1953

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LAW REPORTS

Supreme Court of Canada

Editors

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Stuart Sinclair Garson, Q.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Stuart Sinclair Garson, Q.C.

ERRATA

in Volume I of 1953

Page 210, fn. (1) should read: "[1953] 1 S.C.R. 127."

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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.

A. G. Alberta v. *Huggard Assets* [1951] S.C.R. 427. Appeal allowed, 24th March, 1953.

A. G. Alberta v. *West Canadian Collieries* [1952] 1 D.L.R. 346. Appeal dismissed, 24th March, 1953.

A. G. Saskatchewan v. *C.P.R.* [1951] S.C.R. 190. Appeal dismissed, 6th July, 1953.

Baker v. *National Trust Co. and Others* [1953] 1 S.C.R. 95. Petition for special leave to appeal granted, 20th May, 1953.

Brown v. *Welstead* [1952] 1 S.C.R. 3. Petition for special leave to appeal dismissed, 24th March, 1953.

Canada Steamship Lines v. *The King* [1950] S.C.R. 532. Appeal allowed, 21st January, 1952.

Dansereau v. *Berget* [1951] S.C.R. 822. Order of Supreme Court varied so as to confine it to an order dismissing the appeal for want of jurisdiction and omitting that part of the order which affirms the probate of the Will of 21st August, 1946, 5th October, 1953.

Winnipeg, City of v. *C.P.R.* [1952] S.C.R. 424. Appeal dismissed, 14th July, 1953.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

68773—1

THOMAS CAMPBELL .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

1952

*Jun 5
*Oct. 7

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Revenue—Income tax—Profit from resale of real estate by individual—Whether income or capital gain—Whether realization or change of investment—Whether carrying on business—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1)—Practice—Appeal from Income Tax Appeal Board a trial de novo.

The appellant was assessed for income tax in respect of profits realized by him on the sale of three apartment blocks which he had caused to be built in the City of Vancouver between the years 1945 and 1948. The first of these had been built in 1945 and sold in 1946; the second had been commenced in 1946 and sold in the summer of 1947 and construction of the third had been commenced in 1948 and sold in that year before it was completed.

The appellant appealed to the Income Tax Appeal Board contending that his purpose in building each of the apartments was as an investment in the expectation of receiving an income from the rentals and providing living accomodation for himself and his family. The Board held upon the evidence that the profits were not realized from the enhancement in value of an ordinary investment but rather from what was in fact the carrying on of a business. An appeal to the Exchequer Court from this decision was dismissed.

Held: The appeal should be dismissed, there being evidence upon which the Income Tax Appeal Board and the Exchequer Court might properly hold that the appellant was carrying on the business of constructing the buildings for the purpose of resale at a profit.

Californian Copper Syndicate v. *Harris* [1904] 5 Tax C. 159 and *Commissioner of Taxes* v. *Melbourne Trust Ltd.* [1914] A.C. 1001 referred to.

APPEAL from the judgment of the Exchequer Court of Canada (1), Sydney Smith, Deputy Judge, dismissing an appeal from the decision of the Income Tax Appeal Board and holding that the appellant was assessable for income tax.

A. S. Gregory for the appellant.

W. R. Jackett Q.C. and *F. J. Cross* for the respondent.

*PRESENT: Kerwin, Kellock, Locke, Cartwright and Fauteux JJ.

(1) [1951] Ex. C.R. 290.

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The judgment of the Court was delivered by:—

LOCKE J.—The question to be determined in the present matter is as to whether certain profits realized by the appellant in the taxation years 1946, 1947 and 1948 were income, within the meaning of that term as defined by subsection 1 of section 3 of the *Income War Tax Act* (c. 97, R.S.C. 1927 as amended). The subsection, so far as relevant, reads:—

> For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere.

To the income as reported by the appellant in his income tax returns there was added by the Minister a sum of $2,000 for the taxation year 1946, $29,500 for the year 1947 and $31,880 for the year 1948, these amounts being profits made by him on the sale of three apartment blocks, which he had caused to be constructed in the City of Vancouver between the years 1945 and 1948. The first of these, the Promenade Apartments, had been built in the year 1945 and sold in the month of April 1946; the second called the Seacrest, the construction of which was commenced in 1946 was sold in the summer of 1947 and the third called the Harcrest, the construction of which was commenced in March of 1948 was sold by the appellant in that year, before completion.

The appellant appealed to the Income Tax Appeal Board. While the proceedings before that court are in form an appeal from the decision of the Minister of National Revenue, the hearings are in the nature of a trial in which both parties are entitled to call evidence. In the present matter, the appellant gave evidence before the Board in support of his contention that his purpose in building the first of these apartments was as an investment in the expectation of receiving an income from the rentals, at the same time affording living accommodation for himself and his family in one of the suites, and that it was due to unforeseen circumstances that it became necessary for him to sell the property. The two other blocks were

built with the same end in view, according to the appellant, and in each case it was necessary for him to sell for reasons which he had not foreseen when undertaking the construction. The appellant accordingly contended that the profits realized were in the nature of capital gains and did not fall within the definition of income in the statute. On cross-examination it was disclosed that in the year 1943 the appellant had sold an apartment block containing ten suites which he had had built some four years earlier and which, the appellant said, had been constructed for the same purpose as the apartments in question, and that in that year he had purchased a large house on Hudson Street which he intended to turn into suites and which, after it had been remodelled, he had sold.

In a carefully considered judgment the learned Assistant Chairman of the Income Tax Appeal Board, Mr. Fabio Monet, Q.C. found that the appellant had realized the profits in question while engaged in carrying on a business or activity, within the meaning of subsection 1 of section 3. Mr. Monet, with whose reasons for judgment Mr. W. S. Fisher, Q.C., the other member of the Board who presided at the hearing agreed, applying the principle stated in the judgment of the Lord Justice-Clerk in *Californian Copper Syndicate* v. *Harris* (1), found that these were not profits realized from the enhancement in value of an ordinary investment but rather from what was in fact the carrying on of a business. Considering, however, that the appellant had been improperly assessed in the sum of $2,000 for the taxation year 1946, his appeal in this respect was allowed, the assessment for the year 1947 amended by deducting from it the amount of $300. The appeal in respect of the year 1948 was dismissed.

The proceedings on an appeal in such matters to the Exchequer Court are in the nature of a trial de novo and the appellant again gave evidence in that Court (2) and was cross-examined at length, and further evidence was given by his wife as to the reasons which had led her husband to sell certain of the properties. In the reasons for judgment of Mr. Justice Sidney Smith (2) he expressed the opinion that on the evidence the appellant was carrying on a trade, business or calling for the purpose of making

(1) (1904) 5 Tax C. 159 at 165. (2) [1951] Ex. C.R. 290.

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Locke J.

profits during the periods in question, saying that his reasons for this conclusion of fact were substantially those of the learned Assistant Chairman of the Income Tax Appeal Board and that he agreed with the latter's statement as to the applicable principles of law. On the evidence before him he held, however, that for the year 1946 $8,700 should be added to the amount of the assessment and a like amount deducted from that made in the year 1947: for the year 1948 he considered the amount as found by the Board should remain unchanged and, with these variations, dismissed the appeal.

While the proceedings before the Income Tax Appeal Board under the provisions of the *Income Tax Act* are by way of appeal from decisions of the Minister, the proceedings in the present matter are indistinguishable from those upon the trial of issues in other courts of record. By subsection 2 of section 91 of the *Act*, upon completion of the steps required by the statute on an appeal to the Exchequer Court, the matter is to be deemed as an action in that Court and the proceedings are conducted in the same manner as in other actions. The question as to whether the appellant was engaged during the years in question in carrying on the business of building apartment blocks with a view to reselling them at a profit is one of fact. While the decision in *Californian Copper Syndicate* v. *Harris* turned upon the interpretation of Schedule D of the Income Tax Act of 1842, the passage from the judgment of the Lord Justice-Clerk, referred to in the judgment of the learned Assistant Chairman, in my opinion, expresses the principle which is applicable here. In delivering the judgment of the Judicial Committee in *Commissioner of Taxes* v. *Melbourne Trust Limited* (1), Lord Dunedin quotes with approval the passage from the judgment in the *Californian Copper Syndicate* case reading:—

> It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

(1) [1914] A.C. 1001 at 1010.

The learned members of the Income Tax Appeal Board having heard the evidence of the appellant did not accept his statement that he had caused to be built these various properties for the purposes of investment and concluded that in truth he was carrying on the business of constructing them for the purpose of resale at a profit. The learned Deputy Judge of the Exchequer Court having again heard the appellant's evidence in the matter has come to the same conclusion. Mr. Gregory's able argument for the appellant has failed to satisfy me that there is any ground upon which we are justified in interfering with these findings.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. S. Gregory.*

Solicitor for the respondent: *F. J. Cross.*

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*Apr. 30
*May 1
*Oct. 7

J. M. BRIDGE ..... APPELLANT;

AND

HER MAJESTY THE QUEEN, ON THE INFORMATION OF EDWARD SKALINSKI ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal Corporation—Validity of By-law—Whether delegation of powers of Municipality to City Clerk—The Factory, Shop and Office Building Act, R.S.O. 1937, c. 194 as amended.

By-Law 6300 of the City of Hamilton, purporting to have been passed under the authority of ss. 82(3) and 82a of the *Factory, Shop and Office Building Act,* R.S.O. 1937, c. 194 as amended, provides that all gasoline service stations be closed during the period between 7 p.m. and 7 a.m. of the following day during week days and all day Sunday. The By-Law provides that the City Clerk "may, on the recommendation of the Property and Licence Committee, issue" extension permits and emergency (without defining that word) permits to authorize the service stations named therein to remain open during stated hours; it also provides that such permits be issued to stated percentages of the total number of gasoline shops "according to the records of the City Clerk" in rotation; it further provides that the Clerk shall omit from the list of those entitled to extension and emergency permits such occupiers as have "according to evidence satisfactory to the City Clerk" failed to keep their shops open as authorized.

The appellant's conviction by a justice of the peace of a breach of the by-law was affirmed by a judge of the County Court and by the Court of Appeal for Ontario. The conviction was attacked on the ground that the by-law was invalid because, inter alia, the council have delegated the legislative power conferred upon them with regard to the issue of extension permits and emergency service permits to the City Clerk and have substituted his judgment and discretion for their own.

Held (Rand J. dissenting), that the appeal should be dismissed and the conviction affirmed.

Per Kerwin, Kellock, Locke and Cartwright JJ.: The submission that as the permissive word "may" is used in s. 5 of the by-law Council have left it to the City Clerk to decide whether permits shall be issued at all, failed; the by-law must be read and construed as a whole and it is obvious from other provisions that the Clerk must issue permits in the manner laid down in the by-law.

The provisions in ss. 7(2) and 8(2), that such occupiers as "according to evidence satisfactory to the City Clerk" have failed to keep their shops open as authorized, are invalid. It is within the powers of the Council to prescribe a state of facts the existence of which shall render an occupier ineligible to receive a permit for a stated time; but express words in the enabling Statute would be necessary to give the Council power to confer on an individual the right to decide, on

*Present: Kerwin, Rand, Kellock, Locke and Cartwright JJ.

such evidence as he might find sufficient, whether or not the prescribed state of facts exists and there are no such words. However, these provisions are severable.

The submission that there is an unauthorized delegation to the Clerk of the discretionary right to decide as to the groups provided for in ss. 7 and 8 of the by-law and as to the order of rotation as between such groups, failed. The conferring of these powers on the Clerk was within the authority given to the Council by s. 82a of the enabling Statute, ". . . any by-law . . . may . . . (c) provide for the issuing of permits". The Council has provided in the by-law with sufficient particularity for the issuing of permits and the duties imposed upon the Clerk to select the occupiers to make up the respective groups and to arrange the order of rotation, are administrative and validly imposed.

Finally, the failure to define the word "emergency" did not invalidate the by-law for uncertainty.

Per Rand J. (dissenting):—With respect to the determination of membership in the percentage groups, there was an infringment of the general requirement that no part of the legislative action or discretion reposed by the Legislature in a council could be delegated to any other body or person. In view of all the factors to be considered as to the mode of selection and order, it cannot be said that the judgment of the Council is interchangeable with that of a committee. If under a provision of the by-law, the recommendation of the committee had been placed before the Council and approved, the objection would have been met.

(As to the other submissions, Rand J. agreed with the majority).

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the conviction of the appellant for breach of a municipal by-law.

J. A. Sweet, Q.C. for the appellant.

J. D. Arnup Q.C. and J. S. Boeckh for the respondent.

The judgment of Kerwin, Kellock, Locke and Cartwright, JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal, brought by special leave, from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal from a judgment of the learned County Court Judge which in turn had dismissed an appeal from the conviction of the appellant on a charge of breach of a by-law of the City of Hamilton respecting the closing of gasoline service stations during certain hours.

In the courts below and in this court the sole ground on which the conviction was attacked was that the by-law in question is invalid.

(1) [1951] O.R. 715.

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The by-law purports to be passed under the authority conferred upon the Council by section 82(3) and section 82(a) of *The Factory, Shop and Office Building Act*. These sections read as follows:—

82(3) The council of a city, town or village may by by-law require that during the whole or any part or parts of the year all or any class or classes of shops within the municipality shall be closed, and remain closed on each or any day of the week at and during any time or hours between seven of the clock in the afternoon of any day and five of the clock in the forenoon of the next following day, but no such by-law shall be deemed to apply to the sale of fresh fruit.

82a. In addition to any matter authorized by section 82, any by-law thereunder applicable to retail gasoline service stations, gasoline pumps and outlets in the retail gasoline service industry as defined in The Industrial Standards Act may,—

(*a*) provide that the by-law shall apply only in the portion or portions of the municipality designated in the by-law;

(*b*) require that during the whole or any part or parts of the year such retail gasoline service stations, gasoline pumps and outlets be closed and remain closed at and during any time or hours between six of the clock in the afternoon of any day and seven of the clock in the forenoon of the next following day and between six of the clock in the afternoon of Saturday and seven of the clock in the forenoon of the next following Monday; and

(*c*) provide for the issuing of permits authorizing the retail gasoline service station, gasoline pump or outlet for which it is issued to be and remain open, notwithstanding the by-law, during the part or parts of the day or days specified in the permit.

The portions of the by-law relevant to the questions raised on this appeal are sections 4 to 9 inclusive reading as follows:—

Closing Hours

4. During the whole of the year, all gasoline shops shall, save as hereinafter in this By-law otherwise provided, be closed and remain closed:—

(*a*) Between seven of the clock in the afternoon of each Monday, Tuesday, Wednesday, Thursday and Friday, respectively and seven of the clock in the forenoon of the next following day; and

(*b*) Between seven of the clock in the afternoon of each Saturday and seven of the clock in the forenoon of the next following Monday.

Permits to Stay Open

5. Notwithstanding the provisions of section 4 hereof the City Clerk, may, on the recommendation of the Property and Licence Committee, issue permits authorizing those gasoline shops for which such permits are issued, to be and remain open, notwithstanding the By-law, during the part or parts of the day or days specified in the permit.

Idem

6. Each said permit issued shall be either:—

(1) An Extension Permit, which shall authorize the gasoline shop for which it is issued to be and remain open, notwithstanding the By-law, during the part or parts of the day or days specified in the permit, which,

(*a*) In that part of the year from the first day of May until the last day of October, inclusive, shall be during the hours between seven of the clock in the afternoon and ten of the clock in the afternoon of Monday, Tuesday, Wednesday, Thursday, Friday and Saturday of the week for which the permit is issued, and during the hours between ten of the clock in the forenoon of the preceding Sunday and seven of the clock in the afternoon of the said Sunday; and

(*b*) In those parts of the year from the first day of November in each year until the last day of April in the following calendar year, inclusive, shall be during the hours between ten of the clock in the forenoon and five of the clock in the afternoon of the Sunday for which the permit is issued; or

(2) An Emergency Service Permit, which shall authorize the gasoline shop for which it is isued to be and remain open for emergency service only, notwithstanding the By-law, during the part or parts of the day or days specified in the permit, which, throughout the year, shall be during those hours on Sunday, Monday, Tuesday, Wednesday, Thursday, Friday, Saturday of the week for which the permit is issued, commencing at twelve of the clock in the afternoon of the preceding Saturday, when the gasoline shop for which the permit is issued would otherwise be required by the provisions of this By-law to be and remain closed.

Proportion of Extension Permits

7. (1) Extension Permits issued pursuant to the provisions of sub-clause (1) of Section 6 shall, for each week or for each Sunday as the case may be, be issued in such number as most nearly approximates twenty-five per centum of the total number of gasoline shops in the city, according to the records of the City Clerk, and shall be issued in rotation to those occupiers of gasoline shops who are entitled to Extension Permits as hereinafter provided, so that each shall receive at least one such Extension Permit in each calendar month;

(2) The occupiers of all gasoline shops in the City shall be entitled to Extension Permits, except those occupiers who, according to evidence satisfactory to the City Clerk, have failed to keep their gasoline shops open during the whole of the time or times so authorized by such permits, on more than three days or on more than one Sunday in the current calendar year, in which case the City Clerk shall, for the balance of the calendar year or for three months, whichever is the longer period, omit every such occupier from the list of those entitled to receive Extension Permits.

Proportion of Emergency Service Permits

8. (1) Emergency Service Permits issued pursuant to the provisions of sub-clause (2) of section 6 shall, for each week, be issued in such number as most nearly approximates five per centum of the total number of gasoline shops in the city, according to the records of the City Clerk, and shall be issued in rotation to those occupiers of gasoline shops who are entitled to Emergency Service Permits as hereinafter provided;

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(2) The occupiers of all those gasoline shops in the city shall be entitled to Emergency Service Permits, who file notice in writing with the City Clerk that they wish to receive the same, except those occupiers who, according to evidence satisfactory to the City Clerk, have failed to keep their gasoline shops open for emergency service only during the whole of the time or times so authorized by such permits, on more than three days in the current calendar year in which case the City Clerk shall, for the balance of the calendar year or for three months, whichever is the longer period, omit every such occupier from the list of those entitled to receive Emergency Service Permits.

Schemes of Rotation

9. Schemes of rotation of Extension Permits or of Emergency Service Permits or both, submitted by the majority of occupiers of gasoline shops in the City of Hamilton may be considered by the Property and License Committee in coming to a decision for recommending issuance of such Extension Permits or Emergency Service Permits or both.

It was contended on behalf of the appellant that no power to pass the by-law in question could be derived from section 82a, quoted above, as that section uses the words " . . . in the retail gasoline service industry as defined in the Industrial Standards Act" and while section 82a came into force on March 31, 1948, the amendment to the *Industrial Standards Act* which defined "retail gasoline service industry" did not come into force until May 1, 1948. It is not necessary to consider what weight this argument would have had in regard to the validity of a by-law passed pursuant to section 82a between March 31, 1948 and May 1, 1948. In my opinion, it became untenable after May 1, 1948, and the by-law with which we are concerned was passed on October 25, 1948.

Counsel for the appellant argues that the by-law is bad on the ground that the council in the provisions dealing with the issue of extension permits and emergency service permits have delegated to the City Clerk the legislative power conferred upon them and have substituted his judgment and discretion for their own.

In support of this it is first submitted that as the permissive word "may" is used in section 5 of the by-law Council have left it to the City Clerk to decide whether permits shall be issued at all; but the by-law must, of course, be read and construed as a whole and it is obvious from other provisions that the Clerk must issue permits in

the manner laid down in the by-law. It is only necessary to refer by way of example to the opening words of sections 7(2) and 8(2);—

> 7 (2) The occupiers of all gasoline shops shall be entitled to Extension Permits. . . .
>
> 8 (2) The occupiers of all those gasoline shops in the city shall be entitled to Emergency Service Permits, who file notice. . . .

It is next submitted that the provisions in sections 7(2) and 8(2) of the by-law that the clerk shall omit from the list of those entitled to permits such occupiers as have "according to evidence satisfactory to the City Clerk" failed to keep their shops open as authorized, are invalid. With this submission I agree. It is within the powers of the Council to prescribe a state of facts the existence of which shall render an occupier ineligible to receive a permit for a stated time; but express words in the enabling Statute would be necessary to give the Council power to confer on an individual the right to decide, on such evidence as he might find sufficient, whether or not the prescribed state of facts exists and there are no such words. In my opinion, however, these provisions are severable and if the by-law is otherwise valid it may stand with the words quoted above in this paragraph deleted from sections 7(2) and 8(2).

It is next submitted that there is an unauthorized delegation to the City Clerk of the discretionary right to decide (i) which occupiers shall compose the groups most nearly approximating twenty-five per centum of the total number of gasoline shops (under section 7) and most nearly approximating five per centum of such total (under section 8) and (ii) the order of rotation as between such groups. I am unable to agree with this submission. In my opinion the conferring of these powers on the City Clerk is within the authority given to the Council by the words of section 82a of the enabling Statute, ". . . any by-law . . . may . . . (*c*) provide for the issuing of permits". The Council has laid down in the by-law (i) the times during which the permits shall authorize occupiers of gasoline shops to remain open (ii) the proportion of total occupiers who shall make up the groups entitled to receive permits for each Sunday and for each week (iii) that the permits shall be issued to such groups in rotation (iv) that all occupiers shall be entitled to receive permits except those who have failed to remain

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open in accordance with the permits received by them (v) that the occupiers so failing shall cease to be entitled to permits for a time defined in the by-law. The Council has thus provided with sufficient particularity for the issuing of permits and, in my opinion, the duties imposed upon the City Clerk, (i) to select the occupiers to make up the respective groups, and (ii) to arrange the order of rotation, are administrative and are validly imposed.

It was finally argued that the by-law is bad for uncertainty in that it fails to state what constitutes an emergency. On this point I am in agreement with Roach J.A. (1) and would respectfully adopt the following passage from his reasons:—

> There will be full compliance with sec. 6 (1) (2) of the by-law, which deals with an emergency service permit, if such permit simply states in the terms of the by-law that it is issued for emergency service only, and the Clerk is not called upon to define the scope of such emergency service. If an occupant of a service station to whom an emergency service permit is granted extends service which those charged with the responsibility of enforcing the by-law consider amounts to more than an emergency service, they may consider it their duty to prosecute the occupier, and on a trial on that charge it will become the duty of the Court trying the accused to determine whether or not the circumstances in fact amounted to an emergency. The failure to define the words does not invalidate the by-law.

In the result the appeal fails and should be dismissed. If the question before us had been whether the by-law was valid *in toto* it might have been necessary to consider whether there should be any apportionment of costs in view of it being held that the words above quoted in sections 7(2) and 8(2) of the by-law are invalid but severable, but since the question actually to be decided is whether the conviction is good or bad I think the respondent is entitled to costs.

I would therefore dismiss the appeal with costs.

RAND, J. (dissenting): This appeal is concerned with the validity of a by-law of the city of Hamilton providing for the closing of gasoline stations. The statute under which the council acted was *The Factory, Shop and Office Building Act*, c. 194, R.S.O. 1937. Sec. 82(3) of that Act, as amended, enacts:—

> The council of a city, town or village may by by-law require that during the whole or any part or parts of the year all or any class or classes of shops within the municipality shall be closed, and remain closed on each or any day of the week at and during any time or hours between

(1) [1951] O.R. 715 at 725.

six of the clock in the afternoon of any day and five of the clock in the forenoon of the next following day, but no such by-law shall be deemed to apply to the sale of fresh fruit.

Sec. 82a deals specifically with service stations and other places of gasoline sale, and by clauses (*b*) and (*c*) any bylaw enacted under sec. 82 may:—

(*b*) require that during the whole or any part or parts of the year such retail gasoline service stations, gasoline pumps and outlets be closed and remain closed at and during any time or hours between six of the clock in the afternoon of any day and seven of the clock in the forenoon of the next following day and between six of the clock in the afternoon of Saturday and seven of the clock in the forenoon of the next following Monday; and

(*c*) provide for the issuing of permits authorizing the retail gasoline service station, gasoline pump or outlet for which it is issued to be and remain open, notwithstanding the by-law, during the part or parts of the day or days specified in the permit.

The by-law contained the following provisions:—

4. During the whole of the year, all gasoline shops shall, save as hereinafter in this Bylaw otherwise provided, be closed and remain closed:—

(*a*) Between seven of the clock in the afternoon of each Monday, Tuesday, Wednesday, Thursday and Friday, respectively, and seven of the clock in the forenoon of the next following day; and

(*b*) Between seven of the clock in the afternoon of each Saturday and seven of the clock in the forenoon of the next following Monday.

5. Notwithstanding the provisions of section 4 hereof the City Clerk may, on the recommendation of the Property and License Committee, issue permits authorizing those gasoline shops for which such permits are issued, to be and remain open, notwithstanding the By-law, during the part or parts of the day or days specified in the permit.

Sec. 6 provided for Extension Permits to remain open from the first day of May until the last day of October between seven and ten o'clock p.m. on week days and from ten a.m. to seven p.m. on Sundays, and a slight modification in the Sunday opening for the remainder of the year; and for Emergency Permits for emergency service only throughout the year.

By sec. 7(1) Extension Permits were for the week or Sunday as the case might be, in such number

as most nearly approximates twenty-five per centum of the total number of gasoline shops in the city, according to the records of the City Clerk,

and they were to be issued in rotation in order that each station should receive at least one permit in each calendar month.

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Rand J.

By s.s. (2):—

> The occupiers of all gasoline shops in the city shall be entitled to Extension Permits, except those occupiers who, according to evidence satisfactory to the City Clerk, have failed to keep their gasoline shops open during the whole of the time or times so authorized by such permits, on more than three days or on more than one Sunday in the current calendar year, in which case the City Clerk shall, for the balance of the calendar year or for three months, whichever is the longer period, omit every such occupier from the list of those entitled to receive Extension Permits.

Similar provision was made by sec. 8(1) for the issue of Emergency Permits for each week and in such number as most nearly approximated five per centum of the total number of gasoline shops in the city, which were to be subject to a like rotation. These permits, also, were not to be continued to those who, according to "evidence satisfactory to the City Clerk," had "failed to keep their gasoline shops open for emergency service only during the whole of the time or times authorized by such permits, on more than three days in the current calendar year," for the balance of the year or for three months, whichever might be the longer period.

And by sec. 9:—

> Schemes of rotation of Extension Permits or of Emergency Service Permits or both, submitted by the majority of occupiers of gasoline shops in the City of Hamilton may be considered by the Property and License Committee in coming to a decision for recommending issuance of such Extension Permits or Emergency Service Permits or both.

Mr. Sweet argued the invalidity of the by-law on several grounds. Conceding that if the council laid down all essential features of the scheme administrative details could be left to a committee or an official, he contended that no part of the legislaive action or discretion reposed by the legislature in the council could be delegated to any other body or person and that in three respects of substance that had been done here. They were, first, in the determination of membership in the 25 per cent groups and the order of the permits; secondly, that the clerk could, on evidence "satisfactory to him", refuse to continue Extension and Emergency Permits to those who had failed to keep their stations open as stipulated; and finally, that the provision for an Emergency Permit, without more, was too vague.

With Mr. Sweet's proposition there can be no quarrel; and where, as here, the right to trade as and when one pleases is involved, its restriction must be justified by action

within the clear intention of the legislature. But there are other considerations of policy which, at times, are raised to qualify that right and in the legislation before us we have a familiar example. The object of the powers entrusted is, primarily, the health and general welfare of employees by limiting the hours of labour, but of course in a non-discriminatory impingement on the businesses affected. The question is whether the general requirement has been infringed.

Once it is provided that only 25 per cent of all stations are to be open on extended hours for weekdays or Sundays, the ascertainment of those to be allocated to the different groups and their order may involve the consideration of a great variety of matters. The object of these exceptions from the general prohibition is public service. Unless the determination of the composition of the groups and their open periods is by a rule of thumb, as by lot or alphabetical order, the consideration, for that purpose, of the geography of the city or its traffic currents or volume, or of the periods of greater or less demand, and, I have no doubt, of other pertinent factors, may lend itself to an exercise of significant judgment: at least I feel unable to say that it cannot.

A precise equalization of participation in this privilege, even with the rotation, is quite impossible of measurement or accomplishment, and nothing better than a substantial or a rough equality could be hoped for. In view of that, can it be said that the judgment of the council as to the mode of selection and order is not interchangeable with that of a committee? For example, some traffic arteries may, no doubt, be the routes of the greatest volume of automobile operation on Sundays or holidays: could a committee's judgment prejudice stations in the groupings? or in the order of their rotation? Is it an answer that it would be a most inconvenient detail to thrust on the council, or that the council would, in all likelihood, adopt the committee's recommendation? Other like possibilities might be suggested. Can it be said with confidence that any imbalance in either respect would be corrected in the course of the year? Is it possible to say that no group selection basis could have the opposite effect of perpetuating a handicap?

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Rand J.

Mr. Arnup viewed the working out of the groups and periods as little more, in substance, than an exercise in mathematics, and at first I was disposed to agree with him. But the further examination of the question discloses so many possible significant factors and circumstances underlying the practical decision, that I am reluctantly driven to a conclusion I would prefer to avoid. If under a provision of the by-law the recommendation of the committee had been placed before the council and, after consideration, approved, the objection would have been met.

On the other points, I agree that to leave it to the clerk to declare the fact of being closed during the currency of a permit on evidence "satisfactory to him" is objectionable; but it is a severable provision, and that phrase can be eliminated leaving the matter as one of fact. The clerk must indeed make his own decision when a renewal of the permit is called for, but it would be open on an application for a mandamus to challenge his finding on the ground that it was not supported by evidence.

The final ground of vagueness I would reject. An emergency may arise out of such a variety of circumstances and be of such a nature as to defy precise definition. Whether, in any case, the occasion was one of emergency would, then, also, be a question open to a court, in which the problem of determining whether it did or did not come within the scope of the word as used would be a simple task compared with the formulation of a definition.

I would allow the appeal and set aside the conviction.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Sweet.*

Solicitor for the respondent: *A. J. Polson.*

THE CANADIAN INDEMNITY COMPANY (DEFENDANT) ..... APPELLANT;

AND

ANDREWS & GEORGE COMPANY LIMITED (PLAINTIFF) ..... RESPONDENT.

1952

*June 9, 10

*Oct. 7

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Insurance—Sale of Goods—Indemnity against liability imposed by law caused by accident arising out of condition in vendor's product after possession passed to another—Defective glue causing damage to vendee's product—Whether defect an accident—Whether liability assumed by agreement or imposed by law—Sale of Goods Act, R.S.B.C., 1948, c. 294, ss. 21, 58.

The respondent sold and delivered a quantity of glue to a lumber company to be used in the manufacture of plywood. Owing to the respondent's ignorance that its testing appliance was out of order, the glue supplied was defective and as a result the lumber company sustained damages, which the respondent paid. It then brought this action against the appellant upon a business liability insurance policy to recover the amount of such damages. Before this Court the only claim advanced was upon Endorsement 10(1) whereby the insurer undertook "To indemnify the Insured against the liability imposed by law upon the Insured for damage to or destruction of property of others caused by accident during the policy period and arising out of the handling or use of or the existence of any condition in merchandise products or containers manufactured, sold, or handled by the Insured after the Insured has relinquished possession of such merchandise products or containers to others and away from the premises owned by, leased to or controlled by the Insured." By Exception A to this endorsement it was provided that the policy should not cover "Damage to or destruction of property where the Insured has assumed liability therefor under the terms of any contract or agreement." Under Endorsement 11(1) the insurer undertook "to pay on behalf of the Insured all sums which the Insured shall be obligated to pay by reason of the liability imposed by law upon the Insured or by written contract for damage to or destruction of property of others of any or every description not hereinafter excepted, resulting solely and directly from an accident due to the operations of the Insured as stated in the said Policy . . . ."

Held: Reversing the judgment of the Court of Appeal for British Columbia and restoring that of the trial judge, that the action should be dismissed.

Per: Kerwin and Estey JJ.: (1) The defective condition of the glue was unsuspected and undesired and therefore there was an "accident" which caused damage to the "property of others"; (2) it was not necessary that such accident should occur "after the Insured had relinquished possession of such merchandise products . . . . to others and away from the premises owned . . . . by the Insured" but it was sufficient if the damage should so arise. So held upon

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

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the construction of the endorsement but, in any event, being capable of that construction, the endorsement must be construed *contra proferentem;* (3) by s. 21 of the *Sale of Goods Act,* R.S.B.C. 1948, c. 294, there is an implied condition in certain circumstances as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. Within the terms of Exception A to Endorsement 10(1) the respondent assumed liability for the damage under the terms of the contract between it and the lumber company, particularly in view of the fact that Endorsement 11(1) includes both liability imposed by law and that imposed by written contract. The implied condition under the *Sale of Goods Act* is as much a term of the contract as if it had been expressly stated therein; (4) in view of Exception A it is unnecessary to consider whether the rule in *Donoghue* v. *Stevenson* [1932] A.C. 562, and *Grant* v. *Australian Knitting Mills Limited* [1936] A.C. 85, applied between the immediate parties to a contract so as to raise the contention that the lumber company had a cause of action against the respondent as well in tort as in contract.

Per: Rand J.: (1) There was no accident and in any event none occurred after the respondent had parted with possession of the glue; (2) the phrase "liability imposed by law" in Endorsement 10(1) does not include liability arising under contract. This is put beyond controversy by the inclusion in Endorsement 11(1) of liability "imposed by law . . . . or by written contract"; (3) under the rule in *Donoghue* v. *Stevenson* the duty of care by the respondent in the manufacture of the glue extended to the immediate purchaser, the lumber company; but (4) that duty did not arise out of a contract, notwithstanding s. 21 of the *Sale of Goods Act.*

Per: Kellock J.: The damage for which indemnity was given by Endorsement 10(1) was not damage arising after the respondent had relinquished possession of the glue but damage caused by accident so arising, and the respondent failed to show any accident within the meaning of the Endorsement.

Cartwright J. concurred with those parts of the reasons of Kerwin and Rand JJ. which held that any possible liability was excluded by the terms of Exception A to Endorsement 10(1).

APPEAL from the judgment of the British Columbia Court of Appeal (1) reversing the judgment of Farris, Chief Justice of the Supreme Court of British Columbia at the trial (2), dismissing the plaintiff's claim to recover under a policy of insurance against business liability.

D. McK. Brown for the appellant.

J. A. MacInnes Q.C. for the respondent.

(1) (1951) 4 W.W.R. (N.S.) 37; [1952] 1 D.L.R. 180.

(2) [1951] 1 D.L.R. 783.

The judgment of Kerwin and Estey, JJ. was delivered by:—

KERWIN J.:—Among other businesses carried on by the respondent is the making of glue and the sale thereof to lumber companies for use in their manufacture of plywood. One of these lumber companies, Canadian Western Lumber Company, Limited, purchased a quantity of glue from the respondent under an open oral contract. The glue was not fit for the purpose for which it was supplied as it showed defective lamination or adhesion, and the respondent paid the lumber company the sum of $9,159.79 which, as between the parties to this litigation, it is agreed is the amount of the damage sustained by the lumber company. This action to recover that amount from the appellant was based upon the terms of endorsement No. 10 to what is called a comprehensive business liability policy, issued by the appellant to the respondent and a number of other insured. Before the Court of Appeal the respondent also relied on endorsements 2 and 11, but in this Court the claim was restricted as at the trial.

The policy is dated November 17, 1947, for the period from noon, November 30, 1947, to noon, November 30, 1950. By it, the appellant agreed to indemnify the insured against certain liabilities with which we are not concerned but the policy is made subject to certain conditions, one of which may be noted:—

B. This policy applies only to accidents or occurrences which originate during the policy period.

Endorsements Nos. 10 and 11 to the policy are dated November 30, and by endorsement No. 12, dated December 2, 1947, the additional premium to cover "Damage to property of others as per Endorsements No. 10 and No. 11" was fixed at $426.67. By clause 1 of endorsement No. 10, in consideration of the additional premium, the policy was extended:—

1. TO INDEMNIFY the Insured against the liability imposed by law upon the Insured for damage to or destruction of property of others caused by accident during the policy period and arising out of the handling or use of or the existence of any condition in merchandise products or containers manufactured, sold, or handled by the Insured after the Insured has relinquished possession of such merchandise products or containers to others and away from premises owned by, leased to or controlled by the Insured;

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Kerwin J.

The first question is whether the damage suffered by the lumber company was caused by accident. I agree with the trial judge and the Court of Appeal that it was, although not resting that conclusion in any respect on there being, as the Court of Appeal held, "nothing in the glue ingredients nor in the glue itself which was inflammable or explosive", since there is no evidence in the record upon which to base such a finding. The evidence does show that the glue sold to the lumber company had been prepared and tested in the usual manner by the respondent but that, owing to the appliance used by it for testing being out of order, a misleading result was achieved. As a consequence of further investigation, a number of possibilities emerged as to the manner in which the defect in the glue had occurred but the cause was left undetermined. Under these circumstances, the defective condition was unsuspected and undesired and, therefore, there was an accident which caused the damage to "property of others".

The trial judge considered that to be within the terms of clause 1 the accident must have occurred "after the insured has relinquished possession . . . . to others and away from premises owned by, leased to or controlled by the insured." If that be so, it is the end of the matter as it cannot be successfully argued that any accident occurred after the glue had left the respondent's possession. The Court of Appeal disagreed with the trial judge's construction of the clause and I think they were right in deciding that it is the damage only that must occur after the events specified. In view of condition B in the policy itself, the words in clause 1 of endorsement 10 "during the policy period" may be disregarded. With them deleted, the clause would then read: "To indemnify the Insured against the liability imposed by law upon the Insured for damage to or destruction of property of others caused by accident and arising out of the handling or use, etc.", and the word "arising" relates to "damage to or destruction of property of others" and not to "accident". Furthermore, it is appropriate to speak of damage or destruction, rather than accident "arising out of the handling or use, etc." In any event it is open to that interpretation and the clause must be construed *contra proferentem.*

However, the respondent must bring itself within the opening words of clause 1 by which the appellant agreed to indemnify the insured against the liability "imposed by law" upon it. These words also appear in the policy and in endorsements Nos. 2, 7 and 11. Clause 1 of endorsement 11 reads:—

> 1. TO PAY on behalf of the Insured all sums which the Insured shall be obligated to pay by reason of the liability imposed by law upon the Insured or by written contract for damage to or destruction of property of others of any or every description not hereinafter excepted, resulting solely and directly from an accident due to the operations of the Insured as stated in the said Policy, provided such damage or destruction occurs during the policy period;

This endorsement was added at the same time as No. 10 and both are part of the policy. While endorsement 11 contemplates an entirely different class of risk, the inclusion therein of "the liability imposed . . . . upon the Insured . . . . by written contract" indicates that the phrase "imposed by law" in endorsement 10 does not include a liability imposed upon the respondent as a result of its own volition in entering into the contract with the lumber company. "As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary" (Holmes', *The Common Law*, p. 302). To the same effect, in expanded form, is *Chitty on Contracts*, 20th edition, page 3:—

> It therefore appears that, as stated above, the kind of obligation involved in a contract is that which the parties themselves *intend* shall be created. It arises from their volition and is not imposed on them *ab extra* by the law. A and B are not obliged to enter into any contract unless they wish to do so; if they do so, they create their own obligation, the one to the other; they intend that their bargain shall, if necessary, be enforced by the law.

