding by way of *habeas corpus* with relation to a criminal charge is in substance criminal and was so regarded, long prior to the *Judicature Act* of 1873. That Act, and the same may be said of later *Judicature Acts,* was intended to change procedure in criminal cases: *Regina* v. *Fletcher* (1), referred to by Lord Wright in *Amand's* case (2) at p. 161.

Certiorari, prohibition and *habeas corpus,* are matters of procedure; Lord Sumner in *The King* v. *Nat Bell Liquors Limited* (3); Lord Wright in *Amand's* case (2)

(1) (1876) 2 Q.B.D. 43, at 44. (2) [1943] A.C. 147.
(3) [1922] 2 A.C. 128, at 168.

1945

In re STORGOFF

Kellock J.

at p. 160; Lord Dunedin in *The King* v. *Halliday* (1). So far as concerns the question which arises in the case at bar, proceedings by way of *certiorari,* prohibition and *habeas corpus* are comparable.

It is from this standpoint, therefore, that *Amand's* case (2) is to be approached. Were *habeas corpus ad subjiciendum* always and under all circumstances a civil proceeding, I do not think that the *Amand* case (2) nor the earlier decisions of which it approves could have been decided as they have been. In my opinion, all these authorities are based on the view that *habeas corpus,* being procedural, partakes of the nature of the earlier proceeding, as a result of which it has been invoked, and that this view of its nature is not dependant upon anything enacted in England by the *Judicature Acts* but was well recognized long before their enactment.

The fact that in Canada the field of legislation is divided between Parliament and the provincial legislatures by virtue of the provisions of the *British North America Act,* does not render the principle of the above decisions inapplicable in the present case. The result of the division of legislative power may reduce the area in which proceedings by way of *habeas corpus* are to be considered as falling within Dominion jurisdiction, but it has no other effect. I agree, therefore, with the conclusion that section 6 of the *Court of Appeal Act,* if it can be said to authorize, in such a case as the present, an appeal by the Crown from an order granting the writ, is *ultra vires.* The application to Coady J. was in a criminal proceeding and it was, therefore, a matter for legislative purposes, within section 91 (27) of the B.N.A. Act, from which the provincial legislature is excluded.

With respect to the decisions in the Supreme Court of the United States to which we were referred, it is sufficient to say that as they are at variance with the decision of the House of Lords in *Amand's* case (2), they cannot be regarded as authorities.

It follows that Storgoff must be discharged.

(4) [1917] A.C. 260, at 295. (2) [1943] A.C. 147.

1945

In re STORGOFF

Estey J.

ESTEY J.—This appeal raises an important question with respect to the position of the prerogative writ of *habeas corpus ad subjiciendum,* or, as often referred to, the writ of *habeas corpus* in Canadian jurisprudence.

The accused, Fred Storgoff, was found guilty by a magistrate in the city of Vancouver on the 8th of May, 1944, for an offence contrary to section 205A of the Criminal Code and sentenced to imprisonment for three years in the penitentiary. On June 30th, 1944, the Honourable Mr. Justice Coady, a judge of the Supreme Court of British Columbia, upon an application for a writ of *habeas corpus* released the accused Fred Storgoff from custody.

The Crown appealed to the Court of Appeal for British Columbia, and on the 18th of July, 1944, that Court reversed the order of the Honourable Mr. Justice Coady and ordered a re-arrest of Storgoff.

The appeal to the Court of Appeal was taken under the *Court of Appeal Act* for British Columbia, being chap. 57, R.S. B.C. 1936, which reads in part as follows:

6. * * * an appeal shall lie to the Court of Appeal:—

* * *

(*d*) From every decision of the Supreme Court or a Judge thereof, or of any County Court or County Court Judge, in any of the following matters, or in any proceeding in connection with them, or any of them:—

* * *

(vii) *Habeas Corpus*:

* * *; and in cases of *habeas corpus* in which the Crown is the successful appellant the Court of Appeal may make such order as it may see fit concerning the re-arrest of the accused person:

This is an application under sec. 57 of the *Supreme Court Act,* chap. 35, R.S.C. 1927, that a writ of *habeas corpus* be issued releasing the accused from custody under the order directed by the Court of Appeal. The application came before the Honourable Mr. Justice Hudson, who, because of the importance of the question, referred it to the full Court.

The respective contentions are that as the accused was convicted for an offence contrary to the Criminal Code, (legislation within the exclusive jurisdiction of the Dominion Parliament, B.N.A. Act, sec. 91 (27)), the province cannot legislative with respect thereto, and therefore the foregoing sec. 6 (*d*) (vii) is *ultra vires* of the

1945

In re STORGOFF

Estey J.

province of British Columbia and the order of the Court of Appeal made thereunder a nullity: On the other hand, that the writ of *habeas corpus* is not issued in respect of criminal law or criminal procedure, but is a prerogative writ for the protection of personal liberty. Personal liberty is itself a civil right and comes under the B.N.A. Act, sec. 92 (13) and is therefore subject to provincial jurisdiction: That the above sec. 6 (*d*) (vii) was passed under these provisions and is valid provincial legislation.

In the result the issue is restricted to the competency of the British Columbia legislature to pass sec. 6 (*d*) (vii) above quoted. In this case the answer is dependent upon the position of the writ of *habeas corpus* in our jurisprudence.

We in Canada adopted the writ of *habeas corpus* from the common law of England. In British Columbia, the province with which we are immediately concerned, it is provided (*English Law Act,* R.S.B.C. 1936, chap. 88, sec. 2; Criminal Code of Canada, R.S.C. 1927, chap. 36, sec. 2) that the civil and criminal laws of England, as of the 19th day of November, 1858, shall be in force throughout British Columbia, except as they may be modified as provided in the foregoing *English Law Act* and the Criminal Code.

In modern times the position of the writ of *habeas corpus* in the common law has been discussed in *Ex parte Woodhall* (1); *Cox* v. *Hakes* (2); *Secretary of State for Home Affairs* v. *O'Brien* (3); *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* (4). These authorities establish the character and nature of the writ and its position, not only in the common law, but under the various statutes passed from time to time, and in particular the *Habeas Corpus Act,* 1679 and the *Habeas Corpus Act,* 1816. The following quotations describe the writ:

> It is a remedial mandatory writ by which the King's supreme court of justice, and the judges of that court, at the instance of a subject aggrieved commands the production of that subject, and inquires after the cause of his imprisonment. Lord Eldon, *Crowley's* Case (5).

(1) (1888) 20 Q.B.D. 832.
(2) (1890) 15 App. Cas. 506.
(3) [1923] A.C. 603.
(4) [1943] A.C. 147.
(5) (1818) 2 Swan. 1, at 61.

It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. Earl of Birkenhead, *Secretary of State for Home Affairs* v. *O'Brien* (1), at 609.

It was not a proceeding in a suit, but was a summary application by the person detained. No other party to the proceeding was necessarily before, or represented before the judge except the person detaining, and that person only because he had the custody of the applicant and was bound to bring him before the judge to explain and justify, if he could, the fact of imprisonment. Lord Halsbury L.C., *Cox* v. *Hakes*, (2).

The remedy by *habeas corpus* is equally available in criminal and civil cases, provided that there is a deprivation of personal liberty without legal justification. 9 Halsbury, page 713, par. 1214.

The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction, in *habeas corpus*. 9 Halsbury, page 702, par. 1201.

The authorities establish that the writ of *habeas corpus* is available to any subject detained or imprisoned, not to hear and determine the case upon the evidence, but to immediately and in a summary way test the validity of his detention or imprisonment. It matters not whether the basis for the detention or imprisonment be criminal or civil law: That the applicant may go from judge to judge renewing his application, and once he finds a judge who grants his application, at common law that concludes the matter as no appeal is provided. Appeals in matters of *habeas corpus* have been and are statutory.

The most recent description of the writ in the common law is that of Lord Wright in *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government* (1):

> The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter.

The writ of *habeas corpus* is therefore a matter of procedural or adjective law rather than that of substantive law as this division has been developed in the common law of England. Salmond Jurisprudence, 8th ed., pages 496 and 498; Dicey's Conflict of Laws, 4th ed., page 798.

The problem here presented arises because of the division of legislative powers between the Dominion Parliament and the Provincial Legislatures, and specifically in

(1) [1923] A.C. 603.

(2) (1890) 15 App. Cas. 506, at 515.

1945

In re STORGOFF

Estey J.

this case because the Dominion Parliament only can legislate with respect to criminal law, and the Provincial Legislature with respect to civil rights.

An examination of the provisions of the B.N.A. Act indicates that the division into substantive and procedural or adjective law as developed in the common law is continued in that Act. In this regard sec. 92 (13) deals with the substantive law of property and civil rights, whereas sec. 92 (14) deals with procedural rights in civil matters. These sections read as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—
>
> 13. Property and Civil Rights in the Province.
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

Moreover, the same distinction appears in sec. 91 (27) where the language is "criminal law * * * including procedure in criminal matters." There the substantive right and procedural right are recognized, and it is specifically provided that they are both included in the phrase "criminal law" as it is used in that section.

Lord Wright's description of the writ of *habeas corpus* as a procedural writ appears to fit logically into the scheme of the B.N.A. Act. It is part of the "machinery of justice" contemplated by the provisions of that Act. This does not mean that the test expressly adopted in the *Amand* case (1) under the Imperial Statute is necessarily applicable to the determination of questions that may arise under our law, either dominion or provincial, but only that the writ is a matter of procedure.

The conclusion that the writ of *habeas corpus* is a procedural writ in our jurisprudence does not dispose of the question presented in this case. It is here contended, as above set out, that personal liberty is a civil right under sec. 92 (13), and because the province has a right to legislate with respect to the procedure in civil matters under sec. 92 (14), the province has jurisdiction to legislate with respect to the writ of *habeas corpus*.

(1) [1943] A.C. 147.

The question is, what are proceedings in relation to civil rights, and what are proceedings in relation to the provisions under sec. 91, or more particularly in this case under sec. 91 (27) "criminal law * * *"

In this Court counsel for the province of British Columbia submitted that section 6 (*d*) (vii) was valid in its application to this case because it applied

to an appeal from an order in a *Habeas Corpus* proceeding, releasing a prisoner from custody on a warrant of commitment on a conviction for a criminal offence on the ground that the magistrate had no jurisdiction to issue the warrant; and that as such the section was within the competence of the legislature as being in relation to a matter within the class of subject Property and Civil Rights in the Province and was not legislation in relation to Criminal Law and Procedure.

The basis for this contention "that the magistrate had no jurisdiction to issue the warrant," was that he, as magistrate, had jurisdiction to issue a warrant committing the accused to the common jail, but not, as he did, to the penitentiary.

The judge who heard the application so decided the case, and the accused was released; his decision was reversed in the Court of Appeal. In arriving at their decision, the learned judges considered provisions of the Criminal Code, the *Penitentiary Act,* as well as reported decisions upon the criminal law.

It is conceded that it was a criminal proceeding before the magistrate when the accused was found guilty under 205A of the Criminal Code. The language of Lord Esher is appropriate:

If the proceeding before the magistrate was a proceeding the subject-matter of which was criminal, then the application in the Queen's Bench Division for the issue of a writ of *habeas corpus,* which if issued would enable the applicant to escape from the consequences of the proceeding before the magistrate, was a proceeding the subject-matter of which was criminal. *Ex parte Woodhall* (1).

It is also important to note the words of Lord Wright in the *Amand* case (2) at p. 160:

The cause or matter in question was the application to the court to exercise its powers under the *Allied Forces Act* and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals

(1) (1888) 20 Q.B.D. 832, at 836.

(2) [1943] A.C. 147.

1945

In re STORGOFF

Estey J.

with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter.

Amand v. *Home Secretary and Minister of Royal Netherlands Government* (1).

The foregoing indicate that in England it is the law invoked in the original proceedings under which the applicant is placed in custody which determines the character of the proceedings throughout.

Under our law the authorities indicate that it is the provisions of the statute or law under which the accused is charged which determines the character of the proceedings. Even where the offence charged is under a provincial statute the proceedings may be criminal in character, within sec. 1024 of the Criminal Code and sec. 36 of the *Supreme Court Act,* but this conclusion is arrived at by an examination of the statute or law out of which the proceedings arise or upon which they are based. *The King and Nat Bell Liquors Ltd.* (2); *Nadan and The King* (3); *Chung Chuck and The King* (4).

The King and Nat Bell Liquors Ltd. (2) illustrates this point and indicates some of the complications that develop under the B.N.A. Act. There, upon an application for a writ of *certiorari,* proceedings under the *Liquor Act, 1916,* of the province of Alberta, were held to be criminal within the meaning of sec. 36 of the *Supreme Court Act.* Then in passing, with respect to the writs of *certiorari* and prohibition, also prerogative writs, the Privy Council, at page 168, stated:

> *Certiorari* and prohibition are matters of procedure and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion Legislature under section 91 (27).

There is also the case of *Chung Chuck* v. *The King* (4), which was an appeal from the Courts of British Columbia to the Privy Council. Chung Chuck was convicted for an offence contrary to the British Columbia *Produce Marketing Act* (Statute of B.C. 1926-27, chap. 54) and amendments thereto. After conviction he applied by way of *habeas corpus* and *certiorari* for discharge on the basis that

(1) [1943] A.C. 147.
(2) [1922] 2 A.C. 128; 2 Cam. 272.
(3) [1926] A.C. 482; 2 Cam. 400.
(4) [1930] A.C. 244.

the *Produce Marketing Act* was *ultra vires* province of British Columbia. It was held in the Privy Council that upon a construction of the *Produce Marketing Act* this was a criminal matter within sec. 1025, now sec. 1024, of the Criminal Code. Upon this point the Privy Council followed its decision in *Nadan* v. *The King* (1).

These cases indicate the basis of the decision upon related questions brought before the Courts by way of prerogative writs and indicate to some extent the limits of the legislative power of the dominion and of the provinces. The Privy Council here points out that under the division of legislative powers by the B.N.A. Act, a matter within the competence of the Provincial Legislature may be criminal law within the meaning of the Dominion legislation with respect to appeals to the Supreme Court of Canada and the Privy Council.

This illustrates again what was said in *Hodge and The Queen* (2):

> * * * that subjects which, in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

It also provides an example of that relationship which exists between the substantive and procedural law as indicated by Chief Justice Cockburn:

> And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law, and to the end of justice, is as much part of the law as the substantive law itself. *Martin* v. *Mackonochie* (3).

It appears from all of the relevant provisions of the B.N.A. Act, particularly sec. 91, 92 and 101, that it was intended that the Dominion, within its field, and the provinces, within their fields, should have authority to determine the procedure that shall obtain with respect to the enforcement and the determination of rights under any laws which might be enacted by the respective legislative bodies. Sir Lyman Duff C.J., *In re "An Act to Amend the Supreme Court Act"* (4) in referring to sec. 101 of the B.N.A. Act stated:

> I now come to section 101. That section has two branches, one which deals with a general court of appeal for Canada, while the other relates to the establishment of additional courts for the better admin-

(1) [1926] A.C. 482.
(2) (1883) 9 App. Cas. 127, at 130; 1 Cam. 333, at 344.
(3) (1878) 3 Q.B.D. 730, at 775.
(4) [1940] S.C.R. 49, at 61.

1945

In re STORGOFF

Estey J.

istration of the laws of Canada. The phrase "laws of Canada" here embraces any law "in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion". (*Consolidated Distilleries* v. *The King* (1)).

It may be added that it has been held to give authority to Parliament in relation to the jurisdiction of provincial courts; and to impose on such courts judicial duties in respect of matters within the exclusive competence of Parliament; insolvency (*Cushing and Dupuy* (2); in election petitions (*Valin and Langlois* (3)).

Then also, *Cushing and Dupuy* (2) establishes that with respect to legislation competently passed by the Dominion Parliament under one of the clauses of sec. 91, it is the procedure as determined by the Dominion Parliament which obtains and is paramount to any procedure that might be applied with respect thereto as passed by a Provincial Legislature. In that case the Parliament of Canada had passed "an Act respecting Insolvency", (38 Vict. chap. 16) and set forth provisions for an appeal which "shall be final". The final court of appeal in the province of Quebec under that provision was the Court of Queen's Bench. At the same time, there existed a procedure for appeals to the courts in that province, to this Court and to the Privy Council with respect to civil rights. It was there decided that the Dominion Parliament had the jurisdiction to enact provisions for appeal under the *Insolvency Act* which should obtain, notwithstanding the provisions for appeal in matters respecting civil rights.

It is important in regard to all of these questions to observe the basic distinction between civil rights and public wrongs:

> The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this—that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity. 4 Bl. Comm. p. 5. *In re McNutt* (4).

And again, Blackstone states:

> To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty by rendering its protection impos-

(1) [1933] A.C. 508, at 522.
(2) (1880) 5 App. Cas. 409; 1 Cam. 253.
(3) (1879) 5 App. Cas. 115, at 119, 120.
(4) (1912) 47 Can. S.C.R. 259.

sible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. 3 Blackstone 134.

No one would minimize either the right or the dignity of personal liberty. It is a fundamental right of English jurisprudence, but it is subject to that larger or paramount public right or authority which assures to the individual his personal liberty and freedom. The people through Parliament fix these limitations, more particularly through the enactment of prohibitory, penal and criminal laws. It is through these parliamentary enactments in the language of Blackstone we clearly define

the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful.

It is equally a fundamental right throughout our law that both in the administration of criminal and civil law every opportunity is given for the taking of all proper objections and a due presentation of every contention that either party may care to raise. The writ of *habeas corpus* provides one procedure for submitting contentions with respect to the legality of the detention or imprisonment imposed by legislative enactments in relation to public wrongs. It is upon such an application, the competency of the legislation and the compliance with all the requirements imposed by that legislation before the detention or imprisonment can be legally imposed, which are inquired into.

Upon an application for a writ of *habeas corpus* questions of law only are decided. It is not a hearing or a trial at which the evidence is heard and decision made thereon. It is the legality of the applicant's detention that is in issue. The question raised may be as to jurisdiction of the justice of the peace, magistrate or presiding judge; the constitutionality or the interpretation of the law upon which the proceedings are based; the sufficiency of the information or complaint, conviction or order of commitment. It may also be a question as to the adequacy of the service of process, notice or step required. This is not a complete enumeration, but they do indicate the type of questions that are determined upon these applications.

1945

In re STORGOFF

Estey J.

The determination of these questions is made not upon the law with respect to personal liberty, but upon the provisions of the law or the constitutionality of a law upon which the proceedings are based, or out of which they arise. If the applicant is successful, his liberty is restored, but if unsuccessful, his liberty has been legally interfered with and he remains in custody. The result does not determine the nature of the proceedings. The fact that an accused is found not guilty and discharged when tried upon indictment, or discharged upon an application to quash an indictment under sec. 898 of the Criminal Code, does not make the proceedings civil. They are criminal proceedings regardless of the outcome. The nature and character of the proceeding in an application for the writ of *habeas corpus* is not determined by the result, but rather by the law upon which the proceedings are based, or out of which they arise. If it is a section of the Criminal Code or a law that is competent criminal law, then the procedure by way of *habeas corpus* is a criminal proceeding. It is criminal procedure, and as such is subject to the legislation of the Dominion Parliament, except only insofar as the provinces may legislate with respect thereto, and even then the Dominion legislation with respect to appeals may apply. *Attorney General of Manitoba and Manitoba License Holders' Association* (1); *Canadian Pacific Wine Co. Ltd.* v. *Tuley* (2); *The King and Nat Bell Liquors Ltd.* (3); *Chung Chuck and The King* (4).

The Storgoff case is a splendid illustration of the foregoing. Mr. Justice Coady, upon an application for a writ of *habeas corpus*, released the accused from custody and from the consequences of the criminal proceedings before the magistrate.

Then an appeal was taken on behalf of Storgoff under the above quoted section 6 (*d*) (vii) in these *habeas corpus* proceedings.

The appeal so taken on behalf of the Crown was for the express purpose of reversing the order of Mr. Justice Coady, and for the re-arrest and putting Storgoff back

(1) [1902] A.C. 73; 1 Cam. 574.
(2) [1921] 2 A.C. 417; 2 Cam. 238.
(3) [1922] 2 A.C. 128; 2 Cam. 272.
(4) [1930] A.C. 244.

into custody, not under any law with respect to civil rights, but under, and by virtue of, the provisions of the criminal law. Yet, it was the same proceeding throughout. It was the same law that was invoked and adjudicated upon throughout the proceedings. That law was criminal in character within the exclusive jurisdiction of the Dominion Parliament, and in my opinion, the proceeding by way of the writ of *habeas corpus,* arising out of the prosecution based thereon, was a criminal proceeding.

In this case the appellate court, in my view, was acting without authority, but it would be otherwise and the same reasoning would apply, in respect to the same proceeding arising out of, or based on, competent provincial legislation.

The able presentation and exhaustive review of the authorities by all of counsel have been of greatest assistance in consideration of this important question. A study of the decisions throughout Canada indicates a difference of judicial opinion. I have carefully considered the reasons advanced, and have arrived at my conclusion with the greatest deference to the learned judges who hold a contrary view.

In my opinion the application made on behalf of Storgoff before the Honourable Mr. Justice Coady was a matter of criminal procedure, and so far as the foregoing section 6 (*d*) (vii) purports to legislate with respect to criminal law and procedure, it is beyond the competence of the Provincial Legislature. Therefore, there was no appeal from the order directed by Mr. Justice Coady, and consequently this application should be granted.

1945
*May 21
*June 20

ATTORNEY GENERAL OF QUEBEC (PLAINTIFF) ..... APPELLANT;

AND

ATTORNEY GENERAL OF CANADA (INTERVENANT) ..... RESPONDENT.

Constitutional law—Criminal law—Fees on proceedings before Justices under Part XV of the Criminal Code—Tariff enacted by section 770 Cr. C.—Validity—Intra vires—Ancillary power of the Dominion—Fees also payable under tariff enacted by provincial Act—B.N.A. Act, sections 91 (27), 92 (2) (14), 101.—Criminal Code, sections 735, 736, 770, 1134.—Officers of Justice Salary Act; R.S.Q., 1941, c. 24, s. 10.

Section 770 of the Criminal Code (Part XV) enacts that "The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices under this Part." There exists also a provincial tariff providing for payment by litigants, before the inferior courts of criminal jurisdiction, for services by officers of justice, which is higher than the tariff provided for in the above section. The Superior Court declared section 770 to be in certain respects *ultra vires*. The appellate court reversed that decision; but gave leave to the Attorney General of Quebec to appeal to this Court.

Held that the appeal should be dismissed.

Per the Chief Justice and Taschereau JJ.:—Section 770 Cr. C., although not being strictly legislation in relation to criminal law and procedure (section 92 (27) B.N.A. Act), is nevertheless within the competence of the Dominion of Canada, on account of its incidence upon criminal law and procedure; and, in such a case, the field being occupied, the provincial legislation becomes inoperative.

Per Kerwin, Hudson and Estey JJ.:—The provisions enacted by section 770 Cr. C. are necessarily incidental to the power to legislate upon criminal law and procedure under section 91 (27) of the B.N.A. Act. —Even if the fixing of the fees to be taken by officers of provincial courts, constituted and organized under section 92 (14) of the B.N.A. Act, may be said to be "Constitution, Maintenance and Organization", criminal law and procedure in criminal matters would be affected very seriously if the Dominion did not have the power to provide the maximum fees that could be taken in criminal matters by provincially appointed officers and by witnesses.

Held, also, that the terms of section 770 Cr. C. are of general application. The section is an imperative direction that no other fees shall be demanded or accepted; and its terms should not be restricted to the case where the unsuccessful party has to pay costs to the other, as the result of an acquittal or conviction (sections 735 and 736 Cr. C.)

Judgment of the appellate court (Q.R. [1945] K.B. 77) affirmed.

PRESENT.—Rinfret C.J. and Kerwin, Hudson, Taschereau and Estey JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Tyndale J. and declaring section 770 of the Criminal Code to be within the powers of the Dominion Parliament.

Aimé Geoffrion K.C. for the appellant.

F. P. Brais K.C., Adélard Lachapelle K.C. and *D. W. Mundell* for the respondent.

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

TASCHEREAU J.:—I cannot agree to the proposition that the tariff of fees determined by the Parliament of Canada, and embodied in section 770 of the Criminal Code, is applicable only when a complainant or accused is condemned to pay costs under section 735 or 736 of the Code. This section 770 is as follows:—

770. Fees.—The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices under this Part.

I find it impossible to give to this section the restrictive meaning which has been suggested, and the terms which the legislators have used lead me to the conclusion that this text is of general application, and cannot be limited to the case where the unsuccessful party has to pay costs to the other, as the result of an acquittal or conviction. The words "no others shall be and constitute the fees to be taken" appear to be quite imperative and sufficiently clear, to convey the conviction that it was the intention of Parliament, that justices of the peace, constables, witnesses and interpreters, may in no case, even if no order is made as to costs, exact a higher amount than the one mentioned in the various items of the tariff. This view is confirmed, I think, by section 1134 of the Criminal Code which makes an offence for a justice of the peace who wilfully receives a larger amount of fees than by law he is authorized to receive, and also by the history of section 770 Criminal Code which my brother Kerwin has carefully reviewed.

(1) Q.R. [1945] K.B. 77.

1945

ATTORNEY GENERAL FOR QUEBEC v. ATTORNEY GENERAL FOR CANADA

Taschereau J.

It has been submitted on behalf of the appellant that there exists also a provincial tariff providing for payment by litigants, before the inferior courts of criminal jurisdiction, for services by officers of justice, which is higher than the tariff provided for in section 770 Criminal Code, and that this last section is unconstitutional. It would be so on the ground that the provincial authority being entrusted by the B.N.A. Act with the administration of justice, including the constitution, maintenance and organization of provincial courts, both of criminal and civil jurisdiction, and with the power to raise a revenue for provincial purposes, by direct taxation, is the sole authority which can determine whence will come the moneys necessary to meet the expenditure caused by the maintenance of these courts.

It is now settled law since *Valin* v. *Langlois* (1) that, although it is incumbent upon the provincial authorities to organize and maintain provincial courts, these latter courts have the constitutional obligation to hear cases referred to them by the federal authorities, without the necessity of making these courts federal courts, which power the Parliament of Canada derives from section 101 of the B.N.A. Act.

It is also well established that, although a court may be provincially organized and maintained, its jurisdiction and the procedure to be followed for the application of laws enacted by the Parliament of Canada, in relation to matters confided to that Parliament, are within its exclusive jurisdiction. That applies to criminal law and procedure in criminal matters which by subsection 27 of section 91 of the B.N.A. Act are subject to the legislative powers of the Dominion.

It would follow that the determination of the fees before a court of criminal jurisdiction, as provided in section 770 of the Criminal Code, would be within the sole jurisdiction of the federal power, if this matter may be considered as a part of criminal law or of criminal procedure, and it would be *ultra vires* of the provinces to attempt to impose their own tariff of fees.

(1) (1879) 3 Can. S.C.R. 1.

But I find it quite impossible to reach the conclusion that the fixing of fees payable to justices of the peace, to constables, witnesses and to interpreters, is legislation strictly in relation to criminal law or procedure.

The power given to the federal parliament to legislate in criminal law and criminal procedure, is the power to determine what shall or what shall not be "criminal", and to determine the steps to be taken in prosecutions and other criminal proceedings before the courts. The fixing of fees is neither criminal law or a step in a prosecution. The issuing of a warrant or of a writ of summons is clearly procedural, but not the payment of a fee to a provincial justice of the peace, who issues it, or to a constable in charge of its execution. Criminal law in itself is unaffected by such an imposition, and the proceedings before or at the trial are in no way modified by the amount that the employees of the province will receive for their services.

The most I think that can be said is that the determination of the fees that are payable, may incidentally affect criminal law or procedure, but is not a substantive part of these laws. The right of a person to institute legal proceedings cannot be denied by excessive fees or taxes that a province may decide to charge or impose.

Not being a matter assigned to the Dominion of Canada, it remains that it is within the legislative competence of the provinces to determine the amount of these fees and to collect them from the litigants as a tax or a compensation for services rendered. This would be within their powers in virtue of subsections 2 and 14 of section 92 of the B.N.A. Act.

But it does not follow that the provinces may always exercise this right. In certain cases, the legislative enactments of the provinces, "in order to prevent the scheme of the B.N.A. Act from being defeated" have to remain inoperative; this is so when the Dominion of Canada, acting within its competence, enacts legislation affecting matters otherwise within the legislative powers of the provincial legislature, but which is necessarily incidental to subjects enumerated in section 91.

1945

ATTORNEY GENERAL FOR QUEBEC v. ATTORNEY GENERAL FOR CANADA

Taschereau J.

In *Attorney General for Ontario* v. *Attorney General for Canada* (1), Lord Halsbury said at page 200:—

> In their Lordship's opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the *British North America Act*. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislation competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

This statement of the law has since been many times reaffirmed and particularly in *Grand Trunk Railway Company of Canada* v. *Attorney General of Canada* (2), and *Attorney General for Canada* v. *Attorney General for British Columbia* (3).

It follows as a result of this jurisprudence which is applicable to the present case, that section 770 of the Criminal Code, although not being strictly legislation in relation to criminal law and procedure, is nevertheless within the competence of the Dominion of Canada, on account of its incidence upon criminal law and procedure. And in such a case, the field being occupied, the provincial legislation becomes inoperative.

It is useless to emphasize further the point that all other provincial legislation concerning fees payable to provincial employees in criminal courts, is entirely valid and competent legislation, when the Dominion, although not precluded from legislating, has refrained from taking any action.

The appeal should be dismissed without costs.

(1) [1894] A.C. 189.
(2) [1907] A.C. 65.
(3) [1930] A.C. 111.

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

KERWIN J:—This appeal reaches us in a peculiar manner. One Bérubé having laid two complaints, under Part 15 of the Criminal Code dealing with summary convictions, before a judge of the Sessions of the Peace for the district of Montreal, and these complaints having been dismissed without the magistrate making any ruling as to the costs, the appellant herein, the Attorney General of Quebec, sued Bérubé in the Superior Court of Quebec to recover the sum of $121.60 (less $13.60 already paid) as being the fees payable under Quebec tariffs for the services of provincial officers that had been rendered to the complainant in consequence of his complaints. Bérubé contested the action relying *inter alia* on section 770 of the Criminal Code. The appellant attacked that section as unconstitutional and the Attorney General of Canada intervened to support the legislation.

The trial judge in the Superior Court declared the section to be unconstitutional and maintained the action for $36.20, based upon what he considered were the applicable provisions of the provincial tariffs. Bérubé did not appeal but the Attorney General of Canada appealed on the question of the constitutionality of section 770 of the Criminal Code. The Court of King's Bench, Appeal Side, considered that this was permissible under the Quebec Code of Civil Procedure and, by a majority, held the section to be constitutional but gave leave to the Attorney General of Quebec to appeal to this Court. Assuming that we have jurisdiction, it is apparent that the matter is presented to us in a manner somewhat similar to references by the Governor General in Council under the *Supreme Court Act*.

This consideration is important because, at the hearing, the main argument of counsel for the respondent was that section 770 Cr. C. means merely that Parliament had fixed the maximum amount to which a complainant or accused could be condemned under section 735 or 736 of the Criminal Code. An alternative construction was suggested rather than argued but it is developed in the respondent's factum. It is quite evident that, if the

1945

ATTORNEY GENERAL FOR QUEBEC v. ATTORNEY GENERAL FOR CANADA

Kerwin J.

former were the construction originally advocated by the respondent, the Attorney General of Quebec would not have been interested. As a matter of fact, counsel for the appellant stated that he had no quarrel with such a construction and, furthermore, it is unlikely that on any such basis the Court of King's Bench would have given leave to appeal. That is, in this appeal no admissions as to the construction of section 770 of the Criminal Code may be accepted and, therefore, irrespective of the main submission on behalf of the respondent, it is necessary for the Court to reach its own conclusion

Section 770 Cr. C. provides:—

> The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices under this Part.

and then follows the fees under these headings:—

(A) Fees to be taken by Justices of the Peace or their Clerks.
(B) Constables' Fees.
(C) Witnesses' Fees.
(D) Interpreters' Fees.

This section is in Part 15 of the Criminal Code dealing with summary convictions. When *The Summary Convictions Act* was first enacted in 1869, by 32-33 Victoria, c 31, Parliament intended, as the recital indicates,

> to assimilate, amend and consolidate the statute law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders, and to extend the same as so amended to all Canada;

Sections 53 and 54 of this Act provides:—

> 53. In all cases of Summary Conviction, or of Orders made by a Justice or Justices of the Peace, the Justice or Justices making the same, may in his or their discretion, award and order in and by the conviction or order, that the Defendant shall pay to the Prosecutor or Complainant such costs as to the said Justice or Justices seem reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before Justices of the Peace.
>
> 54. In cases where the Justice or Justices, instead of convicting or making an order, dismiss the information or complaint, he or they, in his or their discretion, may, in and by his or their order of dismissal, award and order that the Prosecutor or Complainant shall pay to the Defendant such costs as to the said Justice or Justices seem reasonable and consistent with law.

That is, if a conviction were recorded, such costs could be awarded as to the justice or justices seemed reasonable

in that behalf and not inconsistent with the fees established by law to be taken or proceedings had by and before justices of the peace If the information or complaint were dismissed, such costs as to the said justice or justices seemed reasonable and consistent with law could be ordered to be paid by the complainant. This means that reference would be had to the various provincial laws then in force authorizing the fees or costs "to be taken" or to the costs consistent therewith. Section 78 provided a penalty for justices of the peace who not only neglected to comply with certain other provisions therein contained as to making returns, but who also wilfully received a larger amount of fees than by law they were authorized "to receive" Corresponding provisions appear in *The Summary Convictions Act,* R.S.C. 1886, chapter 178.

In 1889, by chapter 45, *The Summary Convictions Act* was amended by adding thereto section 61A, reading as follows—

> The fees mentioned in the tariff (W) in the schedule to this Act and no others shall be and constitute the fees to be taken on proceedings before justices under this Act.

The tariff itemized fees under "Fees to be taken by justices of the peace or their clerks" and "Constables' fees". I think it plain that, in dealing with summary conviction matters, Parliament intended, by this amendment, to insure not only that the fees mentioned in the tariff and no others could be directed to be paid by a complainant or accused but also that no other fees for the itemized services could be taken or accepted by the parties mentioned, and that in summary conviction proceedings the tariffs of fees or costs which up to that time Parliament had been willing should be fixed by the provinces should thereafter be uniform.

This provision is now section 770 of the Criminal Code and the tariff has been extended to include witnesses' fees and interpreters' fees and the naming of the former strengthens the view that I would have adopted even without their inclusion. There is also a general section 1134 Cr. C., providing for a penalty in the case of every justice who, among other things, "wilfully receives a larger amount of fees than by law he is authorized to receive."

1945

ATTORNEY GENERAL FOR QUEBEC v. ATTORNEY GENERAL FOR CANADA

Kerwin J.

My opinion is that section 770 Cr. C. is not confined to providing for the maximum amount that may be imposed upon a person convicted of an offence, or upon the complainant in the event of the dismissal of the charge, but is an imperative direction to all concerned that, for the services to be rendered by the officials named, and for witnesses, no other fees shall be demanded or accepted.

It is sufficient to say that this enactment is necessarily incidental to the power to legislate upon criminal law and procedure as allotted to Parliament by head 27 of section 91 of *The British North America Act,*

> The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

It is true that, under head 14 of section 92,

> The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts,

the provinces must maintain any courts they decide to constitute and organize, that is that the financial burden thereof falls upon the provinces. However, even if the fixing of the fees to be taken by provincial officers of such courts may be said to be "Constitution, Maintenance, and Organization", criminal law and procedure in criminal matters would be affected very seriously if the Dominion did not have the power to provide the maximum fees that could be taken in criminal matters by provincially appointed officers and by witnesses. And it matters not whether those officers are paid by fees or salaries, or whether the permissible fees go to the province direct or to its own appointees.

The appeal should be dismissed but, as is usual in disputes of this nature, without costs.

Appeal dismissed without costs.

Aimé Geoffrion K.C. and *Edouard Asselin K.C.*
Solicitors for the appellant.

Adélard Lachapelle K.C.
Solicitor for the respondent.

1945

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT; *June 4 *June 20

AND

ROBERT RUTHERFORD (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Railways—Negligence—Truck at night running into railway train standing across highway—Action for damages against railway company—Alleged condition of fog—Extent of duty of railway company—Sufficiency of its precautions by way of signs and warning signals.

Appeal—Judgment at trial against defendant—New trial ordered by Court of Appeal—Defendant, in formal notice of appeal to Court of Appeal, asking in alternative for new trial—Whether this affected adversely defendant's further appeal to Supreme Court of Canada, in view of stands taken by defendant on the hearings of the appeals.

Plaintiff, while driving his truck through Carleton Place, Ontario, at night on November 30, 1942, ran into defendant's freight train which was standing across the highway, and sustained injuries for which he sued defendant for damages. The usual railway-crossing signs were there as required by the Dominion *Railway Act*, and also defendant had erected a standard which carried a bell, which was ringing, and above the bell was a light, which was burning. The windows of the truck were closed. Plaintiff did not hear the bell nor see the light. There was conflicting evidence as to existence of fog. At the trial the jury found plaintiff and defendant equally in fault, finding that defendant's negligence was "improper protection of the crossing under existing weather conditions. We feel that if this crossing had been protected by visible sign such as a wig-wag with light or flashing light, that the accident could have been avoided". The trial Judge gave judgment for plaintiff in accordance with findings of the jury. Defendant appealed to the Court of Appeal for Ontario, which ordered a new trial ([1945] O.R. 44). Defendant appealed to this Court. While defendant's formal notice of appeal to the Court of Appeal asked in the alternative for a new trial, its counsel before that Court argued only for dismissal of the action and its counsel before this Court stated that defendant's appeal was from the refusal by the Court of Appeal to dismiss the action and, if he failed in that, he was satisfied to have the judgment at trial restored.

Held (1) Defendant's appeal should be entertained. Under the circumstances, the rule set forth in *Ainslie Mining & Ry. Co.* v. *McDougall* (40 Can. S.C.R. 270), *Mutual Reserve* v. *Dillon* (34 Can. S.C.R. 141) and *Delta* v. *Wilson* (Cameron's S.C. Prac., 3rd ed., p. 110) did not apply.

(2) Defendant's appeal should be allowed and the action dismissed. Assuming that the jury's finding above quoted was a finding that the fog was "so dense in front of you that you could not see", as testified to by plaintiff, there was no basis on which defendant could be held

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

1945

CANADIAN PACIFC RY. CO. v. RUTHERFORD

liable. Defendant was entitled to have its train standing where it was at the particular time; nothing was being done by defendant or its employees to create a dangerous situation; and even if the fog existed to the extent suggested, defendant was not required to take further precautions than it had done in the way of signs and warning signals. There was no common law duty upon defendant under the circumstances to take special measures of warning to persons on the highway while the train was stopped on the crossing, and the jury was not the tribunal to which Parliament had entrusted the duty of determining what permanent protection should be installed (*Grand Trunk Ry. Co.* v. *McKay,* 34 Can. S.C.R. 81, at 97).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1), which set aside the judgment of Urquhart J. (2) (from which the defendant had appealed) and ordered a new trial.

The action was for damages for personal injuries suffered by the plaintiff by reason that the truck which he was driving on a provincial highway on the night of November 30, 1942, struck a freight train of the defendant which was standing across the highway at a level crossing in the town of Carleton Place, Ontario. The plaintiff claimed that the accident was caused by negligence of the defendant.

The action was tried before Urquhart J. and a jury. The findings of the jury are set out in the reasons for judgment in this Court now reported. At the close of the trial (after the jury had made their findings and been discharged), counsel for the defendant (who had moved for a non-suit at the close of the evidence for the plaintiff, and renewed the motion at the close of the evidence for the defendant) moved for dismissal of the action on the ground that there was no negligence found against the defendant which was negligence in law or within the purview of the jury. The trial Judge reserved judgment and subsequently gave judgment (cited *supra*) for damages in accordance with findings of the jury. On appeal by the defendant, the Court of Appeal for Ontario (as stated and cited *supra*) set aside the judgment at trial and ordered a new trial; Laidlaw J.A., dissenting, would have dismissed the action. The defendant appealed to this Court, claiming that the action should have been dismissed.

(1) [1945] O.R. 44; [1945] 1 D.L.R. 333; 57 C.R.T.C. 385.
(2) [1944] O.W.N. 331; 57 C.R.T.C. 137.

1945

CANADIAN PACIFC RY. CO. v. RUTHERFORD

Kerwin J.

C. F. H. Carson K.C. and *J. Q. Maunsell K.C.* for the appellant.

H. A. O'Donnell K.C. and *G. R. Dulmage* for the respondent.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal by the defendant, the Canadian Pacific Railway Company, from an order of the Court of Appeal for Ontario ordering a new trial in an action brought by Robert Rutherford for damages for injuries sustained by him shortly after midnight on November 30th, 1942. The plaintiff was driving his truck from Ottawa to Perth and, while passing through Carleton Place, ran into one of the railway cars of a standing freight train of the defendant at a point where the highway is crossed by the railway line. There is no evidence that the railway car had been standing on the highway for a longer period of time than is allowed by statute, or, in fact, that it had been there for any particular time. The usual railway-crossing signs required by the *Railway Act* were in their proper place and, in addition thereto, the Company had erected a standard which carried a bell, and above the bell there was a light. It does not appear whether the bell and light had been installed as a result of an order of the Dominion Transport Commissioners or not.

It is not disputed that the bell was ringing and that the light was burning. The windows of Rutherford's truck were closed and he did not hear the bell until he hit the railway car and, although he was familiar with the road and the crossing and was looking for the light, he did not see it; but, even he did not say that it was not burning. He said he saw the railway car when about fifty or sixty feet away from it, that his brakes were applied when he was between thirty to forty feet away and that, owing to the slippery surface of the highway, he was unable to bring his truck to a stop before the collision. A police constable who was at the scene of the accident shortly after its occurrence identified the marks of the tires on the plaintiff's truck as extending on the highway for a distance of 150 feet behind the truck, which still stood in the same position in which it was found after the accident. The surface of the road

1945

CANADIAN PACIFIC RY. CO. v. RUTHERFORD

Kerwin J.

was icy. Rutherford and a passenger with him put the speed of his truck at twelve or fifteen miles an hour although the evidence of an automotive engineer, called by the defendant, was to the effect that, in his opinion, the truck must have been travelling at a speed greatly in excess of that. Rutherford and his passenger said that there was a heavy fog "so dense in front of you that you could not see", while the witnesses for the defendant said that the night was clear and cold and that visibility was good.

The action was tried before Mr. Justice Urquhart and a jury who answered the first three questions put to them as follows:—

1. Has the plaintiff Rutherford satisfied you that there was no negligence or improper conduct on his part which caused or contributed to the collision in question?

Answer "Yes" or "No". A. No.

2. Were the damages sustained by the plaintiffs caused by or contributed to by the negligence of the defendant, its servants or agents?

Answer "Yes" or "No". A. Yes.

3. If your answer to question No. 2 is "Yes", of what did that negligence consist?

Answer fully.

"Improper protection of the crossing under existing weather conditions. We feel that if this crossing had been protected by visible sign such as a wig-wag with light or flashing light, that the accident could have been avoided."

In answer to subsequent questions, they found the plaintiff and the defendant equally in fault and fixed the total damages at $4,500.

Mr. O'Donnell first contended that the appeal should not be entertained because the appellant had, before the Court of Appeal, asked, in the alternative to its claim to have the action dismissed, for a new trial. Reliance was placed upon the decision in this Court in *Ainslie Mining and Railway Co.* v. *McDougall* (1), where Mr. Justice Girouard, speaking on behalf of the Court, followed two earlier judgments,—*Mutual Reserve Fund Life Assn.* v. *Dillon* (2), and *Corporation of Delta* v. *Wilson,* decided in March, 1905, and referred to in the third edition of Cameron's Supreme Court Practice at page 110. In those cases the appellants in this Court sought to hold the order for a new trial that they had obtained and, as stated at page 143 of the *Mutual Reserve* case, "they cannot and do

(1) (1908) 40 Can. S.C.R. 270. (2) 1903) 34 Can. S.C.R. 141.

not appeal from the judgment ordering a new trial." In the present instance, while the Company's formal notice of appeal to the Court of Appeal did ask in the alternative for a new trial, the report of the decision of that Court in [1945] O.R. 44, and the Company's memo. of points of law and fact, required to be filed by an appellant before the Court of Appeal, indicate that the only question argued was whether the judgment at the trial should be reversed and judgment entered in favour of the Company dismissing the action. Furthermore, counsel for the appellant stated at bar that he does not wish to hold the order for a new trial but desires to appeal from the order of the Court of Appeal which in fact refused his application to have the action dismissed, which is the judgment that he seeks in this Court. If he fails in that, he is satisfied to have the judgment at the trial restored Under these circumstances, it would appear that the rule set forth in the cases referred to does not apply.

The Chief Justice of Ontario stated that he expressed no opinion whether or not a finding by the jury of exceptional conditions of fog such as the respondent says existed would support a judgment for him based on negligence of the Company in regard to the protection of the crossing when a freight train was standing across it. He considered that this question should be left to be decided when a jury has determined whether or not there were in fact such exceptional circumstances as the respondent has alleged. I am willing to assume that the jury's answer to question 3 is a finding that the fog was "so dense in front of you that you could not see", as testified to by the respondent. Under those circumstances I can find no basis upon which the appellant may be held liable. The train was not in motion and nothing was being done by the Company, or its employees, to create a dangerous situation. The railway car was entitled to be on the highway at the particular time and even if the fog existed to the extent suggested, the appellant was not required to take further precautions than it had done in the way of signs and warning signals. There was no common law duty upon the Company under the circumstances to take special measures of warning to persons on the highway while the train was stopped on the

1945

CANADIAN PACIFIC RY. CO. v. RUTHERFORD

Kerwin J.

crossing and the jury is not the tribunal to which Parliament has entrusted the duty of determining what permanent protection should be installed: *Grand Trunk Ru. Co.* v. *McKay* (1). It is unnecessary to consider any of the other cases referred to by the Court below or relied upon by the respondent, *Lake Erie and Detroit River Railway Company* v. *Barclay* (2); *Imerson* v. *Nipissing Central Railway Company* (3); *Montreal Trust Company* v. *Canadian Pacific Railway Co.* (4); *Anderson* v. *Canadian National Railway Co.* (5). In none of them were the circumstances similar to those in the present case.

The appeal should be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *J. Q. Maunsell.*

Solicitor for the respondent: *H. A. O'Donnell.*

1945

*June 5
*June 20

GRAY COACH LINES LIMITED AND LESLIE WHITE (DEFENDANTS) } APPELLANTS;

AND

LEONA PAYNE (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Collision—Action for damages—Jury's findings—Principles applicable on question as to setting them aside.

In a case tried by a jury, the question whether there is any evidence on any particular issue is distinct from that whether the jury's verdict may stand as being one to which reasonable men might have come. In the latter enquiry the principles to be followed are as set forth in *McCannell* v. *McLean,* [1937] S.C.R. 341, where it is said at p. 343: "The verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it." If, however, there is no evidence, then an appellate court has the right and the duty to set aside the verdict.

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

(1) (1903) 34 Can. S.C.R. 81, at 97.
(2) (1900) 30 Can. S.C.R. 360.
(3) (1925) 57 O.L.R. 588.
(4) (1927) 61 O.L.R. 137.
(5) [1944] O.R. 169.

1945

GRAY COACH LINES LTD. v. PAYNE

The present action was for damages for death of a passenger in a motor car which collided with defendant's coach. The jury found negligence against defendant and against the driver of the car in which the deceased was a passenger, and apportioned the fault. This Court held that, as to one finding against defendant by the jury, reading it in connection with all the answers of the jury, it was fairly arguable that it fell within negligence alleged, and, in accordance with the principles above mentioned, the action should not be dismissed; but, as to the other finding against defendant by the jury, there was no evidence to support it, and as this wrongful finding might have influenced the jury in their apportionment of fault, there should be a new trial.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario dismissing their appeal from the judgment of Hope J. at trial upon the findings of the jury.

The plaintiff, suing under *The Fatal Accidents Act*, R.S.O. 1937, c. 210, claimed damages for the death of her husband, a passenger in a motor car driven by one Rimmer, caused when the said motor car, proceeding easterly on Ontario Highway No. 2, came into collision with the defendant company's motor coach, driven by the defendant White, proceeding westerly. The accident occurred at about 10 p.m. in the evening of December 24, 1942.

The questions to and answers by the jury are set out in the reasons for judgment in this Court *infra*. They found negligence (causing or contributing to the accident) in the defendants and in Rimmer; their findings being: a certain finding against the defendant company as to the brakes; a finding against the defendant driver (White): "poor judgment used. Instead of turning left, he should have turned to the right"; and a finding as to Rimmer that "he had been driving more to the north side of the road previous to the accident and in our opinion he failed to pull over to the south side of the road as soon as he might have". They apportioned the fault: against the defendants 80 per cent. and against Rimmer 20 per cent.

An appeal by the defendants to the Court of Appeal for Ontario was dismissed (*per* Gillanders and Laidlaw JJ.A.; Henderson J.A. dissenting). Laidlaw J.A., with whom Gillanders J.A. agreed, stated that he had concluded that the Court could not interfere with the jury's findings or with the judgment entered thereon; he was unable to say that the jury's findings were unsupported or that they did

1945

GRAY COACH LINES LTD. v. PAYNE

not constitute good findings in law; while he did not agree with all their findings, he could not substitute his conclusions as to the facts for those of the jury; it was not open to him to determine that the findings of a jury were perverse or unfair so long as there was some evidence in support of them; it was not for the Court of Appeal to test or re-test the weight of the evidence. Henderson J.A., dissenting, held that there was no evidence whatever to support the jury's finding as to the brakes; and that their finding against the defendant White, "poor judgment used. Instead of turning left, he should have turned to the right," could not be supported; that White "was at the time and at the last moment in the agony of the emergency attempting to avoid the motor car which was travelling on his side of the road and in that effort he turned his motor coach to the left. Unfortunately the motor car which was approaching the motor coach on its wrong side of the highway, at the last moment was also turned to its driver's right, but the finding of the jury in answer to the fourth question makes it clear that it was the motor car which was travelling on the wrong side of the highway up until the instant preceding the collision"; and that it could not be negligence for White to act as he did in the circumstances.

The defendants appealed to this Court.

I. S. Fairty K.C. and *A. H. Young K.C.* for the appellants.

J. W. Pickup K.C. and *I. Levinter K.C.* for the respondent.

The judgment of the Court was delivered by

KERWIN J.—The widow of George Francis Payne brought this action under *The Fatal Accidents Act* of Ontario for damages for the death of her husband, caused by the alleged negligence of the appellants, Gray Coach Lines Limited and Leslie White. On December 24th, 1942, Payne was a passenger in a motor vehicle owned and operated by Ernest Rimmer. The motor vehicle was proceeding easterly on Provincial Highway No. 2, in the Township of Toronto, when it was struck by a coach or autobus owned by the appellant Gray Coach Lines Limited, and being driven by the appellant White in a west-

1945

GRAY COACH LINES LTD. v. PAYNE

Kerwin J.

erly direction. The action was tried with a jury which, after a charge that is not now objected to, answered the questions put to them as follows:—

1. Was the accident caused or contributed to by any fault or negligence of the defendants or either of them?
   Answer: ("yes" or "no")—"Yes."
2. If the answer to No. 1 is "yes" then state fully in what did the fault or negligence of the defendants or either of them consist?
   (*a*) (the defendant company)—"Faulty brakes. Reason:—Taking into consideration the condition of the highway the brakes did not act according to the test of the Gray Coach Lines."
   (*b*) (the defendant driver)—"Poor judgment used. Instead of turning left, he should have turned to the right."
3. Was the accident caused or contributed to by any fault or negligence of Rimmer, the driver of the automobile in which the deceased was a passenger?
   Answer: ("Yes" or "no")—"Yes."
4. If the answer to No. 3 is "yes", then state fully in what did the fault or negligence of Rimmer consist. "He had been driving more to the north side of the road previous to the accident."
5. If the answer to No. 1 is "yes" and to No. 3 is "yes", then state if in your opinion it is practicable to apportion the degree of fault or negligence as between the parties?
   Answer ("yes" or "no")—"Yes."
6. If the answer to No. 5 is "yes", then state the proportion of fault or negligence attributable to each:—

(*a*) the defendants	80%
(*b*) the driver Rimmer	20%
	100%

7. Regardless of the degree of fault attributable to either party, state the amount at which you assess the *total* damages of the plaintiff.
   $8,500 Plus Costs.

1945

GRAY COACH LINES LTD. v. PAYNE

Kerwin J.

The jury were sent back to clarify their answer to question 4 to which they thereupon added the words "and in our opinion he failed to pull over to the south side of the road as soon as he might have." While apparently considering that the findings were not justified, the trial judge entered judgment for the plaintiff for the sum of $6,800 and costs. On an appeal by the defendants to the Court of Appeal for Ontario, Mr. Justice Laidlaw, with whom Mr. Justice Gillanders agreed, considered that he was precluded by the law and the evidence from interfering with the jury's findings. Mr. Justice Henderson was of the opinion that there was no evidence to warrant the jury's findings against the defendants.

In a case tried by a jury the question whether there is any evidence on any particular issue is distinct from that whether the jury's verdict may stand as being one which reasonable men might have come to. *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin et al.* (1). The principles which must be followed in the latter inquiry are set forth in *McCannell* v. *McLean* (2), where Chief Justice Sir Lyman Duff states, at page 343:—

> The verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

As was there pointed out, the same rule had been set forth in numerous cases in this Court, the then most recent one being *C.N.R.* v. *Muller* (3), and was the same guide by which the judges in England had governed themselves as exemplified in the judgment of Lord Wright, delivered in the *Mechanical* case (1), which judgment was adopted by Lord Atkin and Lord McMillan. The same rule has been consistently followed ever since.

If, however, there is no evidence, then a Court of Appeal has the right and the duty to set aside a verdict. It was admitted on the argument before us that the amendment allowed by the Court of Appeal to the particulars of negligence alleged in paragraph 7 of the statement of claim so as to add thereto clause (*j*), "the defendant's bus was being driven with faulty brakes", had really been permitted by the trial judge although the record had not been amended.

(1) [1935] A.C. 346.
(2) [1937] S.C.R. 341.
(3) [1934] 1 D.L.R. 768.

There is no evidence upon which the jury could say in the answer to question 2 (*a*) that the fault or negligence of the defendant company consisted of "Faulty brakes. Reason,—taking into consideration the condition of the highway, the brakes did not act according to the test of the Gray Coach Lines." The only testimony upon this point is that of the witness Wood, a service mechanic in the employment of the appellant company. On December 21st he tested the brakes on the coach concerned in the accident and merely testified that the coach could be stopped in a certain number of feet, depending upon whether the foot-brake or hand-brake was used. He was not cross-examined. White, the operater of the coach with a full coach load of passengers did not attempt to apply any brake so as to bring the coach to an immediate stop.

If this were the only fault or negligence found against the Coach Company or the driver, the action should be dismissed. However, the answer to question 2 (*b*) as to the fault or negligence of the driver is given as "poor judgment used. Instead of turning left he should have turned to the right." There is considerable force in Mr. Fairty's argument that the latter part of this answer applies to what the coach driver should have done in an emergency but, upon consideration, I am unable to say that that is the only way in which it may be construed. In any event, the first part, "poor judgment used", must be taken in connection with all the answers and, so reading it, it is fairly arguable that it falls within the negligence alleged in the statement of claim. Of course, any difficulty on the score of pleading felt by the Court of Appeal was removed by its order permitting an amendment. Under all the circumstances, I am not disposed to quarrel with that order since the Court of Appeal must have concluded that such an amendment did not deprive the defendants of their right not to be called upon to meet a case not open on the pleadings.

On the whole case I find it impossible, in accordance with the principles already adverted to, to dismiss the action, but, as in *Reynolds* v. *C.P.R.* (1), the wrongful finding of the ground of negligence against the Company in the answer to question 2 (*a*) may have influenced the

(1) [1927] S.C.R. 505.

1945

GRAY COACH LINES LTD. v. PAYNE

Kerwin J.

jury in their apportionment of the fault or negligence attributable to the defendants and Rimmer. There should, therefore, be a new trial upon the record as amended. The appellants are entitled to their costs in the Court of Appeal and in this Court and the costs of the abortive trial will abide the event of the new trial.

Appeal allowed with costs; new trial directed.

Solicitor for the appellants: *I. S. Fairty.*

Solicitor for the respondent: *A. M. Garrison.*

1945

*May 22
*June 20

HIS MAJESTY THE KING (INTERVENANT) ..... } APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... } RESPONDENT.

AND

MONTREAL LOCOMOTIVE WORKS LIMITED (PLAINTIFF) .....

THE CITY OF MONTREAL (DEFENDANT) ..... } APPELLANT;

AND

MONTREAL LOCOMOTIVE WORKS LIMITED (PLAINTIFF) .....

AND

HIS MAJESTY THE KING (INTERVENANT) ..... } RESPONDENTS.

MONTREAL LOCOMOTIVE WORKS LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... } RESPONDENT;

AND

HIS MAJESTY THE KING (INTERVENANT) .....

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

Assessment and taxation (municipal)—Crown's interests—Construction and production contracts between Crown and industrial company—Sale of land by Company to Crown and building of plant for war purposes by Company for the Crown—Agreements stipulating Company to act on behalf of Crown and as its agent—Claim by municipal authority against Company for property and business taxes—Company erroneously described as "proprietor"—Company not liable for taxes—Company, under contracts, being the "agent" or "servant"

*PRESENT: Rinfret CJJ. and Kerwin, Hudson, Taschereau and Estey JJ.

1945

THE KING
v.
CITY OF MONTREAL AND MONTREAL LOCOMOTIVE WORKS LTD.

of the Crown—Crown, and not the Company, being "occupant" of land and building—Sections 362 (a) and 363 of the Montreal City Charter.

The Montreal Locomotive Works Limited (hereinafter called the Company), on October 23, 1940, entered into a first contract (construction contract) with The King in right of Canada (hereinafter called the Crown), where it was agreed, *inter alia,* that the Company would sell and transfer unto the Crown certain land in the city of Montreal and would construct thereon, for and on behalf of the Crown, as its agent and at its expense and subject to the supervision, direction and control of the Crown, a new plant to remain the property of the Crown, and to be capable of producing gun carriages and tanks. On the same day, a second contract (production contract) was passed between the Crown and the Company, where it was agreed, *inter alia,* that the Company, acting on behalf of the Crown and as its agent, would administer, manage and operate the new plant and produce therein, for the account of the Crown, gun carriages at a certain fee per gun and per tank. It was admitted that the new plant is, and has always been, the property of the Crown, and that the City was so informed by the Deputy Minister of Munitions and Supply. The Company was entered as proprietor in the valuation roll for the fiscal year beginning May 1st, 1941, and paid to the City $35,858.59 for taxes due under the assessment roll for that year. After the new building, erected under the construction contract, was completed, the building and motor power were added to the assessment roll in the name of the company for $18,934.78 from November 1st, 1941 to April 30th, 1942; and the Company was also entered on the tax roll for business tax on the same property for the same period for $3,425.22. Then, on the valuation roll for the fiscal year commencing May 1st, 1942, the Company was entered as occupant of the new building, motive power and land owned by the Crown and, on the assessment roll, was billed at the sums of $41,141.77 for property tax and $6,850.44 for business tax. The Superior Court dismissed the claim of the City for the first item of $18,934.78 because the claim was directed against the Company as proprietor and not as occupant; but, as respects the three other items, the Court held that the City's right against the Company as occupant had been established and condemned the City to pay these amounts. The appellate court, by a majority of the judges, affirmed that judgment.

Held, affirming the judgments of the Courts below, as to the first item, that the City cannot hold as valid the assessment and taxation of the Company for the amount claimed. The Company was in respect of that claim improperly assessed and taxed by the City as proprietor and not as occupant: it had been admitted, in the joint stated case submitted to the courts, that the new plant was, and always has been, the property of the Crown and that the City was duly informed of it. Upon that very admission, it was obviously erroneous to describe the Company as proprietor. The valuation and assessment rolls, as they existed, could and can be supported only if the quality of owner or proprietor had been established in respect of the Company.

The three other items were allowed by the Courts below against the Company, as to the property tax on the ground that the Company was during the material dates the occupant of the property and entered as such on the rolls, and as to the business tax on the ground that the Company occupied the premises for commercial and industrial purposes and was doing business at the new plant.

Held that, as to these items, the judgment of the appellate court should be reversed.—In order that the Company may be exempt from paying the taxes claimed by the City, it is not necessary that it should be either "an instrumentality of the Government, or an emanation of the Crown" (*City of Halifax* v. *Halifax Harbour Commissioners* [1935] S.C.R. 215). It is sufficient if, looking at the contracts as a whole, the Courts are satisfied that the Company, for the purpose of the present decision, is nothing but the agent, or the servant, of the Crown. Such decision turns on the meaning of the two contracts and, upon their construction, these agreements clearly provide for a case of agency. The Company is described throughout as the agent of the Crown. Although the use of this word is not in itself absolutely decisive, it is at least an indication of the intention of the parties; and it is that intention, gathered from the words used, that determines the nature of the contracts. There is absolutely nothing in the agreements inconsistent with the idea that the parties wanted the company to be anything else than an agent.

Held also that, under the agreements, the Company is not the occupant of the building and land, at least within the meaning of that word in the City's Charter; and, *a fortiori*, it does not occupy it for industrial purposes. The Company never carried on or exercised a manufacture, either under section 362a or section 363 of the Charter; and these sections are inapplicable for the purpose of establishing the right of the City to property tax as occupant or to the business tax. The occupation is not that of the Company, but the occupation of the Crown; and the business carried on, in the circumstances of this case and under the terms of the agreements, is not carried on by the Company, but carried on by the Crown itself on its own property.

City of Halifax v. *Halifax Harbour Commissioners* ([1935] S.C.R. 215), *City of Montreal* v. *Société Radio-Canada* (Q.R. 70 K.B. 65), *Regina Industries Ltd.* v. *City of Regina* ([1945] 1 D.L.R. 220) and *City of Vancouver* v. *Attorney General of Canada* ([1944] S.C.R. 23) discussed.

APPEALS (Three) from three judgments of the Court of King's Bench, appeal side, province of Quebec, affirming by a majority the judgment of the Superior Court, Bond C.J. The city of Montreal asserted claims against the Montreal Locomotive Works Limited to recover $18,934.78 and $41,141.77 for property taxes and $3,425.22 and $6,850.44 for business taxes.

1945

THE KING v. CITY OF MONTREAL AND MONTREAL LOCOMOTIVE WORKS LTD.

The Superior Court maintained the claims, except as to the item of $18,934.78 which was rejected.

The city of Montreal appealed to this Court asking that that amount should also be awarded to it.

Both the Montreal Locomotive Works Limited and the Crown (intervenant) appealed to this Court from the judgment condemning the Company to pay the three other items claimed.

The Supreme Court of Canada dismissed the City's appeal and allowed the appeal by the Company and the Crown.

Aimé Geoffrion K.C. for the Crown.

J. E. L. Duquet for the Montreal Locomotive Works Ltd.

C. Laurendeau K.C. and *G. St-Pierre K.C.* for the city of Montreal.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—Montreal Locomotive Works Ltd., His Majesty the King, in right of Canada, and the city of Montreal have joined in submitting to the Courts questions of law upon facts admitted, pursuant to article 509 of the Code of Civil Procedure of the province of Quebec. For the purpose of abbreviation I will call them, in the course of the present judgment, the Company, for the Locomotive Works, the City, for the city of Montreal, and the Crown, for His Majesty the King.

The questions to be decided are whether, upon the facts about to be recited, the City is entitled to charge and to collect certain taxes from the Company. The facts which give rise to the questions of law involved are as follows:—

On the 23rd of October, 1940, a contract (hereinafter called the construction contract) was made between the Crown and the Company, wherein it was agreed, amongst other things, that the Company would sell and transfer unto the Crown certain premises forming part of the land of the Company located at Longue Pointe in the city of Montreal, and would construct thereon for and on behalf of the Crown, and as its agent and at its

expense and subject to the supervision, direction and control of the Crown, through the Honourable the Minister of Munitions and Supply, a new plant to remain the property of the Crown and to be capable of producing gun carriages and tanks.

On the same day a contract (hereinafter called the production contract) was made between the Crown and the Company, wherein it was agreed, amongst other things, that the Company, acting on behalf of the Crown and as its agent, would administer, manage and operate the new plant and produce therein, for the account of the Crown, gun carriages and tanks at a certain fee per gun carriage and per tank. It is specifically stated in the joint case that the new plant is, and has always been, the property of the Crown, and that the City was so informed by the Deputy Minister of Munitions and Supply by the latter's letter, dated December 1st, 1941. The sale of the land to the Crown by the Company was confirmed by a deed in authentic form on the 27th of February, 1942, which was registered the next day.

On the valuation roll of the City for the year beginning the 1st of May, 1941, the Company was entered as proprietor of the land in question, including the building, rails and motive power. On the real estate assessment roll for the municipal fiscal year beginning on the 1st of May, 1941, the Company was billed to the amount of $35,858.59, which the Company paid on the 30th of September, 1941.

After the new building, erected under the construction contract, was completed, the building and motive power were added to the City's real estate assessment roll in the name of the Company from the 1st of November, 1941, to the 30th of April, 1942, for the sum of $18,934.78. Moreover, the Company was entered on the City's tax roll for business tax, with respect to the new building and motive power, for the amount of $3,425.22 for the period extending from the 1st of November, 1941 to the 30th of April, 1942.