The fact that s. 21 of the *Sale of Goods Act* R.S.B.C. 1948, chapter 294, provides that in certain circumstances there shall be an implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, and that s. 58 provides for damages for breach of such a condition (treated as a warranty) does not affect the matter. If the lumber company's cause of action against the respondent were based only on contract, the latter's liability for damage to the former's property was not imposed by law upon the respondent within the meaning of clause 1 of endorsement 10.

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Kerwin J.

We have not had the benefit of argument as to whether the rule expounded in *Donoghue* v. *Stevenson* (1), and *Grant* v. *Australian Knitting Mills Ltd.* (2), applies between the immediate parties to a contract in order to raise the contention that the lumber company had a cause of action against the respondent as well in tort as in contract. In view of exception A to the indemnity provided by clause 1 of endorsement 10, it is unnecessary to deal with the point. That exception runs:—

> A. Damage to or destruction of property where the Insured has assumed a liability therefor under the terms of any contract or agreement.

The respondent assumed liability for the damage under the terms of the contract between it and the lumber company since the implied condition provided for by s. 21 of the *Sale of Goods Act* is as much a term as if it had been expressly stated therein.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment at the trial restored.

RAND J.:—The indemnity insurance undertaken by the appellant is admittedly of a type designed generally to meet the extended liability imposed on manufacturers by the rule laid down in *Donoghue* v. *Stevenson* (1) and followed in *Grant* v. *Australian Knitting Mills Limited* (2), and that circumstance is significant among the commercial facts which furnish the background to the policy. The latter, subject to the long established qualifications, must, of course, be read according to the ordinary meaning of its language; but "meaning" itself has rather shadowy boundaries, and even ordinary language must, for a true understanding of what the parties meant by it, be construed in the context and the circumstances out of which it has arisen. When the words are in the form of legal expressions which have no fixed or precise definition, those circumstances become so much more necessary to enable us to appreciate the mental perspectives of the parties when they bargained.

(1) [1932] A.C. 562. (2) [1936] A.C. 85.

Endorsement No. 10 is the provision under which the claim is made. By s. 1 the company agrees to indemnify the respondent against

> The liability imposed by law upon the Insured for damage to or destruction of property of others *caused by accident* during the policy period and arising out of the handling or use of or the existence of any condition in merchandise products or containers manufactured, sold, or handled by the Insured after the Insured has relinquished possession of such merchandise products or containers to others and away from premises owned by leased to or controlled by the Insured;

The question is whether that clause applies to what may be taken as a negligent production of inferior glue which, being used to make laminated lumber, produced a grade below what proper glue would have done and involved, therefore, a breach of warranty of fitness.

The policy contains an exclusion, among others, of liability for "damage to or destruction of property where the Insured has assumed liability therefor under the terms of any contract or agreement;".

Endorsement No. 11 provided a further indemnity in the following words:—

> 1. TO PAY on behalf of the Insured all sums which the Insured shall be obligated to pay by reason of the liability *imposed by law* . . . . or *by written contract* for damage to or destruction of property of others . . . . resulting . . . . from an accident due *to the operations* of the Insured . . . .

I take the phrase liability "imposed by law" in No. 10 to mean, as distinguished from liability arising under contract. I should have done that from the context alone, but the inclusion in No. 11 of both "imposed by law . . . . or by written contract" seems to me to put the matter beyond controversy.

Although there is a warranty, is there also a collateral co-existing right in tort based on negligence? Whether the rule of *Donoghue* v. *Stevenson* (1) runs in favour of the immediate purchaser from the manufacturer has not apparently been expressly decided. But I can see no reason why the general duty of the manufacturer should not extend to his purchaser, the first in the direct line of those within the scope of the potential mischief. Where warranty is excluded, what is there in the policy of the law to deny him the same relief from the effects, say, of an explosion as would be accorded a purchaser from him on the same

(1) [1932] A.C. 562.

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Rand J.

terms? An exclusion of warranty does not necessarily involve a release of the general duty of care in manufacture; and I should say that the duty does extend to the immediate purchaser.

Does the sale, then, with warranty impliedly absorb all other liability that would, in its absence, arise out of the transaction? Where a contract expressly or by implication of fact provides for a performance with care, as in the case of carriers, the general duty is clearly not displaced and the person injured or damaged in property may sue either in contract or tort. As a settlement was made here without action, it cannot be said in what right the claim was pressed or discharged, though all liability would be satisfied.

But the question seems to be disposed of by the exclusion (A) from liability "assumed . . . . under the terms of any contract or agreement", unless Mr. MacInnes is right when he argues that the warranty is provided by the *Sale of Goods Act* and not by the contract.

No doubt every liability enforceable in the courts is, in one sense, created by law: if there were no legal order, there would be no civil rights as we know them enforced by the power of the community. But it is not in that sense that the words must be taken to be used: here again they imply a contrast between liability arising in respect of contractual relations, and that in respect of matters outside of agreement.

At common law the warranty was deemed to be an element of the intention of the parties: the purchaser was buying something that would accomplish a certain purpose and placed reliance in the seller who, in effect, undertook to furnish such a thing: it was a term of the bargain. The statute has crystallized that element but only as a term, which by agreement can be excluded. The right to damages is a creation of law annexed to the contract as an incident; and the "assumption of liability" is effected by entering into a contract to which are annexed both the warranty and the remedial right in case of breach. The liability is one, therefore, that has been assumed by contract.

The indemnity, moreover, is seen to be limited to damage "caused by accident". This presupposes a tortious act by the manufacturer creating a liability to which an accident,

in the strictly legal sense of the term, could not of itself give rise. Grammatically and in, I think, the true sense, it is related to the damage, not the liability: and in that sense, the accident must eventuate when the possession of the goods has passed to another than the manufacturer. Such cases can easily be imagined as, for instance, explosions and similar mishaps.

Was the damage here, then, produced by such an accident? The glue was used no doubt in the belief that it was of proper quality but the possibility that it was not was always present to the minds of the purchasers who tested it regularly in the course of production; but the test involved a time lag which accounts for the substantial damage. To treat mistaken action of that nature as "accident" would render the word superfluous. What is meant is something out of the ordinary or the likely, something fortuitous, unusual and unexpected, not, in the ordinary course, guarded against.

It was argued that, on such a construction, no liability could ever arise since an "accident" in that sense, resulting from defective glue, is inconceivable. No evidence was directed to that point and there is no factual basis for such a conclusion. The language of the indemnity applied to a number of different businesses and necessarily it was general. But what the parties had in mind were possibilities difficult if not impossible to foresee: what they clearly did not aim at were direct and expectable damages from the daily risks which it was part of their business of production and sale to face and eliminate. These are the ordinary consequences of a breach of warranty of fitness, a liability as old as warranty itself.

The appeal must be allowed and the judgment at trial restored with costs in the Court of Appeal and in this Court.

KELLOCK J.:—In this case the respondent brought action to recover from the appellant the sum of $9,159.79 paid by the respondent to the Canadian Western Lumber Company Limited, being the agreed amount of damage sustained by the lumber company in using, in the manufacture of its plywood, glue manufactured and sold to it by the respondent, it being admitted by the respondent, a fact which the appellant also accepts, that the glue was not fit for the

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Kellock J.

purpose for which it was supplied to the lumber company. The respondent claimed the amount of this loss from the appellant under the terms of a policy of insurance, the relevant provision of which is as follows:

> To indemnify the Insured against the liability imposed by law upon the Insured for damage to or destruction of property of others caused by accident during the policy period and arising out of the handling or use of or the existence of any condition in merchandise products or containers manufactured, sold, or handled by the Insured after the Insured has relinquished possession of such merchandise products or containers to others and away from premises owned by leased to or controlled by the Insured.

The glue in question is of a type known as phenolic resin glue, the basic ingredients of which are phenol, formaldehyde and caustic. The glue was deficient in adhesive strength which resulted in the plywood not being up to the standard, and it was sold at a lower price in consequence.

The process of manufacture of the glue is carried out by heating the ingredients until a chemical reaction takes place, and the volatile ingredients are driven off, leaving a residue composed of from forty to forty-five per cent of non-volatile solids.

The particular glue which was shipped to the lumber company was composed in fact of thirty-six to thirty-seven per cent only of these solids, but this condition was not discovered by the respondent owing to the fact that the apparatus which it used to test its product did not record the actual condition of the glue. The apparatus itself is a small oven in which a portion of the glue is kept under constant temperature during testing, the heat being kept constant by reason of a thermostat control. The servants of the respondent had not checked the thermostat for a period of nine months, and were not aware that it was not functioning. Evidence was given on behalf of the appellant that it was standard practice to make a check of such apparatus at least once a week. The learned trial judge found that the reason for the glue being defective had been left a complete mystery on the evidence. While in his view the defect was due to accident, nevertheless, he was of opinion that, under the terms of Endorsement No. 10, the respondent could not recover as the accident referred to in the policy was one occurring after the glue had left the possession of the respondent. He also held

that in any event the respondent could not recover as the liability of the respondent was not a liability "imposed by law" within the meaning of the endorsement but a liability assumed by the respondent under its contract with the lumber company which was excluded by express exception.

This judgment was set aside on appeal. In the view of the Court of Appeal, on a proper construction of the endorsement, the respondent was entitled to recover if the damage arose after the glue had left the respondent's premises although the accident occurred prior thereto. The court also disagreed as to the applicability of the term of exclusion.

In my opinion, the damage for which indemnity is given by the endorsement is damage caused by an accident (*a*) which occurs during the term of the policy and (*b*) which arises "after" the goods have left the insured's premises. It is the contention of the respondent that the qualifying words following the word "accident" relate not to "accident" but to the preceding word "damage," and that therefore it is immaterial if the accident occurred on the premises of the insured. I do not think the endorsement can be so read. In my opinion, the "accident" contemplated is an accident "arising out of the handling . . . . or use of . . . . or condition in" the products "after" the insured has relinquished possession. In other words, it is not "damage" arising after the insured has relinquished possession of the goods, but damage caused by "accident" so arising. In my opinion, therefore, the respondent failed to show any accident within the meaning of the endorsement.

The Court of Appeal appears to have been influenced in reaching their decision by the consideration thus expressed in the judgment of Robertson J.A.:

> There was nothing in the glue ingredients or in the glue itself which was inflammable or explosive, nor was any damage to be apprehended in connection with its manufacture. There was not any danger of this sort to be feared by its customers. There would only be one thing for which it required protection, viz., some accidental fault in the manufacture of the glue which affected its value or rendered it unfit for the purpose for which it was being sold.

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Kellock J.

As pointed out by the appellant, there is no evidence in the record to support a finding of this nature. This consideration is therefore not available to affect the ordinary grammatical construction of the language used, whatever might otherwise have been the case.

It is not necessary to consider the other questions argued. I would allow the appeal with costs here and below.

CARTWRIGHT J.:—I agree that this appeal should be allowed. For the reasons given on this branch of the matter by my brothers Kerwin and Rand and by the learned Chief Justice who presided at the trial, I am of opinion that even if the appellant would otherwise have been under liability (a question which I find it unnecessary to determine) such liability is negatived by the terms of Exclusion (A) of Endorsement 10, quoted in the reasons of my brother Kerwin.

I would allow the appeal and restore the judgment at the trial with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *L. St. M. Du Moulin.*

Solicitor for the respondent: *J. A. MacInnes.*

SCHARA TZEDECK (PLAINTIFF) .....APPELLANT;

AND

THE ROYAL TRUST COMPANY, as Executor of the Will of Jennie Edith McIntyre, deceased (DEFENDANT) ... } RESPONDENT.

1952

*June 6
*Oct. 7

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Will—Executor—Direction by Testatrix that body be buried in Jewish cemetery and cost be part of funeral and testamentary expenses—Amount of Executor's liability.

The appellant, a society incorporated under the *Benevolent Societies Act* (R.S.B.C. 1911, c. 19), maintains at Vancouver a synagogue and a cemetery and carries out the functions of a registered undertaker and provides for persons of the Jewish faith burial services in accordance with the ritual of that faith. Pursuant to a request, which was not made by the respondent executor, the appellant caused burial services to be conducted for and the body of the testatrix, a Jewess, to be buried in its cemetery. There was no communication between the appellant and the respondent until after this had been done. The appellant claimed to recover a fee for its services in an amount fixed by a committee of seven persons, members of its synagogue and in fixing such amount the committee took into account the financial circumstances of the testatrix, her mode of life and other considerations, a method it alleged to be authorized by usage and custom in respect to persons of the Jewish faith. The respondent brought an amount into Court with its defence and the trial judge gave judgment in an amount less than the sum so paid in. An appeal to the Court of Appeal was dismissed.

Held: (Rand J. dissenting) that upon the evidence the only liability of the respondent as executor was to pay a fair and reasonable amount for the services rendered, and as such amount had been awarded at the trial, the appeal failed. *The King* v. *Wade* 5 Price 622 at 627; *Tugwell* v. *Heyman* 3 Camp. 298; *Corner* v. *Shew* 3 M. & W. 350 at 354 applied.

Per: Kellock J. Assuming the usage and custom pleaded could be considered either reasonable or certain, there was nothing in the evidence which established the existence of either. Neither did the will contain anything upon which the appellant could claim against the estate other than the common law basis of liability of personal representatives with respect to funeral expenses.

Per: Rand J. (dissenting)—A contractual basis is inappropriate to the claim and the obligation to pay arises by way of bequest.

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

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SCHARA TZEDECK v. THE ROYAL TRUST CO.

APPEAL by plaintiff from a judgment of the British Columbia Court of Appeal (1), affirming the judgment of Clyne J. (2).

J. W. deB. Farris Q.C. for the appellant.

Alfred Bull Q.C. and *P. R. Brissenden* for the respondent.

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

LOCKE, J.:—The appellant is a society incorporated under the provisions of the *Benevolent Societies Act,* R.S.B.C. 1911, c. 19, whose objects are described in its amended declaration as being religious, philanthropic, charitable, social, educational and fraternal, with power to hold lands for the purpose of erecting a house of worship for those of the Jewish religion and to acquire lands for the purpose of maintaining a "burial ground for burial privileges" for persons of that faith. The Society in due course erected a synagogue for the members of the Schara Tzedeck Congregation and established a cemetery known as the Schara Tzedeck Cemetery, on Marine Drive in the City of Vancouver.

By her last will and testament made on September 11, 1924, Jennie Edith McIntyre, therein described as having been born Waga, and sometimes using and known by the name of Jennie Green, of Sandon, B.C. appointed the respondent company as executor and trustee and, after making various minor bequests, directed that the moneys realized from the estate should be divided equally between her father, mother, brothers and sisters, described as resident in Russian Poland, and further directed that her body should be buried "in a Jewish cemetery in my own burial plot in a casket suitable to a person of my means and that a suitable head stone shall be placed on my grave and that the cost thereof shall be paid as part of my testamentary expenses."

Jennie Edith McIntyre died at Nelson, B.C. on December 9, 1946. She was of the Jewish faith and shortly thereafter Mr. David A. Chertkow, a member of the Bar of British

(1) 5 W.W.R. (N.S.) 279; [1952] 2 D.L.R. 298.

(2) 1 W.W.R. (N.S.) 760; [1951] 2 D.L.R. 288.

Columbia practising in Vancouver and the General Secretary of the Cemetery Board of the Society, received a telephone call from Nelson informing him of the death, that the deceased had been a Jewess and asking whether the Society would accept her body for burial. The name of the person who spoke to Mr. Chertkow does not appear and apparently neither the latter nor any of the other active members of the Society knew Mrs. McIntyre. On the examination for discovery of Mr. Diamond, the President of the Cemetery Board of the appellant Society, Mr. Chertkow had appeared as counsel and, after consultation with him, Mr. Diamond said that they did not know who it was that had telephoned to Mr. Chertkow from Nelson. After receiving this message the Board had made inquiries sufficient to satisfy them that the deceased had been a Jewess: thereupon her body having been shipped from Nelson was buried in the casket in which it arrived without further inquiry, the services being conducted in accordance with the requirements of the Orthodox Jewish faith. No one on behalf of the appellant Society got in touch with the Royal Trust Company until after the funeral. Neither Mr. Chertkow nor any one connected with the appellant knew the contents of the will and were thus not informed that there was a direction that the body should be buried "in a Jewish cemetery in my own burial plot", and accordingly the burial was in what was described by him as a single grave. Burial was on December 15, 1946, and an account was rendered to the executors by the Cemetery Board on March 1, 1947.

The statement of claim, after describing the nature and objects of the Society and its ownership of the cemetery and that it carries out the functions of and is a registered undertaker, alleged that the Schara Tzedeck Cemetery Board, a committee appointed annually, has complete charge of burial arrangements and maintains and operates the cemetery, and that:—

> the said Board has the sole right and discretion to set and arrange a burial fee in accordance with the principles of the Jewish faith, taking into consideration, amongst other things, the character and nature of the deceased; the value of his or her estate; the persons dependent for support upon the said estate; and the manner in which the deceased in his or her lifetime discharged his or her obligations of giving and doing charity in accordance with the principles of the Jewish faith.

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After alleging that the deceased was a person of the Jewish faith, it alleged that:—

the said Board was called upon to perform the last rites.

and that this was done. By whom the Board was requested to do this was not stated. These allegations, however, were followed by a claim for moneys payable by the defendant to the plaintiff for goods, services, materials provided and moneys paid by the plaintiff for the defendant in and about the funeral of the said deceased, this being followed by a claim for $3,000 "total fees as set by the Board." These various allegations were put in issue by the statement of defence, the denials being followed by an allegation that it had been arranged between the parties that the plaintiff would provide a grave in its cemetery and attend to the burial of the said Jennie Edith McIntyre, but that the amount to be paid had not been agreed upon and that the claim was exorbitant. No reply was filed and these pleas were accordingly put in issue. Presumably the claim that there had been an arrangement made between the parties for the burial in advance of December 15 was not in accordance with the facts since no evidence was tendered to support it, the evidence tendered for the defendant on this aspect of the matter being therefore unchallenged. The statement of defence, in addition, alleged that the defendant had at all times been ready and willing to pay the plaintiff a reasonable amount for the grave and the burial and brought into court the sum of $1,000 as a sum ample to satisfy the claim.

At the trial before Clyne J. written admissions of the defendant were filed to the effect that the charges of commercial undertakers for undertaking, funerals, burial and cemetery services of the kind provided by the plaintiff to the deceased would amount from $200 to $600; that the defendant had no knowledge until some time after the funeral of the basis upon which the Society or any like Jewish organization fixed its charges for such services and that, under Jewish religious law and in accordance with Jewish custom, Jewish burial societies charged for the carrying out of burial rites on any one of three bases, namely, by a set fee which is the same for all members or by a fixed percentage of the estate of the deceased or by setting a fee in accordance with the principles of the

Jewish faith, taking into consideration amongst other things the value of the estate, the persons dependent upon the estate for support and the manner in which the deceased in her lifetime discharged her obligations of giving and doing charity in accordance with the principles of the Jewish faith, and that the plaintiff Society had since its origin adopted the last mentioned basis.

The evidence disclosed that the appellant Society appoints annually a committee of seven persons, members of its synagogue, who are designated as the Schara Tzedeck Cemetery Board, which is charged, inter alia, with the maintenance of the cemetery and the setting of the fees which are charged to estates of deceased persons for their burial. Mr. Chertkow, as secretary of this committee, wrote to the estates' officer of the respondent on July 22, 1947, explaining the manner in which the Board had fixed the fee of $3,000 shown in the account which had been rendered on March 1st of that year, pointing out that neither the persons who performed the last rites nor the members of the Board received any remuneration for their services which were performed as a religious duty to enable persons of the Jewish faith to receive a proper burial in accordance with the orthodox rites and customs of that faith and that in many cases they conducted burials without charge for the estates of persons unable to pay, that in fixing the charges made the Board took into consideration the character and nature of the deceased person, whether being financially able such person had discharged his or her religious duty of giving and doing charity in his or her lifetime for the assistance of those who were less fortunate, that the estates of people of means must pay for the burial of the poor of the Jewish faith, and that the Board considered the person's character, whether he or she had lived a good and proper life "judging from moral standards to which all people adhere to." The letter further stated that the Board endeavoured to be practical and applied these principles equitably and without hardship for the remaining dependents, that as regards the estate of Mrs. McIntyre the value of her estate far exceeded the value of most of the estates left by other Jews, that in her lifetime she had been removed from her people and did not discharge her charitable duties and "that her manner

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of living left much to be desired", that, as she left no immediate family or infants dependent upon her, sufficient would remain to take care of any remote relatives that would share under the terms of the will, and that, in addition to failing to give to Jewish charities in her lifetime, the deceased did not by her will make any bequest to such charities, while specifically providing for Jewish burial.

Mr. Chertkow gave evidence at the trial and produced a list of the amounts which had been charged for the burial of various people of the Jewish faith in Vancouver during a period of five years prior to the time of the trial where, he said, the amounts charged had been fixed upon this basis. Of the three methods of fixing the charges referred to in the admissions, the one commonly known among Jews in Canada, in his opinion, was that of charging a fee in accordance with the ability of the estate to pay. Rabbi Kogen of the Congregation Beth Israel of Vancouver, gave evidence as to the great importance attached by people of the Jewish faith to having their bodies buried in Jewish cemeteries according to the Jewish ritual, and said that he believed that it had been the universal custom among Jews for many centuries and was now the custom that everybody was buried in the same manner and that the estates of the rich paid more than those of the poor. While in the case of members of his congregation there was an arrangement with the Schara Tzedeck Cemetery Board for the payment of a fixed fee which was the same for all, this was an exception to the common rule. This witness said further that giving to charity was considered to be an obligation upon every Jew. Rabbi Mozeson agreed with the evidence given by Rabbi Kogen.

Mr. Justice Clyne who considered that the evidence showed that the respondent had caused arrangements to be made for the burial decided that the plaintiff's claim could be only for services rendered, the remuneration to be such as in the circumstances would be just and reasonable, being of the opinion that the usage alleged was uncertain and had not been proved. Based upon the admission as to the charge on an ordinary commercial basis, he fixed the sum of $400 as being reasonable and allowed this amount, giving the plaintiff costs up to the time of the

payment into court and the defendant the subsequent costs of the action in accordance with the rules of the Supreme Court. The present appellant's appeal from this judgment was dismissed by a unanimous judgment of the Court of Appeal.

It is clear from the evidence that there was no express contract made between the respondent and the appellant for the burial of the body of the deceased and it was, no doubt, for this reason that the statement of claim merely asserted that the Board had been called upon to perform the last rites. The only evidence of any request to the appellant to bury the body of Jennie Edith McIntyre in its cemetery was of that made by some person in Nelson whose name was not disclosed and it was admitted by Mr. Diamond in his examination that no other instructions from any source were received. That this person was acting for or on behalf of the respondent was neither alleged nor proven. The services were not rendered in reliance upon the terms of the will since its existence was not known to the officers of the appellant Society until after the burial. If there is any liability in contract on the part of the respondent, therefore, it must be upon a contract to be implied by law in these circumstances.

The respondent in this matter properly admitted its liability to pay the reasonable cost of the burial of the testator and paid the sum of $1,000 into Court with the defence as sufficient to satisfy the claim. Apart from the fact that the *Administration Act* (R.S.B.C. 1948, c. 6, s. 153) provides that claims for funeral expenses not exceeding $100 shall be preferred as heretofore, neither the nature nor the extent of the liability of the executor is affected by any statute in force in British Columbia. At common law a duty is imposed upon an executor to see that the deceased is buried in a manner befitting his or her station in life and that no undue expense is incurred. In Williams on Executors, 12th Ed. p. 610, the learned author says that if the deceased has left directions as to the disposal of his body, though these are not legally binding on the personal representative, effect should be given to his wishes as far as is possible. The executor is liable to pay the reasonable funeral expenses, even without any order on

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his part, if he has assets available for the purpose (*The King* v. *Wade* (1); *Sharp* v. *Lush* (2), Jessel, M.R. at 472). In *Tugwell* v. *Heyman* (3), where the executors had neglected to give orders for the funeral of a testator and the claim was for expenses incurred for furnishing a funeral, Lord Ellenborough said that it had been shown that the funeral was conducted in a manner suitable to the testator's degree and circumstances and that the plaintiff's charge was fair and reasonable and, the executors, not denying that they had assets available, the law implied a promise on their part to satisfy the demand. This was followed in *Rogers* v. *Price* (4), by the Court of Exchequer. That the implied promise on the part of an executor who has assets to pay the reasonable expenses of such a funeral of his testator as is suitable to his degree and circumstances is a liability imposed upon the executor personally and not in his representative character was decided by Parke B. in delivering the judgment of the Court in *Corner* v. *Shew* (5). It is impossible, in my opinion, to import into a contract implied under these circumstances any term by reason of the usage which the appellant seeks to establish in this matter. In so far as support for the claim is based upon custom, it would have been necessary for the appellants to establish that a custom to charge the estate of deceased Jewish persons in the manner described in the letter from Mr. Chertkow had obtained the force of law in the locality and thus taken the place of the common law in respect of the matter (10 Hals. p. 2) and this was not done.

The appellant's claim is pleaded in contract but in the course of the argument addressed to us some support is sought for it under the terms of the will. Since I think all the available evidence was given at the trial, it is proper in a case such as this to consider this aspect of the matter, even though the claim is not so pleaded. I am unable, with respect for other opinions, to understand how there can be any claim upon this basis. It is contended in the factum of the appellant that the executor was bound by law pursuant to the directions of the will, to bury the body

(1) (1817) 5 Price, 621 at 627.
(2) (1879) L.R. 10 Ch. D. 468.
(3) (1812) 3 Camp. 298.
(4) (1829) 3 Y. & J. 28.
(5) (1838) 3 M. & W. 350 at 354.

in a Jewish cemetery in which the testatrix had her own burial plot, but this statement is not supported by authority (Williams, 12th Ed. p. 610: 3 Hals. p. 457). Since the appellant does not claim qua beneficiary but simply as a creditor of the Royal Trust Company for services performed after her death, at the request of some person whose identity is not disclosed and who was neither the agent or the representative of the Trust Company, the terms of the will relating to the manner of her burial cannot affect the matter. It is also to be noted that the manner of the burial of the body was not that directed by the will, not being in her "own burial plot" and being in the casket in which the body had been forwarded from Nelson. Had the terms of the will as to the manner in which the testatrix wished her body to be buried been communicated to the appellant by the respondent in advance of the burial and had the directions of the will been complied with, the nature of the liability of the respondent would require consideration, but nothing of the kind took place in the present matter. In my opinion, no support can be found for any claim based upon the provision in the will.

As to the claim on a quantum meruit, the admission filed was to the effect that the charges of commercial undertakers for undertaking, funerals, burial and cemetery services of the kind provided by the plaintiff in respect of the deceased would amount to from $200 to $600. While the evidence is silent on the matter, such a charge would no doubt include a casket but would not either provide a grave or perpetual care of the grave, which the appellant Society provides for graves in the Schara Tzedeck Cemetery. The appellant did not give any evidence as to what would be regarded as a proper charge for the use of its chapel or for the services of the watchmen at the cemetery and the learned trial judge was required to deal with the matter upon the evidence afforded by the admission. The appellants did not supply a casket in the present case and I respectfully agree with Bird J.A. that there is nothing in the evidence to lead to the conclusion that the amount awarded by Clyne J. was other than just and reasonable.

I would dismiss the appeal with costs.

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RAND J. (dissenting):—The question raised on this appeal is the right of the appellant, a Jewish church society in Vancouver, to receive a sum for the burial with its accessory services of a deceased unmarried Jewish woman. The action is framed in contract, but it is agreed that if recovery is warranted on any ground the form of the claim may be disregarded.

The deceased died in 1946 at Nelson, B.C., where for some years she had resided: and her will, made in 1924, at a place called Sandon in the same province, contains the following provision:—

> I DIRECT that I shall be buried in a Jewish cemetery in my own burial plot in a casket suitable to a person of my means and that a suitable headstone shall be placed on my grave and that the cost thereof shall be paid as part of my testamentary expenses.

The service of burial is one of the basic rites of the Jewish church law, and no member of that race can be buried in a Jewish cemetery without the prescribed ceremonial. By that law there is a duty on the Jewish community to accord the service in the same form to every member: all are treated on the same level: born equal, they are buried as equals. The ceremonies include preparation of the body, shrouds, coffin, use of the chapel and hearse, watchmen, interment, religious services and the grave with perpetual care. The Society here owns both the synagogue and the cemetery. In relation to burials, it has two governing bodies, a Board which administers the secular interests, and what is described as a Holy Society, members of which only can carry out the burial rites. The Board, among other duties, determines, according to church law, the assessment to be made on the burial ceremony. In this case, the rule of the Society was that generally adopted in Canada: it prescribed the determination of the contribution on a consideration of the entire circumstances of the life of the deceased: his conduct, his observance, generally, of Jewish law, his gifts to charity, the amount of his estate at death, the beneficiaries, the bequests, and, in short, all that the Board should deem relevant to the sum which, from his possessions, in the total circumstances the traditional judgment dictated. In many cases no charge is made, and the common saying is that the rich must pay for the poor, and that a grave

cannot be opened without a great deal of money. That this procedure was carried out in good faith is not questioned.

The deceased left an estate of approximately $105,000. The only relatives suggested are parents, brothers and sisters who remained in Russia from where she came, but who are believed now to be dead. So far as inquiries disclosed, she had made no contributions to charity during her lifetime. The Board fixed the amount that should be paid at $3,000, and upon the refusal of the trustee to pay that sum, brought the action.

In the trial court, Clyne J., proceeding on the basis of an undertaker's charges for burial, allowed $450 as on a quantum meruit, and his judgment was affirmed on appeal.

In my opinion, that contractual basis is inappropriate to the claim made. The subject matter is a religious service with mystical implications, conceived as an entirety, which in most of its elements cannot be valued in terms of money. In the background of the Jewish religion and its law, looking to the future life as well as the past, that service carries to every Jew the deepest significance of all the rites of his people. It is somewhat analogous to extreme unction and other fundamental rites in other religions.

What, then, did the testatrix have in mind when she directed her body to be given such a funeral and that "the cost thereof shall be paid as part of my testamentary expenses."? She had previously in the will referred to the payment of "my funeral and testamentary expenses". The will had been drawn either by a lawyer or one who was familiar with the language of lawyers, but who probably had little or no knowledge or acquaintance with these rites or their associated tolls; and the words "cost" and "expenses" must be interpreted with that in mind. There is also the fact that, colloquially, "cost" would ordinarily be used to describe all payments directly related to such a service performed by third persons.

In the early '40's, the deceased had visited Vancouver and had, in some way, satisfied herself about burial. She spoke of this to a merchant acquaintance in Nelson and seemed to be at ease about it. In discussions between them at this period she made it quite evident that she was

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familiar with the burial charges under the church law which she summed up by repeating what has already been mentioned: the rich pay more and the poor less.

Having, undoubtedly, in mind that in relation to the burial service the church law would prescribe an assessment, by the provision of the will she expressed her intention that the last act relating to her existence on earth, believed by her to be significant to her future life, was to be fulfilled in all respects according to a rule of great antiquity which to her bore a sacred obligation. Included in that act was the payment of a sum of money designed, among other things, to accomplish finally the moral and secular duty owed by her during her lifetime as prescribed by her church law.

There is no question of public policy, of enforcing church laws, of uncertainty as to object or person entitled, or of anything of a similar nature. Assuming that her direction could have been disregarded by the trustee and an ordinary non-Jewish burial given, it is settled that under the law the trustee was at liberty to carry it out as was done. What is involved is merely the interpretation of the language of the instrument; and once the burial society became identified, and it is agreed that it was the proper and in fact the only society in Vancouver by which the desire of the deceased could be fulfilled, the direction became complete. Upon the performance of the services, therefore, the obligation to pay the money as by way of bequest arose and the right to demand it likewise.

I would allow the appeal and direct judgment accordingly. All costs in all courts will be paid out of the estate, those of the Trust Company as between solicitor and client.

KELLOCK, J.:—The facts are set out in the judgment of my brother Locke and it is not necessary to repeat them. Appellant contends on the basis alternatively of custom or usage, that it has established a liability extending to the executor or administrator of a person of the Jewish faith to pay to those undertaking the burial such charges as they themselves determine, having regard to (*a*) the character and nature of the deceased person, judged from moral standards, (*b*) whether that person, being financially

able, had discharged his or her religious duty in the doing and giving of charity in his or her lifetime for the care and assistance of his or her less fortunate brothers, (*c*) the size of the deceased person's estate, and (*d*) the existence or otherwise of dependents of the deceased.

Assuming that, on either basis, such a custom or usage could be considered either reasonable or certain, I find nothing in the evidence which establishes the existence of any such custom or usage. Evidence such as that given by the witness Brook as to his own knowledge or that of the deceased that "the rich pay more than the poor" for funeral services, falls far short of the custom or usage alleged.

Nor do I think that the language of the will is to be interpreted as the appellant seeks to interpret it. In my view, with respect, the will contains nothing more than a direction to the executor which furnishes no ground upon which the appellant may claim against the estate other than the ordinary common law basis of liability upon which all personal representatives stand with respect to funeral expenses.

On the argument I had thought that perhaps the amount allowed by the learned trial judge did not take into consideration the fact that the appellant had undertaken to furnish perpetual care of the burial plot, but I think the written admission of the appellant does cover this item. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *D. A. Chertkow.*

Solicitor for the respondent: *P. R. Brissenden.*

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* Oct. 28.
* Dec. 22.

DONALD CAPSON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Criminal law—Murder—Drunkenness—Reasonable doubt—Incapacity to form specific intent—Objections to charge of trial judge.

A jury found the appellant guilty of murder with "the strongest recommendation for mercy". His appeal, mainly on grounds of misdirections on the issue of drunkenness which he had raised at the trial, was dismissed by the Supreme Court of New Brunswick, Appeal Division, on the ground that, though some of the involved directions might have been objectionable or that the principles could have been more clearly worded, the evidence supported no finding other than that of murder and that, in any event, no substantial wrong or miscarriage had occurred.

Held (Rinfret C.J. and Locke J. dissenting): That the appeal should be allowed and a new trial ordered.

The instructions given to the jury were confusing, incomplete, illegal and were not corrected. The appellant was not bound to prove beyond a reasonable doubt that drunkenness had produced a condition such as did render his mind incapable of forming the pertinent specific intent essential to constitute the crime of murder. Furthermore, the jury should have been clearly instructed that the accused should only be found guilty of manslaughter if, in their view, the evidence indicated such incapacity or left them in doubt as to the matter. (*Latour* v. *The King* [1951] S.C.R. 19 referred to).

On the evidence, it cannot be safely asserted that the jury, properly instructed and acting honestly and reasonably, might not have found itself in doubt as to the accused's incapacity, on account of drunkenness, to form the specific intent to murder. The length of the jury's deliberation coupled with the fact that they came back for further instructions as to the effect of intoxication, support the view that drunkenness was at least considered and support the conclusion that it is impossible to say that the verdict would have necessarily been the same had they been properly instructed that any reasonable doubt had to be given to the accused. There was substantial wrong or miscarriage.

Rinfret C.J. and Locke J. (dissenting) agreed with the unanimous judgment of the Appeal Division of the Supreme Court of New Brunswick, and would have dismissed the appeal.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division, maintaining the verdict of murder found by a jury against the appellant.

J. T. Carvell for the appellant.

H. W. Hickman Q.C. for the respondent.

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

The dissenting judgment of Rinfret C.J. and Locke J. was delivered by

LOCKE, J.:—I respectfully agree with the unanimous judgment of the Appellate Division delivered by Mr. Justice Hughes and would dismiss this appeal.

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

FAUTEUX, J.:—On the 6th day of March 1952, a jury in the Supreme Court of New Brunswick (Queen's Bench Division) presided over by Mr. Justice W. A. I. Anglin, after four hours of deliberation, returned against the appellant a verdict of guilty—to which they added "the strongest recommendation for mercy"—on the following charge:—

> That Donald Capson, on or about the 2nd day of October A.D. 1951, at the City of Moncton, in the County of Westmorland, in the Province of New Brunswick, did unlawfully murder Rosie Wing in violation of section 263 of the Criminal Code of Canada.

This verdict, appealed mainly on ground of misdirections on the issue of drunkenness raised at trial by the accused, was unanimously maintained by the Appeal Division of the Supreme Court of New Brunswick, on the view that, though some of the involved directions might be objectionable or that the principles could have been more clearly worded, the evidence in the case would support no finding other than that of murder and that, in any event, no substantial wrong or miscarriage of justice had actually occurred.

Leave was thereafter granted to the appellant to appeal to this Court on two questions of law, namely:—

> Did the trial Judge misdirect the jury as to the burden of proof with respect to the defence of drunkenness?
>
> Did the trial Judge misdirect the jury in omitting to direct them that the accused was entitled to the benefit of any reasonable doubt upon the whole case, including the reduction of the crime of murder to manslaughter?

The directions in the address of the trial Judge that are attacked are:—

> (1) I must direct you that if you think the accused was so intoxicated that *he did not have the mind to appreciate what he was doing*, then the charge of murder may be reduced to manslaughter.

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(2) If he is so drunk that you are satisfied *beyond a reasonable doubt* he did not know what he was doing because of the alcohol, then it is impossible for you to say that he intended to murder. So, under those circumstances, the law is that a charge of murder must then be reduced to manslaughter.

* * *

(3) If, however, he has drunk so much he does not know what he is doing at all and you are *well satisfied beyond a reasonable doubt* that his mind is so blurred by liquor that he does not appreciate what he is doing at all, then you are unable to find that he had any one of these intents which I will speak to you about later, so a charge of murder would have to be reduced to a finding of manslaughter.

* * *

(4) *As I told you before*, if you think that he had enough to drink that he did not know what he was doing in respect of any of these occasions when he must have a specific intent, then you may bring in a verdict of manslaughter instead of murder.