Then on the valuation roll for the fiscal year beginning the 1st of May, 1942, the Company was entered as occupant of the new building, motive power and land

1945

THE KING v. CITY OF MONTREAL AND MONTREAL LOCOMOTIVE WORKS LTD.

Rinfret C.J.

owned by the Crown, and, on the real estate assessment roll of the City, the Company, in respect to the building, motive power and land, was billed at the sum of $41,141.77 as occupant thereof.

The Company was billed for the further sum of $6,850.44 on the business tax roll with respect to the same property.

The City, therefore, is claiming from the Company the following taxes:—

(*a*). Property taxes on the new building and motive power from 1st of November, 1941 to April 30th, 1942.....	$18,934.78
(*b*) Business tax on the same property as hereinbefore mentioned for the same period	3,425.22
(*c*) Property tax on the land, building and motive power on lot 21, subdivision 2210, as occupant of the property of the Crown for the municipal year commencing May 1st, 1942.....	41,141.77
(*d*) Business tax on the same property as hereinbefore mentioned for the same year	6,850.44

The contention of the City is that, for the period from the 1st of November, 1941 to the 30th of April, 1942, the new building and motive power were built on the property of the Company, that they were occupied by the Company for commercial and industrial purposes and the Company is, therefore, subject to municipal taxation in the hands of the Company by the City, in accordance with the provisions of the charter of the City. Further, that the Company, doing business at the said new plant, is also subject to the business tax for the same period, in accordance with by-law no. 1642 of the City. The City also contends that, for the municipal fiscal year beginning the 1st of May, 1942, the new building, the motive power and the land are the property of the Crown, but that they are occupied by the Company for commercial and industrial purposes and are, therefore, subject to municipal taxation in the hands of the Company by the City, in accordance with the provisions of the charter of the City, and more particularly section 362 (*a*) thereof and the taxation

by-laws passed in accordance therewith, being by-law no. 1704 of the City, and that the Company, doing business at the new plant, is also subject to the business tax for the same period of time, in accordance with by-law no. 1642.

The Company and the Crown, which intervened in the proceedings, deny the contentions of the City on the following grounds:—

(*a*) That for the first period (1st November, 1941 to 30th April, 1942) the new building and the motive power were the property of the Crown and were not occupied by the Company for commercial or industrial purposes, or otherwise, and were not subject to municipal taxation either as owner, occupant, or otherwise, and that the Company was not doing business at the said new plant and is not subject to the business tax for the same period.

(*b*) That for the municipal fiscal year beginning the 1st of May, 1942, the new building, the motive power, and the land were the property of the Crown and were not occupied by the Company for commercial or industrial purposes, or otherwise, and were not subject to municipal taxation in the hands of the Company by the City either as owner, occupant, or otherwise, and that the Company does not do business at the new building and is not subject to the business tax for the same period.

The Crown is interested and has become a party to the proceedings to hear judgment rendered and any recommendations which may be made by the Court.

The Superior Court (Bond C.J.) held that, as respects the claim of the City for the sum of $18,934.78 for property taxes on the new building and motive power from the 1st of November, 1941 to April 30th, 1942, the claim was directed against the Company as proprietor and not as occupant, and it rejected that item. But, as respects the three following items, the learned trial judge held that the City's right thereto against the Company as occupant had been established, both for business tax and for property tax, and accordingly condemned the Company to pay to the City the said sums, together with interest at the rate of five per cent. from the date when the taxes respectively were due, and also to the costs of the present proceedings. By the same judgment, the intervention of the Crown was dismissed, except as to the item of $18,934.78, and it was recommended that the Crown should pay to the City the costs upon such intervention.

The Court of King's Bench (appeal side) in three different judgments, although supported by the same reasons, affirmed the judgment of the Superior Court, by a majority of the judges, Walsh and St. Jacques JJ. dissenting.

1945

THE KING v. CITY OF MONTREAL AND MONTREAL LOCOMOTIVE WORKS LTD.

Rinfret C.J.

To deal first with the item of taxation for the sum of $18,934.78. It is admitted in the joint case that the new plant, that is to say, the new building and the motive power, are, and always have been, during the material dates, the property of the Crown and that the City was duly informed of it. Nevertheless, on the valuation roll for the first period of time, and also on the real estate assessment roll, the name of the Company appeared as being the proprietor thereof; or, in other words, the Company was assessed and taxed as proprietor and not as occupant.

"Occupant", in the charter of the City, has a special meaning. In section (1), subsection (*h*), it is defined as follows:—

> The word "occupant" shall mean any person who occupies an immovable in his own name, otherwise than as proprietor, usufructuary or institute, and who enjoys the revenues derived from such immoveable.

Upon the very admission contained in the joint case, it was obviously erroneous to describe the Company as proprietor in the several rolls for the period extending from the 1st of November, 1941 to the 30th of April, 1942. The learned trial judge so found and that part of his judgment was affirmed by the Court of King's Bench (appeal side).

The title to the new building and equipment, as well as all material on hand, was undoubtedly vested in the Crown, which had assumed all risks and liabilities incidental to such ownership. It is true that at that time the land was still registered in the name of the Company, registration having taken place only on the 28th of February, 1942; but the City was fully aware of the true circumstances and, moreover, the purpose of registration is merely to establish the priority of title as between two purchasers who derive their respective titles from the same person. (Article 2089 C.C.) However that may be, for the purpose of the present submission, it is sufficient that the parties agree on the fact that the Crown is and has always been the owner of the new plant and motive power.

The ground of appeal of the City, in respect of the item we are now discussing, is based on section 362 (*a*) of the charter:

> The exemptions enacted by Article 362 shall not apply either to persons occupying for commercial or industrial purposes buildings or lands

belonging to His Majesty or to the Federal and Provincial Governments, or to the board of harbour commissioners, who shall be taxed as if they were the actual owners of such immovables and shall be held to pay the annual and special assessments, the taxes and other municipal dues.

Upon that fact and these admissions, it seems clear that the City cannot hold as valid the assessment and taxation of the Company as proprietor for the period in question. It was only, as we have seen, on the valuation roll for the fiscal year beginning the 1st of May, 1942, that the Company was entered as occupant of the new building, motive power and land there described as being owned by the Crown; so that up to the 1st of May, 1942, and, therefore, for the period extending from the 1st of November, 1941 to the 30th of April, 1942, in respect of which the claim of $18,934.78 is made, the Company was improperly assessed and taxed as proprietor. The City cannot, on the basis of the valuation roll and the real estate assessment roll, claim the tax against the Company otherwise than as a proprietor, which it was not at the time, and it cannot now come before the Courts to pretend that even if, with regard to the Company, the rolls were admittedly incorrect and the tax was erroneously claimed, it might yet have assessed and taxed the Company upon the ground that it was the occupant. A short answer to that contention is that the Company has neither been assessed nor taxed as occupant and that the rolls, as they existed, could and can be supported only if the quality of owner or proprietor had been established in respect of the Company. So far as the item of $18,934.78 is concerned, the unanimous judgments of the Superior Court and of the Court of King's Bench (appeal side) must, therefore, be affirmed.

I have only to add, with regard to that item, that I find sufficient reason to disallow the item, but it does not follow, as will be seen later, that I admit that at the material time the Company was the occupant, within the meaning of the definition in the Charter of the City.

Coming now to the three other items. They were allowed against the Company by the learned trial judge and the majority of the Court of King's Bench (appeal side) as to the property tax for the fiscal year commencing May 1st, 1942, on the ground that the Company was then the occupant of the property in question and entered as such on the rolls; and, as to the business tax, both for the period

1945

THE KING v. CITY OF MONTREAL AND MONTREAL LOCOMOTIVE WORKS LTD.

Rinfret C.J.

extending from the 1st of November, 1941 to the 30th of April, 1942, and for the period commencing on the 1st of May, 1942, on the ground that the Company was then subject to such municipal taxation because it occupied the premises for commercial and industrial purposes and was doing business at the new plant.

In order to test the validity of the ground upon which the judgments *a quo* went against the Company for those three items, it is necessary to carefully examine the construction and production contracts between the Company and the Crown.

In my view, the learned trial judge rightly held that the situation created by these contracts in no way resembled that which arose in *The City of Halifax* v. *Halifax Harbour Commissioners* (1). In that case the Commissioners were held to be an instrumentality of the Government, or an emanation of the Crown, by virtue of the statute creating them and investing them with peculiar powers and attributes.

In the present case the Company is an ordinary commercial corporation and cannot, by any possible view of its status, be considered to come under one or the other of these designations. But, in order that the Company may be exempt from paying the taxes claimed by the City in the case now under consideration, it is not necessary that it should be either "an instrumentality of the Government, or an emanation of the Crown." It is sufficient if, looking at the contracts as a whole, the Courts are satisfied that the Company, for the purpose of the present decision, is nothing but the agent, or the servant, of the Crown.

In the Superior Court, with due respect, there seems to have been some confusion on this point. The learned trial judge says in his judgment that he finds it "necessary to find a name for such a contract", and that he would say "it was one of lease and hire of work rather than a contract of agency". He adds:—

Looking at the contract as a whole, I am satisfied that the Company is not an "agent" or "servant" of the Crown.

Then in the judgments of the majority of the Court of King's Bench (appeal side) the same confusion seems to have existed, although each of the judges forming the

(1) [1935] S.C.R. 215.

majority, upon an analysis of the construction and production contracts, do state that they have come to the conclusion that these contracts were in effect contracts of work by estimate governed by article 1683 *et seq* of the Civil Code. On this aspect of the case, I must say I find myself in agreement with the reasons of Walsh and St.-Jacques JJ.

The decision turns on the meaning of the two agreements. Throughout, the Company is described as the agent of the Crown. Of course, it is not claimed that the use of this word is absolutely decisive, but it is at least an indication of the intention of the parties, and it is that intention, gathered from the words used, that determines the nature of the contracts. Now, as pointed out by St. Jacques J., in the Court of King's Bench (appeal side), there is absolutely nothing in the agreements inconsistent with the idea that the parties wanted the Company to be anything else than an agency. The duties of the Company are minutely defined and, for the design and construction of the plant, the fullest control is given to the Minister. The Company is authorized to incur costs and pay for on behalf of the Government, as its agent, all that may be necessary or incidental to the performance of the agreements. Any act or thing, performed by the Company, is to be performed by it as the Crown's agent. The Company is authorized to sign deeds or instruments necessary, useful or incidental to the performance of the agreements, but always subject to the Minister's control. The cost is estimated only and not guaranteed; and the contracts provide that the Crown shall pay to the Company all its proper and reasonable costs and expenses. Moreover, these expenses will be met without the Company having to resort to its own funds.

The Company agreed to carry out any changes that the Crown may order on the same terms. It is stated in the contracts that the Company shall be fully indemnified and that it shall not be responsible except for definite bad faith or wilful neglect. They provide that the title to the plant and equipment, etc., shall at all times be vested in the Crown; that the Company will endeavour to obtain remission or refund of duties and taxes; that the Crown may at any time cancel the agreements, subject to the provi-

1945

THE KING v. CITY OF MONTREAL AND MONTREAL LOCOMOTIVE WORKS LTD.

Rinfret C.J.

sion that the Crown will not dispose of the land and plant or equipment without first offering it to the Company and that, if the Crown disposes of the plant in favour of someone else, on the Company's refusal to take it, it shall pay to the Company the value of the land, but if the plant is disposed of to the Company, the land will be paid for at $1, the original purchase price; or, if the Crown demolishes the plant, the land will revert to the Company for $1 and if, after five years, neither of these events has happened, the Crown must pay the Company for the land.

Under the agreements, the Company, for its work, receives absolutely no remuneration, except the administrative and overhead expenses which, in the opinion of the Minister, are properly apportionable to the performance of the contracts.

The only difference between the construction contract and the production contract is that, under the latter, the Company receives a fee for its work; but, in each case and under each contract, banking arrangements are provided for so that the Company will not have to resort to its own funds. The Minister has full control throughout.

Therefore, the Company sells to the Crown for $1 land which it will get back at the same price, or which it will be paid for at its value if the Crown keeps it. It is to build and equip a plant and manufacture in it, as agent for the Crown, certain war implements, at the cost of the Crown, without using any of its funds, under the Crown's control and without any responsibility, except for bad faith or wilful neglect. Everything remains the property of the Crown and the agreements are revocable at any time. In my view, these contracts clearly provide for a case of agency.

The Company is not the occupant of the building and land, at least within the meaning of the definition of that word contained in the City's Charter. *A fortiori* it does not occupy it for industrial purposes. It never carried on or exercised a manufacture, either under section 362 (*a*) or section 363 of the City's Charter; and these sections are inapplicable for the purpose of establishing the right of the City to property tax as occupant or to the business tax.

In such a case and under such agreements, we have not the occupation of the Company, but the occupation of the Crown; and the business carried on, in the circumstances,

is not carried on by the Company, but carried on by the Crown itself on its own property. There is nothing in the law of Quebec to prevent a company from acting as the agent or servant of somebody else, and, in this case, the Company is nothing else than the agent or servant of the Crown. It works on the Crown's property for the Crown and cannot be said to occupy the property, or to use it for its business. Therefore, it cannot be taxed under sections 362 (*a*) and 363 of the City's Charter; and not only the Crown being the owner and being to all intents and purposes the occupant carrying on the business, the taxing sections of the City's Charter are inapplicable to it, but, as against the applicability of the text of the Charter, there exists a constitutional limitation. Whether an agent or servant, under the Civil Code the situation remains the same, so far as the present case is concerned, and if, as the learned trial judge seems to have held, the contracts are contracts of lease of hire and work rather than contracts of agency, the difference does not matter for the purposes of the decision which we have to give; the Company must succeed equally whether it was an agent or a servant. If these contracts, instead of being with a company, had been made with an individual, it seems that they would clearly have been considered as contracts of agency or service, and the fact that we have here a company instead of an individual makes no difference (Article 1701 C.C.; *Quebec Asbestos Corporation* v. *Couture* (1); *Lambert* v. *Blanchette* (2); *Hill-Clarke-Francis, Ltd.* v. *Northland Groceries (Quebec) Ltd.* (3).

We have already indicated that the case in this Court of *City of Halifax* v. *Halifax Harbour Commissioners* (4) has no analogy with the present case, nor is the judgment of the Court of King's Bench (appeal side), in the *Cité de Montréal* v. *Société Radio-Canada* (5); and we must say the same of the case decided by the Saskatchewan Court of Appeal in *Regina Industries Ltd.* v. *City of Regina* (6). I have carefully compared the analysis made of the contract in the latter case by Martin C.J.S., with the contracts in the present case, and I have come to the conclu-

(1) [1929] S.C.R. 166.
(2) (1925) Q.R. 40 K.B. 370.
(3) [1941] S.C.R. 437, at 442.
(4) [1935] S.C.R. 215.
(5) (1941) Q.R. 70 K.B. 65.
(6) [1945] 1 D.L.R. 220.

1945

THE KING v. CITY OF MONTREAL AND MONTREAL LOCOMOTIVE WORKS LTD.

Rinfret C.J.

sion that there is no analogy between them. It stands to reason that, in order to treat a judgment construing another contract between other parties, it can be looked upon as an authority only if the terms of both contracts are identical. Moreover, with due respect, the *Regina* judgment (1), although entitled to great weight, cannot be considered as an authority in this Court.

But, in addition to that, the section of the *City Act*, R.S.S. 1940, chap. 126, which the Saskatchewan Court of Appeal was called upon to apply, is not similar to that of the City's Charter under which the present case stands to be decided, nor was the definition of the word "occupant". So that from no point of view can the *Regina* case (1) be held identical with the present one. You do not find in it the same subordination of the Company, or the same authority to bind the Crown.

A further argument was made that, assuming the City could tax the Company in respect of this property under the provisions of section 362 (*a*) of the City's Charter, the general by-laws providing for the tax only contemplate a tax on taxable immovables. Now there can be no question of taxing this immovable. All that can be taxed under section 362 (*a*) would be persons occupying for industrial purposes buildings or lands belonging to the Crown.

It may be said that the wording of section 362 (*a*) is very unusual. Section 361 provides that all immovable property shall be liable to taxation; section 362 provides that certain immovable property is exempt from the ordinary and annual assessment (no reference being made to Crown properties). Then comes section 362 (*a*) which is very unusually worded in view of the provisions of sections 361 and 362. It is certainly to be doubted that such wording is apt to include in it persons occupying Crown property for commercial or industrial purposes and to say that they can be taxed by force of the said section. But, at all events, even if they could be taxed under the section, they are not taxed in the premises. The by-law levies a tax on the immovable properties in the City and that is all.

We do not consider that the case of *City of Vancouver* v. *the Attorney General of Canada et al* (2) has any application to the present case.

(1) [1945] 1 D.L.R. 220. (2) [1944] S.C.R. 23.

On the whole, I am of the opinion that the City's appeal as against the judgment denying its claim to the sum of $18,934.78 should be dismissed, and that the Company's appeal as against the judgment condemning it to pay to the City the sums of $3,425.25, $41,141.77 and $6,850.44 should be allowed, the whole with costs throughout against the City. The intervention of the Crown should also be allowed with costs throughout against the City.

City of Montreal's appeal dismissed with costs.

Montreal Locomotive Works Ltd.'s appeals allowed with costs.

Intervention by the Crown allowed with costs.

Geoffrion & Prud'homme
Solicitors for His Majesty The King.

Saint-Pierre, Choquette, Berthiaume, Emard, Martineau, McDonald & Seguin
Solicitors for the city of Montreal.

Ralston, Kearney, Duquet & MacKay
Solicitors for Montreal Locomotive Works Ltd.

1945
*April 26, 27, 30
*June 20

J. R. PARMLEY (DEFENDANT)..... APPELLANT;

AND

T. F. PARMLEY (DEFENDANT)..... RESPONDENT;

AND

AMANDA PEARL YULE (PLAINTIFF).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Trespass to the person—Torts—Surgery—Indemnity—Contribution—Judgment for damages against doctor and dentist for unauthorized extraction of teeth while patient under anaesthetic for purpose of another operation—In third party proceedings, indemnity or contribution claimed by dentist against doctor—Facts held not to provide a basis upon which indemnity could be recovered, but judgment given for contribution—Contributory Negligence Act, R.S.B.C. 1936, c. 52.

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

1945

PARMLEY
v.
PARMLEY

Judgment had been recovered against appellant, a doctor, and respondent, a dentist, for damages for unauthorized extraction of some of plaintiff's teeth while she was under an anaesthetic for the purpose of an operation by appellant to remove her tonsils. Respondent had not talked with plaintiff before making the extractions, but had had conversations with appellant, who had had conversations with plaintiff and made with respondent the appointment for extractions. Respondent had taken third party proceedings against appellant, claiming indemnity or contribution in respect of any liability to plaintiff found against him, and at trial recovered a judgment for indemnity (60 B.C.R. 395), which was, by a majority, affirmed on appeal ([1945] 1 W.W.R. 405) (the dissenting judges holding that respondent was not entitled to indemnity but was entitled to contribution on the basis of equal liability). On appeal to this Court:

Held: Upon the evidence, the facts did not provide a basis upon which respondent could recover from appellant by way of indemnity. The conversations between them were not such as to amount to a request, instruction or message from appellant to respondent which justified respondent in removing the teeth. In the extractions being done without plaintiff's consent, both appellant and respondent were negligent, even though they may have believed, upon respondent examining the teeth, that they were acting in plaintiff's best interests (professional duty in such circumstances discussed). But the case was a proper one, under the provisions of the *Contributory Negligence Act,* R.S.B.C. 1936, c. 52, for contribution between appellant and respondent; their pleadings raised the question of fault and the evidence throughout was led with regard thereto and established that their fault or negligence led them to so conduct themselves that in law they committed a trespass; a trespass may be the result of negligent conduct; they should be held equally at fault and each should bear one-half of the total loss as fixed by the judgment for plaintiff at the trial.

APPEAL by one of the defendants from that part of the judgment of the Court of Appeal for British Columbia (1) whereby his appeal from the judgment of Coady J. (2) in third party proceedings taken by the other defendant, was dismissed.

The appellant is a physician and surgeon. The respondent is a dentist. They are hereinafter referred to respectively as the "doctor" and the "dentist". The plaintiff sued both of them for damages because of unauthorized extraction of some of her teeth while she was under an anaesthetic for the purpose of the performance by the doctor of an operation for tonsillectomy. The dentist took third party proceedings against the doctor, claiming indemnity or contribution in respect of any liability found against him in favour of the plaintiff.

(1) [1945] 1 W.W.R. 405; [1945] 2 D.L.R. 316.
(2) 60 B.C.R. 395; [1944] 3 W.W.R. 94; [1944] 4 D.L.R. 46.

The evidence in the case is discussed at length in the reasons for judgment in this Court *infra* (and also in the reasons for judgment in the Courts below, cited *supra*).

The trial Judge, Coady J., found that at the time of the extractions the doctor knew or ought to have known that the dentist was relying on the authorization which the doctor led the dentist to believe that he had from the plaintiff, and the dentist proceeded with the extractions on the basis that the plaintiff's consent had been given to the doctor and through the doctor to him; that the doctor did not have such authorization from the plaintiff, and that his words and conduct constituted a representation of authority which he did not have but which the dentist was justified in assuming he did have; that the evidence failed to establish contributory negligence on the part of the plaintiff. He held that both defendants were liable in damages to the plaintiff. He fixed the general damages for the unauthorized extractions at $4,800 for twelve upper teeth and $200 for one lower tooth and special damages at $200, making in all $5,200, for which sum judgment was given against both defendants. In the third party proceedings he held that the doctor was liable to the dentist for indemnity, extending, however, only to the damages awarded against the dentist for the unauthorized extraction of twelve upper teeth, and costs, as he could not find that there was any instruction or representation of authority by the doctor as to the lower tooth. In the formal judgment it was declared that the dentist was entitled to be indemnified by the doctor against the sum of $5,000 payable by the dentist to the plaintiff under the judgment and against the amount of the plaintiff's costs of action payable by the dentist under the judgment; and it was adjudged that the dentist recover from the doctor any amounts up to the said sum of $5,000 and the plaintiff's costs of action as should be paid by the dentist under the judgment and the dentist's own costs of the action and of the third party proceedings to be taxed, those of the action as between solicitor and client.

The doctor appealed to the Court of Appeal for British Columbia, both against the judgment in favour of the plaintiff and against the judgment in the third party pro-

1945

PARMLEY v. PARMLEY

ceedings. The dentist did not appeal against the judgment in favour of the plaintiff. He gave notice that he contended that the trial Judge was not in error in holding that he was entitled to be indemnified by the doctor, but that, in the event of the Court of Appeal coming to the conclusion that the trial Judge was in error in so holding, but not otherwise, he would contend that he was entitled to contribution, indemnity or other relief from the doctor in respect of the sum of $5,000 and costs of the plaintiff payable by the dentist to the plaintiff in proportion to the degree in which the doctor might be found at fault and that the judgment appealed from should be varied accordingly.

The doctor's appeals to the Court of Appeal, both in the action and in the third party proceedings, were dismissed with costs. As to the third party proceedings, however, O'Halloran and Sidney Smith JJ., dissenting in part, held that the dentist was not entitled to indemnity; that the evidence did not justify a finding that the doctor instructed the dentist to extract any of the plaintiff's teeth, or that he warranted to the dentist that he was the agent of the plaintiff with authority to instruct the dentist to extract any of them; all the doctor did was to pass on to the dentist the information that the plaintiff wished to have some teeth extracted, leaving the dentist himself to get particulars and instructions, and later had casually given him what other information he had or thought he had on the matter; that in the operating room both men thought the dentist was justified in extracting whatever teeth he found decayed; but that the parties came within the provisions of the *Contributory Negligence Act*, R.S.B.C. 1936, c. 52; and, being unable to distinguish between their degrees of liability, they held the parties equally to blame, and held that the dentist was entitled to contribution from the doctor upon the basis of equal liability.

The doctor appealed to this Court from that part of the judgment in the Court of Appeal whereby his appeal in the third party proceedings was dismissed. The dentist gave notice of contention in the present appeal in form similar (*mutatis mutandis*) to that stated above on the appeal to the Court of Appeal.

C. K. Guild K.C. and *E. F. Newcombe K.C.* for the appellant.

F. J. Hughes K.C. for the respondent.

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

ESTEY J.—This appeal arises out of third party proceedings in an action of trespass in which Mrs. Yule, plaintiff, recovered judgment against the defendants J. R. Parmley, a physician and surgeon, and T. F. Parmley, a dentist, in the sum of $5,200 and costs, on the basis that they had removed all of her upper teeth and one lower tooth without her authority.

The order for directions in the third party proceedings named T. F. Parmley plaintiff, J. R. Parmley defendant, and directed that the question of liability between these parties "be tried at or immediately after the trial of this action as the trial judge shall direct."

The judgment of the learned trial judge in these third party proceedings directed the doctor to indemnify the dentist up to $5,000 and costs.

The Court of Appeal affirmed this judgment, but two of the learned judges dissented on the basis that this was not a case for indemnity but rather of contribution and that each defendant should pay one-half.

Mrs. Yule, a young lady of twenty-two years of age, a patient of the doctor, arranged to have her tonsils removed at the hospital on October 12th, 1943. Two of her teeth were bothering her and, as her dentist was on active service, she from time to time mentioned them to Dr. Parmley. On Friday, October 8th, she suggested to the doctor that she would like two teeth removed while she was under the anaesthetic for the tonsillectomy. The doctor suggested, and Mrs. Yule agreed, that she might have his brother, a dentist whose office was in the same building, make the extraction. He asked that she at once interview him, but Mrs. Yule could not then conveniently do so, and asked if she might see the dentist at the hospital on the morning of the operation. In that request the doctor acquiesced.

1945

PARMLEY v. PARMLEY

Estey J.

On the same afternoon of October 8th the doctor called at the office of the dentist and the latter deposed as to the conversation:

He came in the door and he said, "Fred, has Mrs. Yule been in to see you yet?" And I said, "No;" "Well, she wants you to take some teeth out at the hospital on Monday." So I looked at my appointment book, and noting it was a holiday I asked him if Tuesday morning would do as well and he said he would get in touch with Mrs. Yule and see if that was agreeable to her, and that was the end of the conversation.

That was on Friday. On Sunday afternoon they met at their mother's for afternoon tea, when the dentist deposes:

I asked my brother if he knew what teeth Mrs. Yule wanted extracted, and he replied, "They are the uppers."

Mr. McAlpine: Excuse me, I didn't get the answer.

Mr. Tysoe: They are the uppers.

The Witness: I replied that I would take my full kit of instruments in any case.

Q. Anything else said?

A. I think that was all at that conversation.

The dentist also stated that he would not deny that the doctor said, "I am not sure but I think it is just the uppers."

The operation was scheduled to take place at 8.30 Tuesday morning. The dentist arrived at the hospital, and when giving his instruments to a nurse for the purpose of having them sterilized, asked her where Mrs. Yule was. On being informed that she did not know, he made no further inquiry but went to the chart room and there remained until he went to the operating room. While there, his brother came into the chart room, they passed the time of day, and the doctor went on into the hospital. A little later the dentist went to the operating room, and finding that Mrs. Yule was already under the anaesthetic, he exclaimed, "Oh, so you have started already." The dentist then for the first time examined Mrs. Yule's mouth and, as he says, found three upper teeth badly decayed, the upper gum tissue in "a very neglected and deplorable condition," and an advanced condition of pyorrhea. He then said to his brother:

Well, Bob, I think the upper teeth should come out, all right, and also this lower left third molar, which is so badly decayed.

To which the dentist says the doctor replied,

Then you had better go ahead.

The foregoing is all that took place between the doctor and the dentist up to the time of the actual extraction.

On the basis of these brief conversations and his own examination he, assisted by the doctor, extracted all the upper teeth and one lower tooth.

The main case turned upon, what authority, if any, did Mrs. Yule give for the extraction of her teeth? There were conversations extending over a period of time between the doctor and Mrs. Yule. The doctor believed she wanted all of her uppers out. Mrs. Yule wanted only two uppers out, and in any event expected to see the dentist herself. The learned trial judge accepted the evidence of Mrs. Yule.

Mrs. Yule never did see or have any conversation with the dentist respecting her teeth, and the foregoing quotations set forth the conversations between the doctor and the dentist. These provide the basis for the contention of the dentist that he was requested by the doctor to remove the teeth, that he did so in compliance with that request, and as a consequence suffered damage and is therefore entitled to be indemnified.

The question in these third party proceedings is therefore: was there a request by the doctor which authorized the dentist to make the extractions he did?

There is no serious, if any, disagreement between them with respect to these conversations, and therefore it is a matter of the construction thereof. I think it may be pointed out here that the learned trial judge does not make a finding with respect to credibility as between the doctor and the dentist; as between Mrs. Yule and either of them he accepts Mrs. Yule's evidence. He states:

> The doctor is, in my opinion, an honest witness, but his memory as to details is not good. He is uncertain in his evidence.

Then with respect to the dentist the learned trial judge does not accept his evidence as to the condition in which he found the teeth. He accepts the evidence of Mrs. Yule, as will appear in a quotation from his judgment hereinafter set out.

The learned trial judge in the course of his judgment states:

> The dentist therefore, I find, proceeded with the extractions on the basis that the consent of the plaintiff had been given to the doctor and through the doctor to him;

1945

PARMLEY v. PARMLEY

Estey J.

and again,

> But the doctor's words and conduct in my opinion constituted a representation of authority which he did not have but which the dentist was quite justified in assuming he did have.

This finding, as I read the evidence and the judgment, is a matter of inference and conclusion rather than a question of credibility. In the third party proceedings the dentist, a defendant in the main action, is the plaintiff, and upon him rests the burden of proof. In my opinion, with great respect to the learned trial judge, I do not think in these latter proceedings his conclusion can be supported by the evidence.

The conversations of Friday and Sunday construed most favourably to the dentist, do not, in my opinion, contain an assertion of authority or a request, or the giving of instructions in such clear and definite language as to justify a professional man performing a serious operation.

On Friday the doctor's first words are words of inquiry: "Fred, has Mrs. Yule been in to see you yet?" What follows in this brief conversation is but an inquiry and an intimation that the patient wants "some teeth" extracted. The reason therefor is made neither the subject of an inquiry nor a statement then or at any other time.

Then, as to the effect of the second conversation at his mother's tea on Sunday, when the doctor had said, "The uppers," or "I think the uppers," the following appears in the dentist's evidence:

> Q. You were quite content, I say, to proceed with the extraction on the basis of this conversation which might have been, "I am not sure but I think it is uppers?"
>
> A. I would like to answer yes with a qualificatior
>
> The Court: That is your privilege. That is your privilege, witness, explain your answer if you wish to.
>
> A. The consent carried by Dr. Parmley to me, along with my own judgment, was the reason that I had to take those teeth out.

There were only the two conversations of Friday and Sunday prior to that in the operating room, and therefore the following is important in the dentists's evidence:

> Q. I would like to get this clear, doctor [dentist], as to whether you extracted the upper teeth on the basis of the conversation you say you had with Dr. Robert in the operating room that morning, or whether it was by reason of instructions you thought you had received before then?
>
> A. It would probably be a combination of them. I think all the conversations had a part in the decision, Mr. Yule.

His appreciation of these two conversations is emphasized by his further evidence:

Q. Isn't it customary to take instructions from the patient personally?

A. We like to see the case we are going to operate on and advise, yes.

Q. Was that your answer?

A. Yes.

Q. Because after all the dentist is the one who knows what teeth should and what teeth should not come out?

A. That is right.

Q. Was it your intention to see Mrs. Yule to find out from her what teeth she wanted out?

Q. I went up with the intention of seeing her mouth, to see the condition of the teeth, and I would have discussed the case with Mrs. Yule if I had seen her.

In view of this evidence it is difficult to understand why he did not make a serious effort to locate Mrs. Yule in this hospital of about forty beds, more particularly as he had not inquired and had not been told why she wanted her teeth out. He knew at that time nothing of the condition of the teeth. Yet, apart from the casual inquiry of the nurse to whom he gave his instruments, he made no effort to locate Mrs. Yule, notwithstanding the fact that the acting matron entered the chart room while he was there. He suggests that he expected to see her in the operating room before she was anaesthetized. This was leaving a most important matter to a time when the patient would be naturally, if not necessarily, disturbed or, as the evidence indicates in this case, Mrs. Yule, who had gone to the hospital the night before, was under the influence of a drug given to her in her room when she went to the operating room. Mrs. Yule states:

When the nurse did come in with the stretcher for me I was feeling sort of funny from the effects of this hypo; I wasn't just myself. I don't remember very much. I remember seeing the doctor and the nurse in the operating room, and that is all I remember.

The dentist admits he was familiar with the hospital, and under all the circumstances he cannot be excused for not having located Mrs. Yule at a time when he could make an examination and discuss the condition of her teeth with her.

It is now important to observe that the dentist was here called upon in his professional capacity and therefore at all times material hereto a relation of dentist and patient existed between himself and Mrs. Yule. She was a young lady of twenty-two years of age, known to the dentist but

1945

PARMLEY v. PARMLEY

Estey J.

who had not prior thereto been a patient of his. He believed that she had not received professional advice with respect to her teeth.

Q. And your thought was in this particular case that Mrs. Yule had made her own diagnosis?

A. As far as I was concerned, yes.

The dentist therefore knew, or ought to have known, that she was not in possession of that information that a patient was entitled to before arriving at a decision so important that it involved the extraction of many of her teeth.

In the operating room, as he entered upon his examination, he had no idea why she wanted her teeth removed. He then found the condition of pyorrhea. It had not been mentioned to him before, nor did he there mention it to his brother. He takes the position that both the diagnosis and treatment of pyorrhea are matters for the dentist, and by way of further clarifying his position he says:

I think Dr. Parmley was not asked for his professional judgment on pyorrhea. I think it was a straight matter of carrying consent from the patient to myself.

When one keeps in mind that pyorrhea was first discovered by the dentist in the operating room, the following evidence given by the dentist is important:

Q. * * * you would not, or would you, doctor, expect to be instructed under the circumstances by Dr. Parmley for the extraction of teeth on account of a pyorrhea condition?

A. I was willing to carry his message of consent rather than a question of instructions.

Q. In other words, you took the position to be this: When Dr. J. R. Parmley came to you he merely conveyed to you the wishes of Mrs. Yule?

A. That is right, sir.

Q. And that is all he was endeavouring to do?

A. That is right.

* * *

Q. And before you proceeded with the extraction, doctor, you have said that you spoke to the doctor?

A. Yes, sir.

Q. And you told him about the condition that you found, or did you?

A. Yes, just a very brief outline.

Q. That you had found in the mouth?

A. Yes.

Q. And why did you tell him?

A. Probably through courtesy—to gain further consent, I think, seeing he was carrying the consent he was entitled to know.

* * *

Q. And there wasn't any occasion for speaking to him about the uppers?

A. I think I just told you, sir, it was a courtesy conversation.

* * *

In my opinion there is no request, instruction or message which justified the dentist in removing the teeth. An analysis of these conversations shows an absence of precise and definite language. The learned trial judge describes the doctor as "uncertain in his evidence," and certainly one gets that impression as he reads his evidence. Upon the points most important to the dentist he is particularly uncertain and indefinite. He never becomes more specific in his statements than to say, "some teeth," "the uppers," "I think the uppers." These conversations are so general, vague and ambiguous that in my opinion a professional man is not justified in acting upon them.

It seems to me that had the patient herself, Mrs. Yule, made such statements to the dentist, he would not have proceeded, and would not have been justified in proceeding, without making an examination of her teeth and advising and consulting with her; then, if she desired and requested that her teeth or any of them be extracted, the dentist would be justified in proceeding to do so.

Force to the person is rendered lawful by consent in such matters as surgical operations. The fact is common enough; indeed authorities are silent or nearly so, because it is common and obvious. Taking out a man's tooth without his consent would be an aggravated assault and battery. With consent it is lawfully done every day. [Pollock on Torts, 14th ed., p. 124.]

The respondent has contended that the doctor in the operating room should have there prevented the dentist from removing the teeth. There is much to be said for that view. At the same time that does not excuse the dentist. His duty to the patient remained the same. In my view they were both negligent, particularly in the operating room, not with respect to the quality of any work there performed, that is not an issue. In that room it was in proceeding to extract the teeth without the consent of the patient. The dentist knew she had received no advice, and yet upon these vague and general statements he proceeded with a serious operation.

The conclusion appears unavoidable that both of the parties hereto, particularly in the operating room, failed to recognize the right of a patient, when consulting a pro-

1945

PARMLEY v. PARMLEY

Estey J.

fessional man in the practice of his profession, to have an examination, a diagnosis, advice and consultations, and that thereafter it is for the patient to determine what, if any, operation or treatment shall be proceeded with. *Slater* v. *Baker* (1); 22 Halsbury, 2nd ed., p. 319, par. 603; *Marshall* v. *Curry* (2); *Schloendorff* v. *The Society of the New York Hospital* (3); *Kinney* v. *Lockwood Clinic Ltd.* (4). Mrs. Yule obviously expected just that. She had been so treated with respect to the tonsillectomy.

It may be that in the operating room the parties hereto were of the opinion that they were acting in the best interests of Mrs. Yule in extracting the teeth, but that is not the point. That would have been very important in their consultation with and their advising of Mrs. Yule, but it does not justify their proceeding without her consent. As was said by Garrison J., "No amount of professional skill can justify the substitution of the will of the surgeon for that of his patient." *Bennan* v. *Parsonnet* (5).

There are times under circumstances of emergency when both doctors and dentists must exercise their professional skill and ability without the consent which is required in the ordinary case. Upon such occasions great latitude may be given to the doctor or the dentist. In this case it is not even suggested, nor is there any evidence to suggest, that any such circumstances exist. In a matter of a very short time the condition of her teeth could have been discussed with the patient. There was no reason for an immediate extraction. Her position under the anaesthetic for the tonsillectomy provided a convenient, but not a necessary, opportunity for the removing of her teeth.

It was urged that the dentist was entitled to take the position upon these conversations with the doctor that he was to remove these teeth unless in his judgment they ought not to be removed. In view of what I have already said, I do not think such a position is tenable in law, and even if it was, it is not open to the dentist in this case because here the learned trial judge has found that the condition of the teeth which the dentist represents as his justification for removing them, did not exist.

(1) (1767) 2 Wils. K.B. 359.
(2) [1933] 3 D.L.R. 260.
(3) (1914) 211 N.Y.R. 125.
(4) [1931] O.R., 438.
(5) (1912) 83 N.J.L.R. 20, at 26.

On the whole of the evidence I am of the opinion that the dentist has failed to establish by a preponderance of evidence that the condition of the teeth was as he states, or if it was, that the teeth could not have been successfully treated. I have no hesitation in accepting the evidence of the plaintiff that she had no knowledge of the existence of a condition such as the dentist says he found, or of any condition other than she has described. I find it difficult to believe that a condition such as the dentist has described could have been present without her knowledge. The teeth may not have been and possibly were not in as good condition as she thought, but on the other hand I am not satisfied the condition was such as the dentist has stated. This examination was hastily made, and made, too, on the assumption that she wanted all the upper teeth out, and that the doctor for some reason wanted them all out.

So far as the last remark, "that the doctor for some reason wanted them all out," is concerned, with great respect I can find no evidence to support it. Apart, however, from this last remark, the learned trial judge in effect has found that the dentist removed teeth which he was not justified in removing, and therefore provided the basis for the substantial damages awarded in this case.

In my opinion the doctor, himself a professional man, in using the vague, general and ambiguous terms which I have already quoted and in not protecting his patient from, rather than acquiescing in, the conduct of the dentist, is himself negligent.

I am also of the opinion that the dentist in going forward and making the extractions as he did, without any inquiry as to why this young woman of twenty-two years of age wanted all of her upper teeth out, relying on conversations or, as he prefers, "messages", in the vague, general and ambiguous terms I have quoted; in not seeing Mrs. Yule, examining her teeth, advising and consulting with her before she went under the anaesthetic; and in removing teeth which were not in the condition he describes, was in all of these particulars himself negligent.

The dentist as plaintiff asks indemnity from the doctor on the basis that the latter requested him to remove the teeth. On his behalf counsel cites Underhill on Torts, 14th ed., p. 43:

> If one person does an act at the request of or under the directions of another, which is neither manifestly tortious nor tortious to his knowledge, he will be entitled to be indemnified by that other against all liability which he may incur by reason of that act proving to be a tort, whether he be servant or agent of that other or not.

1945

PARMLEY
v.
PARMLEY

Estey J.

The basis for an indemnity based upon a request is set forth as follows:

> The law implies from the request an undertaking on the part of the principal to indemnify the agent if he acts upon the request. It is true that this is not confined only to the case of principal and agent, there are other cases which it is not necessary to examine now. But they all proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so.

Bowen L.J., in *Birmingham and District Land Co.* v. *London and North Western Railway Company* (1).

In my opinion, for the reasons already discussed, there was no request which authorized the extraction of the teeth.

Then if there was a request and there be given to that request the certainty, the definiteness and the extent which the dentist asks, any compliance therewith involves the exercise on the part of the dentist of his professional skill and knowledge. There is no language which restricts or eliminates the duty which devolves upon him as a professional man toward the patient; indeed in this case he admits he applied his professional skill and ability; and therefore I do not think that this type of request, nor the relations which existed between the doctor and the dentist, provides a basis or a foundation for the implication of a promise to indemnify.

Counsel for the dentist cites *Secretary of State* v. *Bank of India, Ltd.* (2), and quotes the following passage from Lord Wright at p. 801:

> There is nothing anomalous in the presence of some element of choice or deliberation on the part of the officer who is the person doing the act, so long as he proceeds on the assertion or claim or direction or evidence of the applicant. Indeed, in the simpler type of case illustrated by *Dugdale* v. *Lovering* (3) it is not necessary that the plaintiff should have been other than a free agent. He may act on the defendant's request, not under compulsion, but of choice. That does not, however, deprive him of the right, if the circumstances are appropriate, to the implied indemnity, though no doubt he may waive the right.

In that case there was the duty upon the person entitled to a government promissory note to satisfy the officer employed by the government of the justice of the claim. There the party did so satisfy the officer, but did so by the

(1) (1886) 34 Ch. D., 261, at 275.
(2) [1938] 2 All E.R., 797.
(3) (1875) L.R. 10 C.P. 196.

presentation of a document which appeared complete and regular upon its face but which was in fact a forgery. It was held that the fact the officer was satisfied and therefore exercised his judgment but in so doing did not detect the fraud that was intended to deceive and mislead him, did not deny to his employer the right to be indemnified.

The facts in that case are so different as to make it clearly distinguishable. In the case at bar the dentist was, however one construes the words spoken, invited or requested to act in his professional capacity. There was no fraud or deception practised upon him, and had he sought to satisfy himself or to have discharged his professional duty he would not have committed the trespass which imposed upon him the damage or loss.

Moreover, if the language used in the conversations is construed as constituting a request, then by virtue of his negligent conduct he cannot recover on the basis of indemnity. The language of Swinfen Eady L.J., appears particularly appropriate where, after quoting certain well known facts of the law, he continues:

> The statement of the law which I have just read, in which it is held that the defendant is bound to indemnify the plaintiff against the consequences of an act done at his request, must be read as meaning that the plaintiff, who claims the indemnity, must have acted without negligence, and that the injury to the third party must be the direct result—that is, the natural and direct consequence—of doing the particular act the plaintiff was requested to do, and not a consequence merely arising from the manner in which the act was done. [*W. Cory & Son* v. *Lambton and Hetton Collieries* (1).]

In my opinion, the facts of this case do not provide a basis upon which the dentist may recover from the doctor by way of indemnity.

The dentist, in the alternative, claims a right to contribution under the provisions of the *Contributory Negligence Act*, ch. 52, R.S.B.C. 1936. Sec. 2 reads as follows:

> 2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:
>
> Provided that:—
>
> (*a*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
>
> (*b*) Nothing in this section shall operate so as to render any person liable for any damage or loss to which his fault has not contributed.

(1) (1916) 86 L.J.K.B. 401, at 405.

1945

PARMLEY v. PARMLEY

Estey J.

It was contended that because Mrs. Yule's action is founded in trespass, there should be no right to contribution under the foregoing Act, on the basis that it was restricted to cases of negligence. It was pressed that the word "fault" was synonymous with the word "negligence," and therefore did not include trespass. There is authority that the word "fault," as used in the *Maritime Conventions Act,* 1911 (1 and 2 Geo. V., ch. 57), upon which the British Columbia *Contributory Negligence Act* is modelled and from which it is substantially copied, means negligence.

There can be no question but that the word "fault" includes negligence, but whether it is a somewhat wider term as used in the British Columbia Act, in my view it is not necessary here to determine.

It appears to me that these third party proceedings constitute an action between two persons whose joint fault caused them to suffer "damage or loss," and the Court must determine whether this is a proper case in which the damage or loss should be apportioned between these parties. To do so in a proper case is precisely the purpose of the Act, and the pleadings of both parties here raised the question of fault, and the evidence throughout is led with regard thereto. It establishes that their fault or negligence led them to so conduct themselves that in law they committed a trespass. It is clear upon the authorities that a trespass may be the result of negligent conduct. 33 Halsbury, 2nd ed., pp. 3 and 30.

The reasons for judgment rendered in *The Cairnbahn* (1) are applicable to this case. That was decided under the *Maritime Conventions Act,* 1911. A hopper-barge, without any blame on the part of those in control thereof, suffered damage in a collision due to the fault of two other vessels. At p. 33 Lord Sumner states:

> The word "loss" is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer.

In my opinion, this is a proper case for contribution between the parties.

It is always difficult to determine, apart from special circumstances, the proportions of the damage or loss which should be assumed by or apportioned to the respective

(1) [1914] P. 25.

1945

PARMLEY v. PARMLEY

Estey J.

parties. In this case, having regard to the fact that both parties were negligent throughout and both parties took part in the extraction, it seems to me that both parties are equally at fault and therefore each should bear one-half of the total loss as fixed by the judgment rendered in favour of Mrs. Yule.

In my opinion this appeal should be allowed, in the third party proceedings the plaintiff should pay one-half of the claim and costs as fixed by the judgment of the learned trial judge in favour of Mrs. Yule at the trial, that in the third party proceedings there should be no costs to either party at the trial, that the doctor should pay the costs of the appeal to the Court of Appeal for British Columbia, and that the dentist should pay the costs of appeal to this Court.

KELLOCK J.—I concur in the result proposed by my brother Estey.

Appeal allowed (and judgment as stated in above reasons) with costs.

Solicitor for the appellant: *W. S. Lane.*

Solicitor for the respondent: *Charles W. Tysoe.*

1945
*May 10, 11
*June 20

W. A. BECHTEL COMPANY AND OTHERS, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF BECHTEL - PRICE - CALLAHAN (DEFENDANTS) ..... } APPELLANTS;

AND

STEVENSON & VAN HUMBECK SAWMILL AND OTHERS (PLAINTIFFS). } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contract—Whether such delay in performance as to warrant repudiation —Measure and computation of damages for breach—Reference back for reassessment.

APPEAL by the defendants from the judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing (Harvey C.J.A. dissenting) their appeal from the judgment of the trial judge, Macdonald J., in favour of the plaintiffs for damages for breach (as he found) of a verbal contract to take delivery of and pay for a minimum of 500,000 feet of lumber and bridge timber to be manufactured by the plaintiffs. The trial judge allowed as damages $9,415.30, being for 500,000 feet at $30 a thousand ($15,000), less $4,019.30 paid, and less the cost (estimated at $6 per thousand) of sawing into lumber and bridge timber 260,901 feet of unmanufactured logs ($1,565.40).

L. A. Forsyth K.C. and *Paul F. Renault* for the appellants.

J. N. McDonald K.C. for the respondents.

The judgment of the Court was delivered by

RAND J.—The Courts below concur in finding a contract for the work of logging and sawing not less than 500,000 feet of lumber and the questions here are as to delay and damages.

Considering all the circumstances admittedly contemplated by the persons actually making the engagement, the

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

(1) [1944] 4 D.L.R. 561

urgency and pressure under which the Canol project in the north country was set in motion, the difficulties of communication, the proposed all season road, with the first object to get things done rather than to frame engagements, made in good faith, in a form satisfactory to official punctilio, I find myself unable to say that there was such a delay as warranted the repudiation of liability by the appellants for the work done or being done beyond the 139,000 feet of lumber accepted by them. I do not say the continuing intimation to Stevenson by Stites, throughout January, 1943, in effect, "to do the best he could and get the lumber out as quickly as possible," can be taken to mean the effort could go on indefinitely; yet assuming this in turn to be bounded by a reasonable period, it would carry performance to the time within which the respondents, had they not been told to desist, could have finished sawing the remaining logs.

On the question of damages, it was argued by Mr. Forsyth that an order given on November 23rd, in ignorance, apparently, of both the terms and circumstances of the arrangement and subsequently put aside by Stites, must be treated as representing a quantity which Weiss, his successor, toward the middle of February, was prepared then to take and that it should, in any event, be deducted from the 500,000 feet. It is claimed the order was afterwards filled from another mill but that is by no means clear. The lumber had been intended for the construction of a bridge across the Hay River but the conditions at the river in January dispensed with its necessity. It appears from a letter sent by the defendants on June 23rd, 1943, to the United States Army Engineers Department recommending a settlement, that the subsequent field orders, ten in number, filled by the respondents, were designed to take up approximately the quantity of the original order. There is nothing to indicate that, if, in February, the respondents had filled that order, the subsequent orders would have been given. I am, consequently, unable to treat this 145,000 feet as chargeable against the minimum quantity.

There remains, then, the amount recoverable. The question is very narrow: what would it have cost the respondents to complete the sawing of approximately 260,000 feet then in log? The respondent Van Humbeck estimated six

1945

W. A. BECHTEL COMPANY ET AL. v. STEVENSON & VAN HUMBECK SAWMILL ET AL.

Rand J.

dollars a thousand feet. Stevenson gave the same figure but he was not a lumberman and his opinion is of little value. On the other hand, statements furnished by Van Humbeck of the expenses of the entire operation, for the purpose of supporting the original claim to be reimbursed for the total outlay, indicate quite a different cost: and he appeared to acquiesce in suggestions that various amounts shown covering wages, supplies and other expenses, could be taken as cost items for the balance of 260,000 feet. On that basis, the cost works out to about thirty dollars a thousand feet, the price allowed. But on the face of the statements there are patent errors and, with them corrected, some surplus over expense would remain.

It is said by the respondents that the items included wages from the time the mill was set up until the sawing ceased and in one case, that of McLarty, a witness, that seems to be so. Admittedly, too, they covered the cost of additional logging of approximately 100,000 feet. On the other hand, in the details of the commissary there were four men whose expenses ranged from $60.25 to $94.54; two others $115 and $117 respectively, another $162 and the last two $241 and $251 respectively. It seems quite impossible to say that four, at least, of these items represented commissary expenses over a period of four full months: and two and possibly three others could only doubtfully be such. With that conflict furnished by the evidence of the respondents, the finding of the trial judge cannot be supported and I see no escape from a reference back for reassessment.

The reference will be limited to the cost of sawing the remaining quantity of 260,000 feet. There will then be deducted from $15,000 the sum of $4,019.30 already paid plus the cost so ascertained, and judgment will go for the balance. The appellants are entitled to one-half of their costs in this Court and in the Court of Appeal. The respondents will have the costs of the trial, but they must bear the costs of the reassessment.

Appeal allowed in part.

Solicitors for the appellants: *Field, Hyndman, McLean.*

Solicitors for the respondents: *Simpson & Manning.*

1945

GATINEAU POWER COMPANY (DEFENDANT) ..... APPELLANT;

*May 29
*June 20

AND

CROWN LIFE INSURANCE COMPANY (PLAINTIFF) ..... RESPONDENT;

AND

THE ROYAL TRUST COMPANY (MISE-EN-CAUSE).

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

Companies—Bonds—Redemption before maturity—Payment in American or Canadian funds at the option of holder—Redemption date—Date of presentation—Exchange rate not same on those dates—Rate at which bonds are payable.

Where, in conformity with a trust deed, a company (appellant) elects to redeem, prior to maturity, some of its outstanding bonds on June 1, 1939, such bonds being payable in United States or Canadian funds at the holder's option and the holder (respondent) does not present the bonds on that date when the rate of exchange was 13/4th of 1 per cent. but later forwards them to New York where, on September 20, 1939, the rate of exchange being 11 per cent., they are presented to a paying agent, an American bank, with a demand that the amount be paid in American currency, but payment is refused by the bank under instructions from the appellant company, the holder (respondent) is entitled to bring an action in Quebec asking that the appellant be ordered to pay in Canadian funds an amount sufficient to purchase the required United States funds at the rate of exchange current on September 20, 1939.

The privilege of receiving payment in two currencies was not limited to the day of maturity of interest or principal.

The obligation of the appellant company, under the bonds, was not only to be ready and willing to pay the debt on the day fixed but to maintain that readiness until the debt was discharged. On the other hand, there was no duty upon the holder (respondent) to present the bonds for surrender on any particular day, and, consequently, there was no default by the latter through failure to act until September 20th, 1939.

Judgment of the appellate court (Q.R. [1944] K.B. 700) affirmed.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1) reversing the judgment of the Superior Court, Demers Philippe J.

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

(1) Q.R. [1944] K.B. 700.

1945

GATINEAU POWER CO. v. CROWN LIFE INSURANCE CO.

The respondent company claimed from the appellant company the sum of $177,322.50, being the alleged value in Canadian currency of 150 $1,000 bonds issued by the appellant company plus premium and interest. After the institution of the action, but before pleading, the appellant company paid the respondent company a sum of $159,750 in virtue of a special agreement between the parties, thus leaving in issue the sum of $17,572.50, such amount representing an 11 per cent. premium of exchange of United States funds over Canadian funds which the respondent company claimed to be entitled to receive in addition to the amount paid by the appellant company. The trial judge maintained the respondent company's action for $330 only; but the appellate court maintained it for the full amount claimed.

L. A. Forsyth K.C. and *Hazen Hansard K.C.* for the appellant.

Aimé Geoffrion K.C. and *F. J. Laverty K.C.* for the respondent.

The judgment of the Court was delivered by

RAND J.—This action was brought on bonds, the covenant in which was in the following terms:

> Gatineau Power Company (hereinafter called the "Company"), for value received hereby promises to pay to the bearer hereof * * * on the first day of June, 1956 * * * dollars in gold coin of the Dominion of Canada of or equal to the June 1, 1926 standard of weight and fineness at the office or agency of the Company, at the holder's option, either in the city of Montreal, province of Quebec, or in the city of Toronto, province of Ontario, or, at the holder's option, in gold coin of the United States of America, of or equal to the June 1, 1926, standard of weight and fineness at the office or agency of the Company, at the holder's option, either in the Borough of Manhattan, city and state of New York, or in the city of Boston, Commonweath of Massachusetts, and to pay interest thereon from June 1, 1926, until fully paid, at any one of said places, at the holder's option, in like gold coin as aforesaid at the rate of five per cent (5%) per annum semi-annually on the first days of December and June in each year, but only upon presentation and surrender of the respective coupons hereto attached as they severally become due.

They were of a series due in 1956 and were subject to redemption on any interest date prior to maturity at the election of the company. The redemption price was to be the principal plus a premium of four per cent. The company elected to redeem as of June 1st, 1939. In case of

redemption, upon funds being provided by the company to the trustee, the bonds were to cease to bear interest; and they were to be surrendered upon payment. On the day fixed, the company had made provision for funds of appropriate currencies in the four cities mentioned. On that day, the premium on American funds was 13/64ths of one per cent. The respondent presented its bonds at New York on September 20th, when the premium was officially at eleven per cent., but the company declined to pay their face value in American funds. Some time later it proposed to pay such sum in American funds as then represented the amount of Canadian currency payable as of June 1st, i.e. on the exchange rate of 13/64ths of one per cent., or the sum of $917.09 in American funds on each thousand dollar bond. An offer of $22.04 in American funds, calculated on the same basis, was made on the interest coupon for $25 due June 1st, 1939. These offers the respondent declined to accept and this action was brought in Quebec.

Two contentions are made by the appellant. It is said first that the clause dealing with the several currencies and places contemplated primarily a Canadian currency and place of payment at Montreal; secondarily, an option in the holder to receive payment in American funds at either New York or Boston but limited in time to the precise day named for redemption. The second point was that, assuming the option continued after the maturity date, nevertheless, for the purposes of judgment in Canadian currency, the date as of which the conversion rate must be determined was the date of maturity, June 1st, 1939.

It would, I think, be rather astonishing to purchasers to be told that the privilege of receiving payment in two currencies and at four places of payment, obviously provided in the bonds as an inducement to their sale, was one that was strictly limited to the day of maturity of both interest and principal. There is in the clause no such express limitation and to imply one would be to adopt a construction, having regard to the continuing debt, utterly at variance with the plain and ordinary meaning of the language. Nor is there anything in the circumstance that payment is to be made on redemption or at maturity upon surrender of the bonds that gives support to, much less requires, such an implication.

1945

GATINEAU POWER CO. v. CROWN LIFE INSURANCE CO.

Rand J.

The appellant's position is in fact vitiated by a fallacy at the bottom: it assumes the word "option" to have the technical signification it carries in, say, an "option" to purchase. It is treated as an incidental or collateral privilege of which time is a condition. One day's delay in presenting an interest coupon at either Boston or New York would render it payable only at Montreal in Canadian funds: such a consequence, in the absence of language compelling it, needs but to be mentioned to be rejected. The word is not used in any such sense. It is used, in relation to an alternative mode of payment, to put the choice in the holder of the bonds rather than in the debtor. So interpreted, the provisions of the bonds and of the trust indenture are not only consistent but free from commercial absurdity.

The second ground is that the date of conversion into Canadian funds is the date of the maturity of the obligations and that this was on June 1st, 1939. In the application of the authorities relied on, this date of maturity is confused with the date of a breach. In the ordinary case of a debt payable at a certain time, the date of payment becomes, in case of non-payment, the date of the breach or default; but here the obligation to redeem had, as a concurrent condition, the surrender of the bonds. The obligation of the company, under the bonds, was not only to be ready and willing to pay the debt on the day fixed but to maintain that readiness until the debt was discharged. On the other hand, there was no duty upon the holder to present the bonds for surrender on any particular day. There was consequently no default by the respondent through failure to act until September 20th. Nor was there any default on the part of the company until that day, when payment according to the tenor of the bonds was refused. It is on the cause of action arising from that refusal that this proceeding is brought.

In such a case, the rule laid down in *The Custodian* v. *Blucher* (1) and in *S.S. Celia* v. *S.S. Volturno* (2), is that conversion into the currency of the forum is to be made as of the date of the breach and that rule was followed in

(1) [1927] S.C.R. 420. (2) [1921] 2 A.C. 544, at 528.

1945

GATINEAU POWER CO. v. CROWN LIFE INSURANCE CO.

Rand J.

the Court of King's Bench. But even if we were to take the date of judgment as controlling, the amount recoverable would be the same.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Montgomery, McMichael, Common, Howard, Forsyth & Ker.*

Solicitors for the respondent: *Laverty, Hale & Laverty.*

1945

*May 14, 15 16

*June 20

S.S. *RICHELIEU* AND HER OWNERS (DEFENDANTS) ..... } APPELLANTS;

AND

LA CIE DE NAVIGATION SAGUENAY ET LAC ST-JEAN LIMITÉE AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Collision—Ship channel divided in two branches—One ship going up and the other down stream—Whether one or both ships at fault—Confusion created by successive blasts given by both—Required signals to be given from a sufficient distance and within a sufficient time to allow ships to proceed safely—Danger arising from misunderstood signals—Absence of proper look-out.

The action brought by the respondents, owners of the S.S. *Roberval,* her master and members of the crew and owners of her cargo on board, and the counter-claim by the appellants, the S.S. *Richelieu* and her owners, arose out of a collision between the two ships in the river St. Lawrence, near Three Rivers. In the vicinity of that city, the regular ship channel divides into two branches, one practically parallel to the other. The *Roberval* was proceeding down stream and was following the north branch, while the *Richelieu* was coming upstream, below a buoy in the ship channel east of the junction of the two branches. The *Richelieu* intended to proceed by the south branch and, seeing the *Roberval,* gave two short blasts of its whistle to indicate that it was directing its course to port, and in fact ported. Those on the *Roberval* say that they heard only one blast, which would indicate that the *Richelieu* was directing its course to starboard. Those on the *Richelieu,* not hearing any immediate answer from the *Roberval,* stopped their engines. Immediately thereafter,

---

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

1945

S.S. "RICHELIEU" AND HER OWNERS v. CIE DE NAVIGATION SAGUENAY ET LAC ST-JEAN LIMITÉE AND OTHERS

the *Roberval* answered with one blast and thereupon the *Richelieu's* engines were ordered full speed astern and three blasts of its whistle were given. The collision occurred almost immediately: the stem of the *Richelieu* came in contact with the port side of the *Roberval*, the *Richelieu* being practically stopped at the time of the impact. The trial judge, holding that the *Richelieu* alone was to blame for the collision, maintained the action and dismissed the counter-claim.

Held, per The Chief Justice and Hudson and Taschereau JJ,, that, according to the facts of the case, both ships were to blame, that the responsibility should thus be apportioned and that the judgment appealed from should be modified accordingly. Kerwin and Rand JJ. were of the opinion that the respondents' action ought to be dismissed *in toto* and the counter-claim allowed.

Per the Chief Justice and Hudson and Taschereau JJ.—When two ships are about to meet, the required signals have to be given from a sufficient distance and within a sufficient time to allow the respective crews to take the necessary steps to avoid any peril which may arise as the result of misunderstood signals. The *Richelieu* was late in signalling her intention as to which channel she would follow, and, under similar circumstances, ordinary prudent seamen would not have waited as long as she did to indicate the route she was to follow. At the time of the first blast given by the *Richelieu*, the distance between the two ships, half a mile, was too short, the blasts were given too late and the officers of the crews did not have the necessary time to avoid the peril created by the emergency resulting from the misunderstanding. The errors of the *Roberval*, in trying to pass port and her failure to stop her engines in proper time when the danger was imminent, contributed to two-thirds of the accident, and the *Richelieu* should bear one-third of the responsibility for her delay in giving the necessary signals.

Per Kerwin and Rand JJ.—The *Richelieu* has acted properly at all times. The signals given by her were proper because the ship was taking a course "authorized by the Rules," and they were not given too late; she also acted properly, and not too late, in stopping its engines when hearing no reply to its signal and then in reversing its engines when it did hear the one blast from the *Roberval*. The cause of the collision was the absence of a proper lookout by those on the *Roberval*. If they had kept a proper lookout, they would have heard the *Richelieu's* two blasts, and, even then, the collision might have been avoided if the Captain of the *Roberval*, seeing what the *Richelieu* was actually doing, had altered his course to port and had slowed his engines.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Cannon, J., maintaining the respondents' action and dismissing the appellants' counter-claim, arising out of a collision between the S.S. *Richelieu* and the S.S. *Roberval* owned by the respondent company.

R. C. Holden K.C. for the appellants.

A. Pouliot K.C. and *William Morin K.C.* for the respondents.

1945

S.S. "RICHELIEU" AND HER OWNERS v. CIE DE NAVIGATION SAGUENAY ET LAC ST-JEAN LIMITÉE AND OTHERS

Taschereau J.

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

TASCHEREAU J.—On the 29th of August, 1942, the S.S. *Roberval,* owned by La Cie de Navigation Saguenay et Lac St-Jean Ltée, and the S.S. *Richelieu,* property of the Canada Steamship Lines Ltd., collided opposite the city of Three Rivers, in the St. Lawrence river, and as a result of this collision the S.S. *Roberval* sank.

In the Admiralty Court, Mr. Justice Lucien Cannon found that the S.S. *Richelieu* was to blame for this accident and he therefore maintained the action of the S.S. *Roberval,* and of the other plaintiffs and dismissed the counter-claim of the S.S. *Richelieu* with costs.

The evidence adduced by both parties is contradictory, and there are very few points on which the respective crews of the two ships agree. However, there are certain facts which cannot be challenged, and which may help to determine to whom shall attach the responsibility for this collision.

The S.S. *Roberval* which was on her regular voyage between Montreal and Chicoutimi, via Quebec city, was a small ship having a gross tonnage of 348·20, and a registered tonnage of 184·16. Her normal speed was approximately seven knots per hour through the water. On the relevant date, a few minutes after 11 p.m., the S.S. *Roberval* was steaming down the north channel opposite the city of Three Rivers following the St. Maurice course, steering on the lights of the Three Rivers Range astern of her. This north channel is practically parallel to the south channel, and both join in the vicinity of black gas buoy 49-C.

The S.S. *Richelieu* was proceeding up the main channel at fourteen knots an hour, on the Cap de la Madeleine upper course, steering on the lights of the Cap de la Madeleine lower Range, and she was returning from her weekly cruise to the Saguenay river.

At that time, the weather was clear and calm, with a light breeze blowing from the northeast, and the current was running down the channel at a speed of approximately two knots per hour. When the two ships, which were properly manned and equipped, reached a point 600 feet west of buoy 49-C, where both channels meet,

1945

S.S. "RICHELIEU" AND HER OWNERS v. CIE DE NAVIGATION SAGUENAY ET LAC ST-JEAN LIMITÉE AND OTHERS

Taschereau J.

the stem of S.S. *Richelieu* came in contact with the port side of the S.S. *Roberval* abreast of her bridge, with the result already indicated.

Were it not for the confusion created by the successive blasts given by both ships, this collision would have easily been avoided. The S.S. *Roberval* could have met the S.S. *Richelieu* starboard to starboard, and could have continued her course on the lights of the Cap de la Madeleine lower Range.

The appellant company owns a number of ships that make regular voyages on the St. Lawrence River. Those which carry the passenger and freight services, between Quebec and Montreal and vice versa, stop at Three Rivers, and it is therefore necessary for them to use the north channel; while the S.S. *Richelieu* which makes a weekly cruise to the Saguenay river, does not stop at Three Rivers, and passes through the south channel.

On the night in question, it was the intention of the Captain of the S.S. *Richelieu* to follow this latter course, but the S.S. *Roberval* was not and could not be aware of this fact. It rested therefore upon the S.S. *Richelieu* to signal with two short blasts that she would proceed on the south channel, to meet starboard to starboard, leaving the channel wide open for the S.S. *Roberval.*

All the members of the crew of the S.S. *Richelieu* who were heard as witnesses, testified that this was done, and that less than thirty seconds after having given this two blast signal, the order was given to stop the engines in view of the S.S. *Roberval's* failure to give an answer. A few seconds later—and on this point the officers of the S.S. *Richelieu* are also in agreement—a one blast signal was heard coming from the S.S. *Roberval,* indicating that she would meet port to port instead of starboard to starboard, as requested by the S.S. *Richelieu.* In view of this confusion of signals, the S.S. *Richelieu* gave a three blast signal, and at the same moment an order was given to put her engines astern. She was practically stopped at the time of the impact, one minute later.

With this version of the facts as related by the crew of the S.S. *Richelieu,* the Captain and others on board the S.S. *Roberval* entirely disagree. It is their contention that

the first signal given by the S.S. *Richelieu,* was a one short blast, and this one blast signal meant that they were to meet port to port. In order to do so, and pursuant to the agreement, the S.S. *Roberval* had to proceed in a straight line, directing her course approximately in the direction of buoy 49-C, and even more to the south, in order to pass in front of the S.S. *Richelieu* and meet port to port. Some members of the crew of the S.S. *Roberval* also contend that the second signal given by the S.S. *Richelieu* was not, as stated, a three blast signal, but a two short blast signal.

It is indeed quite extraordinary that such a discrepancy in the evidence should occur and that we should be confronted with these wide divergencies of opinions. The learned trial judge, however, has found as a fact that the S.S. *Richelieu* gave a first two blast signal, and that after receiving a one blast signal from the S.S. *Roberval,* put her engines astern. These divers opinions expressed by the respective members of the crew, have not been explained, although many hypotheses have been suggested. It has been said that the whistle of the S.S. *Richelieu* was not functioning properly, that a sufficient time did not elapse between the two blasts, or that due to some peculiar atmospheric conditions, some of the blasts of the S.S. *Richelieu* were inaudible. But these suggestions seem to be mere conjectures and no evidence has been adduced to substantiate any of them.

We are left with the mere fact that the S.S. *Richelieu* gave originally the proper two blast signal, and that she conveyed her intention to proceed as she usually does through the south channel. Unfortunately, these blasts were picked up differently by the S.S. *Roberval,* but for this unfortunate happening, the S.S. *Richelieu* cannot be blamed. It was her duty, because she had the choice of two different channels, to indicate which one she would follow, and this she did by giving the proper signal and by inclining to port simultaneously. This last move was noticed by the officers in the wheelhouse of the S.S. *Roberval,* and this fact should have given rise to the suspicion that they had misunderstood the signal. When the counter-signal was given by the S.S. *Roberval,* the S.S. *Richelieu* reversed her engines, which were then stopped, but then the accident could not be avoided.

1945

S.S. "RICHELIEU" AND HER OWNERS v. CIE DE NAVIGATION SAGUENAY ET LAC ST-JEAN LIMITÉE AND OTHERS

Taschereau J.

I believe that the S.S. *Roberval* cannot escape her share of responsibility. Her officers saw the S.S. *Richelieu* going slightly to port after the first signal, but nevertheless insisted in directing their ship to starboard, in the direct path of the on-coming S.S. *Richelieu,* at full speed, stopping the engines only at the moment of the impact. The S.S. *Roberval* realized or should have realized that there was no agreement between the two ships, and she should have stopped her engines long before she did. For this failure to follow the rules of the sea and of good seamanship, she must bear her share of the responsibility.

But the S.S. *Richelieu* cannot be absolved of all blame for this accident. It seems reasonably clear that she was late in signalling her intention as to which channel she would follow. Under similar circumstances, I believe that ordinary prudent seamen would not have waited as long as she did to indicate the route that she was to follow. When two ships are about to meet, the required signals have to be given from a sufficient distance and within a sufficient time to allow the respective crews to take the necessary steps to avoid any peril which may arise as the result of misunderstood signals.

In the present case, and it is also a finding of the trial judge, the S.S. *Richelieu* did not signal in due time, and in order to reach such a conclusion, I base my judgment not only on the evidence of the members of the respective crews who have appreciated the distance between the two ships when the first blast was given, but also on the time that elapsed between the first signal and the moment of the impact.

Although Captain Gagnon of the S.S. *Roberval* says that the distance between both ships at the time of the first blast was approximately one mile, Frégeau, master on board the same ship, says that it was 1,000 feet. Bernier, second officer of the S.S. *Richelieu,* says that it was approximately 3,000 feet. R. Gagné, pilot on board the S.S. *Richelieu,* believes that the distance was 3,000 to 4,000 feet, and R. Savard, the assistant-pilot of the S.S. *Richelieu,* testifies that 2,000 feet only, separated the two ships.

I think that one is justified in saying that the two ships were about half a mile away when the first blast was given.

This fact is corroborated by the evidence of the officers of the S.S. *Richelieu* who testified in a very precise way, that the mishap occurred less than one minute and a half after the first blast. They all agree that thirty seconds after the original signal was given, the engines of the S.S. *Richelieu* were stopped and put full astern, and that one minute later the collision happened.

During that time, taking into account the speed at which the S.S. *Richelieu* was proceeding, she covered 1,400 feet, and the S.S. *Roberval* coming in the opposite direction covered 1,200 feet, making a total of 2,600 feet, or half a mile, which was the distance between the two ships at the time of the first blast.

In my opinion, this distance was too short. It seems obvious that if the S.S. *Richelieu* found it necessary to stop and reverse her engines within thirty seconds after signalling her intention, the blasts were given too late, and the officers of the crew did not have the necessary time to avoid the peril created by the emergency resulting from the misunderstanding.

It follows that both ships are to blame, and that the responsibility should be apportioned. I believe that the errors of the S.S. *Roberval* in trying to pass port to port, and her failure to stop her engines in proper time when the danger was imminent, contributed to two-thirds of the accident, and that the S.S. *Richelieu* should bear one-third of the responsibility for her delay in giving the necessary signals.

The appeal should therefore be allowed and judgment should be entered condemning the S.S. *Richelieu* to pay one-third of the damages suffered by the S.S. *Roberval* and the other plaintiffs. The appeal on the counter-claim should also be allowed and the S.S. *Roberval* should be ordered to pay to the S.S. *Richelieu* two-thirds of the damages that the latter suffered.

In the lower court, the S.S. *Roberval* should be entitled to one-third of her costs and the S.S. *Richelieu* to two-thirds of hers. In this Court, the appellants should have two-thirds of their costs on the main action, and will be entitled to the same proportion of costs on their appeal on the counter-claim.

1945

S.S. "RICHELIEU" AND HER OWNERS v. NAVIGATION CIE DE SAGUENAY ET LAC ST-JEAN LIMITÉE AND OTHERS

Kerwin J.

The judgment of Kerwin and Rand JJ. was delivered by

KERWIN J.—This is an appeal from a judgment of the District Judge in Admiralty for the Quebec Admiralty District which maintained the action and dismissed the counter-claim. The plaintiffs are the owners of the S.S. *Roberval,* her master and members of her crew, and the owners of the cargo on board the *Roberval.* The defendants are the S.S. *Richelieu* and her owners. The action and the counter-claim arise out of a collision between the two ships in the river St. Lawrence near Three Rivers at about 11.18 p.m. daylight saving time on August 29th, 1942.

The *Roberval* was proceeding down stream at its full speed of seven knots with a current of approximately two miles per hour. In the vicinity of Three Rivers the regular ship channel divides into two branches and the *Roberval* was following the north branch. The *Richelieu* was coming upstream at its full cruising speed of fourteen knots and was below buoy 49C in the ship channel east of the junction of the two branches. The *Richelieu* intended to proceed by the south branch and, seeing the *Roberval,* gave two short blasts of its whistle to indicate that it was directing its course to port, and in fact ported. Those on the *Roberval* say that they heard only one blast, which would indicate that the *Richelieu* was directing its course to starboard, although those in the wheelhouse of the *Roberval* noticed the alteration of the *Richelieu's* course to port. Those on the *Richelieu,* not hearing any immediate answer from the *Roberval,* stopped their engines. Immediately thereafter the *Roberval* answered with one blast and thereupon the *Richelieu's* engines were ordered full speed astern and three blasts of its whistle were given. The collision occurred almost immediately.

The trial judge was assisted by nautical assessors but no mention is made in his judgment as to the views of these assessors, or either of them, and the only place in the record, to which we were directed as indicating that the assessors took any part in the proceedings, was at pages 156, 157. This occurred during the questioning, by the judge, of Léopold Bernier, the second officer on the *Richelieu,*

on the point as to what might have caused those on the *Roberval* to hear only one blast of the *Richelieu's* whistle. The trial judge found that two blasts had been given but that only one was heard. The only suggestion in his judgment as to why this should be is the condition of the atmosphere but it was a calm night with a light breeze blowing up the river and there appears to be no foundation in the record for the suggestion.

I accept the trial judge's finding that while two blasts of its whistle were given by the *Richelieu,* those on the *Roberval* were telling the truth when they said they heard only one. The inevitable result of this, in my opinion, is the conclusion that those on the *Roberval* were not keeping a proper lookout because, if they were, they would have heard the *Richelieu's* two blasts. It was contended by the respondents that no signal should have been given by the *Richelieu* and that, although she wanted to take her usual course up the south branch, she should have waited until the *Roberval* had passed in front of her. None of the international rules of the road require this to be done. It is quite evident that, if the two ships kept on their courses, there would be a collision. The *Richelieu,* therefore, ported a little and gave the signal therefor, which in the terms of Article 28 was proper because the ship was taking a course "authorized by the Rules". The interpretation of this word "authorized" given by Sir Francis Jeune in *The Uskmoor* (1), was approved by the Court of Appeal in *The Anselm* (2), and *The Aristocrat* (3). What Sir Francis Jeune said was this:—

> It has been sought to put a rather narrow interpretation on the rule. Of course the word "required" is clear enough. There are certain things required by the rules to be done. The word "authorized" is, however, very much larger, and I am inclined to think that a large interpretation ought to be given to it, and that it includes any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight.

As is pointed out in the ninth edition of Marsden's Collisions at Sea at page 429:—

> This definition, it may be observed, covers every course which "good seamanship" requires.

(1) [1902] P. 250, at 253.
(2) [1907] P. 151.
(3) [1908] P. 9.

1945

S.S. "RICHELIEU" AND HER OWNERS v. CIE DE NAVIGATION SAGUENAY ET LAC ST-JEAN LIMITÉE AND OTHERS

Kerwin J.

The trial judge found the *Richelieu* entirely to blame for the accident for four reasons:—

A.—Le S.S. *Richelieu* a changé sa course sans attendre le résultat de l'échange des signaux; B.—Les signaux du S.S. *Richelieu* ont été donnés trop tard; C.— S.S. *Richelieu* a persisté dans sa mauvaise manoeuvre, nonobstant le signal donné par le S.S. *Roberval* et sa course à tribord; D.—Les engins du S.S. *Richelieu* ont été arrêtés et renversés trop tard.

As to the first, the *Richelieu* acted properly in stopping its engines when it did not hear any reply to its signal and then in reversing its engines when it did hear the one blast from the *Roberval.* As to the second, I can find no evidence the *Richelieu's* signals were given too late and, with respect, there is nothing in the record from which any such inference may be drawn. As to the third, I have already pointed out what was done on the *Richelieu* and I can find no justification in the suggestion, if that is what is meant, as was argued by the respondents, that the wheel of the *Richelieu* should have been put to starboard. It appears to me that the collision would have been worse, with possible loss of life, if that had been done. As to the fourth, I am constrained to disagree with the trial judge that the *Richelieu* had stopped and reversed its engines too late.

As to all of these, it is I think impossible to estimate the precise times that elapsed between the various episodes, such as the sighting of the *Roberval* by the *Richelieu,* the giving of the signals, and the collision. It is true that only a short time intervened between the first and the last but whistles are not to be used when ships are a great distance apart as they might easily be mistaken by some other intervening vessels. The truth of the matter is that the *Richelieu* acted properly at all times and the cause of the collision was the absence of a proper lookout by those on the *Roberval.* Even then the collision might have been avoided if the Captain of the *Roberval,* seeing what the *Richelieu* was actually doing, had altered his course to port and had slowed his engines.

I would maintain the appeal, dismiss the claim and allow the counter-claim with costs throughout. There may be a reference to the Registrar to fix such damages as may be established by the appellants.

Appeal allowed and judgment appealed from modified.

Counter-claim also allowed in part.

1945

S.S. "RICHELIEU" AND HER OWNERS *v.* CIE DE NAVIGATION SAGUENAY ET LAC ST-JEAN LIMITÉE AND OTHERS

Kerwin J.

Solicitors for the appellants: *Heward, Holden, Hutchison, Cliff, Meredith & Collins.*

Solicitor for the respondents: *William Morin.*

1945

*May 29, 30, 31

*June 20

HIS MAJESTY THE KING
(PLAINTIFF IN PRINCIPAL ACTION)
APPELLANT IN PRINCIPAL ACTION;

AND

THE MONTREAL TELEGRAPH COMPANY
(DEFENDANT IN PRINCIPAL ACTION;)
(PLAINTIFF IN ACTION IN WARRANTY.)
RESPONDENT IN PRINCIPAL ACTION;
APPELLANT IN ACTION IN WARRANTY;

AND

THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA
(INTERVENANT IN PRINCIPAL ACTION;)
(DEFENDANT IN ACTION IN WARRANTY.)
RESPONDENT IN ACTION IN WARRANTY.

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

Taxation—Companies—Tax imposed by provincial statute—Telegraph company and company working a telegraph system—Agreement between two telegraph companies—One company operating whole system of the other for agreed remuneration—Whether liable for tax—Dismissal of claim for tax against operating company—Action in warranty by the latter against other company—Such action conse-

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

1945

THE KING
v.
THE MONTREAL TELEGRAPH COMPANY AND THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA

quently dismissed—Defendant in warranty also intervening in the principal action—Question of the costs of action in warranty as between the two telegraph companies.

The King, in right of the province of Quebec, claimed from the Montreal Telegraph Company (hereinafter called M.T.C.) $38,375.85, representing an annual tax of $1,000 for the years 1908-1909 up to 1938-1939, plus interest. This amount was alleged to be due by that Company under the *Corporation Tax Act*, which imposed a tax on "every telegraph company and every other company working a telegraph system for the use of the public". By an agreement, dated August 17, 1881, between the M.T.C. and the Great North Western Telegraph Company of Canada (hereinafter called G.N.W.T.C.), the latter Company undertook for a period of ninety-seven years to work, manage and operate the system of telegraph owned and, before that date, operated by M.T.C. Under that agreement the G.N.W.T.C. bound and obliged itself to pay all costs and expenses of the M.T.C.'s system and to keep the property free and clear from all liens and encumbrances arising from taxes and assessments. On the ground that the tax claimed by the appellant was a tax included in, and covered by, the above conditions of the agreement, the M.T.C. took an action in warranty against the G.N.W.T.C. to have the latter condemned to indemnify it against any condemnation which the Crown might obtain upon its claim. While the G.N.W.T.C. pleaded to the action in warranty and denied its obligation to indemnify the M.T.C. and prayed for the dismissal of the action in warranty, it, nevertheless, filed an intervention in the main action and prayed that the latter be dismissed with costs. The trial judge dismissed the main action and recommended that the appellant pay the defendant's and intervenant's costs; and, on the ground that the action in warranty was nothing else than the exercise of an action in indemnity and therefore subordinate to the fate of the principal action, he dismissed that action with costs against the M.T.C. The appellate court affirmed this judgment in the main action and dismissed the intervention with costs for the reason that the intervenant had, at the same time, contested the action in warranty and intervened in the main action, which was held to be inconsistent; the action in warranty was also dismissed with costs against M.T.C., that action being held to be without legal basis as the principal action had been dismissed. The Crown on the main action and the M.T.C. on the action in warranty appealed to this Court.

Held, affirming the judgments of the Courts below on the principal action, that the Crown, appellant, cannot maintain its claim against the M.T.C. for a tax imposed by *The Corporation Tax Act.* The statute clearly contemplates, not alone a telegraph company, but a company doing business in the province and working there a telegraph system for the use of the public. The M.T.C. does not come within such description: that company, by the sole fact it made the agreement with the G.N.W.T.C. and collects the agreed remuneration, is not doing business in the province.

Held, also, that the M.T.C. cannot be brought within the general clause of the taxing statute, concerning an ordinary "incorporated company carrying on any undertaking, trade or business" which is not otherwise taxed.

Held, further, in as much as the principal action had been dismissed, that a decision on the merits of the action in warranty has become unnecessary and that the M.T.C.'s appeal from the judgment dismissing that action should also be dismissed (*Archbald* v. *de Lisle,* 25 Can. S.C.R. 1, followed), so that nothing remains between the parties to that action but a question of costs.

Held that, under the circumstances of this case, while the G.N.W.T.C. should not be condemned to pay the costs of the M.T.C. in the action in warranty, it should at least get none of its own costs of that action against the M.T.C.; and the latter's appeal on that action should be allowed to the extent that the judgment of the appellate court should be modified accordingly.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, E. M. McDougall J. and dismissing an action by the Crown against the Montreal Telegraph Company for taxes amounting with interest to $38,375.85; and

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, E. M. McDougall J. and dismissing an action in warranty taken by The Montreal Telegraph Company against The Great North Western Telegraph Company of Canada.

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

Aimé Geoffrion K.C. and *L. E. Beaulieu K.C.* for the Crown appellant.

Geo. A. Campbell K.C. and *John W. Long K.C.* for the respondent in the principal action; and for the appellant in the action in warranty.

Gustave Monette K.C. and *L. Côté K.C.* for the respondent in action in warranty.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—His Majesty the King, in right of the province of Quebec, claimed from the Montreal Telegraph Company the sum of $38,375.85, with interest from the 12th of January, 1939, as taxes alleged to be due by that Company under the *Corporation Tax Act* of Quebec, 45 Victoria, ch. 22, statutes of 1882 and

1945

THE KING
v.
THE MONTREAL TELEGRAPH COMPANY AND THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA

Rinfret C. J.

amendments (6 Edward VII, ch. 10; 7 Edward VII, ch. 13; sections 1345 to 1359 inclusive of R.S.Q. 1909, and ch. 26 of R.S.Q. 1925).

It was contended by the appellant that, under the above statutes and subsequent amendments, there was imposed, prior to the year 1908, on all telegraph companies and other companies working telegraph systems, an annual tax of $1,000, which remained in force throughout the years 1908-1909 up to 1938-1939, and for which the respondent was liable, such tax, together with interest for each of the years from 1908 to 1939, making up the total claimed by the action.

It was further alleged that the tax in question constitutes a privileged debt, ranking immediately after the costs of justice, and that, by the resolution adopted on the 27th of June, 1938, the respondent renounced any prescription that may have been applicable to the claim so made.

By an agreement between the respondent and the Great North Western Telegraph Co. of Canada, bearing date of the 17th August, 1881, the latter Company undertook for a period of ninety-seven years from the 1st of July, 1881, to work, manage and operate a system of telegraph owned, and, before that date, operated by the respondent. One of the conditions and considerations of the said agreement, so it was alleged, was that the Great North Western Co. bound and obliged itself to pay all costs and expenses of operation of the respondent's telegraph system of every description, and to keep the property free and clear from all liens and encumbrances arising from taxes and assessments. On the ground that the tax now claimed by the appellant was a tax included in the costs and expenses agreed to be paid by the Great North Western Telegraph Co., it was the respondent's contention that it was entitled to call upon that Company to indemnify the respondent against the appellant's claim. Accordingly, the respondent called upon the Great North Western Telegraph Co. to warrant the respondent against the appellant's demand. While the Great North Western Telegraph Co. pleaded to the action in warranty and denied its obligation to indemnify the respondent and prayed for the dis-

missal of the action in warranty, it, nevertheless, filed an intervention in the main action and prayed that the latter be dismissed with costs.

In the result, in the Superior Court at Montreal (E. M. McDougall J.) the main action was dismissed and the respondent and the intervenant were successful in establishing their defence, the learned trial judge recommending, as is usual in such cases, that the appellant pay the respondent's costs and also those of the intervenant.

By judgment, rendered concurrently with that on the main action, the learned trial judge considered that it necessarily followed from the dismissal of the main action that the action in warranty was left without basis and could not accordingly be maintained, and it was dismissed with costs.

In the Court of King's Bench (Appeal Side) the judgment on the main action was affirmed. The intervention was dismissed with costs for the reason that the intervenant had, at the same time, contested the action in warranty and intervened in the main action, which was held to be inconsistent. As for the action in warranty, it was considered as being nothing else but the exercise of an action in indemnity, subordinate to the fate of the principal action, and, as the plaintiff in warranty was not condemned, the principal action having been dismissed, the warranty action was held to be without legal basis, and it was dismissed with costs.

The intervenant does not appeal from the judgment dismissing its intervention, but both His Majesty the King, on the main action, and the Montreal Telegraph Co., on the action in warranty, filed an appeal against the judgments of the Court of King's Bench (Appeal Side).

Both the principal action and the action in warranty were consolidated for purposes of evidence and trial and both appeals were also consolidated before this Court.

Before discussing the judgments, it is necessary to analyze the agreement of the 17th of April, 1881, between the respondent and the Great North Western Telegraph Co. It recites that the Montreal Telegraph Co. owns and operates lines of telegraph in Canada and in the

1945

THE KING
v.
THE MONTREAL TELEGRAPH COMPANY AND THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA

Rinfret C.J.

United States; that the Great North Western Telegraph Co. is willing and has agreed to undertake the working of the lines of the Company at a fixed rate of remuneration and upon the terms and conditions hereinafter provided. The fixed rate of remuneration is referred to as an annual guaranteed dividend of eight per cent. upon the capital stock of the Montreal Telegraph Co. of two millions of dollars. Upon other conditions mentioned in the body of the agreement, the Great North Western Co. undertakes for a period of ninety-seven years from the 1st of July 1881, to work, manage and operate the system of telegraph owned and heretofore operated by the Montreal Telegraph Co. This is to be done by means of its own employees and operators; and the Great North Western Co. is to conduct the business thereof in all respects as efficiently as the Company has hitherto operated the same. The rates and charges for messages are to be collected in the name of the Montreal Telegraph Co. according to the tariffs the latter shall establish from time to time, the whole to be done in such manner as to perform to the fullest extent all the obligations of the Montreal Co. towards the public.

The Great North Western Telegraph Co. is to have the right to use and occupy, during the continuance of the agreement, all the offices, stations, buildings and property of the Montreal Co., save and except the board room of the Company at Montreal with the adjacent secretary's room, and a portion of the vaults for the purpose of preserving and keeping in safe custody the books and muniments of the Company.

Then it was covenanted and agreed that, upon the requisition of the Great North Western Co., the Montreal Co. shall, from time to time, change their tariff of fees and rates in such manner as shall be stated in such requisition, provided that the Montreal Co. shall not be required or bound to make such alteration in the said rates as shall make the transmission of a message of ten words over the present extent of the lines of the Company in Canada or any part thereof, cost more than twenty-five cents, but subject to be adequately increased generally or locally in the event of any charge or tax being at any time imposed by any Parliament or local enactment or

authority, beyond the amount now payable by the Company, or in the event of the Great North Western Co. being legally compelled to substitute or provide other means than those now in use by poles for carrying their wires through cities and towns.

The Great North Western Co. obliged itself to pay to the Montreal Co., quarterly, during the continuance of the agreement, the sum of $41,250 on the first days of October, January, April and July in each year from out of the proceeds of the operations and use of the Montreal Company's lines and property, which proceeds the Great North Western Co. warranted should amount to the sum of $41,250 per quarter, or $165,000 per annum.

The Great North Western Co. also bound and obliged itself to pay all costs and expenses of operation of every description, including municipal taxes and assessments on property owned by the Montreal Co. and occupied by the Great North Western Co., and to keep the property of the Company free and clear from all liens and encumbrances arising from taxes and assessments, or from any act of the Great North Western Co. itself during the continuance of the agreement.

The Great North Western Co. further agreed and bound itself at all times, during the continuance of the agreement, faithfully to execute and perform all the contracts, covenants and agreements of the Montreal Co., and to save and hold harmless and indemnified the Montreal Co. from such covenants, contracts and agreements, of which it acknowledged to have received communication.

Then there are provisions that, if the Great North Western Co. fails to make the quarterly payments, the Montreal Co. shall have the option, in its own discretion, to resume possession of its lines and property, and the agreement shall be determined, the Great North Western Co. forfeiting and surrendering to the Montreal Co. for its use and benefit all additions and improvements which may have been made upon the lines and property herein referred to.

By the agreement, all contracts heretofore made by the Montreal Co. for future deliveries of supplies and material were assigned to and accepted by the Great North Western

1945

THE KING
v.
THE MONTREAL TELEGRAPH COMPANY AND THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA

Rinfret C.J.

Co. which undertook and agreed to carry out the conditions of such contracts to the entire exoneration and discharge of the Company.

Any balance remaining over and above the sum of $165,000 per annum, payable by the Great North Western Co. to the Montreal Co. under the agreement, is to become and remain the property of the Great North Western Co. as a remuneration for the obligations undertaken by it under the agreement.

We may now consider the statute under which the appellant made his claim against the respondent. It reads as follows (Ch. 26, R.S.Q., 1925):—

An act to impose taxes upon corporations, companies, partnerships, associations, firms and persons.

By section 3, of Division 1, it is stated:—

3. In order to provide for the exigencies of the public service, every one of the following companies, corporations, partnerships, associations, firms and persons, doing business in this province, in his or its own name or through an agent, namely:

(1) Every incorporated company carrying on any undertaking, trade or business therein;

(2) Each of the following companies, whether incorporated or not:

* * *

Every telegraph company and every other company working a telegraph line in the province for the use of the public;

* * *

shall, annually, pay the several taxes mentioned and specified in section 5, which taxes are hereby imposed upon each of such corporations, companies and persons, or upon each such partnership, association, firm or agent, respectively.

By force of section 4, subsection (9), of the same Division, the words "Doing business in this province" and "carrying on any undertaking, trade or business therein", when these expressions relate to an incorporated company, mean "exercising any of its corporate rights, powers or objects in the province".

Then, section 5 of the Act is the section which imposes the annual taxes payable by the corporations, companies, partnerships, associations, firms, persons and agents mentioned and specified in section 3. It includes subdivisions concerning incorporated companies, banks, insurance companies, loan companies, navigation companies, telegraph companies, telephone companies, express companies, city

passenger railway or tramway companies, railway companies, sleeping or parlor car companies, trust companies, and partnerships, associations, firms, or persons, whose chief office or place of business is outside of Canada, and which are not taxed under any other provisions of this Act.

As to telegraph companies, the wording is:—

> Every telegraph company and every other company working a telegraph system for the use of the public, one thousand dollars.

In the Superior Court, Mr. Justice McDougall held that, during the period with which the Court is here concerned, the tax was imposed upon a Telegraph Company and every other Company working a telegraph line for the use of the public; and that the member of the phrase "working a telegraph line" cannot be divorced from its context "A Telegraph Company", as counsel for the appellant contended. He said the tax was imposed not purely upon a Telegraph Company as such, but upon a Telegraph Company which "works" a telegraph line. Having so construed the statute, he further held that, under the agreement of August 17th, 1881, the respondent in the main action was not working the telegraph system in question, nor was it subject to the tax. He stated further that, however needful it may be to the taxing authority to collect taxes for the public service, it is none the less true that the tax payer may only be held liable for the tax when the wording of the taxing levy imposes the burden upon him. As was said by Lord Cairns in *Partington* v. *The Attorney General* (1):—

> * * * if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

(See also *Versailles Sweets Ltd.* v. *Attorney General of Canada* (2)).

Now, the statute clearly contemplates not alone a telegraph company, but a company doing business in the

(1) (1869) L.R. 4 H.L. 100, at 122.

(2) [1924] S.C.R. 466, at 468.

1945

THE KING v. THE MONTREAL TELEGRAPH COMPANY AND THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA

Rinfret C.J.

province of Quebec, and working a telegraph system for the use of the public.

The respondent herein in the principal action neither does business in the province, nor works a telegraph system for the use of the public. It does not come within the description of Telegraph Companies upon which the tax is imposed. Therefore, the appellant cannot maintain a claim for that tax against the Montreal Telegraph Co. The agreement between it and the Great North Western Co. has not the effect of creating of the latter Company an agent of the former. In my view, the agreement in question, to all intents and for the purposes of working a telegraph system for the use of the public, places the Great North Western Co. in the shoes of the Montreal Telegraph Co. I have analyzed the agreement above and I cannot find in it any provision which would make it an agency contract. Under it, the Great North Western Co. works the telegraph system for its own account, and its only obligations towards the Montreal Co. is to pay the agreed remuneration of $165,000 per annum. For the operation thereof, it is in no way to account to the Montreal Co.. Outside of very special cases where it is authorized to say a word with regard to the tariff of rates, the Montreal Co. has no right under the contract, so long as it is being performed by the Great North Western Co. within its terms, but to receive the stipulated remuneration. It cannot be said to be working the telegraph system, either within the meaning of the statute or within any possible sense of the word.

This disposes of the main action, because, under such construction of the statute, so that a telegraph company may come within it, it must be a telegraph company working a telegraph system for the use of the public; and it is not sufficient, as was suggested by counsel for the appellant, that it be a telegraph company as such doing business in the province.

Of course, it is essential, for the existence of the tax, that the Company should be doing business, and I cannot agree with the suggestion that, by the sole fact the Montreal Co. made the agreement with the Great North Western Co. and collects the remuneration therein provided, it is doing business in the province.

As a result of the agreement, the Montreal Co. must be looked upon merely as the owner of the telegraph system which agreed with the Great North Western Co. to put entirely in the hands of the latter the working and operation of the telegraph system, for which it receives the remuneration mentioned. That, in my view, is a mere ordinary civil contract, exactly similar to that of the owner of a house who leases his property to another person and for which the lessee pays a certain amount to the owner. That, having received the specified remuneration, the Montreal Co. subsequently distributes the amount as a dividend among its shareholders, is due exclusively to the fact that this is a company having shareholders. The shareholders are the owners and they get their share of the stipulated remuneration. In the case of an individual, as he is entitled to the whole of the remuneration, of course, he keeps it for himself.

So that, in any view suggested by counsel for the appellant, the tax is not due by the respondent in the principal action, and that action was rightly unanimously dismissed by both Courts.

Counsel for the appellant alternatively suggested that, if the Montreal Co. did not come under the taxing statute as a telegraph company, it could be reached by the statute as an ordinary incorporated company carrying on an undertaking, trade or business, which is not otherwise taxed and for which a tax is provided of one-tenth of one per cent. upon the amount of the paid up capital of the Company.

But, the declaration in the present case is distinctly a claim for the $1,000 yearly tax imposed upon telegraph companies working a telegraph system for the use of the public, and it cannot be extended to cover a claim for a tax upon an ordinary incorporated company carrying on any undertaking, trade or business which is not otherwise specially taxed; not to say anything of the fact that, in the case of the present Company, the tax would not be $1,000, but $2,000, and of the further fact that, as the taxing statute specifies what telegraph companies are to be taxed, it is extremely doubtful whether it could be brought within the general clause concerning ordinary companies.

1945

THE KING
v.
THE MONTREAL TELEGRAPH COMPANY AND THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA

Rinfret C.J.

Furthermore, there would still be a question whether, in any event, the Montreal Co., in view of the agreement it made with the Great North Western Co., could be held to carry on an undertaking, trade or business, which, in my view, it is not carrying on.

It follows, on that point, I find myself in complete agreement with both Courts below.

I have now to deal with the action in warranty brought by the Montreal Co. against the Great North Western Co. Both in the Superior Court and in the Court of King's Bench (Appeal Side) this was dismissed because it was nothing else but the exercise of an action in indemnity and it was, therefore, subordinate to the fate of the principal action.

There is no doubt that this is a case of simple, or personal, warranty, where, under article 186 of the Code of Civil Procedure, the warrantor cannot take up the defence of the defendant, but can merely intervene and contest the principal demand, if he thinks proper.

As the object of the present action in warranty was merely that the respondent in warranty be condemned to intervene and contest the principal demand and to cause such demand to cease and terminate, and to fully protect and defend the appellant in warranty therein, and that, in any event, the respondent in warranty be condemned to warrant and indemnify the appellant in warranty against any condemnation which might be rendered against it as a result of the principal action, and to pay the amount of any such condemnation to the complete exoneration and discharge of the appellant in warranty; and as both these demands of the appellant in warranty have ceased to have any object since the respondent in warranty did intervene as prayed for and the principal demand has been dismissed, with the result that the appellant in warranty now has no condemnation against it, nor any amount to pay as a result of it and there is, therefore, no occasion for the respondent in warranty to either warrant or indemnify the appellant in warranty, there really remains, between the two parties in the action in warranty, nothing but a question of costs. The substantive point whether, in view of the agreement between them, the Great North Western Co. might have

been obliged to indemnify the Montreal Co. in case the appellant in the main action had succeeded against it, has now disappeared, and upon that issue, in accordance with the jurisprudence of this Court and following the rule laid down by the Privy Council, it has become a mere academic question, in respect of which we should not entertain an appeal.

The Montreal Telegraph Co. has no claim against the Great North Western Co. for its costs in the principal action, since His Majesty the King is condemned to pay those costs; and, moreover, the result, in the main appeal, is to the effect that the principal action was wrongly brought, and even if the Great North Western Co. is the warrantor of the Montreal Co., it could not be held in an action which was erroneously introduced against its warrantee.

The jurisprudence of this Court on such a point has been established as early as the year 1895 in the well-known case of *Archbald* v. *de Lisle* (1). In that case it was held that, in circumstances such as the present one where the principal action has been dismissed, the action in warranty consequently fails whether the defendant in warranty was warrantor or not. It was said that if it was not warrantor, *cadit quœstio,* and, if it was, it could only be of condemnations that might have been given against the warrantee and not of all false accusations or unfounded complaints that the warrantee might be subject to. It is not the fault of the respondent in warranty if an unfounded action has been taken against its warrantee. It is likewise not its fault if the warrantee did not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff. In France, the Cour de Cassation has invariably decided that when once the principal action is dismissed there is no longer any grounds for warranty, but the same Court also decided that the plaintiff in the principal demand who fails may be condemned to the costs of the action in warranty on the sole ground that such action was caused by the principal demand and without the Court having to appreciate the merits of

(1) (1895) 25 Can. S.C.R. 1.

1945

THE KING
v.
THE MONTREAL TELEGRAPH COMPANY AND THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA

Rinfret C.J.

the action in warranty. (Sirey, 68, 1, 217; 68, 1, 41; 67, 1, 109).

In the *Archbald,* case (1), no costs of the action in warranty were asked against the principal plaintiff. In the province of Quebec, the principal action having been dismissed, the action in warranty is also dismissed, but it may be with costs against the plaintiff in warranty. (*Peck* v. *Harris* (2); *Lyman* v. *Peck* (3)). In the case of *Aylwin* v. *Judah* (4), the Court having dismissed the principal action, held on the action in real warranty that the Court could not consequently adjudicate upon it, and ordered the costs thereof to be paid by the plaintiff in the principal action.

It is clear that a decision on the merits of the action in warranty has become unnecessary, and, following the decision of this Court in *Archbald* v. *de Lisle* (1), there seems to be no other course open to us but to dismiss the appeal on the action in warranty.

There is, however, a special feature in this case which was not present in the *Archbald* case (1). In the latter, some other parties had intervened to support the case of the plaintiffs in the principal demand as they were joint owners; and it was held that the intervenants, having espoused the cause of the plaintiffs, they must bear the consequences of the defeat of the action, and, the principal appeal having been dismissed, the appeal on the intervention for the purpose of supporting the principal appeal should likewise be dismissed with costs *distraits* to the attorneys of the respondents in that appeal.

In the present case the situation is different. The respondent in warranty filed a plea contesting its obligation to warrant the appellant in warranty and, notwithstanding the stand so taken by it, the respondent in warranty filed an intervention, as prayed for in the action in warranty, and for the purpose of contesting the principal demand. I would not say that, on account of that stand, the intervenant was ill-advised to file the intervention. It was really carrying out what the appellant in warranty had asked him to do. In a sense, if not strictly speaking, it

(1) (1895) 25 Can. S.C.R. 1.
(2) (1862) 6 L.C.J. 206.
(3) (1862) 6 L.C.J. 214.
(4) (1857) 7 L.C.R. 128.

was a confession of judgment—a compliance with the conclusions of the action in warranty. It rendered the whole dispute on the action in warranty unnecessary, since the respondent in warranty immediately complied with the prayer in that action.

Moreover, it cannot be said that the action in warranty was altogether useless, since it had the effect of bringing into the litigation the Great North Western Co., which, if only sued in warranty subsequently, might have pleaded against that action that, if the Montreal Co. had been condemned in the principal action, it was due to the fact that it had not properly defended itself.

There is no denying the fact that, if the respondent in warranty had contented itself with intervening in the principal demand, as it has done, and if it had not filed a contestation of the action in warranty, not only would it have avoided this useless litigation, but it would not have put the appellant in warranty to the costs which it has had to incur.

In the circumstances, I think the situation is a special one. It was not obligatory for the respondent in warranty to file a defence in the action in warranty just because it wanted to raise the question whether, in the premises, it was or not a warrantor. In the first place, I think it had to take one stand or the other; it could not, at the same time, pretend that it was under no obligation to warrant and, having taken that stand, act as a warrantor in filing its intervention. Moreover, if it had decided to intervene, it was a simple matter for it to do so in such terms that would reserve, as between it and the Montreal Co., its right to contend that it was under no obligation to indemnify the Montreal Co. in any event. It would then have meant that the Great North Western Co. was taking steps to have the principal action dismissed in any event and reserve its right to dispute its obligation to indemnify subsequently as regards the Montreal Co., if it had been condemned.

It seems to me that that is a good reason for holding that while the Great North Western Co. should not be condemned to pay the costs of the Montreal Co. in the action in warranty, it should at least get none of its own costs of the said action against the Montreal Co. The

1945

THE KING
v.
THE MONTREAL TELEGRAPH COMPANY AND THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA

Rinfret C.J.

appeal on the action in warranty should therefore be allowed to this extent, that is to say, that the judgment of the Court of King's Bench (Appeal Side) should be modified so that the Montreal Telegraph Co. will have no costs to pay to the Great North Western Co.

For all these reasons, the appeal on the principal demand should be dismissed with costs, and the appeal on the action in warranty should be allowed and the judgment modified as above stated. I think the course which I take in the matter of the action in warranty is justified by what was said by Sir Elzéar Taschereau, delivering the judgment of the Court in *Archbald* v. *de Lisle* (1) and, as the appellant in warranty achieves a substantial success, its appeal should be allowed with costs of the appeal in warranty both here and in the Court of King's Bench (Appeal Side).

Appeal in principal action dismissed with costs.

Appeal in action in warranty allowed with costs.

Solicitors for His Majesty the King: *Genest, Champeau & Guertin.*

Solicitors for The Montreal Telegraph Company: *Harold, Long & Puddicombe.*

Solicitors for The Great North Western Telegraph Company of Canada: *Harwood & Côté.*

(1) (1895) 25 Can. S.C.R. 1.

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR (DEFENDANT)..... } APPELLANT;

AND

THE SCHOOL TRUSTEES FOR THE MUNICIPALITY OF THE TOWN OF AYLMER (PLAINTIFFS)..... } RESPONDENTS.

1944
*Nov.8,9,10
1945
*Mar. 23
*Apr. 24, 25
26
*June 22

School law—Assessment and taxation—Building of a dissentient school—Borrowing of moneys by trustees— Bonds or debentures issued—Resolution adopted by Trustees under section 244 of the Education Act— Stipulating that a special tax "shall be levied annually"—Whether wording of resolution sufficient to create a tax—Whether resolution otherwise legal and regular—Privilege on immovable for school assessment—Property owned by dissentient when taxed and later sold to a Roman Catholic—Scope of the tax exemption granted to religious corporations under sections 251 (3) and 424—Issue of bonds or debentures authorized under section 246—Whether both the bonds or debentures and the resolution providing for their issue are validated thereby —The Education Act, R.S.Q., 1925, c. 133, now R.S.Q., 1941, c. 59.

The respondents trustees, in 1925, passed a resolution to borrow a sum of $25,000 through an issue of bonds or debentures payable in thirty years, the purpose of the loan being the rebuilding of a school recently destroyed by fire. The resolution stipulated *inter alia* that "to provide for the annual interest and sinking fund of these debentures, a special tax * * * shall be levied annually upon all taxable property on the collection roll of the school trustees of this municipality at present in force * * * and on any other taxable property that may come under the control of the said school trustees during the term of these debentures; and all lands subject to the said tax now entered on the said roll * * * shall be bound and liable for the special tax, until the full and final payment and discharge of the said debt." At the time the resolution was adopted, the property, on which it is claimed special taxes are due, belonged to one Wright, a dissentient, subject to the jurisdiction of the respondents. In 1937, the property was sold to the appellant, a Roman Catholic institution, exempt from the payment of school assessments by force of sections 251 (3) and 424 of the *Education Act*. In 1938, 1939 and 1940, the respondents trustees passed resolutions by which the appellant's property was assessed at $51.91, $52.09 and $904.47, the increase in the last assessment being the result of improvements and the construction of buildings for an amount exceeding $500,000. In 1941, the respondents brought against the appellant an hypothecary action for $1,016, respresenting the above mentioned assessments and interest. The Superior Court dismissed the action; but the appellate court reversed that judgment and maintained the action as brought.

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

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

On the appeal before this Court:

The Chief Justice and Taschereau J. were of the opinion that the appeal should be allowed in full, Hudson and Estey JJ. were of the opinion that the appeal should be dismissed and Rand J. was of the opinion that the respondents trustees were entitled to succeed, in part, in their action. As a result, it was

Held that the appeal should be allowed in part and the judgment of the appellate court be modified so that the amount of the taxes awarded to the respondents be reduced to accord with the value of the property as it appeared on the valuation and collection rolls in force in 1925.

Per The Chief Justice: The respondents' action is an hypothecary action, i.e. an action to enforce an alleged hypothec or privilege, and they have failed to show that the resolution of 1925, nearly all of its clauses being illegal and *ultra vires,* was effective for the purpose of creating a privilege upon the immovable property then owned by Wright, which privilege would have followed the property into the hands of the appellant.

Per The Chief Justice and Taschereau and Estey JJ: The resolution of 1925 was not passed in conformity with the imperative provisions of sections 244 (1) of the *Education Act.* Under that section, "no issue of bonds may be made * * * unless * * * there be imposed * * * an annual tax * * *." The resolution does not impose a tax immediately: it only states that a tax shall be imposed each year: "shall be levied annually." A resolution providing for the imposition of a tax in the future does not meet the requirements of that section and is ineffective to operate a valid issue of bonds. *The School Commissioners of St. Adelphe* v. *Charest* ([1944] S.C.R. 391) followed.

Per Estey J: Such contention would have been available to the appellant, if it had been made before the approval of the resolution by order in council under section 246, the existence of this approval distinguishing this case from the above decision. (Section 246 is further commented below.)

Per Hudson J.: The principle of that decision is not applicable to this case: in the *Charest* case, there was no definite imposition but rather a promise to do so in the future, while, in this case, there was an immediate burden imposed to be satisfied in a definite way; moreover, there was not in that case an issue and sale of bonds approved by order in council under section 246.

Per Rand J.: Although, in the resolution, there is no express imposition and the future tense is used in the expression "shall be levied", the paragraph providing for the taxation should nevertheless be read to imply in fact a present imposition sufficient for the purposes of section 244. The rule of the *Charest* case should not be extended beyond the precise words that were there dealt with.

Per The Chief Justice: The resolution of 1925 declared that the "special tax * * * shall be levied annually upon all taxable property on the collection roll * * * at present in force." The appellant's action was not based upon the collection roll of 1925-1926 and the amounts for

which the Trustees claimed a privilege result from the collection rolls of 1938-1939-1940, at a time when the appellant's property was not taxable. The respondents' claim is therefore contrary to the text of the 1925 resolution.

Per The Chief Justice: The 1925 resolution cannot be reconciled with subsection (3) of section 244. The valuation of the property having been fixed once and for all on the collection roll of 1925, it would be contrary to the text of the resolution, and therefore illegal, for the secretary-treasurer to assess that property for a different amount in collection rolls prepared by him under instructions given to him by subsequent resolutions.—The resolution contains also another illegality: there is no provision, either in the *Education Act* or in the Civil Code, which authorizes the creation of a privilege upon future property.

Per The Chief Justice and Taschereau J.: The privilege for school assessments is not immediately created at the time of the adoption of the loan resolution, but comes into existence only after the collection roll comes into force. *Per* The Chief Justice: Such privilege, at the time it thus comes into existence, cannot be related back to the date of the original resolution, at least so far as the privilege or hypothecary claim is concerned.

Per Hudson J.: The language of the 1925 resolution is clear and definite. The property therein described was "bound and liable for the special tax (in each year) until the * * * final payment of the debt." The levy sought by the present action is merely the maturing of the tax obligation imposed by the original resolution. The charge operates from the time the bonds are sold until they are finally paid in full. The purchasers of the bonds relied on the terms of the resolution and subsequent purchasers took with implied or express notice of them. Any withdrawal of property from the taxable area so defined would throw on the remaining properties a greater burden than was assumed by the property owners when the resolution was passed and it would deprive the bond holders of security assured to them when they bought the bonds. Under the circumstances, the Court would not be justified in refusing to give effect to the resolution unless compelled to do so by clear and definite mandate.

Per Taschereau J.: There must be necessarily a personal debtor bound to pay a tax. It cannot be conceived that a tax imposed solely on an immovable could exist without a person having the legal obligation to pay it and against whom it could be legally claimed. Personal liability is from the beginning fastened on the owner of the immovable, because he is then under the jurisdiction of the school commissioners or trustees and the immovable is taxable because he owns it. Such personal liability ceased to exist when the owner originally liable has sold the property "in respect of which" he has been taxed; the liability is then incumbent on the purchaser, whatever his religion may be.

Per Estey J.: The school tax is primarily a property tax, but the *Education Act,* when read as a whole, contemplates a personal liability upon the owner. Therefore there would be a personal liability within the meaning of the Act upon the appellant.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Per Taschereau J.: When a tax is "imposed" by virtue of a loan resolution under section 244, the immovables subjected to the jurisdiction of the Trustees are from that time determined in advance as bound to be later charged with a privilege for the annual tax in consequence of the combined effect of the original resolution and of the collection roll duly homologated, and such immovables cannot be withdrawn from the payment of the tax notwithstanding the fact that they become the property of another person and even if the latter is entitled to the exemption granted by the *Education Act*.

Per Taschereau and Estey JJ.: The religious communities cannot claim the exemption granted to them by sections 251 (3) and 424, if they were not owners of the immovable at the time the tax has been originally imposed.

Per Rand J.: The language of section 244 should be constructed to mean that an "annual tax",—annual in relation to the years of the terms, for instance, of a bond issue—, carrying inplicitly the characteristic of a specific amount in relation to each separate parcel of land is declared, and that it is *en marche* to become definitive as a realizable exaction as each year is reached, and as it is extended on a collection roll. It is as if the resolution in 1925 were in the words: a tax of $30 on property "A" is now imposed for the year 1940, and as if it were repeated in 1940. An annual resolution is passed in advance: it describes a taxing effect to be attained in future. But the declaration of a potential tax in a certain amount in respect of each taxable immovable for each year during the currency of the obligation, as a specific imposition, can be made only by reference to the valuation or assessment roll, at the time of the resolution, in force. When the tax becomes levied in each year as the collection roll is completed, the time of payment is determined, but whether there is determined also personal liability for each year's tax, there is no need to enquire. The resolution, then, fixes as of its date the amount of the annual levy, the lands to be taxed, and the property valuations. Section 391 provides for the homologation of the collection roll, and after the period for payment has expired the taxes become a special hypothecary charge upon the property taxed. Even if that section does not apply to a special assessment, the taxes, upon default of payment, would become a privilege upon the immovables under article 2009 and 2011 of the Civil Code.

An order in council was passed, in pursuance of section 246 of the *Education Act*, stating that the Minister of Municipal Affairs had reported favourably that the Trustees be authorized to borrow moneys in conformity with the resolution of 1925, that all the formalities required by the law had been fulfilled and that accordingly authorization to borrow should be granted. Section 246 enacts that "every bond or debenture issued in virtue of a resolution (so) approved * * * shall be valid, and its validity shall not be contested for any reason whatsoever".

Held that, under that section, not only the bond or debenture is validated, but the resolution providing for their issue must also be deemed to have been passed in conformity with section 244. The Chief Justice and Taschereau J. *contra*.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Per The Chief Justice and Taschereau J.: The intention of the legislature in enacting section 246 has been to put the validity of the bonds and debentures beyond all discussion so that the bondholders would have an absolute guarantee of the legality of the bond itself, notwithstanding the invalidity or illegality of the proceedings leading to its issue. But the section cannot be invoked in favour of a resolution which would be null and void. Any issue that may arise between the Commissioners or the Trustees and a ratepayer is in no way affected thereby. Otherwise the result would be that the Lieutenant Governor in Council would be made a judge of the validity and legality of all the loan resolutions adopted by the former and that the courts would be entirely ousted of their jurisdiction in the matter.

Per Hudson J.: The prohibition against the issue of bonds, in section 244 (1), ceased to have any application here once the resolution to borrow had been approved as being adequate for the purposes of the section and the bonds certified, as they were, under section 246. When sold they created a legal obligation. The resolution and the order in council were duly registered. The purchasers of bonds were entitled to accept the certificates as conclusive. The appellant itself cannot complain of lack of notice when it bought the property.

Per Rand J.: The bonds in this case, bearing the requisite certificate are admittedly valid, but there is created under section 246 more than a valid debt. The whole object of the section is to conclude such questions as those in the present case. The purchaser of a bond is entitled to the security he would have had if every preliminary or conditional step had been taken in exact accordance with the provisions of the statute and the purchaser cannot be told later that the condition essential to that validity did not in fact or in law exist. The special assessment is for the sole benefit of the bondholders. They are the beneficiaries of that power to tax and the sufficiency of the resolution must be deemed concluded not only in relation to the bond as a debt, but also to the taxation intended to be appropriated exclusively to the payment of that debt.

Per Estey J.: The language used by the legislature in enacting section 246 is clear and definite and, when read and construed with the other relevant sections of the Act and particularly section 244, its meaning is that the approval therein provided for applies to the validity of the resolution and includes both the validity of the bonds and the existence of the security.

Comments upon the decision of this Court in *Canadian Allis-Chalmers Limited* v. *The City of Lachine* ([1934] S.C.R. 445).

APPEAL from the judgment of the Court of King's Bench, Appeal Side, province of Quebec, reversing the judgment of the Superior Court, Trahan J. (1) and maintaining the respondents' action.

(1) [1943] R.L. N.S. 186.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR
v.
THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

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

Fernand Choquette K.C. and *Eugène Marquis K.C.* for the appellant.

John A. Aylen K.C. for the respondents.

THE CHIEF JUSTICE.—This is an hypothecary action, that is to say, an action to enforce an alleged hypothec or privilege. It means, therefore, that the respondents were bound to show that, in the premises, a privilege has been created upon the immoveable property of the appellant as a charge for the payment of certain special taxes imposed by the respondents in connection with a loan by means of an issue of bonds under a resolution adopted by the respondents on the 19th of August, 1925.

At the time when the resolution was adopted the property, on which it is claimed a privilege exists, belonged to one R. H. Wright, a dissentient, subject to the jurisdiction of the respondents. Later the appellant acquired the property from Mr. Wright and, at the material dates, it was the owner in possession of the property in question. The price of the sale from Wright to the appellant was $22,925, but, as a result of improvements and the construction of buildings, the total value of the property in 1940 had reached the sum of $500,000.

It is admitted that the appellant is exempt from the payment of school assessments by force of section 251 of *The Education Act* (Chap. 133 of R.S.Q. 1925, as amended).

The Superior Court dismissed the respondents' action, but the Court of King's Bench (Appeal Side) reversed that judgment and maintained the action as brought.

The point at issue is whether the resolution of the 19th of August, 1925 has immediately affected by privilege for the amount of the special tax the property then be-

longing to Wright in such a way that the appellant who purchased it now holds the property subject to the alleged privilege.

Some subsidiary points were raised at the argument as to the right of the respondents to bring action for the purposes herein, and also as to whether, if the privilege is held to exist, it extends to the improvements and new buildings added by the appellant to the property purchased from Wright, but, in the view I take of the litigation, these subsidiary points are immaterial.

With regard to this last point concerning the improvements and additional buildings, it is sufficient to say that a privilege, as clearly stated in article 2017 of the Civil Code, being only an accessory and subsisting no longer than the obligation which it secures, necessarily requires the existence of a third party as debtor of the personal obligation. In the present case, as it is impossible under the law that the appellant could be the personal debtor, it follows that Mr. Wright, or his successors, must be the personal debtor, and it is hardly to be suggested that the latter's personal debt could have been increased as a consequence of the construction and improvements made by the appellant.

We have in the record the collection rolls respectively for the year 1926, immediately following the adoption of the resolution, and for the years 1938, 1939 and 1940, upon which the present claim of the respondents is based. In 1926 all the properties belonging to Wright appeared on the roll as being valued at about $47,000, and it is not certain that this valuation includes certain properties of Wright which he did not sell to the appellant. At that time the total special tax assessed against Wright for the year ending on the 30th June, 1926 amounted only to $69.92, while the tax which is now claimed hypothecarily from the appellant for the years 1938, 1939 and 1940 amounts to $1,016, being $51.91 for the year 1938 and $52.09 for the year 1939, the improvements and constructions not having been then made on the property, and $904.47 for the year 1940, after the improvements and constructions were made.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

One can only surmise what would be the surprise of Mr. Wright, or of his successors, if the respondents proceeded to claim from him or from them, as a personal obligation, the sum of $904.47, which represents the special tax for 1940. It is not likely that he or they could be called upon to pay such a sum; and, if the personal obligation for that sum of $904.47 does not exist against Wright or his heirs, it cannot be pretended that the accessory privilege can exist for that sum on the property of the appellant as security for a personal obligation which has no existence. One need only suggest the objection to show that it repudiates itself.

The present action stands to be decided not on what the Trustees might have done under *The Education Act*, but upon what they have in fact done. This Court is not called upon to give an opinion upon the relevant sections of *The Education Act*, but upon the proceedings and resolutions that the respondents adopted for the purpose of the loan. We have only to decide whether the resolutions which are now before us were effective for the purpose of creating a privilege on Wright's property, which privilege followed the property when it came into the hands of the appellant. With respect, that is precisely what appears to have been lost sight of in the judgment from which the appeal is brought to this Court.

The resolution of the 19th of August, 1925, begins by stating that the Trustees have decided to petition His Honour, the Lieutenant Governor of Quebec, to grant to them authorization to borrow the sum of $25,000, said amount to be secured by an issue of debentures payable thirty years from the first day of September, 1925, such debentures to bear interest at the rate of five per centum per annum, payable half yearly on the first day of March and September in each year, and to be of the denomination of $500 each, there being attached to each debenture coupons for the amount of each payment of interest and to be made payable at the Royal Bank of Canada in Aylmer, Que. Then comes the important clause, which must be reproduced in full in view of the fact that the whole contention of the Trustees relied on it:—

To provide for the annual interest and sinking fund of these debentures, a special tax, sufficient for the payment of interest and sinking fund, as hereinafter provided, shall be levied annually upon all taxable

property on the collection roll of the school trustees of this municipality at present in force, and on the said school trustees proportion of all taxable property belonging to incorporated companies, and on any other taxable property that may come under the control of the said school trustees during the term of these debentures; and all lands subject to the said tax now entered on the said rolls, together with the buildings and improvements thereon made or erected or which may be made or erected thereon during the term of these debentures, shall be bound and liable for the said special tax, until the full and final payment and discharge of the said debt.

To provide for the payment of these debentures when due, a sinking fund shall be provided in which shall be deposited each year and shall remain deposited with accrued interest during the term of these debentures, an amount of $2\frac{1}{10}$ per cent. of the amount of debentures sold.

The first point to be noticed about the above clause is that, contrary to the imperative provisions of section 244, subsection (1), of *The Education Act,* there is not in that resolution imposed upon the taxable property held for the payment of the loan an annual tax sufficient for the payment of the interest each year and at least one per cent. of the amount of the loan, besides the interest, to create a sinking-fund for the extinction of the debt. The resolution states:—

A special tax * * * shall be levied annually * * *

The decision with respect to the tax is expressed in the future. It does not impose a tax immediately; it only states that a tax shall later be provided for—"shall be levied annually". That is very clear; the imposition will be made only each year in the future. Moreover, according to the text of the resolution, the special tax shall be levied annually upon the taxable property on the collection roll "at present in force". Further, the special tax shall be levied annually not only on the taxable property then under the jurisdiction of the Trustees, but also

on any other taxable property that may come under the control of the said school trustees during the term of these debentures * * * until the full and final payment and discharge of the said debt.

Now the present action is not based upon the collection roll of 1925-1926. The amounts for which the Trustees claimed a privilege on the appellant's property result from the collection rolls of 1938-1939-1940. That alone would be sufficient to declare that the respondent's claim is irregular and illegal and contrary to the very text of the resolution of 1925; but the fundamental illegality is evidently that the resolution of 1925 was not adopted in con-

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

formity with section 244, subsection (1), of *The Education Act*. On that point this Court is bound by its own judgment in the case of *The School Commissioners of St. Adelphe* v. *Charest and Douville* (1), where it was decided that a resolution in similar terms, that is to say, providing for the imposition of a tax only in the future, does not meet the requirements of section 244 and is ineffective to operate a valid issue of bonds. That is what the Court of King's Bench (Appeal Side) of Quebec decided in that case (2) and which was affirmed in this Court.

The learned counsel for the respondents, notwithstanding his ingenious argument, has not succeeded in convincing me that any distinction whatever can be made between the *St. Adelphe* case (1) and the present case.

But, in addition to this fundamental illegality, the 1925 resolution contains many other illegalities, *inter alia:* First, it is impossible to reconcile that resolution with subsection (3) of section 244. That subsection enacts that:—

> It shall be the duty of the Secretary-Treasurer to make, every year until the payment of the loan or the redemption of the bonds, a special collection roll, apportioning, upon the taxable immoveable property liable for the payment of such loan or such bonds, the amount of the tax imposed on each one for the payment of the interest and the annual payment into the sinking-fund.

It has already been pointed out that the resolution stipulates that the special tax shall be levied annually upon all taxable property on the collection roll "at present in force". Incidentally, that appears to me to be the intention of the law expressed in subsection (1) of section 244. But, in such a case, the valuation of the taxable property held for the payment of the debentures being fixed, once and for all, as it appears on the collection roll of 1925, it would evidently be contrary to the text of the resolution and, therefore, illegal for the Secretary-Treasurer to make each year a new collection roll assessing against the taxable immoveable property liable for the payment of the loan a different amount based on the collection roll of each of those years. One can see in the present case the anomalous result of such a practice. While Mr. Wright's special tax in 1925 amounted to $69.92, it is now claimed by the respondents, as a result

(1) [1944] S.C.R. 391. (2) Q.R. [1943] K.B. 504.

of the collection roll of 1940, that Mr. Wright's personal obligation would amount for that year alone to the extraordinary sum of $904.47; and, of course, the consequence of such a contention is that the privilege now sought to be enforced against the appellant's property instead of being only $69.92 is $904.47 for the year 1940.

It may be that subsection (3) of section 244 is incompatible with the true construction to be put on subsection (1). It is not easy to reconcile subsections (1) and (3) of section 244, for, if subsection (1) be interpreted in the sense that seems to be not only likely but imperative, the result would be that subsection (3) is merely surplusage and that, in order to conform with the requirements of subsection (1) (and incidentally to the clear provision of the 1925 resolution) the special collection roll could only be and ought to have been a mere repetition from year to year until the payment of the loan or the redemption of the bonds. Instead of that, we have here collection rolls assessing varying amounts for the years 1938, 1939 and 1940, which are made the bases of the action and which in each case are different from the amount appearing on the collection roll of 1926. That is contrary to the provisions of the 1925 resolution; and, moreover, it shows beyond doubt that the claim of the respondent is not based on the resolution of 1925 but is necessarily based on the resolutions of the years 1938, 1939 and 1940.

All that the Secretary-Treasurer of the respondents had to do in order to obey the instructions contained in the resolution of 1925 was to repeat each year in the collection roll prepared by him, against each property liable for the payment of the loan, the amount fixed in 1925 and based on the valuation roll of that year. He did not require any fresh permission or order from the Trustees to act in such a way. Subsection (3) made it his "duty" without it being necessary that he should receive new instructions to that effect.

But such was not the method adopted by the respondents. Each of the resolutions adopted by them, and alleged in the declaration in the present case, on the 6th December, 1938, the 13th November, 1939, and on the 26th November, 1940, confirms the interpretation now given to

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

the resolution of 1925, and which is that no tax was actually imposed in 1925, that the resolution contains only the expression of the intention to impose a tax later, that the imposition so levied was in fact made only in each year, as appears from the resolutions of 1938, 1939 and 1940, and that indeed the Trustees in this case proceeded exactly in the manner referred to by this Court in its judgment in the *St. Adelphe* case (1). In 1925: a declaration of the intention to impose a tax later; and then each subsequent year a resolution imposing a tax, as is more particularly evident in the resolutions of 1938, 1939 and 1940. However, in these later resolutions the Trustees did not limit themselves to giving instructions to their Secretary-Treasurer to prepare a special collection roll in conformity with the resolution of 1925; they actually imposed a tax for each year, as is well shown by the text of the resolutions themselves, as follows:—

December 6th, 1938.

That a tax rate of 10 mills on Aylmer property, and 6½ mills on South Hull Township property be and is hereby levied on all property under the control of the School Trustees, as a general tax for the year 1938-39 and a special tax rate of 1¾ mills be levied on all properties on which we are entitled to collect for the year 1938-39 and also that a discount of 5 per cent. be allowed on all current general school taxes paid on or before January 31st, 1939.

November 13th, 1939.

That a tax rate of 10 mills on the Aylmer property on our collection roll and a tax rate of 6½ mills on our portion of South Hull Township be and is hereby imposed on all property under our control as a general school tax and a special tax rate of 1¾ mills be imposed on our whole school district for the year 1939-40, also that a discount of 5 per cent. be allowed on all current general school taxes paid on or before January 31st, 1940.

November 26th, 1940.

That a tax rate of 10 mills on Town of Aylmer and 6½ mills on our portion of South Hull Township be and is hereby imposed as a general tax on the property under our control for the year 1940-41 and a special tax rate of 1¾ mills be imposed on our whole district for the same year. Also that a discount of 5 per cent. be allowed on current general taxes paid before January 31st, 1941.

There is really no difference in the text of these three resolutions. In 1938 the Trustees used the word "levy", while in 1939 and 1940 they used the word "impose". No doubt the Trustees were of the opinion that the two words are synonymous, or at all events that they have the same effect. In section (1) of *The Education Act,* subsections

(1) [1944] S.C.R. 391.

(17) and (18), the words "school tax", or "tax", are defined as meaning "all contributions that may be levied in virtue of this Act", and the words "school assessment" as meaning "the tax which is levied on the taxable property of a school municipality". In the French version of the Act, in subsections (17) and (18) of section (1), the word "imposé" is used for the word "levy" in the English version. On the other hand, section 244 uses the word "imposé" in French and the word "impose" in English in subsection (1) as well as in subsection (3). In section 249 the word "imposé" in French is inserted as the equivalent of the word "levy" in English; and, if one goes through the several sections of the Act, it will be seen that the words "impose" and "levy" are used interchangeably, as well as the words "tax" and "assessment". It is clear, therefore, that the respondent Trustees have really, in each of the years 1938, 1939, and 1940, in order to provide for the payment of the interest and for the sinking-fund in each of those years, as provided for in section 244, imposed or levied a special tax which was only then and there imposed or levied and which was not imposed or levied in 1925. That is the only interpretation which must be given to all those resolutions; that the special tax for which a privilege is now sought to be enforced against the appellant by means of the present hypothecary action was actually imposed in 1938, 1939 and 1940. It is clear that the resolution of 1925 and the three subsequent resolutions cannot exist concurrently and at the same time. The evident intention of the three last resolutions was to complete that of 1925 and that is exactly what is suggested in the judgment of this Court in the *St. Adelphe* case (1). It is only in the three resolutions of 1938, 1939 and 1940 that the Secretary-Treasurer could find the authority to prepare the collection rolls which are made the bases of the present action.

Unfortunately, the illegality of the respondent Trustees' resolutions does not stop there. The 1925 resolution enacts that the immovable properties which are to be held for the payment of the loan are those which appear on the collection roll then in force; and, while the resolution of 1938 is ambiguous in that it states that

(1) [1944] S.C.R. 391.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

a special tax is levied on all properties on which we are entitled to collect for the year 1938-39,

those of November, 1939 and November, 1940, pretend to impose the special tax "on our whole school district for the year 1939-40" and "on our whole district for the same year" (i.e., 1940-41). Therefore, the resolutions of 1939-40 make the imposition on all the properties which then formed part of the respondents' school district, and that is directly opposite to what was done in the resolution of 1925. In that respect it is impossible to reconcile the two last resolutions with that of 1925. They cannot co-exist because they are contradictory, and the two last resolutions can be held as valid only if they are envisaged as having amended the resolution of 1925. Now, the only authority of the Secretary-Treasurer to prepare the collection rolls for the years 1939-40 and 1940-41, as he has done, can be found only in the resolutions of 1939-40, which brings us to the following dilemma: either the 1925 resolution has really been amended, as just stated, and, therefore, the respondents have illegally modified the bases of the collection of taxes providing for the interest and the sinking-fund of the loan of 1925, or the resolutions of 1939-40 have illegally imposed a personal tax against the appellant which is exempt from taxation.