* * *

(5) ...and you have to be satisfied *beyond a reasonable doubt* that his mind was so affected by liquor that he could not have meant to inflict grievous bodily harm to facilitate robbery, if you say it was robbery, or that he did not have the mind to intend to cause bodily injuries known to him to be likely to cause death or that he was reckless whether death ensued or not.

* * *

(6) But if you think that he had so much liquor during that day that his mind was not in the state of *appreciating what he was doing* and not just only influenced to do more readily and he would not probably have done it, if he was sober, then you may find him guilty of manslaughter.

* * *

(7) So that if you think, *not necessarily beyond a reasonable doubt*, but if you are satisfied that the influence of liquor was such that he could not appreciate what he was doing in the sense that he could not form the necessary intent to cause the death, then you may find him guilty of manslaughter instead of murder.

With these instructions, the jury retired and returned, two hours later, to ask the trial Judge "to explain again the effect which the different degrees of intoxication as regards to the accused, would have upon the verdict of murder as distinguished from manslaughter." The following instructions were then given:—

(8) So in that intermediate stage you must satisfy yourselves that the accused was so much under the influence of liquor that he just could not be said to be capable or have the mental capacity to form any of these specific intents...

* * *

(9) If he had so much liquor in him and his mind was so affected that you can say he did not mean to cause her death then he would be guilty of manslaughter only and not guilty of murder.

It must be added that, with these conflicting instructions related to doubt on the specific issue of drunkenness, the jury were not instructed in a manner sufficiently clear that any reasonable doubt they might have on the specific issue had to be given to the accused and that the verdict should then be reduced from murder to manslaughter.

The jury retired again and after two more hours of further deliberation, returned to give the above verdict and recommendation for mercy.

Appreciated in the light of well settled principles, as to the burden of proof, in the matter, it is manifest that the instructions given in this respect are confusing, incomplete and illegal. The appellant was not bound to prove beyond a reasonable doubt that drunkenness had produced a condition such as incapacitating his mind of forming the pertinent specific intent essential to constitute the crime of murder. Furthermore, the jury should have been clearly instructed that the accused should only be found guilty of manslaughter if, in their view, the evidence indicated such incapacity or left them in doubt as to the matter. (See *Latour* v. *The King* (1) and authorities therein referred to).

The contention of the Crown that the instructions given were innocuous or were corrected is, I think, undefendable.

The second submission of the Crown—accepted by the Court of Appeal—is that there was no evidence upon which a jury could reasonably find that the appellant's mind was incapacitated by drunkenness to form the intent to commit murder; consequently, says counsel for the respondent, the jury should not have been invited to consider the issue at all and even if the directions given to them, in this respect, were illegal, no substantial wrong or miscarriage of justice resulted therefrom since a verdict of manslaughter could not, for the reason of drunkenness, be legally returned by the jury.

Since there is to be a new trial, no reference will be made to the evidence.

In the opinion of the Court of Appeal, the appellant entered Rosie Wing's house "probably with the idea of trying to make a loan of some money"; but what took place from then on up to the moment at which the injuries

(1) [1951] S.C.R. 19.

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were inflicted is not apparent in the evidence. On any view that would bring the case under the provisions of ss. (*b*) of s. 259 of the Criminal Code, the jury, properly instructed and acting honestly and reasonably, might have had no hesitation in finding that Capson was not, on account of drunkenness, incapacitated to form the specific intent therein provided, but it cannot safely be asserted that the jury, equally properly instructed and acting honestly and reasonably, might not have found itself in doubt on the point. The very fact that, after two hours of deliberation, the jury required from the trial Judge further instructions as to "the effect which the different degrees of intoxication as regards to the accused, would have upon the verdict of murder as distinguished from manslaughter", together with the fact that, after receiving such additional instructions, they deliberated again for two more hours before bringing a verdict of murder "with the strongest recommendation for mercy" support the view that drunkenness to some degree was at least considered and support the conclusion that it is impossible to say that the verdict would have necessarily been the same had they been properly instructed that any reasonable doubt had to be given to the appellant. It was, therefore, necessary for the trial Judge to instruct the jury on the issue of drunkenness and to do so according to law.

This conclusion also disposes of the ultimate contention of the Crown that no substantial wrong or miscarriage of justice actually resulted from the illegal manner in which the jury were instructed.

The appeal should be maintained and a new trial ordered.

Appeal allowed; new trial ordered.

Solicitor for the appellant: *J. T. Carvell.*

Solicitor for the respondent: *H. W. Hickman.*

NETTIE LAURIE (PLAINTIFF) .....APPELLANT;

AND

PERRY WINCH (DEFENDANT) .....RESPONDENT.

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*May 2, 5
*Oct. 7

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Easement—Right of Way—Grant silent as to dominant tenement, location and termini of way, nature and extent of rights conveyed—Evidence admissible for purpose of construing grant.

Circumstances existing at the time of a grant may be looked at, not only for the purpose of ascertaining the intention of the parties as to the dominant tenement, and as to the location and termini of a right of way granted, but also for the purpose of construing the conveyance as to the nature and extent of the rights conveyed. *Waterpark* v. *Fennell* 7 H.L.C. 650 at 678, 683; *Cannon* v. *Villars* 8 Ch. D. 415; *Pettey* v. *Parsons* [1914] 2 Ch. 653 at 667; *Canada Cement Co.* v. *FitzGerald* 53 Can. S.C.R. 263; *White* v. *Grand Hotel* [1913] Ch. 118; *Todrick* v. *Western National Omnibus Co.* [1934] 1 Ch. 191 at 206; *Robinson* v. *Bailey* [1948] 2 All E.R. 791 at 795.

S owned two adjacent farms A and B. Lake Simcoe bounded A on the west and B bounded it on the east. S subdivided A into lots. Lot 33 adjoined B and lot 17 had served as a lane whereby access was gained to the lake from B by passing along a lane on B over lot 33 to lot 17. S sold farm B and purported to grant a "perpetual right of way" over lot 33 to the purchaser "his heirs executors and assigns" to be binding on S his "heirs executors and assigns". B and lot 17 were later sold en bloc and the successor in title to this land subdivided B, laying out a road on the site of the old farm lane and, in selling lots, purported to convey a right of way over lot 33.

Held: On the construction of the grant in the light of the authorities that 1. The dominant tenement intended by the parties was the farm B and not lot 17. 2. The existence of the farm lane over lot 33 between the gates on the farm and lot 17 and the non-user in connection with the farm of any other part of lot 33 indicated that the way granted was over the existing farm lane and the width of the way was limited to the width of the farm gate for the purpose of access from the farm gate to the gate on eastern boundary of lot 17. 3. As it could not be said it was within the contemplation of the parties that the farm would always remain a farm, there was nothing to restrict the plain words of the grant to the use being made of the farm lane at that time, and further, that upon the severance of the dominant tenement into several parts, the easement attached to those parts. *Codling* v. *Johnson* 9 B. & C. 934; *Newcomen* v. *Coulson* 5 Ch. D. 141.

Judgment of the Court of Appeal for Ontario [1951] O.R. 504, reversed in part.

APPEAL from a judgment of the Ontario Court of Appeal (1), reversing a judgment of McRuer C.J.H.C. (2), declaring that no right of way existed on certain land.

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

(1) [1951] O.R. 504; 3 D.L.R. 81 (2) [1950] O.R. 626; 4 D.L.R. 577.

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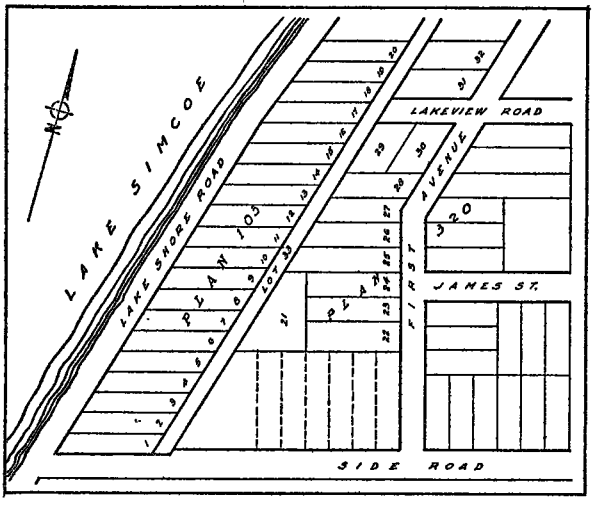
G. N. Shaver Q.C., F. W. Bartrem Q.C. and *G. M. Paulin,* for the appellant.

N. L. Matthews Q.C., Beatrice E. Lyons and *G. W. Gorrell* for the respondent.

The judgment of Kerwin, Kellock, Estey, Locke and Cartwright JJ. was delivered by:

KELLOCK, J.:—The appellant is the owner of lots 18, 19 and 33 on registered plan 103 which fronts on the easterly side of a road known as the Lake Shore Road skirting the easterly shore of Lake Simcoe in the Province of Ontario. The respondent is the owner of lots on plan 320 which adjoins plan 103 to the east. Plan 103 consists of thirty-two lots, numbering from south to north, fronting on the east side of the Lake Shore Road, and also a long narrow lot, number 33, which adjoins the easterly limits of the other lots and fronts on the north limit of a road called the Mahoney Side Road which, in turn, runs east and west to the Lake Shore Road along the southerly limits of the two plans. Lots 1 to 32 are fifty feet in width, while lot 33 is thirty feet. The attached sketch sufficiently indicates the situation.



When plan 103 was registered in or about the year 1910, the lands covered by both plans, as well as other land to the east, were owned by one O. B. Sheppard, the lands now covered by plan 320 and the land to the east being in the

occupation of a tenant, John T. Smith, who was engaged in farming operations thereon. Subsequently, Sheppard conveyed the farm to Smith and his wife as joint tenants.

The farm fronted on the north side of the Mahoney Side Road, but there had been in use for some time prior to the conveyance to the Smiths a farm lane running in an easterly and westerly direction from the farm buildings located some distance north of the side road, across the farm, over lot 33 to lot 17, plan 103, and thence to the Lake Shore Road. This lane was used as a means of access to and from the farm buildings.

The farm was fenced off from plan 103 by a wire fence running along the easterly boundary of lot 33, the only opening in it being a gate opposite lot 17 where the farm lane met the east limit of lot 33. There was also a gate opposite in the east limit of lot 17, while there was another gate in the west limit of lot 17 where the lane entered Lake Shore Road.

Lots on plan 103 were from time to time disposed of by Sheppard, usually together with a right-of-way over lot 33. Sheppard conveyed lot 17 on September 9, 1924, to one Lascelles, reserving to himself a right-of-way over the entire lot "for all purposes and at all times." At this time Sheppard remained the owner of lot 18 immediately to the south, as well as lot 33. On November 29, 1924, Lascelles conveyed lot 17 to the Smiths, subject to the above-mentioned right-of-way. Subsequently, on September 21, 1925, Sheppard executed the following deed:

> In consideration of the sum of one dollar the receipt of which is hereby acknowledged I hereby give to John Smith of the Township of North Gwillimbury in the County of York and Province of Ontario his heirs executors and assigns a perpetual right of way over Lot thirty-three (33) Plan one hundred and three (103) registered said Lot & Plan being in the Township of North Gwillimbury in the County of York and Province of Ontario. This is to be binding on my heirs executors or assigns.

In 1941 the Smith farm, as well as lot 17, plan 103, was conveyed (the latter subject to the right-of-way already mentioned) to the predecessor in title of the respondent, together with "a perpetual right-of-way over lot No. 33 according to plan No. 103". The registration of plan 320 followed on March 30, 1946. This plan shows a street known as Lakeview Road overlying the site of the westerly

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portion of the old farm lane, but this street is sixty-six feet in width, whereas that of the lane was about fifty feet between its fences.

This action was commenced by the appellant to restrain the respondent and certain other owners of lots on plan 320 from entering upon lot 33, and in the alternative, from using lot 33 to any greater extent than the same was actually used prior to the year 1945. The action was tried by the Chief Justice of the High Court who held that the conveyance of 1925 from Sheppard to Smith was a personal license only, but that if it amounted to the conveyance of an easement, Smith acquired nothing more than the right to pass over the portion of lot 33 between the gates already mentioned, and for the purposes only for which the lane was in fact used at the time of the grant. The only one to appeal to the Court of Appeal was the defendant Winch. As to him, the trial judgment was set aside and the action dismissed although the Chief Justice of Ontario would have restricted Winch's right-of-way over lot 33 to that part between lot 17 and the point on the east limit of lot 33 where the gate had been.

The appellant seeks to restore the judgment of the learned trial judge on the ground that the conveyance of 1925 was a personal license only. In the alternative, the appellant seeks a declaration that (1) the right-of-way granted to Smith was limited to the purposes for which the lane was at that time used, and (2) that by reason of the filing of plan 320 and the sale of lots according thereto, there was such a change in the circumstances as amounted to an extinguishment of that easement.

The basis upon which counsel founds his argument that the conveyance of 1925 amounted to nothing more than a personal license, is that there is no dominant tenement named in the conveyance. It is therefore said that the conveyance amounts to a grant of an easement in gross, something unknown to the law, with the consequence that the grant is to be construed as a personal license only.

It is to be observed that in the case at bar, there is in the deed of 1925 not only no mention of a dominant tenement but, apart from the words "over lot thirty-three," there is no indication as to the termini of the "right-of-way" granted by the instrument. The grantee of the right, John

Smith, together with his wife, were owners as joint tenants, both of lot 17, plan 103, and of the farm lands to the east. To my mind, in addition to the silence of the instrument of 1925 with respect to any dominant tenement, there is also, when the terms of the grant are applied to the existing circumstances, ambiguity as to whether *the* right-of-way was intended to be granted over the entire length and breadth of lot 33 or over some lesser part of it only. It is to be noted that the lot extended some 700 feet north of the northerly limit of the farm lane and ended in a cul-de-sac.

As stated by Lord Chelmsford in *Waterpark* v. *Fennell* (1):

> Parol evidence is generally admissible to apply the words used in a deed, and to identify the property comprised within it. You cannot, indeed, show that the words were *intended* to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include or exclude land, where the words are capable of either construction.

Lord Wensleydale, in the same case, at p. 683, said:

> In the course of the long and elaborate discussion which this case underwent in the Irish Court, some observations were incidentally made which are liable to be misunderstood as to the limits within which parol evidence is receivable to explain deeds, as if it could be done only in cases of doubt . . . The construction of a deed is always for the Court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor.

In *Cannon* v. *Villars* (2), Sir George Jessel M.R. said at p. 419:

> In construing all instruments, you must know what the facts were when the agreement was entered into.

In Goddard on Easements, 8th edition, p. 381, the author says that

> Under ordinary circumstances the owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other; for instance, if a way to a field runs by the side of the field, the dominant owner is not entitled to alter the position of the gate through which he has been accustomed to pass from the field to the way, and to make a new entrance at a fresh place.

At p. 382 the author says with respect to a way originating by express grant:

> . . . . if the deed is silent as to the place of entry, surrounding circumstances must be taken into consideration to throw light on the intention of the parties.

(1) (1859) 7 H.L.C. 650 at 678, 683. (2) (1878) 8 Ch. D. 415.

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In *Pettey* v. *Parsons* (1), Swinfen Eady L.J. at p. 667 said:

> It is a question of construction in a deed granting a right of way whether the way that is granted is a way so that the grantee may open gates, or means of access to the way, at any point of his frontage, or whether it is merely a way between two points, a right to pass over the road, and is limited to the modes of access to the road existing at the date of the grant. In each case it is a question of construction.

In *South Metropolitan Cemetery Co.* v. *Eden* (2), the right-of-way there granted was for the benefit of the dominant tenement "or any part thereof," and this was also the situation in *Cooke* v. *Ingram* (3), as well as in *Pettey* v. *Parsons, supra.* In *Sketchley* v. *Berger* (4), it was made plain by the deed that the grantee of the easement was entitled to enter at any point where the right-of-way touched his lands.

In *Deacon* v. *South Eastern Railway* (5), the defendant had granted to the plaintiff certain lands under a railway arch,

> together with a right of way to the said arch to and from Villiers Street.

At the date of the grant and for eight years thereafter, there was only the one way by which the plaintiff could get from the land so granted to Villiers Street, and this he used. It was held by North J. that the right-of-way being undefined by the deed, the right to define was vested in the grantor, and he having defined the way, could not thereafter open a new way and require the grantee to use it.

In *Canada Cement Co.* v. *Fitzgerald* (6), the respondent had conveyed part of his farm to the appellant reserving

> the right to pass over for cattle, horses and other domestic animals for water going to and from Dry Lake.

A well defined way across the land conveyed had been used by cattle from the plaintiff's farm in going to and returning from Dry Lake for many years before and after the grant, and it was held by this court that the fact that the location and width of the passage over the land conveyed were not defined in the deed did not render it void for uncertainty, but that the way was sufficiently established by the evidence of the existing circumstances.

(1) [1914] 2 Ch. 653.
(2) (1855) 16 C.B. 41.
(3) (1893) 68 L.T.N.S. 671.
(4) (1894) 69 L.T.N.S. 754.
(5) 61 L.T.N.S. 377.
(6) (1916) 53 Can. S.C.R. 263.

In the light of these authorities, I think, in the first place, that the dominant tenement intended by the parties to the deed of 1925 was the farm and not lot 17. The fact that that lot, although also owned by the Smiths, was subject to a right-of-way appurtenant to lot 33 indicates, I think, that it could not have been intended that the easement created by the instrument of 1925 was intended to be appurtenant to a lot which was, at that time at least, sterile so far as building upon it was concerned.

In the second place, as pointed out by the learned Chief Justice for Ontario, the right-of-way granted was "a" right-of-way, and the situation existing at the time, namely, the existence of the farm lane over that part of lot 33 between the gates and the non-user in connection with the farm of any other part of lot 33 indicates, in my opinion, that the way granted was over the site of the existing farm lane. I think this conclusion is very strongly reinforced by the existence of the fence along the entire easterly limit of lot 33, which indicates clearly that the only place of entry upon lot 33 from the farm which the grantee was intended to have was at the gate in the easterly boundary of the lot. It follows that the width of the way was limted to the width of such gate. In admitting that he had no other point of access to lot 33 from plan 320, I think the respondent was well advised.

The words "over lot thirty-three" are just as capable of referring to that part of the lot north of the old lane as to that part of the lot to the south. It is not suggested that Smiths had ever made use of the northerly part of the lot or that its use could have been of benefit to the farm. Similarly, with respect to any user by the Smiths of the southerly part of the lot, I think, with the learned Chief Justice of Ontario, there is no evidence of such user. The only suggestion is that contained in the following evidence of an adopted daughter of Smith who had lived with him on the farm. She testified as to the use of the farm lane to and from the Lake Shore Road, and then gave the following evidence in answer to a leading question as to the use of lot 33 down to the side road:

Q. Did you ever have any occasion to travel on Lot 33 down to what was known as the Mahoney Side Road at that time?

A. Yes, I have travelled down there.

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Q. Did any other people use it in that way?
A. Anyone that wanted to, used it . . . anyone that I know of.

Such evidence does not, in my opinion, indicate any user in connection with the farm or justify a conclusion that the parties to the conveyance of 1925 had reference to anything more than the one right-of-way over lot 33 for the purpose of connecting the western gate of the lane on the farm with the eastern gate of the lane on lot 17. The farm fronted on the side road and thus communicated with it directly. The lane was a means of communication between the farm buildings and the Lake Shore Road. There was little or no utility so far as the farm was concerned, in going to or from the farm buildings to the side road by means of lot 33.

With respect to the nature and extent of the easement granted, it is to be observed that the grant is one of a right-of-way *simpliciter* with no express restriction as to use. Just as the circumstances existing at the time of the grant may be looked at for the purpose of ascertaining the intention of the parties as to the dominant tenement and as to the location and termini of the way, the circumstances may also be looked at for the purpose of construing the conveyance as to the nature and extent of the rights conveyed.

In *White* v. *Grand Hotel* (1), while the easement there in question was the subject of an express grant, there was no documentary evidence of its exact terms. The action was by the owner of the servient tenement to limit the user of the way, the dominant tenement having been changed from a private residence, at the time of the grant, to a hotel. It was held, that there being no limitation to be found in the grant in the nature of the width of the right-of-way or anything of that kind, full effect must be given to the grant and the way could not be restricted to such use as existed at the time of its execution. Hamilton L.J., as he then was, pointed out that the dominant tenement, although used as a private dwelling house at the time of the grant, might be, with the consent of a third person, as in fact it had been, turned into a house which could be used for the purpose of trade. The decision on this point was upheld by the House of Lords.

(1) [1913] 1 Ch. 118; 110 L.T. 209.

In *South Eastern Railway Co.* v. *Cooper* (1), Warrington L.J. used the following language at p. 226:

> There is no question that if this were a grant of a way from one person to another, the grantee would be entitled to use it for any purpose without reference to the purpose for which the dominant tenement was used at the date of the grant, and notwithstanding that the burden on the servient tenement was thereby increased.

In *Todrick* v. *Western National Omnibus Co.* (2), Farwell L.J. at the trial said, at p. 206:

> In considering whether a particular use of a right of this kind is a proper use or not, I am entitled to take into consideration the circumstances of the case, the situation of the parties and the situation of the land at the time when the grant was made: see *United Land Co.* v. *Great Eastern Ry. Co.* (3), and in my judgment a grant for all purposes means for all purposes having regard to the considerations which I have already mentioned.

It was held by the Court of Appeal in *Todrick's* case (4) that having regard to the width of the land over which the right-of-way there in question was granted, it was not within the intention of the parties to the grant that it should be used for heavy omnibus traffic.

In *Robinson* v. *Bailey* (5), Lord Greene M.R. referred to the language of Farwell L.J. in *Todrick's* case, *supra,* and said at p. 795:

> While not in any way dissenting from that statement as a general proposition, I would like to give this word of caution, that it is a principle which must not be allowed to carry the court blindly. Obviously the question of the scope of the right of way expressed in a grant or reservation is *prima facie* a question of construction of the words used. If those words are susceptible of being cut down by some implication from surrounding circumstances, it being, to construe them properly, necessary to look at the surrounding circumstances, of course they would be cut down. *Todrick's* case is a very good example of the sort of application of the rule which Farwell J. was enunciating.

In *Robinson's* case the court found that there was no limitation upon the language of the grant to be implied from the nature of the land over which the right was granted, but rather the contrary, and although the dominant tenement in question in that case was at the date of the grant subject to restrictions, those restrictions, like the situation in *White's case* (6), could have been gotten rid of by the consent of a third party.

(1) [1924] 1 Ch. 211.
(2) [1934] 1 Ch. 190.
(3) L.R. 10 Ch. 586 at 590.
(4) [1934] 1 Ch. 561.
(5) [1948] 2 All E.R. 791.
(6) [1913] 1 Ch. 118; 110 L.T. 209.

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In the case at bar, while the Smith lands were, at the date of the grant, being used for agricultural purposes, there was no reason why they might not subsequently be subdivided into building lots as had been the case with the original part of the farm with respect to which plan 103 had been registered, and I cannot think that it is to be said that it was within the contemplation of the parties to the conveyance of 1925 that the farm would always remain a farm. I think, therefore there is nothing in the circumstances to restrict the plain words of the grant to the use being made of the farm lane at that time. Further, upon the severance of the dominant tenement into several parts, the easement attached to those parts; *Codling* v. *Johnson* (1), *Newcomen* v. *Coulson* (2).

I would therefore allow the appeal to the extent indicated. The farm lane having been obliterated and the gates having disappeared, I would, if the parties cannot agree, direct a reference to define the location of the right-of-way. The appellant should have her costs in this court and the respondent should have his costs in the Court of Appeal.

Appeal allowed in part.

Solicitors for the appellant: *Hollinrake & Bartrem.*

Solicitors for the respondent: *Mathews, Stiver, Lyons & Vale.*

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(1) (1829) 9 B. & C. 933. (2) (1877) 5 Ch. D. 133.

VINCENT FEELEY, ANDREW HERGEL, GEORGE REID, EDWARD MEECHAN ..... APPELLANTS;

1952
*Oct. 27
*Dec. 15

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Common betting-house—Summary trial under Part XVI—Motion for non-suit—Criminal Code, ss. 229, 773(f), 777(a), 1013(4) 1023(2).

The appellants were jointly charged with having kept a common betting-house and were tried summarily before a magistrate pursuant to ss. 773(*f*) and 777(*a*) of the *Criminal Code*. On a motion for non-suit, made at the close of the case for the Crown, the charge was dismissed as against all four accused. Pursuant to s. 1013(4) of the *Code*, the Crown appealed the acquittal on the ground that there was evidence to support the case against the accused and the Court of Appeal for Ontario ordered a new trial.

Held: (1): The appeal of the appellant Feeley should be dismissed; there was evidence which, if accepted, showed circumstances from which the inference might fairly be drawn that the building in question was being used as a common betting-house; and the evidence as to the statements made by this appellant and as to his actions was such that, in the absence of explanation or denial, the tribunal of fact might properly have decided that he was guilty of being the keeper of such betting-house.

(2): The appeals of the appellants Reid, Hergel and Meechan should be allowed and a judgment of acquittal entered, there being no evidence on which a properly instructed jury, acting reasonably, could have found a verdict of guilty.

Held also, that the rules laid down in The *King* v. *Morabito* [1949] S.C.R. 172. (i) that the judicial officer presiding at the trial of a criminal charge can not dismiss the charge at the close of the case for the Crown and before the defence has elected whether or not to give evidence unless at that stage there is no evidence upon which a jury might convict, and (ii) that whether or not there is such evidence is a question of law alone, are applicable to the conduct of a trial under Part XVI of the *Criminal Code*.

APPEALS from the judgment of the Court of Appeal for Ontario, allowing the Crown's appeal from the acquittal of the accused and ordering a new trial.

W. E. MacDonald for the appellants.

C. P. Hope Q.C. for the respondent.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Cartwright and Fauteux JJ.

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The judgment of the Court was delivered by:—

CARTWRIGHT J.—The appellants were jointly charged that they,

> within six months ending on the 4th day of November A.D. 1950 at the Town of New Toronto in the County of York unlawfully did keep a common betting house at the premises situate and known as Lakeside Cigar Store, 132 Sixth Street in the said Town of New Toronto, contrary to Section 229 of the Criminal Code.

They were tried summarily before His Worship Magistrate Hand pursuant to sections 773(*f*) and 777(*a*) of the *Criminal Code*. Each of the appellants was separately represented. Upon the close of the case for the Crown on January 26, 1951, the counsel for each defendant moved "for non-suit and dismissal in respect of" his client. The learned Magistrate granted this motion as to the appellants Hergel and Meechan, reserved his judgment as to the appellants Feeley and Reid and adjourned the hearing to January 29, 1951, on which date he gave judgment dismissing the charge against them also.

The learned Magistrate did not give extended reasons for judgment. In dealing with the motion so far as Hergel and Meechan were concerned he said "I find no evidence for a conviction against Andrew Hergel and Edward Meechan and the charge against them will be dismissed." In dealing with the motion as to Feeley and Reid he simply stated that the motion would be granted and the charge dismissed.

From this judgment of acquittal the Attorney-General appealed to the Court of Appeal for Ontario pursuant to section 1013 (4) of the *Criminal Code* on the following ground:—

> That the learned Magistrate erred in holding that there was no evidence to support the Crown's case against the accused.

The appeal was allowed and a new trial directed as to all four of the appellants, who now appeal to this Court pursuant to section 1023 (2) of the *Code*. We have not the benefit of any written reasons for the judgment of the Court of Appeal.

It is common ground that had the learned Magistrate refused the motion the appellants would have had the right to call evidence for the defence if so advised and

counsel for the respondent submits that the decision of this Court in *The King* v. *Morabito* (1) establishes (i) that at that stage it was not open to the learned Magistrate to dismiss the charge unless there was no evidence on which, had the trial been before a jury, a properly instructed jury, acting reasonably, might have convicted the accused, and (ii) that whether or not there was such evidence is "a question of law alone" within the meaning of section 1013 (4) of the *Code*. I agree with this submission.

Counsel for the appellant sought to distinguish the *Morabito* case from the case at bar. It is true that in the former case the trial was held under the provisions of Part XVIII of the *Code* and in the latter under Part XVI; and that *Perry* v. *The King* (2), approved in the judgment of Kellock J., concurred in by Rand and Locke, JJ., in the *Morabito* case, dealt with a charge disposed of under Part XV of the *Code*. It would seem, however, that *Rex* v. *Olsen* (3) also, approved in the judgment of Kellock J., dealt with a charge tried under Part XVI. The offence there charged was one on which the Crown might have proceeded either summarily or upon indictment and the fact that there was an appeal to the Court of Appeal for British Columbia indicates that the latter course had been followed. It is true that the corresponding sections in Parts XV, XVI and XVIII of the *Code* are not identically worded but in proceedings under each of such parts the judicial officer before whom the trial is held acts as judge both of the law and of the facts and it appears to me that the rules laid down in the *Morabito* case are applicable to the conduct of a trial under Part XVI of the *Code*. It is therefore necessary to consider as to each appellant whether at the close of the Crown's case there was evidence upon which a properly instructed jury, acting reasonably, might have convicted him.

The charge being that of keeping a common betting-house it was essential for the Crown to prove (i) that the building known as 132 Sixth Street, New Toronto, was at the relevant time a common betting-house, and (ii) that each appellant was a keeper thereof.

(1) [1949] S.C.R. 172. (2) 82 Can. C.C. 240.
(3) 4 C.R. (Can.) 65.

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The burden resting upon the prosecution as to (ii) above is somewhat lightened by the terms of section 229 (3) of the *Criminal Code* reading as follows:—

> (3) Every one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house, or as assisting in such care, government or management, shall be deemed to be the keeper thereof and is liable to be prosecuted and punished as such although in fact he or she is not the real owner or keeper thereof.

As in my view the order for a new trial should be upheld as to the appellant Feeley, I do not propose to discuss the evidence in detail. During the argument counsel for the Crown made it clear that he did not rely upon the presumptions created in certain circumstances by sections 985 and 986 (2) of the *Criminal Code*. He submitted that a *prima facie* case was made out against all of the appellants without the aid of these statutory presumptions.

In my view there was evidence which, if accepted, showed circumstances from which the inference might fairly be drawn that on the 3rd of November, 1950 the building in question was being used as a common betting-house. The more difficult question is whether there was evidence that the appellants were the keepers of such betting-house.

I have reached the conclusion that the evidence as to the statements made by the appellant Feeley, and as to his actions was such that, in the absence of explanation or denial, the tribunal of fact might properly have decided that he was guilty.

As to the appellants Reid, Hergel and Meechan respectively counsel for the respondent relies on the following items of evidence: As to Reid: (i) the license, Exhibit 30 (ii) the fact that in the pocket of a coat hanging in a closet on the premises was "a liquor permit in the name of George Reid" (iii) that he was found by the police in the cellar of the store in the circumstances to be mentioned hereafter.

As to Hergel: (i) that on November 3, 1950, he was twice seen to leave the premises in question and return (ii) the same as item (iii) in the case of Reid.

As to Meechan: (i) he had in his possession a key which would open the back door of the building in question and a key which would open the door of a small room in the building (ii) the same as item (iii) in the case of Reid.

It will be convenient to deal first with the third item mentioned in the case of Reid as it is common to these three appellants. There was evidence that Reid, Hergel and Meechan were all found by the police in the cellar room, under the building in question, containing the oil furnace. There was evidence from which it would have been open to a jury to draw the inference that one or more of them had been burning in the furnace pieces of paper which it was open to the jury to infer were betting slips but there was no evidence from which the jury could infer that all three of them had taken part in this or from which it could be determined which one had been doing it. This being so the effect of this item is only to warrant the drawing of an inference that each of the three was present while betting slips were being destroyed. It does not warrant the drawing of the inference as to any one of them that he destroyed betting slips.

Dealing next with item (i) as to Reid, there was evidence that a document, Exhibit 30, was on the wall in the building in question. It reads as follows:

TOWN OF NEW TORONTO No. 1 672

Tobacco

LICENSE

This License is granted to Lakeside Cigar Store of 132 6th St. to carry on Business or Businesses as above mentioned in the Town of New Toronto.

PROVIDED that the said Geo. Reid (L.C. St.) shall duly observe all By-laws made and provided by the Municipal Council of the Town of New Toronto, under which this License is Issued.

This License to continue in force until the 31st day of Dec. 1950 and no longer. This License may be Cancelled if the provisions of any By-law regarding the same are not fully observed.

ISSUED at the Town of New Toronto, this 1st day of February, 1950. Amount of License Fee $2.00

(Sgd.) F. R. LONGSTAFF

Municipal Treasurer

Below this appears a cash register printing shewing $2.00 paid on February 1, 1950.

Counsel for the appellant objects that this has no probative value in the absence of any evidence to identify the appellant George Reid with the individual intended to be described by the words "Geo. Reid" in the license. This point was not further developed in argument and I do not

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propose to discuss the numerous decisions, some of which are not easy to reconcile, in which the question has been considered as to whether and to what extent identity of name is evidence of identity of person. I will assume, without deciding, that a jury would have been entitled to infer that the appellant George Reid was the individual described by the words "Geo. Reid" in Exhibit 30. It might then be suggested that this indicated that on February 1, 1950, the appellant Reid was the licensee permitted to carry on business under the name "Lakeside Cigar Store" at the premises in question and that the presence of Exhibit 30 on such premises on November 3, 1950 indicated that he had up to that date continued in charge of such business. Be this as it may, it appears to me that if such an inference could otherwise have been drawn it was displaced by the evidence given by the Crown that Feeley was both the owner and the person in charge of the premises.

Item (ii) as to Reid seems to me to indicate nothing more than that the appellant Reid had hung up his coat in a closet in the premises in question and possessed a liquor permit. It throws no light on the question as to what he was doing on the premises.

In my opinion, these three items of evidence, taken together, are insufficient to make out a *prima facie* case that Reid was in fact the keeper or that he appeared, acted or behaved as the person having the care, government or management of the house in question or as assisting in such care, government or management.

In the case of Hergel the evidence as to his presence in the cellar in the circumstances mentioned, coupled with the evidence as to his twice leaving and entering the premises, falls far short of making out a *prima facie* case.

In the case of Meechan the evidence as to his presence in the cellar and as to the possession of the two keys mentioned above does not appear to me to indicate that he was a keeper. His possession of the keys would permit the jury to infer that he had a right to enter the building and a particular room therein, but would afford no foundation for a finding that he took any part in its care, government or management.

For the above reasons I have reached the conclusion that as to the appellants Reid, Hergel and Meechan there was no evidence on which a properly instructed jury, acting reasonably, might have found a verdict of guilty.

I would dismiss the appeal of the appellant Feeley. I would allow the appeals of the appellants Reid, Hergel and Meechan and direct that as to each of them a judgment of acquittal be entered.

Appeal of the appellant Feeley dismissed; appeals of the other appellants allowed.

Solicitor for the appellants: *W. E. MacDonald.*

Solicitor for the respondent: *C. P. Hope.*

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*Jun. 11
*Oct. 7

MARSDEN KOOLER TRANSPORT LTD. AND ALBERT PICHE (DEFENDANTS) ..... APPELLANTS;

AND

ANNIE POLLOCK, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM BRUNO POLLOCK, DECEASED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobile—Motorcyclist colliding with disabled trailer at night—Flares extinguished and not placed at distance required by Statute—Failure to repair or move trailer—Damages—Deceased illegitimate—Whether award in reasonable proportion to loss—Public Service Vehicles Act, R.S.A. 1942, c. 276—Fatal Accidents Act, R.S.A. 1942, c. 125—Trustee Act, R.S.A. 1942, c. 215.

The respondent's minor son was killed when his motorcycle collided in a very foggy night with the appellant's disabled trailer which had been left parked on the highway well over on its proper side of the road. The appellant had placed three flares, two behind and one in front of the trailer, all three at less than one hundred feet from the trailer; but these flares were extinguished at the time of the accident.

The action was taken by the son's mother, as administratrix of his estate, and on her own behalf and that of his father, as dependents. The trial judge, having found negligence in the failure to set out the flares in the manner prescribed by the *Public Service Vehicles Act* (R.S.A. 1942, c. 276) and in the failure to remove the trailer from the highway or repair it, awarded damages in the sum of $6,000 under the provisions of the *Fatal Accidents Act* (R.S.A. 1942, c. 125) and the *Trustee Act* (R.S.A. 1942, c. 215). This judgment was affirmed by the Court of Appeal for Alberta.

Held: The appeal should be dismissed; Kellock and Locke JJ., dissenting in part, would have ordered a new trial restricted to the amount of damages to be awarded under the *Fatal Accidents Act*.

Per Kerwin, Estey and Fauteux JJ.: Applying *City of Vancouver* v. *Burchill* [1932] S.C.R. 620 and *Fuller* v. *Nickel* [1949] S.C.R. 601, even if the appellant did put the flares out in a manner that did not comply with the statute, it was not liable in damages unless such breach was the direct cause of the accident. The statutory requirement of putting out flares in the circumstances of this case constitutes a duty the performance of which is the minimum required by law and does not relieve from exercising the care that a reasonable man would exercise in the circumstances. The collision was directly caused by the failure to exercise such care. A reasonable man would

*PRESENT: Kerwin, Kellock, Estey, Locke and Fauteux JJ.

have appreciated the danger, foreseen the possibility of injury and would have made an effort to remove or repair the trailer which, upon the evidence, would have been successful. (*Jones* v. *Shafer* [1948] S.C.R. 166 distinguished).

The amount of damages awarded under the *Fatal Accidents Act* must be determined upon the particular facts in each case and, in part, must be a matter of estimate, even conjecture. Appellate Courts have, apart from some error in principle, interfered only where the damages were clearly excessive, that is to say where there was no reasonable proportion between the amount awarded and the loss sustained, which is not the case here even though the damages awarded were somewhat large.

Per: Locke J. (dissenting in part): The fact that the flares were not placed at the distance from the stranded vehicle required by the regulations had no bearing on the occurrence of the accident since they had been extinguished before it happened. The proper inference to be drawn from the evidence was that the flares were in a defective condition when placed upon the highway and this, coupled with the negligence found by the trial judge of failing to remove the vehicle from the highway, was sufficient to sustain the finding of liability.

No evidence was given at the trial as to the age or the financial circumstances of the parents on whose behalf the claim for damages was made under the *Fatal Accidents Act* in respect of the death of an illegitimate child and the amount awarded was so excessive as to bear no reasonable relation to any loss shown to have been sustained. There should be a new trial restricted to the assessment of damages.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, affirming the judgment of Shepherd J. (1), which had awarded the respondent $6,000 for damages for fatal injuries suffered by her son when his motorcycle collided with the appellant's trailer parked on the highway at night.