In the first case, the procedure adopted by the respondents is contrary to the imperative provisions of sections 242 and 244 of *The Education Act,* for the resolution of 1925 alone has been adopted with the authorization of the Provincial Secretary and the approval of the Minister of Municipal Affairs, Trade and Commerce. It follows that the Trustees had no authority whatever to modify it.

Or, in the second case, the Trustees, in 1939-40, proceeded in virtue of the new resolutions which then and there imposed the special tax, and these two resolutions are doubly inoperative both from the general point of view because they had not received the previous authorization of the Provincial Secretary or the approval of the Lieutenant Governor in Council, or of the Minister of Municipal Affairs, Trade and Commerce; and, moreover, from the particular point of view of the appellant because at the

time the tax was then and there imposed the appellant was exempt from taxation and no imposition could validly be made against it.

Furthermore, the 1925 resolution contains another illegality resulting from the fact that it pretends to impose

> a special tax * * * on any other taxable property that may come under the control of the said school trustees during the term of these debentures.

There is no provision, either in *The Education Act* or in the Civil Code of the province of Quebec, which authorizes the creation of a privilege upon future properties, or properties that may come in.

The conclusion is that the so-called resolution of 1925 is illegal and *ultra vires* from beginning to end, and that is the resolution on which the respondents now pretend to base their claim against the appellant.

Indeed the respondents press their contention much further. They would like the Court, notwithstanding all these illegalities, to regard these illegal and *ultra vires* clauses of the resolution as if they did not exist, as if they had never been inserted therein, and to proceed to apply the resolution as if it contained only the clauses which are not tainted with illegality and absence of authority. That would really be an absolute novelty in the jurisprudence of the province of Quebec. All that the Courts would have to do would be to strike out what is illegal and *ultra vires* and to hold the balance of the resolution as being the true resolution which the respondents adopted and which they would now have the right to use as the basis of their hypothecary claim.

The first difficulty which comes to the mind to prevent the courts from adopting that point of view is that, when everything that is illegal and *ultra vires* is withdrawn from the 1925 resolution, there is nothing left. Moreover, I would be very much surprised if there could be found in the Quebec jurisprudence a single case where a resolution thus tainted with illegality and want of authority, even only in part, was held to be valid for those parts of it which were not found illegal and *ultra vires*.

Then the Trustees adopted the resolution, as is found in the record, with the conditions therein inserted; and it cannot be assumed that they would have adopted it if

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

these conditions had been eliminated therefrom. In addition to that, they proceeded contrary to the intention expressed in the resolution of 1925, since in 1939-40 they ordered their Secretary-Treasurer to prepare a collection roll affecting not only the properties which were under their jurisdiction in 1925 but equally all those which were under their jurisdiction in 1939 and 1940 ("imposed on our whole school district"). I find it absolutely impossible to admit that such a resolution and such a proceeding can justify a claim for a tax against the appellant, and still less an hypothecary action.

The charge, hypothec, or privilege may result only, as stated in section 249 of *The Education Act*, from an assessment which specifically designates the immoveable property assessed, which fixes the amount of the tax, and which becomes a special charge only as a result of the failure to pay within twenty days following the homologation of the collection roll: and section 249 is the only section to be found in *The Education Act* providing for the creation of a special hypothecary charge upon any property. If it cannot be found there, it does not exist under *The Education Act;* while, if recourse is had to the Civil Code, the privilege for school rates exists only in conformity with article 2011, and in that case the assessment and rates become privileged only "upon the immoveable specially assessed", and the provisions of that article are imperative. They constitute a principle from which the Civil Law has never departed.

Now, in this case, the conditions required by section 249 of *The Education Act* have not been followed, and if we look at the resolutions of 1938, 1939 and 1940, and apply section 249, then the privilege took effect only twenty days after the collection roll in each of those years came into force; or, if we have recourse to article 2011 of the Civil Code, the property of the appellant was "specially assessed" only from the moment that these collection rolls became applicable. Whatever date is chosen, the appellant was then exempt from school tax and any pretended imposition or levy against it was inoperative.

Of course, as suggested by the learned counsel for the respondents, it may be that we are confronted here with

a *casus omissus* and that neither *The Education Act* nor the Civil Code provides for such a case. However, I fail to see what benefit the respondents could obtain from that situation, because a hypothec or privilege may be created only as a result of a convention, or by the operation of law. Here there was no convention, and, if the law did not forsee the case, no privilege can exist. Therefore, the whole sub-stratum of the respondents' action is completely absent.

At the re-hearing ordered by this Court, counsel for the respondents contended that we need no longer be hampered by the illegalities contained in the resolution of 1925, in view of section 246 of *The Education Act*. That section enacts that every bond or debenture shall bear the seal of the Department of Municipal Affairs, Trade and Commerce and a certificate of the Minister of Municipal Affairs, Trade and Commerce, or any person specially authorized by the latter, establishing that the resolution authorizing the issue of such bond or debenture has been approved by the Lieutenant Governor in Council, or the Minister of Municipal Affairs, Trade and Commerce, as the case may be, and that such bond or debenture is issued in conformity with such resolution, and that such bond

shall be valid and its validity shall not be contested for any reason whatsoever.

Counsel for the respondents invited the Court to draw therefrom the conclusion that as soon as the resolution was approved, as therein stated, not only the bond or debenture is validated but equally the resolution providing for the issue of the bond, and that, although it might have been illegal before, it became legal as a result of the approval. I do not recall that such a construction was ever put on section 246. The intention of the section is simply to validate the bond or debenture and it cannot be invoked in favour of a by-law or a resolution which is illegal, null or void.

Of course, at the re-hearing, our attention was drawn to the fact that there is absolutely no evidence in the record that the bonds issued under the resolution of 1925 bore the seal of the Department of Municipal Affairs and a certificate of the Minister of that Department, or of any

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

person specially authorized by the latter. That alone, would be sufficient to dispose of the discussion of the application of section 246 to the present case.

But admitting, for argument's sake, that the bonds or debentures were impressed with the seal and certificate in question, in my view, the present case between the Trustees and one of its alleged ratepayers would in no way be affected thereby. Section 246 is already sufficiently exhorbitant of the common law to prevent the courts from extending its application. That section does not say that the approval by the Lieutenant Governor in Council or the Minister of Municipal Affairs, Trade and Commerce, has the effect of validating the resolution. The words "valid" and "validity" are used therein only in respect of the bond or debenture. The intention of the Legislature clearly appears to have been to put the validity of the bonds and debentures beyond all discussion so that the bond holders would have an absolute guarantee of the legality of the bond itself and so that they would be sure they need not preoccupy themselves with the validity or the legality of the proceedings leading to the issue of the bonds. Indeed it might verily be said that the object of section 246 was to provide precisely for the case where the resolution was illegal and to specify that, notwithstanding the illegality of the resolution, the validity of the bond would not thereby be affected.

If the sole approval by the Lieutenant Governor in Council of the loan resolution had the effect of rendering indisputable the validity of the resolution, it was not necessary to provide specifically for the validity of the bonds issued as a result of that resolution. Therefore, if the resolution was valid and legal there was no object in declaring that the bonds themselves would equally be valid and legal; that followed as a necessary consequence. But it is precisely in order to provide for the case where the resolution might be illegal that the Legislature took the opportunity, to assure the bonds holders, to declare that, notwithstanding the illegal resolution, the bond itself would nevertheless be valid, providing it bore the seal and certificate mentioned in sectiton 246. Otherwise, we would be led to the absurd consequence that the loan resolutions could never

be attacked before the courts, for they imperatively require the authorization and approval of the Lieutenant Governor in Council and the Minister of Municipal Affairs, Trade and Commerce. The result would be that the Lieutenant Governor in Council would be made a judge of the validity and legality of all the loan resolutions adopted by the school commissioners and that the courts would be entirely ousted of their jurisdiction. That question is not raised for the first time. It came before Mr. Justice Demers in the case of *Aubertin* v. *La Corporation du Village du Boulevard St.-Paul* (1) where a municipal by-law, although it had received the approval of the Lieutenant Governor, was declared null on account of the failure to adopt an essential formality.

The same question also came before Mr. Justice Tellier in the case of *Goyer* v. *La Corporation de la Ville St.-Lambert* (2), where the judgment expressly declares that the approval given to an illegal by-law by the Lieutenant Governor in Council has not the effect of making that by-law valid, nor to legalize its carrying into effect by the Municipal Council, and that the law, which validates the bond, may serve as a protection to the bond holder or to the purchaser in good faith of a municipal debenture, but it cannot be invoked in favour of a by-law which is null and void.

No judgment in the province of Quebec can be found to the contrary effect. But there is much more—our own judgment in the case of *Kuchma* v. *The Rural Municipality of Taché* (3). We had to decide a similar case where a municipal by-law, providing for the closing of a road, had received the approval of the Minister under section 473 of the *Municipal Act* of Manitoba (R.S.M. 1940, ch. 141), and the decision of the Court was:—

> Though such a by-law has been approved by the Minister under s. 473 (and notwithstanding that, under s. 473, it "when so approved shall be valid, binding and conclusive, and its validity shall not thereafter be questioned in any court"), the Courts have jurisdiction to pass upon its validity. Section 473 does not authorize the municipality to go beyond its statutory powers, nor permit it to exercise its powers otherwise than in the public interest and in good faith.

(1) (1908) Q.R. 33 S.C. 289
(2) (1920) Q.R. 59 S.C. 232.
(3) [1945] S.C.R. 234.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

In that case, Mr. Justice Estey, speaking for the majority of the Court (The Chief Justice and Hudson, Taschereau and Estey JJ.) said, at p. 239:—

> Any other view would enable the municipal corporation, with the approval of the Municipal Commissioner under sec. 473, to enlarge its powers beyond the express intention of the legislature and in effect to nullify many sections of the same statute. It has always been the function of the courts to pass upon questions of jurisdiction, good faith and public interest, and legislatures pass this and similar legislation in the expectation that the courts will continue to pass upon and determine such questions.

That proposition does not appear to me to warrant any discussion and, moreover, that judgment is binding upon this Court.

But the learned counsel for the respondent would like us to go still further. He does not limit his contention to the proposition that the sole approval by the Lieutenant Governor in Council has the effect of validating the resolution of 1925; he argues that, since such approval has been given, the resolution must be held valid not only in the terms in which it was adopted, but that it should be read as if it had strictly followed the terms and conditions of section 244. The result would be that, from the moment the approval is given, the resolution should be envisaged as amended so as to contain the very text of section 244. This, it is needless to say, is carrying the contention to extreme consequences. Not only would it have the effect of making the Lieutenant Governor in Council final judge of the legality of loan resolutions by school municipalities, but it would give to the Lieutenant Governor in Council the power to amend the resolution so as to make it conform to sections 242 and 244. Without the slightest hesitation I say that such a proposition is absolutely untenable and *The Education Act* itself demonstrates that it is so. There is at the present time in *The Education Act* section 244 (*a*), which permits the Minister of Municipal Affairs, Trade and Commerce, upon the recommendation of the Superintendent, to amend a loan resolution submitted for his approval. But that section was added to the Act only on March 11th, 1926 (16 Geo. V, chap. 41), so that it does not apply to the resolution of the respondents which was adopted in 1925. Moreover, under this new section 244 (*a*), in order that the

Minister of Municipal Affairs, Trade and Commerce, may modify a loan resolution, it is necessary that there should be first a formal application contained in a subsequent resolution of the School Corporation which passed the original resolution on the recommendation of the Superintendent of Public Instruction; and, even on the application of the School Corporation and the recommendation of the Superintendent, the amendments brought in by the Minister may only be made in certain cases well specified in section 244 (*a*). Here there has been no ulterior application on the part of the respondents and no recommendation of the Superintendent of Public Instruction. Besides that, the present litigation does not fall within any of the cases provided for by section 244 (*a*).

Assuming, therefore, that, in the circumstances, the approval of the Lieutenant Governor in Council would lead to the conclusion that the 1925 resolution now has sufficient value to justify the issue of the bonds, it stands to reason that it has not been modified or amended as a consequence of the approval. It remains within the terms in which it was adopted and must continue to be so read; and, if those terms do not come within the requirements of sections 242 and 244 of the Act, conformably to the jurisprudence to which we have referred, the resolution must be held incomplete, insufficient and ineffective to impose immediately a special tax, and *a fortiori* to create a privilege on the properties of the ratepayers which were then subject to the jurisdiction of the respondents. For that reason it would be useless to enter into a discussion of the jurisprudence which has been cited to us so abundantly by counsel for each of the parties in this appeal.

Again, I must repeat that we are not here to decide what may be considered to be the theory of the law in that respect. In each case it is not possible to eliminate the consideration of the text of the resolutions, or by-laws, which have been adopted. It may be that one may find cases more or less similar in the different judgments to which this Court has been referred, but, it is, of course, necessary to make sure that the text of the resolutions, or by-laws, is identical with that of the resolutions, or by-laws, in the other cases which have come before the Courts.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

In the Court of King's Bench (Appeal Side), as well as before this Court, great reliance was placed on the judgment of this Court in *Canadian Allis-Chalmers Limited* v. *The City of Lachine* (1). But it should be noticed that in that case the text of the by-law provided for an immediate imposition of the tax. It read:—

> Une taxe de un et trente-six centièmes de un pour cent est par le présent imposée et sera prélevée sur tous les immeubles imposables de la cité de Lachine suivant leur valeur réelle, telle que portée au rôle d'évaluation en vigueur dans la cité pour pourvoir pour autant, aux dépenses générales d'administration de la cité pour l'année courante et à l'amortissement de sa dette fondée * * *

As will be seen, the by-law used the present tense. It would, therefore, be idle to attempt to decide the present case by placing reliance on the *Allis-Chalmers* judgment (1), since the by-law in that case was not drafted in the same way as the resolution in the present case.

Moreover, in the *Allis-Chalmers* case (1) the question at issue had no relation whatever to the one we are now discussing. The Allis-Chalmers Co. had been exempt from taxes for twenty-five years. Its properties were not taxable for the whole of those twenty-five years. The by-law of the city of Lachine imposed the taxes therein mentioned

> sur tous les immeubles imposables de la cité de Lachine, suivant leur valeur, réelle, telle que portée au rôle d'évaluation en vigueur.

What was discussed in that case, what we had to ask ourselves, was: Can such a tax, imposed immediately, affect a property which, on the date of the adoption of the by-law, had the benefit of exemption, although such exemption had ceased to exist at the time of the homologation of the collection roll whereby it was sought to collect the tax in question? The question was in order because, at the time of the adoption of the by-law imposing the tax, the exemption was still in force, although it had ceased to exist at the time of the preparation of the collection roll. It seemed decisive in that particular matter, because, under the by-law of the city of Lachine, the tax was imposed on the immovable property then taxable and, at the time the by-law was adopted, the Allis-Chalmers property was not taxable. It followed that the said property did not come within the description of the immovables upon

(1) [1934] S.C.R. 445.

which the tax was imposed. The consequence was that the Allis-Chalmers property not coming within the by-law which imposed the tax, it could not subsequently appear on the collection roll prepared by the Secretary-Treasurer to give effect to the by-law itself.

From all that has been said, the consequence is inevitable that the resolution of the 19th of August, 1925 did not impose a tax nor create a privilege resulting from it on the properties then in the possession of Mr. Wright as owner. It did not impose a tax because it did not say so and also because the resolution itself was illegal, null and void.

That conclusion makes it unnecessary to examine the question so much disputed in the reasons for judgment of the Court of King's Bench (Appeal Side), and also at the hearing before this Court, as to whether, in a matter of this kind, the privilege granted by law to secure such a tax is created immediately as a result of the adoption of the resolution or by-law, or, on the contrary, it is brought into existence only after the collection roll comes into force. On that point it will be sufficient for me to refer to what has been said in the judgment in the *Allis-Chalmers* case (1), always observing that it is never sufficient to limit one's self to the construction of the sections of *The Education Act*, but that, in the end, the effect of the by-law or resolution depends essentially on the particular text in the particular proceedings which the School Commissioners deemed advisable to adopt.

It would not be out of the way, however, to say that the interpretation given in the Court of King's Bench (Appeal Side) to what this Court said in the *Allis-Chalmers* judgment (1) differs *toto cœlo* from the true meaning of our judgment in that case, as a reference to all that was said on that subject in the judgment as reported would abundantly show.

Although, in view of the conclusion at which we arrived in the *Allis-Chalmers* case (1), it was unnecessary to decide the point whether the privilege was immediately created at the time of the adoption of the loan by-law, or whether it came into existence only after the collection roll came

(1) [1934] S.C.R. 445

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

into force, we clearly expressed our view that the latter was the true effect of the Quebec law; and, that as a matter of fact, before the coming into force of the collection roll, not only was there no privilege existing as a result of the original by-law, but there was not even a personal obligation on the part of the ratepayer who, in accordance with *The Education Act,* is not called upon to pay anything until within twenty days after the coming into force of the collection roll. Such has always been the jurisprudence of the province of Quebec, and it is strictly in accordance with the text of the law and with the notion of a hypothec or a privilege in the Civil Law of the province. The only exception one could find in the jurisprudence would be possibly the case of *La Communauté des Soeurs des Saints Noms de Jésus et Marie* v. *The Corporation of the Village of Waterloo* (1). To my mind, that case cannot in any way influence our judgment in the premises. In the first place, the question in issue there was really this: When a tax has become a charge on the property, does the fact that such property is subsequently sold to a person or a corporation exempt from taxation have the result of exempting the purchaser of the property from the obligation to pay such a tax, either personally or hypothecarily as holder of the property? That was the sole point involved in the *Waterloo* case (1) and there the Court was not called upon to decide at what time the tax became a charge on the property.

Incidentally, it is only fair to remark that the two by-laws which the Court had to interpret in the *Waterloo* case (1) were not expressed in the future, but constituted an immediate imposition of the tax in the present tense. That case was heard in 1887 and the wording of those by-laws shows clearly that the form which must be given to by-laws of that kind was well known even at that time. No doubt certain expressions of Buchanan J., and of the Court of King's Bench (Appeal Side), in the *Waterloo* case (1) would seem to imply that a tax imposed at the same time as the adoption of the loan by-law creates a hypothec on the taxable property and constitutes a charge upon it from that time. Strictly speaking those expres-

(1) (1887) M.L.R. 4 Q.B. 20.

sions ought to be taken as *obiter dicta*, because the courts in that case, as already mentioned, were not called upon to decide that point. But, if it should be assumed that the *Waterloo* case (1) may be considered as having decided that the privilege is created immediately upon the adoption of the resolution imposing the tax, it is unquestionably the only case in the province of Quebec where that point has ever been decided in that sense. The jurisprudence is all the other way and no other judgment can be found to that effect, while all the judgments rendered in that province have always decided the contrary. It is so much the case that in the present case the Court of King's Bench (Appeal Side) stated that it had always been of the opinion that such a point had been definitely settled in the sense that the privilege was created only as a result of the collection roll coming into force, because only then is the amount which the ratepayer must pay specified and only then is the taxable immovable property specially charged with the tax in accordance with article 2011 of the Civil Code. It is sufficient to read the reasons of the judges of the Court of King's Bench (Appeal Side) to find that that Court came to a different conclusion only on account of the erroneous interpretation which it gave to the judgment of this Court in the *Canadian Allis-Chalmers* case (2), and which led them to a conclusion directly opposite to what we said in that case. In *Les Ecclésiastiques du Séminaire de Saint-Sulpice de Montréal* v. *Masson* (3); *La Compagnie des terrains Dufresne Limitée* v. *Curé et les marguilliers de l'Oeuvre et fabrique de la paroisse de Saint-François d'Assise* (4); *Goulet* v. *Corporation de la Paroisse de St.-Gervais* (5); *Commissaires d'Ecoles de St.-Adelphe* v. *Charest et Douville* (6), and in the *Canadian Allis-Chalmers* case (2) itself, the Court of King's Bench (Appeal Side) always laid down the law as being that the privilege began to exist only from the time that the collection roll came into force. In the latter case see particularly what was said by Chief Justice Tellier and Mr. Justice Rivard. Such was also the opinion of Mr.

(1) (1887) M.L.R. 4 Q.B. 20.
(2) [1934] S.C.R. 445.
(3) (1900) Q.R. 10 K.B. 570.
(4) (1926) Q.R. 41 K.B. 391.
(5) (1930) Q.R. 50 K.B. 513.
(6) Q.R. [1943] K.B. 504.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

Justice Martineau as expressed in his judgment in *Les Commissaires d'Ecoles de Saint-Marie-de-Monnoir* v. *Auclair* (1). More conclusively, as far as this Court is concerned, is the judgment rendered by Sir Elzéar Taschereau in the case of *La Banque Ville Marie* v. *Morrison* (2):—

> C'est là, de la part de l'appelante, soutenir que si son achat eût eu lieu, au lendemain même de cette résolution, et dès avant toute autre procédure, la garantie de l'intimée se serait étendue à cette taxe. Or cette proposition est erronée. Un immeuble n'est taxé en pareil cas, et la corporation n'y a aucun droit, que par la répartition qui établit le privilège, et non seulement son montant. Ou, en d'autres termes, il n'y a pas de privilège, il n'y a pas de taxes, tant que le rôle n'en a pas fixé le montant. La corporation n'a pas de créance contre qui que ce soit, avant la répartition.

That language is quite clear and leaves no doubt whatever on the point we are discussing.

As a final resort, the respondents' counsel contended that it was not open to the appellant to argue against the validity of the loan resolution, or its effectiveness in creating a privilege upon the property of the appellant, because, in the written admissions, paragraph (5), the appellant had conceded

> that plaintiffs (respondents) took the necessary steps to impose said taxes if plaintiffs were entitled to do so, and, in particular, that the resolutions and other proceedings mentioned in paragraphs 2, 3, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the declaration were enacted and passed as alleged in said paragraphs.

But it should be noticed that the admission is "were enacted and passed as alleged in said paragraphs". Paragraphs 2 and 3 of the declaration refer to the initial resolution of the 19th of August, 1925; the other paragraphs refer to the three resolutions of December, 1938 and November 1939 and 1940, and also to the collection rolls subsequently homologated in conformity with those three resolutions. If we refer to those paragraphs it will be found that the respondents nowhere in them alleged that the taxes which are now claimed were imposed by the resolution of 1925. On the contrary, they allege that they were imposed only in 1938, 1939 and 1940. The admission of the appellant must be interpreted as it was made and as a whole. In that sense the words:

> That plaintiffs took the necessary steps to impose said taxes, if plaintiffs were entitled to do so

(1) (1917) 23 R.L. N.S. 485. (2) (1895) 25 Can. S.C.R. 289, at 295.

can have only one meaning and that is that the appellant admitted that the respondents had fulfilled the formalities required as alleged in the paragraphs of the declaration, but it cannot be taken to mean that the resolution of 1925 had immediately imposed a special tax and that such tax was thereupon exigible from Mr. Wright, or that it implied from that moment a privilege on his properties. The resolutions are there and it would not be open to one or the other party to make an admission having the effect of changing the text of them. They must be envisaged according to their tenor and applied in the sense in which they were adopted. To act otherwise would be to permit the parties, or their counsel, to make admissions on the law.

Now, it is a well recognized principle that admissions of a party can only bear on the facts and that no court can be bound by admissions on the law which the parties might pretend to make. (See Demolombe, vol. 30, no. 450; Aubry and Rau, vol. 8, p. 167, sec. 751; Pothier, Obligations, no. 831; Langelier, La Preuve en Matières Civiles et Commerciales, p. 12, art. 25).

It would really be inadmissible that, after all I have said on the way the resolution of 1925 was drafted, and even more particularly after the judgment of this Court in the *St. Adelphe* case (1), this Court would now be called upon to declare that, on account of an admission made by one of the parties and as a result of the expression of his opinion on a question of law, as well as on the legal meaning of the resolutions which we have had to examine in this case, these resolutions have a juridical purport different from that which results from their very text and contrary to the interpretation that this Court has given in its judgment in the *St. Adelphe* case (1). We cannot ascribe to the admissions in question the meaning which the respondents wish us to give to them; and, even if we arrived at the conclusion that such would really be the meaning intended, such an opinion on the legal interpretation to be given to the resolutions which form the basis of the present case could never bind the Court, nor compel it to adopt a juridical conclusion contrary to the Court's own opinion.

(1) [1944] S.C.R. 391.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rinfret C.J.

The only remaining point about which I think it advisable to make mention is the contention of the respondents' counsel that, even if the privilege comes into existence only after the collection roll is in force, such privilege should then be related back to the date of the original resolution. Whatever may be said on that contention so far as it may apply to the personal obligation, I would say, with due respect, that, so far as the privilege or hypothecary claim is concerned, it is nothing less than legal heresy.

By its very nature, a privilege or hypothec can have effect only from the moment it is created and there can be no relation back. The very idea is repugnant to the notion of privilege or hypothec as understood under the Civil Law of Quebec. Let us just think what it would mean in the present case, where the initial resolution was adopted on the 19th of August, 1925, and the collection roll fixing the amount intended to affect the property came into force only sometime after the 26th of November, 1940. It would mean that what, I suppose, might be called a "potential" hypothec was hanging in the air, like a sword of Damocles, over the property, during that period of fifteen years, and with the possibility that the special tax might never be imposed. That would mean that for the whole period of the twenty-five years the property might be looked upon as susceptible, at a certain time, to becoming affected by a privilege which would date back to the year 1925. No hypothec of that nature or of that character is known under the Quebec system of law.

For all the above reasons, I am of the opinion that the appeal should be allowed, the judgment of the Court of King's Bench (Appeal Side) reversed, and the hypothecary action of the respondents dismissed with costs throughout.

However, in view of the conclusions reached by some members of the Court, it follows that the appeal is allowed in part as to the amount.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Hudson J.

HUDSON J.—This action is brought to enforce payment of taxes levied by the respondent corporation for the years 1938-40 against land acquired by the appellants in 1937.

The taxes in question are not ordinary school rates but special taxes levied to pay the annual interest and sinking-fund charges upon bonds issued by the respondents under the authority of a resolution passed in 1925. The relevant provisions of this resolution are as follows:

To provide for the annual interest and sinking fund of these debentures, a special tax, sufficient for the payment of interest and sinking fund, as hereinafter provided, shall be levied annually upon all taxable property on the collection roll of the school trustees of this municipality at present in force, and on the said school trustees proportion of all taxable property belonging to incorporated companies, and on any other taxable property that may come under the control of the said school trustees during the term of these debentures; and all lands subject to the said tax now entered on the said rolls, together with the buildings and improvements thereon made or erected or which may be made or erected thereon during the term of these debentures, shall be bound and liable for the said special tax, until the full and final payment and discharge of the said debt.

To provide for the payment of these debentures when due, a sinking fund shall be provided in which shall be deposited each year and shall remain deposited with accrued interest during the term of these debentures, an amount of $2\frac{1}{10}$ per cent. of the amount of debentures sold.

The lands on which the taxes have been levied were admittedly on the collection roll referred to in this resolution and as such became and remained liable for the special tax until they were acquired by the appellants. It is now claimed that such lands are exempt under section 251 (3) of *The Education Act* of Quebec which reads as follows:

The following properties shall be exempt from the payment of school assessment:

* * *

3. Property belonging to or gratuitously occupied by fabriques, or religious, charitable, or educational institutions or corporations legally constituted, for the purposes for which they have been established, and not held by them for purposes of revenue.

It will be observed that subsection 3 covers a large group of institutions and corporations who may be non-sectarian, catholic or protestant, as the case may be. It is admitted by the respondents that the appellants fall within the exempted class, but denied that the exemption thereby given extends to charges imposed on such lands prior to acquisition by the appellants.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Hudson J.

The language of the resolution is clear and definite. The lands are

bound and liable for the special tax in each year until the final payment of the debt.

The charge operates from the time the bonds are sold until they are finally paid in full. The language of the resolution sets forth the expressed will of all concerned at the time it was passed and the time the bonds were issued. It was the will of the respondent corporation, of all of the property owners then affected, of the Lieutenant-Governor in Council of the province and the governmental officials who approved of the resolution. The purchasers of the bonds no doubt relied on what was stated and subsequent purchasers took with implied or express notice of its terms.

Any withdrawal of property from the taxable area so defined would throw on the remaining properties a greater burden than was assumed by the owners when they approved of the resolution. It would deprive the bondholders of security assured to them when they bought the bonds.

Under these circumstances the Court would not, in my opinion, be justified in refusing to give effect to the resolution unless compelled to do so by clear and definite statutory mandate.

The Education Act of Quebec imposes on school commissioners and school trustees a duty to acquire land and build necessary school buildings. If they have funds in hand there is no need for any authorization from the Lieutenant-Governor in Council. If, however, it is necessary to borrow, then it is provided by section 242:

242. Any school corporation may also, with the authorization of the Provincial Secretary and of the Minister of Municipal Affairs, Trade and Commerce and the recommendation of the Superintendent, borrow moneys and, for such purpose, issue bonds or debentures, but only in virtue and under the authority of a resolution indicating:

1. The objects for which the loan is to be contracted;
2. The total amount of the issue;
3. The term of the loan;
4. The maximum rate of interest that may be paid;
5. All other details relating to the issue and to the loan.

The Minister of Municipal Affairs may require from the school corporation all other information he may deem proper.

It is not suggested in the present case that there was any failure to observe the provisions of this section, but the appellant relies strongly on the provisions of section 244 (1) which is as follows:

244. 1. No issue of bonds may be made, nor loan contracted, unless, by the resolution authorizing the same, there be imposed, upon the taxable property held for the payment of such bonds or such loan, an annual tax sufficient for the payment of the interest each year, and at least one per cent. of the amount of the loan, besides the interest, to create a sinking-fund for the extinction of the debt.

The plain object of this section was to prevent long-term borrowing without taxing provisions adequate to ensure payment of interest, and retirement of the debt at maturity.

The prohibition against the issue of bonds ceased to have any application here once the resolution had been approved and the bonds certified, as they were, under section 246. When sold they created a legal obligation.

Section 244 (1) does not in terms create the right to tax, nor does it forbid the imposition of a tax. It recognizes an existing right and imposes a duty to levy an annual tax. I do not find elsewhere any prohibition against binding land for the payment of future taxes in the case of the issue of bonds.

The argument is that the words in the section "there be imposed" mean an immediate imposition.

Now when a tax is "imposed" must in large measure depend upon the language, the context and circumstances of each case. *The City of Ottawa* v. *The Canadian National Railways* (1).

The imposition here intended cannot be the immediate fixing of a definite amount chargeable to each parcel of land in each year. This is apparent from subsection 3 of section 244 which reads as follows:

244. 3. It shall be the duty of the secretary-treasurer to make, every year until the payment of the loan or the redemption of the bonds, a special collection roll, apportioning, upon the taxable immoveable property liable for the payment of such loan or such bonds, the amount of the tax imposed on each one for the payment of the interest and the annual payment into the sinking fund.

The amount to be assessed in respect of each property must be apportioned each year. Over a period of thirty

(1) [1925] S.C.R. 494; 56 Ont. L.R. 153, at 158.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Hudson J.

years there almost certainly will be substantial changes in the relative value of individual properties, and possibly some in the total assessed value of a taxable district.

The only item that can be fixed at once and for all is the total amount to be paid each year for interest and sinking-fund. In the present instance that amount was fixed when the bonds were sold. Thereafter, it was a mere matter of calculation, the rate of interest and sinking-fund being fixed by the bond.

The total amount to be paid by all properties thus ascertained is the subject of the imposition, and that I think is what was intended to be done by the words of the resolution. To again repeat:

and all lands subject to the said tax now entered on the said rolls, together with the buildings and improvements thereon made or erected or which may be made or erected thereon during the term of these debentures, shall be bound and liable for the said special tax, until the full and final payment and discharge of the said debt.

The lands included in this general description are in the words of the section "held for the payment of the bonds". This surely implies an immediate and continuing imposition until the bonds are retired. What remained to be done before collection was elsewhere provided for in *The Education Act*. The old maxim "certum est quod certum reddi potest" has some application.

The provisions of the resolution were deemed to be adequate for the purposes of section 244. They were approved as such by the Lieutenant-Governor in Council on the advice of the Superintendent of Education, the Minister of Municipal Affairs and the Attorney-General of the province. The approval was given by order in council in the following language:

L'honorable Ministre des Affaires Municipales, dans un rapport en date du 27 octobre, (1925) expose: que le surintendant de l'instruction publique, par une lettre en date du 8 courant, recommande que les Syndics d'écoles protestantes de la municipalité scolaire de la ville d'Aylmer, comté de Hull, soient autorisés à contracter un emprunt de $25,000 pour 30 ans, à un taux d'intérêt n'excédant pas 5 pour cent, pour payer le coût de la reconstruction d'un "high school", récemment détruit par un incendie, et ce conformément à une résolution desdits syndics, adoptée à leur séance du 19 août 1925:

Que toutes les formalités prescrites par la loi ont été accomplies.

Vu le rapport du procureur général en date du 14 octobre 1925.

En conséquence, l'honorable Ministre recommande que ladite autorisation soit accordée, conformément aux dispositions de l'article 2728 de la loi scolaire.

This was done in pursuance of section 246 of *The Education Act* which is as follows:

246. Every bond or debenture, before delivery thereof, shall bear the seal of the Department of Municipal Affairs and a certificate of the Minister of Municipal Affairs or of any person specially authorized by the latter, establishing that the resolution authorizing the issue of such bond or debenture has been approved by the Lieutenant-Governor in Council, or the Minister of Municipal Affairs, Trade and Commerce, as the case may be, and that such bond or debenture is issued in conformity with such resolution.

Every bond or debenture issued in virtue of a resolution approved by the Lieutenant-Governor in Council or the Minister of Municipal Affairs, Trade and Commerce, as the case may be, and bearing such certificate shall be valid, and its validity shall not be contested for any reason whatsoever.

The resolution and order in council were then registered in the Registry Office at Hull and the debentures issued and sold.

The purchasers of bonds were entitled to accept the certificates as conclusive. No action was ever taken by a property owner to question the validity of the resolution or of the tax imposed thereunder, except in one single instance where it was questioned by the Honourable Louis Cousineau. He acquired some property within the area and contended that as a Roman Catholic his property was not subject to this special tax. The court there upheld the contention of the present respondents and sustained the action for reasons which were approved of by the Court of King's Bench in the present case. The *Cousineau* case is reported (1) and it is interesting to observe that it was decided early in the year 1937, the year appellants purchased the land in question.

The appellants' auteur, Wright, assumed as a charge against the land his proportionate share of the obligation created by the bond issue and the resolution was registered in the proper Registry Office in the year 1925, pursuant to section 5889 R.S.Q. 1909. So the appellants themselves have no right to complain of a lack of notice.

It is true that no action would lie to enforce payment until the levy had been made by the Secretary-Treasurer in each year under subsection 3 of section 244 and the proportionate amount payable in respect of each property definitely ascertained.

(1) *Syndics d'Ecoles de la Municipalité de la ville d'Aylmer* v. *Cousineau* (1937) Q.R. 75 S.C. 315

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Hudson J.

But if we are to give effect to the plain meaning of the words of the resolution, my opinion is that the levy must be made in the words of subsection 3 "upon the taxable immoveable property liable for the payment", which in this case is the property named in the resolution and held for the payment of the debt under subsection 1. The levy here is merely the maturing of the tax obligation imposed by the original resolution.

With great respect to the other members of the Court who take a different view, I do not think that this conclusion is in conflict with the principle of the decision of this Court in the case of *Les Commissaires d'Ecoles de St. Adelphe* v. *Charest* (1). In that case, there was no definite imposition but rather a promise to do so in the future. Here there was an immediate burden imposed to be satisfied in a definite way. Moreover, there was not in that case an issue and sale of bonds approved of by the Lieutenant-Governor in Council.

It is difficult to reconcile several of the provisions of the statute and it seems to me it is a case where the court should keep in mind the general rules of good sense stated in Maxwell on Statutes, 8th Ed. p. 48:

> The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonize with the object of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained.

There is a similar statement at p. 202.

In the court below the learned judges were unanimous in holding:

> Considérant que les lots de terre dont il s'agit en cette cause étaient partie de ceux détenus et possédés par des Protestants dissidents sous la juridiction des demandeurs-appelants, lors de la résolution de ces derniers en date du 19 août 1925 les imposant comme garantie du remboursement de l'emprunt de la somme de vingt-cinq mille dollars y mentionnés et les affectant au privilèges auquel la loi a pourvu pour ce remboursement;
>
> Considérant que cette résolution même, et non pas seulement les rôles de perception qui devaient en résulter, a fait naître et créé ce privilège auquel il est en loi pourvu que la garantie du remboursement de tout tel emprunt, de telle sorte que tous les immeubles alors détenus par des Protestants dans les limites de la juridiction des demandeurs-

(1) [1944] S.C.R. 391.

appelants ont été affectés au paiement et remboursement de la somme ainsi empruntée, comme aussi au privilège que la loi accorde au porteur de débentures se rapportant à cet emprunt;

Considérant que ce privilège ainsi créé et constitué par la résolution en question et sur les immeubles dont il s'agit ne devait désormais s'éteindre et disparaître que selon les données de l'article 2081 du Code civil;

With this holding I am in substantial agreement except as to the privilege of the bondholders for the reasons above stated.

I also agree with the court below in holding:

Considérant que l'acquisition subséquente par la défenderesse-intimée de certain des lots ainsi affectés, et particulièrement de ceux dont il s'agit en cette cause, a été et est sujette au privilège susmentionné qui les grevait déjà pour le solde resté dû de cet emprunt et quant à chacun des prélèvements annuels ou autres, auxquels ce remboursement devait encore donner lieu;

The rights and obligations contemplated by section 244 are *sui generis* and not in my opinion subject to the other provisions of the Act which may appear to be in conflict therewith. The section provides for the immediate creation of an obligation operating in a defined area to be satisfied in the future. The resolution gives all the rights and creates all the liabilities contemplated by the section and, in my opinion, the appellants took the land subject thereto and are not entitled to the preference which they claim over other properties in the area.

It appears from the record that after the appellants acquired the property they erected thereon a building valued at some $500,000 and the tax for the final year in question is based on that addition to value.

The appellants contend that even if the land was subject to the tax, the buildings were not. The Court of King's Bench did not accept this view and supported their opinion by a wealth of authority as well as by reference to article 2017 of the Code of Civil Procedure.

Recently, in the important case of *City of Vancouver* v. *Attorney-General of Canada et al.* (1) this Court insisted on the unity of the buildings and land where the Crown in the right of the Dominion claimed exemption from municipal taxes in a case where the buildings forming the basis of an increase in taxation were clearly the property of the Crown.

(1) [1944] S.C.R. 23.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Hudson J.

A departure from this general rule could be upheld only where clearly authorized by statute and I have not been able to find any such authorization.

On the evidence before the Court, it appears that the officers of the respondents must have taken into account in arriving at their figure for the final year in question something which was not authorized. At the trial it was formally admitted:

> Defendant admits, however, that plaintiffs took the necessary steps to impose said taxes, if plaintiffs were entitled to do so, and in particular that the resolution and other proceedings mentioned in paragraphs 2, 3, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the declaration were enacted and passed as alleged in said paragraphs.

There is no evidence before the Court sufficient to make any correction in the amount. However, I think it should be corrected by agreement, if possible; if not, by reference. Subject to this, I would dismiss the appeal with costs.

TASCHEREAU J.—En 1925, lorsque l'une de leurs écoles fut détruite par un incendie, à Aylmer, dans la province de Québec, les syndics d'école de cette municipalité décidèrent de la reconstruire, et à cette fin, empruntèrent $25,000.00.

Une résolution fut alors adoptée, dont les parties essentielles se lisent ainsi: —

> That, therefore, the said trustees do petition His Honour the Lieutenant-Governor of Quebec to grant authorization to the school trustees for the Municipality of the Town of Aylmer to borrow the said sum of $25,000 for the purpose above mentioned, said amount to be secured by an issue of debentures, payable thirty years from the first day of September 1925. Such debentures shall bear interest at the rate of 5% per annum, payable half yearly on the first day of March and September in each year. The said debentures shall be of the denomination of $500 each and to each debenture shall be attached coupons for the amount of each payment of interest to be payable each half year as provided. The said debentures and coupons to be made payable at the Royal Bank of Canada in Aylmer, Que.
>
> To provide for the annual interest and sinking-fund of these debentures a special tax, sufficient for the payment of interest and sinking-fund, as hereinafter provided, shall be levied annually upon all taxable property on the valuation roll of the school trustees of this Municipality at present in force, and on the said school trustees' proportion of all taxable property belonging to incorporated companies, and any other taxable property that may come under the control of the said school trustees during the term of these debentures; and all lands subject to the said tax now entered on the said rolls, together with the buildings and

improvements thereon made or erected or which may be made or erected thereon during the term of these debentures, shall be bound and liable for the said special tax, until the full and final payment and discharge of the said debt.

To provide for the payment of these debentures when due a sinking-fund shall be provided in which shall be deposited each year and shall remain deposited, with accrued interest, during the term of these debentures, an amount of $2\frac{1}{16}\%$ of the amount of debentures sold.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Taschereau J.

A cette époque, un nommé R. H. Wright, protestant dissident, était propriétaire de certains immeubles évalués en 1926 à $46,612.00, et la taxe spéciale qu'il lui fallait payer pour rencontrer les intérêts et le fonds d'amortissement, s'élevait à $69.92.

En 1937, l'appelante, la Congrégation du Très St-Rédempteur, une corporation religieuse catholique, se porta acquéreur des immeubles Wright pour la somme de $22,925.00, et en 1940, elle construisit un édifice dont la valeur, admise par les parties, s'élevait à au delà de $500,000.00. C'est ce qui explique que l'évaluation des propriétés occupées par l'appelante, qui n'était que de $29,658.00 en 1939 et 1940, fut portée à $512,258.00 en 1941.

Le litige qui est soumis à la Cour remonte à 1941, date où les intimés ont institué contre l'appelante une action hypothécaire au montant de $1,016.00, par laquelle ils réclament les cotisations pour les années 1939, 1940 et 1941. L'appelante a contesté cette action qui a été rejetée par la Cour Supérieure, mais unanimement maintenue par la Cour du Banc du Roi. C'est de ce dernier jugement que la Congrégation du Très St-Rédempteur appelle devant cette Cour, et la question que nous avons à décider est de savoir si les immeubles de l'appelante, corporation religieuse catholique, sont assujettis au paiement des taxes imposées par les intimés, pour défrayer le coût de la construction de cette école protestante.

Evidemment, la difficulté ne se présenterait pas, si l'appelante eut été propriétaire des immeubles à l'époque où la résolution a été adoptée. Par les termes mêmes de son acte d'incorporation, elle bénéficie de l'exemption accordée, par l'article 251 du code scolaire, à toutes les corporations religieuses et éducationnelles qui possèdent des immeubles, non pour en retirer un revenu, mais pour atteindre

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Taschereau J.

dre les fins qu'elles se proposent. Dans cette hypothèse, toute tentative des intimés, pour faire déclarer que les immeubles de l'appelante sont grevés de charges privilégiées en garantie du remboursement de l'emprunt, eut été facilement repoussée.

Cette cause présente de sérieuses difficultés, et cette Cour a dû même ordonner une ré-audition afin d'obtenir des éclaircissements supplémentaires. Elle se résume maintenant, je crois, à quelques points essentiels, dont la solution me paraît suffisante pour déterminer les droits respectifs des parties.

Les corporations scolaires sont autorisées par la loi à effectuer des emprunts au moyen d'émissions de débentures, mais elles doivent nécessairement se conformer à certaines prescriptions impératives de la loi. Ainsi, l'article 244 du code scolaire est rédigé dans les termes suivants: —

> Art. 244. 1. Aucune émission d'obligations ne peut être faite et aucun emprunt ne peut être contracté, à moins qu'il ne soit imposé par la résolution qui les autorise, sur les biens imposables affectés au paiement de telles obligations ou de tel emprunt, une taxe annuelle suffisante pour payer l'intérêt de chaque année, et au moins un pour cent du montant de l'emprunt, à part l'intérêt, pour créer un fonds d'amortissement destiné à l'extinction de la datte.

Les mots "*à moins qu'il ne soit imposé par la résolution qui les autorise*" sont interprétés par les parties de façon différente. Les intimés soutiennent que dès l'origine, lors de la passation de la résolution en 1925, les immeubles ont été imposés et grevés d'un privilège qui doit subsister jusqu'à l'extinction totale de la dette, quelles que soient les mutations qui aient pu avoir lieu. L'appelant dit, au contraire, qu'il n'y a pas de charge hypothécaire ou privilégiée dès l'origine, mais que cette charge ne prend naissance au bénéfice des intimés annuellement, qu'aux dates où est confectionné le rôle de perception. On a aussi discuté afin de savoir qui, dans le cas qui nous occupe, est le débiteur personnel de la taxe. Est-ce Wright, le propriétaire originaire, ou les appelants qui dans la suite ont acquis sa propriété?

Il est nécessaire en premier lieu de bien déterminer ce qui constitue l'imposition d'une taxe scolaire, et quelles sont les formalités qu'il faut observer pour qu'elle soit en force et crée une dette que le contribuable aura l'obligation de payer.

Seule une résolution n'est pas suffisante. Il faut en outre que le secrétaire-trésorier fasse, chaque année, un rôle spécial de perception, répartissant sur les biens imposables, affectés au paiement des obligations, le montant de la taxe imposée sur chacun d'eux, pour l'intérêt et le paiement annuel du fonds d'amortissement. C'est le paragraphe 3 de l'article 244 du code scolaire qui impose cette obligation, et ce devoir doit être rempli tant que l'emprunt n'est pas totalement payé.

La résolution qui n'est pas suivie de la confection d'un rôle de perception ne fait pas même naître l'obligation de payer la taxe. Elle ne fait que " mettre la taxe en marche ", que créer une taxe " en puissance ", qui ne sera complétée que lorsque, les délais étant expirés, le rôle deviendra en vigueur. Avant que cette double opération ne se soit produite, la taxe n'est véritablement pas imposée; le contribuable ne connaît pas le montant qu'il doit; il n'est pas même le débiteur personnel de la Commission Scolaire. (*Canadian Allis-Chalmers Limited* v. *The City of Lachine* (1)).

Il ne faudrait pas confondre l'imposition d'une taxe annuelle, avec la cotisation imposée en vertu de l'article 265 du code scolaire. Au contraire de la taxe annuelle, cette cotisation, dans les cas où la loi l'autorise, est imposée dès l'origine pour la totalité du montant, et est payable par annuités pour un espace de temps qui ne doit pas excéder cinq années.

C'est donc par l'effet combiné de la résolution et du rôle de perception que la taxe existe, et quand l'une ou l'autre de ces formalités essentielles ne se rencontre pas, alors le contribuable n'a pas l'obligation de payer et son immeuble ne peut être affecté d'aucun privilège.

En supposant même — et nous examinerons cet aspect de la question plus tard — que la résolution fût légalement adoptée, je suis bien d'opinion que le privilège n'a pas existé au bénéfice des intimés à cette date de 1925, lorsque la résolution a été adoptée par les syndics. Il me semble en effet inadmissible qu'une charge quelconque ait pu grever cet immeuble avant même que la dette ne soit créée, alors que cette taxe, comme nous l'avons vu précédemment,

(1) [1934] S.C.R. 445.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Taschereau J.

n'était qu'en formation, et qu'aucune réclamation n'existait contre le débiteur personnel. Une taxe n'affecte une propriété immobilière que lorsque le rôle de perception est fait, et qu'il est homologué, selon le cas, par les commissaires ou les syndics d'écoles.

On a soutenu que dans la cause de *La Communauté des Sœurs des Saints Noms de Jésus et Marie* v. *The Corporation of the Village of Waterloo* (1), il a été décidé que dès l'origine, à la date où la résolution est passée, la propriété est grevée pour la totalité du montant. En effet, dans cette cause, il semble avoir été décidé que les taxes imposées en vertu d'un règlement municipal, pour pourvoir au paiement des intérêts et à la création d'un fonds d'amortissement pour le rachat de débentures, constituent une hypothèque affectant toute la propriété immobilière de la municipalité sujette à la taxe, *à la date où ce réglement est adopté* et l'hypothèque continuerait ainsi à affecter tout immeuble, même quand il passe à un acquéreur entre les mains de qui il aurait été exempt de taxation, si ce dernier en avait été propriétaire à la date où le règlement a été adopté. Et même, M. le juge Buchanan disait ceci: —

> When new valuation rolls were made, a new tax was not imposed, that was imposed under the by-law, and immediately affected all properties. The old tax still existed, and all that varied was the amount to be paid, more or less than before, according as the evaluation increased or diminished; but the tax itself was always there, etc. * * * etc. * * *

Mais, cette cause n'a jamais été suivie et la cour d'appel (*Les Ecclésiastiques du Séminaire de St-Sulpice de Montréal* v. *Masson*, (2)) a affirmé le principe que la charge hypothécaire ne prend naissance que lorsque le rôle de perception est en force, et à la page 582, la Cour dit ce qui suit: —

> Considérant qu'une taxe sur la propriété foncière ne devient une charge sur les immeubles qui y sont assujettis que par la mise en vigueur d'un rôle de cotisation qui en répartit le montant et détermine la part afférente à chaque immeuble qui y est assujetti, et ne devient pas une telle charge seulement par la mise en vigueur d'un règlement qui pourvoit à l'imposition de telle taxe.

Et pour ne citer que cette autre cause de la cour d'appel (*Surprenant* v. *Brault* (3)), M. le juge Tellier s'exprime de la façon suivante: —

(1) (1887) M.L.R. 4 Q.B. 20.
(2) (1900) Q.R. 10 K.B. 570.
(3) (1921) Q.R. 32 K.B. 481, at 485.

La taxe scolaire ne devient une charge portant hypothèque que si le contribuable fait défaut de la payer. Il ne peut être en défaut que du jour de l'échéance de la taxe. Cela me paraît indiscutable en présence du texte de la loi. Or, il ne suffit pas que le rôle de perception soit fait pour que la taxe soit exigible ou même due. La loi requiert bien d'autres formalités avant l'entrée en vigueur du rôle.

En résumé, le rôle de perception fait par le secrétaire-trésorier n'est rien qu'un projet et, partant, ne crée pas de dette, tant qu'il n'a pas été homologué par les commissaires d'écoles. Ce n'est que par l'homologation qu'il entre en vigueur et qu'il produit son effet. Jusque-là, il pourrait être comparé à un bill déposé devant le Parlement, mais non encore revêtu de la sanction définitive. A partir de l'homologation, la taxe est due; le contribuable doit l'acquitter dans un délai de vingt jours. S'il ne le fait pas, il est en défaut; et de ce moment-là, la taxe devient une charge spéciale portant hypothèque sur l'immeuble imposé.

Il est vrai que dans cette cause, il s'agissait de la taxe ordinaire imposée annuellement pour le maintien des écoles, en vertu des dispositions de l'article 249 du code scolaire, mais ce jugement démontre bien que la simple résolution ne fait pas naître de charge privilégiée dès la date de sa passation. D'ailleurs, la cause de *Waterloo* (1) que nous avons citée précédemment est aussi en contradiction avec un jugement de cette Cour (*La Banque Ville-Marie* v. *Morrison* (2)), où Sir Elzéar Taschereau s'exprimait de la façon suivante: —

L'appelante voudrait faire remonter la taxe en question jusqu'à la résolution du conseil de ville de 1867. C'est par cette résolution, dit-elle, que cette propriété a été taxée, pour le coût de l'élargissement de la rue St-Jacques.

Mais cette prétention n'a pas été accueillie par le jugement *a quo*, et ne pouvait l'être.

C'est là, de la part de l'appelante, soutenir que si son achat eût eu lieu, au lendemain même de cette résolution, et dès avant toute autre procédure, la garantie de l'intimée se serait étendue à cette taxe. Or cette proposition est erronée. Un immeuble n'est taxé en pareil cas, et la corporation n'y a aucun droit que pour la répartition qui établit le privilège, et non seulement son montant. Ou, en d'autres termes, il n'y a pas de privilège, il n'y a pas de taxes, tant que le rôle n'en a pas fixé le montant. La corporation n'a pas de créance contre qui que ce soit, avant la répartition.

C'est dans ce rôle et son homologation, qu'est le décret, qui, pour la première fois, affecte spécialement chacun des immeubles imposables. Et comment l'intimée aurait-elle pu payer une taxe dont le montant n'était pas établi, ou payer avant que la taxe fût due, payer sans cause, sans dette? Il est bien vrai que la résolution du conseil de ville a, dès 1867, décrété que les travaux requis pour l'élargissement de la rue St-Jacques

(1) (1887) M.L.R. 4 Q.B. 20. (2) (1895) 25 Can. S.C.R. 289, at 295.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Taschereau J.

seraient aux frais des propriétaires intéressés, *ut universi*. Mais cette résolution par elle seule n'a pas créé de taxe spéciale sur chacun d'eux, *ut singuli*, ni sur chacune de leurs propriétés.

Les procureurs des intimés nous ont cité la cause de *Canadian Allis-Chalmers Limited* v. *The City of Lachine* (1). Cette cause ne peut servir de précédent, car elle a été jugée sur des faits entièrement différents. La Canadian Allis-Chalmers Limited bénéficiait d'une exemption de taxe qui lui avait été accordée jusqu'au 1er septembre 1927. Un règlement de la cité de Lachine imposant une taxe, est entré en vigueur le 27 août 1927, et le rôle de perception fut complété et déposé au bureau du secrétaire-trésorier de la cité, et avis en fut donné le 10 septembre 1927. Le règlement de la cité de Lachine est donc entré en vigueur le 27 août, avant l'expiration de la période fixée pour l'exemption de la taxe, mais le rôle de perception n'a été publié que le 10 septembre, et la taxe n'est devenue exigible que le 30 septembre 1927.

Le règlement cependant, disait

> une taxe * * * est par le présent imposée * * * et sera prélevée sur tous les immeubles imposables de la cité de Lachine suivant leur valeur réelle telle que portée *au rôle d'évaluation en vigueur*.

Cette cour en est venue à la conclusion que le règlement imposant la taxe ne frappait pas les immeubles de la compagnie parce que l'exemption de la compagnie Canadian Allis-Chalmers Limited, dont ses immeubles bénéficiaient, était encore en force. Ces mêmes immeubles n'étaient pas imposables parce qu'à la date où le règlement a été passé ils n'apparaissaient pas au rôle. Ceux-là seuls qui étaient portés au rôle en vigueur à cette date pouvaient être imposés, d'après les termes mêmes du règlement. C'est la portée de la décision dans cette cause de *Canadian Allis-Chalmers Limited* v. *The City of Lachine* (1), et comme on peut le voir, elle ne peut servir à déterminer le litige qui nous est actuellement soumis.

La véritable solution ne peut être, je crois, que la suivante: Quand la résolution qui, en vertu de l'article 244 du code scolaire, doit être passée pour autoriser l'emprunt, " et imposer une taxe annuelle suffisante pour payer l'intérêt de chaque année ", les immeubles des propriétaires sou-

(1) [1934] S.C.R. 445.

mis à la juridiction des syndics et apparaissant au rôle d'évaluation, sont dès lors choisis, déterminés d'avance, comme devant plus tard être affectés d'une taxe annuelle, à laquelle ils ne pourront pas être soustraits, même s'ils deviennent la propriété d'une autre personne; mais la taxe n'existe pas encore; et elle n'existera que quand sera fait et homologué le rôle de perception annuel. Admettre que l'immeuble est déjà grevé pour la totalité de l'hypothèque depuis la date où la résolution est passée serait contredire l'économie de notre loi, qui veut que la taxe n'existe que par l'effet combiné de la résolution et du rôle de perception; et, d'un autre côté, soutenir que l'immeuble n'est pas, dès la date où la résolution est passée, affecté en puissance d'une charge flottante qui se fixera définitivement lors de la passation du rôle de perception, serait enlever toute signification au mot " imposé ".

Voilà pour la nature de la taxe et pour le sens qu'il faut, je crois, donner au mot " imposé ".

Quant à la responsabilité personnelle, il ne fait pas de doute que, dès l'origine, elle est attachée au propriétaire de l'immeuble. Celui-ci a cette obligation personnelle, parce qu'il est soumis à la juridiction des syndics ou des commissaires, selon le cas. Et son immeuble est imposable parce qu'il est sa propriété, et c'est cet immeuble, par le montant qui apparaît au rôle d'évaluation, qui détermine l'étendue de cette responsabilité personnelle. Deux éléments doivent donc nécessairement se rencontrer: la juridiction des syndics sur la personne, et la nécessité pour cette personne soumise à cette juridiction d'être propriétaire d'un immeuble.

Il est donc vrai de dire, comme l'affirmait M. le juge Barclay dans la cause de *McKesson & Robbins Ltd.* v. *Biermans* (1) que Wright a été taxé " in respect of his property and in proportion to his right ". Le même langage a été employé dans la cause de *Brett* v. *Rogers* (2), et dans cette même cause de *McKesson & Robbins Ltd.* v. *Biermans,* qui a été portée devant cette Cour (3), M. le juge Rinfret, comme il était alors, accepte ce principe et dit que Biermans a été taxé " because he was the owner of land in the

(1) (1936) Q.R. 60 K.B. 289.
(2) [1897] L.R. 1 Q.B. 525.
(3) [1937] S.C.R. 113.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR
v.
THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Taschereau J.

parish on the date of the assessment". Il approuve également la citation que je viens de donner du jugement de M. le juge Barclay.

Il faut de toute nécessité qu'il y ait un débiteur personnel obligé de payer la taxe. On ne peut en effet concevoir l'existence de cette taxe affectant seulement un immeuble sans qu'il y ait une personne qui ait l'obligation légale de la payer et contre qui elle peut être légalement réclamée. Comme le disait Lord Thankerton dans la cause de *Provincial Treasurer of Alberta* v. *Kerr* (1):—

> Generally speaking taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or *in respect of a taxpayer's interest in property,* or in respect of transactions or actings of the taxpayers. It is at least unusual to find a tax imposed on property and not on persons—in any event, the duties here in question are not of that nature.

Il ne fait pas de doute qu'à l'origine, le propriétaire de l'immeuble est le débiteur personnel de la taxe, mais cette responsabilité personnelle persiste-t-elle quand le contribuable originairement responsable vend le terrain "in respect of which" il a été taxé? Dans la cause de *McKesson & Robbins Ltd.* v. *Biermans* (2), M. le juge Rinfret se pose la question, mais ne la résout pas, et il s'exprime de la façon suivante, à la page 122: —

> It may be a question whether a roman catholic person, on whom the assessment has been imposed because he was owner of land in the parish on the date of the assessment, continues to be personally liable for the subsequent instalments of such assessment after he has sold the land in respect of which the assessment was made—a point which it is unnecessary to decide in this case—.

La question se pose donc maintenant, et je crois qu'elle doit être résolue dans la négative. Il me semble impossible, en effet, d'admettre que cette responsabilité personnelle du débiteur originaire, taxé "in respect of his property" puisse se continuer quand il cesse d'être propriétaire de l'immeuble. En vertu des dispositions de la loi, le rôle d'évaluation doit mentionner non seulement la valeur de l'immeuble, mais aussi la valeur des améliorations qui ont été faites subséquemment. Si la responsabilité personnelle ne disparaissait pas avec la vente de l'immeuble, elle se trouverait à augmenter, à cause des améliorations qui ajoutent à la valeur de cet immeuble. Dans le cas qui nous occupe,

(1) [1933] A.C. 710, at 713. (2) (1936) Q.R. 60 K.B. 289.

on comprendrait facilement la surprise et l'étonnement justifiés de Wright, propriétaire originaire, dont l'immeuble était évalué à $40,000.00 et qui maintenant, sans son consentement et peut-être aussi hors sa connaissance, verrait sa responsabilité personnelle augmentée, par suite de la nouvelle évaluation qui se chiffre à au delà de $500,000.00.

Comme il doit de toute nécessité y avoir un débiteur personnel, il faut nécessairement que cette responsabilité incombe à l'acquéreur de l'immeuble quelle que soit sa religion. Et, toujours dans cette même cause de *McKesson & Robbins Ltd.* v. *Biermans* (1), M. le juge Rinfret dit encore à la page 122: —

> while it is clear that once the assessment is imposed, the consequential charge on the land and the privilege which affects and binds the land under section 69 of the Act continues to affect it in the hands of a new owner, even if he be not a roman catholic and even if it be a joint stock company.

On invoque l'exemption accordée aux communautés religieuses par les articles 251 et 424 du code scolaire, mais les communautés religieuses ne bénéficient de ces exemptions que lorsqu'elles sont propriétaires des immeubles au moment de l'imposition originaire. Admettre la prétention contraire nous conduirait à un résultat désastreux, dont l'aboutissement serait la faillite des commissions scolaires et l'impossibilité pour elles de rencontrer leurs obligations financières. Si les commissaires ou les syndics d'écoles ne pouvaient plus percevoir les taxes qu'ils ont imposées, quand les immeubles, en premier lieu sujets à cette imposition, deviennent l'objet de mutations qui font qu'ils deviennent la propriété de personnes professant une religion différente, alors, la seule source de revenus possible pourrait bien disparaître en partie ou même en totalité, et où serait la garantie des obligataires?

Pour résumer, je suis d'opinion que Wright était personnellement responsable de la taxe qui annuellement a été imposée, parce qu'il était propriétaire d'un immeuble, mais cette responsabilité personnelle a disparu lors de la vente de l'immeuble en question, pour devenir celle des appelants dans la présente cause, qui ont acquis l'immeuble " in respect of which " la taxe a été imposée.

(1) (1936) Q.R. 60 K.B. 289.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Taschereau J.

En posant ces quelques principes qui, je crois, sont ceux qui doivent nous guider pour déterminer la présente cause, j'ai assumé que la résolution de 1925 avait été légalement adoptée, que l'immeuble avait été affecté, pour employer l'expression dont je me suis servi précédemment, d'une charge flottante qui devait définitivement se fixer annuellement lors de l'adoption du rôle de perception. Mais, en est-il ainsi, et l'immeuble a-t-il été véritablement, par les termes de la résolution passée, affecté dès l'origine? Je suis bien d'opinion que le privilège n'a pas existé au bénéfice des intimés à cette date de 1925, lorsque la résolution a été adoptée par les syndics. L'article 244 du code scolaire est rédigé en des termes non équivoques, et stipule qu'aucune émission d'obligations ne peut être faite, et aucun emprunt ne peut être contracté, *à moins qu'il ne soit imposé par la résolution qui les autorise,* sur les biens imposables affectés au paiement de telles obligations ou de tel emprunt, une taxe annuelle suffisante pour payer l'intérêt de chaque année, et au moins un pour cent du montant de l'emprunt, à part l'intérêt, pour créer un fonds d'amortissement destiné à l'extinction de la dette.

Ainsi donc, aucune émission d'obligations ne peut être faite à moins qu'une " taxe ne soit imposée " et cette imposition doit avoir lieu avant que l'emprunt ne soit effectué. La disposition de la loi est claire. Elle pose une condition essentielle, préalable, à laquelle est subordonnée la vente des obligations. La législature a voulu avec raison que les commissions scolaires pourvoient d'avance au remboursement des intérêts et des fonds d'amortissement, et comme le disait cette cour dans la cause des *Commissaires d'Ecoles de St-Adelphe* v. *Charest et al.* (1) : —

> On conçoit facilement la sagesse d'une semblable législation dont le but évident est de mettre un frein aux dépenses exagérées, et de protéger le contribuable contre les extravagances des administrateurs.

Or la résolution, sur laquelle les intimés se basent pour prétendre qu'un privilège a existé dès l'origine sur les immeubles de Wright, n'impose clairement pas de taxe, et les termes mêmes employés doivent inévitablement nous conduire à cette conclusion. La résolution en effet ne dit pas qu'une " taxe est imposée et sera prélevée ", mais elle dit

(1) [1944] S.C.R. 391.

seulement "shall be levied". On n'a fait que manifester une intention de prélever une taxe dans l'avenir, sans même qu'elle ne soit imposée. Dans la cause des *Commissaires d'Ecoles de St-Adelphe* v. *Charest* (1), où un futur était également employé dans la rédaction d'une résolution, cette Cour a également décidé: —

C'est une erreur de prétendre qu'en employant les expressions "sera imposée et prélevée", on a pourvu à ses voies et moyens, et qu'on s'est assuré une source de revenus pour payer le coût de l'entreprise.

En rendant cet arrêt, cette Cour n'a pas créé de jurisprudence nouvelle, mais n'a fait que confirmer plusieurs décisions rendues précédemment.

Ainsi, la Cour du Banc du Roi dans cette même cause des *Commissaires d'Ecoles de St-Adelphe* v. *Charest* (2) disait ce qui suit: —

Quand la résolution porte: "Il sera imposé et prélevé par la Commission scolaire une taxe spéciale annuelle suffisante sur toutes les propriétés taxables", cette résolution viole l'article 244 du code scolaire disposant: "Aucune émission d'obligations ne peut être faite et aucun emprunt ne peut être contracté à moins qu'il ne soit imposé par la résolution qui les autorise * * * une taxe annuelle * * * *". La résolution susdite n'impose pas la taxe;

Et dans la cause de *Goulet* v. *La Corporation de la Paroisse de St-Gervais* (3), Sir Mathias Tellier alors juge en chef s'exprimait ainsi: —

Ledit règlement statue, pour chaque pont, qu'une taxe spéciale sera imposée et prélevée sur les biens imposables des contribuables obligés audit pont, afin d'en faire le paiement, dans un seul versement, argent comptant. Le demandeur objecte que, par cette disposition, la taxe ne se trouve pas actuellement imposée; et il conclut, en se basant sur l'article 627a du Code municipal, que le règlement est nul.