A. F. Moir for the appellants.

F. R. McLean Q.C. and *F. Dunne* for the respondent.

The judgment of Kerwin, Estey and Fauteux JJ. was delivered by

ESTEY J.:—William Bruno Pollock, shortly after 1:30 on the morning of August 20, 1948, riding a motorcycle northward toward Edmonton on Highway No. 2, lost his life when he collided with a heavily loaded trailer owned by the appellant Marsden Kooler Transport Limited (hereinafter called the Company) and parked on the highway. This action is brought by his mother, as administratrix of his estate, on her own behalf and that of his father William

(1) [1951] 3 W.W.R. (N.S.) 266.

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Bruno. The learned trial judge (1) awarded damages in the sum of $6,000 against both appellants and his judgment was affirmed in the Appellate Court.

The appellant Piche, an employee of the Company, was driving the Company's truck, with trailer attached, northward on Highway No. 2 when about 9:00 p.m., on the evening of August 19, 1948, a bearing seized in the right rear wheel of the trailer. It was impossible for him then to move the trailer further with his own truck. He, therefore, detached the truck and left this trailer, 22 feet long and 7 feet 8 inches wide, parked on the east side of the highway. The highway had a hard surface width of 22 feet, with one foot of gravel on each side. The policeman who made certain measurements found the west side of the trailer was 13·6 feet from the west edge of the hard surface. This trailer was entirely on the hard surface and every vehicle proceeding northward, of necessity, had to turn to the west in order to avoid it.

Piche immediately communicated with another of the Company's drivers, who returned with his truck while Piche was still there, but no effort was then made, notwithstanding the presence of two of the Company's drivers and their respective trucks, to move the trailer. The learned trial judge found:

> I am satisfied from the evidence that had Piche and his fellow truck driver hooked up their two trucks to the trailer they could have removed it from the highway without difficulty shortly after it became disabled. The wrecker truck that did remove it the next morning pulled it two and a half miles in about an hour to a point where it was clear of the highway.

Piche put out three flares, one between 30 and 50 feet north of the trailer, the second just south of the trailer and a third about 30 or 50 feet south of the trailer. These were not placed as required by the regulations made under *The Public Service Vehicles Act* of the Province of Alberta (R.S.A. 1942, c. 276). They remained burning until some time around midnight, but were not burning at the time of the collision. After the collision these flares were found in a damaged condition, but in places that did not assist in determining where they had been originally placed. The learned trial judge stated that after parking the trailer and placing the flares

(1) [1951] 3 W.W.R. (N.S.) 266.

Piche then drove in his truck to Edmonton, called at his employer's warehouse and, finding it closed, went home to bed, making no other effort to get in touch with his employer until the next morning, nor did he notify the police, nor anyone else, of the presence of the trailer on the highway.

The trailer was, in fact, removed by another party the next morning as a result of action taken by the police.

The deceased had left Edmonton about midnight with two friends, each riding a motorcycle. They went to Leduc and as they passed the trailer the three flares were burning. They left Leduc to return to Edmonton about 1:30 in the morning. It was then very foggy. As they approached the trailer the flares were not burning. The deceased was riding last and it would appear that his motorcycle collided with the rear left corner of the trailer, causing him to lose his life.

The appellants' contention that, even if Piche did put the flares out in a manner that did not comply with the statute, the appellants are not liable in damages, as here claimed, unless such breach was the direct cause of the accident, has been repeatedly recognized. *City of Vancouver* v. *Burchill* (1) and *Fuller* v. *Nickel et al* (2). The learned trial judge appears to have been satisfied that the absence of the flares did contribute to the accident and that their absence was due to the manner in which they were placed by Piche. It was, however, unnecessary for the learned judge to make a specific finding to that effect, as he found that if Piche had exercised reasonable care the trailer would have been removed from the highway some time before the accident took place. It was on the failure in this regard that the learned judge appeared to place the greater emphasis and it was undoubtedly a direct cause of the collision.

This case illustrates again what has been repeatedly stated that a statutory requirement such as putting out flares constitutes a duty that must be performed and if the flares are placed with care they are often an adequate protection, at least for some time. However, the performance of that statutory obligation is the minimum required by law and does not relieve a person in Piche's position from exercising the care that a reasonable man would

(1) [1932] S.C.R. 620. (2) [1949] S.C.R. 601.

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exercise in the circumstances. A reasonable man would have appreciated the danger caused by the presence of the trailer, foreseen the possibility of injury and would have utilized the Company's two trucks in an effort to remove the trailer which, upon the evidence, would have been successful.

There was another alternative. It was about 10:00 p.m. when Piche left for Edmonton. A reasonable man would not have been content merely to try the warehouse door, but would have made an effort to communicate with his employer and endeavour to arrange for either the repair, which the evidence establishes could have been made upon the highway, or removal of the trailer.

If either of the foregoing reasonable courses had been adopted the trailer would not have been there at the time of the collision. It was Piche's failure to exercise the care of a reasonable man in the circumstances that directly caused the collision here in question. At all material times he was acting within the scope of his employment with the appellant company.

Jones v. *Shafer* (1), relied upon by the appellants, is distinguishable upon its facts. There, apart from other distinguishing factors, the learned trial judge found:

> I do not think under the circumstances here that the defendant could have secured the necessary equipment to do so (that is to move the truck), at least until the next morning.

The flares were put out with care and were removed by some unknown person. Moreover, after the flares were so removed the police visited the vehicle there in question and lighted the lights thereon, which were burning at the time of the accident.

The appellants contend that the damages in the sum of $6,000 awarded under *The Fatal Accidents Act* (R.S.A. 1942, c. 125) are excessive. They draw our attention to the statement of my Lord the Chief Justice, then Rinfret J., with whom Smith J. concurred, in *Littley* v. *Brooks et al* (2):

> In assessing damages under the Fatal Accidents Act, it is well settled law that the jury are confined to pecuniary loss sustained by the family and cannot take into consideration the mental suffering of the survivors . . . It is the reasonable expectation of pecuniary advantage by the relatives remaining alive that may be taken into consideration.

(1) [1948] S.C.R. 166.

(2) [1932] S.C.R. 462 at 470.

The appellants then cite a number of cases in which they contend the damages awarded were such as to indicate the damages here are excessive. The amount of damages allowed upon the above basis must be determined upon the particular facts under consideration in each case and, in part, must be a matter of estimate, even conjecture. *Grand Trunk Ry. Co. of Can.* v. *Jennings* (1). Appellate courts have, apart from some error in principle, interfered only where the damages are clearly excessive. Our attention was directed to *Taff Vale Ry.* v. *Jenkins* (2), where damages were fixed by a jury under *The Fatal Accidents Act.* It was contended in the House of Lords that the damages were excessive. Lord Atkinson stated that in such a case an appellate court would regard the damages as excessive only where "the Court cannot find any reasonable proportion between the amount awarded and the loss sustained." In *Davies* v. *Powell Duffryn Associated Collieries, Ld.* (3), Lord Wright stated:

> Where the verdict is that of a jury, it will only be set aside if the appellate court is satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case: *Mechanical and General Inventions Co., Ld.* v. *Austin,* 1935 A.C. 346. Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint* v. *Lovell,* 1935—1 K.B. 354, 360.

The statement of Lord Justice Greer (4) referred to reads as follows:

> In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

On the foregoing basis, even if one were disposed to conclude that the damages were somewhat large, there is no basis here disclosed upon which an appellate court should interfere.

The appeal should be dismissed with costs.

(1) (1888) 13 App. Cas. 800.
(2) [1913] A.C. 1 at 7.
(3) [1942] A.C. 601 at 616.
(4) [1935] 1 K.B. 354 at 360.

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KELLOCK, J. (dissenting in part)—In my opinion, this appeal should succeed as to damages only. At the time of the accident, the deceased was within a few weeks of being seventeen years old. He was a normal, healthy boy, and the family was apparently in humble circumstances. The boy had been engaged in helping his father in his business of trucking, being paid a wage of $60 a month, out of which he was paying $7 a week to his mother for board. The father testified that a few months after his son's death he took in another man on a partnership basis, he himself retaining a 75 per cent interest, and that this arrangement cost him from $60 to $70 a month more than he had been paying his deceased son. There is nothing in this evidence, however, which suggests that either the father or the son during the latter's lifetime realized that the boy was being under-paid or that he was making a contribution to his father. He occasionally bought, as the father said, "odd little things, a present, some small thing" for his sister "that didn't amount to much."

The contention of the respondent that the deceased "was in a rather different position from so many others of his age due to the fact that here was not only an expectation of contribution insofar as the dependents were concerned, but an actual contribution of $50 to $60 per month through his work with his father," is therefore not borne out by the evidence.

It is, of course, quite unnecessary in a case of this kind that, in order to establish a reasonable expectation of pecuniary benefit, the deceased should have in fact contributed to the support of the plaintiff, but, to employ the language of Lord Atkinson in *Taff Vale Railway Company* v. *Jenkins* (1), the court must find a "reasonable proportion between the amount awarded and the loss sustained."

In my opinion, there is on the evidence in this case no reasonable relation between the amount awarded and the loss sustained. I therefore concur in the order proposed by my brother Locke.

(1) [1913] A.C. 1 at 7.

LOCKE, J. (dissenting in part):—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta which dismissed the appeal of the present appellants from a judgment for damages awarded against them under the provisions of the *Fatal Accidents Act* (c. 125, R.S.A. 1942) and the *Trustee Act* (c. 215, R.S.A. 1942).

In view of the nature of the findings of negligence made at the trial, it is desirable to state the facts proven in some detail. The appellant Piche, a truck driver employed by the appellant company, was on the evening of August 19, 1948, driving a three ton tractor drawing a vehicle described as a semi-trailer upon the main highway from Calgary to Edmonton. At about 8 o'clock, when he was north of Leduc, trouble developed in one of the housings of the trailer, the bearings being smashed or seized, whereupon he drew over to the right side of the pavement and stopped and, deciding that he would be unable to proceed without assistance, sent word to the driver of another truck of the respondent company which was preceding him to the north asking him to return and assist him. When the driver of the second truck joined him, Piche decided to put out flares on the highway to give warning of the presence of the trailer, to disconnect that vehicle from the tractor and leave it standing on the highway. Having done this, he proceeded to Edmonton and, after going to the appellant company's warehouse to report and finding it closed, went to his home and retired to bed.

The highway at the place in question has a hard surface twenty-two feet wide: the trailer was twenty-two feet long and seven feet eight inches wide and, according to a constable who gave evidence on the respondent's behalf, the left side of the vehicle was thirteen feet six inches distant from the west side of the pavement, thus being well to the east of the center line. The right wheels of the trailer were close to the easterly edge of the pavement. While the trailer was equipped with the clearance lights required by the *Vehicles and Highways Traffic Act* (c. 275, R.S.A. 1942), these were supplied with electricity from the tractor and were extinguished when the latter unit was disconnected.

The boy William Bruno Pollock in respect of whose death damages were claimed had that evening ridden, in company with two companions named Fricker and McMinn

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from Edmonton South to Leduc. Each of them was riding on a motorcycle. They had passed the trailer on their way south, at which time, according to Fricker, there were three flares on the roadway, one to the north and two to the south of the trailer. After spending a short time at Leduc, McMinn started north for Edmonton and was followed a short time after by the others. Pollock who had left with Fricker apparently got behind and was riding alone at the time the accident occurred. According to Fricker, it had become very foggy and before he reached the place where the trailer was standing he had lost sight of Pollock. As he approached the trailer there were no flares to be seen: having passed it he proceeded north. Pollock meanwhile followed Fricker along the highway and, failing to detect the presence of the trailer, collided with the left rear of the vehicle suffering injuries which caused his death before anyone reached the scene of the accident.

The claim of the respondents as pleaded is in negligence. While, as stated in the reasons for judgment of Shepherd, J. (1), he permitted an amendment at the trial to set up a claim in nuisance he made no finding on that issue. He found Piche to have been negligent in failing to set out the flares in the manner required by regulations made under the provisions of the *Public Service Vehicles Act* (c. 276, R.S.A. 1942) and in failing to remove the trailer from the highway which, he considered, could have been accomplished with the assistance of the other truck of the appellant company. The learned trial judge also expressed the view that as the trailer could have been repaired on the highway by taking out repairs from Edmonton this should have been done.

The regulations relating to the setting out of warning lights passed under the provisions of the *Public Service Vehicles Act* read as follows:—

> When during the period between sunset and sunrise or any other time when things are not plainly visible at a distance of 500 feet a Public Service or Commercial Vehicle becomes stationery for any reason whatever upon any highway outside the boundaries of a city, town or village, and
>
> (*a*) the lighting equipment required by The Public Service Vehicles Act and/or The Vehicles and Highway Traffic Act is disabled, the driver or other person in charge of such vehicle shall immediately cause two red lanterns, fusees, flares or approved

(1) [1951] 3 W.W.R. (N.S.) 266.

reflectors to be placed on the highway in line with the vehicle, one at a distance of approximately one hundred (100) feet in front of the vehicle and one at a distance of approximately one hundred feet at the rear of the vehicle.

(*b*) the lighting equipment is not disabled, the driver or person in charge of such vehicle shall after a period not exceeding ten (10) minutes, proceed to set out flares, lamps, lanterns, reflectors, or fusees as provided for above.

In dealing with this aspect of the matter the learned trial judge said in part:—

In fixing the distance of approximately 100 feet at which flares must be set out under circumstances such as we have here it is presumed that this distance of approximately 100 feet is the minimum required for safety but in this case the flares were at the most placed not more than 50 ft. from the parked trailer. This surely was negligence on the part of Piche for which he and his employer, the other defendant, must be held responsible.

It was, however, not the fact that the flares were put out less than one hundred feet from the vehicle that caused or contributed to the occurrence of the accident but the fact that they were extinguished when Pollock arrived there on his return journey. Unless, therefore, as contended for the respondent, the placing of the flares on the highway at less than the prescribed distance from the vehicle was a contributing factor to their being extinguished by passing vehicles striking them, the fact that this was done is an irrelevant circumstance.

The flares in question were described by Piche as being round pot flares burning kerosene and having a screw top wick in them and they were, according to him, in good condition and full of oil. Constable McLean of the Royal Canadian Mounted Police said that they were the usual type used for this purpose and he considered them to be standard equipment. According to Piche, he had placed one flare on the highway to the east of the center line about twenty paces to the north of the trailer, a second one close to the back of it and a third some twenty paces to the south of it. This witness had said at the coroner's inquest that he had placed the flares thirty feet to the north and to the south of the trailer and this discrepancy in his evidence is commented on adversely by the learned trial judge. With respect, however, I think it can make no difference in considering what caused the flares to be extinguished whether the one to the north and the one

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farthest to the south were thirty feet or fifty feet (estimating a pace as Piche did as two and a half feet) from the trailer. As to the distance such flares are visible, Holcombe, an experienced bus driver employed by the Western Canadian Greyhound Lines and who passed the trailer in the early morning hours of August 20 when it was very foggy, said that they were visible at a distance of three hundred yards and that the vehicle itself was visible when he was about seventy-five yards distant. Engel, an experienced driver, said that he could see such flares in a fog in ample time to stop: if it was really foggy he considered they could be seen from one hundred to two hundred feet distant. Fricker, who said that there was fog as he described it "in patches" when they passed the trailer going south, stated that at that time the flares could be seen a quarter of a mile away. There is no contradiction of this evidence in the record. Constable McLean said that flares of this type when set out at night were very good as warning signals, but he was unable from any experience to say how effective they were in a fog.

In endeavouring to come to a conclusion as to what caused the flares to be extinguished, it is of importance to consider the condition and the various locations in which they were found after the accident. Constable McLean found one of the flares about twenty feet south of the trailer on the east side of the highway. The wick had been knocked out and the container was damaged. He also found one about twenty or thirty feet to the north of the trailer in the ditch on the west side of the highway. A third flare was seen by the witness Holcombe between the rear wheels and under the back of the trailer which, he said, had been "up ended." Constable McLean found a skid mark on the highway commencing forty-eight feet south of the van and leading to the left rear corner which, in his opinion, had undoubtedly been caused by Pollock's motorcycle. Holcombe who said that one of the flares was burning at a point some forty to fifty feet south of the trailer when he passed that vehicle going south, said that it had apparently been hit by some vehicle at about the point where the skidmark commenced and coal oil was spilled on the highway. The evidence of both of these witnesses, it

may be noted, supports Piche's statement that he had placed the most southerly flare about twenty paces or fifty feet distant from the trailer.

Since it was proven as part of the plaintiff's case that the flares were out at the time of the accident, the only reasonable inference to draw from this evidence is, in my opinion, that the most southerly flare was struck by Pollock's motorcycle and the one placed immediately to the south of the vehicle also struck as it skidded towards the rear of the van. As to the flare which had been placed to the north of the trailer, in view of the evidence of the visibility of such flares, the proper inference is, I think, that after it had ceased to burn it had been struck and knocked to the side by some passing vehicle. Nothing in any of this evidence, in the view I take of this matter, supports the idea that the distance at which they were placed from the vehicle had any bearing on their being extinguished. The finding of liability based upon an infringement of the regulations cannot, therefore, be supported.

The second ground of negligence found was that the trailer could, without difficulty, have been removed from the highway within a short time after it became disabled as the equipment to do so was available. The learned trial judge was of the opinion that if Piche and his fellow truck driver had hooked up their two trucks to the trailer they could have removed it from the highway without difficulty shortly after it became disabled. There was conflicting evidence upon this point. While the evidence of Engel, the driver of the powerful wrecker sent to the scene, would indicate the contrary, the admissions made by Piche on cross-examination that while he considered it would have injured the axle of the vehicle the two tractors could have moved the trailer off the highway were accepted by the learned trial judge. It was shown that very close to the place where the trailer was halted there was a roadway leading into an elevator to which the trailer might have been moved and the possibility of danger to passing traffic avoided. It is to be remembered that while this large trailer was equipped with clearance lights which would have served as an additional warning to traffic upon the highway these were extinguished, of necessity, when the tractor was disconnected. Flares of the required type if in condition

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should, upon the evidence, have burned throughout the night and the fact that these flares went out in the circumstances above detailed is consistent only, in my opinion, with the fact that they were in a defective condition when they were placed upon the highway. It was the duty of the appellants, I think, since they proposed to leave the vehicle standing upon the highway to see that the flares set out were in proper condition to continue burning throughout the hours of darkness, particularly in view of the absence of any other lights upon the vehicle. These circumstances, together with the negligence found by the learned judge, suffice, in my opinion, to sustain a finding of liability on the part of the appellants.

It is further argued for the appellants that the cause of the accident was the negligence of Pollock and, alternatively, that he was guilty of negligence which contributed to the occurrence. On these issues the learned trial judge has found for the respondent and the Appellate Division has dismissed the appeal from this finding. The argument addressed to us has not satisfied me that there has been any error in dealing with this aspect of the case.

The appellants contend further that the damages awarded under the *Fatal Accidents Act* are excessive and bear no reasonable relation to the actual financial loss suffered by the parents of the deceased. The respondent Annie Pollock is the mother of the deceased boy who was born out of wedlock: the father William Bruno and the respondent, it appears, have lived together for about twenty years and there is another child of which they are the parents who was seven years old at the time of the trial. While unmarried they have maintained a home together and the boy lived with them and went to school until he was fourteen years old, after which he worked for his father in his business of trucking and dealing in scrap metal. The father was paying his son $60 a month for his services and the boy paid $7 a week to his mother for board. Had he lived he would have attained the age of seventeen years on September 6, 1948. Neither the age of the father or the mother was proven and no evidence given as to the financial circumstances of either of them. According to William Bruno, it would have cost him $120 a month for a man to replace his son as his assistant in carrying on his

business at the date of the trial which was December 19, 1950, more than two years after the time of the accident. It was also shown that at times the boy used to buy small presents for his mother and for the little girl. He was a strong healthy lad and had had nothing other than minor illnesses during his life.

Upon this evidence the learned trial judge awarded damages under the *Fatal Accidents Act* of $6,000. The learned Chief Justice of Alberta, in delivering the judgment of the Court, said as to this:—

> While we might not have awarded so large a sum under the Fatal Accidents Act, we are not prepared to find that the trial judge assessment under that Act did not bear a reasonable proportion to the loss sustained.

The principles which govern awards under statutes of this nature have long since been settled. In my opinion, they cannot be more concisely and accurately stated than in the following passage from the judgment of Killam, C.J. in *Davidson* v. *Stuart* (1):

> The damages are not to be allowed for injury to the feelings of the survivors, but for the loss of a life of substantial pecuniary value to the relatives entitled under the statute; there must be evidence reasonably warranting the inference that the relatives have sustained a loss of that character. It need not appear that the deceased was under any legal liability to the survivors of which his death has prevented performance; it is sufficient that the circumstances were such as should give them a reasonable expectation of pecuniary benefit from the continuance of the life.

Section 2 of the *Fatal Accidents Act* provides that the expression "child" in the statute shall, unless the context otherwise requires, include an illegitimate child: but for this there would have been no claim by either parent (*Town of Montreal West* v. *Hough* (2)). In addition to the damages claimed under the provisions of that *Act* the plaintiff claimed under the provisions of the *Trustee Act* and the learned trial judge awarded a sum of $1,000 which, we were informed by counsel for both parties, was for loss of life expectancy, and the sum of $340 for funeral expenses. The deceased boy left other estate to the amount of $750 which amount, together with the damages awarded under the *Trustee Act,* go to the mother under the provisions of the *Intestate Successions Act* (c. 211, R.S.A. 1942), the net amount so received being $1,750. From the damages

(1) (1902) 14 M.R. 74 at 81. (2) [1931] S.C.R. 113 at 120.

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awarded under the *Fatal Accidents Act* it was directed that this amount be deducted, leaving a sum of $4,250 to be divided equally between the father and the mother.

The onus lay upon the plaintiff in the present matter to establish that those on whose behalf the claim was advanced had a reasonable expectancy of pecuniary benefit from the continued life of Pollock and this, in my opinion, was done in so far as the claim was made on behalf of the mother and the father. It was, however, further the obligation of the plaintiff to prove the facts from which a fair estimate of the damage sustained could be made. The fact that at a time two years after the event the father was required to pay a man $60 a month more than the amount he had paid to his son does not, of course, establish a loss in any such amount. The period when this was done was two years later when all wage earners were being paid increased amounts and a full grown man would presumably be able to do more and effective work than a boy of seventeen. The boy had gone to work when taken out of school and, while it is perhaps fair to assume that for some time he would work for his father for less than he could obtain elsewhere, in the normal course of events within two or three years he would either establish himself elsewhere or expect the same wages as other men for the work done. It is not necessary in claims under the *Act* that it should be shown that the person on whose behalf the claim is made has a claim in law to maintenance or assistance but the fact that this boy was illegitimate is, in my opinion, a factor which must be considered in dealing with the claim advanced on behalf of his father. The age of the parents and the financial circumstances of each of them were also material facts to be considered in estimating what value should be attributed to the support which the father and mother might reasonably expect to receive from their son in the future and neither point was touched in the evidence.

The question of the quantum of the award under the *Fatal Accidents Act* is to be considered as standing by itself. The evidence is, in my opinion, inadequate to enable the Court to properly estimate the amount of the loss sustained

by the boy's death. Upon the evidence as it stands, I think the amount of $6,000 is so excessive as to bear no reasonable relation to such loss as was shown to have been sustained.

In these circumstances, I think there should be a new trial restricted, however, to the amount of damages to be awarded under the *Fatal Accidents Act*. As the appeal should otherwise fail, in my opinion, and success thus be divided between the parties I think there should be no costs either in this Court or in the Appellate Division.

Appeal dismissed with costs.

Solicitors for the appellants: *Wood, Buchanan, Campbell, Moir & Hope.*

Solicitors for the respondent: *Maclean & Dunne.*

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*May 29
*Dec. 15

GUY BERNARD AND OTHERS (*Plaintiffs*) ..... } APPELLANTS;

AND

DAME ALBERT AMYOT-FORGET AND OTHERS (*Defendants*) ..... } RESPONDENTS

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

Will — Substitution — Children — Grandchildren — Whether great-grandchildren included—Whether rule of representation of Article 980 C.C. applicable—Article 509 C.P.

The testator's will provided that on the death or remarriage of his widow the children issue of his marriage should have the usufruct of his property and that on the extinction of the usufruct the ownership should pass to "the children issue of the lawful marriage of my children, that is to say my grandchildren". It is admitted that the will created a fiduciary substitution and that the final opening of the substitution has occurred.

The appellants, whose parents died prior to the date of distribution of the estate, claimed, as great-grandchildren of the testator, the shares which their parents, as grandchildren of the testator, would have received had they survived. Their action was dismissed by the Superior Court and by a majority in the Court of Appeal for Quebec.

Held: (Rinfret C.J. and Taschereau J. dissenting), that the appeal should be allowed. The rule of representation enunciated in Article 980 C.C. applied. The words "children" and "grandchildren" as used in the will applied to all the descendants of the testator and, therefore, to his great-grandchildren as well as to his grandchildren.

Per Rand J.: The word "grandchildren" is used without qualification and, therefore, Article 980 C.C. disposes of the question. The phrase "that is to say" is introductory to a form of statement equivalent in meaning to one already made and its effect is the same as if the equivalent expression had been used alone in the first instance. Even if this were to produce tautology, it would not be sufficient to change the legal meaning of the words. The instrument leaves no doubt of the general intention that the property should pass to the direct descendants by equal division between the family lines of the children.

Locke J. agreed with Barclay J. that the words "that is to say my grandchildren" following the words "the children issue of the lawful marriage of my children" should be construed as being merely explanatory and not limitative. The testator must be assumed to have known the law and the significance of the word "grandchildren" used without qualification.

Per Cartwright J.: If it was the intention of the testator to qualify or cut down the meaning ascribed to the word "children" by Article 980 C.C., it is unlikely that the notary who prepared the will would have chosen as a word of qualification a word to which the same meaning is ascribed by the same Article of the *Code*. It is more reasonable to suppose that an unnecessary and repetitious phrase was used.

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

Per Rinfret C.J. (dissenting): Since the words "children" and "grandchildren" are qualified, Article 980 C.C. cannot be invoked in favour of the appellants. The phrase "that is to say my grandchildren" would be meaningless if it were not descriptive. Without inquiring into the reasons of the testator but giving the fair and literal meaning to the actual language of the will, the property should go to the children issue of the lawful marriage of his children who can never be the great-grandchildren.

Per Taschereau J. (dissenting): The word "grandchildren" is not used without qualification and the expressions accompanying it are sufficiently clear to justify the exclusion of the great-grandchildren from the disposition. The words cannot be a meaningless repetition and must be given a meaning. The words determine the intention of the testator and indicate who should benefit.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming, Barclay and Pratte JJ.A. dissenting, the dismissal of the action by the Superior Court in an action taken by the great-grandchildren of the testator.

J. P. Lanctot, Q.C., for the appellants.

A. Laurendeau, Q.C., for the respondents.

The CHIEF JUSTICE (dissenting): Dans la cause de *Métivier* v. *Parent* (2), cette Cour a décidé unanimement:

The general provisions of the Civil Code (Arts. 1013 et seq.) enacting certain rules of interpretation as to contracts are applicable, by analogy, to arrive at the true meaning of the clauses of a will, taking into account however the difference existing between a contract and a will. Therefore, in a will as in a contract, the real intention of the testator must first be looked for and such intention will be found by giving a fair and literal meaning to the actual language of the will; and it is only when the intention is really doubtful that it is permissible to go outside the literal meaning of the words.

Il suit de cette décision que l'on doit interpréter la volonté du testateur suivant le sens littéral des termes qu'il a employés et que l'on ne doit chercher son intention par voie d'interprétation que lorsque cette intention est douteuse. (1013 C.C.) En plus, toutes les clauses d'un testament doivent s'interpréter les unes par les autres, en donnant à chacune le sens qui résulte de l'acte entier (1018 C.C.).

(1) Q.R. [1952] K.B. 89. (2) [1933] S.C.R. 495.

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Dans la cause de *Auger* v. *Beaudry* (1), le Conseil Privé a déclaré:

...But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean.

Ce sont là les principes qui doivent nous guider pour l'adjudication sur le point de droit que les parties nous ont soumis en se prévalant des articles 509 et suivants du *Code de Procédure Civile.*

La question est très simple:

Par son testament, daté à Montréal le 15 avril 1875, M. Jean-Baptiste Dufort a disposé de ses biens, tant en usufruit qu'en capital, en faveur de son épouse et de ses enfants. Il leur a légué la jouissance et usufruit de ses biens leur vie durant, puis, à la Clause sixième du testament, il a ajouté:

...Et quant à la propriété de mes biens, je la donne et lègue aux enfants à naître en légitime mariage de mes enfants, c'est-à-dire à mes petits-enfants; lesquels diviseront et partageront mes biens entre eux par parts et portions égales par souches, après l'extinction de l'usufruit par moi légué tant à madite épouse qu'à mes enfants.

Les appelants, qui sont les arrière petits-enfants du testateur, ont prétendu que cette clause les incluait dans la disposition. Les intimés, au contraire, ont conclu à ce qu'ils soient déclarés les seuls appelés définitifs aux biens substitués, vu qu'ils sont les seuls survivants des enfants du testateur.

La Cour Supérieure a donné raison à ces derniers et elle a été confirmée par la majorité de la Cour du Banc du Roi (en appel) (2).

La demande des appelants est basée sur l'article 980 C.C., qui se lit comme suit:

Art. 980. Dans la prohibition d'aliéner, comme dans la substitution, et dans les donations et les legs en général, le terme *enfants* ou *petits enfants,* employé seul soit dans la disposition, soit dans la condition, s'applique à tous les descendants avec ou sans gradualité suivant la nature de l'acte.

(1) [1920] A.C. 1010 at 1014.

(2) Q.R. [1952] K.B. 89.

Et la prétention des appelants est que par application de cet article les mots "enfants" et "petits-enfants" doivent être compris comme s'appliquant à tous les descendants.

De même que le juge de première instance et la majorité de la Cour d'Appel, je ne puis me rendre à cette interprétation.

En vertu de l'article 872 C.C., "Les règles qui concernent les legs et les présomptions de la volonté du testateur, ainsi que le sens attribué à certains termes, cèdent devant l'expression formelle ou autrement suffisante de cette volonté dans un autre sens et pour avoir un effet différent".

Or, la règle posée dans l'article 980 C.C. ne peut être invoquée ici par les appelants. En effet, cette règle ne s'applique que lorsque le terme "enfants" ou "petits enfants" est "employé seul". Ce texte de l'article 980 C.C. est encore plus formel que le texte en langue anglaise "without qualification". Ainsi que le fait remarquer l'honorable Juge Marchand, qui a fait partie de la majorité en Cour d'Appel, le testateur n'a jamais employé ces termes seuls. Cela, déjà, serait suffisant pour que l'article 980 ne régisse pas la Clause sixième du testament.

Mais il y a plus. Introduire cette règle pour interpréter la clause amènerait à une redondance ou à l'emploi de mots inutiles. Si, au lieu de constituer une description, cette phrase ne devait être considérée que comme n'ajoutant rien aux mots "petits enfants" qui la précèdent, alors cette phrase était inutile.

En outre, si l'on veut lui appliquer l'article 980 C.C., alors il faudrait lire la clause: "Je lègue aux enfants à naître en légitime mariage de mes enfants, c'est-à-dire à mes petits enfants" comme si elle se lisait: Je lègue "aux descendants à naître en légitime mariage de mes descendants, c'est-à-dire à mes descendants". On ne saurait ainsi travestir l'intention du testateur. Au contraire, en traitant les mots "c'est-à-dire mes petits enfants" comme excluant les arrière-petits-enfants, qui sont les appelants, on arrive à une interprétation cohérente de la Clause sixième. Ce que dit le testateur, en effet, c'est qu'il lègue "aux enfants à naître en légitime mariage de mes enfants"; et si l'on applique les règles d'interprétation reconnues comme s'appliquant aux testaments dans notre jugement de *Métivier* v. *Parent*, si l'on adopte le sens littéral des mots employés,

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les biens vont aux enfants nés du mariage des enfants du testateur. Or, il est évident que les enfants nés du mariage des enfants du testateur ne peuvent être que les petits-enfants. Les arrière-petits-enfants ne peuvent jamais être les enfants nés du mariage des enfants du testateur. Le testateur les a donc exclus, et, si nous écoutons les sages avis du Conseil Privé cités plus haut, nous n'avons pas à nous demander quels ont pu être les motifs du testateur en excluant les arrière-petits-enfants. Nous n'avons pas à spéculer sur la raison pour laquelle il a cru devoir disposer de ses biens ainsi qu'il le dit dans son testament. Le Conseil Privé nous en avertit dans *Auger* v. *Beaudry*: "...It is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will".

Je suis donc d'avis que les jugements dont est appel doivent être confirmés, avec dépens.

TASCHEREAU J. (dissenting): Par son testament reçu à Montréal, le 15 avril 1875, devant les notaires Dumouchel et Hétu, Jean-Baptiste Duford a laissé la jouissance de ses biens à son épouse, Dame Vélanire Laporte. Au décès de cette dernière, les enfants issus du mariage du testateur et de son épouse devaient à leur tour être saisis des biens à titre de grevés, et pour employer les termes mêmes du testateur, la propriété de la totalité du patrimoine était dévolue "aux enfants à naître en légitime mariage de mes enfants, c'est-à-dire à mes petits-enfants; lesquels diviseront et partageront mes biens entre eux par parts et portions égales et par souches..."

Le testateur est décédé en 1876, laissant son épouse, décédée à son tour en 1901, et cinq enfants tous également décédés respectivement en 1909, 1913, 1945, 1946 et 1949.

Fortunate Duford Boisseau, l'une des filles du testateur, eut cinq enfants. Deux, Robert et Alice, maintenant décédés, en ont eu quatre qui se trouvent les arrière-petits-enfants du testateur, et qui sont les demandeurs-appelants dans la présente cause. C'est leur prétention que par l'opération de l'article 980 C.C., le terme "petits-enfants" dans le testament créant la substitution s'applique à tous les descendants, et qu'en conséquence, ils doivent hériter

comme appelés au même titre que les autres petits-enfants. M. le Juge Smith de la Cour Supérieure, ainsi que la majorité de la Cour d'Appel (1), ont rejeté ces prétentions.

L'article 980 C.C. est rédigé dans les termes suivants:

980. Dans la prohibition d'aliéner, comme dans la substitution, et dans les donations et les legs en général, le terme *enfants* ou *petits-enfants*, employé seul soit dans la disposition soit dans la condition, s'applique à tous les descendants avec ou sans gradualité suivant la nature de l'acte.

Il est important de signaler que le terme "petits-enfants" s'étend aux "arrière petits-enfants", quand il est employé *seul*, c'est-à-dire, comme le dit le texte anglais, sans qualification. Si on trouve dans la disposition quelque expression qui démontre une intention contraire, il faut laisser au terme "petits-enfants" son sens ordinaire, et ne pas lui donner l'extension que le Code permet, quand il est employé seul.

Je partage les vues du juge de première instance et celles exprimées par la majorité de la Cour d'Appel. Les mots "petits-enfants" ne sont pas employés seuls, et les expressions qui les accompagnent sont, je crois, suffisamment claires pour nous justifier d'exclure les "arrière petits-enfants" de la disposition testamentaire. "Aux enfants à naître en légitime mariage de mes enfants, c'est-à-dire à mes petits-enfants", sont des mots qui précisent l'intention du testateur et qui indiquent quels sont ceux, et ceux-là seuls qui devaient être les appelés définitifs. Il faut nécessairement donner un sens aux mots "c'est-à-dire à mes petits-enfants". A moins de les considérer comme une répétition inutile, ce que je ne puis faire, ils doivent qualifier les mots "les enfants à naître en légitime mariage de mes enfants". C'est à eux, à ses "petits-enfants" que le testateur me paraît avoir limité l'étendue de sa libéralité et qu'il a voulu léguer la propriété définitive de ses biens. En d'autres termes, le testateur a dit qu'il instituait comme appelés ceux-là qui naîtront du mariage de ses enfants, et il qualifie ces mots en disant que ce seront ses "petits-enfants".

En vertu de l'article 980 C.C., les mots "enfants" et "petits-enfants" s'appliquent à tous les descendants, et comme le fait remarquer le juge au procès, si l'on substitue

(1) Q.R. [1952] K.B. 89.

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Taschereau J.

le mot "descendants" aux mots "enfants à naître" et "petits-enfants" on arrive avec la disposition suivante, où la dernière partie n'est plus l'explication de la première que le testateur a voulu évidemment donner en employant les mots "c'est-à-dire": "Je lègue la propriété de mes biens aux descendants à naître de mes enfants, c'est-à-dire à leurs descendants".

Je ne crois pas que le testateur ait eu l'intention d'insérer dans son testament une clause qui comporterait une aussi inutile répétition, et qui enlèverait tout sens aux mots "c'est-à-dire", employés évidemment pour préciser sa volonté.

Je crois que l'appel doit être rejeté avec dépens.

RAND J.: The question in this appeal is the interpretation of a clause in a will which reads:

Et quant à la propriété de mes biens, je la donne et lègue aux enfants à naître en légitime mariage de mes enfants, c'est-à-dire à mes petits-enfants; lesquels diviseront et partageront mes biens entre eux par parts et portions égales par souches, après l'extinction de l'usufruit par moi légué tant à ma dite épouse qu'à mes enfants.

Art. 980 of the Code provides:

In the prohibition to alienate, as in substitutions, and in gifts and legacies in general, the terms children or grandchildren, made use of without qualification either in the disposition or in the condition, apply to all the descendants, without the effect of extending to more than one degree according to the terms of the act.

The point is whether the words "petits-enfants" in the clause are used "without qualification"; and in determining that, the meaning of the language as the expressed intention of the testator is to be ascertained before any resort is made to the Code.

A qualification is said to be introduced by the expression "c'est-à-dire": this, it is argued, signifies an exclusiveness to the grandchildren and as if the word "only" had been added. I must confess to a difficulty in drawing any such meaning from the phrase. Its literal translation in English is the ordinary expression, "that is to say", and so far as I can gather it means the same thing in French: in other words, it is introductory to a form of statement equivalent in meaning to one already made, and its effect is the same as if the equivalent expression had been used alone in the first instance. This sense is objected to as producing

tautology. No doubt we endeavour to give all words in an instrument effective meaning; but tautology is too universal a weakness or, as sometimes, strength, to give rise to a rule of interpretation that controls what would otherwise be the proper construction of the language used.

The will was made in 1875 and the testator died in the following year, and the instrument leaves no doubt of the general intention that the property should pass to the direct descendants by equal division between the family lines of the children. Why should we be astute to find a qualification that arbitrarily arrests that descent? As we are seeking what was in the mind of the testator from the words used, and what he would have declared to be his intention had the question been put to him, it is, I think, involving oneself in a wholly unnecessary verbal tangle to discover even doubt in the language here. On that view, the article of the Code disposes of the question.

Agreeing, therefore, with Barclay and Pratte, JJ. in the court below, I would allow the appeal and direct a declaration accordingly, with costs in all courts.

LOCKE J.:—I agree with the reasons for judgment delivered in the Court of King's Bench by Mr. Justice Barclay (1) and would allow this appeal with costs throughout.

CARTWRIGHT J.:—The relevant facts and the terms of the will of the late Jean Baptiste Duford are set out in sufficient detail in the judgments of other members of the Court.

I am in substantial agreement with the reasons of my brother Rand and with those of Barclay and Pratte JJ. and desire to add only a few words.

It is common ground that the capital of the testator's estate is to be distributed at the date of the death of his last surviving child, which occurred in October 1949, and the question to be determined on this appeal is whether the appellants, who are great-grandchildren of the testator whose parents died prior to the date of distribution, are entitled to the shares which such parents would have received had they survived.

(1) Q.R. [1952] K.B. 89.

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Cartwright J.

The question turns on the following words in the will:

...je la donne et lègue aux enfants à naître en légitime mariage de mes enfants, c'est-à-dire à mes petits-enfants; lesquels diviseront et partageront mes biens entre eux par parts et portions égales par souches,...

I do not understand that any of the learned judges in the courts below or counsel who argued the appeal before us disagreed with the following statement of Pratte J. (1):

Si, dans la disposition sous examen, le testateur avait dit seulement: "Je lègue la propriété de mes biens aux enfants à naître en légitime mariage de mes enfants", il ne ferait pas de doute, à mon avis, que les arrière-petits-enfants seraient compris dans la disposition. De même, s'il avait dit seulement qu'il léguait ses biens à ses petits-enfants, la même solution s'imposerait nécessairement, par application de l'art. 980 C.C.

The learned judge of first instance and the majority in the Court of Appeal were, however, of opinion that the two expressions "enfants à naître en légitime mariage de mes enfants" and "mes petits-enfants" coupled by the words "c'est-à-dire" qualify each other so as to change the meaning which either standing alone would have had to "grandchildren excluding any remoter issue."

The will was prepared by a Notary who may safely be assumed to have been familiar with the terms of Article 980 of the *Civil Code*. I find it difficult to accept the view that if it was his intention to qualify or cut down the meaning ascribed by the *Code* to the words "enfants à naître en légitime mariage de mes enfants", i.e. "descendants" he would choose as words of qualification other words to which the same meaning is ascribed by the same article of the *Code*. Forced to choose between the two alternatives, I find it more reasonable to suppose that he used an unnecessary and repetitious phrase.

I would dispose of the appeal as proposed by my brother Rand.

Appeal allowed with costs.

Solicitor for the appellants: J. P. Lanctot.

Solicitors for the respondents: Laurendeau & Laurendeau.

(1) Q.R. [1952] K.B. 89 at 100.

MICHAEL MANOS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1952

*Nov. 28
*Dec. 1
*Dec. 22

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Theft—Evidence—Testimony of accomplice—Corroboration —Corroborative inference is question of fact—Criminal Code, s. 1025.

Applying *Rex* v. *Baskerville* [1916] 2 K.B. 658, it was held that, on a charge of theft, the jury were rightly told that the evidence as to a certain cheque was capable of being corroborative of the testimony of the accomplice who was the main witness against the appellant. Applying *Hubin* v. *The King* [1927] S.C.R. 442, it was also held that the jury should have been told that it was for them to decide if it was in fact corroborative. As it was impossible to state that no substantial wrong or miscarriage had occurred, the appeal was allowed and a new trial directed.

APPEAL from the judgment of the Court of Appeal for Ontario, dismissing the appellant's appeal from his conviction on a charge of theft.

A. E. Maloney for the appellant.

W. B. Common Q.C. for the respondent.

The judgment of the Court was delivered by:—

KERWIN J.:—The appellant was convicted in the Court of the General Sessions of the Peace in and for the County of York on a charge that in the year 1950 he stole approximately $38,000 in money, the property of S. P. Ryan, A. D. McAlpine and J. M. Ryan, contrary to the *Criminal Code*. The Court of Appeal for Ontario dismissed an appeal from his conviction and sentence and, pursuant to section 1025 of the *Code*, he appealed to this Court in accordance with leave granted by Cartwright J. on the following grounds:—

(*a*) Was the alleged fact that a certain cheque was given by the appellant to one, Elsie Teasdale, in or about the month of April, 1950, capable in law of being corroboration of the testimony of the said Elsie Teasdale?

(*b*) Did the learned trial judge usurp the functions of the jury in instructing them that the evidence concerning the said cheque was corroborative?

*PRESENT: Rinfret C.J. and Kerwin, Kellock, Cartwright and Fauteux JJ.

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In view of the conclusion reached, it is not advisable to refer to the evidence at the trial in detail. The substance of the charge against the appellant was that he had counselled and procured Elsie Teasdale to steal the money in question from her employers, the parties named in the indictment. Elsie Teasdale had already pleaded guilty to a charge of theft and had been sentenced. She was the main witness called against the appellant, and the trial judge charged the jury that as she was an accomplice they ought not to convict on her uncorroborated testimony. He also told the jury that the cheque given by the appellant to her in or about the month of April, 1950, was capable in law of being such corroboration. This cheque could not be found but, notwithstanding the argument of counsel for the appellant, we are satisfied that there was evidence upon which the jury could find that it had in fact been signed by the appellant and given to Elsie Teasdale.

Then it was said that while on her own testimony the cheque was to repay the amounts she had given the appellant from her own funds and from the sums she had stolen from her employers up to that time, the amount of the cheque exceeded the total of all of these amounts down to the date of the cheque. However, the jury were entitled to accept Elsie Teasdale's evidence that the amount of the cheque represented the approximate total and that any excess was to be repaid by her to the appellant. In that view of the matter and considering all the other evidence, the cheque was capable in law of being corroborative as it falls within the classical statement as to what may be corroboration as found in *Rex* v. *Baskerville* (1). The answer, therefore, to the first question must be in the affirmative.

The second question must also be answered in the affirmative. The charge to the jury must, of course, be read as a whole but it is necessary to refer only to the following portions of it. At one stage the trial judge told the jury:—

> I will tell you here there is some evidence corroborative of her evidence and if you accept that evidence you may believe her evidence, accept the whole of her story.

(1) [1916] 2 K.B. 658.

Later, after referring to the evidence as to the existence of the cheque given by the various bank officials, the trial judge continued:—

Gentlemen, you may or may not accept that evidence. If you do, that is evidence corroborative in a material respect and you may believe the whole or necessary parts of Miss Teasdale's evidence to bring in a verdict. If you do not accept the evidence as corroborative of her story, as I told you, you ought not to convict and should bring in a verdict of not guilty.

After considering the matter for over four hours, the jury returned and the foreman asked the following questions:—

. . . . something was said about the fact that it was unusual to convict a person based on or solely on the evidence of a convicted member or party to the offence. Could you perhaps go over that for us again and clarify it just to what extent?

The trial judge replied:—

I am very glad you asked about that because they are very important. You see, there is not enough evidence in this case, gentlemen, to convict the accused unless you accept the whole or important parts of the evidence of Miss Teasdale.

Now, as I have told you as a matter of law, as I am supposed to tell you the law, she is in law what is known as an accomplice, that is, if you find the accused guilty the two of them were both in it, she is guilty anyway, she is what you call an accomplice. You realize when you have two people accused of something there might be a tendency to put the blame on the other so a person who is admittedly guilty of a crime may not be too reliable, so the law is laid down that the judge must tell the jury they ought not to convict the accused on the evidence of an accomplice alone, it must be corroborated, that is, there must be some other evidence which backs it up in some material particular.

I have explained to you here that there is such evidence, which you accept it as corroboration, if you accept that evidence you may take her story, holus bolus if you want to. It is all in your hands; if there is no corroboration, I have to tell you there is not. Here I explained what the corroboration was; it was the evidence concerning this cheque which was signed by the accused which went through the bank. You heard the evidence about that and if you believe that evidence and accept it, it is open to you to accept the whole or any part of Miss Teasdale's evidence.

Particularly bearing in mind this last quotation, we think the charge was defective and that the jury should have been told clearly that the evidence as to the cheque was

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capable of being corroboration but that it was for them to decide if it was in fact corroborative. In *Hubin* v. *The King* (1), this Court decided, at page 444, that "whether corroborative inferences should be drawn is a question for the jury." This rule was infringed in the present case and it is impossible to state that no substantial wrong or miscarriage has occurred. This appeal must therefore be allowed and a new trial directed.

Appeal allowed; new trial directed.

Solicitors for the appellant: *Edmonds & Maloney.*

Solicitor for the respondent: *W. B. Common.*

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*May 12, 13, 14

*Dec. 22

In re HERBERT COPLIN COX

AND

In re LOUISE BOGART COX

EDWIN G. BAKER ..... APPELLANT;

AND

NATIONAL TRUST COMPANY LIMITED AND OTHERS ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Charity—Charitable Trust—Income of trust fund payable to such employees and their dependents of an assurance company as determined by its Board of Directors—Validity.

By his will the testator directed his trustees to hold the residue of his estate upon trust as follows: "To pay the income thereof in perpetuity for charitable purposes only: the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the Board of Directors of the said The Canada Life Assurance Company, as they, the said Board of Directors, in their absolute discretion shall from time to time decide."

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

(1) [1927] S.C.R. 442.

Held: (Rand and Cartwright JJ. dissenting)—That on its true construction the clause did not evidence a general charitable intent and the specific bequest to the employees did not satisfy the test of public benefit requisite to establish it as a charitable trust. *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* [1951] A.C. 297; *In re* Compton [1945] Ch. 123; *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* [1946] Ch. 194 and *In re Drummond* [1942] 2 Ch. 90.

Per: Rand and Cartwright JJ. (dissenting)—The residuary clause declares a general charitable intent and impresses upon the residue a trust for that purpose. The word "directly" restricts direct benefits to those mentioned and implies that all other benefits are to be indirect, but since the benefit to the specified class violates the rules laid down requiring that public quality in the recipients defined by the cases mentioned, it follows that only by indirect benefits to individuals as by grants to charitable agencies or objects are the funds to be dealt with by the trustees.

Rand J. was of opinion that failure of the benefits to the employees of the Assurance Company did not cause the appointment of the Board of Directors as the body to determine the distribution of the funds to also fail but rather that the absolute discretionary appropriation to charity of the property generally was conferred upon the Board.

Cartwright J. was of opinion that since the mode of carrying the testator's general charitable intention into effect could not be carried out, the matter should be referred back so that proper proceedings could be taken for the propounding and settlement of a scheme for the application *cy-près* of the residuary estate.

APPEALS by the representative of the employees of The Canada Life Assurance Co. from the judgment of the Court of Appeal for Ontario (1) construing the residuary clause in the wills of the late Herbert Coplin Cox and his widow the late Louise Bogart Cox. The clauses were substantially identical and by consent of the parties the two appeals were heard together. Wells J., the trial judge, construed the disposition as a valid charitable bequest for the relief of poverty confined to the class described (2). The Court of Appeal reversed his judgment, declared the clause did not constitute a valid charitable bequest and ordered a reference to determine the next-of-kin.

(1) [1951] O.R. 295; 2 D.L.R. 326. (2) [1950] O.R. 137; 2 D.L.R. 449.

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J. J. Robinette, Q.C. and *G. F. Hayden* for Edwin G. Baker, by order representative of the employees of The Canada Life Assurance Co., appellant.

L. H. Snider, Q.C. for the Public Trustee.

Beverley Mathews, Q.C. and *W. C. Terry, Q.C.* for the National Trust Co., Administrator of the estate of H. C. Cox, respondent.

Hon. S. A. Hayden, Q.C. for the National Trust Co., executor of the will of Louise Bogart Cox.

J. D. Arnup, Q.C. and *R. B. Robinson* for Margaret Jane Ardagh and all next-of-kin in the same interest, respondent.

H. C. Walker Q.C. for Lida Louise Shepard, respondent.

H. J. McLaughlin, Q.C. for W. B. Shepard, one of the next-of-kin of Louise Bogart Cox, respondent.

P. D. Wilson, Q.C. for the Official Guardian, respondent.

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

KERWIN J.:—The will of the late Herbert Coplin Cox directs his trustees to hold the residue of his estate upon trust as follows:—

> To pay the income thereof in perpetuity for charitable purposes only; the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependents of such employees of said The Canada Life Assurance Company; subject to the foregoing restrictions, the application of such income, including the amounts to be expended and the persons to benefit therefrom, shall be determined by the Board of Directors of the said The Canada Life Assurance Company, as they, the said Board of Directors, in their absolute discretion shall from time to time decide. The Trust Fund is to be known as "The Cox Foundation" in memory of the family whose name has been so long associated with the said Company.

The first point to be determined is the proper construction of this clause. If it consisted merely of the opening words "To pay the income thereof in perpetuity for charitable purposes only" that would be a good charitable trust,

and it is therefore argued that while in the latter part of the clause the only persons to benefit "directly" from the application of the income are the present and former employees (and their dependants) of The Canada Life Assurance Company, there is an area of indirect benefit untouched by such latter part but which falls within the opening words. As against this it might be suggested that, if that were so and assuming the latter direction would not fall within the scope of legal charity, the funds could be applied for either purpose. It might be also suggested that, in that event, the present case could not be distinguished from those where the fund could be diverted in the trustees' discretion to an object totally uncharitable in the legal sense with the result that the whole bequest would be void: *Hunter* v. *A.G.* (1); *Chichester Diocesan Fund and Board of Finance* v. *Simpson* (2).

The point need not be determined on this appeal because the word "directly" does not operate in the manner suggested as I construe the clause to mean that the charitable purposes for which the income is to be paid in perpetuity are the employees and dependants. Members of that class must of necessity benefit directly as a trust for indirect benefits would be too vague for the Court to enforce. The word "directly" therefore adds nothing. On that construction it is not a case of there being a charitable intention with merely the particular mode of application failing for illegality or some other reason, and the cases cited on that branch of the matter have no application.

Upon a consideration of the numerous decisions, it is clear that, if the objects of a trust are not charitable in themselves, it is not a charitable trust, and the fact that the donor thought his gift charitable is not relevant to the issue: Tudor on Charities, 5th edition, page 8. The circumstance, therefore, that the testator directed his trustees to pay the income for charitable purposes only does not determine the matter when, as I believe, the only purposes to which the moneys may be applied are not charitable.

(1) [1899] A.C. 309. (2) [1944] A.C. 341.

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It has now been settled that the element of public benefit is essential for all charities no matter in which of Lord Macnaghten's classifications in *Income Tax Commissioners* v. *Pemsell* (1), they fall. The only exception is the anomalous case of trusts for the relief of poverty and, here, that condition does not exist. Mr. Robinette contended that, granted the words "to pay the income thereof in perpetuity for charitable purposes only" would, by themselves, establish a valid charitable trust, it should be held that the succeeding part of the clause applied only to indigent or necessitous persons. However, this succeeding part permits the Board of Directors to choose employees and dependants who are not poor and the argument fails.

As pointed out by Lord Simonds in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* (2), when the trust is for the benefit of a class of persons, the question is whether that class can be regarded as such a "section of the community" as to satisfy the test of public benefit. He points out that these words, "section of the community", have no special sanctity, "but they conveniently indicate first, that the possible (I emphasize the word "possible") beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as *In re Compton* (3), of a number of families cannot be regarded as charitable. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes."

The House of Lords approved the judgments of Lord Greene as Master of the Rolls in *In re Compton* (3), and of Lord Greene and of Lord Justice Morton (as he then

(1) [1891] A.C. 531.
(2) [1951] A.C. 297 at 306.
(3) [1945] 1 Ch. 123; [1945] 1 All E.R. 198.

was) in *In re Hobourn Aero Components Ltd.'s Air-raid Distress Fund* (1). The decision in *In re Drummond* (2) was also approved. That decided that trusts for the benefit of employees past, present or future of an employer are not public charities. *In re Rayner* (3), was regarded as of doubtful authority. As pointed out by Lord Morton of Henryton, the Court of Appeal in *Gibson* v. *South American Stores (Gath and Chaves) Ld.* (4), felt obliged because of the rule of *stare decisis* to follow an unreported decision of its own in 1935, *In re Sir Robert Laidlaw,* and to hold that a trust was valid which was for all persons who in the opinion of a Board of Directors are, or should be necessitous and deserving, and who had been in the employ of the Company or a subsidiary thereof, and dependants thereof. The element of poverty was present and it was held to be a valid charitable trust notwithstanding the limited nature of the class of beneficiaries. I have already pointed out that the element of poverty does not enter into the present matter and, in my opinion, the decision in *Oppenheim* is decisive.

It is decisive notwithstanding that at the date of the application to Wells J. the persons who would answer the description of employees, past or present, of the Company, and dependants of such employees, were estimated to be in excess of thirty thousand, and that some of these were in such circumstances as to require financial aid. Even if those facts satisfied the first test of a "section of the community", the second requirement is a quality which does not depend on the relationship of the members thereof to a particular individual. When the *Hobourn* case came before the Court of Appeal, it was contended that the observations of that Court in *Compton* that a trust for the benefit of employees of a business was a purely private and personal trust were dicta only. At page 200, Lord Greene stated his belief in the correctness of those observations, and at page 208, Lord Justice Morton said quite

(1) [1946] 1 Ch. 194; [1946] 1 All E.R. 501.
(2) [1914] 2 Ch. 90.
(3) [1920] 89 L.J. Ch. 369; 122 L.T. 577.
(4) [1950] 1 Ch. 177.

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plainly that he entirely approved of the *Drummond* decision. In the *Hobourn* case the Court was not dealing with a fund put up by outside persons but, at page 200, Lord Greene stated that "even if we were, I should on the authority of *In re Compton* feel constrained to hold that such a fund would not be a good charity." Lord Justice Morton was of the same opinion and Lord Justice Somervell agreed. In view of the approval by the House of Lords of the decisions in *Compton and Hobourn,* the matter would appear to be concluded.

It was argued that the law should not be the same for Ontario but even if the decision in *Oppenheim* had never been given, I would hold that its basis, as found in the judgments of Lord Greene in *Compton* and of Lord Greene and of Lord Justice Morton in *Hobourn,* is a complete and satisfactory method of disposing of the present issue. I adopt, if I may, the words of Lord Simonds in *Oppenheim*: "It must not I think be forgotten that charitable institutions enjoy rare and increasing privileges and that the claim to come within that privileged class should be clearly established." Those privileges, it might be added, are, of course, not confined to the receipt of benefits in perpetuity under a will.

The appeal should be dismissed subject to a variation to which Mr. Snider drew our attention. The testator's widow survived her husband, and paragraph 5 of the judgment of Wells J., as inserted in the Court of Appeal order, should be stricken out and the following substituted therefor:—

> 5. And there therefore being an intestacy as to such balance of the testator's residuary estate, THIS COURT DOTH FURTHER ORDER that it be referred to the Master of this Court at Toronto to determine and report who were entitled thereto at the date of the death of the testator.

The costs of all parties should be paid out of the estate, those of the surviving administrator with the will annexed and trustee of the testator's will and codicil as between solicitor and client.

The residuary clause in the will of the testator's widow is the same as in her husband's and the same order should, therefore, go in the appeal in connection with her estate except that there is no necessity of any alteration in the order of the Court of Appeal.

RAND J. (dissenting):—I agree with the construction placed on the residuary clause by my brother Cartwright, that it declares a general charitable intent and impresses upon the residue a trust for that purpose; I agree, also, that the word "directly" is significant, that it restricts direct benefits to those mentioned and implies that all other benefits are to be indirect; I agree, finally, that the benefit to the specified class violates the rules laid down requiring that public quality in the recipients defined by the cases mentioned. It follows that only by indirect benefits to individuals, as by grants to charitable agencies or objects such as libraries, hospitals, schools, churches, works or institutions, are the funds to be dealt with by the Trustees.

But I am unable to concur in the view that by reason of the failure of the benefits to the employees of the Assurance Company, the appointment of the Board of Directors as the body to determine the distribution of the funds, must be taken also to fail. The absolute discretionary appropriation to charity of the property generally was conferred upon the Board; benefits might or might not be awarded to the employee group: they might from time to time be bestowed exclusively on other objects. The reasons leading the testator to select the Board would, from the evidence, seem to be obvious. He, himself, as well as others of the Cox family, had long been associated with the Company, and he had come to know and, undoubtedly, appreciate the competency and character of those who constituted its Board. It may be also that that long family connection had, directly or indirectly, in some degree, enabled the accumulation of the wealth of which he was disposing, and it was an easy step to associating the Company with its distribution as a public benefaction.

In these circumstances I cannot take the designation of the Board to have been bound up with the intended benefits to the employees. The discretion extended over the whole charitable field; and I find nothing to indicate that had there not been the special provision for the employees, that discretion would have been placed elsewhere. I should think, on the contrary, that, in his opinion, the perpetuation of the family name in the maintenance of a charitable Foundation would be uniquely served by such an intimate office on the part of the Board.

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I would therefore declare the bequest in both testaments to be a valid gift to charity, the income to be applied by the trustees to such charitable purposes with indirect personal benefits only as the Board in their discretion think proper.

The costs of all parties should be paid out of the estates as proposed.

The judgment of Taschereau, Kellock and Fauteux, JJ. was delivered by:—

KELLOCK J.:—As the question arising in these appeals is common to both, it will be convenient to deal with the will of the male deceased. The relevant paragraph reads as follows: (As to which see page 96).

Wells J., the judge of first instance, construed this disposition as a good charitable bequest confined to the relief of poverty among the class described. The Court of Appeal appears to have entertained the same view with respect to the question of construction, but reversed the judgment of Wells J. on the ground that a trust for the relief of poverty confined to such a class was not a valid trust. In the view of Roach J., who delivered the judgment of the court, such a trust lacked the necessary public character.

The appellant, while adopting the construction of the will accepted in the courts below, contends that the Court of Appeal erred in its view of the law. Appellant contends further that, while the class defined by the testator comprises the only persons who are to benefit "directly" from the trust, the testator has expressed a general charitable intention and has left his gift to operate in the field of "indirect" benefit.

In its popular sense, "charity" does not coincide with its legal meaning but, as stated by Lord Macnaghten in *Pemsel's* case (1), adopting the argument of Sir Samuel Romilly in *Morice* v. *Bishop of Durham* (2),

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes, beneficial to the community, not falling under any of the preceding heads.

(1) [1891] A.C. 531. (2) (1805) 10 Ves. 521 at 531; 32 E.R. 947.

In *Verge* v. *Somerville* (1), Lord Wrenbury said at p. 499:

> To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.

Lord Greene M.R. in *Compton's* case (2), said with reference to the above proposition that it is true with respect to all charitable gifts and is "not confined to the fourth class in Lord Macnaghten's well known statement in *Pemsel's* case."

In the submission of the appellant, any trust for the relief of poverty creates, per se, a public benefit. Accordingly, while admitting that the trust here in question cannot, on the law as stated by Lord Wrenbury, be upheld as applied to the last three heads of Lord Macnaghten's classification, the appellant submits that if the language here in question may be construed as the appellant seeks to construe it, the trust is valid with respect to the first head, namely, for the relief of poverty within the group defined by the testator.

The initial question, therefore, is as to the true construction of the language which the testator used. Appellant says that the words "for charitable purposes only" are to be construed as though the testator had said, "for such legal charitable purposes as the law recognizes" within the class of beneficiaries defined.

As I have said, this construction of the testator's language found acceptance in the courts below, but I am regretfully unable to come to that conclusion. The word "charitable," construed in its legal sense, comprises all of the four heads already mentioned, and I find nothing in the language used which permits me to eliminate therefrom any of them. To put the matter more plainly, I see no escape from reading the words used as though the testator had set out seriatim the said four heads. This being so, the testator has empowered his trustees, even on the appellant's thesis, to apply the subject matter of the trust for charitable and

(1) [1924] A.C. 496. (2) [1945] 1 All E.R. 199 at 201.

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non-charitable purposes, thereby empowering them to devote the whole, if they please, to the non-charitable. The "application of such income" is left entirely to the discretion of the directors of the company and the bequest is therefore void; *Morice* v. *Bishop of Durham* (1). In my view, therefore, the basis of the argument of the appellant fails on this branch of the case.

In 1938 when the will here in question was executed, a testator might not unreasonably have thought, in the state of the authorities at that time, that a valid trust for purposes embracing all of the four heads of charity could be created for the benefit of a class such as the employees of a particular company and their dependents. In 1881 the case of *Spiller* v. *Maude* (2), had come before Jessel M.R. That case dealt with a fund derived from subscriptions made by members of a company of actors and actresses for the benefit of the members and their dependents. The learned Master of the Rolls came to the conclusion that poverty was clearly an ingredient in the qualification of members who should receive benefits and that the fund was, accordingly, charitable. Again in 1896, in *In Re Buck* (3), Kekewich J. decided similarly with respect to the funds of a Friendly Society. In 1900, also, in *In Re Gosling* (4), Byrne J. upheld as a good charitable trust, a fund for the purpose of pensioning off old and worn-out clerks of a particular firm.

In 1914, the case of *In Re Drummond* (5), came before Eve J., who held that a trust for the purpose of providing holiday expenses for the employees of one department of a company was invalid as not being a trust for public purposes but for private individuals. But, in 1920 the same learned judge, in *Re Rayner* (6), had to consider the validity of a trust for the education of children of the employees of a particular company. Eve J. distinguished his decision in *Drummond's* case and held the trust then before him valid, being of opinion that the class of beneficiaries was sufficiently defined as a section of the public to support

(1) (1805) 10 Ves. 521 at 541.
(2) (1881) 32 Ch. 158 N.
(3) [1896] 2 Ch. 727.
(4) (1900) 48 W.R. 300.
(5) [1914] 2 Ch. 90.
(6) 122 L.T. 577.

the gift. Although Lord Wrenbury's judgment in *Verge* v. *Somerville* (1) was delivered in 1924, it was not until 1945 that the decsion in *Rayner's* case was over-ruled by the Court of Appeal in *In Re Compton, supra.* In the meantime, the will of the testator here in question was executed.

By 1948 when the will of the testatrix was executed, *In Re Hobourn* (2), had been decided, although *Gibson* v. *South American Stores* (3), and *Oppenheim* v. *Tobacco Securities Trust* (4), had not. However, whatever may have been the view of the professional advisers of either the testator or the testatrix when the respective wills now in question were executed, the appellant does not argue now that the trusts here in question can be supported in law except as trusts for the relief of poverty. For the reason already given, the necessary foundation for such an argument does not exist upon the construction of the language used by the testators which, in my view, is the proper construction.

With respect to the argument that there is a whole field of "indirect" benefit left open within which the trust may validly operate, we have not the benefit of the view of either of the courts below, as this contention was for the first time put forward in this court. This argument is, of course, founded upon the use of the word "directly".

It is contended that while the testator has prohibited the application of any part of the income for the *direct* benefit of an individual who does not fall within the specified class, the will permits the income to be applied to such objects as, for example, a hospital, as it is said, such a gift involves only indirect benefit, presumably, to the patients.

Had the testator stopped with the words "The Canada Life Assurance Company" where those words are used for the second time in the first limb of the paragraph, there might be considerable force in this contention. The testator, however, did not stop there, but went on to prescribe

(1) [1924] A.C. 496.
(2) [1946] 1 Ch. 194; [1946] 1 All E.R. 501.
(3) [1950] 1 Ch. 177.
(4) [1951] A.C. 297.

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in the second limb that, "subject to the foregoing restrictions", the application of the income, including

(*a*) "the amounts to be expended" and

(*b*) "the persons to benefit therefrom"

(and here the word "directly" does not occur)

should be determined by the Board of Directors.

It is to be observed that while it is the trustees who are to disburse the income, it is the directors who are to control the application of the payments. The word "persons" in (*b*) above certainly does not exclude individuals. It includes them. If, therefore, according to the appellant's contention, no individual may take a direct benefit, the directors could never, as the testator directs, determine the "persons" to benefit but only at best, the "classes of persons" who might be served by any particular institution or organization to which they might direct payments to be made. The Canada Life employees and their dependents are themselves a class but the testator has declared that even among that class, the selection of the actual beneficiaries is a matter for the directors.

Having imperatively prescribed that the "persons" to benefit *shall* be determined by the directors, the testator has made it clear, in my opinion, that it is individuals and not institutions or organizations that he had in mind. Accordingly, as a gift to or for the benefit of an individual must benefit that individual directly, I think that in prescribing in the second limb of the paragraph that "the persons to benefit therefrom" are to be determined by the directors, he has removed any ambiguity there might otherwise have arisen upon the phrase "the persons to benefit directly" in the earlier language. The testator had in mind I think, in the employment of the earlier language that while a gift to or for the benefit of a member of the specified class would involve direct benefit to him, it might, in many cases, also involve indirect benefit to others, e.g., relatives of the beneficiary. In making their selections from that class, however, the directors will be concerned only with persons to be directly benefited.

I therefore think that the testator has devoted the income for "charitable purposes" among the persons of the class which he has himself described, to the exclusion of all

others. Accordingly, while the opening language of the paragraph "to pay the income thereof in perpetuity for charitable purposes only", taken alone, could not well be broader for the purpose of expressing a general charitable intention, the language which follows makes it clear, in my opinion, that the testator had no general charitable intention but an intention that the income should be used for charitable purposes for the benefit only of the persons he specifies and for no one else. If this be the true view, the court is not in a position to apply the gift in any other way upon the failure of the testator's gift.

I think the case at bar is within the principle of *In Re Wilson* (1), rather than within *In Re Monk* (2). In *National Anti-vivisection Society* v. *Inland Revenue Commissioners* (3), Lord Simonds, in dealing with the doctrine of general charitable intention, said at p. 64:

> It would be very relevant, if the society, conceding that the campaign against vivisection was not a charitable purpose, argued that there was yet a general charitable intention and that its funds were applicable to some other charitable purpose. That is not the argument. If it were, I should not entertain it, though it might in an earlier age have succeeded.

I would use the same language in the present case, and would dispose of the appeal as proposed by my brother Kerwin.

ESTEY J.:—The late Herbert Coplin Cox provided in his will that the residue of his estate should be held by his trustees upon trust (As to which see p. 96).

His widow, the late Louise Bogart Cox, included an identical provision in her will and both have been considered in this litigation. As a matter of convenience only the will of Herbert Coplin Cox will be referred to hereafter.

The Court of Appeal for Ontario reversed the judgment of Mr. Justice Wells and held that the foregoing provision did not constitute a valid charitable trust or, as stated by Mr. Justice Roach, writing the judgment of the Court:

> . . . These trusts are not trusts for general public purposes; they are trusts for private individuals, a fluctuating body of private individuals but still private individuals. Because they are not for public purposes they are not charitable and are therefore void as offending the rule against perpetuities.

(1) [1913] 1 Ch. 314. (2) [1927] 2 Ch. 197. (3) [1948] A.C. 31.

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Counsel for the appellant contends that the judgment of Mr. Justice Wells should be restored, declaring that the foregoing provision of the will constitutes a valid charitable bequest for the relief of poverty and, with respect to public benefit, he submits:

> The rule is either that the element of public benefit must be present in every category of legal charity except in the case of trusts for relief of poverty; or that a trust for the relief of poverty of a class of persons *per se* creates a public benefit.

It is convenient first to consider how far public benefit is essential in the creation of a valid charitable trust. Charitable purposes and objects have been classified by Lord Macnaghten in *Pemsel's* case (1), under four headings. These are trusts for (*a*) the relief of poverty; (*b*) the advancement of education; (*c*) the advancement of religion and (*d*) other purposes beneficial to the community not falling under any of the preceding heads.

In *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*, (2), securities were left upon trust to apply the income

> in providing for or assisting in providing for the education of children of employees or former employees of British-American Tobacco Co. Ld. . . . or any of its subsidiary or allied companies in such manner and according to such schemes or rules or regulations as the acting trustees shall in their absolute discretion from time to time think fit . . .

In the House of Lords it was held that this trust for educational purposes was invalid because the beneficiaries were limited to the children of employees of specified companies and, therefore, did not constitute a section of the community. Lord Simonds, at p. 306, stated:

> A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.
>
> I come, then, to the present case where the class of beneficiaries is numerous but the difficulty arises in regard to their common and distinguishing quality. That quality is being children of employees of one or other of a group of companies. I can make no distinction between children of employees and the employees themselves. In both cases the common quality is found in employment by particular employers.

In the foregoing quotation Lord Simonds, with whom Lord Oaksey and Lord Morton of Henryton agree, makes it plain that it is not the number of beneficiaries that constitutes the test, but that however large the number, if

(1) [1891] A.C. 531. (2) [1951] A.C. 297.

the nexus between them is their personal relationship to a single propositus such as The Canada Life Assurance Company, they do not constitute a section of the community and, therefore, the trust is invalid, not being for a public benefit.

In *Gilmour* v. *Coats* (1), the House of Lords emphasized the same requirement of public benefit in order that a valid charitable trust for religious purposes may exist. The Privy Council emphasized the same requirement in relation to a trust falling under classification (*d*) (for other purposes beneficial to the community) in *Verge* v. *Somerville* (2), where Lord Wrenbury stated at p. 499:

> To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.

The *Oppenheim, Gilmour and Verge* cases make it clear that public benefit must at least be found in charities classified under (*b*), (*c*) and (*d*) of Lord Macnaghten's classification; further that the *Oppenheim* case makes it equally plain that in specifying the employees of The Canada Life Assurance Company and their dependents the testator had not created a trust for public benefit.

Counsel for the appellant, however, contends that public benefit is not essential to the creation of a trust under Lord Macnaghten's classification (*a*) (for the relief of poverty).

Trusts for the relief of poor and needy relatives, usually described as the "poor relations" cases, have at least since 1754 (*Isaac* v. *de Friez* (3)), been held to be valid in courts of first instance and the Court of Appeal in England. These have been treated, in the Court of Appeal and in so far as they have been referred to in the House of Lords, as exceptions to the general rule that public benefit must be found in order that a charitable trust may be valid. (See Lord Simonds in the *Oppenheim* case, *supra,* at 308).

(1) [1949] A.C. 426; [1949] 1 All E.R. 848.
(2) [1924] A.C. 496.
(3) 2 Amb. 595.

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There is also, in the Court of Appeal in England, a second exception to this general rule, of which *Gibson* v. *South American Stores Ld.* (1), is an illustration. In that case the trust was for the benefit of those

> who are or shall be necessitous and deserving and who, for the time being, are or have been in the company's employ . . . and the wives, widows, husbands, widowers, children, parents, and other dependants of any person who, for the time being, is, or would if living have been, himself or herself a member of the class of beneficiaries.

The foregoing provision was held to be for the relief of poverty and the requirement of public benefit was raised by the Master of the Rolls at p. 191:

> Under the law as it has now been established, and in the light of its several recent decisions both in this court and in the House of Lords, is a trust for a class of poor persons defined by reference to the fact that they are employed by some person, firm or company, a good charitable trust, or does it fail of that qualification through the absence of the necessary public element?

The Master of the Rolls, after recognizing the "poor relations" cases as an exception or an anomaly, appeared to regard the decisions in *Spiller* v. *Maude* (2), *In re Buck*, (3), and *In re Gosling* (4), as constituting another exception to the rule requiring that in a valid trust public benefit must be found. In each of these cases the fund was held to have been created expressly for the benefit of poverty and the fact that the beneficiaries must be selected from an association or company did not prevent its being a valid charity. The learned Master of the Rolls, in appreciation of the fact that the issue in the foregoing cases had never been before the House of Lords, recognized the possibility that it might be otherwise decided in that House. He, however, without in any way discussing the principles involved, felt bound by the unreported judgment of the Court of Appeal in 1935, *Re Sir Robert Laidlaw* (5), of which no reasons were available. In his own words:

> I think that, so far as I am concerned, this question has been determined by *In re Sir Robert Laidlaw*, on grounds which are not apparent, and I loyally follow them without affirming or disaffirming any of the grounds relied on by Harman J.

He, therefore, held the trust valid and the same position was taken by that court in *Re Coulthurst* (6).

(1) [1950] 1 Ch. 177.
(2) (1881) 32 Ch. D. 158.
(3) [1896] 2 Ch. 727.
(4) (1900) 48 W.R. 300.
(5) Unreported.
(6) [1951] 1 Ch. 661.

The case at bar, however, does not come within either of the foregoing exceptions. It could not, nor has it been suggested that it falls within the "poor relations" group. Then, with respect to the second exception or group, illustrated by the *Gibson* case, *supra,* it must be observed that all of the cases that have been included thereunder were specifically created for the relief of poverty and no other charitable purpose. This is not such a case. The language here, without enumerating them, includes all the classifications as made by Lord Macnaghten, which, of course, would include poverty. Even if this exception should ultimately become established in the law, it ought not to be so far extended as to include a trust for all charitable purposes such as that here under consideration.

The fact that the "poor relations" cases and the group illustrated by the *Gibson* case, *supra,* have been treated as exceptions to the general rule that a charitable trust must be not only charitable in character but for a public benefit indicates that the general rule requiring public benefit is applicable to trusts for the relief of poverty. Moreover, that such is the correct view is strengthened by the statements to be found in the authorities and text books, of which the following may be noted:

Lord Simonds:

> . . . the principle has been consistently maintained, that a trust in order to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals: if it is, it will not be in law a charity though the benefit taken by those individuals is of the very character stated in the preamble. *Williams' Trustees* v. *Inland Revenue Commissioners* (1).

Lord Porter in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* (2), stated:

> One must take it therefore that in whichever of the four classes the matter may fall, it cannot be a charity unless it is beneficial to the community or to some sufficiently defined portion of it.

See also Lord Wright at p. 42.

Then again the learned authors of Tudor on Charities, 5th Ed., p. 11, state:

> In the first place it may be laid down as a universal rule that the law recognizes no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community.

(1) [1947] A.C. 447 at 457. (2) [1948] A.C. 31 at 53.