Le demandeur a raison, lorsqu'il dit que, par la disposition ci-dessus du règlement, la taxe ne se trouve pas actuellement imposée; mais je crois qu'il a tort de prétendre que cela rend le règlement nul. L'article 627a, sur lequel il se base, ne va pas si loin que cela. Il frappe de nullité tout contrat d'entreprise donné par une corporation municipale qui n'a pas pourvu à ses voies et moyens; mais il ne déclare pas invalide le règlement lui-même en exécution duquel elle a agi.

On a dit que la jurisprudence que je viens de citer, et en particulier la cause de *Charest* (1), ne s'applique pas, parce que dans la présente cause, s'il est vrai que le futur est employé pour le prélèvement de la taxe, il faut présumer l'existence d'une imposition dès 1925, dont le prélèvement

(1) [1944] S.C.R. 391. (2) Q.R. [1943] K.B. 504.
(3) (1930) Q.R. 50 K.B. 513.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Taschereau J.

n'est que la conséquence. On signale que, dans les causes qui ont servi à fixer la jurisprudence, le futur était clairement employé, quant à l'imposition.

Je ne puis admettre cette prétention. Il s'agit de taxe, et la loi doit être interprétée restrictivement, et au bénéfice du contribuable. A moins que l'immeuble ne soit imposé d'une façon raisonnablement claire, il ne doit pas être sujet à la taxe. Ici, non seulement il n'y a pas d'ambiguité, mais il n'y a aucune imposition quelconque.

Il s'ensuit donc, des termes mêmes de la résolution de 1925 tels qu'interprétés à la lumière de la jurisprudence que je viens de citer, que l'immeuble de Wright n'a pas été imposé à l'origine et qu'aucune charge ne l'a affecté. Cet immeuble n'a pas été à ce moment déterminé d'avance comme devant plus tard être affecté d'une taxe annuelle par l'effet de la confection d'un rôle de perception.

Cependant, ce défaut d'imposition ne rend pas nulle la résolution qui peut toujours être complétée plus tard, mais il rend illégaux tout contrat donné ou tout emprunt effectué comme conséquence de son adoption (*Goulet* v. *La Corporation de la Paroisse de St-Gervais* (1) et *Les Commissaires d'Ecoles de St-Adelphe* v. *Charest et al.* (2)). Cette absence d'imposition actuelle lors de la passation de la résolution de 1925 serait donc une omission suffisante pour frapper l'emprunt d'illégalité, car elle constitue clairement une violation des dispositions de l'article 244 du code scolaire. Heureusement, pour prévenir les inconvénients auxquels des rédactions illégales de résolutions municipales ou scolaires pourraient donner lieu, la législature a, par l'article 246 du code scolaire, décrété que la validité d'une obligation émise ne peut être contestée pour aucune raison, lorsque la résolution qui autorise son émission a été approuvée par le Lieutenant-Gouverneur en conseil ou le Ministre des Affaires Municipales, de l'Industrie et du Commerce, et que cette même obligation porte le sceau et le certificat qu'elle est émise conformément à la résolution qui l'a autorisée.

En admettant que les présentes débentures émises par les intimés portent ce certificat de validité, elles doivent donc être considérées comme émises légalement. Mais,

(1) (1930) Q.R. 50 K.B. 513. (2) [1944] S.C.R. 391.

cette disposition législative ne crée des relations légales qu'entre le porteur de la débenture et la corporation débitrice de la dette, et confère au porteur un titre incontestable qui lui permet de réclamer des intimés.

Il n'existe cependant aucun lieu de droit entre le porteur de la débenture et le contribuable, et l'obligation de ce dernier n'est affectée en aucune façon par l'apposition de ce certificat sur la débenture.

Dans le cas où la corporation scolaire ferait défaut de payer les intérêts ou le capital à échéance, le recours de l'obligataire serait contre la corporation scolaire et nullement contre le contribuable. L'obligation que peut avoir ce dernier de payer n'existe que vis-à-vis la corporation scolaire, et le droit qu'a le porteur de la débenture, de percevoir ce qui lui est dû, ne peut donc s'exercer que contre cette dernière.

La loi, qui valide la débenture et qui la rend incontestable, n'augmente pas et ne diminue pas la responsabilité du contribuable. Elle n'affecte pas de privilège l'immeuble dont il est propriétaire; elle ne fait que rendre parfait le titre du prêteur, qui ne peut être contesté à cause du certificat dont il est revêtu.

Avant d'emprunter par débentures ou autrement, toute corporation scolaire doit se conformer aux dispositions de l'article 242 du code scolaire. Elle doit obtenir l'autorisation des autorités provinciales, et produire la résolution qui mentionne l'objet, le montant, le terme et le taux de l'emprunt. Evidemment, la seule permission ainsi donnée ne légalise pas l'emprunt. Elle accorde l'autorisation nécessaire, et c'est l'accomplissement d'une condition que la loi impose pour que l'emprunt devienne possible.

Lorsque les conditions de l'emprunt sont ainsi approuvées, alors, nous dit l'article 246, la débenture est validée et ne peut être contestée, quand elle porte le sceau du département des Affaires Municipales. Mais ce sceau, s'il rend incontestable le titre du porteur, ne confère pas à la corporation scolaire vis-à-vis des contribuables plus de droits que ceux que lui donne le code scolaire, ou qui résultent des termes mêmes de la résolution.

C'est l'opinion exprimée déjà par M. le juge Tellier, dans la cause de *Goyer* v. *Corporation de la ville de St-*

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Taschereau J.

Lambert (1). Dans cette cause, où l'approbation d'un règlement, en vertu de la loi 4 Geo. V, chap. 50, rendait valide toute obligation émise subséquemment, il a été décidé que

la loi 4 Geo. V, Chap. 50 ne peut être invoquée en faveur d'un règlement nul ou invalide, si elle peut servir de protection au porteur ou acquéreur de bonne foi d'une obligation municipale.

Il en est ainsi, je crois, de la cause qui nous est soumise, et le certificat de validité attaché à la débenture n'a pas pour effet de changer les termes de la résolution et d'étendre son application à des contribuables qui sont autrement hors de son atteinte.

Les intimés semblent avoir réalisé que par leur résolution de 1925 aucune taxe n'a été imposée, car chaque année subséquente ils ont imposé cette taxe par des résolutions successives. Ainsi, en 1938, on adopte la résolution suivante: —

A special tax rate of 1¾ mills be levied on all properties on which we are entitled to collect for the year 1938-39.

En 1939, on agit de la même façon: —

A special tax rate of 1¾ mills be imposed on our whole school district for the year 1939-40.

En enfin, en 1940, les intimés passent une dernière résolution qui se lit ainsi: —

A special tax rate of 1¾ mills be imposed on our whole district for the same year.

Sauf en 1938, où on emploie de nouveau le mot " levied ", on impose clairement la taxe, contrairement à ce qui fut fait en 1925, où l'on se contentait d'exprimer seulement l'intention d'en prélever une plus tard.

Dans la présente cause, il me semble clair, pour les raisons que je viens d'exposer, que la résolution de 1925 n'a pas même mis en mouvement la procédure nécessaire, dont l'aboutissement devait être l'imposition d'une taxe. Elle ne dit pas qu'une taxe est imposée, et elle ne peut donc pas être jointe aux rôles annuels de perception qui ont été faits chaque année, pour engendrer une obligation de la part des contribuables.

C'est aux résolutions passées en 1938, 1939 et 1940, qu'il faut se rapporter pour établir la source la plus reculée de la taxe annuellement imposée, et c'est à ces résolutions qu'il

(1) (1920) Q.R. 59 S.C. 232.

faut joindre les rôles de perception faits durant les mêmes années, pour trouver l'autorité que peuvent avoir les intimés de percevoir quoi que ce soit de la corporation appelante.

La résolution qui impose, et le rôle de perception qui complète, sont tous deux soit de 1938, de 1939 ou de 1940, au moment où, par les dispositions mêmes de la loi, les immeubles de l'appelante ne peuvent pas être imposés.

Pour ces raisons, je suis d'opinion que le présent appel doit être maintenu avec dépens de toutes les cours, et que les conclusions du jugement rendu par la Cour Supérieure doivent être rétablies.

Je m'accorde avec le Juge en Chef quant à la rédaction du jugement formel.

RAND J.—This appeal concerns a question of the taxability, for annual assessments of interest and sinking-fund increments, on bonds issued by a Protestant minority school corporation, of land which, at the time of the passing of the resolution providing for the issue, owned by a Protestant, was subsequently sold to a Roman Catholic institution, by the school law exempt from taxes as to all property occupied by it for religious purposes. In the hands of the vendor, the land was assessed for approximately $25,000. After the purchase, the institution constructed buildings at a cost of over half a million dollars. The Court of King's Bench for Quebec, reversing the Superior Court, has maintained the taxation on the basis of the full value of the land and the improvements; and the institution appeals to this court. The question, though of narrow compass, presents considerable difficulty in the interpretation of certain provisions of *The Education Act* of the province.

The scheme of the Act sets up throughout the province school municipalities. The initial government of a municipality is by school commissioners, who are constituted a corporation. Provision is made for the withdrawal of persons of a minority faith, called dissentients, who may organize their own school administration under the direction

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rand J.

of school trustees. The power to tax for the municipality is distributed between these two bodies, and although the language of section 310 is that the

> trustees of dissentient schools shall alone have the right to impose and collect the taxes to be levied upon the dissentient inhabitants,

I take it to limit also the jurisdiction of trustees.

Section 244 prescribes the conditions under which bonds may be issued or loans contracted, and its language is important:

> 244. (1) No issue of bonds may be made, nor loan contracted, unless, by the resolution authorizing the same, *there be imposed, upon the taxable property held for the payment of such bonds or such loan, an annual tax* sufficient for the payment of the interest each year, and at least one per cent. of the amount of the loan, besides the interest, to create a sinking-fund for the extinction of the debt.
>
> * * *
>
> (3) It shall be the duty of the secretary-treasurer to make, every year until the payment of the loan or the redemption of the bonds, a special collection roll, *apportioning, upon the taxable immovable property liable for the payment of such loan or such bonds, the amount of the tax imposed on each one* for the payment of the interest and the annual payment into the sinking-fund.

Then there are general provisions for taxation:

> 249. The school commissioners and trustees shall cause to be levied by taxation the taxes necessary for the support of the schools under their control.
>
> The rates of school assessments shall be uniform *upon all taxable property in the school municipality.* The assessment shall be based upon the valuation of such taxable property, and shall be payable by the owner. If not paid, such assessment shall be a special hypothecary charge upon such property, not requiring registration. R.S. (1909), 2730, 2731.
>
> * * *
>
> 388. School assessments and monthly fees *shall be imposed* by all school corporations, between the first day of July and the first day of September in each year.
>
> The *imposition of such taxes* shall not, however, be considered null if made after the delay fixed. R.S. (909), 2857.
>
> 389. After the *imposition of the taxes,* the secretary-treasurer shall, without delay, *make a collection roll.*
>
> He shall also make a special collection roll whenever a special assessment *has been imposed* after the making of the general collection roll, or whenever ordered so to do by the school board. R.S. (1909), 2858.

The word "imposed" appears to be used consistently to designate a formal act of the commissioners or trustees by which their taxing power is exercised and, under sub-

section (1) of section 244, an annual tax for future years, subject to sub-section (3), created. The language of sub-section (1), "Unless * * * there is imposed * * * an annual tax," taken with that of sub-section (3), lands itself to two possible conceptions: one, that the tax is a commitment in gross for an ascertained total sum in relation to the entire body of taxable property within the jurisdiction of the trustees as one whole; the other, that it is specific as to amount in relation to each immovable. In the former, the school board binds itself to levy a certain sum by taxes in each of a number of years. This leaves uncertain the property and its valuation. These may be fixed as of the date of the resolution or as each year arrives; or the property may be that taxable at the date of the resolution and the valuation as of the year of levy, or vice versa. But this view attributes a signification to the word "tax" which the ordinary meaning does not support. I do not see how the quoted language can be satisfied in the sense of "tax" except by the second of the alternatives but with the qualification that the tax is potential only until the year is reached for which it is intended. I do not think we can speak accurately of a tax "in gross," nor that a tax can be *imposed* which is not specific and referrable to its precise subject-matter.

The word "apportioning" in sub-section (3) does, in one sense, appear appropriate to an amount—though not a tax—"in gross" to be spread each year over the various parcels, on the basis of the valuations for that year. But the difficulty of that construction—apart from the language of sub-section (1)—arises from the words, "the amount of the tax imposed on each one." The "apportioning" is upon the taxable immovable property "liable for the payment of such loan or such bonds" which I take to be the property mentioned in sub-section (1) as "held for the payment of such bonds"; but what is apportioned is the "*amount of the tax imposed on each one*", meaning each separate immovable. The "imposition" is made only under sub-section (1), and sub-section (3), therefore, assumes the effect of sub-section (1) to be to raise a specific potential tax on each parcel. If that is the case, then the second conception accords with both sub-sections.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rand J.

After the best consideration I can give to it, I take the language of the section to mean that an "annual tax"—annual in relation to the years of the term, for instance, of a bond issue—carrying implicitly the characteristic of a specific amount in relation to each separate parcel of land, is declared; and that it is en marche to become definitive as a realizable exaction as each year is reached, and as it is extended on a collection roll. It is as if the resolution in 1925 were in the words: we now impose a tax of $30 on property "A" for the year 1940, and as if it were repeated in 1940. An annual resolution is passed in advance: it prescribes a taxing effect to be attained in future.

But the declaration of a potential tax in a certain amount in respect of each taxable immovable for each year during the currency of the obligation, as a specific imposition, can be made only by reference to the valuation or assessment roll, at the time of the resolution, in force. When the tax becomes levied in each year as the collection roll is completed, the time of payment is determined, but whether there is determined also personal liability for each year's tax, we do not need to enquire. The resolution, then, fixes as of its date the amount of the annual levy, the lands to be taxed, and the property valuations: *Canadian Allis-Chalmers Limited* v. *The City of Lachine* (1).

Section 391 provides for the homologation of the collection roll, and after the period for payment has expired the taxes become a special hypothecary charge upon the property taxed. Even if that section does not apply to such a special assessment, the taxes, upon default of payment, would become a privilege upon the immovables under articles 2009 and 2011 of the Civil Code.

This interpretation is supported by the provisions of section 17 of chapter 111, R.S.Q. 1925. They require the registration of a certified copy

de tout règlement passé dans le but de faire un emprunt au moyen d'une émission d'obligations

by a corporate body. This copy is to be accompanied by a statement of the amount and other details of the loan, the assessed value of the property of the municipality and the yearly rate of assessment to pay for the bonds. Here is

(1) [1934] S.C.R. 445.

public notice to every prospective purchaser of lands of the long term obligations by which a particular parcel may be bound. A copy of the resolution in this case, with the particulars required, was registered in December, 1925.

Somewhat the same view of similar legislative language was taken by the courts of Quebec as early as 1887 in *La Communauté des Sœurs des Saints Noms de Jésus et Marie* v. *The Corporation of the Village of Waterloo* (1). There, the *Municipal Act* gave to the council the power to "impose" a tax on all the assessable property of the municipality for the payment of the interest and sinking-fund of a bond issue, and likewise provision that the tax "sera levée, prélevée et perçue annuellement" in the same manner as other taxes "sur toutes les propriétés imposables de la municipalité." There was involved, as here, a transfer of an immovable to a religious order of the Roman Catholic faith and precisely the same grounds of objection were presented to the Court of King's Bench as were submitted to this court. The language of the judgment seems to carry the hypothecary charge from the date of the original resolution. But for the matter before us, it is not necessary to go beyond the construction that a hypothec or privilege arises upon default in payment of each year's taxes; there is no relation back in time.

A number of cases have arisen in Quebec in which the incidence of these impositions upon contracts for the sale of immovables has been in question and the principle laid down has held the purchaser bound to the assumption of the tax where the levy has been made subsequently to the date of the contract. But that obviously follows from the view that the tax becomes complete only upon the homologation of the collection roll. *A fortiori* at that time there is no encumbrance in the nature of a hypothec or privilege.

But it is said that the resolution in this case is invalid under the judgment of this court in *Les Commissaires d'Ecoles de la Paroisse de St. Adelphe* v. *Charest* (2). It was there held that, under sections 237 and 244 of the Act, the resolution must presently impose the taxes and that the language, "sera imposé," is not sufficient. In the

(1) (1887) M.L.R. 4 Q.B. 20 (2) [1944] S.C.R. 391.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Rand J.

resolution here, there is no express imposition and the future tense is used in the expression, "shall be levied." But I read the paragraph providing for the taxation to imply in fact a present imposition sufficient for the purposes of section 244. I am not disposed to extend the rule of the *Charest* case (1) beyond the precise words that were there dealt with. We must not overlook the fact that the statute deals with administration by ordinary citizens who are not to be charged with special appreciation of the refinements of language where the substance of the statutory requirement is clearly indicated by the language they use.

But there is another ground upon which I would hold the resolution now to be unassailable. By section 246, it is provided that every bond before delivery shall bear a certificate of the Minister of Municipal Affairs establishing that the resolution authorizing the issue of such bond has been approved by the Lieutenant-Governor in Council and that such bond is issued in conformity with such resolution; and that every bond bearing such certificate shall be valid "and its validity shall not be contested for any reason whatsoever". Now, admittedly the bond bore the certificate and is, therefore, valid, but to what does that validity extend? It is argued that there is created only a valid debt but I cannot agree with that. We must attribute to the legislature some knowledge of the commercial practices in marketing bonds of this nature, and the whole object of section 246 is to conclude just such questions as have been debated in this case. I should say that a purchaser of such a bond is entitled to the security he would have had if every preliminary or conditional step had been taken in exact accordance with the provisions of the statute. Section 244 declares that the bond shall not be issued unless the resolution imposes the tax. The bond in the hands of a purchaser becomes valid and it would be intolerable that the purchaser should be told that the condition essential to that validity did not in fact or in law exist. The special assessment is for the sole benefit of the bondholders. They are the beneficiaries of that power to tax and the sufficiency of the resolution must be deemed concluded not only in

(1) [1944] S.C.R. 391.

relation to the bond as a debt, but also to the taxation intended to be appropriated exclusively to the payment of that debt.

That the valuation and collection rolls are significant to creditors and purchasers of bonds is indicated by the Chief Justice in *Canadian Allis-Chalmers Limited* v. *The City of Lachine* (1):

> En outre, aux créanciers de la municipalité elle indiquerait de façon erronée la valeur de leur gage; et, surtout, elle représenterait faussement aux prêteurs le montant réel de leur garantie.

Like considerations underlie the interests of the taxpayers *inter se*. The obligation they undertake is related to the property out of the taxes on which it is to be discharged: and any material subtraction would work an injustice upon the remaining property. The principle recognized in the Act in relation to alterations in boundaries of school municipalities and districts, sections 77, 78, 85, 275 et seq., regards the interests of the taxpayers as well as of the bondholders.

The respondents are, then, entitled, as the Court of King's Bench has held, to succeed in this action but the taxes they are claiming must be reduced to amounts based on the valuation roll in force when the resolution was passed, and the judgment modified accordingly.

To that extent the appeal must be allowed. If the parties cannot agree upon the amount recoverable on that basis, the matter may be brought before the registrar for determination. The appellants should have two thirds of their costs in this court: the respondents their costs of the trial and of the appeal to the Court of King's Bench on the scale applicable to the sum to which they may be found to be entitled.

ESTEY J.—The respondents (plaintiffs) in this action claim of the appellant (defendant) the amount levied against the property in question as a special tax in the years 1939, 1940 and 1941.

In May, 1925, the Aylmer High School was destroyed by fire. In order to rebuild, the trustees obtained through a

(1) [1934] S.C.R. 445, at 455.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Estey J.

sale of debentures the sum of $25,000. The procedure that must be followed by the trustees with respect thereto is set forth in the *Education Act* (1925) R.S.Q. ch. 133.

The particulars of the resolution passed by the trustees under the provisions of section 244 and of the bonds issued pursuant thereto were registered in the Registration Office at Hull, Que., in December, 1925.

The property in question was at the time of the passing of the resolution owned by Mr. R. H. Wright and subject to the tax. This tax was collected annually with respect to this property until the year 1937, when it was purchased by the appellant.

The appellant contends that the resolution passed by the trustees does not meet the requirements of section 244.

This resolution passed by the trustees on August 19, 1925 in part reads as follows:

> To provide for the annual interest and sinking fund of these debentures, *a special tax,* sufficient for the payment of interest and sinking fund, as hereinafter provided, shall be levied annually upon all taxable property on the collection roll of the school trustees of this municipality at present in force, and on the said school trustees' proportion of all taxable property belonging to incorporated companies, and on any other taxable property that may come under the control of the said school trustees during the term of these debentures; and all lands subject to the said tax now entered on the said rolls, together with the buildings and improvements thereon made or erected which may be made or erected thereon during the term of these debentures, shall be bound and liable for the said special tax, until the full and final payment and discharge of the said debt.

It is contended that its language "a special tax shall be levied annually," phrased in the future tense, is not, and cannot provide, for a present or immediate tax within the meaning of section 244 of the *Education Act.* In my opinion that contention would have been available to the appellant if it had been made before the government approved of the resolution, as provided in section 246 of the *Education Act.* The existence of this approval in my opinion distinguishes this case from *The School Commissioners of St. Adelphe* v. *Charest et al.* (1)

Sections 242-246 inclusive deal specifically with the steps that must be taken by school trustees in order that the approval of such a resolution may be granted by the

(1) [1944] S.C.R. 391.

Lieutenant-Governor-in-Council. These steps were taken and on November 8th, 1925, this resolution was approved by the Lieutenant-Governor-in-Council.

It is specifically provided by section 244 (1):

No issue of bonds may be made, nor loan contracted, unless, by the resolution authorizing the same, there be imposed, upon the taxable property held for the payment of such bonds or such loan, an annual tax sufficient for the payment of the interest each year, and at least one per cent. of the amount of the loan, besides the interest, to create a sinking-fund for the extinction of the debt.

The bonds or debentures were issued by virtue of the resolution passed by the school corporation, and approved by the Lieutenant-Governor-in-Council, as provided under section 246, as it then was:

246. Every bond or debenture, before delivery thereof, shall bear * * * a certificate of the Minister of Municipal Affairs or of any person specially authorized by the latter, establishing that the resolution authorizing the issue of such bond or debenture has been approved by the Lieutenant-Governor-in-Council * * * and that such bond or debenture is issued in conformity with such resolution.

Every bond or debenture issued in virtue of a resolution approved by the Lieutenant-Governor-in-Council * * * and bearing * * * such certificate shall be vaid, and its validity shall not be contested for any reason whatsoever.

This language used by the legislature is very clear and definite. The certificate establishes the approval of the resolution, that the bonds or debentures are issued in conformity with such resolution, and that they shall be valid, and their validity shall not be contested for any reason whatsoever.

Then this section 246 must be read and construed with the other relevant sections, and particularly section 244.

The language of section 244 (1) is equally clear and definite and confirms what appears to me to be the meaning of section 246, that the approval therein provided for applies to the resolution and includes both the validity of the bonds and the existence of the security. The main purpose of the resolution is to authorize the loan and impose a tax upon "the taxable property held for the payment". It provides for an assured source of payment, an item of the greatest importance to the purchasing public. It follows that this is one of the essentials to be considered by the Lieutenant-Governor-in-Council when arriving at a decision to grant or refuse the approval of the resolution.

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Estey J.

When the approval of the Lieutenant-Governor-in-Council is granted as evidence by the certificate, it constitutes an assurance to the ratepayers in the district, the school trustees, and all concerned that the resolution, if within the competence of the trustees to pass, is valid, and that the bonds are issued in conformity with the resolution, and supported by the security indicated in the resolution.

This provision is similar to that which has been adopted by other provinces throughout the Dominion. The purpose and object of the legislation is to place bonds and debentures upon a stable basis and to facilitate the sale of the bonds and debentures by the school districts. It removes from the courts any inquiry into questions properly subject to the approval. That is as far as it goes. Such a provision does not enlarge the jurisdiction of the trustees and questions with respect to jurisdiction may be raised before the courts. *Re Harper and Township of East Flamborough* (1); *In re Gillespie et al. and the City of Toronto* (2); *Kuchma* v. *Rural Municipality of Tache* (3); *The Canadian Agency Ltd.* v. *Tanner* (4); *Molison* v. *Woodlands* (5).

The appellant further submitted that the by-law was illegal because it included a provision that after acquired properties should become subject to the tax. No effort was made to support the validity of this latter provision. The authorities established as stated by Mr. Justice Anglin (later Chief Justice) that:

> a by-law of a public representative body clothed with ample authority should be "benevolently" interpreted and supported if possible.

The City of Montreal v. *Morgan* (6).

If part of a by-law is void, it does not follow that all of the by-law is void if the void part can be severed from that which is valid. Halsbury, 2nd ed., vol. 8, p. 48, par. 82. Meredith & Wilkinson, Canadian Municipal Manual, p. 255; Robson & Hogg, Municipal Manual, p. 14. In my opinion the part here objected to in this by-law is severable, and its invalidity does not justify a declaration that the by-law as a whole is invalid.

(1) (1914) 32 Ont. L.R. 490.
(2) (1892) 19 Ont. App. R. 713.
(3) [1945] S.C.R. 234.
(4) (1913) 6 Sask. L.R. 152.
(5) (1915) 25 Man. R. 634.
(6) (1920) 60 Can. S.C.R. 393, at 409.

It was also contended that the resolutions of December 6th, 1938, November 13th, 1939 and November 26th, 1940 were unnecessary in relation to tax imposed by the resolution of August 19th, 1925 and that in fact these resolutions as passed imposed the taxes claimed for in this action. In view of the provisions of 244 (3), I agree that these resolutions were unnecessary in relation to the resolution of 1925. It should be noted that they do not purport to, nor in my opinion do they alter, change or affect the resolution of 1925, and that so far as this action is concerned, they must be treated as mere surplus.

In my opinion, the resolution was within the competence of the trustees to pass, and when approved, the land in question in the language of the statute was "taxable property held for the payment of * * * such loan".

The respondent asks a declaration that the property in question "be declared affected and hypothecated" in its favour for the payment of the taxes for the three years here claimed. Under the provisions of the *School Act*, in a case of this type a hypothecary charge comes into existence, after the special collection roll is homologated as required by section 391 and by virtue of the Civil Code, but it then becomes a hypothec upon all the "taxable property held for the payment" within the terms of the resolution and section 244 (1).

Section 249 of the *Education Act* makes reference to "a special hypothecary charge", but this section must have reference only to general school taxes, as it specifically provides:

> The rates of school assessments shall be uniform upon all taxable property in the school municipality.

This special tax is specifically restricted by the provisions of section 244 (1) to the "taxable property held for payment". Therefore, I do not think the provisions of section 249 applicable to this case.

But it is contended that no hypothec exists in this case because there is no personal liability. It is urged that though the tax is provided for by the original resolution, it is not in reality a tax until the roll is homologated. Then in as much as the *Education Act* provides by section 424

1945

LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE TOWN OF AYLMER

Estey J.

that the appellants cannot be assessed, therefore at the time the tax came into being, they could not be personally liable therefor. It is the duty of a Court, so far as it may be reasonably possible having due regard for the language used, to construe a statute so as to give to its provisions that interpretation which will carry out the intent and purpose of the legislature and more particularly, that the sections thereof should be construed in a manner which will make them complimentary rather than contradictory. Therefore, it is desirable that these general provisions contained in section 424 be read in relation to 242-246 and in such a manner as to give effect to all of these sections. This end is achieved by construing section 424 as applicable to general and special taxes imposed after the parties, in the position of the appellant, become occupants of the property within the meaning of this section. In my opinion, that is the construction which must be given to section 424, and therefore, in as much as the resolution in question was passed in 1925 and the appellant acquired the property in 1937, it has no application to the tax provided for by this resolution under 244 (1).

Then attention is called to section 251 and specifically section 251 (3), which provides:

> 251. The following properties shall be exempt from the payment of school assessment:
>
> * * *
>
> (3) Property belonging to or gratuitously occupied by fabriques, or religious, charitable, or educational institutions or corporations legally constituted, for the purposes for which they have been established, and not held by them for purposes of revenue;

This section, in my opinion, having regard to the express provision of section 244 (1) and the reasons above set forth with respect to section 424, has no application to this case. It is a general provision and must, in my opinion, be construed to apply only to general and special taxes imposed after the parties, in the position of the appellants, become subject to assessments, and therefore does not affect the impositions made prior thereto. I here use the word "impositions" because in section 244 (1) and (3) the word "imposed" is used.

It is important to keep in mind that provisions for exemption must be strictly construed. In *Dame Mary Wylie* v. *The City of Montreal* (1), Ritchie C.J. said:

> I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed.

Therefore, in the absence of express language, the appellant having purchased the property after it was, in the language of section 244 (1) "taxable property held for the payment", must pay this tax until the debentures are liquidated.

The school tax is primarily a property tax, but when one reads the Act as a whole, it contemplates a personal liability upon the owner. It refers to the persons liable for the same and provides for the seiuzre and sale of movables in the event of non-payment. The language of Lord Thankerton appears appropriate in reference to this legislation in *Provincial Treasurer of Alberta* v. *Kerr* (2):

> Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interest in property or in respect of transactions or actings of the taxpayers. It is at least unusual to find a tax imposed on property and not on persons.

Therefore, it appears to me that there is a personal liability within the meaning of the *School Act* upon the appellant as owner of the property with respect to this specific tax.

Throughout, it seems to me that we are concerned mainly with the construction of sections 242-246 of the *Education Act* and as above stated, it is my opinion that any person or corporation purchasing the property which has become "taxable property held for payment" under section 244 (1) must pay the tax, unless there is some statutory provision expressly exempting that person or corporation from the payment thereof. As intimated above, I can find no such provision applicable to this case.

In my opinion, the appeal should be dismissed.

Appeal allowed in part.

Solicitors for the appellants *Marquis & Lessard.*

Solicitor for the respondents: *John A. Aylen.*

(1) (1886) 12 Can. S.C.R. 384, at 386. (2) [1933] A.C. 710, at 718.

1945
*May 28
*June 4

DUNCAN *v.* THE KING

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Dismissal by Court of Appeal of accused's appeal from conviction of theft—Dissenting opinion in that Court that there was no evidence to support conviction—Appeal to this Court dismissed.

APPEAL by the accused from the judgment of the Court of Appeal for British Columbia (1) dismissing (O'Halloran J.A. dissenting) his appeal from his conviction of unlawfully stealing a number of panel boxes and switches.

D. J. McAlpine for the appellant.

L. W. Brockington K.C. and *G. F. Henderson* for the respondent.

THE COURT.—Assuming that the ground of Mr. Justice O'Halloran's dissenting opinion is that there was no evidence whatever upon which the Magistrate could convict and that, consequently, this Court has jurisdiction in the premises, we are clearly of opinion that there was evidence here on which the Magistrate could find that the accused was guilty.

Therefore, the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *D. J. McAlpine.*

Solicitor for the respondent: *E. A. Dickie.*

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

(1) [1945] 2 W.W.R. 297.

DAME ROSEANNE LATOUR ET AL. (PLAINTIFFS) ..... } APPELLANTS; 1945 *May 24, 25 *Oct. 2

AND

LILIANNE GRENIER (DEFENDANT) .. RESPONDENT.

Will—Action in contestation—Probate—Validity—Onus probandi—Res judicata—Object and effect of probate—Arts. 857 and 858 C.C.

The judgment ordering the probate of a holograph will does not constitute *res judicata*. As a result of such probate, the will takes effect "until it is set aside upon contestation". Art. 857 C.C.

In an action where a holograph will duly probated is contested, the burden of proof still continues to impose upon the beneficiary the obligation to establish the genuineness of the writing or of the signature of the testator.

The probate thus has not the effect of shifting such burden to the party repudiating the will, the latter not having the incumbent duty of proving that the writing or the signature were forged.

There is a very wide difference between the "probate" under the English Law and the "verification" under the civil law of Quebec.

Dugas v. *Amiot* ([1929] S.C.R. 600) approved.

Billette v. *Vallée* not applicable to this case. That decision was rendered upon an exceptional case and was essentially an "arrêt d'espèce".

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Duranleau J. and dismising the appellants' action.

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

Aimé Geoffrion K.C. and *Jacques Cartier K.C.* for the appellants.

Stanislas Poulin K.C. and *Maurice Demers K.C.* for the respondent.

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

(1) Q.R. [1945] K.B. 225.

1945

LATOUR v. GRENIER

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—Il s'agit du prétendu testament de feu Charles Latour, en son vivant cultivateur, de la paroisse de St-Jean l'Evangéliste, dans le district d'Iberville.

Les appelants, Roseanne et Alphonse Latour, sont les deux seuls enfants de M. Latour et ses seuls héritiers légaux.

Le 24 novembre 1937, l'intimée, qui n'est aucunement parente ou alliée de feu M. Latour, a fait vérifier un document qu'elle soutient être un testament fait suivant la forme dérivée de la loi anglaise, et qui se lit comme suit:—

St-Jean, 12 oct. 1937

Moi, Charles Latour, je donne à ma garde-malade Lilianne Grenier le montant que j'ai à la Banque Canadienne Nationale pour la récompenser des services rendus à ma femme et à moi-même.

Je fais ma marque X devant témoins aujourd'hui 12 octobre à 5 hrs de l'après-midi.

Témoins: Antonio Lachance
J. Albert Payant.

Les appelants ont allégué que l'un des témoins, Antonio Lachance, est l'ami de l'intimée et qu'à la date du testament il logeait sous le même toit qu'elle et qu'il y loge encore; que douze heures environ après la prétendue confection du document précité, soit le 13 octobre 1937, vers 6.15 hrs du matin, Charles Latour est décédé d'une angine de poitrine. Il avait alors à la Banque Canadienne Nationale, en dépôt à son compte et à son nom, la somme de $11,929.50.

Les appelants ont prétendu que ce document était faux et frauduleux, et que jamais Charles Latour, qui d'ailleurs pouvait et savait signer et signait tous les actes et papiers se rapportant à ses affaires, n'avait apposé sa marque sur le prétendu testament, et que ni directement ni indirectement il en était l'auteur.

Ils soutiennent en plus que ce document, même s'il est authentique, ne pourrait constituer qu'une donation qui serait elle-même illégale et nulle, parce qu'elle n'a pas été rédigée en forme notariale.

Ils allèguent en plus que leur père, qui ne savait ni lire ni écrire, avait toujours déclaré que les biens qu'il possédait étaient pour ses enfants; que le témoin Payant

était un inconnu pour M. Latour; que ce dernier n'avait aucune estime pour l'intimée, ainsi qu'il l'avait déclaré à plusieurs reprises avant sa mort.

L'intimée a été entièrement payée des services qu'elle a donnés à l'épouse de M. Latour, décédée plusieurs mois avant son mari, et la valeur de ceux qu'elle a donnés à Latour lui-même peut tout au plus s'élever à la somme de $25.00, vu qu'elle ne l'a assisté que pendant cinq jours seulement.

L'intimée a plaidé à cette action en niant généralement les allégations de la déclaration, en alléguant la vérification du testament après comparution des appelants pour s'y opposer et après enquête faite. Elle ignorait lors de la confection du testament soit que Latour avait un dépôt à la Banque Canadienne Nationale, soit le montant de ce dépôt. Elle admet que Latour, lorsqu'il était en santé, signait généralement son nom bien que avec beaucoup de difficulté; mais elle affirme que, au moment du testament, il était au lit et bien malade de corps et, très probablement, incapable de signer son nom. Qu'il fût ou non capable de le faire, elle affirme que le testament est valide du moment qu'il porte sa marque, et elle demande acte de l'admission contenue dans la déclaration que Latour ne savait ni lire ni écrire.

L'intimée ajoute que, lors du testament, Latour bien que très sérieusement malade de corps était parfaitement sain d'esprit et absolument capable de disposer de ses biens. Il se rendait parfaitement compte de l'acte qu'il faisait délibérément, sans qu'il lui eut été suggéré par qui que ce soit.

D'ailleurs, le montant en dépôt à la Banque Canadienne Nationale ne constituait qu'une faible partie de la fortune de Latour, et les appelants reçoivent par succession un bien plus fort montant.

L'intimée prétend que Latour avait beaucoup d'estime pour elle, qu'il avait confiance en elle comme il le lui a dit à elle-même et à plusieurs autres personnes; et que les appelants eux-mêmes avaient beaucoup d'estime pour elle et de confiance en elle, ainsi qu'ils l'ont répété à plusieurs reprises lors du décès de Latour. Ils le lui avaient même prouvé en lui confiant des documents qu'ils considéraient

1945

LATOUR v. GRENIER

Rinfret C.J.

comme très importants, jusqu'à ce qu'ils aient eu connaissance du testament attaqué; alors, ils ont complètement changé d'idée.

Le défunt, dit l'intimée, appréciait beaucoup cette dernière parce qu'il recevait et avait reçu d'elle des soins et des attentions qu'il ne recevait pas de ses enfants, lesquels n'ont jamais vécu avec leur père depuis leur naissance, n'ont jamais été en très bons termes avec lui, au point que ce dernier n'avait pas assisté au mariage de sa fille. En plus, l'épouse de son fils avait poursuivi Latour pour pension alimentaire parce que son mari ne la faisait pas vivre.

D'ailleurs, continue toujours l'intimée dans sa plaidoirie écrite, le testament a été vérifié; il est ainsi devenu authentique malgré l'opposition des appelants qui ont comparu lors de la vérification, et il ne peut plus maintenant être attaqué autrement que par voie directe en faux. De plus, les procédures des appelants ne sont pas signées par eux; aucune procuration spéciale de leur part n'est alléguée ni produite; en sorte que ces procédures sont nulles en la forme qu'ils ont donnée à leur action, laquelle, prétend-t-elle, n'est pas le remède approprié pour attaquer le jugement de vérification qui a maintenant l'autorité de la chose jugée, et le faire mettre de côté.

En réponse, les appelants ont dit que, en tenant compte des droits successoraux, des legs particuliers dont était chargé leur père de par la succession de sa seconde femme et des dettes légitimes de sa propre succession, la somme léguée à l'intimée représentait, particulièrement pour un homme économe et extrêmement prudent en affaires comme l'était Latour, un montant considérable et à peu près le seul actif liquide de sa succession.

Quant à l'appelante, Roseanne Latour, elle était dans les meilleurs termes avec son père, lui rendait tous les services qu'elle pouvait, le visitait très souvent et jouissait de toute son affection. Il est vrai qu'il s'était opposé à son mariage, parce qu'il ne connaissait pas son futur mari, mais depuis très longtemps il avait complètement changé de manière de voir et d'agir à ce sujet.

Quant à l'appelant, Alphonse Latour, il s'est marié en 1918 à son retour du front et jusqu'au début de la crise financière, il avait pu subvenir aux besoins de sa famille;

mais il a ensuite manqué d'ouvrage et c'est alors que sa femme a cru devoir réclamer une pension de son beau-père. Alphonse Latour n'a jamais rien réclamé pour lui-même.

Le juge de première instance (Duranleau J.) a été d'avis que les appelants avait fait la preuve de circonstances qui rendent absolument invraisemblable la confection du document par Latour lui-même.

Il a tenu pour établis les faits suivants:—le document est écrit sur du papier que l'intimée avait en sa possession, avec la plume de cette dernière et entièrement de la main de cette dernière, sauf la prétendue marque du testateur et la signature des deux témoins. Le document en question n'a pas été trouvé dans les papiers du testateur après sa mort, mais il était resté en la possession de l'intimée depuis le moment de sa confection.

Le savant juge n'a pu trouver aucun motif de la part du testateur pour faire un legs de cette nature à l'intimée.

L'appelante était en bons termes avec son père; et s'il est vrai que l'appelant ne visitait pas souvent son père, c'est qu'il résidait à Montréal avec sa femme.

Garde Grenier, l'intimée, n'avait aucun lien de parenté avec le défunt et il ne lui devait rien.

Elle avait été employée par lui durant quelques semaines comme garde-malade auprès de son épouse, à deux reprises, mais ses services avaient été bien payés.

Monsieur Latour était mécontent du traitement donné à sa femme par l'intimée dans les derniers jours de sa maladie. Après la mort de sa femme, il avait même dit à qui a voulu l'entendre, qu'elle était morte après un sommeil de 72 heures, causé par une dose trop forte de remèdes que lui avait administrée l'intimée. Il entretenait donc des sentiments peu sympathiques à l'égard de cette dernière au moment où il eut une attaque d'angine de poitrine, le 8 octobre 1937.

C'est son médecin qui lui dit qu'il avait besoin des soins d'une garde-malade et qu'il allait lui envoyer Garde Grenier.

Monsieur Latour a tenu le lit du 8 au 13 octobre, prenant du mieux de jour en jour. Le 12 octobre, le jour de la prétendue confection du testament, il se sentait

1945

LATOUR v. GRENIER

Rinfret C.J.

tellement bien qu'il a dit à plusieurs personnes qu'il allait se lever le lendemain. Mais le lendemain matin, il eut une autre attaque d'angine qui a causé sa mort.

L'honorable juge a considéré comme un indice très sérieux, si non certain, que le document n'émane pas du défunt, le fait "dans les circonstances bien établies dans cette cause", de l'absence de la signature du défunt sur le document.

Il a constaté que M. Latour était un homme prudent en affaires, qu'il signait facilement son nom, bien qu'il ne sût ni lire ni écrire, comme d'ailleurs il était facile de s'en rendre compte par la signature qui apparaît sur les chèques dont une liasse a été produite, et sur les autres documents versés au dossier. Or, le 12 octobre, à l'heure où ce document est censé avoir été reconnu par lui, il était parfaitement en état de signer son nom et répétait à ceux qui le visitaient qu'il ne s'était jamais senti mieux et qu'il allait se lever le lendemain.

Il a trouvé incroyable qu'un homme de son expérience ait signé de sa marque l'acte le plus solennel de sa vie lorsque, trois jours auparavant, alors qu'il était moins bien, il avait dit à l'un de ses débiteurs venu lui faire le paiement de ses intérêts: "Fais ton reçu, et je vais te le signer". De même qu'il ne croit pas qu'il aurait dit à Garde Grenier, comme elle l'affirme dans sa déposition, après qu'elle eût écrit le document: "Maintenant je vais faire ma marque devant deux témoins."

Toujours à ce sujet, le savant juge fait remarquer que personne n'a vu, à la maison du défunt, les témoins en présence desquels Latour aurait fait sa marque, pas même Colette Gélineau, la servante de la maison.

Lachance était l'ami et le compagnon de l'intimée, et il vivait sous le même toit qu'elle comme pensionnaire de la famille Grenier. Payant était peu connu. Ces deux témoins sont censés être venus à la résidence de M. Latour vers 5 hrs de l'après-midi le jour en question, et y être demeurés environ 10 minutes.

Colette Gélineau, à l'emploi de monsieur Latour depuis quinze mois comme servante, désintéressée et digne de foi aux yeux du juge de première instance, possédant la confiance de son patron, affirme positivement qu'à cinq

heures, Latour, la garde-malade et elle-même étaient seuls dans la maison. Elle était bien sortie pour aller traire deux vaches à quelque cent pieds de la maison, à 4½ heures, mais elle est rentrée à 4.45 heures; et elle a pu fixer cette heure-là parce que lorsqu'elle revint de traire les vaches, monsieur Latour lui demanda quelle heure il était et elle constata alors qu'il était 4.45 heures.

En outre, il est bien établi que trois autres personnes sont venues entre 5 et 6 heures, les unes par affaires et les autres pour rendre visite. Aucune d'elle n'a vu les deux témoins en question.

Comme explication de cette coïncidence étrange, l'intimée a soutenu qu'au moment où ces deux témoins sont arrivés à la maison, Colette Gélineau était allée traire les vaches. Elle admet que Mlle Gélineau n'a été absente qu'un quart d'heure. Le savant juge trouve qu'il était physiquement impossible que la présence des témoins dans la maison n'ait duré que dix minutes, et qu'il est difficile de concevoir que l'on a pu procéder à la confection du testament dans un aussi court espace de temps.

Il ajoute qu'en tenant compte des distances à parcourir, il n'est pas croyable que le témoin Lachance ait pu, en si peu de temps, se rendre à pied à sa maison de pension, alors qu'il est admis qu'à quatre heures p.m. il était à la manufacture où il travaillait; mais arrivé à sa maison de pension chez madame Grenier, il aurait alors appris que l'intimée le faisait demander avec un autre témoin, chez M. Latour; il se serait mis à chercher un témoin, il aurait atteint Payant par téléphone, un journalier qui était censé être au travail, il l'aurait fait venir chez-lui à pieds; et ensuite, tous deux se seraient rendus toujours à pieds chez M. Latour.

Ce dernier demeurait dans les limites de la ville de St-Jean, mais sur une ferme complètement en dehors du centre de la ville.

Le juge de première instance fait ensuite remarquer que, au soir du 12 octobre, c'est-à-dire à peine une couple d'heures après celle où le testament est censé avoir été fait, Lachance, qui allait tous les soirs chez M. Latour pour y porter le journal, et y rencontrer son amie, l'intimée, à son arrivée aurait demandé au malade comment il avait

1945

LATOUR v. GRENIER

Rinfret C.J.

passé la journée. Cette question paraît invraisemblable si l'on pense que Lachance était venu à cinq heures de l'après-midi, pour agir comme témoin au testament.

Le savant juge ne croit pas la conversation rapportée par l'intimée comme ayant eu lieu entre elle et le malade pour l'amener à lui consentir son testament.

Sur ce point, il déclare qu'il suffit de lire les témoignages qu'elle a rendus, tant sur la requête pour vérification qu'au cours de l'enquête, pour s'en rendre compte.

Il ne croit pas non plus que M. Latour, parlant du document contesté qu'il venait de faire, aurait dit à l'intimée: "Vous n'en parlerez qu'après mes funérailles". Ce langage, dit-il, dans la bouche d'un homme qui croyait ne jamais s'être mieux porté, est invraisemblable.

Il ne croit pas la conversation qui aurait été tenue en présence des deux témoins lors de la confection du testament; je veux dire qu'il ne croit pas qu'une telle conversation ait eu lieu.

Il souligne l'affirmation du témoin Payant qu'avant de faire sa croix, Latour aurait lu le document, alors qu'il est établi que Latour ne savait ni lire ni écrire, et que par ailleurs l'intimée n'aurait pas suggéré à Latour de signer son nom sur un document de cette importance, quand elle savait qu'il était en état de le faire.

Le savant juge a reçu de la preuve l'impression que, depuis assez longtemps, l'intimée convoitait les biens de Latour, en tout ou en partie.

Elle avait même, après la mort de madame Latour au printemps de 1937, suggéré à Latour qu'elle pourrait épouser son ami Lachance, et elle lui avait proposé alors d'aller vivre, elle et son mari, avec Latour, ce que ce dernier aurait refusé.

Il constate encore un autre incident pour lequel il trouve qu'il n'y a pas eu d'explication satisfaisante. Au moment de la mort de M. Latour, une somme de $195.00 était cachée dans la chambre du défunt, à un endroit connu seulement de Colette Gélineau et de l'intimée. Immédiatement après la mort de M. Latour, l'intimée dit à l'appelante:

> Faites-vous donc remettre par la servante les $195.00 qui étaient déposées dans l'armoire de la chambre de M. Latour.

Sur cette demande, Colette Gélineau se rendit à l'endroit précité pour constater, à sa grande surprise, la disparition de la somme en question.

Il souligne aussi la disparition, de la chambre du défunt, du livret de banque qui constatait le dépôt que l'intimée prétend lui avoir été légué.

Enfin, il trouve bien étranges les propos tenus par l'intimée après la mort de M. Latour et avant ses funérailles, au sujet des troubles qu'elle pourrait faire à la succession, si elle avait des témoins.

Et puis, après avoir fait mention des contradictions importantes entre le témoignage de l'intimée et celui des témoins au testament sur ce qui s'est passé et dit lors de la confection du document, et que pour un homme qui ne savait pas lire, il est assez extraordinaire que Latour ait pu trouver, sans être aidé, l'endroit précis dans le corps même du testament, et non pas au bas du document comme il est d'habitude, pour y faire sa croix ou sa marque, en définitive, le savant juge de première instance arrive à la conclusion suivante:

> Le tribunal, après avoir vu, interrogé et entendu les témoins, avoir pesé et considéré toutes les circonstances de cette affaire, ne peut pas ajouter foi aux affirmations de la défenderesse et de ses deux témoins, le poids de ces circonstances et des présomptions qui en résultent écrase et détruit ces dites affirmations.

C'est dans ces conditions que le savant juge a maintenu l'action des appelants, qu'il a déclaré le prétendu testament du 12 octobre 1937, faux, frauduleux et illégal, qu'il l'a annullé tant comme donation que comme testament suivant la forme dérivée de la loi d'Angleterre, et qu'il a également déclarée nulle sa vérification, avec dépens contre l'intimée.

Sur un autre point, le savant juge a été d'avis qu'il n'y avait aucune disposition testamentaire dans le document en question, et que, même s'il émanait de feu Charles Latour, il constitue uniquement une donation de biens présents et que, dès lors, il contenait une illégalité fatale, à savoir qu'il n'avait pas été reçu par un notaire et qu'il ne portait pas minutes. (Article 776 C.C.)

L'appel de ce jugement à la Cour du Banc du Roi a été maintenu. Cette Cour a été d'avis que le document constituait un testament et que la preuve n'était pas suffisante

1945

LATOUR v. GRENIER

Rinfret C.J.

pour "prendre la responsabilité de déclarer par le jugement" que ces trois personnes (c'est-à-dire l'intimée et les deux témoins au testament) ont commis les actes criminels qu'on leur reproche. Cette Cour a émis l'opinion que les appelants n'avaient pas fait une preuve suffisante pour lui permettre d'annuller la vérification du testament faite par la Cour Supérieure, et elle a en conséquence débouté les appelants de leur action avec dépens.

En vertu de l'article 857 du code civil, le testament fait suivant la forme dérivée de la loi d'Angleterre est présenté pour vérification au tribunal ayant juridiction supérieure de première instance, dans le district où le défunt avait son domicile. Le tribunal, le juge ou le protonotaire reçoit les déclarations par écrit et sous serment de témoins compétents à rendre témoignage, lesquelles demeurent annexées à l'original du testament, ainsi que le jugement. Il peut ensuite être délivré aux intéressés des copies certifiées du testament, de la preuve et du jugement, lesquelles sont authentiques et font donner effet au testament, "jusqu'à ce qu'il soit infirmé sur contestation."

Et, d'après l'article 858 C.C.,

il n'est pas nécessaire que l'héritier du défunt soit appelé à la vérification ainsi faite d'un testament, à moins qu'il n'en soit ainsi ordonné dans des cas particuliers. L'autorité qui procède à cette vérification prend connaissance de tout ce qui concerne le testament. La vérification ainsi faite d'un testament n'en empêche pas la contestation par ceux qui y ont intérêt.

Dans la cause de *Dugas* v. *Amiot* (1) il a été jugé par cette Cour que le jugement ordonnant la vérification d'un testament olographe (qui est la même que celle qui est requise pour un testament fait suivant la forme dérivée de la loi d'Angleterre) ne constitue pas chose jugée. Le principal objet de la vérification est de conférer de la publicité à ce genre de testament, et son effet pratique est de permettre aux parties intéressées d'en obtenir des copies certifiées qui sont authentiques. Par suite de la vérification, le testament obtient son effet "jusqu'à ce qu'il soit infirmé sur contestation". (Article 857 C.C.) Et sur une action en contestation d'un testament qui a été vérifié, le fardeau de la preuve continue d'imposer au bénéficiaire l'obligation d'établir l'authenticité de l'écriture ou de la signature du testateur. La vérification n'a pas pour effet

(1) [1929] S.C.R. 600.

de transférer ce fardeau sur les épaules de celui qui répudie le testament. Ce n'est pas à lui qu'il incombe de prouver que l'écriture ou la signature ont été falsifiées. Dans cette cause-là, le codicille, qui avait été vérifié, était contesté par les intéressés qui niaient qu'il fut écrit et signé par la testatrice. La Cour Supérieure avait rejeté cette contestation, mais la Cour du Banc du Roi l'avait accueillie, quoique seulement à une majorité de 3 juges contre 2. Notre jugement se rapporta d'abord aux décisions du Conseil Privé re *Migneault* vs. *Malo* (1), et de la Cour Suprême du Canada re *Wynne* v. *Wynne* (2), à l'effet que l'article 858 du Code Civil conserve son effet même à l'égard de celui qui s'était opposé à la vérification. Ainsi que le fait remarquer Mignault dans son "Droit Civil Canadien", (volume 4, p. 314):—

> L'on peut dire que la juridiction en matière de vérification est plutôt gracieuse ou non contentieuse que judiciaire.

Il y a une très grande différence entre le "probate" de la loi anglaise et la vérification suivant le système de la province de Québec.

En soi, disions-nous re *Dugas* v. *Amiot* (3)

> d'après le texte du code, le testament vérifié ne change pas de caractère. La vérification n'en fait pas un acte authentique; les copies seules le sont. * * * l'effet du testament vérifié subsiste "jusqu'à ce qu'il soit infirmé". Mais en dehors de la publicité, qui est évidente, et du pouvoir d'en donner des copies qui y est exprimé, le code n'indique aucun effet qui résulterait de la vérification. * * *
>
> Il semblerait extraordinaire que la vérification, à laquelle il n'est pas nécessaire d'appeler les intéressés, pût modifier la position et les droits de ces derniers. Avant la vérification, celui qui voudrait opposer un testament olographe aux héritiers du défunt aurait le fardeau de la preuve. Par le seul fait d'une vérification à laquelle l'héritier n'aurait pris aucune part, qui aurait même pu avoir lieu hors de sa connaissance, c'est sur lui maintenant que ce fardeau reposerait, et il serait ainsi privé de ses avantages antérieurs. De prime abord, cela paraît injuste. On incline à croire que le sens des articles 857 et 858 du code civil est plutôt à l'effet que, advenant la contestation, les parties seront placées dans la même position que s'il n'y avait pas eu de vérification. Il y a déjà en ce sens, dans la jurisprudence de la province de Québec, l'opinion clairement exprimée par Sir Melbourne Tait, dans *St. George Society* v. *Nichols* (4).

Nous ne discuterons pas l'arrêt re *Doucet* v. *Macnider* (5) où d'ailleurs il s'agit d'incapacité mentale, comme expri-

(1) [1872] L.R. 4 P.C. 123.
(2) [1921] 62 Can. S.C.R. 74
(3) [1929] S.C.R. 600, at 611.
(4) [1894] Q.R. 5 S.C. 273, at 291.
(5) [1905] Q.R. 14 K.B. 232.

1945

LATOUR v. GRENIER

Rinfret C.J.

mant une opinion différente. Mais au rapport des Commissaires (5ième rapport, page 518), ils parlent de cette section comme traitant

> de la vérification préliminaire qui se fait devant le juge d'un testament qui ne s'est pas fait dans la forme authentique.

Ils ajoutent:

> qu'il y a intérêt à ce que sa validité subisse tout de suite une première épreuve.

Sans doute, il ne faut pas faire d'analogie avec le système français qui est différent, mais la formule de la doctrine française est commode pour exprimer notre pensée:

> En principe, en ce qui regarde la force probante, le testament, même après sa vérification, n'est toujours qu'un acte sous seing privé.

(2 Baudry-Lacantinerie, 3ième éd., des Donations, vol. II, no. 1981 et suiv.; 13 Laurent, no. 239 et suiv.; 10 Aubry et Rau, 5ième éd., parag. 669; Demolombe, no. 143 et suiv.)

Dans la cause de *Dugas* v. *Amiot* (1), la vérification du prétendu testament avait été obtenue au moyen d'un affidavit qui fut plus tard reconnu faux, et il suivait que, pour ce seul motif, cette vérification devait être mise de côté. Puis, la vérification étant écartée, il était sûr qu'à l'égard du codicille les parties se trouvaient au même état qu'elles étaient auparavant.

Mais tout ce que nous avons dit dans cette cause, au sujet de l'effet de la vérification du testament, est basé sur des principes généraux qui s'appliquent dans la cause actuelle.

Au contraire, l'arrêt de cette Cour re *Billette* v. *Vallée* (2) ne saurait nous aider à la solution du présent litige. Dans cette espèce, la conclusion de la Cour fut simplement que le demandeur n'avait pas fait une preuve suffisante pour permettre de changer l'état de choses qu'il avait laissé subsister pendant 24 ans. Le testament en question avait été vérifié en 1903; le légataire universel, en vertu de ce testament, était en possession depuis lors, et l'action en annulation ne fut signifiée que le 21 septembre 1927. Toutes ces circonstances n'étaient certes pas favorables au succès du demandeur. C'était évidemment un cas exceptionnel et essentiellement un arrêt d'espèce.

(1) [1929] S.C.R. 600.

(2) [1931] S.C.R. 314.

En envisageant le présent litige, l'on ne saurait oublier que l'intimée n'a aucun lien de parenté ou d'alliance avec le testateur, et que, sans le supposé testament, elle n'aurait jamais pu prétendre à la moindre part de la succession du *de cujus*. Il est bien naturel que, dans ces circonstances, il incombe à l'intimée de prouver que le document qu'elle invoque était bien le testament de feu Charles Latour, vu qu'il aurait pour effet de frustrer les deux seuls enfants de ce dernier, qui sont ses seuls héritiers légaux.

Le jugement de première instance est bien catégorique. Nous avons rapporté plus haut les paroles de l'honorable juge qui a vu, interrogé et entendu les témoins. Il déclare:

qu'il ne peut pas ajouter foi aux affirmations de la défendresse et de ses deux témoins.

Et il poursuit:

Le poids des circonstances, et des présomptions qui en résultent, écrase et détruit ces dites affirmations.

Le savant juge arrive à cette conclusion en se basant sur la crédibilité des témoins qui ont paru devant lui.

Dans ces conditions, la règle est qu'un tribunal d'appel ne devrait substituer ses impressions à l'égard des témoins à celles d'un juge de première instance qu'en exerçant la plus grande circonspection et pour des raisons bien précises et spéciales.

Ainsi que le dit Lord Wrenbury re *Wood* vs. *Haines* (1):

It must be an extraordinary case in which the Appellate Court can accept the responsibility of differing as to the credibility of witnesses from the trial judge who saw and watched them, whereas the Appellate Judge has had no such advantage.

Voir également ce que disait Lord Sankey (page 250) et Lord Wright, (pages 265 et 266) re *Powell* vs. *Streatham Manor Nursing Home* (2).

En tout respect, nous ne croyons pas qu'il existait ici des circonstances extraordinaires et spéciales pouvant justifier la Cour du Banc du Roi en Appel de mettre de côté la décision du savant juge de la Cour Supérieure, sur les faits et sur la preuve; et, suivant nous, cette décision n'aurait pas dû être infirmée.

(1) P.C. [1917] 38 O.L.R. 593. (2) [1935] A.C. 243.

1945

LATOUR v. GRENIER

Rinfret C.J.

Nous sommes d'avis que l'intimée n'a pas réussi à prouver que le document qu'elle invoque a réellement été signé de sa marque par M. Latour ou qu'il constitue le testament de ce dernier. Il n'est pas nécessaire, pour maintenir l'action des appelants, d'en dire davantage.

L'appel doit être maintenu et le jugement de la Cour Supérieure doit être rétabli avec dépens dans toutes les cours.

Appeal allowed with costs.

Solicitor for the appellants: *Jacques Cartier*

Solicitors for the respondent: *Stanislas Poulin* and *Maurice Demers*

1945

*Oct. 29
*Oct. 30

STERLING WOOLLENS & SILKS CO. LTD. (DEFENDANT) ..... } APPELLANT;

AND

DAME SARA LASHINSKY ET VIR (PLAINTIFF) ..... } RESPONDENT.

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

Husband and wife—Incorporated company formed exclusively of both—Hypothec given by wife as security for company's debts—Validity—Husband's shares fully paid up—Allegation of fraud by the wife—Immaterial whether husband has more or less shares than the wife—Article 1301 C.C.

Where husband and wife are shareholders in an incorporated company, in this instance formed exclusively of both of them, the wife cannot guarantee the debts of the company, even if her husband's shares were fully paid up, because by so doing she obliges herself for her husband in contravention of article 1301 C.C. Such obligation is an absolute nullity, or, in the words of the article, "is void and of no effect."

Allegation of fraud on the part of the wife has no bearing in such a case. Article 1301 C.C. is for the purpose of protecting the wife, has always been regarded as a matter of public order and must receive its application under all circumstances.

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

In the present case, the deed of hypothec subscribed to by the wife was given not for her own benefit but for the security of the company's debts. It is immaterial whether the husband held more or less shares than the wife; it is sufficient that he held a substantial interest in the company.

Trust & Loan Company of Canada ([1904] A.C. 94) and *La Banque Canadienne Nationale* v. *Audet* ([1931] S.C.R. 293) foll.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Louis Cousineau J. and maintaining the respondent's action.

The Superior Court dismissed an action taken by the respondent to declare null and void an hypothec for $7,500 given by her to the appellant company as security for the payment of merchandise to be shipped by the latter to an incorporated company formed exclusively of the wife and the husband, on the ground that the bond given by the wife was contrary to the provisions of article 1301 C.C.

The appellate court reversed that judgment; and the Supreme Court of Canada after hearing counsel for the appellant, dismissed the appeal, without calling on counsel for the respondent.

M. M. Sperber K.C. for the appellant.

M. Gameroff K.C. and *S. Fenster* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is another case under article 1301 of the Civil Code. This Court has already rendered many decisions on the interpretation of that article; but the ruling case remains that of *The Trust and Loan Co. of Canada* v. *Gauthier* (1). The several judgments rendered in the courts of Canada since then were nothing else than the application of the *Trust & Loan* judgment (1) to the particular facts in each instance.

In *The Trust and Loan* case (1), Lord Lindley, delivering the judgment of their Lordships, said, among other things, (p. 100):—

> Except in dealing with their common property, she (the wife) is not to bind herself with him, (the husband), i.e., she is not to join him in any obligation which affects him.

(1) [1904] A.C. 94.

1945

STERLING WOOLLENS & SILKS CO. LTD. v. LASHINSKY

Rinfret C.J.

And further on he says:—

> What then is meant by "for him"? Does it mean jointly with him, or as his surety and nothing more? or does it mean for him generally, i.e. in any way for his benefit.

And at p. 101 his Lordship gives the answer:—

> Their Lordships gather from the decisions referred to in the argument and in the published commentaries (6 Mignault 189, 191) on the Civil Code that the words "for her husband" are now judicially held to mean generally in any way for his purposes as distinguished from those of his wife; and that ignorance on the part of her obligee (créancier) cannot avail him if it is proved that she in fact bound herself for her husband. These conclusions are in their Lordship's opinion sound and in accordance with the language of art. 1301 and with its evident object.

We do not want to associate ourselves with many of the pronouncements in the formal judgment *a quo*. As matter of fact, the Court of King's Bench (Appeal Side) divided three judges to two in this matter, and what was handed down as the judgment of the majority is really made up in the main of the reasons of one of the judges who formed the majority. It does not express the views of the two other judges and in some "considérants" even it expresses the contrary of what those two judges said.

We agree with St. Germain and Barclay JJ. that the case of *La Banque Canadienne Nationale* v. *Audet* (1) is in point to the effect that where husband and wife are both shareholders in a company, the wife cannot guarantee the debts of that company, even if her husband's shares were fully paid up, because by so doing she obliges herself for her husband.

This is applying strictly the pronouncement of Lord Lindley on behalf of the Judicial Committee in the *Trust and Loan* case (2) that article 1301 of the Civil Code is now judicially held to mean that the wife cannot bind herself "for her husband" and that those words "are now judicially held to mean generally in any way for his purposes * * *".

This language renders it necessary to distinguish between obligations of a wife for her husband and obligations contracted for her. The object of the article is evidently to protect her against her husband and against herself. (Lord Lindley, at p. 100) (2).

(1) [1931] S.C.R. 293. (2) [1904] A.C. 94.

In these circumstances the question of fraud does not enter into the discussion. The article is for the purpose of protecting the wife. It has always been regarded as a matter of public order and it must receive its application under all circumstances. The obligation which the wife contracts in contravention of article 1301 C.C. is an absolute nullity. In the wording of the article it "is void and of no effect".

Since the judgment of the Privy Council in *The Trust and Loan* case (1), an amendment has been introduced by the Legislature adding to the article the words "saving the rights of creditors who contract in good faith".

In *La Banque Canadienne Nationale* v. *Audet* (2), this Court expressed its views upon the effect of that amendment. Applying what was said in that case on that point we must say that, in the premises, the amendment cannot help the appellant. The bond subscribed to by the wife was given not for her own benefit but for the security of the company's debts. That company was formed exclusively of the wife and the husband. The only other shareholder held one share merely for the purpose of qualifying a third person according to the requirements of the Quebec *Company Law*. It is immaterial whether the husband held more shares than the wife, as in the *Audet* case (2), or whether he held a lesser number of shares than she did. It is sufficient that he held a substantial interest in the company. The wife, guaranteeing the company under such circumstances, clearly came within the wording of the article as interpreted by this Court in *La Banque Canadienne Nationale* v. *Audet* (2) and by the Judicial Committee in *The Trust and Loan Co.* v. *Gauthier* (1).

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Sperber, Godine & Cross.*

Solicitors for the respondents: *Gameroff & Fenster.*

(1) [1904] A.C. 94.

(2) [1931] S.C.R. 293, at 311, 312, 313.

1945
*Oct. 4, 5

MISSION SAWMILLS LIMITED (DEFENDANT) ..... } APPELLANT;

AND

GILL BROTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Finding of, on the evidence—Contract to sell all fuel wood produced at mill—No stipulation in contract as to its duration—Lack of reasonable notice of termination—Contract wrongfully determined—Damages.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1) dismissing (Sidney Smith J. A. dissenting) the defendant's appeal from the judgment of Bird J. (2) who held that there was a binding agreement entered into between the defendant and the plaintiffs whereby the defendant would sell to the plaintiffs all fuel wood produced at the defendant's mill at certain prices and the plaintiffs would buy at such prices and take delivery at said mill and keep clear the wood bunker at said mill; that the agreement was subsisting when it was terminated by a notice given by the defendant; that the agreement was for an undetermined time; that it was subject to termination by either party, only upon reasonable notice; that the notice given by the defendant was not reasonable; and therefore the agreement was wrongfully determined by the defendant, and the plaintiffs were entitled to damages. (Whether the agreement was a terminable agreement would seem to have been doubted by Robertson J.A., one of the majority in the Court of Appeal; but he found it unnecessary to express any opinion upon that question).

Alfred Bull K.C., for the appellant.

C. K. Guild K.C. for the respondents.

On conclusion of the argument of counsel for the appellant, the Court adjourned to the following day, and, on the opening of Court on said following day, the Court,

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

(1) [1945] 2 W.W.R. 337; [1945] 3 D.L.R. 506.
(2) [1944] 3 W.W.R. 310.

without calling on counsel for the respondents, dismissed the appeal with costs; Kerwin J. reading orally for the Court the following reasons:

KERWIN, J.—It will be unnecessary to call upon you Mr. Guild. Mr. Bull has said all that was possible in support of the appellant's contention that there was no contract but, having had an opportunity of considering the evidence, we are all of the opinion that the trial judge and the Court of Appeal came to the right conclusion that there was a valid contract between the parties, entered into in April, 1942. It contained no stipulation as to its duration but the trial judge found, and the Court of Appeal agreed with him, that it was subject to termination upon reasonable notice, that the six days' notice given by the appellant on June 24th, 1943, was unreasonable, that the contract was wrongfully determined on June 30th, 1943, and that six months' notice would have been reasonable. It was therefore referred to the District Registrar at Vancouver to inquire and certify what damages the respondents have sustained during the period from June 30th, 1943, to December 24th, 1943, by reason of the wrongful termination of the contract of April, 1942.

We are unable to agree with Mr. Bull's alternative contention that if the Court agreed with the courts below that such a contract had been made it could be terminated at any time. Speaking generally, a contract indefinite in time is *prima facie* perpetual. The respondents do not quarrel with the finding that the contract in question was determinable upon six months' notice and no other period has been suggested. In order to avoid any question, we think it proper to state that the damages to which the respondents are entitled must be fixed on the basis of the alterations in the original contract, assented to by the respondents and referred to in the reasons for judgments of the trial judge and the Court of Appeal.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. Carmichael.*

Solicitors for the respondents: *Hamilton Read & Paterson.*

1945
*Oct. 30
*Nov. 9

L'ASSOCIATION INTERNATIONALE DES DEBARDEURS, LOCAL 375 (DEFENDANT) ..... APPELLANT;

AND

JOSEPH DUSSAULT AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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

Appeal—Jurisdiction—Petition for leave to appeal—Labour Unions—Alleged illegal expulsion of members—By-law prohibiting members from belonging to a "rival" association—Definition of "rivalry" not given—Uncertainty as to its meaning—Whether by-law passed in conformity with provincial statute—Whether resolution expelling member within the powers of the association under the by-law—Question of general importance for all labour unions in the province—Future rights—Jurisdiction of provincial appellate courts to grant leave to appeal to this Court—Supreme Court Act, section 41 Professional Syndicates Act, R.S.Q., 1925, c. 255, s. 2.

The respondents are longshoremen and were officers of the appellant association. An action for damages for loss of salary was brought by them against the association on the ground that they have been illegally expelled from it. A by-law of the association prohibited its members from belonging to a "rival" association, and it was claimed that the respondents violated the by-law. The Superior Court dismissed the action; but the appellate court reversed that judgment. The appellant moved for secial leave to appeal to this Court.

Held that special leave to appeal should be granted.

The interpretation given to the word "rivalry" by the members of the appellant association differs from the one given by the members of an association preceding it; and that word is also differently construed by the two courts below. There is therefore a primordial interest that the definition of what constitutes "rivalry" should be definitively established by this Court. The question whether the respondents are members of a "rival" association is obviously a question of fact; but the question as to what constitutes a "rival" organization, in the absence of any definition, is an important question of law.

Questions are also raised whether the statutes and the by-laws of the appellant association are binding in law, on the grounds the formalities essential to put them in force would not have been fulfilled and, also, that these statutes and by-laws would not have been deposited with the Provincial Secretary in pursuance of section 2 of chapter 255, R.S.Q., 1928. Another ground of appeal is whether the resolution expelling the respondents is within the powers of the association under the by-law.

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

The present litigation, besides concerning the great number of members of the two labour associations in this case, is of much interest to all other unions which have been incorporated under the same statutory law; and the decision in this case may affect, in a general way for the whole province of Quebec, the *status* of all labour unions and similar organizations.

The rights in future of the parties in this case are also affected by the judgment from which leave to appeal to this Court is sought by the appellant.

As already decided by this Court, the jurisdiction of the "highest court of final resort" in a province to grant special leave to appeal to this Court, under section 41 of the *Supreme Court Act*, is untrammelled, unlimited and free from any restrictions. The proviso in that section, with its sub-classes (*a*) to (*f*) has no bearing as to the jurisdiction of the provincial courts and applies exclusively to the jurisdiction of the Supreme Court of Canada. *Canadian National Railway Company* v. *Croteau & Cliche* ([1925] S.C.R. 384); *Hand* v. *Hampstead Land and Construction Company* ([1928] S.C.R. 428); *Forcier* v. *Coderre* ([1936] S.C.R. 550); *Fortier* v. *Longchamp* ([1941] S.C.R. 193) and *Campbell Auto Finance Co. Ltd.* v. *Bonin* ([1945] S.C.R. 175).

MOTION for leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Philémon Cousineau J. and maintaining the respondents' action.

Charlemagne Rodier K.C. for the motion.

U. Boisvert contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—Les intimés sont des débardeurs résidant à Montréal et ils étaient membres de l'Association appelante.

Le 17 mars 1939, ils furent expulsés de l'Association pour la raison qu'ils faisaient partie d'une autre association rivale de débardeurs dans le port de Montréal, connue sous le nom de "L'Union Nationale Indépendante de l'Ile de Montréal Incorporée".

Ils poursuivirent alors l'Association appelante en recouvrement des dommages pour perte de salaire durant la saison de navigation de 1939.

(1) Q.R. [1945] K.B. 353.

1945

L'ASSOCIATION INTERNATIONALE DES DÉBARDEURS, LOCAL 375 v. DUSSAULT

Rinfret C.J.

La Cour Supérieure les débouta des fins de leur action; mais, sur appel à la Cour du Banc du Roi, (1) ils réussirent à faire infirmer ce jugement et à obtenir le maintien de leur réclamation en dommages.

L'Association appelante demanda alors à la Cour du Banc du Roi la permission d'en appeler à la Cour Suprême du Canada. Cette demande lui fut refusée, et elle fait maintenant une requête au même effet devant cette Cour.

Cette requête expose que les jugements et les opinions, exprimés respectivement par la Cour Supérieure et par la Cour du Banc du Roi, diffèrent à tel point que les questions en litige ne se trouvent pas définitivement réglées; que les droits futurs des parties sont en jeu; que les demandeurs eux-mêmes, dans leur déclaration, réservent leur recours pour perte de salaire à l'avenir; que l'Association appelante est exposée à des sommations et à des procès de la part des intimés dans le but d'être réintégrés dans l'Association; et que les questions soulevées dans ce litige sont d'un intérêt général et d'une importance telle qu'elles affectent même l'ordre public.

Si l'on réfère au jugement de la Cour Supérieure, l'on constate qu'il décide que les deux associations dont il s'agit "étaient des Associations rivales de débardeurs dans le port de Montréal". D'autre part, la majorité de la Cour du Banc du Roi a été d'avis contraire, sauf la dissidence de l'honorable juge en chef de la province de Québec. Or, comme le fait remarquer M. le juge Bissonnette, "les règlements de l'Association ne définissent pas ce qu'il faut entendre par "rivalité"." Je vois par les notes des juges que les Associations comprennent des milliers de membres, et il y a donc un intérêt primordial à ce que la définition de ce qui constitue "rivalité" soit définitivement établie par la plus haute cour de justice.

Je vois même que l'interprétation donnée par les membres de la nouvelle Association comporte un tout autre sens que la signification attribuée au mot "rivalité" par les membres de la première Association.

Il se soulève en plus la question de savoir si les statuts et règlements que l'Association entend appliquer aux intimés ont force de loi, vu que les formalités essentielles pour

(1) Q.R. [1945] K.B. 353.

les mettre en vigueur n'auraient pas été remplies; et, en outre, que ces statuts et règlements n'auraient pas été déposés chez le Secrétaire de la province, en obéissance à l'article 2 du chapitre 255 des Statuts Refondus de 1925.

L'un des juges de la Cour du Banc du Roi émet également la prétention que la résolution des intimés va au-delà des pouvoirs conférés par le règlement à l'Association appelante.

De toute façon, le résultat du litige dépend de l'interprétation que l'on donne au mot "rivalité" et au règlement dans lequel ce mot est employé.

Il est donc juste de présumer que ce litige intéresse à la fois le nombre considérable de débardeurs qui font partie des deux Unions, mais également, d'une façon générale dans toute la province de Québec, les différentes Unions qui ont été constituées en vertu du même régime légal. Cela me paraît suffisant pour que permission d'appeler à cette Cour soit accordée à l'Association appelante.

En autant que nous pouvons nous en rendre compte par les pièces qui ont été soumises à cette Cour lors de l'argumentation de la requête pour permission d'appeler, cette cause affecte généralement le *status* "des unions ouvrières" dans la province de Québec.

La question de savoir si les intimés appartiennent à une association rivale est sans doute une question de fait, mais celle de savoir ce qui constitue une association rivale, en l'absence de la définition à laquelle nous avons référé, constitue une question de droit importante, (*Quinn* vs. *Guernsey* (1)).

L'exposé que nous avons fait jusqu'ici démontre, à notre avis, que les droits futurs des parties sont affectés par les jugements qui ont été rendus, et le seront par celui que devra rendre cette Cour sur l'appel qu'on lui demande la permission d'inscrire.

A proprement parler, la Cour du Banc du Roi, en disposant de la requête pour permission d'appeler qui lui a été soumise, ne s'est pas prononcée sur l'existence des droits futurs, en donnant pour prétexte que

la jurisprudence de la Cour est à l'effet, vu le sous-paragraphe "c" de l'article 41 de la Loi de la Cour Suprême, 1927, S.R.C. c. 35, de laisser à

(1) [1927] S.C.R. 134 and 512.

1945

L'ASSOCIATION INTERNATIONALE DES DÉBARDEURS, LOCAL 375 v. DUSSAULT

Rinfret C.J.

cette plus haute Cour de décider elle-même de l'opportunité, quant à ce motif de *droits futurs*, d'un appel à sa juridiction et d'autoriser cet appel si elle le croit à propos.

Comme nous l'avons déjà fait remarquer à maintes reprises, en vertu de l'article 41, la juridiction d'une cour d'appel dans une province pour permettre l'appel à la Cour Suprême du Canada, est illimitée et n'est restreinte par absolument aucune condition, sauf celles de l'article 36 et pourvu qu'il s'agisse d'un "jugement final".

Sans doute, ainsi que nous l'avons dit dans *Forcier* v. *Coderre*, (1),

il s'agit d'une permission spéciale d'appeler et il incombe donc à celui qui veut l'obtenir de démontrer qu'il existe pour cela des raisons spéciales.

Mais, si le fait que la validité d'une loi ou d'une ordonnance d'un corps législatif, les droits, revenus ou toute somme d'argent payables à Sa Majesté, les rentes annuelles ou autres matières affectant les droits futurs des parties, un titre ou un intérêt dans des propriétés immobilières ou la validité d'un brevet peuvent être considérés comme étant inclus parmi les raisons spéciales qui peuvent donner lieu à une permission d'appeler à la Cour Suprême du Canada, cette énumération a, b, c, d, et f dans l'article 41 de la *Loi de la Cour Suprême* ne concerne pas autrement les cours d'appel des provinces. Cette énumération n'a pour but que d'exposer les cas où la Cour Suprême du Canada a juridiction pour permettre l'appel, lorsque les cours d'appel des provinces l'ont refusé. En dehors des cas ainsi énumérés, la Cour Suprême du Canada n'a pas juridiction pour permettre un appel, et même si elle était d'avis qu'il s'agit d'une cause où l'intérêt en jeu est d'une importance suffisante pour le justifier, elle n'a pas le pouvoir de l'accorder. Nous en avons eu un exemple tout récent dans la cause de *Campbell Auto Finance Company Ltd.* vs. *Bonin* (2) où, quoique nous étions d'avis que permission d'appeler eut dû être accordée, nous avons été forcés de la refuser parce que la cause ne tombait pas dans l'un des cas énumérés à l'article 41, et il s'ensuivait que nous n'avions pas juridiction pour permettre l'appel.

Il en est autrement, nous le répétons, pour les cours d'appel provinciales dont les pouvoirs sont "untramelled,

(1) [1936] S.C.R. 550. (2) [1945] S.C.R. 175.

unlimited and free from any restriction" (Voir *Canadian National Railway Co.* vs. *Croteau,* (1); *Fortier* vs. *Longchamp,* (2) and *Hand* vs. *Hampstead Land & Construction Co.* (3).)

The provision in that section (41) with its sub-clauses "a" to "f" has no bearing as to the jurisdiction of the Provincial Courts and applies exclusively to the jurisdiction of the Supreme Court of Canada. (*Campbell* v. *Bonin* (4)).

Il est indiscutable que la cour d'appel des provinces a le pouvoir de permettre un appel à la Cour Suprême du Canada, absolument dans n'importe quelle cause si l'intérêt en jeu paraît justifier cet appel, toujours sous les restrictions des articles 2 (b) et 36 de la *Loi de la Cour Suprême.*

Dans le cas actuel, nous croyons que les droits futurs des parties sont affectés par le jugement dont on demande la permission d'appeler. (*Christie* vs. *The York Corporation* (5); *Fortier* vs. *Longchamp* (6).)

Nous sommes donc d'avis que la requête de l'appelante doit être accordée, frais à suivre; et que l'appelante doit avoir permission d'appeler à cette Cour à toutes fins que de droit.

Motion granted.

(1) [1925] S.C.R. 384.
(2) [1941] S.C.R. 193.
(3) [1928] S.C.R. 428.
(4) [1945] S.C.R. 175.
(5) [1939] S.C.R. 50.
(6) [1941] S.C.R. 193, at 199.

INDEX

ACTION IN WARRANTY
See ASSESSMENT AND TAXATION 3.

ADMIRALTY
See SHIPPING.

APPEAL—*Criminal law—Accused, respondent, prosecuted for alleged infractions of Order in Council dealing with maximum or ceiling prices—Accused convicted after speedy trial under Part XV of the Criminal Code—Order in Council by federal authorities creating leave to appeal to Supreme Court of Canada in cases of offences against wartime regulations—Regulations made by the Order in Council—Extent of such right of appeal—Interpretation of the conditions imposed by the Order in Council—Right of appeal to Supreme Court of Canada still subject to sections 1023 and 1025 of the Criminal Code.* —Under the provisions of the Criminal Code, there existed no right of appeal to provincial courts of appeal or to the Supreme Court of Canada from judgments rendered on summary conviction under Part XV of the Code. But right of appeal to these courts was allowed, on certain conditions, by a federal order in council, coming into force on the 7th of June, 1943, from such judgments when rendered on convictions for offences against wartime regulations. Certain regulations were made and established by the order in council, amongst which those material to this appeal read as follows: an appeal shall lie to a provincial court of appeal, by leave of such court, on any ground which involves a question of law or of mixed law and fact; a further appeal from the judgment of the court of appeal shall lie to the Supreme Court of Canada by leave of such Court; and it was also regulated that "sections 1023 to 1025 inclusive of the Criminal Code shall, insofar as the same are not inconsistent with this regulation, apply to any appeal to the Supreme Court of Canada***". *Held:* That the effect of the regulations made by the order in council was not to give a right of appeal to the Supreme Court of Canada from any and all judgments or decisions of a provincial court of appeal, with the sole proviso that leave of the Supreme Court of Canada be given by that Court; but *Held:* That the result and effect of the regulations were that an appeal only lies to the Supreme Court of Canada, by leave of that Court "on any questions of law on which there has been a dissent in the court of appeal" (s. 1023 Cr. C.) or "if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case" (s. 1025 Cr. C.). The provisions contained in these two sections are not in any way inconsistent

APPEAL—*Continued*
with the regulations and must be taken into account in any appeal to this Court under the regulations made by the order in council. Therefore, applying to the appellant's application for leave to appeal to this Court the regulations so interpreted, the motion should be dismissed: there having been no dissent in the Court below, this Court has no jurisdiction to grant leave, as the applicant has not shown that the judgment to be appealed from, in respect to the main point involved in the appeal, conflicts with the judgment of any other court of appeal in a like case. OUVRARD v. QUEBEC PAPER BOX CO. LTD. **1**

2.——*Jurisdiction— Supreme Court Act (R.S.C. 1927, c. 35), s. 39—"Amount or value" of the "matter in controversy" in the appeal—Appeal from judgment restraining appellant from proceeding with tax sale.*— The City of Sydney appealed from the judgment of the Supreme Court of Nova Scotia *in banco* (18 M.P.R. 20) dismissing its appeal from the judgment of Graham J. *(ibid)* restraining it from proceeding with the advertised sale for arrears of taxes, or at any future time selling or attempting to sell for taxes, certain land which adjoined land of respondent, and declaring that the land in question was a public way and not assessable. A motion was made to quash the appeal to this Court for want of jurisdiction. The taxes to which the proceeds of the advertised sale could be applied did not exceed $1,500. The value of the land in question was assumed to be $7,200. *Held:* The appeal should be quashed for want of jurisdiction, as "the amount or value of the matter in controversy" in the appeal did not exceed $2,000, within s. 39 *(a)* of the *Supreme Court Act* (R.S.C. 1927, c. 35). The "matter in controversy" was the right of the City to collect $1,500 of taxes through the sale of property. As to "the amount or value", it is the interest of the appellant that must be considered *(Kinghorn* v. *Larue*, 22 S.C.R. 347, at 349); and this was clearly the taxes; and their amount was the measure of value which determined the jurisdiction *(Gendron* v. *McDougall*, Cassels' Digest, 2nd Ed., p. 429, cited). (Special leave to appellant to appeal to this Court was refused.)—CITY OF SYDNEY v. WRIGHT. **131**

3.——*Jurisdiction—Action against incorporated company before Superior Court—Exception to the form—Defendant alleging company an emanation of the Crown—Could only be sued by way of petition of right in the Exchequer Court of Canada—Exception to the form dismissed—Whether "final judg-*

APPEAL—*Continued*

ment"—Supreme Court Act, section 2 (b).—In an action brought by the respondents against the appellant, a company incorporated under the provisions of the Dominion *Companies Act*, the latter fyled an exception to the form, alleging that it was an emanation of the Crown and that it could only be sued by way of petition of right in the Exchequer Court of Canada. The judgment of the Superior Court, dismissing the exception to the form, was affirmed by a majority of the appellate court. The appellant company having appealed to this Court, the respondents moved to quash the appeal for want of jurisdiction. *Held:* That the judgment, from which the appellant desires to appeal, is not a "final judgment" within the meaning of section 2 *(b)* of the *Supreme Court Act* and that this Court is without jurisdiction to entertain the appeal. The action having been instituted in the province of Quebec, the judgment appealed from, as it has been already settled by several judgments both in that province and in this Court, is only provisional and does not determine, in whole or in part, any substantive right in controversy, as the decision is still open to revision by the final judgment on the merits. *Davis* v. *The Royal Trust Company* ([1932] S.C.R. 203) and *Willson* v. *The Shawinigan Carbide Company* (37 Can. S.C.R. 535) followed. The present case is not distinguishable from the above cases and several similar decisions, on the ground that all these cases were only between individuals, while here the Crown is alleged to be in reality the party affected by the judgment appealed from. Such a distinction cannot be made, at least in respect of the point raised by the respondents and which has to do with the finality of that judgment. *The Corporation of the City of Ottawa* v. *The Corporation of the town of Eastview et al.* ([1941] S.C.R. 448) and *Quebec Railway, Light & Power Co.* v. *Montcalm Land Co.* ([1927] S.C.R. 545) distinguished. WARTIME HOUSING LTD. v. MADDEN ET AL. **169**

4.——*Jurisdiction—Petition for leave to appeal—Seizure of automobile—Opposition by third party—Agreement between the latter and possessor of car—Whether a sale or a pledge to guarantee loan—Question of general importance—Proper construction of section 41 of the Supreme Court Act—"Rights in future" (subs. (c))—Must be rights of the parties in the appeal—Lack of jurisdiction if one of the parties is not before the Court—Provincial appellate courts—Their jurisdiction to grant leave to appeal to this Court, untrammelled, unlimited and free from any restriction—Proviso of section 41, with its sub-clauses (a) to (f) applicable only to this Court.*—The respondent seized, in execution of a judgment against one Rivard, an automobile found in his possession, and the appellant company demanded by means of opposition the nullity of the seizure, claiming to be the owner of the car. The appellant company alleged that, according to a certain contract with Rivard, it had bought the automobile; while the respondent contended that such contract did not constitute a sale, but simply a contract of pledge to guarantee the reimbursement of a loan. The Superior Court dismissed the appellant's opposition on the ground that the contract was simulated and was in reality an attempt to make the contract a pledge without the possession of the article pledged being in the hands of the appellant. The appellate court affirmed the judgment, holding that the appellant never intended to become the owner of the automobile, that in effect the agreement constituted a fraud against the law and that, consequently, the appellant acquired no rights in the automobile. The appellant company moved for leave to appeal to this Court, on the grounds that the judgment to be appealed from appears to be in conflict with some decisions of this Court and that the questions in issue involved matters of public interest and important points of law by which rights in future of the parties may be affected. *Held:* That this Court has no jurisdiction to grant leave to appeal. Sub-section *(c)* of s. 41 of the *Supreme Court Act*, which provides that "the matter in controversy on the appeal (must) involve * * * rights in future of the parties", is not applicable to this case. The future rights of Rivard and of the appellant company may be involved in the appeal, but Rivard has not been made a party to the proceedings before this Court. Under that subsection, it is the "rights in future of the parties" in the appeal which must be affected; and the only rights of the parties in this appeal are their rights, present and immediate, arising from the allegations of the opposition and its contestation. *Held*, also, that if this Court would have had jurisdiction or would have been in the place of the provincial appellate court, it would have decided without hesitation that this case was one of those where leave to appeal should have been granted, owing to the great importance of the questions therein raised, principally those concerning commercial matters. Kellock J. expressing no opinion. *Held* further, that the jurisdiction of the "highest court of final resort" in a province to grant special leave to appeal to this Court, under section 41 of the *Supreme Court Act*, is untrammelled, unlimited and free from any restriction. The proviso in that section, with its sub-clauses *(a)* to *(f)* has no bearing as to the jurisdiction of the provincial courts and applies exclusively to the jurisdiction of the Supreme Court of Canada. Kellock J. expressing no opinion. CAMPBELL AUTO FINANCE CO. v. BONIN. **175**

5.——*Leave to appeal granted by appellate court—Motion to quash maintained by this Court—Appeal "manifestly devoid of merit and substance"—No issue left to be decided between the parties—Court declining to hear*

APPEAL—*Continued*

appeal—Action by wheat producer against the Canadian Wheat Board for an accounting of operations of the Board—Orders in Council passed under War Measures Act, when matter before appellate court, removing substratum of plaintiff's claim.—The appellant, a producer of wheat in Manitoba, who had delivered and sold wheat to the Canadian Wheat Board, brought an action against the Board, on behalf of himself and other producers, before the Court of King's Bench, asking among other relief for an accounting of the operations of the Board during the crop years of 1938 to 1942 both inclusive. The Board, besides submitting a statement of defence on different points of law and facts, launched a motion for an order dismissing appellant's action on the ground that, the Board being a servant or agent of the Crown, the Court of King's Bench had no jurisdiction, and, in the alternative, that the action was frivolous and vexatious. The motion was dismissed and the appellant appealed to the Court of Appeal. While the matter was still before that court, an Order in Council was passed under the *War Measures Act*, reciting that there was no surplus in either of the first two years and providing for the distribution of the surplus in each of the other three years. The majority of the Court of Appeal, later, held that the Board was an agent of the Crown and that the appellant's action could not be brought in the provincial court. The appellant appealed to this Court upon special leave granted by the Court of Appeal. The respondent Board moved to quash the appeal on the grounds that the appellant's claim and appeal were without substance and merit and that the appeal was wholly academic and futile, because, among other reasons, by the terms of the *Canadian Wheat Board Act* and the Order in Council, the appellant had and has no right to sue. *Held* that the motion of the respondent Board should be allowed and the appeal dismissed. The Supreme Court of Canada will entertain favourably a motion to quash an appeal to this Court, if such appeal, though within the jurisdiction of the Court, is manifestly entirely devoid of merit and substance. *National Life Assurance Co. of Canada* v. *McCoubrey* ([1926] S.C.R. 277), and judgments therein referred to; *De Bortoli* v. *The King* ([1927] S.C.R. 454, at foot of 457 and at 458); *Bowman* v. *Panyard Machine & Mfg. Co.* ([1928] S.C.R. 63); *Cameron* v. *Excelsior Life Ins. Co.* ([1937] 3 D.L.R. 224); *Laing* v. *The Toronto General Trusts Corporation* ([1941] S.C.R. 32) and *Temple* v. *Bulmer* ([1943] S.C.R. 265). More particularly, the recent decision of this Court in *Coca-Cola Co. of Canada* v. *Mathews* ([1944] S.C.R. 385) is conclusive, where this Court held that it should decline to hear an appeal when there was no issue before it to be decided between the parties. In this case, the Order in Council has removed the sub-

APPEAL—*Continued*

stratum of the appellant's claim, even if the matter could be brought before the ordinary courts at all and should not have been initiated in the Exchequer Court of Canada. No opinion was expressed by this Court upon the judgment of the majority of the Court of Appeal. OATWAY v. THE CANADIAN WHEAT BOARD. **204**

6.——*Jurisdiction—Conservatory attachment not accompanied with a principal demand for pecuniary condemnation—Judgment, dismissing action, affirmed by appellate court—No amount or value in controversy in the appeal—Supreme Court Act, s. 39.*—The appellant's action was dismissed by the trial judge, on the ground *inter alia* that the conservatory attachment taken out by her was not accompanied with a principal demand for a pecuniary condemnation and that such a proceeding was a provisional remedy which cannot be taken out by itself without a claim, which is made the object of the principal demand. The judgment was affirmed by the appellate court and the plaintiff appealed to this Court. *Held* that this Court has no jurisdiction to hear the appeal.—The moveables, on which the conservatory attachment was intended to be executed, even if they were of a value exceeding $2,000, are not in controversy in this appeal. The only matter in controversy is whether the Courts below rightly decided that a conservatory attachment is only an accessory procedure, which cannot be taken out alone; and such right is not appreciable in money. *Gatineau Power Company* v. *Cross* ([1929] S.C.R. 35) foll..BALTHAZAR v. DROUIN. **517**

7.——*Jurisdiction—Judgment by appellate court quashing appeal—Pledge in money given in place of regular security—Not furnished in conformity with article 1215a C.C.P.—No amount or value in controversy—Supreme Court Act, section 39.*—Proceedings in appeal brought by the appellant were quashed by the appellate court on the ground that the security given by him was irregular and illegal, because he had furnished, in lieu of the regular security required by article 1214 C.C.P., a pledge consisting of a sum of money which was not in conformity with the provisions of article 1215a of that code. The appellant appealed to this Court. *Held* that there is no jurisdiction in this Court to entertain the appeal.—There is no amount or value in controversy in the appeal in accordance with the requirement of section 39 of the *Supreme Court Act*. FISET v. MORIN. **520**

8.——*Constitutional law—Criminal law—Habeas corpus—Conviction of applicant under Criminal Code—Application for habeas corpus granted by a judge of British Columbia—Appeal by Attorney General to Appeal Court—Jurisdiction to hear appeal—Appeal Court reversing judgment and ordering re-arrest—Provisions of section 6 of Appeal*

APPEAL—*Continued*

Court Act of B.C. granting right to appeal—Inoperative if applicant convicted for a criminal offence under Criminal Code—Exclusive jurisdiction of Federal Government to authorize such appeal—B.N.A. Act, sections 91 (27) and 92 (13).—The provisions of section 6 of the *Court of Appeal Act* of British Columbia (R.S.B.C. 1936, c. 57), granting a right to appeal to the Court of Appeal in a *habeas corpus* matter are inoperative, if the applicant for that writ is detained in custody by virtue of a conviction for a criminal offence under the Criminal Code.—The Chief Justice dissenting. The Dominion Parliament has exclusive jurisdiction to authorize such an appeal under section 91 (27) of the *British North America Act, 1867* ("Criminal law * * *, including the Procedure in Criminal Matters"); and a Provincial Legislature has no such power under section 92 (13) of that Act ("Property and Civil Rights in the Province").—The Chief Justice dissenting. *In re* STORGOFF. **526**

9.——*Petition for leave to appeal—Labour Unions—Alleged illegal expulsion of members—By-law prohibiting members from belonging to a "rival" association—Definition of "rivalry" not given—Uncertainty as to its meaning—Whether by-law passed in conformity with provincial statute—Whether resolution expelling member within the powers of the association under the by-law—Question of general importance for all labour unions in the province—Future rights—Jurisdiction of provincial appellate courts to grant leave to appeal to this Court—Supreme Court Act, section 41; Professional Syndicates Act, R.S.Q. 1925, c. 255, s. 2.*—The respondents are longshoremen and were officers of the apellant association. An action for damages for loss of salary was brought by them against the association on the ground that they have been illegally expelled from it. A by-law of the association prohibited its members from belonging to a "rival" association, and it was claimed that the respondents violated the by-law. The Superior Court dismissed the action; but the appellate court reversed that judgment. The appellant moved for special leave to appeal to this Court. *Held* that special leave to appeal should be granted. The interpretation given to the word "rivalry" by the members of the appellant association differs from the one given by the members of an association preceding it; and that word is also differently construed by the two courts below. There is therefore a primordial interest that the definition of what constitutes "rivalry" should be definitively established by this Court. The question whether the respondents are members of a "rival" association is obviously a question of fact; but the question as to what constitutes a "rival" organization, in the absence of any definition, is an important question of law. Questions are also raised whether the statutes and the by-laws of the appellant association are

APPEAL—*Continued*

binding in law, on the grounds the formalities essential to put them in force would not have been fulfilled and, also, that these statutes and by-laws would not have been deposited with the Provincial Secretary in pursuance of section 2 of chapter 255, R.S.Q. 1928. Another ground of appeal is whether the resolution expelling the respondents is within the powers of the association under the by-law. The present litigation, besides concerning the great number of members of the two labour associations in this case, is of much interest to all other unions which have been incorporated under the same statutory law; and the decision in this case may affect, in a general way for the whole province of Quebec, the *status* of all labour unions and similar organizations. The rights in future of the parties in this case are also affected by the judgment from which leave to appeal to this Court is sought by the appellant. As already decided by this Court, the jurisdiction of the "highest court of final resort" in a province to grant special leave to appeal to this Court, under section 41 of the *Supreme Court Act*, is untrammelled, unlimited and free from any restrictions. The proviso in that section, with its sub-classes *(a)* to *(f)* has no bearing as to the jurisdiction of the provincial courts and applies exclusively to the jurisdiction of the Supreme Court of Canada. *Canadian National Railway Company* v. *Croteau & Cliche* ([1925]) S.C.R 384); *Hand* v. *Hampstead Land and Construction Company* ([1928] S.C.R. 428); *Forcier* v. *Coderre* ([1936] S.C.R. 550); *Fortier* v. *Longchamp* ([1941] S.C.R. 193) and *Campbell Auto Finance Co. Ltd.* v. *Bonin* ([1945] S.C.R. 175). L'ASSOCIATION INTERNATIONALE DES DEBARDEURS, LOCAL 375 v. DUSSAULT ET AL. **768**

10.——*Matter allowed by trial judge in Admiralty case to be included in settling case on appeal, disregarded by this Court.* **249**

See SHIPPING 1.

11.——*Mortgage—Foreclsoure—Order nisi—Whether interlocutory or final.* **329**

See MORTGAGE.

12.——*Jurisdiction—Award on reference to Exchequer Court under s. 7 of War Measures Act—Whether appeal lies to Supreme Court of Canada—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19, 37, 82—Supreme Court Act, R.S.C. 1927, c. 35, ss. 35, 44—Contention that Exchequer Court was curia designata—Effect of provision for choice of court, etc., in making reference under s. 7 of War Measures Act.* **458**

See COMPENSATION.

13.——*Judgment at trial against defendant—New trial ordered by Court of Appeal—Defendant, in formal notice of appeal to Court of Appeal, asking in alternative for new trial—Whether this affected adversely*

APPEAL—*Concluded*

defendant's further appeal to Supreme Court of Canada, in view of stands taken by defendant on the hearings of the appeals. **609**

See RAILWAYS 1.

14.——*Jury's findings—Principles applicable on question as to setting them aside.* **614**

See NEGLIGENCE 1.

APPROPRIATION—*of ships by the Crown for naval services.* **458**

See COMPENSATION.

ASSESSMENT AND TAXATION—*Companies—Company selling its assets to another company—Payment by latter by allotment and issue of shares in it to trustee for shareholders of the vendor company—Liability of vendor company to tax under The Security Transfer Tax Act, 1939, Ont. (1939, C. 45)—Secs. 1 (b), 2 (a), 5 (1) (b), 19 (c) of the Act, and Regulation 26 made under the Act—The Security Transfer Tax Act, 1939*, Ont. (1939, c. 45), imposes a tax, payable by the vendor, transferer or assignor, "upon every change of ownership consequent upon the sale, transfer or assignment" of a "security" (defined by the Act to include any share of capital stock issued by any company), and authorizes regulations "determining what constitutes a sale, transfer or assignment within the meaning of this Act". By regulation 26, "if any company * * * makes distribution of or assigns to its shareholders assets consisting of taxable securities such distribution or assignment shall be deemed to constitute a sale, transfer or assignment of such securities within the meaning of the Act". By s. 5 (1) *(b)* of the Act, the allotment by a company "of its shares in order to effect an issue thereof" shall not be subject to the tax. Appellant, a company, by an agreement sold its assets to another company, part of the consideration being payment by the latter of a sum to be satisfied by the allotment and issue by the purchasing company of 144,950 shares of its capital stock to shareholders of appellant pro rata. Appellant was to surrender its charter as soon as possible. In accordance with the agreement, the directors of the purchasing company allotted the shares to a trustee for the shareholders of appellant to be distributed among such shareholders, delivery of certificates of shares in the purchasing company to be made on surrender for cancellation of certificates of shares in appellant. *Held:* Appellant was liable to the tax imposed by said Act. (Rand and Kellock JJ. dissented.) *Per* Kerwin J.: The effect in law of the agreement and other proceedings (keeping in mind the distinction between a share and the certificate of the share) was that appellant became owner of the shares and (within the meaning of the Act and regulation 26) transferred or assigned them to its shareholders, and consequent upon that transfer or assignment there was a change of ownership from appellant to its shareholders. In contemplation of law there were two transactions, one between the two companies and the other between appellant and its shareholders. *Per* Hudson J.: The shares went to appellant's shareholders because, as such shareholders, they were entitled by law to the proceeds of the sale of appellant's assets. Under all the circumstances, it should be held that the purchasing company in making the distribution of shares did so on behalf of appellant, and that this in fact amounted to a distribution of taxable assets by appellant within the meaning of regulation 26. *Per* Taschereau J.: In determining whether appellant was liable for the tax, the substance and not the form of the transaction must be considered. In substance what was done was, issue of the shares in fulfilment of the purchasing company's obligation to appellant, and distribution, out of those shares, of appellant's assets (in contemplation of its voluntary liquidation) in fulfilment of appellant's obligation to its shareholders. That was what was covered by the procedure followed, and the direction to the purchasing company to issue the shares to appellant's shareholders did not change what was done in substance; this mere delegation did not affect or alter the legal relations existing between the parties. The absence of actual delivery and change of possession of certificates of shares by the purchasing company to appellant and by appellant to its shareholders—a purely physical formality, which is merely the evidence, and not a constituting factor of the rights of the shareholders—is irrelevant and has no bearing on the ownership of the shares; there was a legal change of ownership of the shares, which is what is taxable under the Act. *Per* Rand and Kellock JJ. (dissenting): The shares were never "issued" prior to their issue to the shareholders of appellant or to the trustee for them, and, therefore, there was no transfer or assignment or change of ownership thereafter to which the tax could attach. Appellant was never a shareholder of the purchasing company in respect to these shares; its only right under the agreement was to call for issue to third persons, namely, its own shareholders. Once given that the agreement constituted a real transaction, as to which no question was raised, its contents determined the legal rights of the parties thereto, and they were entitled to have the transaction take the form which it did take *(Partington* v. *Attorney-General*, L.R. 4 H.L. 100, at 122; *Maclay* v. *Dixon*, [1944] 1 All E.R. 22, at 23; *Inland Revenue Commissioners* v. *Duke of Westminster*, [1936] A.C. 1, at 19, 24 *et seq.*, 28, 31, cited. *Swan Brewery Co. Ltd.* v. *The King*, [1914] A.C. 231, discussed and distinguished). CANADA CHINA CLAY LTD. v HEPBURN. **87**

ASSESSMENT AND TAXATION—*Continued*

ASSESSMENT AND TAXATION—
Continued

2.——*Municipal—Crown's interests—Construction and production contracts between Crown and industrial company—Sale of land by Company to Crown and building of plant for war purposes by Company for the Crown —Agreements stipulating Company to act on behalf of Crown and as its agent—Claim by municipal authority against Company for property and business taxes—Company erroneously described as "proprietor"—Company not liable for taxes—Company, under contracts, being the "agent" or "servant" of the Crown—Crown, and not the Company, being "occupant" of land and building—Sections 362 (a) and 363 of the Montreal City Charter.*—The Montreal Locomotive Works Limited (hereinafter called the Company), on October 23, 1940, entered into a first contract (construction contract) with The King in right of Canada (hereinafter called the Crown), where it was agreed, *inter alia*, that the Company would sell and transfer unto the Crown certain land in the city of Montreal and would construct thereon, for and on behalf of the Crown, as its agent and at its expense and subject to the supervision, direction and control of the Crown, a new plant to remain the property of the Crown, and to be capable of producing gun carriages and tanks. On the same day, a second contract (production contract) was passed between the Crown and the Company, where it was agreed, *inter alia*, that the Company, acting on behalf of the Crown and as its agent, would administer, manage and operate the new plant and produce therein, for the account of the Crown, gun carriages at a certain fee per gun and per tank. It is admitted that the new plant is, and has always been, the property of the Crown, and that the City was so informed by the Deputy Minister of Munitions and Supply. The Company was entered as proprietor in the valuation roll for the fiscal year beginning May 1st, 1941, and paid to the City $35,858.59 for taxes due under the assessment roll for that year. After the new building, erected under the construction contract, was completed, the building and motor power were added to the assessment roll in the name of the company for $18,934.78 from November 1st, 1941, to April 30th, 1942; and the Company was also entered on the tax roll for business tax on the same property for the same period for $3,425.22. Then, on the valuation roll for the fiscal year commencing May 1st, 1942, the Company was entered as occupant of the new building, motive power and land owned by the Crown and, on the assessment roll, was billed at the sums of $41,141.77 for property tax and $6,850.44 for business tax. The Superior Court dismissed the claim of the City for the first item of $18,934.78 because the claim was directed against the Company as proprietor and not as occupant; but, as respects the three other items, the Court held that the City's right against the Company as occupant had been established and condemned the Company to pay these amounts. The appellate court, by a majority of the judges, affirmed that judgment. *Held*, affirming the judgments of the Courts below, as to the first item, that the City cannot hold as valid the assessment and taxation of the Company for the amount claimed. The Company was in respect of that claim improperly assessed and taxed by the City as proprietor and not as occupant; it had been admitted, in the joint stated case submitted to the courts, that the new plant was, and always has been, the property of the Crown and that the City was duly informed of it. Upon that very admission, it was obviously erroneous to describe the Company as proprietor. The valuation and assessment rolls, as they existed, could and can be supported only if the quality of owner or proprietor had been established in respect of the Company. The three other items were allowed by the Courts below against the Company, as to the property tax on the ground that the Company was during the material dates the occupant of the property and entered as such on the rolls, and as to the business tax on the ground that the Company occupied the premises for commercial and industrial purposes and was doing business at the new plant. *Held* that, as to these items, the judgment of the appellate court should be reversed.—In order that the Company may be exempt from paying the taxes claimed by the City, it is not necessary that it should be either "an instrumentality of the Government, or an emanation of the Crown" *(City of Halifax* v. *Halifax Harbour Commissioners* [1935] S.C.R. 215). It is sufficient if, looking at the contracts as a whole, the Courts are satisfied that the Company, for the purpose of the present decision, is nothing but the agent, or the servant, of the Crown. Such decision turns on the meaning of the two contracts and, upon their construction, these agreements clearly provide for a case of agency. The Company is described throughout as the agent of the Crown. Although the use of this word is not in itself absolutely decisive, it is at least an indication of the intention of the parties; and it is that intention, gathered from the words used, that determines the nature of the contracts. There is absolutely nothing in the agreements inconsistent with the idea that the parties wanted the company to be anything else than an agent. *Held* also that, under the agreements, the Company is not the occupant of the building and land, at least within the meaning of that word in the City's Charter; and, *a fortiori*, it does not occupy it for industrial purposes. The Company never carried on or exercised a manufacture, either under section 362a or section 363 of the Charter; and these sections are inapplicable for the purpose of establishing the right of the City to prop-

ASSESSMENT AND TAXATION—
Continued
erty tax as occupant or to the business tax. The occupation is not that of the Company, but the occupation of the Crown; and the business carried on, in the circumstances of this case and under the terms of the agreements, is not carried on by the Company, but carried on by the Crown itself on its own property. *City of Halifax* v. *Halifax Harbour Commissioners* ([1935] S.C.R. 215), *City of Montreal* v. *Société Radio-Canada* (Q.R. 70 K.B. 65), *Regina Industries Ltd.* v. *City of Regina* ([1945] 1 D.L.R. 220) and *City of Vancouver* v. *Attorney General of Canada* ([1944] S.C.R. 23) discussed. THE KING v. THE CITY OF MONTREAL; THE CITY OF MONTREAL v. MONTREAL LOCOMOTIVE WORKS AND THE KING; MONTREAL LOCOMOTIVE WORKS v. THE CITY OF MONTREAL. 621

3.——*Companies—Tax imposed by provincial statute—Telegraph company and company working a telegraph system—Agreement between two telegraph companies—One company operating whole system of the other for agreed remuneration—Whether liable for tax—Dismissal of claim for tax against owning company—Action in warranty by the latter against other company—Such action consequently dismissed—Defendant in warranty also intervening in the principal action—Question of the costs of action in warranty as between the two telegraph companies.*—The King, in right of the province of Quebec, claimed from the Montreal Telegraph Company (hereinafter called M.T.C.) $38,375.85, representing an annual tax of $1,000 for the years 1908-1909 up to 1938-1939, plus interest. This amount was alleged to be due by that Company under the *Corporation Tax Act*, which imposed a tax on "every telegraph company and every other company working a telegraph system for the use of the public". By an agreement, dated August 17, 1881, between the M.T.C. and the Great North Western Telegraph Company of Canada (hereinafter called G.N.W.-T.C.), the latter Company undertook for a period of ninety-seven years to work, manage and operate the system of telegraph owned and, before that date, operated by M.T.C. Under that agreement the G.N.-W.T.C. bound and obliged itself to pay all costs and expenses of the M.T.C.'s system and to keep the property free and clear from all liens and encumbrances arising from taxes and assessments. On the ground that the tax claimed by the appellant was a tax included in, and covered by, the above conditions of the agreement, the M.T.C. took an action in warranty against the G.N.W.-T.C. to have the latter condemned to indemnify it against any condemnation which the Crown might obtain upon its claim. While the G.N.W.T.C. pleaded to the action in warranty and denied its obligation to indemnify the M.T.C. and prayed for the dismissal of the action in warranty, it, nevertheless, filed an intervention in the

ASSESSMENT AND TAXATION—
Continued
main action and prayed that the latter be dismissed with costs. The trial judge dismissed the main action and recommended that the appellant pay the defendant's and intervenant's costs; and, on the ground that the action in warranty was nothing else than the exercise of an action in indemnity and therefore subordinate to the fate of the principal action, he dismissed that action with costs against the M.T.C. The appellate court affirmed this judgment in the main action and dismissed the intervention with costs for the reason that the intervenant had, at the same time, contested the action in warranty and intervened in the main action, which was held to be inconsistent; the action in warranty was also dismissed with costs against M.T.C., that action being held to be without legal basis as the principal action had been dismissed. The Crown on the main action and the M.T.C. on the action in warranty appealed to this Court. *Held*, affirming the judgments of the Courts below on the principal action, that the Crown, appellant, cannot maintain its claim against the M.T.C. for a tax imposed by *The Corporation Tax Act*. The statute clearly contemplates, not alone a telegraph company, but a company doing business in the province and working there a telegraph system for the use of the public. The M.T.C. does not come within such description: that company, by the sole fact it made the agreement with the G.N.W.T.C. and collects the agreed remuneration, is not doing business in the province. *Held*, also, that the M.T.C. cannot be brought within the general clause of the taxing statute, concerning an ordinary "incorporated company carrying on any undertaking, trade or business" which is not otherwise taxed. *Held*, further, in as much as the principal action had been dismissed, that a decision on the merits of the action in warranty has become unnecessary and that the M.T.C.'s appeal from the judgment dismissing that action should also be dismissed *(Archbald* v. *de Lisle*, 25 Can. S.C.R. 1, followed), so that nothing remains between the parties to that action but a question of costs. *Held* that, under the circumstances of this case, while the G.N.W.T.C. should not be condemned to pay the costs of the M.T.C. in the action in warranty, it should at least get none of its own costs of that action against the M.T.C.; and the latter's appeal on that action should be allowed to the extent that the judgment of the appellate court should be modified accordingly. THE KING v. THE MONTREAL TELEGRAPH COMPANY AND THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA. 669

4.——*Building of a dissentient school—Borrowing of moneys by trustees—Bonds or debentures issued—Resolution adopted by Trustees under section 244 of the Education Act—Stipulating that a special tax "shall be levied annually"—Whether wording of reso-*

ASSESSMENT AND TAXATION—
Continued

lution sufficient to create a tax—Whether resolution otherwise legal and regular—Privilege on immovable for school assessment—Property owned by dissentient when taxed and later sold to a Roman Catholic—Scope of the tax exemption granted to religious corporations under sections 251 (3) and 424—Issue of bonds or debentures authorized under section 246—Whether both the bonds or debentures and the resolution providing for their issue are validated thereby—The Education Act, R.S.Q., 1925, c. 133, now R.S.Q., 1941, c. 59. —The respondents trustees, in 1925, passed a resolution to borrow a sum of $25,000 through an issue of bonds or debentures payable in thirty years, the purpose of the loan being the rebuilding of a school recently destroyed by fire. The resolution stipulated *inter alia* that "to provide for the annual interest and sinking fund of these debentures, a special tax * * * shall be levied annually upon all taxable property on the collection roll of the school trustees of this municipality at present in force * * * and on any other taxable property that may come under the control of the said school trustees during the term of these debentures; and all lands subject to the said tax now entered on the said roll * * * shall be bound and liable for the special tax, until the full and final payment and discharge of the said debt". At the time the resolution was adopted, the property, on which it is claimed special taxes are due, belonged to one Wright, a dissentient, subject to the jurisdiction of the respondents. In 1937, the property was sold to the appellant, a Roman Catholic institution, exempt from the payment of school assessments by force of sections 251 (3) and 424 of the *Education Act*. In 1938, 1939 and 1940, the respondents trustees passed resolutions by which the appellant's property was assessed at $51.91, $52.09 and $904.47, the increase in the last assessment being the result of improvements and the construction of buildings for an amount exceeding $500,000. In 1941, the respondents brought against the appellant an hypothecary action for $1,016, representing the above mentioned assessments and interest. The Superior Court dismissed the action; but the appellate court reversed that judgment and maintained the action as brought. On the appeal before this Court: The Chief Justice and Taschereau J. were of the opinion that the appeal should be allowed in full, Hudson and Estey JJ. were of the opinion that the appeal should be dismissed and Rand J. was of the opinion that the respondents trustees were entitled to succeed, in part, in their action. As a result, it was *Held* that the appeal should be allowed in part and the judgment of the appellate court be modified so that the amount of the taxes awarded to the respondents be reduced to accord with the value of the property as it appeared on the valuation and collection rolls in force in

ASSESSMENT AND TAXATION—
Continued

1925. *Per* The Chief Justice: The respondents' action is an hypothecary action, i.e. an action to enforce an alleged hypothec or privilege, and they have failed to show that the resolution of 1925, nearly all of its clauses being illegal and *ultra vires*, was effective for the purpose of creating a privilege upon the immovable property then owned by Wright, which privilege would have followed the property into the hands of the appellant. *Per* The Chief Justice and Taschereau and Estey JJ.: The resolution of 1925 was not passed in conformity with the imperative provisions of sections 244 (1) of the *Education Act*. Under that section, "no issue of bonds may be made * * * unless * * * there be imposed * * * an annual tax * * *". The resolution does not impose a tax immediately: it only states that a tax shall be imposed each year: "shall be levied annually". A resolution providing for the imposition of a tax in the future does not meet the requirements of that section and is ineffective to operate a valid issue of bonds. *The School Commissioners of St. Adelphe* v. *Charest* ([1944] S.C.R. 391) followed. *Per* Estey J.: Such contention would have been available to the appellant, if it had been made before the approval of the resolution by order in council under section 246, the existence of this approval distinguishing this case from the above decision. (Section 246 is further commented below.) *Per* Hudson J.: The principle of that decision is not applicable to this case: in the *Charest* case, there was no definite imposition but rather a promise to do so in the future, while, in this case, there was an immediate burden imposed to be satisfied in a definite way; moreover, there was not in that case an issue and sale of bonds approved by order in council under section 246. *Per* Rand J.: Although, in the resolution, there is no express imposition and the future tense is used in the expression "shall be levied", the paragraph providing for the taxation should nevertheless be read to imply in fact a present imposition sufficient for the purposes of section 244. The rule of the *Charest* case should not be extended beyond the precise words that were there dealt with. *Per* The Chief Justice: The resolution of 1925 declared that the "special tax * * * shall be levied annually upon all taxable property on the collection roll * * * at present in force". The respondents' action was not based upon the collection roll of 1925-1926 and the amounts for which the Trustees claimed a privilege result from the collection rolls of 1938-1939-1940, at a time when the appellant's property was not taxable. The respondents' claim is therefore contrary to the text of the 1925 resolution. *Per* The Chief Justice: The 1925 resolution cannot be reconciled with subsection (3) of section 244. The valuation of the property having been fixed once and for all on the collection roll

ASSESSMENT AND TAXATION—
Continued

of 1925, it would be contrary to the text of the resolution, and therefore illegal, for the secretary-treasurer to assess that property for a different amount in collection rolls prepared by him under instructions given to him by subsequent resolutions.—The resolution contains also another illegality: there is no provision, either in the *Education Act* or in the Civil Code, which authorizes the creation of a privilege upon future property. *Per* The Chief Justice and Taschereau J.: The privilege for school assessments is not immediately created at the time of the adoption of the loan resolution, but comes into existence only after the collection roll comes into force. *Per* The Chief Justice: Such privilege, at the time it thus comes into existence, cannot be related back to the date of the original resolution, at least so far as the privilege or hypothecary claim is concerned. *Per* Hudson J.: The language of the 1925 resolution is clear and definite. The property therein described was "bound and liable for the special tax (in each year) until the * * * final payment of the debt". The levy sought by the present action is merely the maturing of the tax obligation imposed by the original resolution. The charge operates from the time the bonds are sold until they are finally paid in full. The purchasers of the bonds relied on the terms of the resolution and subsequent purchasers took with implied or express notice of them. Any withdrawal of property from the taxable area so defined would throw on the remaining properties a greater burden than was assumed by the property owners when the resolution was passed and it would deprive the bond holders of security assured to them when they bought the bonds. Under the circumstances, the Court would not be justified in refusing to give effect to the resolution unless compelled to do so by clear and definite mandate. *Per* Taschereau J.: There must be necessarily a personal debtor bound to pay a tax. It cannot be conceived that a tax imposed solely on an immovable could exist without a person having the legal obligation to pay it and against whom it could be legally claimed. Personal liability is from the beginning fastened on the owner of the immovable, because he is then under the jurisdiction of the school commissioners or trustees and the immovable is taxable because he owns it. Such personal liability ceased to exist when the owner originally liable has sold the property "in respect of which" he has been taxed; the liability is then incumbent on the purchaser, whatever his religion may be. *Per* Estey J.: The school tax is primarily a property tax, but the *Education Act*, when read as a whole contemplates a personal liability upon the' owner. Therefore there would be a personal liability within the meaning of the Act upon the appellant. *Per* Taschereau J.: When a tax is "imposed" by virtue of a loan resolution under section 244, the immovables subjected to the jurisdiction of the Trustees are from that time determined in advance as bound to be later charged with a privilege for the annual tax in consequence of the combined effect of the original resolution and of the collection roll duly homologated, and such immovables cannot be withdrawn from the payment of the tax notwithstanding the fact that they become the property of another person and even if the latter is entitled to the exemption granted by the *Education Act*. *Per* Taschereau and Estey JJ.: The religious communities cannot claim the exemption granted to them by sections 251 (3) and 424, if they were not owners of the immovable at the time the tax has been originally imposed. *Per* Rand J.: The language of section 244 should be construed to mean than an "annual tax",—annual in relation to the years of the terms, for instance, of a bond issue—, carrying implicitly the characteristic of a specific amount in relation to each separate parcel of land is declared, and that it is *en marche* to become definitive as a realizable exaction as each year is reached, and as it is extended on a collection roll. It is as if the resolution in 1925 were in the words: a tax of $30 on property "A" is now imposed for the year 1940, and as if it were repeated in 1940. An annual resolution is passed in advance: it describes a taxing effect to be attained in future. But the declaration of a potential tax in a certain amount in respect of each taxable immovable for each year during the currency of the obligation, as a specific imposition, can be made only by reference to the valuation or assessment roll, at the time of the resolution, in force. When the tax becomes levied in each year as the collection roll is completed, the time of payment is determined, but whether there is determined also personal liability for each year's tax, there is no need to enquire. The resolution, then, fixes as of its date the amount of the annual levy, the lands to be taxed, and the property valuations. Section 391 provides for the homologation of the collection roll, and after the period for payment has expired the taxes become a special hypothecary charge upon the property taxed. Even if that section does not apply to a special assessment, the taxes, upon default of payment, would become a privilege upon the immovables under article 2009 and 2011 of the Civil Code. An order in council was passed, in pursuance of section 246 of the *Education Act*, stating that the Minister of Municipal Affairs had reported favourably that the Trustees be authorized to borrow moneys in conformity with the resolution of 1925, that all the formalities required by the law had been fulfilled and that accordingly authorization to borrow should be granted. Section 246 enacts that "every bond or debenture issued in virtue of a resolution (so) approved * * * shall be valid, and its

ASSESSMENT AND TAXATION—
Continued

validity shall not be contested for any reason whatsoever". *Held* that, under that section, not only the bond or debenture is validated, but the resolution providing for their issue must also be deemed to have been passed in conformity with section 244. The Chief Justice and Taschereau J. *contra*. *Per* The Chief Justice and Taschereau J.: The intention of the legislature in enacting section 246 has been to put the validity of the bonds and debentures beyond all discussion so that the bondholders would have an absolute guarantee of the legality of the bond itself, notwithstanding the invalidity or illegality of the proceedings leading to its issue. But the section cannot be invoked in favour of a resolution which would be null and void. Any issue that may arise between the Commissioners or the Trustees and a ratepayer is in no way affected thereby. Otherwise the result would be that the Lieutenant Governor in Council would be made a judge of the validity and legality of all the loan resolutions adopted by the former and that the courts would be entirely ousted of their jurisdiction in the matter. *Per* Hudson J.: The prohibition against the issue of bonds, in section 244 (1), ceased to have any application here once the resolution to borrow had been approved as being adequate for the purposes of the section and the bonds certified, as they were, under section 246. When sold they created a legal obligation. The resolution and the order in council were duly registered. The purchasers of bonds were entitled to accept the certificates as conclusive. The appellant itself cannot complain of lack of notice when it bought the property. *Per* Rand J.: The bonds in this case, bearing the requisite certificate are admittedly valid, but there is created under section 246 more than a valid debt. The whole object of the section is to conclude such questions as those in the present case. The purchaser of a bond is entitled to the security he would have had if every preliminary or conditional step had been taken in exact accordance with the provisions of the statute and the purchaser cannot be told later that the condition essential to that validity did not in fact or in law exist. The special assessment is for the sole benefit of the bondholders. They are the beneficiaries of that power to tax and the sufficiency of the resolution must be deemed concluded not only in relation to the bond as a debt, but also to the taxation intended to be appropriated exclusively to the payment of that debt. *Per* Estey J.: The language used by the legislature in enacting section 246 is clear and definite and, when read and construed with the other relevant sections of the Act and particularly section 244, its meaning is that the approval therein provided for applies to the validity of the resolution and includes both the validity of the bonds and the existence of the security. Comments upon

ASSESSMENT AND TAXATION—
Concluded

the decision of this Court in *Canadian Allis-Chalmers Limited* v. *The City of Lachine* ([1934] S.C.R. 445). LA CONGRÉGATION DU TRÈS SAINT RÉDEMPTEUR v. THE SCHOOL TRUSTEES FOR THE MUNICIPALITY OF THE TOWN OF AYLMER.....685

5.——*See* APPEAL 2.

BANKRUPTCY AND INSOLVENCY—*Action by trustee to annul deed of sale—Practice and procedure—Party interested not joined in the proceedings before the Court—Dismissal of action—Husband and wife—Married woman appearing as plaintiff—Want of marital authorization—Absolute nullity—Party to the deed not made defendant or mis-en-cause but acting as co-plaintiff with trustee—Whether sufficient to allow the Court to adjudicate—Arts. 176, 183, 1032 et seq. C.C.*—The appellant Lamarre, acting as trustee to the bankruptcy of an estate represented by a deceased trader's universal legatees, one of which unmarried and the other a married woman separated as to property, brought an action to annul the sale of an immovable property by the legatees to the respondent. The two legatees were joined as co-plaintiffs, although they took no part in the conclusions taken in the statement of claim. The husband was a party to the deed of sale for the purpose of authorizing his wife; but he did not authorize her to act as plaintiff in the case. The jugdment of the Superior Court, maintaining the appellants' action, was reversed by the appellate court which held that the want of authorization by the husband to enable his wife to appear in court constituted a cause of nullity of the action. *Held*, affirming the judgment appealed from (Q.R. [1943] K.B. 691) but on another ground, that the Superior Court could not pronounce the nullity of the contract of sale, as one of the contracting parties, i.e., the husband, had not been called before the Court. *La Corporation de la Paroisse de St. Gervais* v. *Goulet* ([1931] S.C.R. 437). The appellants had based their action on three different grounds; but, before the Court, they urged only one of them, i.e. their right of action *(action paulienne)* under article 1032 *et seq.* C.C. *Held*, also, that the appellant Lamarre, in his quality of trustee representing the creditors, was entitled to bring alone the present action, as *action paulienne;* and, therefore, it was immaterial whether the husband had authorized or not his wife to act as plaintiff, as her presence as such was entirely unnecessary. *Held*, further, that, although the trustee could thus act alone, the appellant's action could not be maintained, as the legatees, as vendors, have not been made parties to the action as defendants or mises-en-cause; but, even if their presence as co-plaintiffs could be considered sufficient to allow the Court to adjudicate

BANKRUPTCY AND INSOLVENCY— *Concluded*
on the merits of the case, the wife would still be acting without the authorization of her husband. LAMARRE ET AL v. BIGRAS. 82

BOARD OF TRANSPORT COMMISSIONERS FOR CANADA—*Jurisdiction* 16
See CONSTITUTIONAL LAW 1.

BONDS—*Of company—Redemption before maturity—Payment in American or Canadian funds at the option of holder—Redemption date—Date of presentation—Exchange rate not same on those dates—Rate at which bonds are payable*..... 655
See COMPANIES 1.

2.——*See* ASSESSMENT AND TAXATION 4.

BROKERS.
See CONTRACT 4.

CARRIERS—*Railway company—"Undertaking" of company declared "for general advantage of Canada"—Added power to operate auto bus service—"Subject to all provincial * * * enactments"—Tariff of tolls—Jurisdiction—Federal or provincial authority—Whether auto busses are "works"—Section 91 (29) and section 92 (10 c) B.N.A. Act.* 16
See CONSTITUTIONAL LAW 1.

2.——*See* SHIPPING 1; STREET RAILWAYS.

CHILDREN—*Precautions against injury to.*
.....191
See CRIMINAL LAW 3.

CIVIL CODE—*Arts. 176, 183 (Husband and wife—Judicial proceedings)*..... 82
See BANKRUPTCY AND INSOLVENCY.

2.——*Articles 857, 858 (Probate and proof of wills)*..... 749
See WILL 2.

3.——*Art. 990 (Consideration of contracts).* 158
See CONTRACT 1.

4.——*Art. 1021 (Interpretation of contracts).* 217
See CONTRACT 3.

5.——*Arts. 1032 et seq. (Avoidance of contracts and payments made in fraud of creditors)*..... 82
See BANKRUPTCY AND INSOLVENCY.

6.——*Arts. 1053, 1054 (Responsibility for damage)*..... 62
See MOTOR VEHICLES 1.

7.——*Art. 1091 (Obligations with a term).* 217
See CONTRACT 3.

CIVIL CODE—*Concluded*
8.——*Art. 1301 (As to wife contracting obligations)*..... 762
See HUSBAND AND WIFE 2.

9.——*Art. 1493 (Sale—Satisfaction of obligation of seller to deliver)*..... 217
See CONTRACT 3.

10.——*Art. 1535 (Sale—Obligations of buyer—Disturbance or cause to fear disturbance in his possession)*..... 217
See CONTRACT 3.

11.——*Arts. 1593 et seq. (Alienation for rent)*..... 158
See CONTRACT 1.

12.——*Arts. 1601, 1608, 1609 (Lease or hire of things)*..... 158
See CONTRACT 1.

13.——*Arts. 1657, 1660 (Termination of the lease or hire of things)*..... 158
See CONTRACT 1.

14.——*Art. 2009 (Privileged claims upon immoveables)*..... 685
See ASSESSMENT AND TAXATION 4.

15.——*Art. 2011 (Privileged claims of assessments and rates upon immoveables)* 685
See ASSESSMENT AND TAXATION 4.

CODE OF CIVIL PROCEDURE—*Art. 288 (Discovery—Use of deposition taken)*... 249
See SHIPPING 1.

Arts. 1214, 1215a (Appeals to the Court of King's Bench—Security)..... 520
See APPEAL 7.

COMPANIES—*Bonds—Redemption before maturity—Payment in American or Canadian funds at the option of holder—Redemption date—Date of presentation—Exchange rate not same on those dates—Rate at which bonds are payable.*—Where, in conformity with a trust deed, a company (appellant) elects to redeem, prior to maturity, some of its outstanding bonds on June 1, 1939, such bonds being payable in United States or Canadian funds at the holder's option and the holder (respondent) does not present the bonds on that date when the rate of exchange was $\frac{13}{64}$ths of 1 per cent. but later forwards them to New York where, on September 20, 1939, the rate of exchange being 11 per cent., they are presented to a paying agent, an American bank, with a demand that the amount be paid in American currency, but payment is refused by the bank under instructions from the appellant company, the holder (respondent) is entitled to bring an action in Quebec asking that the appellant be ordered to pay in Canadian funds an amount sufficient to purchase the required United States funds at the rate of

COMPANIES—*Concluded*

exchange current on September 20, 1939. The privilege of receiving payment in two currencies was not limited to the day of maturity of interest or principal. The obligation of the appellant company, under the bonds, was not only to be ready and willing to pay the debt on the day fixed but to maintain that readiness until the debt was discharged. On the other hand, there was no duty upon the holder (respondent) to present the bonds for surrender on any particular day, and, consequently, there was no default by the latter through failure to act until September 20th, 1939. Judgment of the appellate court (Q.R. [1944] K.B. 700) affirmed. GATINEAU POWER COMPANY v. CROWN LIFE INSURANCE COMPANY. **655**

2.——*Taxation—Company selling its assets to another company—Payment by latter by allotment and issue of shares in it to trustee for shareholders of the vendor company—Liability of vendor company to tax under The Security Transfer Tax Act, 1939, Ont. (1939, c. 45)—Secs. 1 (b), 2 (a), 5 (1) (b), 19 (c) of the Act, and Regulation 26 made under the Act*..... **87**

See ASSESSMENT AND TAXATION 1.