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Whether public benefit exists in a given case is a question of fact. In *National Anti-Vivisection Society* v. *Inland Revenue Commissioners, supra,* the House of Lords adopted the view expressed by Russell J. (as he then was) *in Re Hummeltenberg* (1). Lord Wright, at p. 44, adopts the language of Russell J.:

> In my opinion, the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it.

and expressly approves of it. At p. 42 Lord Wright states:

> The test of benefit to the community goes through the whole of Lord Macnaghten's classification, though as regards the first three heads, it may be prima facie assumed unless the contrary appears.

Lord Simonds stated at p. 65:

> I will readily concede that, if the purpose is within one of the heads of charity forming the first three classes in the classification which Lord Macnaghten borrowed from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham* (2), the court will easily conclude that it is a charitable purpose. But even here to give the purpose the name of "religious" or "education" is not to conclude the matter. It may yet not be charitable, if the religious purpose is illegal or the educational purpose is contrary to public policy. Still there remains the overriding question: Is it pro bono publico? It would be another strange misreading of Lord Macnaghten's speech in *Pemsel's* case (3), (one was pointed out in *In re Macduff* (4)), to suggest that he intended anything to the contrary. I would rather say that, when a purpose appears broadly to fall within one of the familiar categories of charity, the court will assume it to be for the benefit of the community and, therefore, charitable, unless the contrary is shown, and further that the court will not be astute in such a case to defeat on doubtful evidence the avowed benevolent intention of a donor.

If, therefore, upon the face of the document, the purpose or object of the trust is charitable in character, public benefit may be assumed or prima facie established, but where, as here, upon the face of the document it is clear that the cestuis que trust are limited to those who are employees of a particular company and their dependents, public benefit is negatived and, therefore, that element essential to a valid charitable trust is absent.

The appellant further contends that the provision of the will above quoted should be construed to mean that the employees and their dependents were to benefit to the extent that the trust might be declared valid, or, as otherwise stated, the testator discloses an intention that the

(1) [1923] 1 Ch. 237.
(2) 10 Ves. 521.
(3) [1891] A.C. 531.
(4) [1896] 2 Ch. 451.

fund should be used for such charitable purpose or purposes as are legal within the named group. If, therefore, the absence of public benefit made the trust invalid under headings (*b*), (*c*) and (*d*) of Lord Macnaghten's classification, it would still remain a valid charitable trust under (*a*) for the relief of poverty. This contention, if maintained, would involve a consideration of the *Gibson* case, *supra*. However, in my view, the provision does not admit of such a construction. It would appear that the testator, in providing that the directors might expend the income for charitable purposes, included the relief of poverty, in the same sense that all other purposes and objects are included, and made it abundantly clear that the employees and their dependents should benefit, not only in case of financial need, but in any manner that might be included within the phrase "charitable purposes." Moreover, it cannot be concluded that the testator would not have been mindful of the fact that the directors would probably find it difficult to expend the fund for the relief of poverty only among the employees and their dependents.

There remains the further contention that, though the trust for the employees and their dependents may be invalid, the testator has, in the foregoing provision, disclosed a general charitable intention which should be administered cy-près. This involves a difficult question of construction. As stated by Lord Davey in *Hunter* v. *Attorney-General* (1):

> You must construe the words of the will fairly, and if you can find a charitable purpose sufficiently clearly expressed the Court will give effect to it. If you do not find any such definite expression, you are not at liberty to supply it from more or less well-founded speculation of what the testator would probably have wished or intended if his attention had been drawn to the omission.

As Kay J. stated in *Re Taylor; Martin* v. *Freeman*, (2):

> I take the line to be a very clear one; perhaps sometimes it is difficult to say on which side of the line a particular case comes; but the line, which we all very well understand, is one of this nature: if upon the whole scope and intent of the will you discern the paramount object of the testator was to benefit not a particular institution, but to effect a particular form of charity independently of any special institution or mode, then, although he may have indicated the mode in which he desires that to be carried out, you are to regard the primary paramount intention chiefly, and if the particular mode for any reason fails, the court, if it sees a sufficient expression of a general intention of charity,

(1) [1899] A.C. 309 at 321. (2) (1888) 58 L.T. 538 at 543.

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will, to use the phrase familiar to us, execute that *cy-près*, that is, carry out the general paramount intention in some way as nearly as possible the same as that which the testator has particularly indicated without which his intention itself cannot be effectuated.

The testator, under his will, provided for relatives and friends by way of legacies and annuities and then set up the foregoing trust for the employees of the company over which he presided as president and their dependents. When read as a whole, the will rather supports the view that the testator intended to benefit only these groups.

It is, however, contended that in the paragraph creating this trust he discloses a general charitable intention. The opening words "To pay the income thereof in perpetuity for charitable purposes only," if they stood alone, would disclose a charitable intention. However, these words are but a part of the sentence creating the trust which must be read and construed as a whole. The phrase "subject to the foregoing restrictions" refers to both the limitation "for charitable purposes only" and the restriction of the benefit to the employees and their dependents. The testator appears here to place these two first portions of the provision upon an equal basis. Moreover, there is but one income and when, in that provision, he provides "the application of such income . . . shall be determined by the Board of Directors . . . in their absolute discretion" he uses the phrase "such income" to refer back to the word "income" as it is first used in this sentence. It would appear, therefore, that the testator contemplated the directors would expend the entire income upon charitable purposes, but for the benefit of the employees and their dependents.

The testator, throughout this paragraph, provides for the employees and their dependents in such a manner that they may benefit in any way that may be within the limits of charitable purposes. In a sentence so constructed it seems impossible to give to any part thereof a separate and distinct significance such as that here suggested.

The word "only" is twice used in this sentence and in both instances it adds nothing to the meaning except in so far as it may emphasize the intention of the testator. It is, however, stressed that the insertion of the word "directly" in the phrase "the persons to benefit directly in pursuance of such charitable purposes . . ." imports that

the testator had in mind that the employees and their dependents would benefit directly but that some others or other groups might benefit indirectly, which could only be accomplished by interpreting the provision as disclosing a general charitable intention. Even if a general charitable intention be found, it does not follow that the beneficiaries would benefit indirectly. The word "directly" is not a word of art and, while in another context it might well support such a contention, as here used it merely emphasizes the testator's intention to directly benefit the employees and their dependents.

While the word "general" is not essential to disclose a general charitable intention, its absence in a provision by a testator given to using words of emphasis is significant where, as here, in the same sentence he sets forth his purpose, object and the names of the cestuis que trust. Further, the disposition of this residue, having regard to the variety of benefits and the number of beneficiaries, does not suggest any surplus and it cannot be assumed that the testator had any doubt as to the validity of the trust he was creating. The provision read as a whole does not disclose that the testator's paramount object was to benefit charity generally, but rather to benefit the employees and their dependents. In other words, in the language here used one cannot, to use the language of Lord Davey, "find a charitable purpose sufficiently clearly expressed."

The variation in para. 5 of the judgment of Wells J., relative to the will of Herbert Coplin Cox, as inserted in the Court of Appeal order, should be altered as set out by my brother Kerwin. The appeals should be dismissed. The costs of all parties should be paid out of the estate, those of the surviving administrator with the will annexed and trustee of the testator's will and codicil as between solicitor and client.

CARTWRIGHT J. (dissenting):—These two appeals were argued together.

The late Herbert Coplin Cox died on September 17, 1947, leaving a will dated June 25, 1938. His widow, Louise Bogart Cox, died on November 18, 1948, leaving a will dated November 2, 1948. The questions to be determined arise out of the residuary clauses contained in these wills.

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These are substantially identical in wording and it was common ground that the result should be the same in both appeals. It will therefore be necessary to consider only the residuary clause contained in the will of Mr. Cox. It reads as follows:—

> SUBJECT as hereinbefore provided, and with respect to the balance of my residuary estate which may remain in my Trustees' possession, my said Trustees shall hold same upon trust as follows: (The trust is set out at p. 96).

The trustees moved on originating notice for the determination of a number of questions, but it was agreed when the motion came on for hearing before Wells J. that he should deal only with the question whether the disposition made in the residuary clause quoted above is a valid charitable bequest, and that upon the final determination of that question the matter should be referred back to the Weekly Court for further consideration.

Evidence was received of the following matters:—(i) that the number of persons in existence at the date of the hearing before Wells J. who would answer the description of employees, past or present, of the Canada Life Assurance Company and dependents of such employees was estimated to be somewhat in excess of thirty thousand, (ii) that a number of these were in such straitened circumstances as to need financial aid, (iii) that the known next-of-kin of Mr. Cox were of the fourth degree, and (iv) that the known next-of-kin of Mrs. Cox were of the fifth degree. It is stated in the reasons for judgment of the Court of Appeal that the residuary estate of Mr. Cox amounts to about $500,000 and that of Mrs. Cox to about $200,000.

Counsel appeared for the trustees of the wills, for the directors of the Canada Life Assurance Company, for the known next-of-kin, for the present appellant who was appointed in each case to represent the employees of the Canada Life Assurance Company, for the Public Trustee who was appointed to represent such other persons as might benefit under the residuary clause in question and for the Official Guardian who was appointed to represent any unascertained persons who might be interested in the residue in the event of an intestacy.

Wells J. decided that the clause in question "is a valid charitable bequest for the relief of poverty". The Court of

Appeal reversed the judgment of Wells J., declared that the clause does not constitute a valid charitable bequest and that it is therefore void as offending the rule against perpetuities and ordered a reference to the Master at Toronto to determine and report as to who are the next-of-kin of Mr. Cox and Mrs. Cox respectively.

On appeal to this Court, counsel for the appellant asked that the judgment of Wells J. should be restored and alternatively supported the argument of counsel for the Public Trustee. Counsel for the Board of Directors of The Canada Life Assurance Company adopted the argument of counsel for the appellant. Counsel for the trustees of the wills submitted the rights of the trustees to the Court but "suggested" that the judgment of Wells J. should be restored. For the Public Trustee it was contended that the clause is a valid charitable bequest as it stands and is not restricted to the relief of poverty but that if this is not accepted there is a valid bequest for charitable purposes generally and if the particular mode prescribed for carrying such purposes into effect fails, in whole or in part, the general charitable intention should be executed cy-près. Counsel for the next-of-kin and for the Official Guardian supported the judgment of the Court of Appeal.

It will be convenient first to summarize the reasons which brought Wells J. and the Court of Appeal to their respective conclusions.

Early in his reasons Wells J. says:—

> In the case at bar, however, the payment of income is limited "for charitable purposes only" and I think there can be no question that this gift must be deemed to be for any of the four purposes which the authorities have laid down as compendiously describing charitable trusts.

Later, after quoting from the judgment in *The Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (1), where Lord Macnaghten speaks of the four principal divisions which "Charity" in its legal sense comprises, the learned judge continues:—

> As I have said, I must assume that all these four heads were intended to be included by these two testators in the phrase used by them to denote the purpose for which the residue of their assets was to be left, that is "for charitable purposes only".

(1) [1891] A.C. 531 at 583.

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He then proceeds to the inquiry whether the trust is public—whether it is for the benefit of the community or of an appreciably important class of the community. After an examination of numerous authorities, including *Gilmour* v. *Coats* (1), *In re Gosling* (2), *In re Drummond* (3), *In re Rayner* (4), *In re Compton* (5), *In re Hobourn Aero Components Limited's Air Raid Distress Fund* (6), and *Gibson* v. *South American Stores* (7), the learned judge concludes that it has been decided by the Court of Appeal in England that a trust for the relief of poverty amongst the employees and ex-employees of a company and their families is a valid charitable trust. He proceeds:—

> . . . The charitable objects which are roughly gathered together under the words "relief of poverty" and which include the various items originally set out in the statute of Elizabeth and those of a similar nature are included in my view in the general words used by the testators when they provided that the income from the residue of their estates was to be paid over for charitable purposes only. Despite the very cogent argument addressed to me on behalf of some of the next-of-kin I must find that these testators had a general charitable intent which they have expressed without any ambiguity and that included in this intent was the division of charitable trusts which has been described as trusts for the relief of poverty. Under the exception which I have noted in the decisions the fact that the group intended to be benefited is defined by and depends upon a personal relationship either at first or second hand to the Corporation in which both the testators have been interested in their lifetime, does not preclude me from holding as I think I should under the authorities that in each of the wills before me there is a valid charitable bequest for the relief of poverty. But I must hold that the bequest is limited to this head of charitable relief. I do so realizing that the result is not a satisfactory one in the particular circumstances of this case but I am bound by the decision of the Court of Appeal of England in a matter of this sort unless there are contrary decisions of our own Court of Appeal and none have been cited to me nor have I found any.

The unanimous decision of the Court of Appeal was delivered by Roach J.A. (8) who, after reviewing the authorities dealt with by Wells J. and the decision of the House of Lords in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* (9), decided after Wells J. had given judgment, says in part:—

> The trusts with which we are here concerned are "for charitable purposes only". That phrase necessarily includes all legal charities. The law is now definitely settled by as high authority as the House of

(1) [1949] A.C. 426.
(2) (1900) 48 W.R. 300.
(3) [1914] 2 Ch. 90.
(4) (1920) 122 L.T. 577.
(5) [1945] Ch. 123.
(6) [1946] Ch. 194.
(7) [1950] 1 Ch. 177.
(8) [1951] O.R. 205.
(9) [1951] A.C. 297.

Lords—the *Oppenheim* case—that to the extent that those purposes include the charities coming within the second, third and fourth divisions of charities as classified by Lord Macnaghten these trusts are not valid charitable trusts because the beneficiaries are limited to a group of individuals who are defined by reference to *propositi* named by the donor in each case. Wells J. reached that conclusion but he held that they were valid charitable trusts limited to the relief of poverty among the beneficiaries. In my opinion they are not legal charitable trusts even for that purpose.

Clearly they do not come within the "poor relations cases". Those cases constitute a class of anomalous decisions which are now regarded as good law only because of their respectable antiquity.

In the *Oppenheim* case Lord Morton of Henryton suggested that such a case as the *Gibson* case—the case at bar resembles it to the extent that the purposes of the trusts here in question include the relief of poverty—might be described as a descendant of the "poor relations cases". In this Province, at least, and I should think also in England the "poor relations cases" as a class constitute a closed class and no other case not entirely identical with the poor relation cases should be legally adopted into that class.

Since that class is closed then the trusts here in question can be valid charitable trusts only if there is a second exception to the general rule, namely, trusts for the relief of poverty among a group of private individuals who are chosen by the donor by reason of another type of personal relationship, namely, their relationship as employees or dependents of employees of a named employer.

In my opinion this Court should hold that in this Province there is not such an exception to the general rule. The test as laid down in *In re Compton* and approved and applied in the *Oppenheim* case to an educational trust should also be the test to be applied in a trust for the relief of poverty. I can see no reason why it should be applied in the one but not in the other.

While the learned Justice of Appeal points out the distinction between the case at bar and *Gibson* v. *South American Stores* (*supra*), that in the former the relief of poverty is included in the purposes of the trust while in the latter poverty was a necessary element to qualify a person for benefit (*vide Gibson* v. *South American Stores* (*supra*) at 187), it would appear from the quotation from his reasons above, and particularly the last paragraph thereof, that even had the facts of the two cases been identical he would have refused to follow the *Gibson* case.

Roach J.A. does not in his reasons examine the argument of the Public Trustee as to the application of the cy-près doctrine. Early in his reasons, after stating the facts, he says:—

If the trust in question in each estate is not a valid charitable trust, it is void as offending the rule against perpetuities and a partial intestacy will result.

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In my view, the first step to be taken in an endeavour to solve the problem presented to us is to construe the words of the clause in question, bearing in mind the rule that for the purpose of ascertaining the intention of the testator the will is read, in the first place, without reference to or regard to the consequences of any rule of law, the rules of law being applied to the intention thus collected in order to see whether the court is at liberty to carry the intention into effect (*vide* Halsbury 2nd Edition, Volume 34, page 189 and cases there cited). The clause first directs that the trustees shall hold the residue upon trust:—"To pay the income thereof in perpetuity for charitable purposes only;". Pausing here, I can not think of any words more apt to indicate a general charitable intention. The clause proceeds, not to prescribe in any detail the mode in which this charitable intention is to be carried into effect but to confer on the Board of Directors of the Canada Life Assurance Company, subject only to two restrictions, an absolute discretion as to the application of the income, "including the amounts to be expended and the persons to benefit therefrom". The absolute discretion so given is stated to be "subject to the foregoing restrictions". What then are these restrictions? They are, first, that the income is to be paid "for charitable purposes only" and, second, that "the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependents of such employees". The usual and ordinary meaning of the words of the clause does not appear to me to differ from their literal meaning and I can find no ambiguity in the clause. It provides (i) that the income is to be used forever for charitable purposes only (ii) subject to this and to one further restriction an unfettered discretion is given to the Board of Directors of the Canada Life Assurance Company to direct the manner of its application (iii) the further restriction referred to is that the charitable purposes selected by the Board shall be such that direct benefits shall be conferred only upon members of a class made up of the present and past employees of the Canada Life Assurance Company and the dependents of such employees. I can find nothing in the words used to suggest that poverty is a necessary element

to qualify any member of the class mentioned for benefit. While the clause forbids the conferring of direct benefits upon persons outside the class it does not require that direct benefits shall be conferred upon any of its members. The Board is left free, if it sees fit, to devote all the income to charitable purposes which confer only indirect benefits. The discretion given to the Board is no doubt a fiduciary discretion which must be exercised bona fide (*vide* the observations of the Master of the Rolls in *Gibson* v. *South American Stores* (*supra*) at page 185) but apart from this it is subject only to the two restrictions above referred to.

The next, and, as it appears to me, more difficult question is whether the restriction referred to, i.e., "the persons to benefit directly in pursuance of such charitable purposes are to be only such as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependents of such employees", is valid.

A considerable portion of the full and able arguments addressed to us on this branch of the matter proceeded as if the question were whether a perpetual trust to use the income of the fund for charitable purposes only and for the benefit only of members of the class mentioned would be a valid charitable trust. That is not the precise point before us, as, if my view as to the construction of the clause is correct, it is only in the case of direct benefits that the application of the income is confined to members of the class, but a consideration of it may be of assistance. I do not propose to attempt a review of the numerous authorities so fully discussed in the judgments below and in the recent decisions in England, above referred to. With respect, it appears to me that the present state of the law in England on this point is accurately summarized by Jenkins L.J. in *In re Scarisbrick* (1), at page 648 et seq, as follows:

> . . . (i) It is a general rule that a trust or gift in order to be charitable in the legal sense must be for the benefit of the public or some section of the public; See *In re Compton* (2), *In re Hobourn Aero Components Ld.'s. Air Raid Distress Fund,* (3) and *Gilmour* v. *Coats* (4).
>
> (ii) An aggregate of individuals ascertained by reference to some personal tie (e.g. of blood or contract), such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, the members of a particular association, does not amount

(1) [1951] 1 Ch. 622.
(2) [1945] Ch. 123.
(3) [1946] Ch. 194.
(4) [1949] A.C. 426.

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to the public or a section thereof for the purposes of the general rule: see *In re Drummond* (1), *In re Compton* (2), *In re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* (3), and *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* (4).

(iii) It follows that according to the general rule above stated a trust or gift under which the beneficiaries or potential beneficiaries are confined to some aggregate of individuals ascertained as above is not legally charitable even though its purposes are such that it would have been legally charitable if the range of potential beneficiaries had extended to the public at large or a section thereof (e.g., an educational trust confined as *In re Compton,* to the lawful descendants of three named persons, or, as in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* to the children of employees or former employees of a particular company).

(iv) There is, however, an exception to the general rule, in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained as above, and are therefore not trusts or gifts for the benefit of the public or a section thereof. This exception operates whether the personal tie is one of blood (as in the numerous so-called "poor relations" cases, to some of which I will presently refer) or of contract (e.g., the relief of poverty amongst the members of a particular society, as in *Spiller* v. *Maude* (5), or amongst employees of a particular company or their dependants, as in *Gibson* v. *South American Stores (Gath and Chaves) Ltd.* (6).

(v) This exception cannot be accounted for by reference to any principle, but is established by a series of authorities of long standing, and must at the present date be accepted as valid, at all events as far as this court is concerned (see *In re Compton* (2)) though doubtless open to review in the House of Lords (as appears from the observations of Lords Simonds and Morton of Henryton) in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* (4).

If, in the case at bar, the clause in question required the income to be used for the relief of poverty among the class described it would fall within the fourth proposition stated by Jenkins L.J. and it would be necessary for us to decide whether we should accept this proposition, as Wells J. did, or reject it, as the Court of Appeal did; but, as I have already indicated, I am unable to so construe the clause.

I should here mention one of Mr. Robinette's arguments in support of the view that the clause should be construed as limiting the application of the income to the relief of poverty. It is said that the clause imperatively requires the income to be devoted in perpetuity to charitable purposes, that this must mean charitable purposes in the legal sense, that the testator has not specified any particular

(1) [1914] 2 Ch. 90.
(2) [1945] Ch. 123.
(3) [1946] Ch. 194.
(4) [1951] A.C. 297.
(5) 32 Ch. D. 158N.
(6) [1950] Ch. 177.

charitable purposes but, insofar as direct benefits are concerned, has defined with precision the class for whose benefit the income is to be applied, and that it must therefore be taken that he intended the income to be used for such purposes only as the law recognizes as charitable in regard to the defined class. This argument is necessarily based on the assumption that we should accept and follow the decision in *Gibson* v. *South American Stores* (*supra*) and for the purpose of the argument I will assume, without deciding, that we should do so. The learned judge of first instance appears to have accepted this argument which provides a reconciliation of the passages first above quoted from his reasons, to the effect that all of the four principal divisions of charity were intended to be included by the testator in the purposes for which the income from the residue was to be applied, with the final conclusion, also quoted above, that the bequest is limited to the relief of poverty. Not without hesitation I have reached the conclusion that this argument should not prevail. In my opinion the exception to the general rule set out in the fourth proposition stated by Jenkins L.J. is restricted to trusts in which the quality of poverty is made an essential condition of eligibility for benefit and should not be extended to cases where the trust permits income to be applied to any of the four principal divisions of charity; nor should such an extension be effected by construing words in a trust instrument which in their ordinary and natural meaning in no way restrict the application of the income to the relief of poverty as if they imposed such a restriction merely by reason of the fact that there is a clear direction that the income is to be used for charitable purposes only.

In my opinion the restriction is invalid because the class to which direct benefits are restricted (in the words of Jenkins L.J., quoted above) "does not amount to the public or a section thereof". The restriction is therefore ineffective to either require or permit the trustees to confine the direct benefits of the trust to the class defined, that is, such persons "as shall be or shall have been employees of The Canada Life Assurance Company and/or the dependents of such employees".

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It is next necessary to consider the effect of holding the restriction ineffective. In his reasons already quoted the learned judge of first instance says: "I must find that these testators had a general charitable intent which they have expressed without any ambiguity." I have already indicated that I share this view. As is pointed out by Sargant L.J. in *In re Monk, Giffen* v. *Wedd* (1), it is now well settled that the question whether there is a general charitable intent is one depending on the construction of the particular will or other instrument. In the same case at page 204 Lord Hanworth M.R. says:—

> The authority of the judgment of Parker J. in *In re Wilson* (2) is invoked, where he defines broadly two categories into which the cases decided may be divided. The first where "it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect." In such cases, even though the precise directions cannot be carried out, the gift for the general charitable purposes will remain, and be perfectly good, and the doctrine of cy-près applied. The other category is, "where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in the form a particular gift—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail." Parker J. concludes with the statement of his opinion that the question whether a particular case falls within the one or the other of the above categories is simply a question of the construction of the particular instrument.

In the case of *In re Wilson,* referred to by Lord Hanworth, Parker J. says that in this class of cases "different minds may very well take different views". To my mind it seems plain that in the case at bar the testator has indicated the paramount intention of giving the whole income from the residue of his estate to charity. This is expressed in the opening words of the clause:—"To pay the income thereof in perpetuity for charitable purposes only." All that follows in the clause is, in my view, a direction as to the manner in which the testator intends "such charitable purposes" to be carried into effect. The question being one of the construction of this particular will, only limited assistance can be derived from an examination of what Sargant L.J. refers to as "the long bead-roll of cases on the subject" but I have not found a case in which a will contained an express direction that income should be used

(1) [1927] 2 Ch. 197 at 212. (2) [1913] 1 Ch. 314, 320, 321, 324.

for charitable purposes only in which it was held that there was not a general charitable intention. If the matter were doubtful it would be necessary to remember, as is pointed out by Lord Hanworth in *In re Monk* (1) at page 207, "that the Court leans in favour of a charitable purpose." I wish to make it clear that my view that the will indicates a general charitable intention is not dependent on the effect which I think must be given to the word "directly" in construing the clause in question. If, contrary to my view, the words of the clause following the words "To pay the income thereof in perpetuity for charitable purposes only" should be construed as confining all benefits from the trust to members of the defined class it would still be my opinion that the will read as a whole indicates a paramount intention to devote all the residue to charity. The impression which I gather from reading the whole of Mr. Cox's will (and the same is true as to the will of Mrs. Cox) is that the testator has, with care and in considerable detail, provided for all those persons whom he regarded as having a claim upon his bounty, that he has then addressed himself to the question of how he shall dispose of the considerable residue remaining, that he has decided to devote it in perpetuity to charitable purposes, that he has said so in the clearest terms, and then has gone on to direct the method of its application. That method failing, the general intention to devote the residue to charity remains.

Once it has been decided as a matter of construction that there is a general charitable intention it is clear that such intention will not be allowed to fail. The question arises, however, whether it should be left to the Trustees of the will to apply the income under the direction of the Board of Directors of The Canada Life Assurance Company in accordance with the clause with the invalid restriction deleted or whether the Court should direct the income to be applied *cy-près*. While I think that the intention of the testator to confer direct benefits on members of the class mentioned, to be selected by the Board, to the exclusion, so far as direct benefits are concerned, of all who are not members of the class cannot be given effect, there would remain numerous ways in which the trust could be fully executed by applying the income to charitable purposes which, while highly beneficial to the public, produce

(1) [1927] 2 Ch. 197.

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indirect benefits only, such as, for example, reduction of the National Debt, the support of schools, or contribution to what are commonly termed "Community Chests"; but, reading the will as a whole, I find no reason to suppose that the testator would have forbidden the conferring of direct benefits except in furtherance of his intention to afford them to members of the defined class, which last-mentioned intention cannot be given effect. I do not think it can safely be assumed that the testator would have provided as the manner of carrying out his general charitable intention what would remain of the clause after the deletion of the restriction held to be invalid; and I am therefore of opinion that the proper course is to direct a scheme.

I would allow the appeals, declare that each will discloses a general charitable intention as to the residuary estate but that the mode of carrying such intention into effect provided by the testator and testatrix respectively cannot be carried out, and direct that the matter be referred back to the Weekly Court so that the proper proceedings may be taken for the propounding and settlement of a scheme for the application *cy-près* of such residuary estate.

In the particular circumstances of this case I would direct that the costs of all parties appearing on each appeal be paid out of the fund in question in each estate, those of the trustees as between solicitor and client, and that the orders as to costs made in the courts below should stand.

Appeals dismissed.

Solicitor for the appellant: *J. J. Robinette.*

Solicitor for the Public Trustee: *Armand Racine.*

Solicitor for the respondent, National Trust Co. Ltd.: *Frank McCarthy.*

Solicitors for the respondent, The Board of Directors of The Canada Life Assurance Co.: *McCarthy & McCarthy.*

Solicitors for the respondent, W. B. Shepard: *McLaughlin, MacAulay, May & Soward.*

Solicitors for the respondent, Margaret Jane Ardagh: *Graham, Graham & Bowyer.*

Solicitor for the Official Guardian, respondent: *P. D. Wilson.*

McCOLL-FRONTENAC OIL COMPANY LIMITED (PLAINTIFF) ..... APPELLANT;

AND

HIRAM HAMILTON and LOUISE H. HAMILTON (DEFENDANTS) ..... RESPONDENTS.

1952 *June 13

1953 *Jan. 27

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

Homesteads—Dower Act—"Oil and Gas Mining Lease"—Whether a "contract for the sale of property" within meaning of the Act—When wife deemed to have consented to sale.

By an instrument in writing, designated as an "oil and gas mining lease", the owner of a homestead in Alberta comprising a quarter section of land, leased the same to the appellant for the purpose of drilling and operating for oil and gas for a term of ten years. The owner's wife with full knowledge of the contents of the instrument and without any compulsion by her husband, signed a consent thereto and acknowledged such consent in the presence of, and not, as required by s. 7(1) of *The Dower Act*, R.S.A. 1942, c. 206, apart from her husband. Subsequently the owner entered into an oil and natural gas lease with other parties as to the same land on more advantageous terms and undertook to commence proceedings to rid the title of the lease granted to the appellant on the ground of alleged non-compliance with the provisions of *The Dower Act*.

Held: (Kerwin J. dissenting) that the instrument was a good, valid and subsisting "contract for the sale of property". *Joggins Coal Co. Ltd.* v. *The Minister of National Revenue* [1950] S.C.R. 470 applying *Gowan* v. *Christie* L.R. 2 Sc. & Div. 273 at 284; Re *Aldam's Settled Estate* [1902] 2 Ch. 46. Whether construed with respect to the minerals as land, as in *Gowan's* case, or as a demise of the surface to which is super-added a *profit à prendre*, the result was the same. It provided for the sale of property and, under s. 9(1) of *The Dower Act*, there being an absence of fraud on the part of the purchaser, the wife was "deemed" to have consented to the sale "in accordance with the provisions of this Act."

Per: Estey J. When in s. 9(1) the Legislature used the general word "property", rather than "homestead" as in s. 3, it disclosed an intention that the provisions of s. 9(1) should apply in a manner other than to the homestead as a whole and used language sufficiently comprehensive to include, not only a portion of its acreage, but also some interest in the land or soil constituting the homestead. The words "a contract for the sale of property" in s. 9(1) are sufficiently comprehensive to include contracts for the sale of property generally and to include one such as here where it was not contemplated that a transfer under *The Land Titles Act* would be issued. The provisions of the lease in question constituted a sale of a *profit à prendre*, or an interest in land, and notwithstanding the consent was not acknowledged apart from the husband, a valid "contract for the sale of property" by virtue of s. 9(1).

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

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Per: Kerwin J., (dissenting). It was unnecessary to determine whether the document in question was a sale of the oil and gas which might be found, or merely a lease with a grant of a *profit à prendre* and Lord Cairn's remarks in *Gowan* v. *Christie, supra,* as to the nature of a mining lease, approved in *Coltness Iron Co.* v. *Black* 6 A.C. 315 at 335 and applied in the *Joggins Coal Co.* case *supra,* are irrelevant. If it was a sale, then it was not a "contract", and if it was a lease, then while it might be a contract, it was not one for sale. The document was not such a one as was envisaged by the Legislature in enacting s. 9(1) and not within its terms.

APPEAL by the plaintiff-appellant from a judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming on an equal division the judgment of Howson, Chief Justice of the Trial Division, (2), dismissing the action with costs.

H. W. Riley, Q.C. and *M. H. Patterson* for the appellant.

G. M. D. Blackstock for the respondent.

KERWIN J. (dissenting):—This is an appeal by McColl-Frontenac Oil Company Limited against a decision of the Appellate Division of the Supreme Court of Alberta (1), affirming, on an equal division, the judgment of the Chief Justice of the Trial Division (2). The respondents are Hiram Hamilton and his wife, the former of whom is the registered owner of a quarter-section of land in Alberta containing 160 acres less 2 acres for a road, upon which land is a house occupied as his residence. In March, 1947, what is designated an "oil and gas mining lease" from Hiram Hamilton to the appellant was signed by the former.

By it he leased to the appellant all of the said land for the purpose of drilling and operating for, producing and storing oil, gas and casinghead gas, laying and maintaining pipe lines, erecting and maintaining tanks, power stations, telegraph, telephone and power lines and all structures thereon necessary or useful to test for, drill for, produce, save, treat, store, transport, and take care of such products and for housing and boarding employees, to be held by the lessee for a space of ten years, renewable and to be renewed for successive renewal terms of ten years each, each of such successive renewal terms to commence forthwith upon the

(1) (1952) 5 W.W.R. (N.S.) 1; 2 D.L.R. 637.

(2) (1952) 4 W.W.R. (N.S.) 77.

expiration of the then preceding term, for so long as gas, oil, casinghead gas or any of them are being produced from the said lands, or are being prospected or drilled for thereon, at the rental thereinafter set forth, subject to the covenants and conditions thereinafter contained. The appellant as lessee covenanted and agreed *inter alia*: to pay as rental a royalty of one-eighth of all oil and gas produced and saved from the lands and in the case of gas, used off the said lands or in the said lands or in the manufacture of casinghead gasoline; to pay in addition a cash rental of $3 per acre for the first year of the term; if the drilling of a well upon the lands should not have been commenced during the first year, to pay half-yearly in advance a "delay rental" of $1 per acre; to commence, within twelve months, the drilling of a well for oil or gas either upon the lands or within five miles from some point in the boundary thereof.

The cash rental of $474 provided for was paid at the time of the execution of the document. While during 1947 and 1948 a well, which turned out to be a "dry hole", was drilled within the five miles specified, at a cost in excess of $100,000, there appears to be no doubt that the appellant had intended and had prepared to drill such well even before the execution of the lease. The "delay rental" of $79 was paid regularly half-yearly. In the meantime, in March 1947, the appellant had filed a caveat; in October, 1950, Hiram Hamilton entered into a lease with other parties for the same purposes upon more advantageous terms; in November, 1950, notice was given the appellant requiring it to take proceedings on its caveat. In December, 1950, the appellant registered the document of March, 1947, in the Land Titles Office as a lease and then commenced the present action for a declaration that the lease is valid and subsisting and for an order continuing the caveat; and, in the alternative, for judgment for the total of the rentals paid, with interest and five percentum per annum on each amount from the date of its payment.

The respondents did not allege fraud but claimed that the lease was null and void for all purposes on the ground that, relating as it did to the Hamilton homestead, it was not "made with the consent in writing of the wife", as

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provided in s. 3 of *The Dower Act*, R.S.A. 1942, chapter 206. By s. 2 of that Act:—

2. In this Act, unless the context otherwise requires,—

(*a*) "Disposition" means any disposition by act *inter vivos* which is required to be executed by the owner of the land disposed of, and includes every transfer, agreement of sale, lease or other instrument intended to convey or transfer any interest in land and every mortgage or incumbrance intended to charge land with the payment of a sum of money (and requiring to be so executed) and every devise or other disposition made by will; and includes every mortgage by deposit of certificate of title or other mortgage not requiring the execution of any document.

(*b*) "Homestead" means,—

(i) land in a city, town or village, consisting of not more than four adjoining lots in one block, as shown on a plan duly registered in the proper Land Titles Office, on which the house occupied by the owner thereof as his residence is situated;

(ii) land other than that referred to in paragraph (i) of this definition on which the house occupied by the owner thereof as his residence is situated, consisting of not more than one quarter section.

Then comes s. 3:—

3. Every disposition by act *inter vivos* of the homestead of any married man whereby the interest of the married man shall or may vest in any other person at any time during the life of the married man or during the life of the married man's wife living at the date of the disposition, shall be absolutely null and void for all purposes unless made with the consent in writing of the wife.

Ss. 6, 7 and 9, so far as material, are as follows:—

6. (1) Any consent required for the disposition *inter vivos* of the homestead, or for the purpose of establishing a change of residence under this Act shall, whenever any instrument by which the disposition is effected is produced for registration under the provisions of *The Land Titles Act*, be produced and registered therewith.

(2) The consent may be embodied in or indorsed upon the instrument effecting the disposition.

(3) The execution by the wife of any such disposition shall constitute a consent under this Act.

7. (1) When a wife executes any instrument concerning any disposition or consent under this Act she shall acknowledge it, apart from her husband, to have been executed by her of her own free will and accord and without any compulsion on the part of her husband.

(2) The acknowledgment may be made before any person authorized to take proof of the execution of instruments under *The Land Titles Act*, and a certificate thereof in Form B shall be indorsed on or attached to the instrument executed by her.

9. (1) When any woman has executed a contract for the sale of property, or joined in the execution thereof with her husband, or given her consent in writing to the execution thereof, and the consideration

under the contract has been totally or partly performed by the purchaser, she shall, in the absence of fraud on the part of the purchaser, be deemed to have consented to the sale, in accordance with the provisions of this Act.

(2) When any subsequent disposition by way of transfer of the property is presented for registration under *The Land Titles Act*, the consent previously given, or the agreement executed, shall, if produced and filed with the Registrar be sufficient for the purposes of this Act.

Hamilton's wife was not a party to the lease and did not execute it but did sign the following Consent at the end thereof:—

CONSENT

Wife of Hiram Hamilton, the lessor herein I, LOUISE H. HAMILTON, of Calmar, in the Province of Alberta, do hereby give my consent to the within mentioned disposition of the said premises.

"Louise H. Hamilton"

Edward P. Lamar, a Commissioner for Oaths in and for the Province of Alberta, but who also was the agent of the appellant for the purpose of securing oil and gas leases signed a "Certificate of Acknowledgment by Wife", which follows Form B referred to in subsection 2 of s. 7:—

This document was acknowledged before me by Louise H. Hamilton apart from her husband to have been executed by her of her own free will and accord and without any compulsion on the part of her husband, and she has further acknowledged that she was aware at the time of such execution of the contents thereof.

DATED at Calmar, in the Province of Alberta, this 10th day of March, A.D. 1947.

"Edward P. Lamar"

A Commissioner for Oaths in and for The Province of Alberta.

The lease is undoubtedly a "disposition" under s. 2(*a*) and in view of the definition of "homestead" in s. 2(*b*) (ii) and particularly the last phrase thereof, Hamilton's homestead is not confined to the buildings thereon and the land immediately surrounding them. This is so notwithstanding these clauses in the document:—

When required by the Lessor, the Lessee will bury all pipe lines below ordinary plough depth and no well shall be drilled within two hundred (200) feet of any residence or barn now on the said lands, without the Lessor's consent . . . .

The Lessee shall use only that portion of the surface of the said lands from time to time required in its operations, and shall pay compensation for damage by such operations to growing crops of the Lessor, and shall, when necessary to protect live stock of the Lessor, fence in all wells, and upon abandonment of any well, shall properly close the same and restore the site thereof to its condition prior to the commencement of drilling operations insofar as may be reasonably practicable.

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It has been held in Alberta that, notwithstanding that the wife of the owner of a homestead may sign the consent, such consent must be given in accordance with s. 7. Considering the objects of *The Dower Act*, there would seem to be no doubt that this is the correct construction. At one time there was a difference of opinion as to the effect of non-compliance but, in 1942, s. 3 was amended by inserting the word "absolutely" before "null and void" and the words "for all purposes" immediately thereafter, so that it now appears as extracted above.

Subsection 1 of s. 9 refers to a contract for the absolute sale of property. It is unnecessary to determine the exact nature of the document before us, that is, whether it is a sale of the oil and gas which may be found, or merely a lease with a grant of a *profit à prendre*. Lord Cairns' remarks as to the nature of a mining lease in *Gowan* v. *Christie* (1), approved by Lord Blackburn in *Coltness Iron Co.* v. *Black* (2), "as a perfectly accurate statement" and applied by this Court in *Joggins Coal Company* v. *Minister of National Revenue* (3), are not, in my opinion, relevant to this document. If it is a sale, then it is not a "contract" and, if it is a lease, then, while it may be a contract, it is not one for sale. If the specified conditions are met, then the married woman has consented "in accordance with the provisions of this Act" and I quite agree that subsection 2 merely provides for the occasion when a transfer is presented for registration under the *Land Titles Act*. However, a comparison of the words "contract for the sale of property" in subsection 1 with "any subsequent disposition by way of transfer" in subsection 2 supports the view that the Hamilton document is not one contemplated by the former. The object of the Act was to preserve the wife's life estate in the homestead which she has contingent upon her surviving her husband. If, however, the latter contracts to sell all his interest in the homestead, the wife may be assumed to know that by consenting thereto she is agreeing to forego the protection afforded her and therefore the legislature has declared that if the other conditions in subsection 1 are fulfilled such consent will be sufficient. On the other hand, it is an entirely different matter if the husband enters into

(1) (1873) L.R. 2 Sc. & Div. 273 at 284.

(2) (1881) 6 App. Cas. 315 at 335.

(3) [1950] S.C.R. 470.

a relationship such as that with which we are concerned. In short, my view is that the document is not such a one as was envisaged by the legislature in enacting subsection 1 and is not within its terms. There is no basis for the argument that there was an estoppel since, if *The Dower Act* was not complied with, the disposition is absolutely null and void for all purposes.

All the members of the Appellate Division held the views expressed in the last three paragraphs but only two agreed with the trial judge that the wife's execution of the consent in the presence of her husband is not an acknowledgment "apart from her husband" and that, therefore, subsection 1 of s. 7 had not been complied with. The other two members proceeded on the basis of a presumption in favour of official acts. Particularly bearing in mind that the Commissioner was also the agent of the appellant, I agree with the first two that any such presumption is met when all the parties present at the transaction gave evidence before the Court and that nothing has been shown to cast doubt upon the soundness of the trial judge's finding of fact.

The appeal should be dismissed with costs but the judgment at the trial should be amended by providing that in addition to Hiram Hamilton paying the appellant the sum of $948, he should also pay interest at the rate of five percentum per annum upon each amount making up that sum from the time of its payment to him by the appellant.

The judgment of Taschereau, Kellock and Fauteux, JJ. was delivered by:

KELLOCK, J.:—In this case the appellants claim under an oil and gas lease of March 9, 1947, executed by the respondent Hiram Hamilton in favour of the appellant and consented to by the respondent Louise H. Hamilton. By this instrument the first named respondent, described as "lessor," doth "hereby lease exclusively" to the appellant, described as "lessee," all the land of the lessor "for the purpose of drilling and operating for, producing and storing oil, gas and casing-head gas, laying and maintaining pipe lines, erecting and maintaining tanks, power stations, telegraph, telephone and power lines and all structures thereon necessary or useful to test for, drill for, produce, save, treat,

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store, transport and take care of such products and for housing and boarding employees," to be held by the lessee for ten years, renewable for successive terms of ten years so long as gas or oil is being produced or prospected for on the lands. The instrument provides for an annual rent to be paid on an acreage basis, as well as for a royalty on all oil and gas produced. It is also stipulated that the lessee shall use only the portion of the lands required for its operations and shall pay damages caused by such operations to growing crops.

Subsequently, on or about October 27, 1950, the respondents entered into an oil and natural gas lease with other parties in consideration of a cash payment of $10,000, and undertook with these parties to commence proceedings to rid their title of the lease granted to the appellant on the alleged ground of non-compliance, in the taking of the appellant's lease, with the provisions of *The Dower Act,* R.S.A. 1942, c. 206. In the present proceedings the respondents therefore claimed that the appellant's lease was void for non-compliance with s. 7 (1) of the statute, in that, as alleged, the consent of the respondent Louise Hamilton was not acknowledged "apart" from her husband within the meaning of that section. No fraud or overreaching on the part of the appellant is suggested, it being admitted in fact that the consent of the wife was given of her own free will and accord and without any compulsion on the part of the husband, which, of course, is alone the object of the statute.

The respondents adduced evidence that when the lease was executed and the consent of the respondent wife given, the husband and wife were together. The witness Lamar, who had obtained the lease on behalf of the appellant and before whom the acknowledgment was made, was unable to remember the particular circumstances. He testified that he had taken similar documents covering some 2,000,000 acres of land and that it was impossible for him to remember the circumstances of each case. He said, however, that he knew the requirements of the statute at the time, that he understood that "apart" meant "out of sight" and "out of hearing" and that it was his invariable practice to take the acknowledgment of a wife in accordance with these requirements. The learned judge, however, accepted

the evidence for the respondents, and in the view he entertained of the statutory provisions, set aside the lease.

On appeal the court was equally divided. Parlee and Macdonald JJ.A. agreed with the learned trial judge, while Frank Ford J.A. and Clinton Ford J.A. would have allowed the appeal on the ground that the learned trial judge did not give effect to the onus which, in their opinion, rested on the respondents to prove that the acknowledgment of the consent by the respondent wife was not made "apart." Frank Ford J.A., the only member of the court to mention the section, was also of opinion that s. 9(1) of the statute could not be availed of by the appellant as, in his opinion, the section applies only to contracts for the sale of land "which are to be and can be followed by transfers capable of registration as transfers of the interest coming within the description required for purposes of registration." The learned judge appears to have assumed that the instrument here in question was not of such a character.

The relevant sections of the statute are as follows:

2. In this Act, unless the context otherwise requires,—

(*a*) "Disposition" means any disposition by act *inter vivos* which is required to be executed by the owner of the land disposed of, and includes every transfer, agreement of sale, lease or other instrument intended to convey or transfer any interest in land and every mortgage or incumbrance intended to charge land with the payment of a sum of money (and requiring to be so executed) and every devise or other disposition made by will; and includes every mortgage by deposit of certificate of title or other mortgage not requiring the execution of any document;

3. Every disposition by act *inter vivos* of the homestead of any married man whereby the interest of the married man shall or may vest in any other person at any time during the life of the married man or during the life of the married man's wife living at the date of the disposition, shall be absolutely null and void for all purposes unless made with the consent in writing of the wife.

7. (1) When a wife executes any instrument concerning any disposition or consent under this Act she shall acknowledge it, apart from her husband, to have been executed by her of her own free will and accord and without any compulsion on the part of her husband.

9. (1) When any woman has executed a contract for the sale of property, or joined in the execution thereof with her husband, or given her consent in writing to the execution thereof, and the consideration under the contract has been totally or partly performed by the purchaser, she shall, in the absence of fraud on the part of the purchaser, be deemed to have consented to the sale, in accordance with the provisions of this Act.

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(2) When any subsequent disposition by way of transfer of the property is presented for registration under *The Land Titles Act*, the consent previously given, or the agreement executed, shall, if produced and filed with the Registrar be sufficient for the purposes of this Act.

With respect to s. 9 (1), the first question which arises is as to whether or not the instrument here in question is "a contract for the sale of property." That a lease is a contract which includes a demise is perfectly clear; Hill & Redman, 10th edition, p. 1; *Whitehall Court Ltd.* v. *Ettlinger* (1), per Lord Reading C.J. at 687. In my opinion, the lease to the appellant is a "contract for the sale of property." In *Joggins Coal Company* v. *Minister of National Revenue* (2), we had occasion to apply to the facts of that case the statement of Lord Cairns in the course of his judgment in *Gowan* v. *Christie* (3):

> . . . for although we speak of a mineral lease, or a lease of mines, the *contract* is not in reality, a lease at all in the sense in which we speak of an agricultural lease . . . What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil.

In *Re Aldam's Settled Estate* (4), Collins M.R. expressed a similar view at p. 56:

> . . . mining lease, which is really in its essence rather a sale at a price payable by instalments than a demise properly so called.

At p. 58, Stirling L.J. said:

> The rent reserved by a mining lease rather resembles an instalment of purchase-money for the demised minerals than what is understood by rent reserved on an ordinary demise of the surface.

Cozens-Hardy L.J., at p. 63, said:

> The use of the word "rent" in the case of a mining lease is somewhat misleading. It is really purchase-money for coal worked . . .

In *Gowan's* case the lease was of "the freestone and minerals . . . lying in and under" certain lands "with power to search for, work and carry away" the same at a rent of £200 per annum. As already pointed out, the instrument here in question is a demise of the whole quarter-section for the purpose of producing oil and gas, with a covenant on the part of the appellant to use only such portion thereof as may be necessary for its operations. Whether the proper construction of the instrument is that, with respect to

(1) [1920] 1 K.B. 680.
(2) [1950] S.C.R. 470 at 475.
(3) L.R. 2 H.L. Sc. 273 at 284.
(4) [1902] 2 Ch. 46.

minerals, it is a grant of the minerals as land, as in *Gowan's* case, or a demise of the surface to which is super-added a *profit à prendre,* the result is, in my opinion, the same. The instrument provides for the sale of property, and under the first subsection, there being an absence of fraud on the part of the purchaser, the respondent wife is "deemed" to have consented to the sale "in accordance with the provisions of this Act."

In my opinion, the words quoted can only mean in this statute "taken to have so consented whether or not she did so in fact"; *Lawrence & Sons* v. *Willcocks* (1), per Lord Esher and Lopes L.J. at 699 and 701 respectively. In the language of Fry L.J. in the same case at 700:

> We are bound to give the words of the section their natural meaning unless some absurdity or injustice arises.

See also *Shepheard* v. *Broome* (2).

In my view, the language under consideration would be meaningless unless so construed, as the mere production of the instrument would entitle it to be accepted prima facie for what it is. It is only if fraud be shown that that defence is left open to a wife.

I do not think, with respect, that subsection (2) of s. 9 affects this conclusion. That subsection merely provides that "when" any subsequent transfer is presented for registration, the consent already given to the contract for sale is sufficient and no consent is necessary to the transfer itself, as would be the case under s. 3 but for the provisions of subsection (2) of s. 9. I do not think that the subsection goes any farther than this or restricts the meaning of the word "contracts" in subsection (1). It is therefore not necessary to consider whether or not the interest covered by the instrument here in question could be the subject of a "transfer" under the statute.

I would allow the appeal with costs throughout.

Estey J.:—The respondent Hiram Hamilton, under date of March 9, 1947, entered into an oil and gas mining lease under which he leased to the appellant the "North West Quarter of Section Twenty-five (25) Township Forty-eight (48) Range Twenty-seven (27) West of the Fourth Meridian in the Province of Alberta containing 158 acres, more or less, . . . for the purpose of drilling and operating for,

(1) [1892] 1 Q.B. 696. (2) [1904] A.C. 342.

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producing and storing oil, gas and casing-head gas, . . . for a space of ten (10) years from the date hereof, renewable and to be renewed for successive terms of ten (10) years . . . for so long as gas, oil, . . . are being produced from the said lands . . .” The respondent Louise H. Hamilton is the wife of the said Hiram Hamilton. The appellant registered a caveat as No. 7503, notice of which the Registrar, under date of April 19, 1947, forwarded to Hiram Hamilton. On January 6, 1951, it commenced this action asking a declaration that the lease is valid and subsisting and that caveat No. 7503 be continued, or, in the alternative, judgment against the respondent for the rentals paid in the sum of $948 with interest at 5 per cent.

The appellant drilled a well in accordance with the terms of the lease which turned out to be a “dry hole” and paid to the respondent Hiram Hamilton the sums payable in accordance with the terms of the lease from 1947 to September, 1950, in the sum of $948.

The respondents admit the foregoing, but contend that the said oil and gas mining lease was null and void and, therefore, they had a right to enter into a further and more advantageous agreement with another party in 1950. This contention is based upon the provisions of an act respecting the interests of a wife in her husband's homestead and cited as *The Dower Act,* R.S.A. 1942, c. 206.

The above-described quarter section is the homestead of the respondent Hiram Hamilton within the meaning of *The Dower Act* and the contract is a “disposition by act *inter vivos* of the homestead” within the meaning of s. 3 thereof.

The Dower Act was passed for the purpose of protecting the wife against a disposition by her husband of the homestead without her consent. The Legislature, in order to ensure the consent would be voluntary on the part of the wife and, therefore, without any undue influence or compulsion on the part of her husband, has provided she must acknowledge this consent, in the manner required by s. 7(1), before a party duly appointed to take proof of the execution of instruments under *The Land Titles Act* (s. 7(2)). The relevant portions of s. 3 read:

> 3. Every disposition by act *inter vivos* of the homestead of any married man . . . shall be absolutely null and void for all purposes unless made with the consent in writing of the wife.

Then in s. 7 the Legislature specifies how this consent shall be acknowledged. The relevant portions of s. 7 read:

> 7. (1) When a wife executes any . . . consent under this Act she shall acknowledge it, apart from her husband, to have been executed by her of her own free will and accord and without any compulsion on the part of her husband.
>
> (2) The acknowledgment may be made before any person authorized to take proof of the execution of instruments under *The Land Titles Act*, and a certificate thereof in Form B shall be indorsed on or attached to the instrument executed by her.

These provisions are imperative and, therefore, only the consent made in compliance therewith is valid within the meaning of the enactment.

Mr. Lamar, on March 9, 1947, as agent for the appellant, called at the home of Mr. and Mrs. Hamilton and advised them that Mr. Hamilton was the owner of the mineral rights in the homestead, a fact which apparently neither he nor his wife had previously appreciated. Then followed a discussion which resulted in Mr. Hamilton's agreeing to give the lease here in question to the appellant. This discussion took place in the kitchen while the parties were seated around the kitchen table. It was there the lease was prepared and executed as well as Mrs. Hamilton's consent and her acknowledgment. Throughout, all three parties took part in the discussion and it is clear that Mrs. Hamilton appreciated all that was there taking place. Mr. Hamilton also heard and understood all that took place. The acknowledgment of Mrs. Hamilton's consent was taken while the parties remained seated around the table. Whatever the precise meaning of the phrase "apart from her husband" may be, an acknowledgment taken in the presence and hearing of the husband, as in this case, is not a compliance with s. 7 and, therefore, the disposition by way of the oil and gas mining lease between the parties hereto under the terms of s. 3 is "absolutely null and void for all purposes" unless it comes within the exception contained in s. 9(1) to be hereinafter discussed.

In arriving at the foregoing conclusion, I have not overlooked the view expressed by some of the learned judges in the Appellate Division that in taking Mrs. Hamilton's acknowledgment, Lamar was acting in an official capacity, and that the presumption that in doing so he acted in a regular and proper manner has not been rebutted by the evidence here adduced.

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The force of this presumption is explained in Taylor on Evidence, 12th Ed., p. 105:

> In this mode *the law* . . . defines the nature and amount of the evidence which is sufficient to establish a *prima facie* case, and to throw the burthen of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption.

Such is a rebuttable presumption. Am. & Eng. Encyc. of Law, 22, 2nd Ed., p. 1266; Broom's Legal Maxims, 10th Ed., p. 642. In this case Mr. and Mrs. Hamilton and an independent witness deposed to facts that clearly establish that Lamar did not properly perform his official duties in the taking of Mrs. Hamilton's acknowledgment. Lamar himself had no recollection of the occasion and went no further than to state that he always took such acknowledgments separate and apart from the husband. The learned trial judge, referring to this evidence, stated that Lamar's "evidence does not assist in making any definite finding. I accept the evidence of Hamilton and his wife in preference to Lamar." He had previously accepted the evidence of the independent witness who corroborated Mr. and Mrs. Hamilton.

The position, therefore, is quite different from that in *Jackson* v. *Chabillon* (1), where at p. 615 the learned trial judge came to the conclusion

> In my view the evidence is not sufficiently impressive to rebut the presumption in favour of the proper execution of the mortgage as well as compliance with the requirements of *The Dower Act* . . .

In these circumstances I agree with Mr. Justice Parlee, with whom Mr. Justice W. A. Macdonald agreed, that any presumption in favour of the regularity of official acts is rebutted when, as here, the trial judge accepts the evidence of the wife, her husband, and that of an independent witness, all of whom depose that the acknowledgment was made in a manner contrary to the statute.

The appellant contends that notwithstanding the foregoing, the oil and gas lease here in question is a valid "contract for the sale of property" by virtue of the provisions of s. 9(1), the relevant parts of which read as follows:

> 9. (1) When any woman has executed a contract for the sale of property . . . or given her consent in writing to the execution thereof, and the consideration under the contract has been totally or partly performed by the purchaser, she shall, in the absence of fraud on the part of the purchaser, be deemed to have consented to the sale, in accordance with the provisions of this Act.

(1) [1943] 2 W.W.R. 612.

There is no suggestion of fraud on the part of Mr. Lamar and it is clear that he was a party authorized to take the acknowledgment.

The provisions of s. 9 would make valid "a contract for the sale of property" where the consideration, as here, has been partially performed and where the consent in writing by the wife has not been acknowledged separate and apart from her husband. Its provisions, therefore, constitute an exception to the requirements of s. 7, enacted for the protection of the wife, and ought not to be given a wider application than that which is clearly intended by the Legislature as expressed in the language there adopted.

It is the contention of the respondents that the phrase "a contract for the sale of property" ought not to be construed to include the oil and gas mining lease here in question. As ordinarily used and understood, the word "sale" in such a phrase would not include a lease. It is, however, pointed out that Lord Cairns in *Gowan* v. *Christie* (1), at 284, stated:

> . . . a mineral lease is really, when properly considered, a sale out and out of a portion of land.

Lord Cairns is here again stressing that it is not the name or words by which the parties describe their contract, but rather the substance thereof, as determined from a study of its provisions, that determines its true nature and character. The contract here in question, though styled a lease, gives to the appellant the exclusive right to search for oil and gas and, if found, then, by virtue of the renewal clauses, to take possession thereof until such time as the supply is exhausted. If the contract had provided but a right to search that would have created but a licence or privilege which would not have constituted an interest in land. The contract, however, goes further and gives the additional right to take the gas and oil as and when found, which, until it is removed, is a part of the soil and passes with the fee. This contract, therefore, gives to the appellant the right to take a part of the soil and is a *profit à prendre,* which, in itself, is an interest in land. 11 Hals., 2nd Ed., 387, para. 680; *McIntosh* v. *Leckie* (2); *Canadian Ry. Accident Co.* v. *Williams* (3).

(1) (1873) L.R. 2 Sc. & Div. 273 at 284. (2) (1906) 13 O.L.R. 54.
(3) (1910) 21 O.L.R. 472.

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The agreement or contract for the sale of a homestead or other parcel of land is a well known instrument in Alberta. When, therefore, in the phrase "a contract for the sale of property" in s. 9(1) the Legislature used the general word "property," rather than "homestead" as in s. 3, it disclosed an intention that the provisions of s. 9(1) should apply in a manner other than to the homestead as a whole and has used language sufficiently comprehensive to include, not only a portion of its acreage, but also some interest in the land or soil constituting the homestead.

The respondents contend that when sub-secs. 9(1) and 9(2) are read together the words "a contract for the sale of property" in sub-sec. 9(1) must be construed to refer only to a contract to be followed by a transfer registerable under The Land Titles Act. Sub-sec. 9(2) reads as follows:

> 9. (2) When any subsequent disposition by way of transfer of the property is presented for registration under The Land Titles Act, the consent previously given, or the agreement executed, shall, if produced and filed with the Registrar be sufficient for the purposes of this Act.

Sub-section 9(2) is restricted in its application to transfers registerable under The Land Titles Act. A construction of the phrase "a contract for the sale of property," as used in sub-sec. 9(1), that would limit it to contracts which contemplate, when carried out, the delivery and registration of a transfer under The Land Titles Act, would be to add words that the Legislature has not seen fit to insert. It is the duty of the court to interpret rather than to legislate and, therefore, to give effect to the language adopted. *Blyth* v. *Lord Advocate* (1). The words "a contract for the sale of property" in sub-sec. 9(1) are sufficiently wide and comprehensive to include contracts for the sale of property generally and to include one such as here under consideration where it is not contemplated that a transfer under The Land Titles Act will be issued.

No particular words are required in order to create a *profit à prendre* and where, as here, the contract gives to the appellant the exclusive dominion and control and the right to take all the gas and oil, then, even if the word "grant" be not found in the contract, it will be so construed. 11 Hals., 2nd Ed., 388, para. 684, and cases already cited.

(1) [1945] A.C. 32 at 43.

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It follows that the provisions of the oil and gas lease here in question constitute a sale of *profit à prendre*, or an interest in land, and, notwithstanding that her consent was not acknowledged by Mrs. Hamilton apart from her husband, is a valid "contract for the sale of property" by virtue of the provisions in sub-sec. 9(1).

The appeal should be allowed and judgment entered that the lease is a good, valid and subsisting "contract for the sale of property" and that caveat No. 7503, registered against the land on the sixteenth day of April, 1947, should be continued. The appellant should have its costs throughout.

Appeal allowed with costs.

Solicitors for appellant: *Macleod, Riley, Bessemer & Dixon.*

Solicitors for respondents: *Duncan, Johnson, Miskew, Dechene, Bishop & Blackstock.*

PERCY L. NESBITT (DEFENDANT) .....APPELLANT;

AND

MINA KATHLEEN D. HOLT, Administratrix of the Estate of Lee Robert Holt, deceased (PLAINTIFF) ..... } RESPONDENT.

1952

*Oct. 9, 10

1953

*Jan. 27

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Physicians and Surgeons—Negligence—Evidence—Sponge lodging in patient's windpipe—Applicability of Res ipsa loquitur rule.

An action for damages was brought against the appellant, a dental surgeon, following the death of a patient. It was established that while the appellant was extracting a number of teeth under a general anaesthetic the patient collapsed and died from asphyxia. It was argued on behalf of the appellant that it had not been shown that one of the gauze sponges used in the operation had lodged in the windpipe during that operation, or that death was caused by that obstruction, and that even if the cause of death be taken as established, no negligence on the part of the appellant had been shown.

Held: That ordinary care and prudence had not been shown by the appellant in overlooking the fact—especially as no count of the sponges was kept—that a sponge in the windpipe might have been the cause of the patient ceasing to breathe and in making no effort to ascertain this, other than looking into the patient's mouth, and consequently making no attempt to remove the obstruction. The appellant therefore must be held to have been negligent.

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

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Held: also, that sufficient was shown by the evidence to call upon the appellant for an explanation. *Res ipsa loquitur* is not a doctrine but "The rule is a special case within the broader doctrine that courts act and are entitled to act upon the weight of the balance of probabilities". *The Sisters of St. Joseph of the Diocese of London* v. *Fleming* [1938] S.C.R. 172 at 177. The rule may apply in malpractice cases depending upon the circumstances and it applied here. *Clark* v. *Wansbrough* [1940] O.W.N. 67 over-ruled.

APPEAL from a judgment of the Court of Appeal for Ontario (1) setting aside the judgment of Aylen J. who dismissed the action, and fixing the amount of damages under *The Fatal Accidents Act* at $2,000 each for the widow and two children.

Gordon Watson, Q.C. for the appellant.

Michael Fram and *Lionel Choquette, Q.C.* for the respondent.

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

KERWIN J.:—Lee Robert Holt died in the office of a dentist, the appellant Dr. Percy L. Nesbitt, and this action is brought by the widow and administratrix of the deceased against the appellant to recover damages for the death of her husband. No evidence was led on behalf of the appellant at the trial so that the circumstances surrounding the death are found in the evidence of Detective Simms, who related the details as told to him by the appellant, and in extracts from the examination for discovery of the appellant put in by the respondent at the trial. On this evidence the facts are as follows.

The appellant had extracted ten out of an intended total of twelve or fourteen of Holt's teeth while the patient was under a general anaesthetic of nitrous oxide and oxygen. The appellant noticed Holt changing colour so he changed from the mixture to straight oxygen and Holt seemed to revive. The appellant was going to recommence the pulling of teeth when he noticed that Holt had relapsed so he and his assistant took Holt out of the chair, put him on the floor, and applied artificial respiration. The appellant said that a number of pieces of gauze called sponges had been placed in the patient's mouth and that he removed

(1) [1951] O.R. 601; O.W.N. 504; 4 D.L.R. 478.

the last of these. However, he also said that this was torn but in the evidence of the pathologist Dr. Klotz, who testified at the trial, it appears that another one must have been overlooked as it was found by Dr. Klotz in the trachea, folded but moulded to the shape of the trachea. This sponge was found to be intact and not torn. There appears to be no doubt, on the evidence, that the appellant kept no count of the sponges he inserted in Holt's mouth.

It was argued that Holt had died either of shock or of asphyxia caused by the gauze in the trachea and that it was not shown that the sponge lodged in the patient's trachea during the operation and that his death was caused by that obstruction. I agree with the Court of Appeal (1) that this contention cannot prevail. While an effort was made in the cross-examination of Dr. Klotz to show that death might have been caused by shock since the head of the deceased was not opened, Dr. Klotz adhered to the opinion he had expressed in direct examination that Holt had died of asphyxia caused by the sponge in the trachea. It would appear that the trial judge had the same view.

It was then argued that even if the cause of death be taken as established, no negligence on the part of the appellant has been shown. I agree with Hogg J.A. "that ordinary care and prudence was not shown by the respondent in his overlooking the fact—especially as there is the evidence that no count of the sponges was kept—that a sponge in Holt's windpipe might be the cause of his ceasing to breathe and in making no effort to ascertain whether this was the case other than looking into the patient's mouth, and as a consequence in making no attempt to remove the obstruction which terminated Holt's life. I think the respondent must be held to have been negligent." I also agree with all the members of the Court of Appeal that sufficient was shown by the evidence to call upon the appellant for an explanation. No issue is raised as to the competency of the appellant or as to the carrying out of the operation of pulling teeth. What is complained of is that anyone, even without the appellant's training, knowledge and experience, would have checked the sponges, and that when he noticed the patient turning pale, he would have looked to see if all the sponges were accounted for. I have

(1) [1951] O.R. 601.

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read all the reported cases in England and Canada on the subject which were referred to in the reasons for judgment of the Court of Appeal or by counsel on the argument and, in addition, decisions in other jurisdictions. It is unnecessary to refer to them except to say it is impossible to agree with the statement of McTague J.A., sitting as a trial judge, in *Clark* v. *Wansbrough* (1), that "The doctrine *res ipsa loquitur*, no matter how ingeniously put, has no application in malpractice cases." *Res ipsa loquitur* is not a doctrine but "The rule is a special case within the broader doctrine that courts act and are entitled to act upon the weight of the balance of probabilities." *The Sisters of St. Joseph of the Diocese of London* v. *Fleming* (2). It may apply in malpractice cases depending upon the circumstances and for the reasons already given, it applies here.

Counsel for the appellant did not question the amount at which the damages had been fixed in the Court below and the appeal should therefore be dismissed with costs.

LOCKE J.:—In their reasons for judgment delivered in the Court of Appeal Mr. Justice Laidlaw has found that in the circumstances disclosed by the evidence the respondent was entitled to invoke the rule *res ipsa loquitur*, while Mr. Justice Hogg has expressed the view that there was affirmative evidence of negligence upon which the appellant should have been found liable. I respectfully agree with both of these conclusions.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *S. C. Metcalfe.*

Solicitor for the respondent: *Lionel Choquette.*

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(1) [1940] O.W.N. 67 at 72. (2) [1938] S.C.R. 172 at 177.

CHARLES KERR (PLAINTIFF) .....APPELLANT;

AND

ALEXANDER CUMMINGS (DEFENDANT) RESPONDENT.

1952
*Oct. 29
1953
*Jan. 27

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Automobile—Negligence—Injury to gratuitous passenger—"Gross Negligence"—Proof of—Res ipsa loquitur—Motor Vehicles Act, R.S.B.C. 1948, c. 227, s. 82.

By section 82 of the British Columbia *Motor Vehicles Act,* R.S.B.C. 1948, c. 227, no action lies by a gratuitous passenger in a motor vehicle for injury sustained by him by reason of the operation of such vehicle unless there was gross negligence on the part of the driver that contributed to the injury.

Held: (1) it is not necessary that such gross negligence be proven conclusively as if there were a prosecution for criminal negligence; (2) very great negligence on the part of the driver must be shown (*Studer* v. *Cowper* [1951] S.C.R. 450), and it was impossible to say in the present case that the mere happening of the occurrence gave rise to a presumption that it had been caused by very great negligence.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, O'Halloran J.A. dissenting, the dismissal of an action for injuries suffered by the appellant as gratuitous passenger in an automobile.

Alfred Bull Q.C. for the appellant.

Douglas McK. Brown for the respondent.

The judgment of the Court was delivered by

KERWIN J.:—The appellant was a gratuitous passenger in an automobile owned by the respondent and driven by one Brentzen from Nanaimo northerly towards Port Alberni in the province of British Columbia. About fifteen miles from Nanaimo the car rammed a concrete abutment of a highway bridge on the west side of the road. Brentzen and another passenger were killed while a third passenger was so badly injured that he remembers nothing of the accident. The appellant had fallen asleep when the car was about seven miles out of Nanaimo and he does not know what happened. He was seriously injured and brought the present action to recover damages for such injuries. By virtue of section 81 of the British Columbia *Motor Vehicles*

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

(1) [1952] 2 D.L.R. 846; 6 W.W.R. (N.S.) 451.

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Act, R.S.B.C. 1948, chapter 227, the respondent is liable for such damages if it can be shown that Brentzen was grossly negligent as provided by section 82 of the Act:—

> 82. No action shall lie against either the owner or the driver of a motor vehicle . . . by a person who is carried as a passenger . . . for any injury, loss or damage sustained by such person, or for the death of such person by reason of the operation of that motor vehicle . . . while such person is a passenger . . . unless there has been gross negligence on the part of the driver of the vehicle and unless such gross negligence contributed to the injury, loss or damage in respect of which the action is brought . . .

The trial judge and the majority of the Court of Appeal (1) decided that the appellant had failed to show such gross negligence. I can find nothing to suggest, as is intimated in the reasons of the dissenting judge in the Court of Appeal, that the case proceeded on the basis that gross negligence is not shown unless it is proven conclusively as if it were a prosecution for criminal negligence in a criminal Court and, in any event, I do not proceed on any such basis. This, of course, is a civil case but it is one where something more than negligence must appear. As was held by this Court in *Studer* v. *Cowper* (2), this means there must have been very great negligence. Without referring to any of the decisions where the maxim *res ipsa* was applied in cases of claims for damages caused by the operation of a motor car, it is impossible, in my view, to say that the mere happening of the occurrence in the present case gives rise to a presumption that it was caused by very great negligence on the part of Brentzen.

It was argued that the proper inferences from the evidence are that he had no sleep the night before, and that starting out from Nanaimo about seven o'clock in the morning of a November day he had fallen asleep at the wheel. I cannot read the evidence as indicating either of these things, which in my view are mere suppositions. It is further said that the marks on the left shoulder of the road indicate that the automobile must have been driven from the right to the left side of the centrally paved portion of the highway, because there are tire marks showing that for 66 feet the car proceeded along the shoulder and into the concrete abutment. However, these circumstances do not indicate what caused the auto to go from the right to

(1) [1952] 2 D.L.R. 846; 6 W.W.R. (N.S.) 451. (2) [1951] S.C.R. 450.

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the left side of the road. There was a governor on the car which precluded a speed exceeding forty miles per hour. We know nothing of what the actual speed was but, even if it were much lower than that permitted, it would not take long to cover the 66 feet.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Bull, Houser, Tupper, Ray, Guy & Merritt.*

Solicitor for the respondent: *A. E. Branca.*

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*Jan. 27

MODERN MOTOR SALES LIMITED (*Defendant*) ..... APPELLANT;

AND

SAM MASOUD AND MONTREAL CANDY MANUFACTURING LIMITED (*Plaintiffs*) ..... RESPONDENTS.

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

Motor vehicles—Warranty—Collision—Defective brakes—Negligence of driver—Liability of owner—Action in warranty against used car dealer —Action by purchaser and third party—Latent defects—Arts. 1053, 1054, 1520, 1522, 1527 C.C.

By a judgment from which no appeal was taken, the respondents and the driver of a truck, owned by the respondent Masoud and lent by him to the respondent corporation of which he was the president, were jointly and severally condemned to pay damages as the result of a collision between the truck and a horse drawn vehicle. The judgment held that the accident was mainly due to the defective condition of the brakes on the truck. The driver was found liable because he had been negligent; the respondent corporation, because it was the employer of the driver; and the respondent Masoud, because he was paying the driver's salary and had allowed the use by the corporation of the defective truck. The respondent Masoud had only a few days previous to the accident purchased the truck from the appellant.

Contemporaneously with the filing of their plea in the action, the respondents, but not the driver, took action in warranty with the customary conclusions against the appellant who did not intervene in the principal action but denied liability in warranty. The judgment in the warranty action dismissed the corporation's action and maintained Masoud's

*PRESENT: Rinfret C.J. and Taschereau, Rand, Cartwright and Fauteux JJ.

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for one half. Appeals were entered by all the parties of the warranty action, and the majority in the Court of Queen's Bench for Quebec maintained the appeals of the respondents.

Held, that the appeal as against the respondent Masoud should be dismissed, in view of the legal warranty against latent defects which arose on the sale of the truck (1527 C.C.).

Held also (Rinfret C.J. and Rand J. dissenting), that the appeal as to the respondent corporation should be dismissed.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), maintaining, St. Germain J.A. dissenting, the appeals of the respondents in an action in warranty against a used car dealer.

A. Laurendeau, Q.C., for the appellant.

A. J. Campbell, Q.C., for the respondents.

The CHIEF JUSTICE (dissenting): In this case, a truck driver, Picard, employed by the Montreal Candy Manufacturing Co. Limited, was found liable on account of his personal negligence, for an accident, as a result of which he was sued together with his employer, the Candy Company, and one Sam Masoud, the owner of the truck.

The trial judge, in his judgment, held that the degree of responsibility of Picard amounted to ten per cent of the damages incurred; that the Candy Company was responsible under Art. 1054 of the *Code,* as the employer of Picard; and that Masoud, as owner of the truck, was responsible because he had put into circulation a vehicle with defective brakes. The learned judge attributed to this defect the main cause of the accident.

There was no appeal from that judgment and, therefore, it is from those findings at the trial that we must proceed to determine the decision which has to be rendered in the matter now submitted to this Court.

This matter is an action in warranty brought by both the Candy Company and Masoud against Modern Motor Sales Co. Limited, the present appellant, which sold the truck to Masoud.

Both the Courts below found the appellant guilty in having sold the defective truck, but the question on the appeal is whether, on that ground, it should be held responsible in warranty towards both Masoud, the purchaser of the truck, and the Candy Company.

(1) Q.R. [1951] K.B. 154.

No doubt can be expressed as to the responsibility in warranty of the appellant towards Masoud on account of the contractual relation which resulted from the sale to him.

But, a different consideration arises with regard to the action in warranty of the Candy Company. No contractual relationship existed or exists betwen the appellant and the Candy Company.

Moreover, the Candy Company was not found responsible for the damages caused on the ground that they were making use of a defective truck; the ground of their responsibility was exclusively the fact that they were the employer of the driver Picard. It is, therefore, on account of the personal negligence of their employee. With that point, the appellant is in no way concerned and there exists no connection between that ground of liability and the fact that they sold a defective truck to Masoud.

It is significant that the trial judge himself, when disposing at the same time of the principal action and of the actions in warranty dismissed the action in warranty of the Candy Company against the appellant.

I agree with Rand J. that while the appeal of Modern Motor Sales Co. Limited fails as against Masoud, it is well founded as against the Candy Company and to that extent the judgment appealed from should be reversed.

The quotation made by my Brother Rand, in his reasons for judgment, and taken from "Les Pandectes Françaises, Nouveau Répertoire, Tome 34, p. 36 et seq., n^{os} 49 et 54" seems to me to be absolutely in point. The appellant, to my mind, cannot be called upon to warrant either Picard or the Candy Company against their liability resulting from the negligence of Picard. The action in warranty of the Candy Company should, therefore, be dismissed.

It strikes me, however, that from the practical point of view such a result is really not very material.

Masoud was condemned to pay the full amount of the damages (less ten per cent attributable to the negligence of the driver Picard). As the warrantor of Masoud, the appellant will, therefore, be called upon to pay all the damages, less ten per cent, and in turn, of course, Masoud will hand over to the plaintiff in the main action the sum of money thus received from the appellant.

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If the Candy Company had succeeded in its action in warranty against the appellant, the latter would not have been obliged to pay any more. The sum which it will pay to Masoud is exactly the same as that it would have paid to the company. It would be one and the same amount; and when the plaintiff in the main action receives that amount from Masoud, he will become completely disinterested. The Candy Company will only have to pay to the main plaintiff the ten per cent for which Picard was found responsible on account of his personal negligence.

The whole matter, so far as the Candy Company is concerned, resolves itself into a question of costs. Its action in warranty against the appellant being dismissed by the present judgment, it will have, of course, to pay the costs of the appellant in this Court; but, as the appellant fails so far as Masoud is concerned, I would agree with my Brother Rand that the appellant should be entitled to recover only one-third of its costs in this Court as against the Candy Company, and that there should be no costs as between the Candy Company and the appellant in the Court of King's Bench.

The judgment of Taschereau and Fauteux JJ. was delivered by

TASCHEREAU, J.:—Le 29 octobre 1940, M. Rosenthal, conduisant une voiture à traction animale, a été frappé au coin des rues Cherrier et St-Hubert, dans les limites de la Cité de Montréal, par un camion, propriété de Sam Masoud, et conduit par Édouard Picard. Ledit Édouard Picard était employé de la Montreal Candy Manufacturing Co. Ltd., qui se servait de ce camion pour transporter sa marchandise.