3.——*Taxation—Tax imposed by provincial statute—Telegraph company and company working a telegraph system—Agreement between two telegraph companies—One company operating whole system of the other for agreed remuneration—Whether liable for tax—Dismissal of claim for tax against operating company—Action in warranty by the latter against other company—Such action consequently dismissed—Defendant in warranty also intervening in the principal action—Question of the costs of action in warranty as between the two telegraph companies*.... **669**

See ASSESSMENT AND TAXATION 3.

4.——*See* HUSBAND AND WIFE 2.

COMPENSATION—*Appropriation of ships by the Crown for naval services—Reference to Exchequer Court under s. 7 of War Measures Act, R.S.C. 1927, c. 206, to determine compensation—Principles applicable in determining compensation—"Value of the vessel" in s. 5 (1) of The Compensation (Defence) Act, 1940 (c. 28)—Appeal—Jurisdiction—Award on reference to Exchequer Court under s. 7 of War Measures Act—Whether appeal lies to Supreme Court of Canada—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19, 37, 82—Supreme Court Act, R.S.C. 1927, c. 35, ss. 35, 44—Contention that Exchequer Court was curia designata—Effect of provision for choice of court, etc., in making reference under s. 7 of War Measures Act.*—Under s. 7 of the *War Measures Act*, R.S.C. 1927, c. 206, the Minister of Justice referred to the Exchequer Court respondent's claim for compensation in respect of two ships, the *Seaborn* and the *Sankaty*, appropriated and acquired for naval services by the Crown. In the Exchequer Court ([1944] Ex. C.R. 123) Angers J. awarded $100,000 for the *Seaborn* and $205,000 for the *Sankaty*. Against the amounts of such awards the Crown appealed to this Court. Respondent moved to quash the appeal for want of jurisdiction, mainly on the ground that the Exchequer Court was *curia designata* and, no appeal being provided by the *War Measures Act*, there was no right of appeal. Argument was heard both on the motion to quash and on the merits of the appeal. Under said s. 7, if the compensation is not agreed upon, the claim shall be referred by the Minister of Justice "to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court". Under s. 5 (1) of *The Compensation (Defence) Act, 1940* (c. 28), the compensation shall be "a sum equal to the value of the vessel * * * no account being taken of any appreciation due to the war". *Held:* (1) This Court had jurisdiction to hear the appeal. (Cases discussed.) *Per* The Chief Justice: It is to be noted that, along with the authority or jurisdiction to each of the courts enumerated in s. 7 of the *War Measures Act* or to a judge thereof, there is not given special and independent powers. When once the reference is made, the court or the judge is to deal with the matter in the ordinary way and according to the powers vested in the court by the general Act and the inherent powers already possessed. Parliament's intention was clearly that the Exchequer Court, in a reference to it as in the present case, should act as a court in accordance with the provisions of the *Exchequer Court Act* and that all the provisions of that Act should apply to the reference. The jurisdiction of the Exchequer Court, through the reference, was one "in any manner vested in the Court" within s. 82 of the *Exchequer Court Act*, and under said s. 82, read in connection with s. 44 of the *Supreme Court Act*, there was a right of appeal to the Supreme Court of Canada. *Per* Kerwin J.: S. 82 (1) of the *Exchequer Court Act*, taken in conjunction with ss. 35 and 44 of the *Supreme Court Act*, conclusively gives a right of appeal in this case. The words "in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court" in said s. 82 (1) are broad enough to include the present reference. S. 7 of the *War Measures Act* provides for the very vesting required by said s. 82 (1). The option given to the Minister in making the reference under said s. 7 is not a ground for holding against a right of appeal in the present case. If a reference were made to a provincial superior or county court or a judge thereof, then whether any appeal would lie from the ensuing judgment would depend upon the ordinary jurisdiction of such court and the provisions made as to appeals from judgments thereof. *Per* Hudson, Taschereau and Kellock, JJ.: The option given under s. 7 of the *War Measures Act* as to the court

COMPENSATION—*Continued*

COMPENSATION—*Continued*

or judge to whom the reference shall be made, is not a ground for holding against a right of appeal in the present case *(James Bay Ry. Co.* v. *Armstrong*, [1909] A.C. 624, at 630). *Per* Hudson J.: S. 44 of the *Supreme Court Act*, read with s. 82 of the *Exchequer Court Act*, is ample to vest jurisdiction in this Court in this appeal. The matters referred to the Exchequer Court fell well within those comprised in its ordinary jurisdiction; and the procedure followed in that Court was in accordance with the normal practice of a suit carried on therein. *Per* Taschereau J.: The trial Judge did not exercise any special jurisdiction with an appropriate machinery for that particular purpose, but dealt with the matter as a judge of the Court in the discharge of his ordinary judicial functions. *Per* Rand J.: A reference to the Exchequer Court under s. 7 of the *War Measures Act* is not to be taken in any other sense than a reference by a departmental head (as under s. 37 of the *Exchequer Court Act)* and the effect of the reference is to place the claim within the ordinary procedure of the Court. (Whether a similar reference allowed to a provincial county or superior court carries with it the ordinary rights of appeal under provincial law, it is not necessary to decide. The language "or to a judge of any such court" in said s. 7 contemplates a judge exercising the original jurisdiction of his court.) The present proceeding was in the Exchequer Court as such, and therefore an appeal lies under s. 82 of the *Exchequer Court Act*. *Per* Kellock J.: S. 7 of the *War Measures Act* vests jurisdiction in the Exchequer Court within the meaning of s. 82 of the *Exchequer Court Act*, conditional only upon the exercise by the Minister of the power of reference given him by the *War Measures Act;* and the combined effect of s. 82 of the *Exchequer Court Act* and s. 44 of the *Supreme Court Act* is to authorize an appeal to this Court. (2) On the merits of the appeal: As to the *Seaborn*, the compensation should be reduced to $92,764.93 (the amount tendered by the Crown) (The Chief Justice and Kerwin and Taschereau JJ., dissenting, would have affirmed the judgment at the trial, except as to the rate of interest allowed). As to the *Sankaty*, the case should be sent back to the Exchequer Court for re-assessment. The meaning of "value of the vessel" within s. 5 (1) of *The Compensation (Defence) Act, 1940*, and the principles to be applied and factors to be considered in determining that value, discussed, and cases referred to. As to the *Seaborn: Per* Hudson J.: The award below failed to give due weight to the cost of the vessel to respondent, which, though not necessarily evidence of value, was, under the circumstances, practically the only evidence of value before the Court within the prescription of s. 5 of *The Compensation (Defence) Act, 1940*. Also there were errors in amounts in items considered in reaching

COMPENSATION—*Concluded*

the award. It is a case where this Court is justified in modifying the award and it should be reduced as aforesaid. *Per* Rand J.: The purchase by respondent of the *Sankaty*, admittedly much more suitable than the *Seaborn* for respondent's service, excludes any special value of the *Seaborn* to respondent as of the time of acquisition. In all the circumstances, the general market value must govern the determination of the value of the *Seaborn*. But the trial Judge, in reaching his award, included items irrelevant to market value; and also indicated a regard to considerations of realized special adaptability, and no such element was admissible. There was not in the evidence sufficient to bring the market value to more than the sum tendered by the Crown, which, though relatively not much less than that awarded below, was so generous as to prevent this Court from exceeding it. *Per* Kellock J.: There was no evidence which enabled the trial judge, consistently with the proper principles to be applied, to assess the value of the *Seaborn* at any amount beyond that tendered by the Crown. Estey J. agreed in the conclusion of Rand and Kellock JJ. *Per* the Chief Justice (dissenting): There was evidence upon which the trial judge could make the award he made; and, even though this Court might, in its own view, think there was possibly a small error of valuation, this Court should not, under the circumstances, interfere. *Per* Kerwin J. (dissenting): It does not appear that the trial judge failed to observe the applicable principles and it cannot be said that the sum awarded was excessive so as to justify alteration of it. *Per* Taschereau J. (dissenting): The trial judge did not misdirect himself on the principles to be applied and took into account the proper elements in reaching his award, which was not clearly excessive; and therefore this Court should not interfere with his finding. As to the *Sankaty: Per Curiam:* The trial judge erred in applying the principle of "replacement value" or "reinstatement" in reaching his award, as that was a method not in accordance with the direction in said s. 5 (1) of *The Compensation (Defence) Act, 1940*, on which the award must be based; and, as the evidence was not sufficient to enable this Court to ascertain the value on the proper basis, the case must be returned to the Exchequer Court for that purpose. THE KING v. NORTHUMBERLAND FERRIES LTD. 458

CONFLICT OF LAWS—*Negligence—Automobile—Person invited by driver who was also owner—Accident—Injury to passenger—Damages—Invitation made and accepted in Quebec—Accident occurring in Ontario—Negligence of driver proven—Conflict of laws—Whether Quebec or Ontario law applicable—Driver liable, if negligence actionable under Quebec law and punishable under Ontario law—Agreement by benevolent*

CONFLICT OF LAWS—*Concluded*

driver to carry passenger as a favour—Not a contract of transport nor a "contrat de bienfaisance"—Arts. 1053 and 1054 C.C.—Criminal Code, s. 285—Highway Traffic Act (Ont.) R.S.O., 1937, c. 288, as amended in 1939 by 3 Geo. VI, c. 20, s. 6..... **62**

See MOTOR VEHICLES 1.

CONSTITUTIONAL LAW—*Carriers—Railway company—"Undertaking" of company declared "for general advantage of Canada"—Added power to operate auto bus service—"Subject to all provincial * * * enactments"—Tariff of tolls—Jurisdiction—Federal or provincial authority—Whether auto busses are "works"—Section 91 (29) and section 92 (10 c) B.N.A. Act.*—The Quebec Railway, Light & Power Company applied for an order of the Board of Transport Commissioners approving its tariff of tolls for the carriage of passengers on the motor buses operated by it; while the town of Beauport petitioned the Quebec Public Service Board for an order by which the same tolls would be fixed. The Board of Transport Commissioners dismissed the company's application for want of jurisdiction; while the appellate court of Quebec, reversing the decision of the President of the Public Service Board, held that that Board was without jurisdiction to deal with such tolls on the ground that the railway company fell under the exclusive jurisdiction of the federal board. The decisions being contradictory, both the railway company and the town of Beauport appealed to this Court. *Held,* Davis and Hudson JJ. dissenting, that the fixing of fares, or tolls, to be charged by the railway company in respect of its motor bus service, was within federal jurisdiction; but that federal legislation was lacking, as regulation of tolls over such service is not included in the powers granted to the Board of Transport Commissioners. *Per* Davis and Hudson JJ. dissenting.—Jurisdiction over the fares, or tolls, of the railway company's autobus system is vested in the province. Such jurisdiction has not been transferred to the Dominion under Dominion Acts and should be exercised by the Quebec Public Service Board. *Per* Rinfret J. and Kerwin J.: A Dominion Act of 1895 declared the "undertaking of the (railway) company * * * a work for the general advantage of Canada" and thus brought the company under the legislative authority of the Parliament of Canada *(Quebec R. L. & P. Co.* v. *Montcalm Land Co.* [1927] S.C.R. 545). The word "undertaking" as used in the statute comprises the whole of the works of the company, not only the works existing in 1895 but all its future enterprises. The auto busses owned and operated by the company fall within the meaning of the term "works" in head 10 *(c)* of section 92 B.N.A. Act and, therefore, can properly be brought and integrated into the "undertaking". *Per* Rand J.: The steam railway and the tramway

CONSTITUTIONAL LAW—*Continued*

system of the company are both within the legislative jurisdiction of the Dominion *(Montcalm Land Co.'s* case, *supra).* The works of the company are, in the jurisdictional aspect, to be considered as if they had been specifically set forth in section 91 (29) of the B.N.A. Act. The federal legislation of 1939, adding the power to operate auto busses is within the scope of the legislative field appropriate to the subject matter of the declaration in the Dominion Act of 1895. It cannot be denied to such an undertaking modifications in operational means and methods designed more efficiently to carry out its original and essential purposes. The controlling fact is that the identity of the works is presented: they remain in substance the works of transportation dealt with by the declaration. *Per* Rinfret, Kerwin and Rand JJ.: The proviso of the amending federal Act of 1939 whereby the power to operate auto busses "subject to all provincial and municipal enactments" was conferred, does not give to the provincial Board jurisdiction to deal with the fares and tolls to be charged by the company. Such proviso made autobus service amenable to provincial laws for certain purposes, e.g. the right to license and regulate traffic, but the exclusive field of the Dominion as to regulation of rates is unaffected by that Act. *Per* Davis J. (dissenting): The generality of the language of the sub-section (2) added by the Dominion Act of 1939, imposing a condition on the grant of the power to operate auto busses, is sufficient to involve the regulation and control by the province of the motor busses on the municipal and provincial highways of the province, and the fixing of fares or tolls, for uniformity or otherwise, by a provincial board comes within the condition, upon a proper construction of the subsection. *Per* Hudson J. (dissenting): The declaration contained in the Dominion Act of 1895 does not, and never was intended by Parliament to, extend to the operation of auto busses on the highways, either in respect of the regulations of rates or otherwise. QUEBEC RAILWAY LIGHT & POWER CO. v. THE TOWN OF BEAUPORT; THE TOWN OF BEAUPORT v. QUEBEC RAILWAY LIGHT & POWER CO..... **16**

2.——*Foreshore—Public harbour—Dispute between Dominion and Province as to ownership—Provincial order in council recognizing Dominion's right—Power to pass—Validity of—Whether authorizing legislation necessary—Admission of fact contained in order in council—"Public Harbour" in B.N.A. Act—Whether Coal Harbour a "public harbour"—Transfer of Crown land by Province to Dominion—Residuum of royal prerogative—Crown grant of land "with appurtenances"—Land or foreshore not included in—Prescription—Nullum Tempus Act—Riparian rights—Erection of building and making of fill on foreshore—Whether mesne profits due the*

CONSTITUTIONAL LAW—*Continued*

Crown.—The Attorney General of Canada, on behalf of the Dominion Crown, sued to recover possession (and mesne profits) of the foreshore of a lot fronting on an indentation of Burrard Inlet, known as Coal Harbour, in British Columbia. The action was maintained by the trial judge; but that judgment was reversed by a majority of the Court of Appeal. *Held* that the judgment appealed from ([1944] 1 W.W.R. 615) should be set aside and that the judgment at the trial, declaring the ownership and right of possession of the foreshore to be in the appellant and that the respondents were liable for mesne profits to the Crown, should be restored. Controversy over harbours in British Columbia and disputes as to the ownership of the foreshores, as between the Dominion and the Province, were resolved in 1924 by a provincial order in council (a reciprocal Dominion order in council being also passed in practically identical terms) made without legislative authority or ratification, whereby it was agreed that six harbours therein mentioned, including Burrard Inlet, were declared to be public harbours within the meaning of schedule 3 of the B.N.A. Act, that they became the property of Canada thereunder and that the Province transferred to the Dominion any interest which it might have in the foreshores of these six harbours. The appellant contended that the executive authority of the Province had power to pass the order in council, while the respondents argued that it was lacking in legislative authority or statutory ratification. *Held*, per the Chief Justice and Kerwin, Hudson and Taschereau JJ., that the Provincial order in council must be held as valid to the extent that it contains an unequivocal admission of fact that every piece of foreshore in every part of Burrard Inlet was at the relevant time used for public harbour purposes and thus became the property of the Dominion. There is nothing to prevent the Executive of the Province to make such admission. *Tweedie* v. *The King* (52 Can. S.C.R. 197) ref. *Per* the Chief Justice and Taschereau J.: The Provincial order in council, moreover, contained a valid recognition from the Province to the Dominion of the latter's jurisdiction over Burrard Inlet including Coal Harbour and its foreshore. *Per* Rand J.: The Provincial executive cannot transfer "property" of the Province, without legislative sanction, to another executive and legislative administration. The provincial function is exercised under provincial legislative control and that authority, in the absence of legislation, cannot extend to an act merely of transferring its own proper subject-matter to another executive: it would rather be a surrender than an exercise of function. But, where the situation of fact is, in the opinion of the government concerned, one of doubt and uncertainty, it lies within the authority of the provincial executive to give formal

CONSTITUTIONAL LAW—*Continued*

binding recognition to a claim asserted by the Dominion. The effect of the order in council is therefore limited to an agreement or acknowledgment of boundary at high water, and, as between the two jurisdictions, such an acknowledgment concludes the question. But as to private rights different considerations arise; and in some cases, a third person remains entitled to contest the fact of Crown right ownership. The respondents may be entitled to advance their claim on the footing of the fact as found in the action, but they are entitled to no more; and where, in such case, they fail to establish a prescriptive right against either the Province or the Dominion, as here, they fail likewise in an answer to the claim of the appellant. *Per* the Chief Justice and Taschereau J.: The orders in council, either from the Dominion or the Province, may not be lacking in legislative authority or ratification in view of certain statutory enactments referred to by the appellant; but, even if they were, these orders in council were Acts of the highest authority and they were acted upon by both parties to them for more than seventeen years when this action was instituted. They constitute, as already stated, an unequivocal admission that these harbours became the property of the Dominion, not only at the date of the orders in council, but also in 1871 at the time when British Columbia entered Confederation. *Per* the Chief Justice and Taschereau J.: The orders in council may also be upheld as valid, because both Governments, in acting as they did, were exercising powers which are part of the residual prerogative of the Crown, or because the transfer from one Government to another is not appropriately effected by ordinary conveyance: His Majesty the King does not convey to himself.—If, however, it had to be assumed that the orders in council were invalid without legislative approval, it should be pointed out that "The Land Act" of British Columbia imposed no restrictions on a transfer from the Province to the Dominion —When the Crown in right of the Province transfers land to the Crown in right of the Dominion, there is no real conveyance of property, since His Majesty The King remains the owner in either case and, therefore, it is only the administration of the property which passes from the control of the Executive of the Province to the Executive of the Dominion. *Per* the Chief Justice and Taschereau J.: Coal Harbour was part of a "public harbour" in 1871 and, as such, it came under the jurisdiction of the Federal Government. The particular spot of the foreshore, in this case, is within the ambit of the harbour and forms a part of it. The trial judge so found, and that finding, coupled with that made by Duff J. in 1904 *(Atty. Gen. for B.C.* v. *C.P.R. Co.* 11 B.C.R. 289 at 291) should be given preference over the decision of the Court of

CONSTITUTIONAL LAW—*Continued*

Appeal. *Per* Kerwin and Hudson JJ.: Upon the evidence alone, it cannot be found that the foreshore in question formed part of that public harbour, were it not for the two orders in council. In the *Canadian Pacific Railway* case *(supra)*, it is apparent that the question of fact was confined to the particular piece of foreshore there in question. The respondents also contended that, even if the order in council was effective without legislative approval, it was nevertheless subject to a prior grant from the Crown provincial to the respondents' predecessors in title, that the grant was of an upland lot "with appurtenances" and that, these words being ambiguous, the intention of the Crown must have been to pass title to the foreshore. *Held* that the foreshore did not pass to the respondents under the grant. The language of the description in the grant is clear and the intent unambiguous. There was no express grant of the foreshore and it is not to be implied. Standing alone, the word "appurtenances" does not include land: land cannot be appurtenant to land. *Held* also that the respondents have not discharged the onus of establishing acquisitions of the foreshore by prescription. The evidence is not sufficient under the *Nullum Tempus Act* (9 Geo. III, c. 16) to establish that the respondents and their predecessors in title have had such possession of the foreshore as is sufficient to oust the title of the Crown. *Held* that this Court does not concur in the holding of the trial judge, that the respondents "have never had any riparian rights over the said land arising out of their title to (their) lot or otherwise". *Held*, per the Chief Justice and Kerwin, Hudson and Taschereau JJ.: The erection by the respondents of a substantial structure and the making of a fill on part of the foreshore adjoining their lot cannot be justified as the exercise of riparian rights arising out of their title. The respondents are therefore liable for mesne profits to the Crown appellant. *Per* Kerwin, Hudson and Rand JJ.: It cannot be inferred from what was shown that by their acts the respondents intended to surrender rights attaching to their upland property. *Per* Rand J.: In the circumstances, the appellant is entitled to mesne profits if any can be shown; but they must be profits arising beyond that use of the foreshore which may be found to be within the exercise of riparian privileges. ATTORNEY GENERAL OF CANADA v. HIGBIE ET AL. AND (INTERVENER) ATTORNEY GENERAL FOR BRITISH COLUMBIA..... **385**

3.——*Criminal law—Habeas corpus—Conviction of applicant under Criminal Code—Application for habeas corpus granted by a judge of British Columbia—Appeal by Attorney General to Appeal Court—Jurisdiction to hear appeal—Appeal Court reversing judgment and ordering re-arrest—Provisions of section 6 of Appeal Court Act of B.C. granting right to appeal—Inoperative if applicant convicted for a criminal offence under Criminal Code—Exclusive jurisdiction of Federal Government to authorize such appeal—B.N.A. Act, sections 91 (27) and 92 (13).*—The provisions of section 6 of the *Court of Appeal Act* of British Columbia (R.S.B.C. 1936, c. 57), granting a right to appeal to the Court of Appeal in a *habeas corpus* matter are inoperative, if the applicant for that writ is detained in custody by virtue of a conviction for a criminal offence under the Criminal Code.—The Chief Justice dissenting. The Dominion Parliament has exclusive jurisdiction to authorize such an appeal under section 91 (27) of the *British North America Act, 1867* ("Criminal law * * *, including the Procedure in Criminal Matters"); and a Provincial Legislature has no such power under section 92 (13) of that Act ("Property and Civil Rights in the Province").—The Chief Justice dissenting. *In re* STORGOFF... **526**

4.——*Fees on proceedings before Justices under Part XV of the Criminal Code—Tariff enacted by section 770 Cr. C.—Validity—Intra vires—Ancillary power of the Dominion—Fees also payable under tariff enacted by provincial Act—B.N.A. Act, sections 91 (27), 92 (2) (14), 101—Criminal Code, sections 735, 736, 770, 1134—Officers of Justice Salary Act, R.S.Q., 1941, c. 24, s. 10.*—Section 770 of the Criminal Code (Part XV) enacts that "The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices under this Part". There exists also a provincial tariff providing for payment by litigants, before the inferior courts of criminal jurisdiction, for services by officers of justice, which is higher than the tariff provided for in the above section. The Superior Court declared section 770 to be in certain respects *ultra vires*. The appellate court reversed that decision; but gave leave to the Attorney General of Quebec to appeal to this Court. *Held* that the appeal should be dismissed. *Per* the Chief Justice and Taschereau J.: Section 770 Cr. C., although not being strictly legislation in relation to criminal law and procedure (section 92 (27) B.N.A. Act), is nevertheless within the competence of the Dominion of Canada, on account of its incidence upon criminal law and procedure; and, in such a case, the field being occupied, the provincial legislation becomes inoperative. *Per* Kerwin, Hudson and Estey JJ.: The provisions enacted by section 770 Cr. C. are necessarily incidental to the power to legislate upon criminal law and procedure under section 91 (27) of the B.N.A. Act.—Even if the fixing of the fees to be taken by officers of provincial courts, constituted and organized under section 92 (14) of the B.N.A. Act, may be said to be "Constitution, Maintenance and Organization", criminal law and procedure in criminal matters would be affected very seriously if the Dominion did not have the

CONSTITUTIONAL LAW—*Concluded*
power to provide the maximum fees that could be taken in criminal matters by provincially appointed officers and by witnesses. *Held*, also, that the terms of section 770 Cr. C. are of general application. The section is an imperative direction that no other fees shall be demanded or accepted; and its terms should not be restricted to the case where the unsuccessful party has to pay costs to the other, as the result of an acquittal or conviction (sections 735 and 736 Cr. C.). Judgment of the appellate court (Q.R. [1945] K.B. 77) affirmed. ATTORNEY GENERAL OF QUEBEC v. ATTORNEY GENERAL OF CANADA..... **600**

CONTRACT—*Agreement called "lease"—Enjoyment of water power rights and immoveables appurtenant thereto—Action for unpaid "rental" instalments—Renewal periods of 21 years—Same stipulated "for ever"—Validity of agreement during current period—Whether agreement a "lease" in perpetuity—Such lease not contrary to law of Quebec—Resolutory condition in the agreement—Crown entitled to claim back power rights—Whether agreement contrary to public order—Validity of the agreement during current period—Agreement not illegal, and, if illegal, merely voidable—Articles 990, 1593, et seq., 1601, 1608, 1609, 1657, 1660 C.C.*—In an agreement, called a "lease", entered into in 1876, respecting certain water power rights in the Lachine canal forming a part of the public domain together with the immoveable appurtenant thereto, situated in the city of Montreal, it was stipulated that "at the expiration of said term of twenty-one years, from the first day of March, 1851, the period for the termination of the present lease, and at such subsequent period of twenty-one years thereafter forever, the parties of the first part shall grant, and the parties of the second part shall take, a renewal of these presents * * * save and excepting only the amount of the yearly rent herein stated" for such subsequent period of 21 years, it being provided that, should the Crown at such period, increase the amount of the rent, the rent to be paid would be increased in the same ratio. It was also provided that the agreement could be resiliated at any time by the Crown, in case the latter would require the water power, or any part thereof, for public purposes. Pursuant to deeds of transfer, the respondent now stands, in respect of the deed, in the place and stead of the parties of the first part and the appellant in the place and stead of the parties of the second part. The current twenty-one year period or renewal, having started on the first day of March, 1935, would thus expire in 1956. The respondent brought an action against the appellant for $2,000, representing five unpaid "rental" instalments of $400 each, which became due and payable respectively on July 1st, 1939 to July 1st, 1941, both inclusive. The trial judge held that the

CONTRACT—*Continued*
agreement was a lease in perpetuity of property, and, as such, contrary to the law of Quebec, against public policy, and, therefore, void and of no effect *ab initio;* but, as the appellant had been in peaceable possession of the property and water rights for a period of time, he granted to the respondent a sum of $1,066.66 as representing the reasonable value for that use and occupation. On appeal, the judgment of the trial judge was reversed. The defendant company appealed to this Court. *Held*, affirming the judgment appealed from (Q.R. [1944] K.B. 305) that the agreement was a valid subsisting one for the current period of 21 years at the time of the institution of the respondent's action and that the action should be maintained for the full amount of $2,000 claimed by it. *Per* The Chief Justice and Kerwin, Taschereau and Estey JJ.: The agreement is not contrary to public order nor prohibited by law. Assuming it to be illegal on account of being made in perpetuity, it would then be merely voidable, remaining in existence until annulled by a judgment of a court of justice; and it would be difficult for the appellant to succeed on that ground in view of the absence in its plea of any conclusions for annulment. But the agreement is not illegal. A lease, or demise, of property in perpetuity is not contrary to the law of Quebec; perpetuity of consideration is acknowledged by the Civil Code and no text makes it contrary to public order or illegal; in fact, several grants recognized by the code are perpetual. The nullity of the agreement, therefore, does not arise in this case. Moreover, were there a question of perpetuity, the existence in the agreement of a resolutory condition, resulting from the intervention of the Crown in claiming back the power rights for public purposes, would be sufficient to eliminate any doubt as to the validity of the agreement in that respect. Finally, as a result of their own free will, the parties have renewed their agreement until 1956, and the agreement continues to govern their relations, duties, obligations and rights, at least until the expiration of that period. *Per* Rand J.: Whether the agreement is considered as *bail à rente, louage* or *contrat innommé*, it was at least within a *de facto* term of twenty-one years when the rent for which the action was brought accrued. CONSUMERS CORDAGE CO. LTD. v. ST. GABRIEL LAND & HYDRAULIC CO. LTD. **158**

2.——*Alleged negligence in performance—Removal of equipment in kitchen of hotel—Oxy-acetylene torch used to cut ducts—Fire breaking out, damaging the hotel—Liability for the damage—Effect on liability of change made, at wish of hotel manager, in proposed place of cutting the ducts during the work.*—Appellant agreed to deliver and erect certain cooking equipment in the kitchen of respondent's hotel and for that purpose to remove a range and canopy. To remove the

CONTRACT—*Continued*

canopy it was necessary to sever two ducts leading therefrom to a main duct, and appellant's man in charge of the work engaged a workman to do the cutting with an oxy-acetylene torch. It was intended to cut the two ducts near the canopy, but respondent's hotel manager expressed his with that, for the sake of appearance, they be cut near the main duct (which involved no more labour) and appellant's man in charge agreed that this be done. The hotel manager then left the kitchen. While the workman was using the torch, oil and grease which had accumulated in the main duct caught fire, resulting in a fire which damaged the hotel. *Held*, affirming judgment of the Court of Appeal for Ontario, [1944] O.R. 273, that appellant was liable to respondent in damages. *Per* the Chief Justice and Kerwin and Rand JJ.: In the circumstances in which the work was carried out, the cutting was done and intended to be done as in performance of the contract; and whether or not it was at a point originally not strictly within the contract, there was sufficient doubt as to what was intended to render the acquiescence in the hotel manager's suggestion a specification of the precise point of severance. But even if the parties had looked upon it as a modification of the bargain, appellant's representative treated the act as performance under the contract, and must be taken to have had the implied authority of appellant to modify such an insignificant detail of performance, while keeping within the general scope of the work, having regard to appellant's interest in a satisfied customer. *Per* Taschereau and Estey JJ.: The arrangement that the ducts be cut at the place desired by respondent's hotel manager was not a variation, alteration, or something outside, of the contract. It was rather an item within the terms of the contract which came up necessarily and incidentally during the course of the work. It was an "arrangement as to the mode of performing" the original contract. Those acting for appellant in doing the work must be treated as experts; and while the hotel manager may have been the only one present at the work who knew when the main or any duct had been cleaned, he was not asked about it, and there was no evidence that he had knowledge of the risk, and proof of his having such knowledge was upon appellant. The duty was upon appellant to take reasonabes precautions against injury to the premisln and respondent was entitled to rely upoe appellant doing so. (*The Nautilus Steamship Co. Ltd.* v. *David and William Henderson & Co. Ltd.*, 1919 Sess., Cas. 605, and other cases, cited.) AGA HEAT (CANADA) LTD. v. BROCKVILLE HOTEL CO. LTD.. **184**

3.——*Lease with promise of sale—Farm land—Rent when fully paid to be deemed sale price—Lessor then to execute deed of sale with warranty of clear title—Loan guaranteed by hypothec—Payment of loan spread over a period of 25 years—Offer by lessee of balance due under lease—Lessor requested to give title—Refusal by lessor owing to existence of hypothec—Special clause in the agreement—Whether lessor bound to pay balance due on hypothec or lessee obliged to wait until last payment due on hypothec before obtaining title—Articles 1021, 1091, 1493, 1535 C.C.*— The respondent, in July, 1943, entered into an agreement, a lease with promise of sale, whereby he took possession of a farm land belonging to the appellant, including buildings, stock and equipment. The rent was fixed at $13,000, $6,500 to be paid in cash at the signing of the agreement and the balance payable by annual instalments of at least $500, with privilege of pre-payment. The agreement also stipulated that, when the rent had been fully paid, it was to be deemed the sale price and then the appellant bound himself to execute in favour of the respondent a deed of sale of the property *(un bon contrat de vente)* with warranty of clear title *(avec guarantie de titres clairs)*. The farm was one of two parcels of land formerly owned by the appellant, on both of which there had been placed by him in 1936 a hypothec for $4,000 in favour of the Agricultural Loan Commission, and the payment of that loan was spread over a period of twenty-five years. The appellant had in 1938 sold the other parcel to his son who had assumed the entire hypothecary debt and bound himself to his father to pay it. A special clause of the agreement, upon whose interpretation rests the decision of this case, stipulated *inter alia* that the respondent would not be obliged to pay the balance of the purchase price to the appellant as long as the hypothec due to the Commission would not have been paid by the appellant's son or by the appellant, the latter binding himself to request *(devant faire demande)* the Commission to consent to give a discharge *(main-levée)* of the hypothec and to retain its privilege only on the parcel owned by the son; and, in case of refusal by the Commission, the respondent then would be allowed *(pourra)* to retain in his hands an amount of the annual payments equal to the balance then due on the hypothec. A further payment of $1,500 having been made, the respondent on the 11th of March, 1944 offered to the appellant the sum of $5,163.92 being the balance in capital and accrued interest and called upon him to execute an appropriate deed of sale; but the appellant refused. The respondent then brought an action against the appellant asking that he be condemned to sign such deed and, in default thereof, that the judgment to be rendered serve as title. The appellant, in his plea, submitted that he was not able to give clear title to the respondent owing to the hypothec of the Commission which, he alleged, it was agreed the appellant would not be obliged to pay and contended that all the respondent could do,

CONTRACT—*Continued*
as long as that hypothec existed, was to retain into his hands an amount of instalments equal to the amount of the unpaid portion of the hypothec. The respondent replied that the appellant has always been able to give discharge of the hypothec by paying the Commission a sum of $464.52, which the Commission declared in writing it was ready to accept. The respondent's action was dismissed by the Superior Court; but that judgment was reversed by a majority of the appellate court. *Held*, affirming the judgment appealed from, Rand J. dissenting, that the respondent's action should be maintained. The stipulations contained in the special clause were exclusively for the benefit of the respondent and for his own protection, so as to allow him to suspend the annual instalments due by him until the property would be cleared of the Commission's hypothec; the respondent was the only party having the right to invoke that clause, but he was not bound to take advantage of it. There was nothing in the agreement to show that the respondent should wait until the last payment due to the Commission would be made before being able to obtain a title; while, on the other hand, there was nothing to lessen the obligation of the appellant to execute a deed of sale with warranty of clear title as soon as the respondent would have paid the full amount due by him. Moreover, as a fact, the Agricultural Loan Commission had no objection to give a discharge of its hypothec and had declared it was ready to do so on payment of a sum of $464.52. The appellant had only to pay that amount in order to get a main-levée and he was bound to do it. *Per* Rand J. dissenting.—The appellant, during such time as the obligation to the Commission was being performed according to its terms, was to be protected under the terms of the special clause against being called on to pay any of the moneys owing under it. The language of that clause necessarily imports the following interpretation: on the land there is a hypothec which must run according to the terms of the obligation of a third party unless the hypothecary creditor will voluntarily release it; in case he refuses, the completion of the agreement must await the performance of that obligation according to its terms; in that event, the respondent will pay interest on the balance of the rent—a significant provision—but since the appellant cannot give title before the maturity of the obligation; he can neither compel the payment of that balance nor be compelled to accept it as performance by the respondent entitling him to demand the contract of sale during that period of suspension. BREAULT v. TREMBLAY..... 217

4.——*Construction—Alleged breach—Whether contract ambiguous—Extrinsic evidence—Conduct of parties—Party not replying to letters from other party which assumed rights consistent with latter's contention as to effect of the contract.*—The action was for damages for alleged breach of agreement. Plaintiff had long been a customer of defendants, a firm of brokers. At the time of the agreement in question defendants had been carrying on account in plaintiff's name on which there was a debit balance of $180.11, but in respect of which they held 500 shares of a mining stock owned by plaintiff. They had also been carrying an account in the name of W., who, though she might herself instruct defendants, had authorized them to accept instructions from plaintiff on her behalf. In W.'s account there was an unsecured debit balance of $687.40, for payment of which defendants were pressing. Defendants held from each of them a "customer's card" authorizing defendants to sell securities without notice whenever they deemed that necessary for their own protection. On May 18, 1940, plaintiff addressed to defendants a document as follows: "This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of [W.]. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of [W.] without my instructions and consent, and that no further obligation be presumed against me in any way whatever". Defendants transferred plaintiff's account (including the debit balance against plaintiff and said shares) into the account of W. At that time the market value of the shares was approximately equal to the said debit balances now consolidated. The market price of said shares declined. On May 30, 1940, defendants wrote to plaintiff that at the then market price of the shares W.'s account showed a certain deficit and "no doubt you will wish to adjust this, as well as supply some margin for" the shares. On June 18, 1940, defendants wrote to plaintiff: "We have for some time now been carrying a deficit in the account of [W.] which was occasioned by your request to not sell the [said shares] which you gave to the [W.] account. Had we sold it at the time you deposited this stock as collateral to the account there would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately if there is to be no further action taken in this regard". On July 19, 1940, defendants wrote notifying W. that as she had not responded to their margin calls, they would handle the liquidation of said shares at their absolute discretion, looking to her for any remaining deficit. Plaintiff received said letters to him, and a copy of said letter to W.; but made no reply. On July 27, 1940, defendants sold the shares. Plaintiff was notified of this, and wrote to defendants protesting against the sale as being contrary to the agreement expressed in said document of May 18, and asked defendants to replace the shares into the W. account. In May, 1941, he sued

CONTRACT—*Continued*

defendants for damages. His action was dismissed at trial and the dismissal was affirmed (by a majority) by the Court of Appeal for Ontario, and he appealed to this Court. *Held* (affirming the judgments below): The action should be dismissed. Rand J. dissented. *Per* Kerwin and Taschereau JJ.: The provision against further "alterations or dealings", in said document of May 18, meant that plaintiff desired to protect himself against the possibility of W. indulging in future trading. On the only reasonable construction of the document, defendants were entitled at any time to sell the shares under their general powers under said "customer's card" signed by W. *Per* Kellock J.: When said document of May 18 is brought into relation with the circumstances existing at its date, an ambiguity is produced as to whether the sale by defendants was or was not a violation of its terms. In such case extrinsic evidence was admissible for solving such ambiguity; and did so in defendants' favour: the reasonable inference from plaintiff's failure to reply to defendants' said letters between May 18 and July 27 is that plaintiff put the same construction upon the document of May 18 as he knew they were putting upon it. *Per* Estey J.: The effect of the agreement made by said document of May 18 and its acceptance, in the light of the facts and circumstances in evidence, was that thereafter all dealings on the account would be by plaintiff only, acting under his authority from W.; that the shares were held as security for the total of both debit balances, and were subject to the terms of the "customer's card" signed by W., and could be sold as they were sold by defendants. If the document of May 18 be regarded as ambiguous, as it might well be, the subsequent conduct of the parties might be examined to assist in construing it; and in the light of defendants' said letters, which indicated their belief in their right to sell, and the ignoring of them by plaintiff, the effect of said document of May 18 and its acceptance must be taken to be as above stated. *Per* Rand J., dissenting: On the proper construction of said document of May 18, the account of W., after plaintiff's account, including the security, was transferred to it, was in its entirety to remain as it was; the prohibition against "further alterations or dealings" extended not only to action by W. but to action by defendants in relation to the security. As to defendants' said letters to plaintiff: that of May 30 contains no reference to sale without consent; that of June 18, written from defendants' head office in Toronto whereas plaintiff's dealings had been with their branch office at Windsor, was evidently, from circumstances appearing in the evidence, written merely on the assumption of a case of ordinary collateral and the usual power of sale, and was not intended to indicate an interpretation of the document of May 18; also, to consider such

CONTRACT—*Concluded*

communications as raising an obligation to reply on pain of an adverse inference is, in the particular situation, a perversion of the rule by which conduct may be shown; the rule that conduct in performance of a contract participated in by both parties may be used to resolve ambiguity, can have no application to the facts here. There was an "alteration" and "dealing" by defendants in violation of the agreement, and plaintiff was entitled to damages. (Rules and considerations in determining damages in such a case, and with regard to the position and conduct of the parties, discussed. Plaintiff should have judgment for the value of the shares at the time of trial plus the amount of a dividend paid on the shares, less the total indebtedness of the W. account with interest thereon). HOEFLE v. BONGARD & COMPANY..... **360**

5.——*Whether such delay in performance as to warrant repudiation—Measure and computation of damages for breach—Reference back for reassessment.* W. A. BECHTEL CO. ET AL. v. STEVENSON & VAN HUMBECK SAWMILL ET AL..... **652**

6.——*Finding of contract on the evidence—Contract to sell all fuel wood produced at mill—No stipulation in contract as to its duration—Lack of reasonable notice of termination—Contract wrongfully determined—Damages.* MISSION SAWMILLS LTD. v. GILL BROTHERS..... **766**

7.——*See* ASSESSMENT AND TAXATION 2; MOTOR VEHICLES 1; STREET RAILWAYS 1.

CONTRIBUTION.

See NEGLIGENCE 2.

COSTS—*Trustees—Executors—direction in will that fund be set apart for benefit of testator's daughter—Executors and trustees of the will also trustees of the fund—Unsuccessful action by daughter against the executors and trustees with regard to the fund as set up—Question out of what fund (said fund or the residuary estate, or both) the solicitor and client costs incurred by the executors and trustees in said action (to the extent that they exceeded the party and party costs) should be paid.*—By his will, T., who died in 1929, appointed his two sons and a trust company to be executors and trustees and gave to them all his estate upon trusts, one trust being to set apart for the benefit of his daughter, L., the sum of $100,000, revenue from which was to be paid to her during her life (should she become a widow she was to receive the corpus). The residue of the estate was to go to T.'s two sons. In 1937, L. brought action against said executors and trustees, as such and also personally, complaining of the inclusion, in a partial setting up of said trust fund in 1929, of a certain mortgage. She asked *(inter alia)* for relief with regard to the inclusion of that

COSTS—*Continued*

mortgage; that an agreement made in 1931, which was in the nature of a family settlement in regard to matters in dispute, and which contained an approval by her of said partial setting up of the fund, be set aside; damages against the executors and trustees personally; and their removal as trustees of said trust fund and the appointment of new trustees. She was unsuccessful in that action. The question now in issue was, out of what fund the solicitor and client costs incurred by the executors and trustees in that action (to the extent that the same exceeded their party and party costs) should be paid. Barlow J. held ([1944 O.R. 31) that they should be paid out of the capital of the said trust fund. The Court of Appeal for Ontario held ([1944] O.R. 290) that they should be paid out of the capital of the residuary estate. The question was brought to this Court. *Held* (the Chief Justice and Kerwin J. dissenting): The solicitor and client costs in question should be spread over the capital of the estate, including said trust fund; and should be paid out of the trust fund and the residuary estate proportionately according to their respective values. *Per* Hudson J.: It was essential to the success of L.'s action that said agreement of 1931 should be set aside. The Court is now entitled to assume that that agreement served the best interests of all parties, and was not disadvantageous to the trust fund set up especially for L.'s benefit. Under all the circumstances, the executors and trustees were justified in defending the action on behalf of both funds (said trust fund and the residuary estate) as well as on their own behalf. *Per* Rand and Estey JJ.: The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee had acted prudently and properly. If the acts of the executors and trustees challenged in said action were properly done within their duty, they were entitled to indemnity for the costs in question within that general principle, without the need of a finding that, in addition to propriety, there was a benefit to the fund as against what was alleged ought to have been done. The indemnity should extend to their whole costs incurred, as their defence personally was merely incidental to that in their representative capacity. *Per* the Chief Justice and Kerwin J., dissenting: The solicitor and client costs in question should be paid out of the capital of the residue of the estate. In said action, though the executors and trustees were made defendants both as executors and trustees of the will and as trustees of the fund, any claim set up against them as trustees of the fund should be considered as negligible. If the action

COSTS—*Concluded*

had succeeded, the residue of the estate would have been adversely affected; and the defence was really taken to protect that residue. The principle which determines when liability lies for costs incurred by trustees applies to determine where such liability lies; and an estate which derives the benefit from a defence by trustees ought to bear the expense incurred by it; it would be inequitable to impose the expense of litigation, conducted for the benefit of one estate or fund, upon another. THOMPSON ET AL. v. LAMPORT ET AL. **343**

2.——*Of action in warranty* **669**
See ASSESSMENT AND TAXATION 3.

3.——*See* CONSTITUTIONAL LAW 4.

CRIMINAL LAW—*Possession by night of implements of housebreaking—Ordinary tools of the accused's trade as truck driver—Proof of unlawful purpose—Lawful excuse—Onus of proof—Evidence—Sufficiency—Criminal Code, section 464a.*—The appellant, a truck driver, was charged with having been found in possession by night, without lawful excuse, of instruments of housebreaking, contrary to section 464a of the Criminal Code and was convicted before a judge of the County Court. The trial judge found that some of the instruments, but not all of them, were tools a truck driver might use in his trade, while all of the instruments so found were capable of being used for purposes of housebreaking. But he further stated that he was satisfied, in all the surrounding circumstances established in evidence, that at that particular time and place the tools were not in the appellant's possession for an innocent purpose, and, "on the whole of the evidence", he found the appellant guilty. The conviction was affirmed by a majority of the Court of Appeal. The dissenting judge was of the opinion that the trial judge failed to apply the principle in *Rex* v. *Ward* (85 L.J.K.B. 483), where it was held that the accused had *prima facie* satisfied the onus cast upon him of proving that he had a lawful excuse for his possession of the tools and that the onus was then cast upon the prosecution of proving affirmatively that the accused had no lawful excuse for being in possession of the tools at that particular time and place. *Held*, Kellock J. dissenting, that, in the circumstances of this case and upon the evidence, the trial judge was legally warranted in drawing the conclusions he arrived at. The decision in *Rex* v. *Ward (supra)* does not apply. In that case, the trial judge had directed the jury that it was for the accused to establish to their entire satisfaction that his possession of the implements was lawful; while the Court of Criminal Appeal held that the jury had not been properly directed with regard to the onus of proof. In the present case the trial judge was sitting alone

without a jury; it was not necessary for him to expound the law and then verbally apply it to the facts in giving his reasons for judgment; and it should be sufficient if it appears he was alive to the law and that he properly charged himself when reaching his finding upon the evidence. Moreover, the findings alone would be sufficient to take this case out of the application of the *Ward* case. *Per* Kellock J. dissenting: The trial judge did not properly direct himself as to the law applicable as laid down in the *Ward* case. Therefore, the question for decision is as to whether or not he must "inevitably" have come to a conclusion of the guilt of the accused on the evidence, notwithstanding such misdirection; and this must depend upon whether the Crown discharged the onus of establishing beyond reasonable doubt that the accused had possession with guilty intent. The circumstances disclosed in evidence upon which the Crown can rely are not sufficient to make the result, that the accused was guilty, inevitable. There should be a new trial. MIHALCHAN v. THE KING 9

2.——*Charge of rape—Evidence—Corroboration—Charge to jury—Misdirection—New trial.*—The appeal was from the judgment of the Court of Appeal for Ontario (81 C.C.C. 319) dismissing (Laidlaw J.A. dissenting) appellant's appeal from his conviction on a charge of rape. The issue at the trial was whether or not the complainant voluntarily consented to the intercourse. A witness, R., who had arrived at the scene of the alleged offence shortly after what took place, testified to there being a "matted down" area of about 20 x 6 feet. The complainant in her evidence had said nothing about such condition. Appellant testified that such condition existed before what took place. In charging the jury the trial Judge said that the evidence of R. and two other men corroborated the complainant's story in regard to some of the material aspects thereof and he followed by detailing certain matters of their evidence, including the condition of the area as described by R. *Held* (Taschereau and Kellock JJ. dissenting): The conviction should be quashed and a new trial directed. *Per* the Chief Justice and Kerwin J.: It was not necessary that the complainant should have given some particular bit of evidence before an independent witness upon that point could corroborate her general story on the issue of consent. As part of the Crown's case, it was quite proper to show the condition of the particular area when R. arrived, and the jury would not be bound to believe appellant's evidence as to its condition before the occurrence. But it was misdirection to say that evidence of the matted down condition of the area after the occurrence could constitute corroboration of a material aspect of the complainant's story as to which she had not testified. And it could not be said that the misdirection had caused no miscarriage of justice. *Per* Rand J.: It was beyond controversy on the evidence that the state of the surface of the area could not have furnished the slightest corroboration to the complainant's story or to the case of the Crown. The charge to the jury was, therefore, in that respect, a misdirection in law and of such a nature that it could not be said that it might not have influenced the jury in reaching their verdict. *Per* Taschereau and Kellock JJ. (dissenting): The reference in question in the charge to the condition of the area, having regard to its context, related, not to any supposed statement of the complainant as to the condition of the area which was corroborated by R., but to a reference earlier in the charge to the complainant's evidence as to the nature of the alleged assault, and would be so understood by the jury; and R.'s evidence as to the condition of the area was consistent with, and could properly be regarded as corroborative of, the complainant's evidence with respect to the struggle alleged by her to have taken place, unless it were clearly established as a matter of fact that the struggle described by her was of such a limited character that it could not have been the cause of an area of the extent described by R., and on that question the jury, if accepting complainant's evidence that she did not consent and was attacked, and giving due weight to the circumstances, might well have considered that no difficulty arose, and that was a question of fact, expressly left as such to, and entirely one for, the jury. There was really no question of law involved in the dissent in the Court of Appeal, but merely matters of fact, and therefore the appeal should be quashed. MCINTYRE v. THE KING 134

3.——*Child drowned in oil well—Charge against owner of failing to guard the well adequately—Criminal Code, ss. 247, 284, 287 (b)—Child a trespasser—Duty and responsibility of owner of well.*—The appeal was from the conviction of appellant by the Appellate Division, Alberta, [1944] 2 W.W.R. 503 (which set aside the judgment of acquittal at trial), under ss. 247, 284 and 287 *(b)* of the *Criminal Code*, of failing to guard adequately the cellar of an oil well of appellant, in consequence whereof a child of tender years was drowned therein. The well was not, and for some time had not been, in use, and there had been erected a structure around and over it as a guard against danger. The child, in company with other children, had climbed on the structure and in walking along was accidentally pushed off by an older boy into the water below. *Held:* The appeal should be allowed and the judgment of acquittal at trial restored. *Per* the Chief Justice and Rand J.: Secs. 247 and 284 embody the common law rule and, under them, apart from s. 287, appellant could not in the circumstances be held criminally responsible for the accident.

The child was a trespasser. Children were not tolerated about the well, there was no practice of playing there, and on the occasions when a few played there, they were, if seen, warned off by the owner's employees, chiefly because of danger from gas and fire and the pressure in the pipes. There was no object of fascination alluring children nor active conduct by the owner in disregard of children's known or necessarily apprehended presence. In such circumstances the rule at common law that (with certain exceptions not present here) an owner of land is entitled to do with it what he pleases, and that trespassers move at their own risk and peril, is as applicable to children as to adults *(Holland* v. *Lanarkshire*, 1909 Sess. Cas. 1142, and other cases, cited). As to s. 287 *(b)*, assuming the excavation here to be within its scope, what is there contemplated, as indicated by its language, is the prevention of injury from hidden openings; the required fence or guard must protect the unwary; but when the existence of the opening is made evident (as in this case) the purpose of the fence or guard is accomplished; the owner must protect the trespasser on the land from a trap, but he is not called on to protect against a subsequent danger from trespassing on the guard itself raised against that trap; and the scope of the duty is as limited in relation to children as to adults. *Per* Kerwin and Estey JJ.: The evidence supports the trial Judge's finding that the child was a trespasser; and, under the common law rule, of which s. 247 of the *Criminal Code* is a restatement, appellant, in the circumstances of this case, would not be liable to trespassers, including children *(Hardy* v. *Central London Ry. Co.*, [1920] 3 K.B. 459, at 473, and other cases, cited); the precautions taken and the warning and chasing away of children exonerated appellant from any suggestion of intention to injure or trap or of callous or wanton disregard of consequences. As to respondent's contention (in the Appellate Division and in this Court) that the facts disclosed an offence under s. 287 *(b)* (under which the charge was not laid and which was not brought to the trial Judge's attention) and that by virtue of ss. 951, 1013 (5) and 1016 (2) a conviction should now be directed—It is doubtful if the offence under s. 287 could, within the meaning of those sections, be an offence so included under s. 247, both because of the essentials required to constitute the offence and because it is a summary conviction rather than an indictable offence. Apart from these considerations, the evidence did not disclose that an offence was committed under s. 287, as the excavation was so far guarded that instead of accidentally falling therein within the meaning of s. 287 *(b)*, the children climbed over the barrier. *Per* Taschereau J.: The Appellate Division erred in finding a breach of the duty imposed by s. 287 *(b)*. The duty imposed by s. 287 *(b)* is to fence

the excavation in such a manner that a person riding, driving or walking shall not fall therein accidentally. It would unduly stretch the scope of s. 287 *(b)* and do violence to its text, to hold that the fence must be so built that entrance is impossible. What is contemplated is to protect a motorist or pedestrian from a danger of which he is unaware and which may accidentally cause his death; it does not apply to the present case, where a trespasser succeeded in making his way to the excavation where the danger was obvious and was accidentally pushed into the water by a companion. EAST CREST OIL CO. LTD. v THE KING **191**

4.——*Trial on charge of rape—Question whether trial judge should have charged jury as to possible alternative findings of lesser offence—Question whether failure of accused to testify was made subject of comment, contrary to Canada Evidence Act, R.S.C. 1927, c. 59, s. 4 (5).*—The appeal was from the judgment of the Supreme Court of Nova Scotia *en banc* dismissing appeal from appellant's conviction on a charge of rape. The appeal to this Court was on two questions of law on which there was dissent in said Court *en banc*, in connection with the trial Judge's charge to the jury, it being contended: (1) He erred in failing to instruct them as to possible alternative findings of a lesser offence, there being evidence to warrant such a finding. (The trial Judge withdrew from the jury a count of indecent assault contained in the indictment and stated, according to an affidavit offered to the Court *en banc*, that they "must find a verdict of rape or nothing"; and he directed his charge only to the count of rape.) (2) The failure of the accused to testify was made the subject of comment, contrary to s. 4 (5) of the *Canada Evidence Act*, R.S.C. 1927, c. 59. (The trial Judge stated: "* * * You heard the story of this woman * * * and her evidence is not denied * * * I can see nothing in the conduct of this woman that day, according to her evidence —and that is the only evidence we have as to her conduct excepting the other witnesses that came in here to tell the story of what she told them * * * It was his doing, according to the evidence and the only evidence we have * * *".) *Held:* The appeal should be dismissed (Taschereau J. dissented). *Per* the Chief Justice, Kerwin and Hudson JJ.: As to the first contention: On the evidence (discussed), the only evidence of the actual commission of the crime, on which the jury could reasonably have returned a verdict of guilty, pointed only to rape, if the jury believed the victim's story, or not guilty, if they did not believe her; and the trial Judge's charge in this respect was justified. As to the second contention: The trial Judge's remarks complained of could not be taken to have had any effect on the jury as being a comment obnoxious to s. 4 (5) of the *Canada Evidence Act*. (It

CRIMINAL LAW—*Continued*
was remarked that said words "her evidence is not denied" were no doubt referring to statements made by the victim, after the occurrence, to other persons, who gave evidence) *(Rex* v. *Gallagher*, 37 Can. Cr. C. 83, and *Bigouette* v. *The King*, [1927] S.C.R. 112, discussed and distinguished. Opinion expressed that the latter case went as far on the subject in question as this Court would care to go*)*. *Per* Taschereau J., dissenting: As to the first contention (the second one is not dealt with): It was open to the jury upon the evidence to find, if they saw fit, that the accused was guilty only of an attempt to commit rape (a lesser offence included in the major charge of rape), and the failure of the trial Judge to instruct them that such a verdict was open to them and that it was within their power to find the accused guilty of a reduced offence was fatal to the legality of the verdict, and therefore the conviction should be quashed and a new trial directed. (The facts were not sufficiently clear to allow an appellate court to substitute, for the verdict found by the jury, a verdict of guilty of a lesser offence, as may be done in certain cases under s. 1016 of the *Criminal Code.)* WRIGHT v. THE KING..... **319**

5.——*Trial—Evidence—Appeal from affirmance by court of appeal of conviction for murder—Appellant and others jointly indicted and tried together—Written confessions by other accused admitted in evidence—Sufficiency and timeliness of warning by trial Judge to jury that confession put in is evidence only against person making it—Defining "murder" to the jury—Criminal Code, s. 259 (a) (b)—Criminal Code, s. 69 (2) (several persons forming common intention to prosecute unlawful purpose, etc.)—Inapt illustration to jury—Application of the law to the evidence—No substantial wrong or miscarriage of justice (Criminal Code, s. 1014 (2)).* SCHMIDT v. THE KING..... **438**

6.——*Constitutional law—Habeas corpus—Conviction of applicant under Criminal Code—Application for habeas corpus granted by a judge of British Columbia—Appeal by Attorney General to Appeal Court—Jurisdiction to hear appeal—Appeal Court reversing judgment and ordering re-arrest—Provisions of section 6 of Appeal Court Act of B.C. granting right to appeal—Inoperative if applicant convicted for a criminal offence under Criminal Code—Exclusive jurisdiction of Federal Government to authorize such appeal—B.N.A. Act, sections 91 (27) and 92 (13).*—The provisions of section 6 of the *Court of Appeal Act* of British Columbia (R.S.B.C. 1936, c. 57), granting a right to appeal to the Court of Appeal in a *habeas corpus* matter are inoperative, if the applicant for that writ is detained in custody by virtue of a conviction for a criminal offence under the Criminal Code.—The Chief Justice dissenting. The Dominion Parliament has exclusive jurisdiction to authorize such an appeal

CRIMINAL LAW—*Concluded*
under section 91 (27) of the *British North America Act, 1867* ("Criminal law * * *, including the Procedure in Criminal Matters"); and a Provincial Legislature has no such power under section 92 (13) of that Act ("Property and Civil Rights in the Province").—The Chief Justice dissenting. *In re* STORGOFF..... **526**

7.——*Dismissal by Court of Appeal of accused's appeal from conviction of theft—Dissenting opinion in that Court that there was no evidence to support conviction—Appeal to this Court dismissed.* DUNCAN v. THE KING..... **748**

8.——*Appeal—Accused, respondent, prosecuted for alleged infractions of Order in Council dealing with maximum or ceiling prices—Accused convicted after speedy trial under Part XV of the Criminal Code—Order in Council by federal authorities creating leave to appeal to Supreme Court of Canada in cases of offences against wartime regulations—Regulations made by the Order in Council—Extent of such right of appeal—Interpretation of the conditions imposed by the Order in Council—Right of appeal to Supreme Court of Canada still subject to sections 1023 and 1025 of the Criminal Code..*1

See APPEAL 1.

9.——*Fees on proceedings before Justices under Part XV of the Criminal Code—Tariff enacted by section 770 Cr. C.—Validity—Intra vires—Ancillary power of the Dominion—Fees also payable under tariff enacted by provincial Act—B.N.A. Act, sections 91 (27), 92 (2) (14), 101—Criminal Code, sections 735, 736, 770, 1134—Officers of Justice Salary Act, R.S.Q., 1941, c. 24, s. 10...* **600**

See CONSTITUTIONAL LAW 4.

10.——*See* MOTOR VEHICLES 1.

CROWN—*Negligence—Motor vehicles—Evidence—Collision between Crown's vehicle and another vehicle—Claim for damages against Crown—Crown's vehicle skidding across highway into path of other vehicle—Prima facie case of negligence—Onus of explanation—Nature of onus—Whether onus discharged in the circumstances—Res ipsa loquitur as against Crown*..... **143**

See MOTOR VEHICLES 2.

2.——*Foreshore—Public harbour—Dispute between Dominion and Province as to ownership—Provincial order in council recognizing Dominion's right—Power to pass—Validity of—Whether authorizing legislation necessary—Admission of fact contained in order in council—"Public Harbour" in B.N.A. Act—Whether Coal Harbour a "public harbour"—Transfer of Crown land by Province to Dominion—Residuum of royal prerogative—Crown grant of land "with appurtenances"—Land or foreshore not included in—Prescription—Nullum Tempus Act—Riparian rights*

CROWN—*Concluded*

—Erection of building and making of fill on foreshore—Whether mesne profits due the Crown..... **385**

See CONSTITUTIONAL LAW 2.

3.——*Assessment and taxation (municipal) —Crown's interests—Construction and production contracts between Crown and industrial company—Sale of land by Company to Crown and building of plant for war purposes by Company for the Crown—Agreements stipulating Company to act on behalf of Crown and as its agent—Claim by municipal authority against Company for property and business taxes—Company erroneously described as "proprietor"—Company not liable for taxes—Company, under contracts, being the "agent" or "servant" of the Crown—Crown, and not the Company, being "occupant" of land and building—Sections 362 (a) and 363 of the Montreal City Charter*... **621**

See ASSESSMENT AND TAXATION 2.

4.——*See* APPEAL 3; COMPENSATION.

DAMAGES — *Personal injury — Amount awarded by jury held to be so large that a jury appreciating the evidence could not reasonably have awarded it—New assessment ordered.* CANADIAN PACIFIC EXPRESS CO. AND NOVA SCOTIA LIGHT & POWER CO. LTD. v. LEVY..... **456**

2.——*See* COMPENSATION; CONTRACT 4, 5, 6.

DEBENTURES.

See ASSESSMENT AND TAXATION 4; COMPANIES 1.

DEBT ADJUSTMENT ACT, 1937 (ALBERTA).

See MORTGAGE.

DENTISTRY.

See NEGLIGENCE 2.

DEPENDANTS' RELIEF ACT (R.S.S. 1940, c. III).

See WILL 1.

DISCOVERY (EXAMINATION FOR).

See SHIPPING 1.

EDUCATION ACT (QUEBEC)—*Assessment and taxation—Building of a dissentient school—Borrowing of moneys by trustees—Bonds or debentures issued—Resolution adopted by Trustees under section 244 of the Education Act—Stipulating that a special tax "shall be levied annually"—Whether wording of resolution sufficient to create a tax—Whether resolution otherwise legal and regular—Privilege on immovable for school assessment —Property owned by dissentient when taxed and later sold to a Roman Catholic—Scope of the tax exemption granted to religious corporations under sections 251 (3) and 424—Issue of bonds or debentures authorized under section 246—Whether both the bonds or debentures and the resolution providing for their issue are validated thereby—The Education Act, R.S.Q., 1925, c. 133, now R.S.Q., 1941, c. 59*..... **685**

See ASSESSMENT AND TAXATION 4.

ESTOPPEL. *See* SHIPPING 1.

EVIDENCE—*Criminal law—Trial—Appeal from affirmance by court of appeal of conviction for murder—Appellant and others jointly indicted and tried together—Written confessions by other accused admitted in evidence—Sufficiency and timeliness of warning by trial Judge to jury that confession put in is evidence only against person making it—Defining "murder" to the jury—Criminal Code, s. 259 (a) (b)—Criminal Code, s. 69 (2) (several persons forming common intention to prosecute unlawful purpose, etc.)—Inapt illustration to jury—Application of the law to the evidence—No substantial wrong or miscarriage of justice (Criminal Code, s. 1014 (2)).* SCHMIDT v. THE KING..... **438**

2.——*Dispute between husband and wife as to ownership of land—Findings of fact below —Evidence—Accounting.* JOHNSON v. JOHNSON..... **455**

3.——*Criminal law—Possession by night of implements of housebreaking—Ordinary tools of the accused's trade as truck driver—Proof of unlawful purpose—Lawful excuse—Onus of proof—Evidence—Sufficiency—Criminal Code, section 464a*..... **9**

See CRIMINAL LAW 1.

4.——*Criminal law—Charge of rape—Evidence—Corroboration—Charge to jury—Misdirection—New trial*..... **134**

See CRIMINAL LAW 2.

5.——*Negligence—Motor vehicles—Crown—Collision between Crown's behicle and another vehicle—Claim for damages against Crown—Crown's vehicle skidding across highway into path of other vehicle—Prima facie case of negligence—Onus of explanation—Nature of onus—Whether onus discharged in the circumstances—Res ipsa loquitur as against Crown*..... **143**

See MOTOR VEHICLES 2.

6.——*Application to quash by-law of municipality—Allegations that by-law not in the public interest nor passed in good faith—Onus of proof*..... **234**

See MUNICIPAL CORPORATIONS 1.

7.——*Shipping—Claim for damaged cargo —Practice and Procedure in Admiralty cases in Exchequer Court—Examination for discovery—Mere fact that transcription of examination was returned to the court and deposited on trial judge's desk with other papers did not make it evidence—Art. 288 of Quebec Code of*

EVIDENCE—*Concluded*
Civil Procedure not applicable, though action commenced and tried in Quebec—Examination, though allowed by trial judge to be included in settling the case on appeal to Supreme Court of Canada, should be disregarded..... **249**

See SHIPPING 1.

8.——*Life insurance—Provision in policy for "double indemnity" if insured's death resulted from "external, violent and accidental" cause, but not applicable in case of suicide—Insured burned to death in fire in his barn—Whether death "accidental"—Onus of proof—Presumption against suicide—Inferences from facts in evidence*..... **289**

See INSURANCE (LIFE).

9.——*Criminal law—Trial on charge of rape—Question whether trial judge should have charged jury as to possible alternative findings of lesser offence—Question whether failure of accused to testify was made subject of comment, contrary to Canada Evidence Act, R.S.C. 1927, c. 59, s. 4 (5)*..... **319**

See CRIMINAL LAW 4.

10. —— *Contract — Construction — Alleged breach—Whether contract ambiguous—Extrinsic evidence—Conduct of parties—Party not replying to letters from other party which assumed rights consistent with latter's contention as to effect of the contract*..... **360**

See CONTRACT 4.

11.——*Will—Action in contestation—Propate—Validity—Omus probandi—Res judicata—Object and effect of probate—Arts. 857 and 858 C.C.*..... **749**

See WILL 2.

EXAMINATION FOR DISCOVERY.
See SHIPPING 1.

EXCHANGE—*Bonds of company — Redemption before maturity—Payment in American or Canadian funds at the option of holder—Redemption date—Date of presentation—Exchange rate not same on those dates—Rate at which bonds are payable*..... **655**

See COMPANIES 1.

EXECUTORS AND ADMINISTRATORS—*Costs—Direction in will that fund be set apart for benefit of testator's daughter—Executors and trustees of the will also trustees of the fund—Unsuccessful action by daughter against the executors and trustees with regard to the fund as set up—Question out of what fund (said fund or the residuary estate, or both) the solicitor and client costs incurred by the executors and trustees in said action (to the extent that they exceeded the party and party costs) should be paid*..... **343**

See COSTS 1.

FORECLOSURE.
See MORTGAGE.

FORESHORE.
See CONSTITUTIONAL LAW 2.

HABEAS CORPUS—*Constitutional law—Criminal law—Conviction of applicant under Criminal Code—Application for habeas corpus granted by a judge of British Columbia—Appeal by Attorney General to Appeal Court—Jurisdiction to hear appeal—Appeal Court reversing judgment and ordering re-arrest—Provisions of section 6 of Appeal Court Act of B.C. granting right to appeal—Inoperative if applicant convicted for a criminal offence under Criminal Code—Exclusive jurisdiction of Federal Government to authorize such appeal—B.N.A. Act, sections 91 (27) and 92 (13).*—The provisions of section 6 of the *Court of Appeal Act* of British Columbia (R.S.B.C. 1936, c. 57), granting a right to appeal to the Court of Appeal in a *habeas corpus* matter are inoperative, if the applicant for that writ is detained in custody by virtue of a conviction for a criminal offence under the Criminal Code.—The Chief Justice dissenting. The Dominion Parliament has exclusive jurisdiction to authorize such an appeal under section 91 (27) of the *British North America Act, 1867* ("Criminal law * * *, including the Procedure in Criminal Matters"); and a Provincial Legislature has no such power under section 92 (13) of that Act ("Property and Civil Rights in the Province").—The Chief Justice dissenting. *In re* STORGOFF... **526**

HARBOUR.
See CONSTITUTIONAL LAW 2.

HIGHWAYS—*By-law of Rural Municipality for closing of road—Validity—Application to quash—Municipal Act, R.S.M. 1940, c. 141—Period within which application to quash must be made (s. 389 (1))—Approval of Minister (Municipal Commissioner) (s. 473)—Jurisdiction of courts—Allegations that by-law not in the public interest nor passed in good faith—Onus of proof—"Excluded from ingress or egress" (s. 468)—Compensation (s. 468) not dealt with in by-law*..... **234**

See MUNICIPAL CORPORATIONS 1.

2.——*See* MOTOR VEHICLES 1, 2; RAILWAYS 1.

HUSBAND AND WIFE—*Dispute between husband and wife as to ownership of land—Findings of fact below—Evidence—Accounting.* JOHNSON v. JOHNSON..... **455**

2.——*Incorporated company formed exclusively of husband and wife—Hypothec given by wife as security for company's debts—Validity—Husband's shares fully paid up—Allegation of fraud by the wife—Immaterial whether husband has more or less shares than*

HUSBAND AND WIFE—*Concluded*

the wife—Article 1301 C.C.—Where husband and wife are shareholders in an incorporated company, in this instance formed exclusively of both of them, the wife cannot guarantee the debts of the company, even if her husband's shares were fully paid up, because by so doing she obliges herself for her husband in contravention of article 1301 C.C. Such obligation is an absolute nullity, or, in the words of the article, "is void and of no effect". Allegation of fraud on the part of the wife has no bearing in such a case. Article 1301 C.C. is for the purpose of protecting the wife, has always been regarded as a matter of public order and must receive its application under all circumstances. In the present case, the deed of hypothec subscribed to by the wife was given not for her own benefit but for the security of the company's debts. It is immaterial whether the husband held more or less shares than the wife; it is sufficient that he held a substantial interest in the company. *Trust & Loan Company of Canada* ([1904] A. C. 94) and *La Banque Canadienne Nationale* v. *Audet* ([1931] S.C.R. 293) foll. STERLING WOOLENS & SILKS CO. LTD. v. LASHINSKY.. **762**

3.——*Application by testator's widow under The Dependants' Relief Act, R.S.S. 1940, c. 111—S. 8 (1) (2)—On finding that reasonable provision not made by will for her maintenance, question as to effect of s. 8 (2) as to extent of allowance to be awarded*..... **42**

See WILL 1.

4.——*Insolvency—Action by trustee to annul deed of sale—Practice and procedure—Party interested not joined in the proceedings before the Court—Dismissal of action—Husband and wife—Married woman appearing as plaintiff—Want of marital authorization—Absolute nullity—Party to the deed not made defendant or mis-en-cause but acting as co-plaintiff with trustee—Whether sufficient to allow the Court to adjudicate—Arts. 176, 183, 1032 et seq. C.C*..... **82**

See BANKRUPTCY AND INSOLVENCY.

INDEMNITY.

See NEGLIGENCE 2.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE (LIFE)—*Provision in policy for "double indemnity" if insured's death resulted from "external, violent and accidental" cause, but not applicable in case of suicide—Insured burned to death in fire in his barn—Whether death "accidental"—Onus of proof—Presumption against suicide—Inferences from facts in evidence.*—Plaintiff administrator of the estate of R., deceased, sued to recover under a "double indemnity" clause in a policy issued by defendant insuring R.'s life (the amount payable simply on death had been paid). The "double indemnity" was payable "upon receipt of due

INSURANCE (LIFE)—*Continued*

proof" that R.'s death "resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause". It was not payable if R.'s death resulted from *(inter alia)* self destruction or any violation of law by him. He was a successful farmer. He had an asthmatic condition but otherwise was well. On the day before the day on which he died, his wife, during a quarrel, threatened to leave him (as she had threatened in quarrels on previous occasions), and the next morning, on his asking if she still "figured on leaving him", she replied "yes" (though she had made no preparations to leave), and, according to her evidence, he said it would spoil his life, he "couldn't face it". Shortly afterwards his barn was found to be on fire; it was completely destroyed, and his remains were found in its ruins. The trial Judge dismissed the action ([1944] 1 W.W.R. 129), finding, in view of R.'s said statements, that he had committed suicide. That judgment was reversed by the Appellate Division, Alta., ([1944] 2 W.W.R. 68). Defendant appealed. *Held* (affirming the judgment of the Appellate Division), that plaintiff should recover under the double indemnity clause. Rand J. dissented. *Per* the Chief Justice and Kerwin J.: It is evident from the trial Judge's reasons that, but for R.'s said words on the morning of the fire, he would have concluded that R.'s death was due to an accident within the meaning of the policy. An appellate court is in as good a position as the trial Judge, in such a case, to draw the proper inference; and, under all the circumstances, the evidence did not lead to a finding of suicide. There is a presumption against the imputation of crime. That presumption is not overcome merely by proof of motive (also, there was no reasonable motive suggested in this case). The burden upon plaintiff to show that R.'s death came within the terms of the double indemnity clause did not require plaintiff to show that the fire itself was started accidentally. Plaintiff was required only to produce such evidence as would warrant a court in finding that R.'s death, which undoubtedly occurred by reason of the fire, resulted from a bodily injury that was effected solely through an accidental cause (no question arises as to the cause being external and violent). The fire may have been started innocently by R. or innocently or intentionally by some one else; so long as R. did not start the fire with intention of committing suicide or place himself in the barn with that intention after a fire had been otherwise started, plaintiff must succeed. *Per* Taschereau J.: Plaintiff had satisfied the burden upon him to show that R.'s death resulted from an "external, violent and accidental cause" within the meaning of the double indemnity clause. All the circumstances as revealed by the evidence (and bearing in mind that courts act upon the "balance of probabilities") lead

INSURANCE (LIFE)—*Concluded*

to that conclusion. The case is one where an appellate court may draw its own inferences from the proven facts. Suicide is a crime and there is a legal presumption against the imputation of crime. Motives are very unreliable and cannot be classified as an accurate determining cause of human deeds, which they often influence in different ways; taken alone, they have very little probative value; and those alleged in this case do not rebut the presumption against suicide. *Per* Estey J.: The case is one in which an appellate court is in the same position as the trial Judge as to drawing inferences of fact. R.'s words to his wife on the morning of the fire, when read in relation to all the other facts, do not justify an inference of suicide. On the issue of "accidental" death, plaintiff was entitled to invoke the inference against suicide, which inference was not "destroyed or attenuated" by R.'s said words. On the evidence it must be found that the cause of death was the fire and that that was an "external, violent and accidental cause" within the meaning of the double indemnity clause. *Per* Rand J., dissenting: To recover under the double indemnity clause, plaintiff must show death by accident. That onus remained on him; and if, with the presumption against suicide and its underlying probative force properly applied, the evidence compels the Court to say that on the whole case the probabilities of accident or suicide are in equal balance, plaintiff must fail. The presumption against suicide arises from mankind's experience that a human being normally and instinctively shrinks from it. That general reaction the Court, in considering all facts before it, will keep in mind; but it, treated as a fact, is to be looked upon as any other circumstance in the particular situation. In the present case there was in the whole of the circumstances, including the weight of the factors in experience, sufficient to leave the Court in doubt whether R.'s death was brought about by his intentional act or by accident; and in that state of things plaintiff's burden had not been discharged. The Appellate Division had acted upon inferences which the undisputed facts did not warrant and at the same time had applied them to a burden of proof on defendant which the issue between the parties did not raise. The action should be dismissed. NEW YORK LIFE INSURANCE COMPANY v. SCHLITT. **289**

JUDICATURE ACT AMENDMENT ACT, 1942 (ALBERTA).

See MORTGAGE.

LABOUR UNIONS.

See APPEAL 9.

LEASE—*Agreement called "lease"—Enjoyment of water power rights and immoveables appurtenant thereto—Action for unpaid*

LEASE—*Concluded*

"rental" instalments—Renewal periods of 21 years—Same stipulated "for ever"—Validity of agreement during current period—Whether agreement a "lease" in perpetuity—Such lease not contrary to law of Quebec—Resolutory condition in the agreement—Crown entitled to claim back power rights—Whether agreement contrary to public order—Validity of the agreement during current period—Agreement not illegal, and, if illegal, merely voidable—Articles 990, 1593, et seq., 1601, 1608, 1609, 1657, 1660 C.C...... **158**

See CONTRACT 1.

2.——*See* CONTRACT 3.

LEAVE TO APPEAL.

See APPEAL 1, 2, 4, 9.

LIFE INSURANCE.

See INSURANCE (LIFE).

LIMITATION OF ACTIONS—*Prescription as against the Crown*..... **385**

See CONSTITUTIONAL LAW 2.

MESNE PROFITS.

See CONSTITUTIONAL LAW 2.

MORTGAGE—*Foreclosure action—Authorized by permit of Debt Adjustment Board—Permit cancelled after action brought—Whether any effect from cancellation—Period of redemption shortened by order nisi—Whether order interlocutory or final—Jurisdiction of judge making it—Judicature Act, section 34 (f)—Interpretation of sub-paragraphs (ii) and (iii)—Judicature Act, Amendment Act, R.S.A., 1942, c. 129—Roy v. Plourde ([1943] S.C.R. 262) referred.*—The respondent was granted a permit by the Debt Adjustment Board to commence and continue a foreclosure action against the appellants. Aside from filing and serving the statement of claim, no further steps were taken until after the cancellation of the permit by the Board. Immediately thereafter the appellants filed their statement of defence alleging the cancellation of the permit and that no permit authorizing the commencement or continuation of the action was outstanding as required by the *Debt Adjustment Act, 1937*. The respondent then moved for an order striking out the statement of defence and fixing the amount owing under the mortgage and a period within which the appellants might redeem. Upon the return of the motion, Sheperd J. found a sum of $9,246.69 to be due, fixed a redemption period of four months and directed that in default of payment the property might be offered for sale. No appeal was taken from that order and, upon default of payment, O'Connor J. directed a final order vesting the property in the respondent, which order was affirmed by the appellate court. The appellants contended before this Court that they have been improperly denied the

MORTGAGE—*Continued*

benefits of the *Judicature Act Amendment Act*, 1942, whose provisions stipulating a redemption period of one year were alleged to be mandatory. The judgments of the Courts below were rendered at a time when that Act had been declared *ultra vires* by the Appellate Division and, subsequently, the Act was held by this Court to be *intra vires*. The appellants also contended that the cancellation of the permit placed them in a position as if no permit had ever been issued; that, the order nisi having been made without giving effect to the Act, such error vitiated the right to make the final order of foreclosure and vesting, and that the respondent had not made the required specific application to shorten the period of redemption fixed under s. 34 *(f)* of the Act. *Held* that the appeal should be dismissed with costs. *Held*, also, that the order nisi cannot be regarded as an interlocutory order within the meaning of Alberta Rule No. 609, as it finally disposed of the rights of the parties. The order being valid and subject to appeal and no appeal having been taken, the final and vesting order was therefore validly made. *Per* the Chief Justice and Estey J.: Section 34 *(f)* of the *Judicature Act Amendment Act*, 1942, does not apply to the respondent's action. Sub-paragraph (iii) *(b)* of paragraph *(f)* expressed in clear terms that such paragraph does not apply to "any action authorized by a permit granted by the Debt Adjustment Board". *Per* the Chief Justice and Estey J.: The use of the words "any action authorized" in sub-paragraph (iii) *(b)* refers to the commencement as distinguished from a step in, or a continuation of the action. The respondent's action, when commenced, was authorized by a permit, and the cancellation of the permit did not place the appellants in a position as if no permit had ever been issued. *Per* the Chief Justice and Estey J.: Section 34 of the Amendment Act merely gives direction with respect to the terms to be granted in certain orders nisi, but it does not purport to confer jurisdiction on the judge. Any failure to follow or misconstrue its provisions is a mistake in law which would provide a proper basis for an appeal, but does not involve any question of jurisdiction. *Per* the Chief Justice and Kerwin and Estey JJ.: The judge at the time he made the order nisi for sale, was bound by the judgment of the Appellate Division declaring the Amendment Act *ultra vires*, and accordingly paid no attention to it. *Per* Kerwin J.: However, he had power on an "application" to decrease the period of redemption, having regard to certain circumstances set out in the enactment; he did in fact decrease the period and whether he did so on "application" is immaterial as his order was not appealed from. *Per* Kerwin and Hudson JJ.: Even if this Court had power on this appeal to alter the terms of the order nisi, this case in view of its circumstances is not one where that should be done.

MORTGAGE—*Concluded*

Per Kellock J.: The order cannot be treated as no order, but should be treated as an order made under the jurisdiction which in fact existed.—The fact that the proviso in paragraph *(f)* of section 34 applies to clauses (i) and (ii) renders clear the meaning of the words "on application" in the proviso. Where the case is one within clause (i), a special application must be made because the order nisi has already been made; while, if the case is within clause (ii), there is no good reason why the jurisdiction given by the proviso cannot be exercised on the application for the order nisi. The notice of motion given by the respondent entitled the judge hearing the application to abridge or enlarge the period of one year under the jurisdiction given to him by the proviso. Judgment of the Appellate Division ([1943] 3 W.W.R. 669; [1944] 1 D.L.R. 300) affirmed. HALBERT ET AL. v. NETHERLANDS INVESTMENT COMPANY OF CANADA LTD. **329**

MOTOR VEHICLES—*Negligence—Automobile—Person invited by driver who was also owner—Accident—Injury to passenger—Damages—Invitation made and accepted in Quebec—Accident occurring in Ontario—Negligence of driver proven—Conflict of laws—Whether Quebec or Ontario law applicable—Driver liable, if negligence actionable under Quebec law and punishable under Ontario law—Agreement by benevolent driver to carry passenger as a favour—Not a contract of transport nor a "contrat de bienfaisance"—Arts. 1053 and 1054 C.C.—Criminal Code, s. 285—Highway Traffic Act (Ont.) R.S.O., 1937, c. 288, as amended in 1939 by 3 Geo. VI, c. 20, s. 6.*—The respondent, having accepted in Montreal an invitation from the wife of the appellant to accompany them on a trip to Ottawa, was seriously injured as the result of an accident occurring in Ontario. The automobile was owned and driven by the appellant. The respondent's action for damages was maintained by the trial judge for an amount of $5,536.18, which judgment was affirmed by the appellate court. *Held* that the appeal to this Court should be dismissed. Upon the evidence, the negligence of the appellant has been established; and the respondent was entitled to maintain her action, as such negligence, actionable under the law of Quebec, was punishable under the law of Ontario. *Per* The Chief Justice and Hudson, Taschereau and Estey JJ.—The respondent has fulfilled the two conditions required in order to establish the liability of the appellant: first, the negligent act of the appellant was a quasi-offence for which the respondent would have recovered damages in Quebec, if the act had been committed in that province, and, secondly, the respondent has established that such act was "wrongful" i.e. "non justifiable", and therefore punishable under the law of Ontario, as it has been established that the

MOTOR VEHICLES—*Continued*

appellant has driven his car "without due care and attention", in violation of a statutory law of that province *(Highway Traffic Act, s. 27)*. *Per* The Chief Justice and Taschereau and Estey JJ.—An agreement between the benevolent driver of an automobile and a passenger whom he has invited to travel with him, as a favour, is neither a contract of transport, which necessarily implies an onerous remuneration, nor a contract of prestation of gratuitous services, generally called "contrat de bienfaisance". Therefore, no "responsabilité contractuelle" can be incurred by a benevolent driver; and any claim by an invited guest must derive from an offence or a quasi-offence. *Canadian National Steamships Co. Ltd.* v. *Watson* ([1939] S.C.R. 11) ref. McLEAN v. PETTIGREW **62**

2.——*Negligence — Highways — Evidence — Crown—Collision between Crown's vehicle and another vehicle—Claim for damages against Crown—Crown's vehicle skidding across highway into path of other vehicle—Prima facie case of negligence—Onus of explanation—Nature of onus—Whether onus discharged in the circumstances—Res ipsa loquitur as against Crown.*—A Bren gun carrier owned by the Crown and driven in the course of his duties by a member of the armed forces of Canada, while proceeding westerly on a highway in Ontario about 1.45 p.m. on January 11, 1943, skidded so that its rear part was across the south side of the road in the path of the suppliant's motor ambulance which was proceeding easterly on its right side of the road; and a collision resulted. The suppliant's claim against the Crown for damages was dismissed by Thorson J., [1944] Ex. C.R. 17, who held that the suppliant had not established a case of negligence against the Crown. The suppliant appealed. *Held* (Kerwin and Rand JJ. dissenting): The appeal should be allowed and the suppliant should have judgment for damages. The driver of a vehicle meeting another vehicle on a highway has a duty under s. 39 (7) of the *Highway Traffic Act* (R.S.O. 1937, c. 288), and there is a similar duty at common law, to allow to the other vehicle one half of the road free; and a breach of that duty, occasioning damage, will establish a *prima facie* case of negligence against such driver, casting upon him the onus of explanation (the nature of this onus discussed). Such explanation should (in the words of Lord Dunedin in *Ballard* v. *North British Ry. Co.*, 60 Sc. L.R. 441, at 449) "show a way in which the accident may have occurred without negligence". Such a way was not, in the circumstances of this case, shown by the mere fact of the skidding (which, by itself, is a "neutral fact", equally consistent with negligence or no negligence) nor by the evidence (on proper inference from the facts established by evidence accepted by the trial judge). (The phrase *res ipsa loquitur* is applicable to a claim against the Crown under s. 19 *(c)* (as enacted by 2 Geo. VI, c. 28) of the *Exchequer Court Act*. The negligence spoken of in s. 19 *(c)* may be established by legitimate inference from facts proved by the application of the phrase.) *Per* Kerwin and Rand JJ., dissenting: The evidence did not justify a finding of negligence on the part of the driver of the carrier. Skidding on a slippery road cannot be taken *per se* as negligence on a driver's part. Even if the doctrine *res ipsa loquitur* applies to the Crown (which it was unnecessary to determine), the explanation by a witness (who considered that the skid had been caused by the left tread striking a smooth or icy patch on the road, though he could not find any), taken in the light of the circumstances, was sufficient to displace any onus resting upon the Crown. GAUTHIER & CO. LTD. v. THE KING..... **143**

3.——*Negligence—Jury trial—Automobile collision—Highway covered with smoke—Driver turning to left to avoid government truck—Head-on collision with approaching car—Finding of jury as to negligent act of appellants' driver—Whether it comes within allegations of negligence in statement of claim—Charge to jury as to respective duty of drivers—Trial judge reading from reported judgments — Mis-direction — Issues between parties not adequately presented nor sufficiently tried—New trial*..... **441**

See TRIAL 2.

4.——*Collision—Action for damages—Jury's findings—Principles applicable on question as to setting them aside*..... **614**

See NEGLIGENCE 1.

5.——*See* RAILWAYS 1.

MUNICIPAL CORPORATIONS—*By-law of Rural Municipality for closing of road—Validity—Application to quash—Municipal Act, R.S.M. 1940, c. 141—Period within which application to quash must be made (s. 389 (1))—Approval of Minister (Municipal Commissioner) (s. 473)—Jurisdiction of courts—Allegations that by-law not in the public interest nor passed in good faith—Onus of proof—"Excluded from ingress or egress" (s. 468)—Compensation (s. 468) not dealt with in by-law.*—The appeal was from the judgment of the Court of Appeal for Manitoba (51 Man. R. 314) which (reversing the judgment of Donovan J., *ibid*) dismissed the present appellant's application for the quashing of a by-law of a Rural Municipality (the present respondent) for the closing of part of a government road allowance within the municipality. This Court now afirmed the dismissal by the Court of Appeal of the application to quash the by-law. *Per* the Chief Justice and Hudson, Taschereau and Estey JJ.: (1) The period of one year within which, under s. 389 (1) of *The Municipal Act*, R.S.M. 1940, c. 141, such an application must be made is to be computed from the date of the passing

MUNICIPAL CORPORATIONS—
Continued

of the by-law by the municipality, not from the date of approval of the by-law by the Minister under s. 473 (before which date it does not come into force). (2) Though such a by-law has been approved by the Minister under s. 473 (and notwithstanding that, under s. 473, it "when so approved shall be valid, binding and conclusive, and its validity shall not thereafter be questioned in any court * * *"), the courts have jurisdiction to pass upon its validity. S. 473 does not authorize the municipality to go beyond its statutory powers, nor permit it to exercise its powers otherwise than in the public interest and in good faith. (3) A by-law passed by a municipality, if not passed in good faith and in the public interest, is a nullity, and is not made otherwise by lapse of time, approval, registration or promulgation. (4) The onus of proving that a by-law was not in the public interest or passed in good faith is upon the applicant moving to quash it. (5) Courts have recognized that the municipal council, familiar with local conditions, is in the best position of all parties to determine what is or is not in the public interest and have refused to interfere with its decision unless good and sufficient reason be established. (6) The mere fact that the closing of a highway benefits some and adversely affects others does not determine the question of public interest. All the circumstances must be surveyed. In the present case, regard should be had to the scheme of settlement that obtained in the municipality, the limited use of the highway in question, the fact that the municipality did not close all of the highway because of its desire to leave a way of ingress and egress to and from the applicant's land, and particularly the fact that the controversy had continued over a period of years during which the municipal council had had the question brought before it at the instance of both groups (those for and those against the closing) upon many occasions. (7) The evidence did not establish that the members of the municipal council had acted, as alleged, "not in the public interest" or "in bad faith and through fraud and partiality". (8) As the closing was only of the easterly mile and a half of the road, leaving open the half mile passing westward along the north of the applicant's property, thereby preserving his way of ingress and egress westward to a north-south highway, he could not successfully contend that, within the meaning of s. 468 of said Act, he "will be excluded from ingress or egress" so as to require provision for "some other convenient way of access". (9) The compensation or provision therefor, mentioned in s. 468, need not be dealt with in the by-law itself. The omission to do so does not affect the rights of the applicant with respect to any claim that he may have for compensation. (10) On the evidence it must be held that the Minister approve d the by-law with

MUNICIPAL CORPORATIONS—
Concluded

full knowledge of the position taken by the municipality with respect to a certain other road which it had been suggested should be made passable as an alternative road to that closed. (11) A finding by the trial Judge and facts in evidence disposed in the Minister's favour of any question of bad faith or misconduct on his part. There was no evidence to suggest any collusion whatever between the municipal council and the Minister. (12) Sec. 7 (1) of *The Manitoba Expropriation Act* (R.S.M. 1940, c. 68) provides a method of closing highways (not required as such) of the Province's own initiative and without any consultation with the municipalities. It has no application in the present case. KUCHMA v. THE RURAL MUNICIPALITY OF TACHE..... **234**

2.——*Agreement between City of Ottawa and Ottawa Electric Ry. Co., ratified and confirmed by c. 84, statutes of Canada, 1924—Application by City to Board of Transport Commissioners for decrease in fares chargeable by Company—Question whether City had complied with proceedings required before making application—Form of resolution by City Council—Interpretation of agreement, statute—Words of provision, whether imperative, or directory only*..... **105**

See STREET RAILWAYS 1.

3.——*See* ASSESSMENT AND TAXATION 2.

NEGLIGENCE—*Motor vehicles—Collision—Action for damages—Jury's findings—Principles applicable on question as to setting them aside.*—In a case tried by a jury, the question whether there is any evidence on any particular issue is distinct from that whether the jury's verdict may stand as being one to which reasonable men might have come. In the latter enquiry the principles to be followed are as set forth in *McCannell* v. *McLean*, [1937] S.C.R. 341, where it is said at p. 343: "The verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it". If, however, there is no evidence, then an appellate court has the right and the duty to set aside the verdict. The present action was for damages for death of a passenger in a motor car which collided with defendant's coach. The jury found negligence against defendant and against the driver of the car in which the deceased was a passenger, and apportioned the fault. This Court held that, as to one finding against defendant by the jury, reading it in connection with all the answers of the jury, it was fairly arguable that it fell within negligence alleged, and, in accordance with the principles above mentioned, the action should not be dismissed; but, as to the other finding against defendant by the jury, there

NEGLIGENCE—*Continued*

was no evidence to support it, and as this wrongful finding might have influenced the jury in their apportionment of fault, there should be a new trial. GRAY COACH LINES LTD. ET AL. v. PAYNE..... **614**

2.——*Trespass to the person—Torts—Surgery—Indemnity—Contribution—Judgment for damages against doctor and dentist for unauthorized extraction of teeth while patient under anaesthetic for purpose of another operation—In third party proceedings, indemnity or contribution claimed by dentist against doctor—Facts held not to provide a basis upon which indemnity could be recovered, but judgment given for contribution—Contributory Negligence Act, R.S.B.C. 1936, c. 52.*— Judgment had been recovered against appellant, a doctor, and respondent, a dentist, for damages for unauthorized extraction of some of plaintiff's teeth while she was under an anaesthetic for the purpose of an operation by appellant to remove her tonsils. Respondent had not talked with plaintiff before making the extractions, but had had conversations with appellant, who had had conversations with plaintiff and made with respondent the appointment for extractions. Respondent had taken third party proceedings against appellant, claiming indemnity or contribution in respect of any liability to plaintiff found against him, and at trial recovered a judgment for indenmnity (60 B.C.R. 395), which was, by a majority, affirmed on appeal ([1945] 1 W.W.R. 405) (the dissenting judges holding that respondent was not entitled to indemnity but was entitled to contribution on the basis of equal liability). On appeal to this Court: *Held:* Upon the evidence, the facts did not provide a basis upon which respondent could recover from appellant by way of indemnity. The conversations between them were not such as to amount to a request, instruction or message from appellant to respondent which justified respondent in removing the teeth. In the extractions being done without plaintiff's consent, both appellant and respondent were negligent, even though they may have believed, upon respondent examining the teeth, that they were acting in plaintiff's best interests (professional duty in such circumstances discussed). But the case was a proper one, under the provisions of the *Contributory Negligence Act*, R.S.B.C. 1936, c. 52, for contribution between appellant and respondent; their pleadings raised the question of fault and the evidence throughout was led with regard thereto and established that their fault or negligence led them to so conduct themselves that in law they committed a trespass; a trespass may be the result of negligent conduct; they should be held equally at fault and each should bear one-half of the total loss as fixed by the judgment for plaintiff at the trial. PARMLEY v. PARMLEY..... **635**

3.——*Motor vehicles—Highways—Evidence—Crown—Collision between Crown's vehicle and another vehicle—Claim for damages against Crown—Crown's vehicle skidding across highway into path of other vehicle—Prima facie case of negligence—Onus of explanation—Nature of onus—Whether onus discharged in the circumstances—Res ipsa loquitur as against Crown*..... **143**

See MOTOR VEHICLES 2.

4.——*Alleged negligence in performance of contract—Removal of equipment in kitchen of hotel—Oxy-acetylene torch used to cut ducts—Fire breaking out, damaging the hotel—Liability for the damage—Effect on liability of change made, at wish of hotel manager, in proposed place of cutting the ducts during the work*..... **184**

See CONTRACT 2.

5.——*Criminal law—Child drowned in oil well—Charge against owner of failing to guard the well adequately—Criminal Code, ss. 247, 284, 287 (b)—Child a trespasser—Duty and responsibility of owner of well*..... **191**

See CRIMINAL LAW 3.

6.——*Jury trial—Automobile collision—Highway covered with smoke—Driver turning to left to avoid government truck—Head-on collision with approaching car—Finding of jury as to negligent act of appellants' driver—Whether it comes within allegations of negligence in statement of claim—Charge to jury as to respective duty of drivers—Trial judge reading from reported judgments—Mis-direction—Issues between parties not adequately presented nor sufficiently tried—New trial.* **441**

See TRIAL 2.

7.——*Railways—Truck at night running into railway train standing across highway—Action for damages against railway company—Alleged condition of fog—Extent of duty of railway company—Sufficiency of its precautions by way of signs and warning signals.* **609**

See RAILWAYS 1.

8.——*See* MOTOR VEHICLES 1.

NEW TRIAL.

See NEGLIGENCE 1; TRIAL.

NULLUM TEMPUS ACT—9 *Geo. III, c. 16.—Prescription as against the Crown.* **385**

See CONSTITUTIONAL LAW 2.

ORDER IN COUNCIL—*Giving right of appeal in cases of offences against wartime regulations—Extent of right of appeal to Supreme Court of Canada*..... **1**

See APPEAL 1.

2.——*See* ASSESSMENT AND TAXATION 4; CONSTITUTIONAL LAW 2.

PARTIES—*Insolvency—Action by trustee to annual deed of sale—Practice and procedure—Party interested not joined in the proceedings before the Court—Dismissal of action—Hus-*

PARTIES—*Concluded*

band and wife—Married woman appearing as plaintiff—Want of marital authorization—Absolute nullity—Party to the deed not made defendant or mis-en-cause but acting as co-plaintiff with trustee—Whether sufficient to allow the Court to adjudicate—Arts. 176, 183, 1032 et seq. C.C. **82**

See BANKRUPTCY AND INSOLVENCY.

2.——*See* APPEAL 4.

PHYSICIANS AND SURGEONS.

See NEGLIGENCE 2.

PRACTICE AND PROCEDURE—*Insolvency—Action by trustee to annul deed of sale—Practice and procedure—Party interested not joined in the proceedings before the Court—Dismissal of action—Husband and wife—Married woman appearing as plaintiff—Want of marital authorization—Absolute nullity—Party to the deed not made defendant or mis-en-cause but acting as co-plaintiff with trustee—Whether sufficient to allow the Court to adjudicate—Arts. 176, 183, 1032 et seq. C.C.* **82**

See BANKRUPTCY AND INSOLVENCY.

2.——*Mortgage—Foreclosure—Order nisi.* **329**

See MORTGAGE.

3.——*See* SHIPPING 1; *and, in general,* CRIMINAL LAW, EVIDENCE, TRIAL.

PRESCRIPTION—*As against the Crown.* **385**

See CONSTITUTIONAL LAW 2.

PROBATE.

See WILL 2.

PUBLIC HARBOUR.

See CONSTITUTIONAL LAW 2.

QUEBEC PUBLIC SERVICE BOARD—*Jurisdiction* **16**

See CONSTITUTIONAL LAW 1.

RAILWAYS—*Negligence—Truck at night running into railway train standing across highway—Action for damages against railway company—Alleged condition of fog—Extent of duty of railway company—Sufficiency of its precautions by way of signs and warning signals—Appeal—Judgment at trial against defendant—New trial ordered by Court of Appeal—Defendant, in formal notice of appeal to Court of Appeal, asking in alternative for new trial—Whether this affected adversely defendant's further appeal to Supreme Court of Canada, in view of stands taken by defendant on the hearings of the*

RAILWAYS—*Continued*

appeals.—Plaintiff, while driving his truck through Carleton Place, Ontario, at night on November 30, 1942, ran into defendant's freight train which was standing across the highway, and sustained injuries for which he sued defendant for damages. The usual railway-crossing signs were there as required by the Dominion *Railway Act*, and also defendant had erected a standard which carried a bell, which was ringing, and above the bell was a light, which was burning. The windows of the truck were closed. Plaintiff did not hear the bell nor see the light. There was conflicting evidence as to existence of fog. At the trial the jury found plaintiff and defendant equally in fault, finding that defendant's negligence was "improper protection of the crossing under existing weather conditions. We feel that if this crossing had been protected by visible sign such as a wig-wag with light or flashing light, that the accident could have been avoided". The trial Judge gave judgment for plaintiff in accordance with findings of the jury. Defendant appealed to the Court of Appeal for Ontario, which ordered a new trial ([1940] O.R. 44). Defendant appealed to this Court. While defendant's formal notice of appeal to the Court of Appeal asked in the alternative for a new trial, its counsel before that Court argued only for dismissal of the action and its counsel before this Court stated that defendant's appeal was from the refusal by the Court of Appeal to dismiss the action and, if he failed in that, he was satisfied to have the judgment at trial restored. *Held:* (1) Defendant's appeal should be entertained. Under the circumstances, the rule set forth in *Ainslie Mining & Ry. Co.* v. *McDougall* (40 Can. S.C.R. 270), *Mutual Reserve* v. *Dillon* (34 Can. S.C.R. 141) and *Delta* v. *Wilson* (Cameron's S.C. Prac., 3rd ed., p. 110) did not apply. (2) Defendant's appeal should be allowed and the action dismissed. Assuming that the jury's finding above quoted was a finding that the fog was "so dense in front of you that you could not see", as testified to by plaintiff, there was no basis on which defendant could be held liable. Defendant was entitled to have its train standing where it was at the particular time; nothing was being done by defendant or its employees to create a dangerous situation; and even if the fog existed to the extent suggested, defendant was not required to take further precautions than it had done in the way of signs and warning signals. There was no common law duty upon defendant under the circumstances to take special measures of warning to persons on the highway while the train was stopped on the crossing, and the jury was not the tribunal to which Parliament had entrusted the duty of determining what permanent protection should be installed *(Grand Trunk Ry. Co.* v. *McKay*, 34 Can. S.C.R. 81, at 97). CANADIAN PACIFIC RY. CO. v. RUTHERFORD **609**

RAILWAYS—*Concluded*

2.——*"Undertaking" of railway company declared "for general advantage of Canada"—Added power to operate auto bus service—"Subject to all provincial * * * enactments"—Tariff of tolls—Jurisdiction—Federal or provincial authority—Whether auto busses are "works"—Section 91 (29) and section 92 (10 c.) B.N.A. Act*..... **16**

See CONSTITUTIONAL LAW 1.

3.——*See* STREET RAILWAYS 1.

RES JUDICATA.

See WILL 2.

RIPARIAN RIGHTS.

See CONSTITUTIONAL LAW 2.

SCHOOL LAW—*Assessment and taxation—Building of a dissentient school—Borrowing of moneys by trustees—Bonds or debentures issued—Resolution adopted by Trustees under section 244 of the Education Act—Stipulating that a special tax "shall be levied annually"—Whether wording of resolution sufficient to create a tax—Whether resolution otherwise legal and regular—Privilege on immovable for school assessment—Property owned by dissentient when taxed and later sold to a Roman Catholic—Scope of the tax exemption granted to religious corporations under sections 251 (3) and 424—Issue of bonds or debentures authorized under section 246—Whether both the bonds or debentures and the resolution providing for their issue are validated thereby—The Education Act, R.S.Q., 1925, c. 133, now R.S.Q., 1941, c. 59*..... **685**

See ASSESSMENT AND TAXATION 4.

SECURITY TRANSFER TAX ACT (Ont., 1939, C. 45).

See ASSESSMENT AND TAXATION 1.

SHIPPING—*Claim for damaged cargo—Estoppel—Cane sugar bags stored in old open wharf—In bad condition before loading—Bill of lading—Goods shipped "in apparent good order and condition"—Margin notation "Signed under guarantee to produce ship's clean receipt"—Whether shipowner prevented from proving bad conditions of goods—Proper stowage of cargo on ship—Examination on discovery—Transcription merely returned to trial court and deposited before judge—Should be disregarded before this Court.*—The respondent company, by a written contract dated January 25th, 1938, purchased through brokers from B. & Co., who also acted as agents for the appellant company, 1,150 long tons of raw cane sugar, which were to be shipped to Montreal by the ship *Colborne* owned by the appellant company. The bags of cane sugar came from various plantations and were stowed in tiers on an old wooden public wharf in Georgetown, British Guiana. The wharf was built on piles and with large seams between the planks which in places were broken; the height of the wharf over the water at high tide was two to three feet at the cap of the wharf and within a few inches at the end of the foreshore; there was a corrugated iron roof, but otherwise it was an open wharf; the front end of the bags came to the edge of the roof, but were not otherwise protected. The bags had been on the wharf for from four to nine weeks when the *Colborne* proceeded to the wharf to load. The season of 1938 had been unusually wet, as a result of which and of the condition of the wharf about twenty-five per cent. of the bags were in bad condition, some being stained and some torn and re-sewn, when the loading began on June 12th and was concluded late on the 13th or early in the morning of the 14th. The stained bags were stowed and scattered all over the four hatches. The ship was seaworthy in every respect, as the trial judge found. As the bags were loaded, a tally was kept by representatives of B. & Co., the shippers-sellers, and the results of the tally were noted on a sheet which was dated at the top June 10th and addressed to the *Colborne*. That document was endorsed, on June 13th, by the chief tally clerk: "Correct. Many bags stained, torn and re-sewn", that signature was followed by that of the chief officer of the ship and, at the very bottom, was stamped the signature of B. & Co. as agents for the appellant. A received for shipment bill of lading, dated June 13th, was issued by the appellant through its agents B. & Co., stating that the appellant had received "in apparent good order and condition" from B. & Co. for shipment 10,350 bags of cane sugar; and in the margin appeared the stamped notation: "Signed under guarantee to produce ship's clean receipt". The *Colborne* arrived at Montreal on July 3rd, where, upon usual examination by the Deputy Port Warden and after chemical analysis, it was ascertained that the cargo was damaged and that one-third of the bags were badly stained. The respondent company then sued the appellant company for damages and based its claim on two grounds: first, that the appellant was estopped from relying upon the true facts by reason of its own statement in the bill of lading that the cargo was in apparent good order and condition when received for shipment; and, secondly, that in any event the cargo was improperly stowed in that wet bags were mixed with dry bags, which consequently damaged what otherwise would have been sound cargo. The appellant company contended that there was no unqualified statement in the bill of lading that the sugar was shipped in apparent good order and condition, upon which the respondent company could, or did, rely; and also contested the second ground of action raised by the respondent. The trial judge held that a clean bill of lading had been issued by the appellant at a time when the actual condition of the goods was known

SHIPPING—*Continued*

and that the appellant was estopped from setting up that the goods were not in good order and condition; he found the appellant company responsible for the damaged condition of the bags and directed a reference to determine the quantum of damages. The appellant company appealed to this Court. *Held* that the shipowner, the appellant company, under the circumstances of this case, was not estopped as against the holder of the bill of lading, the respondent company, from proving that the bags were not in good condition when shipped. More specially, the effect of the stamped notation on the bill was that the bill contained a qualified statement as to the condition of the goods and the first element in estoppel was therefore lacking. But, even if the bill could be construed as containing an unqualified statement, the respondent never relied on it. *Silver* v. *Ocean Steamship Co.* ([1930] 1 K.B. 416) disc. *Held, also,* that the cargo was properly stowed and that, in any event, even if the stowage was improper, the stained wet bags did not damage what otherwise would have been sound cargo. An officer of the respondent company was examined on discovery on behalf of the appellant. A transcription of the examination was returned to the trial court and deposited on the judge's desk with other papers. The only use made of it was a reference to it by counsel for the appellant in a written argument after the closing of the evidence. Later, when settling the case for this Court, the trial judge, upon an application by the appellant, allowed the inclusion of the examination in the case. *Held* that the examination on discovery should be disregarded by this Court. *Per* The Chief Justice and Kerwin, Taschereau and Estey JJ.: The mere fact of the transcription of such examination being returned to the trial court and deposited before the judge did not make it evidence. Under Rule 75 of the Rules in Admiralty, only such parts of an examination for discovery as are actually read at the trial become part of the record. Also, in an Admiralty case in the Exchequer Court of Canada, article 288 of the Quebec Code of Civil Procedure does not apply although the action was commenced and tried in that province. *Per* Kellock J.: The examination on discovery has not been put in at the trial; and, under the provisions of section 68 of the *Supreme Court Act*, there is nothing which authorizes a judge settling the case to include items which do not form part of the proceedings in the court below. The appeal should be allowed and the respondent company's action dismissed. CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD. v. CANADA AND DOMINION SUGAR CO. LTD..... **249**

2.——*Collision—Ship channel divided in two branches—One ship going up and the other down stream—Whether one or both ships at fault—Confusion created by successive blasts given by both—Required signals to be given from a sufficient distance and within a sufficient time to allow ships to proceed safely—Danger arising from misunderstood signals—Absence of proper look-out.*—The action brought by the respondents, owners of the S.S. *Roberval*, her master and members of the crew and owners of her cargo on board, and the counter-claim by the appellants, the S.S. *Richelieu* and her owners, arose out of a collision between the two ships in the river St. Lawrence, near Three Rivers. In the vicinity of that city, the regular ship channel divides into two branches, one practically parallel to the other. The *Roberval* was proceeding down stream and was following the north branch, while the *Richelieu* was coming upstream, below a buoy in the ship channel east of the junction of the two branches. The *Richelieu* intended to proceed by the south branch and, seeing the *Roberval*, gave two short blasts of its whistle to indicate that it was directing its course to port, and in fact ported. Those on the *Roberval* say that they heard only one blast, which would indicate that the *Richelieu* was directing its course to starboard. Those on the *Richelieu*, not hearing any immediate answer from the *Roberval*, stopped their engines. Immediately thereafter, the *Roberval* answered with one blast and thereupon the *Richelieu's* engines were ordered full speed astern and three blasts of its whistle were given. The collision occurred almost immediately: the stem of the *Richelieu* came in contact with the port side of the *Roberval*, the *Richelieu* being practically stopped at the time of the impact. The trial judge, holding that the *Richelieu* alone was to blame for the collision, maintained the action and dismissed the counter-claim. *Held, per* The Chief Justice and Hudson and Taschereau JJ., that, according to the facts of the case, both ships were to blame, that the responsibility should thus be apportioned and that the judgment appealed from should be modified accordingly. Kerwin and Rand JJ. were of the opinion that the respondents' action ought to be dismissed *in toto* and the counter-claim allowed. *Per* the Chief Justice and Hudson and Taschereau JJ.: When two ships are about to meet, the required signals have to be given from a sufficient distance and within a sufficient time to allow the respective crews to take the necessary steps to avoid any peril which may arise as the result of misunderstood signals. The *Richelieu* was late in signalling her intention as to which channel she would follow, and, under similar circumstances, ordinary prudent seamen would not have waited as long as she did to indicate the route she was to follow. At the time of the first blast given by the *Richelieu*, the distance between the two ships, half a mile, was too short, the blasts were given too late and the officers of the crews did not have the necessary time to avoid the peril created by the emergency resulting from the misunder-

SHIPPING—*Concluded*

standing. The errors of the *Roberval*, in trying to pass port and her failure to stop her engines in proper time when the danger was imminent, contributed to two-thirds of the accident, and the *Richelieu* should bear one-third of the responsibility for her delay in giving the necessary signals. *Per* Kerwin and Rand JJ.: The *Richelieu* has acted properly at all times. The signals given by her were proper because the ship was taking a course "authorized by the Rules", and they were not given too late; she also acted properly, and not too late, in stopping its engines when hearing no reply to its signal and then in reversing its engines when it did hear the one blast from the *Roberval*. The cause of the collision was the absence of a proper lookout by those on the *Roberval*. If they had kept a proper lookout, they would have heard the *Richelieu's* two blasts, and, even then, the collision might have been avoided if the Captain of the *Roberval*, seeing what the *Richelieu* was actually doing, had altered his course to port and had slowed his engines. S.S. RICHELIEU AND HER OWNERS v. LA CIE DE NAVIGATION SAGUENAY ET LAC ST-JEAN LIMITÉE AND OTHERS..... 659

STREET RAILWAYS—*Agreement between City of Ottawa and Ottawa Electric Ry. Co., ratified and confirmed by c. 84, statutes of Canada, 1924—Application by City to Board of Transport Commissioners for decrease in fares chargeable by Company—Question whether City had complied with proceedings required before making application—Form of resolution by City Council—Interpretation of agreement, statute—Words of provision, whether imperative, or directory only.* —An agreement between the City of Ottawa and the Ottawa Electric Ry. Co. (a company incorporated by Act of Parliament of Canada), which agreement was ratified and confirmed by c. 84, statutes of Canada, 1924, provided, *inter alia*, for application for increase or decrease of fares on a certain part of the Company's railway. Clause 9 *(c)* of the agreement provided that "should the revenue to be derived from the operation of [said part of the railway] appear likely to be more than sufficient, in the opinion of the City expressed by resolution, to provide during the five year period next succeeding the five year period then current, for [items specified in clause 9 *(a)*], then the City may notify the Company in writing, one year before the end of any five year period, that it considers the fares excessive", and, if no satisfactory adjustment was made within one month, the City might apply to the Board (now the Board of Transport Commissioners for Canada) for a decrease in fares. The City Council at a meeting "received and adopted" a presented report of the City's Board of Control recommending that the City Clerk notify the Company that "in accordance with clause 9 of the" said agreement, it was the

STREET RAILWAYS—*Continued*

City's "intention to apply for a reduction in the current tariff of fares"; and the City Clerk notified the Company that "under authority of clause 'c' of section 9 of the [said agreement], the City Council, at a meeting held on * * * passed a resolution and instructed me to notify your company that it considers the present fares excessive and if no satisfactory adjustment is made within one month from * * * it is the intention of the City to apply to the Board of Transport for such a decrease in fares during the next five year period as will allow a revenue not more than sufficient to provide for the items specified in clause 'a' of section 9 of the said agreement". Later the City applied to the Board for an order decreasing the fares. The Company contended, by way of preliminary objection, that before giving the notice the City had failed to express by resolution the opinion that the revenue to be derived appeared likely to be more than sufficient to provide during the next five year period in question for said items, as required by the said agreement and statute of 1924, and that therefore the City was not entitled to give the notice or maintain its application to the Board. That question came before this Court, by leave of the Board of Transport Commissioners, on appeal from holdings of the Board. *Held* (affirming holdings of the Board, 56 C.R.T.C. 317), that the City was entitled to give the notice and to maintain its application. *Per* the Chief Justice and Taschereau J.: The fact that the City Council's resolution, instead of reproducing the exact words of said clause 9 *(c)*, adopted a report which proceeded by way of a reference to the clause itself, did not justify the Company's objection. Whether the terms of the clause be held as being imperative or directory, the condition therein stated in respect of the resolution was sufficiently complied with—indeed more than substantially—and the action taken by the City Council completely satisfied the requirements of the clause. The resolution necessarily imported the City's opinion that the Company's revenues appeared likely to be more than sufficient for the purposes in question, and in effect expressed that opinion. Also, no prejudice could result to the Company on account of the alleged omission in the resolution. Also, it was not to be assumed (nor was there any evidence) that the resolution was adopted without due deliberation and after careful consideration. (The words of said Act of 1924, so far as material in this case, merely confirm and validate the agreement and make it binding as a contract between the parties; though the Act, because of its direction to the Board and because the agreement affects the interest of the general public, may not be considered merely as providing and imposing mutual obligations on the Company and the City. Also the Act, rather than conferring a privilege of applying to the

STREET RAILWAYS—*Continued*
Board, really restricts the parties' rights in that connection; the Company is under the Board's jurisdiction existing under the *Railway Act*, and said Act of 1924 limits the right of each party to apply to the Board as to fares, to the terms and conditions of the agreement. The agreement as ratified by the Act, in so far as clause 9 *(c)* is concerned, only deals with the procedure whereby the Board's jurisdiction is to be set in motion; it indicates what form will be given to the application to the Board—a certain resolution of the City Council and the notice in writing to the Company). *Per* Kerwin J.: The Act of 1924 did more than merely ratify and confirm the agreement; and the agreement should be construed as a statutory enactment. Even considered as such, the first part of clause 9 *(c)*, down to the word "resolution", is merely directory, not imperative, and the word "then" in the phrase "then the City may notify the Company in writing" means no more than that the parties were making provision for the City's application; it does not mean that the City may give notice only if it should first specifically express its opinion by resolution. The lack of a resolution expressed in the precise words used in clause 9 *(c)* was not fatal to the City's application made after its notice to the Company. There was nothing to indicate that thorough consideration was not given to the matter by the City Council, nor was there any prejudice to the Company. *Per* Rand J.: The provisions of the agreement dealing with fares and the Board's powers over them must be taken to have become, by the Act of 1924, the subject of statutory enactment. But the mere expression of opinion by the City in a formal resolution is not an imperative step to the right to raise the question of fares. To the language used by Parliament in restricting the power to deal with the fares, which involves the taking away of the general privilege under the *Railway Act*, there should not be attributed the intention of surrounding the public trust lying on the City Council with conditional formalities of no substantive value. The formality intended to be secured was approval of the Council before executive action should take place, and whether that approval should lie in a resolution formally expressing the opinion of the Council, to be followed automatically by executive action, or in one instructing the giving of the notice, would be a matter of indifference. The essential protection to the Company was that there should be no unauthorized action; that behind any step by the executive should stand the knowledge, opinion and approval of the Council. That protection was present here. The resolution directing the giving of the notice, by the necessary implication of its terms, involved the opinion of the Council essential to the propriety of its action. *Per* Kellock J.: The principle of

STREET RAILWAYS—*Concluded*
the decision in *Halford* v. *Cameron's Coalbrook Steam Coal, etc., Co.*, 16 Q.B. 442, applies. The resolution of the City Council did "express" (giving to that word the meaning adopted in the *Halford* case: "represent in words", "exhibit by language" or "shew or make known") that the City was of the opinion specified in said clause 9 *(c)*, and was sufficient, though the word "opinion" or a similar term was not used. OTTAWA ELECTRIC RY. CO. v. CITY OF OTTAWA..... **105**

2.——*See* CONSTITUTIONAL LAW 1.

SUCCESSION DUTY—*Valuation of property for—Land with theatre building thereon—Leased for term of years—Factors and considerations in determining value—Capitalization of revenue method in valuing land—Whether wrong principle applied in the circumstances—Amount determined by Commissioner, reduced by Court of Appeal, restored by this Court.*—The dispute was as to the value of certain land in Edmonton, Alberta, for purpose of succession duty. The owner died in 1942. He had granted a lease of the land in 1918 for 35 years, at fixed rentals, which increased by $937.50 every five years, starting at $5,625 per annum and ending at $11,250 per annum. The lessees were to erect and furnish, at approximate costs respectively of $48,000 and $20,000, a theatre building on the land, to insure it, keep it in repair, and pay taxes, and had the right at end of the term to remove all fixtures (repairing any damage thus caused). On assignment to an assignee who assumed liability under the lease, the lessees were to be discharged from liability. The building had been erected and the rent paid. Alterations had been made in the building in 1928 and 1939 at costs, respectively, of about $128,000 and from $80,000 to $90,000. A Commissioner appointed under s. 28 of *The Succession Duty Act*, R.S.A. 1942, c. 57, determined the value at $108,300. On appeal on behalf of the owner's estate, the Supreme Court of Alberta, Appellate Division, by a majority, fixed the value at $65,000 ([1944] 1 W.W.R. 385). On appeal by the Attorney General of Alberta, this Court now restored the amount determined by the Commissioner. Principles to be applied and factors to be considered in determining the value of such property under the circumstances, discussed, and authorities cited. *Per* the Chief Justice and Rand J.: It may be that the true basis of valuation is the "exchange value" (what could be got in the open market), but this can only be so when such "exchange value" can be ascertained, and in this case it could not be obtained; there was no real evidence of any such value. The Commissioner had to value the land and the building *qua* theatre as it was at the time of the owner's death, and he had to take the conditions as he found them as

SUCCESSION DUTY—*Concluded*
of that date. It was proper for him to take into consideration the revenue-producing qualities of the property, and the value of the lease in effect at the date of the owner's death. The capitalization of revenue method (using 8 per cent. as an interest factor, and allowing a discount for contingencies) used by him in determining the land value should not be held to be a wrong principle, in the circumstances with which he was faced as a result of the evidence before him. As it could not be said that he had acted on any wrong principle of law, and as his valuation was supported by evidence, his finding should not have been disturbed. *Per* Hudson and Taschereau JJ.: In the circumstances of this case, the capital value must in large measure be determined by reference to revenue-producing capacity of the property. Factors tending to reduce the value attributable to the lease were taken into account by the Commissioner and a generous allowance made in respect thereof. Agreement was expressed with his finding. *Per* Estey J.: The Commissioner did not adopt a wrong principle in arriving at his valuation. He would seem to have appreciated that he had to determine the market or exchange value. He had to determine the market value, and when, as in this case, no market existed, it was his task (a difficult one) so far as possible to construct a normal market and determine the value by taking into account all the factors which would exist in an actual normal market (one not disturbed by factors similar to either boom or depression and where vendors, ready but not too anxious to sell, meet with purchasers ready and able to purchase). A perusal of his report indicated that he had exhaustively studied the evidence and carefully examined the factors and had reached a reasonable conclusion, which should be sustained. (Opinion expressed that the Commissioner was in error in considering "fixtures", which the lessees had right to remove at end of the term, to mean furnishings; which error would lead to placing a slightly higher valuation on the building; but, as there was no evidence as to what the fixtures were, or were worth, and as so much of the valuations were and must be approximations, the error did not justify any revision.) *In re* WITHYCOMBE ESTATE; ATTORNEY GENERAL OF ALBERTA v. ROYAL TRUST COMPANY..... **267**

SURGERY.
See NEGLIGENCE 2.

TAXATION.
See ASSESSMENT AND TAXATION.

TRANSPORT COMMISSIONERS FOR CANADA—*Jurisdiction.* **16**
See CONSTITUTIONAL LAW 1.

TRESPASS (TO THE PERSON).
See NEGLIGENCE 2.

TRESPASSER—*Precaution against injury to.* **191**
See CRIMINAL LAW 3.

TRIAL—*Criminal law—Evidence—Appeal from affirmance by court of appeal of conviction for murder—Appellant and others jointly indicted and tried together—Written confessions by other accused admitted in evidence—Sufficiency and timeliness of warning by trial Judge to jury that confession put in is evidence only against person making it—Defining "murder" to the jury—Criminal Code, s. 259 (a) (b)—Criminal Code, s. 69 (2) (several persons forming common intention to prosecute unlawful purpose, etc.)—Inapt illustration to jury—Application of the law to the evidence—No substantial wrong or miscarriage of justice (Criminal Code, s.* 1014 (2)). SCHMIDT v. THE KING.....**438**

2.——*Negligence—Jury trial—Automobile collision—Highway covered with smoke—Driver turning to left to avoid government truck—Head-on collision with approaching car—Finding of jury as to negligent act of appellants' driver—Whether it comes within allegations of negligence in statement of claim—Charge to jury as to respective duty of drivers—Trial judge reading from reported judgments—Mis-direction—Issues between parties not adequately presented nor sufficiently tried—New trial.*—The respondent's car, in which the other respondents were passengers, was being driven southwards when the driver noticed a cloud of smoke being carried across the highway about a mile ahead of him, the smoke covering about 150 feet of the length of the highway. As he approached the smoke, he noticed just ahead of it a government truck which was collecting weeds in the ditch to have them burned; and, when near the truck, the respondent's driver had observed another car in front of him drive around it and enter the smoke, and he proceeded to do likewise. He successfully passed the truck, but beyond it his automobile came into collision with the appellants' oil truck and trailer proceeding from the south. Neither driver saw the other by reason of the smoke until the vehicles were a very short distance apart. As a result of the collision, the respondent and the occupants of his car were injured and an action was brought for the resulting damages. In answer to a submitted question, the jury found that the appellants' driver was negligent because "he should have stopped before entering smoke and determined the cause of smoke, especially in view of the nature of his load"; and they found also that there was no contributory negligence on the part of the respondent's driver. The Court of Appeal held that the trial judge had mis-directed the jury and ordered a new trial. The appellants limited their appeal to this Court to that part of the judgment whereby their application for dismissal of the action was refused. They contended that the answer

TRIAL—*Continued*
of the jury was not responsive to any of the allegations of negligence pleaded by the respondents and that the finding of the jury (if the jury found that the appellant's failure to stop before entering the smoke caused the accident) in that respect was perverse; and they urged that the respondents' action should have been dismissed as no other finding of negligence had been made. The respondents cross-appealed, asking that the judgment of the trial judge in their favour be restored. *Held* that the appeal and the cross-appeal should be dismissed and that the judgment appealed from ([1944] 1 W.W.R. 634) be affirmed. On the appeal: *Per* Hudson, Taschereau and Estey JJ.: It is unnecessary to decide the issue raised by the appellants' submission. If it be decided that the answer of the jury is responsive and not perverse, a new trial must still be had because there has been no appeal from that part of the judgment of the Court of Appeal which has so decided. If it be decided that the answer is not responsive and perverse, it is an answer of a jury deliberating under the influence of a misdirection. A plaintiff's action should be dismissed upon such a basis, only if the charge of the trial judge has adequately placed the issues involved before the jury or if the Court finds that there is no evidence to support a verdict even if the charge had been without objection; and the present case cannot be so regarded. *Per* Rand and Kellock JJ.: The answer of the jury with respect to the negligence of the appellant driver cannot be regarded as a finding which does not come within the allegations of negligence in the statement of claim. There may be some surplusage in the answer, but, regarded reasonably, these allegations were sufficiently wide to include what the jury has found. On the cross-appeal: *Held* that the judgment of the Court of Appeal ordering a new trial should be affirmed. *Per* Hudson, Taschereau and Estey JJ.: The pleadings of both appellants and respondents specifically raised issues as to the manner and position upon the highway in which the respective cars were driven; and each claimed that the negligence of the other caused the accident and adduced evidence in support of their respective contentions. These facts and these issues have not been adequately presented to the jury by the trial judge. *Per* Rand and Kellock JJ.: The trial judge, from the reading of his charge, seems to have directed the attention of the jury to the conduct of the appellants' driver in proceeding into and continuing in the smoke as being conduct which the jury might well consider to be negligent, while he treated the conduct of the respondents' driver, if the jury considered it in any respect negligent, as though it did not matter, being something which the appellants' driver ought to have anticipated and guarded against. Both what the trial judge said himself and what he read from the

TRIAL—*Concluded*
reported judgments had the effect of taking away from the jury the issue of negligence, on the part of the respondent driver, as being essentially irrelevant. The result has been that the issues between the parties have not been tried. Judgment of the Court of Appeal ([1944] 1 W.W.R. 634) affirmed. WOLFE v. GIESBRECHT 441

3.——*Criminal law—Charge of rape—Evidence—Corroboration—Charge to jury—Misdirection—New trial* 134
See CRIMINAL LAW 2.

4.——*Criminal law—Trial on charge of rape—Question whether trial judge should have charged jury as to possible alternative findings of lesser offence—Question whether failure of accused to testify was made subject of comment, contrary to Canada Evidence Act, R.S.C. 1927, c. 59, s. 4 (5)* 319
See CRIMINAL LAW 4.

TRUSTEES—*Costs—Direction in will that fund be set apart for benefit of testator's daughter—Executors and trustees of the will also trustees of the fund—Unsuccessful action by daughter against the executors and trustees with regard to the fund as set up—Question out of what fund (said fund or the residuary estate, or both) the solicitor and client costs incurred by the executors and trustees in said action (to the extent that they exceeded the party and party costs) should be paid...* 343
See COSTS 1.

VALUATION—*Of property for purposes of succession duty* 267
See SUCCESSION DUTY.

2.——*"Value of the vessel" within s. 5 (1) of The Comepnsation (Defence) Act, 1940—Meaning—Principles to be applied and factors to be considered in determining that value* 458
See COMPENSATION.

VERIFICATION.
See WILL 2.

WAR MEASURES ACT.
See COMPENSATION.

WARTIME REGULATIONS—*Accused, respondent, prosecuted for alleged infractions of Order in Council dealing with maximum or ceiling prices—Accused convicted after speedy trial under Part XV of the Criminal Code—Order in Council by federal authorities creating leave to appeal to Supreme Court of Canada in cases of offences against wartime regulations—Regulations made by the Order in Council—Extent of such right of appeal—Interpretation of the conditions imposed by the Order in Council—Right of appeal to Supreme Court of Canada still subject to sections 1023 and 1025 of the Criminal Code....1*
See APPEAL 1.

WILL—*Husband and Wife—Application by testator's widow under The Dependants' Relief Act, R.S.S. 1940, c. 111—S. 8 (1) (2)—On finding that reasonable provision not made by will for her maintenance, question as to effect of s. 8 (2) as to extent of allowance to be awarded.*—On an application, under *The Dependants' Relief Act*, R.S.S. 1940, c. 111, by the widow of a testator for an order making reasonable provision for her maintenance, if the widow has satisfied the Court of the condition stated in s. 8 (1) of the Act, namely, that the testator has by will so disposed of real or personal property that reasonable provision has not been made for her maintenance, she is entitled, under s. 8 (2), to an allowance which, in the opinion of the Court, is not less than the share of the testator's estate which she would have received if he had died intestate leaving a widow and children (i.e., one-third of the estate). Rand J. dissented. *Per* Rand J., dissenting: The underlying purpose and conception of s. 8 (1), which is reasonable provision for *maintenance*, is carried through into s. 8 (2), and what is envisaged is a determination "in the opinion of the Court" of what the actual maintenance of the widow—the pecuniary dimensions of her actual living—in the circumstances of intestacy would have been and to take the amount so found as the measure for determining the supplementary or original allowance called for by s. 8 (1). The Court is to exercise its judgment upon the resources that would go into actual maintenance under intestacy and to determine to what extent that would be received from the intestate share. The minimum allowance for maintenance should be what the reasonable maintenance of the widow, under the circumstances of intestacy, would have drawn from her share of the estate. CITY OF SASKATOON v. SHAW...*42*

2.——*Action in contestation—Probate—Validity—Onus probandi—Res judicata—Object and effect of probate—Arts. 857 and 858 C.C.*—The judgment ordering the probate of a holograph will does not constitute *res judicata*. As a result of such probate, the will takes effect "until it is set aside upon contestation". Art. 857 C.C. In an action where a holograph will duly probated is contested, the burden of proof still continues to impose upon the beneficiary the obligation to establish the genuineness of the writing or of the signature of the testator. The probate thus has not the effect of shifting such burden to the party repudiating the will, the latter not having the incumbent duty of proving that the writing or the signature were forged. There is a very wide difference between the "probate" under the English Law and the "verification" under the civil law of Quebec. *Dugas* v. *Amiot* ([1929] S.C.R. 600) approved. *Billette* v. *Vallée* not applicable to this case. That decision was rendered upon an exceptional case and was essentially an "arret d'espèce". LATOUR ET AL. v. GRENIER..**649**

WORDS AND PHRASES—*"Accidental" death, within provision in life insurance policy*.....**289**
See INSURANCE (LIFE).

2.——*"Amount or value of the matter in controversy in the appeal" (within s. 39 (a) of the Supreme Court Act, R.S.C. 1927, c. 35)*..... **131**
See APPEAL 2.

3.——*"Appurtenances"*..... **385**
See CONSTITUTIONAL LAW 2.

4.——*"Excluded from ingress or egress" (s. 468 of Municipal Act, R.S.M. 1940, c. 141)*..... **234**
See MUNICIPAL CORPORATIONS 1.

5.——*"External, violent and accidental" cause, within provision in life insurance policy*..... **289**
See INSURANCE (LIFE).

6.——*"Final judgment" (within s. 2 (b) of Supreme Court Act)*..... **169**
See APPEAL 3.

7.——*"In any manner vested in the Court" in s. 82 (1) of the Exchequer Court Act, R.S.C. 1927, c. 34*..... **458**
See COMPENSATION.

8.——*"In virtue of any jurisdiction now or hereafter, in any manner, vested in the Court" in s. 82 (1) of the Exchequer Court Act, R.S.C. 1927, c. 34*..... **458**
See COMPENSATION.

9.——*"Matter in controversy" (within s. 39 (a) of the Supreme Court Act, R.S.C. 1927, c. 35)*..... **131**
See APPEAL 2.

10.——*"Or to a judge of any such court" in s. 7 of the War Measures Act, R.S.C. 1927, c. 206*..... **458**
See COMPENSATION.

11.——*"Rights in future of the parties" (s. 41 (c) of the Supreme Court Act)*... **175**
See APPEAL 4.

12.——*"Subject to all provincial and municipal enactments" (in an amending federal Act giving power to company to operate auto busses)*..... **16**
See CONSTITUTIONAL LAW 1.

13.—*"Undertaking" (as used in statute declaring undertaking of company a work for the general advantage of Canada)*..... **16**
See CONSTITUTIONAL LAW 1.

14.——*"Value of the vessel" in s. 5 (1) of The Compensation (Defence) Act, 1940 (c. 28)*..... **458**
See COMPENSATION.

15.——*"Works" (in head 10 (c) of s. 92 of B.N.A. Act)*..... **16**
See CONSTITUTIONAL LAW 1.