Masoud avait acheté ce camion de la Modern Motor Sales Ltd., et l'avait prêté à la Montreal Candy, compagnie dont il était le principal actionnaire. C'est lui qui payait Picard dans le temps où l'accident est arrivé. Les trois défendeurs, poursuivis conjointement et solidairement, ont prétendu qu'ils n'étaient pas responsables de cet accident qui serait attribuable au fait que les freins du camion n'ont pas fonctionné quand le chauffeur Picard a voulu les appliquer.

Le 4 avril 1941, Masoud et la Montreal Candy Manufacturing Co. Ltd, mais non Picard, ont institué une action en garantie contre la Modern Motor Sales Ltd, disant en substance qu'ils ont contesté l'action principale, qu'ils ont nié toute responsabilité, que le camion avait été acheté par Masoud de Modern Motor Sales Ltd, et que l'accident dont la faute ne peut être imputée aux défendeurs, est entièrement dû au fait que les freins du camion vendu étaient dans une condition défectueuse, un fait qui aurait dû être connu par la Modern Motor Sales Ltd, et que cet état des freins constituait un défaut caché. La conclusion de cette action en garantie est que la Modern Motor Sales Ltd, soit condamnée à indemniser les demandeurs en garantie, Masoud et la Montreal Candy Manufacturing Co. Ltd, de toute condamnation qui pourrait être prononcée contre eux.

L'honorable Juge Surveyer de la Cour Supérieure, devant qui se sont instruites en même temps, et l'action principale et l'action en garantie, a condamné sur l'action principale les trois défendeurs Masoud, Montreal Candy Manufacturing Co. Ltd. et Picard, conjointement et solidairement, à la somme de $3,893.00 avec intérêts et dépens. Il en est arrivé à la conclusion que Picard avait été négligent dans la conduite de l'automobile, que la Montreal Candy Manufacturing Co. Ltd. était l'employeur de Picard, et que Masoud devait également être tenu responsable parce qu'il payait Picard, et aussi parce qu'il avait remis à la Montreal Candy Manufacturing Co. Ltd. un camion dont les freins étaient dans un état défectueux.

Sur l'action en garantie, l'honorabe Juge de première instance a rejeté la réclamation de Montreal Candy sans frais, et il a condamné la Modern Motor Sales Ltd. à payer à Masoud la somme de $1,946.50 étant la moitié des dommages accordés à Rosenthal, le tout avec dépens.

Les motifs de ce jugement sont que la défenderesse en garantie, Modern Motor Sales Ltd., étant un commerçant habituel d'automobiles usagés, doit être présumée connaître les défauts de la chose qu'elle vend. L'accident serait presque complètement sinon exclusivement dû au fait que les freins étaient dans une condition défectueuse, et comme le Juge arrive à la conclusion que Masoud et la Modern Motor Sales Ltd. sont en faute, le défendeur en

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garantie doit conséquemment rembourser à Masoud, demandeur en garantie, la moitié de la condamnation sur l'action principale, soit $1,946.50.

Personne n'a interjeté appel du jugement sur l'action principale, mais Masoud et Montreal Candy ont tous deux appelé du jugement sur l'action en garantie. Modern Motor Sales a également logé un contre-appel. La Cour du Banc de la Reine (1), M. le Juge St-Germain étant dissident, a rejeté l'appel de Modern Motor Sales Ltd., mais, les appels de Masoud et de Montreal Candy ont été maintenus parce que la condition défectueuse des freins constituait au moment de la livraison du camion un défaut caché suivant les dispositions de l'article 1522 C.C. pour laquelle la Modern Motor Sales Ltd. doit être tenue responsable en vertu des dispositions de l'article 1527 C.C. Masoud avait le droit de s'attendre à ce que le camion ait été examiné d'une façon prudente et, suivant la preuve, la Modern Motor Sales Ltd. n'a pas rempli ce devoir qui lui était imposé. Il a été également décidé que cette faute donnait ouverture à une réclamation en garantie de la part de Montreal Candy.

La signification du jugement de la Cour du Banc de la Reine est donc à l'effet que la seule partie responsable de cet accident est la Modern Motor Sales comme conséquence de la condition défectueuse des freins, et que l'action principale ayant été maintenue, l'action en garantie doit l'être également, parce que le défendeur en garantie, n'étant pas intervenu à l'action principale, ne peut contester le jugement rendu sur icelle.

L'appelant soumet en premier lieu que l'action en garantie contre la Modern Motor Sales ne peut réussir, que cette Compagnie soit responsable ou non de cet accident. Si elle n'est pas responsable, il ne peut y avoir de condamnation prononcée contre elle; si, d'autre part, elle est seule responsable, elle aurait dû être poursuivie directement par la victime, et comme il n'existait aucun recours contre les défendeurs principaux, l'action instituée contre eux aurait dû être rejetée. Ceci aurait également disposé de l'action en garantie.

Ce raisonnement ne manque pas de logique, mais il pèche en ce sens que l'action de Rosenthal, demandeur principal,

(1) Q.R. [1951] K.B. 154.

a été maintenue contre les trois défendeurs principaux, Picard, Masoud et Montreal Candy, conjointement et solidairement, pour la somme de $3,893.00 et de ce jugement *il n'y a pas eu d'appel.* Comme le fait remarquer la Cour du Banc de la Reine, la Modern Motor Sales n'est pas intervenue pour contester l'action principale, après avoir été appelée en garantie, et il en résulte qu'elle ne peut aujourd'hui soulever devant les tribunaux la validité de ce premier jugement, et prétendre qu'il est erroné. Entre l'appelante et les défendeurs principaux, le jugement sur l'action principale est inattaquable. Le seul droit du défendeur en garantie qui n'est pas intervenu est d'essayer d'établir qu'il n'y a pas lieu à garantie de sa part.

Dans *Meilleur* v. *Montreal Light Heat & Power Company et la Cité de Montréal* (1), M. le Juge Martineau siégeant en revision, s'exprimait de la façon suivante:

> Lorsque le garant a été assigné, que l'action principale comme l'action en garantie ont été réunies, *que l'action principale a été maintenue ainsi que l'action en garantie, le garant ne peut, sur le seul appel du jugement qui le condamne à indemniser le défendeur principal, le faire infirmer, parce que le jugement sur l'action principale serait erroné.*

Dans *Archibald* v. *Delisle* (2), le Juge Taschereau parlant pour la Cour dit:

> By the judgment against which the appellants, defendants in warranty, now appeal, they have been declared to be the warrantors of the plaintiffs in warranty. And as the plaintiffs on the principal action have appealed from the judgment dismissing their action, they might have obtained here a reversal of that judgment and obtained a condemnation against the defendants Delisle, plaintiffs in warranty. That condemnation would then have reflected on the appellants, defendants in warranty, as it is *res judicata between them and the plaintiffs in warranty,* so long as that judgment stands, that they are their warrantors against the condemnations on the principal action. (In what form, and by what means, the plaintiffs in warranty could then have obtained a judgment against the defendants in warranty we are here not concerned with.) It follows clearly that the appellants Baker et al., have an interest upon this appeal distinct and separate altogether from the condemnation to costs.

Ce sont ces principes que la Cour du Banc de la Reine a acceptés dans la présente cause, et je m'accorde avec ses conclusions.

Il résulte donc comme conséquence du jugement de première instance que Picard, Masoud et Montreal Candy sont conjointement et solidairement responsables de l'accident dont Rosenthal a été la victime. J'entretiens des doutes

(1) Q.R. (1917) 52 S.C. 366. (2) (1895) 25 Can. S.C.R. 1 at 16.

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sérieux sur l'existence de cette solidarité entre les trois défendeurs. En effet, elle ne pourrait exister que par l'application de l'article 1106 C.C. qui veut que l'obligation résultant d'un délit ou quasi-délit commis par deux personnes ou plus, soit solidaire. Encore faut-il que les débiteurs aient commis un quasi-délit et que ce soit le même quasi-délit. C'est à cette seule condition qu'il y aura solidarité. Dans le cas qui nous occupe, l'obligation de Picard, conducteur du véhicule, de réparer le dommage causé, procède bien d'un quasi-délit, mais les sources qui font naître les obligations de Masoud et de Montreal Candy sont entièrement différentes. La responsabilité de Montreal Candy, suivant le jugement du Juge de première instance, naîtrait de la relation d'employeur et d'employé (1054 C.C.). Elle aurait son fondement sur un texte de loi, et ne présenterait aucun caractère quasi-délictuel. Masoud, qui payait Picard, serait responsable également comme conséquence de l'application de l'article 1054, et il aurait aussi commis le quasi-délit de donner la possession d'un camion défectueux à la Montreal Candy, ce qui l'obligerait à réparer le dommage en vertu de 1053. Quasi-délit bien différent de celui de Picard.

Mais il semble inutile d'approfondir davantage cette question, car le premier jugement prononce la solidarité et vu le défaut d'appel, il ne peut être attaqué. C'est tel qu'il a été rendu qu'il faut le considérer, et c'est de cette condamnation solidaire que l'appelante doit indemniser les intimés, à moins qu'elle n'en soit dispensée pour quelque autre motif.

Il faut donc prendre pour acquit, comme l'a trouvé le Juge au procès, que la cause de cet accident est la défectuosité des freins du camion acheté par Masoud de l'appelante. Cette dernière est commerçante en automobiles et camions usagés, et comme telle, elle est présumée connaître les défauts de la chose qu'elle vend; dans le cas de dommages subis comme résultat de ces vices, elle est tenue d'indemniser l'acheteur (C.C. 1527). La preuve démontre surabondamment que le défaut aux freins, cause de l'accident, était un vice caché et la responsabilité de l'appelante vis-à-vis de Masoud se trouve conséquemment engagée. Elle résulte de sa "faute professionnelle". "Spondet peritiam artis", et on peut ajouter avec Ulpien, "Imperitia

culpae annumeratur". Vide: *Ross* v. *Dunstall et al* (1); *Samson* v. *Davie Shipbuilding & Repairing Co.* (2); *Guillouard, Vente, No. 463; Lajoie* v. *Robert* (3); *Touchette* v. *Pizzagalli* (4).

La responsabilité de l'appelante vis-à-vis de Montreal Candy se présente sous un aspect différent. Il n'existe pas entre les deux parties, comme dans le cas de Masoud, de relation d'acheteur et de vendeur, et c'est exclusivement sur l'article 1053 que doit reposer la réclamation de la Compagnie. Par la faute de Modern Motor, la Montreal Candy a été tenue responsable d'un accident qui à son tour lui a causé un préjudice, pour lequel elle a droit à une indemnité. Le vendeur d'un objet qui cause un dommage, engage sa responsabilité, non seulement vis-à-vis l'acheteur, mais aussi vis-à-vis les usagers de cette chose, même s'il n'existe aucune relation contractuelle. La faute est délictuelle, et c'est ce qui a été décidé par la Cour du Banc de la Reine dans *Drolet* v. *London Lancashire* (5), jugement confirmé par cette Cour, (6) et dans *Ross* v. *Dunstall et al* (7). Dans cette dernière cause, Ross, manufacturier d'armes à feu, a été tenu responsable d'accidents survenus non seulement à l'acheteur immédiat de la carabine, mais aussi à celui qui en avait fait l'acquisition chez un marchand détaillant aux États-Unis.

L'appel doit être rejeté avec dépens, mais le jugement à être enregistré devra être modifié et réduit à $3,503.70 vu le désistement partiel produit par les intimés.

RAND J. (dissenting): I think it clear that by the law of Quebec a person who is rendered liable in civil responsibility, as, for example, under article 1054 of the *Code*, by reason of damage caused by things, through an act, cause or condition which can be directly traced back to the fault of another, has a right against the latter to be indemnified against the consequences of that intermediate liability; and that that indemnity may be invoked by the procedure known as warranty. For this proposition it is sufficient to cite three authorities: *McFarlane* v. *Dewey* (8); *Gosselin* v. *Martel* (9); and *Archibald* v. *Delisle* (10).

(1) (1921) 62 Can. S.C.R. 393 at 419.
(2) [1925] S.C.R. 202.
(3) Q.R. (1916) 50 S.C. 395.
(4) [1938] S.C.R. 433.
(5) Q.R. [1943] K.B. 511.
(6) [1944] S.C.R. 82.
(7) (1921) 62 Can. S.C.R. 393.
(8) (1870) 15 L.C.J. 85.
(9) (1904) 27 R.J. 364.
(10) (1895) 25 Can. S.C.R. 1.

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In the present case the owner of the truck, Masoud, the driver, Picard, and his employer, the Candy Company, have jointly and severally been found to be responsible for the damages caused. The liability of the driver arose from his personal negligence; but both courts agree that there was present also, as an operative cause, the dangerous condition of the truck resulting from a latent defect in its braking gear. Since that judgment has not been appealed, it stands as res judicata between the principal plaintiff and defendants.

Both courts agree also that the ultimate responsibility for the condition of the truck is that of the Motor Company, the defendant in warranty, and that a legal warranty against latent defects arose on the sale of the car. There seems to be some uncertainty in the judgments as to the precise basis of liability of the owner to the principal plaintiff, but that must be taken, I think, to arise from the presumption of article 1054 in relation to damage caused by a thing in his care. It is the owner, then, who, under the judgment as between the principal defendants, represents the fault ultimately traceable to the Motor Company. Of the total liability attributable to these two causes, that portion of it chargeable against the driver and vicariously to the Candy Company as his employer, results from the personal negligence of the driver and not from any act or default of the Motor Company.

The owner, so liable, has, under the rule stated, a right in the nature of indemnity against the Motor Company; but in view of the source of the judgment against the Candy Company, that principle cannot be invoked by the latter in the warranty action. The Candy Company as a principal defendant has a right of recourse against the owner for the percentage of responsibility attributable to the latter, but this is a matter of ultimate distribution of the loss, and it arises from the rule of contribution between persons found jointly liable for delictual conduct.

It is said that since the judgment against the Candy Company is for the total amount of the damages, it necessarily includes that portion ultimately chargeable against the Motor Company; and as establishing liability on the part of the Motor Company towards the Candy Company, that quantum is assimilated to damage caused the Candy

Company by the Motor Company through a fault within article 1053. It is the fact that the Candy Company has been adjudged liable to the principal plaintiff in the total sum: and if the Motor Company has been a defendant in the main action, on the findings made, it, likewise, would have been held to that amount. But to treat the judgment against the Candy Company as damage resulting from fault under article 1053 of the Motor Company is, I think, to confuse the liability of the Candy Company to the principal plaintiff with its consequences.

For instance, the driver is bound for the total damage because he participated in causing it; it is his act and that alone that has given rise to the judgment against him as well as to the civil responsibility of his employer for the total amount. The ultimate responsibility of the Motor Company has nothing whatever to do with creating either liability.

The distribution, not of liability, but of the ultimate loss as between the culpable joint actors themselves, is a different legal function and is effected by exacting from each according to the degree of participation in causing the damage. If the driver had been sued alone, any action thereafter brought by him against the Motor Company would be by way of enforcing that contribution and not the prosecution of a delict against himself within article 1053. If the Motor Company were brought into the principal action as a co-defendant, the judgment in solidarity would preclude any question of the right to contribution. But there are conditions to the pursuit of that relief, one of which is that the party claiming has in fact paid another's share of the joint judgment or liability; and it would seem undoubted that where there is no judgment in solidarity, all defences available in the original action would be open to the defendant in the subsequent action.

The proceeding in warranty here by the Candy Company is in reality of that nature, the assertion of a claim to contribution, and the question is whether it is properly brought in warranty. As the decisions cited show, there are different categories of contractual and delictual responsibility which can be enforced in that procedure, but they all partake in some degree of a quality which constitutes the essence of the obligation of guaranty: a duty to defend

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another in respect of a certain act, or as the English law states one mode of it, "to save harmless" from certain consequences. Indemnity does not go quite so far, but its effects are in large measure the same; and I should say that indemnity or such an equivalent is a minimal prerequisite to receivability in warranty. If I interpreted the judgment below to mean, as I do not, that the appeal Court intended to add a new class of claim to those determinable under warranty, I should be obliged to take other considerations into account. On the other hand, and with the greatest respect for that Court, I cannot find in the reasons an appreciation of the distinction between guaranty or indemnity and contribution, including the conditions of the prosecution of each.

The respondents in the appeal, sensing the difficulty presented by these circumstances, have made a partial desistement of 10% of the judgment which is intended to represent the degree of responsibility of the driver and the Candy Company, and the question is whether that can affect the result at which I have otherwise arrived. I do not think so. That act impliedly admits, in fact, the view expressed, that the claim is one for contribution.

The law of France on this matter is laid down in Pandectes Françaises, Nouveau Répertoire, T. 34, p. 36 et seq.:

49. C'est, toutefois, à la condition que le fait qui sert de base à la demande en garantie ou en responsabilité, soit le même que celui sur lequel est fondée la demande principale. Un des motifs qui ont poussé le législateur à édicter les dispositions dont s'agit, a été, en effet, ainsi qui a été dit supra, n. 44, d'éviter la contrariété de jugements susceptibles de se produire devant des tribunaux successivement saisis. Cette considération indique que, pour bénéficier de ces dispositions de faveur, la demande en garantie ne doit pas être une simple action récursoire, tendant, de la part de celui qui la forme, à être rendu indemne, par un tiers, des condamnations dont, finalement, les conséquences doivent lui incomber. Elle doit être connexe à la demande principale, s'y rattacher par un lien de dépendance intime et nécessaire, en être l'accessoire.

. . . . . .

54. ...Que, si toute action en garantie peut, pour être recevable, prendre sa source dans un fait quelconque, ou dans une faute commise par celui qui est appelé en garantie, c'est à la condition que ce fait ou cette faute ait été la cause de l'action principale.

The judgment of the Court of Revision in *Thérien* v. *City of Montreal and Montreal Street Railway Company* (1) is a special application of the rule. There the plaintiff was injured through the dangerous condition of a street brought about by the joint negligence of the City and the Company but the City was liable in two aspects: one for its personal fault in allowing the steep side slope of the street to exist, and the other proceeding from the delict of the Company in maintaining its pole in a dangerous position. The City was sued alone and in warranty claimed indemnity against the Company. By the judgment the latter was condemned to "pay and reimburse" the City for one-half of the damages recovered. The damages were divided according to the independent responsibility of each as between themselves; but the claim in warranty was in fact for quasi-indemnity in relation to the second basis of liability.

If distribution of the loss could be effected in warranty, since one of two defendants jointly liable can implead the other in that proceeding, *O'Connor* v. *Flynn* (2), it would mean that that step could become the accompaniment of every action involving a joint delict. That result might be not only unobjectionable but highly convenient as a means of determining the whole controversy; and no one would willingly add another item to the intricacies of Quebec procedure; but that it would be a departure from the civil law as enunciated by the commentators and the decisions seems to me to be unquestionable, and procedural confusion can easily involve substantive matters such as the nature of the judgment here. In English common law jurisdictions under modern legislation governing negligence, such a division is made as part of the adjudication of the action; but the law of Quebec does not authorize it. In *Cormier* v. *Delisle* (3), in which Duranleau J. has clearly indicated the distinction made here between guaranty and contribution, he speaks, at p. 482, of "sa part contributive", and of its determination "soit par une action en garantie dans l'action principale soit par une action principale". The reference to the action in guaranty is, of course, a dictum, but it points the consequences of confirming the judgment in this case.

(1) Q.R. (1899) 15 S.C. 380. (2) Q.R. (1898) 13 S.C. 435.
(3) Q.R. [1942] S.C. 480.

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Rand J.

A further consideration remains. Mr. Laurendeau argues that the claim of Masoud, likewise, is struck with a fatal flaw. It is, he says, an action récursoire in responsibility, and being so, he is entitled to challenge not only his liability in warranty but also the liability of Masoud in the main action; from the judgment in the latter there was no appeal, but because the claim in the accessory proceeding is not true guaranty, it is the same as an independent action in which all defences would be open.

Quasi-indemnity arising in law from a delictual act for which another incurs civil responsibility is distinguishable in character from a contract to guarantee or defend agaisnt a certain act or obligation. The obliger in the latter is directly interested, through the implications of the contract, in the determination of the original issue. He becomes the obligee's defender and the *Code* contemplates not only his participation in the defence but in formal guaranty, that he make the defence his own.

In the present case there is no such implication from either the implied warranty of fitness or the fault in setting a dangerous agency in action. The breach of warranty in reality sounds in damages. In such a case, however, the law either implies a quasi-indemnity or assimilates the delictual liability to that of contractual indemnity so far, at least, as to permit a claim in récursoire under warranty procedure.

But it is unnecessary to pursue the examination of this feature further: I will assume in Mr. Laurendeau's favour that he is entitled to challenge the judgment against Masoud, but that does not, in my opinion, serve him to any purpose.

The courts below have concurred in holding that the defect of the machine was a participating cause of the damages and either Masoud or the Candy Company was chargeable with the legal care of the truck. In either case there would be a resulting liability under article 1054, against which neither could successfully invoke the exculpatory provision of that article. The person charged with the care of a thing cannot avail himself of that provision if the vice has arisen from the fault or negligence of the manufacturer or repairer with whom he deals. Here the defect was patent to professional skill, and the owner was

entitled, at the time of the accident, in respect of personal care, to rely upon the exercise of that skill by the Motor Company: but for the purposes of the exculpation, it is the same as if the Motor Company had been his agent in making the inspection or reconditioning: Juris-Classeur Civil, Art. 1382-83 fin. 1384, Responsabilité du Fait des Choses, paragraphe N° 450. From this it follows that the Motor Company would be liable either through Masoud or the Candy Company, and I see no reason, on the evidence, to place it on the Company rather than the owner.

I would therefore allow the appeal against the judgment in favour of the Candy Company, but dismiss it with costs in respect of Masoud. The appellant will be entitled to recover one-third of its costs in this Court against the Candy Company. There will be no costs as between the Candy Company and the Motor Company in the Appeal Court.

CARTWRIGHT J.: The facts of this case are set out in the reasons for judgment of other members of the Court. The learned trial judge has found that the injuries suffered by the plaintiff were due "mainly if not exclusively" to the defective condition of the brakes of the automobile of the appellant Masoud. In the Court of King's Bench (Appeal Side) (1) the majority were of the opinion, with which I respectfully agree, that such defective condition of the brakes was the sole cause of the accident. Pratte J., with whom Gagné J., agrees, says:

A ce sujet, il faut dire d'abord que, d'après la preuve, c'est la défaillance du frein qui a été la seule cause génératrice de l'accident.

Hyde J., with whom McDougall J. agrees, says:

I am of the opinion that the accident and the resulting damages were exclusively due to the defective hydraulic braking system on the truck.

All of these learned judges and, as I understand, all of the members of this Court are of opinion that it was rightly held that the existence of this defective condition was due to the fault of the appellant. Under these circumstances it is apparent that the effect of the judgment of the Court of King's Bench is to require that the damages suffered by the plaintiff be paid by the party by whose fault they were caused. *Prima facie* this result would

(1) Q.R. [1951] K.B. 154.

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appear to be in accordance with the law. The able argument of counsel for the appellant has raised doubts in my mind as to whether there are not difficulties, of, as I respectfully think, a technical and procedural nature, in the way of affirming the judgment of the Court of King's Bench but before we interfere with that judgment it is necessary that we should be satisfied that it is in error and I am not satisfied of this. To doubt is to affirm.

I would dispose of the appeal as proposed by my brother Taschereau.

Appeal dismissed with costs.

Solicitors for the appellant: Beauregard, Bock, Beauregard & Taschereau.

Solicitors for the respondents: Brais, Campbell & Mercier.

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*Mar. 26

1953

*Feb. 2

EMMANUEL DULAC (*Plaintiff*).....APPELLANT;

AND

ODILON NADEAU (*Defendant*).....RESPONDENT.

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

Immovable—Removal of building and incorporation with another—Notice of ownership—Promise of sale—Conditional—Tradition and actual possession—Payment of purchase price—Whether Art. 416 C.C. applies—Meaning and scope of word "materials" in Art. 416 C.C.—Arts. 376, 415, 416, 417, 418, 419, 1478, 1487 C.C.

The respondent agreed to sell to R under a promise of sale, accompanied by tradition and actual possession, a certain lot with the buildings thereon. The purchase price was to be paid in two instalments. There was an absolute prohibition to register the promise, and it was further stipulated that the deed of sale would not be signed until payment of the whole purchase price and that the respondent would not be obliged to avail himself of the clause which provided for the nullity of the promise for non-compliance of all the conditions thereof.

Before the first instalment on the purchase price had become due, R sold a house and shed of the buildings thereon to the appellant who, as stipulated between the latter and R, removed them to his own land where he united the house with a second building which he had purchased, and after alterations and improvements of the whole made his residence.

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

The respondent registered a notice of ownership of the building against the appellant's land. The latter took action to have the notice radiated. The trial judge maintained the action on the ground that, by virtue of Art. 1478 C.C., R had become the owner of the building and could, therefore, give title to the Appellant. The Court of Appeal for Quebec reversed that judgment.

Held (Taschereau and Fauteux JJ. dissenting), that the appeal should be allowed.

Held: The promise of sale given by the respondent, although accompanied by tradition and actual possession, was not in this case equivalent to a sale (Rinfret C.J. contra and Rand J. expressing no opinion).

Per Rinfret C.J.: The promise of sale was not dependent on any conditions which prevented the application of Art. 1478 C.C. The respondent was not any more the owner at the time of the sale to the appellant. Besides the fact that the respondent was not obliged to avail himself of the clause providing for the nullity of the promise, the sale of the appellant was made before any payment had become due to the respondent. There existed, therefore, at that time no condition to be discharged and the nullity clause could not operate. There was no suspensive condition attached to the promise. What was suspended until the last payment was not the transfer of property but the signing of the deed.

A finding of good faith is a question of fact and, in view of the trial judge's finding that the appellant was in good faith when he purchased from R there was no justification here to set aside such finding.

In this case, the improvements made by the appellant were so extensive that they greatly exceeded the value of the building purchased from R and the respondent could not pretend that he was still the owner by application of Arts. 418 and 419 C.C.

Per Rand J.: Assuming that ownership did not pass to the purchaser from the respondent, the inseverable incorporation of the structure in his house and land gave the appellant, by virtue of Art. 416 C.C., which embodies the general rule of accession, title thereto: the respondent has, therefore, no interest in the appellant's land which could be protected by registration.

Per Estey J.: The terms contained in the promise of sale do not permit of its being classified as a sale within the meaning of Art. 1478 C.C. But by virtue of the law of accession, the appellant became the owner of the house and shed. The act of accession determines the question of ownership and if that act comes, as it did here, within the terms of Art. 416 C.C., the owner of the materials can only recover their value or damages. The construction of the word "materials" in Art. 416 C.C. should not be restricted to the word "movables". As ordinarily used and understood in such a context, the word includes everything movable or immovable, necessary or incidental to the completion of the buildings or works. The word is used here in a broad and comprehensive sense which would include the attachment or incorporation of a small building with a larger one, when the latter is attached to the land. The question of good or bad faith does not affect the appellant's title but may be important in fixing compensation.

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Per Taschereau and Fauteux JJ. (dissenting): By the terms of the promise of sale, the transfer of property was suspended until all the payments on the purchase price had been made. The seller to the appellant did not have the ownership and that sale, therefore, was null as being the sale of a thing which did not belong to the seller (Art. 1487 C.C.).

There is a presumption *juris et de jure* that the appellant was not in good faith, and even if it could be said that he was, his good faith could not validate his purchase as against the respondent.

The appellant cannot invoke the provisions of Art. 416 C.C. The word "materials" in that article must be taken in its usual sense; it does not include immovables but only those movables which can be classified as materials. It is only by the incorporation to an immovable that the materials lose their nature of movable to acquire that of the immovable. The respondent's house, after its removal to the appellant's land, did not constitute "materials". Moreover, that building was clearly an immovable by nature before it was moved (Art. 376 C.C.) and its severance and re-attachment to the soil of the appellant did not affect or change its immovable character.

As a privilege or hypothec can be registered against a building without affecting the land, the respondent could, as he did, validly protect his ownership by registration.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court in an action for radiation of a notice of ownership.

Rosaire Beaudoin, Q.C., for the appellant.

Guy Hudon, Q.C., for the respondent.

The CHIEF JUSTICE: En cette cause il y a conflit entre le juge de première instance et la Cour du Banc du Roi, siégeant en appel (1), sur un point qui me paraît essentiel.

L'intimé a fait enregistrer sur une propriété qui, au bureau d'enregistrement, apparaît au nom de l'appelant, un avis à l'effet qu'une maison d'habitation qui se trouve sur cette propriété lui appartenait (à l'intimé).

L'appelant, par son action, a demandé que cette maison d'habitation soit déclarée lui appartenir et que l'intimé soit tenu de radier l'avis qu'il avait ainsi fait enregistrer.

Il y avait une autre conclusion alternative à l'effet que, si cet avis ne pouvait être radié, l'intimé soit condamné à payer à l'appelant la somme de $3,500 pour les améliorations qu'il avait faites à la maison; et, sur paiement de cette somme, que l'intimé soit tenu d'enlever la bâtisse du terrain de l'appelant.

(1) Q.R. [1951] K.B. 405.

Le juge de première instance a jugé que l'appelant avait acquis la maison de bonne foi d'un nommé Pierre Rodrigue qui, d'après lui, en était propriétaire au moment de la vente et qu'il avait payé le prix d'achat; après quoi, qu'il l'avait transportée sur son terrain et qu'il l'avait réparée et incorporée à une autre bâtisse. Il a ajouté qu'il serait impossible, à l'heure actuelle, de diviser les bâtisses et de donner à l'intimé la partie que ce dernier prétend lui appartenir.

Pour arriver à cette conclusion, il fait remarquer qu'en référant au titre de Rodrigue, ce dernier avait une promesse de vente de l'intimé accompagnée de possession actuelle, ce qui, en vertu de l'article 1478 C.C., équivaut à vente.

La Cour du Banc du Roi, au contraire, a été d'avis que l'appelant n'avait pas établi qu'il était propriétaire de la maison d'habitation, parce que son vendeur, Rodrigue, n'y avait lui-même aucun droit "sauf une promesse de vente accordée à certaines conditions qui n'ont pas été remplies". Elle en a conclu que l'intimé était resté propriétaire de la maison d'habitation et qu'il avait donc le droit de faire enregistrer sur l'emplacement où la maison avait été transportée "un avis dénonçant au registrateur et aux tiers son droit de propriété sur cette maison". Elle a donc infirmé le jugement de la Cour Supérieure et a rejeté l'action de l'appelant avec dépens.

Je ne puis en venir à la conclusion que la promesse de vente consentie par l'intimé à Rodrigue était subordonnée à des conditions qui empêchent l'article 1478 C.C. d'avoir son plein effet. Ce qui revient à dire qu'après avoir consenti la promesse de vente l'intimé, au moment où Rodrigue a vendu à l'appelant, n'était plus le propriétaire.

Personne ne conteste que Rodrigue a vendu à l'appelant; et l'intimé ne peut réussir que s'il établit qu'à ce moment-là Rodrigue n'avait pas encore acquis la maison d'habitation dont il s'agit.

Si nous référons à la promesse de vente de l'intimé à Rodrigue, en date du 24 juillet 1947, on y constate que l'intimé a promis de vendre à Rodrigue, qui s'est obligé d'acheter, la terre qu'il avait acquise le jour même d'un M. Lucien Desrochers avec les bâtisses y construites. Le prix de vente y était stipulé à $1,095 que Rodrigue s'est engagé à payer en deux versements: $150 le 24 juillet 1948 et $945 le 24 juillet 1949, le tout sans intérêt.

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La vente par Rodrigue à l'appelant est antérieure à la date où Rodrigue devait faire à l'intimé le premier versement sur le prix de vente. Elle est du 24 mai 1948.

Il est bien dit dans le contrat qu'à défaut par Rodrigue d'acquitter les versements à l'échéance et de se conformer à toutes les conditions stipulées à l'acte, la promesse de vente deviendrait nulle et l'intimé pourrait disposer de la propriété comme il l'entendait, sans indemnité pour les améliorations qui auraient pu avoir été faites sur la propriété, etc.

Mais, en outre qu'il fut expressément convenu que l'intimé n'était pas obligé de se prévaloir de la clause de nullité que je viens de résumer, il faut nécessairement remarquer que la vente par Rodrigue à l'appelant a eu lieu avant que le versement de $150 devienne dû, soit le 24 juillet 1948. L'intimé a bien déclaré lors de son témoignage, que Rodrigue n'avait rempli aucune des conditions de la vente et entre autres n'avait donné aucun acompte sur le prix d'achat. Mais, la réponse toute naturelle, c'est que, lorsque Rodrigue a vendu à l'appelant, il n'y en avait pas de dû. Il peut être vrai que plus tard Rodrigue n'a pas rempli les conditions, mais ce qui est important c'est de savoir si, au moment de sa vente à l'appelant, il existait des conditions qu'il était appelé à remplir. S'il n'en existait pas, la clause de nullité ne pouvait s'opérer. En plus, comme l'intimé pouvait ne pas s'en prévaloir, au cas même où elle aurait pu opérer, il fallait nécessairement que l'intimé manifestât son intention d'une façon quelconque—ce qu'il n'a pas fait—sans quoi la promesse de vente restait en vigueur et l'intimé avait parfaitement le droit d'en exiger l'exécution par Rodrigue. (Voir *Gagnon* v. *Lemay* (1), et les précédents y cités.)

Dans cette cause de *Gagnon* v. *Lemay* la Cour Suprême a décidé unanimement:

> Where in a deed of sale or promise of sale, it is stated that such deed would become null and void *ipso facto without mise en demeure* if the buyer failed to make any payment in capital or interest at the specified dates, such stipulation is exclusively in the interest of the seller, who has the right to choose between the rescission of the contract or its execution, the obligation of the buyer remaining absolute and without alternative.

(1) (1917-18) 56 Can. S.C.R. 365.

La promesse de vente elle-même suppose que l'intimé, au lieu de la traiter comme devenant nulle *ipso facto* à raison du défaut par Rodrigue de se conformer aux conditions qui y sont stipulées, Nadeau aurait le droit de la traiter, au contraire, comme conservant son plein effet, ainsi que le démontre le paragraphe de cette promesse qui est intitulé: "Recours":

> Il est expressément convenu que si M. Nadeau se prévaut de la clause de nullité ci-dessus... etc.

On voit donc qu'indépendamment de la décision de cette Cour dans *Gagnon* v. *Lemay* les parties elles-mêmes, dans la promesse de vente, ont prévu le cas où M. Nadeau ne se prévaudrait pas de la clause de nullité et alors il se conserve le droit d'exiger que M. Rodrigue se conforme aux obligations qu'il avait assumées dans la promesse de vente.

Il est donc inexact de dire qu'au moment où Rodrigue a vendu à l'appelant la promesse de vente était devenue nulle. Elle était, au contraire, en pleine existence et conservait toute sa vigueur.

L'intimé Nadeau et Rodrigue avaient stipulé que la promesse de vente ne devait pas être enregistrée. L'intimé est donc mal venu à soulever le point que l'appelant n'est pas allé s'informer au bureau d'enregistrement.

En plus, on a voulu voir dans cette promesse de vente une condition suspensive du droit de propriété sous prétexte qu'elle ne prendrait effet que "sur paiement du dernier versement". Mais ce n'est pas la promesse de vente ou la convention entre l'intimé Nadeau et Rodrigue (le 24 juillet 1947) qui était suspendue jusqu'au paiement du dernier versement. La convention elle-même ne dit nullement que Rodrigue ne deviendra propriétaire que lors du paiement du dernier versement. Cette condition se lit: "L'acte de vente se fera sur paiement du dernier versement". Par conséquent, ce n'est pas le lien contractuel qui est suspendu jusqu'au paiement de ce versement, c'est simplement l'acte de vente ou le contrat lui-même.

Je ne saurais interpréter la promesse de vente entre Nadeau et Rodrigue comme contenant une condition suspensive. Le fait même que je viens de faire remarquer, à savoir, que M. Nadeau est parfaitement libre de maintenir cette promesse de vente en vigueur nonobstant que M. Rodrigue n'accomplisse pas les conditions qui y sont stipulées, prouve qu'il ne s'agit pas d'une nullité *ipso facto*.

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En effet, si M. Nadeau, malgré l'inaccomplissement des conditions par Rodrigue, a la faculté de tenir la promesse de vente comme continuant d'exister et, dès lors, de contraindre Rodrigue à en remplir les obligations, il suit nécessairement que, dans ce cas, Nadeau reste vis-à-vis de Rodrigue tenu de lui consentir l'acte de vente définitif lorsque les conditions en question auront été remplies par Rodrigue.

Dans cette situation, je ne trouve rien au dossier pour empêcher l'article 1478 C.C. de prendre tout son effet. Il y a eu, le 24 juillet 1947, entre l'intimé et Rodrigue une promesse de vente avec tradition et possession actuelle. En effet, Rodrigue en a tellement pris possession qu'il a procédé à couper sur la propriété tous les arbres qui s'y trouvaient; et l'article 1478 C.C. édicte, qu'en pareil cas, la promesse de vente équivaut à vente. C'était là la situation lorsque Rodrigue a vendu à l'appelant et, à mon humble avis, l'intimé a complètement failli de démontrer que l'appelant n'était pas valablement devenu le propriétaire de la maison d'habitation.

Il en résulte que c'est à tort qu'il a prétendu en être resté le propriétaire et qu'il a fait enregistrer son avis à cet effet. L'action de l'appelant était donc bien fondée et le jugement de première instance était justifié.

Qu'ultérieurement à la vente de Rodrigue à l'appelant, Rodrigue ait failli de remplir les obligations qu'il avait assumées dans son contrat avec l'intimé, cela ne saurait donner des droits à l'intimé contre l'appelant qui a acquis la maison d'habitation alors que Rodrigue avait parfaitement le droit d'en disposer. La situation est seulement que, si l'intimé veut maintenant procéder contre Rodrigue, il est libre de le faire, soit en réclamant les paiements prévus dans la promesse de vente, soit en dommages, mais cela ne peut affecter le titre de l'appelant.

Je ne saurais me rendre à l'avis que l'appelant n'était pas de bonne foi lorsqu'il a acquis de Rodrigue la maison en litige.

Cette question a été étudiée en particulier dans un jugement fortement raisonné de l'honorable Juge Carroll, alors qu'il faisait partie de la Cour Supérieure de la province de Québec, dans la cause de *"The St-Lawrence Terminal Company"* v. *Hallé* (1). Ce jugement est rapporté au long en

(1) Q.R. (1907) 16 K.B. 127.

même temps que celui de la Cour du Banc du Roi, qui l'a confirmé. Il suffit d'en reproduire le jugé qui est un bon résumé de la décision rendue par cet honorable juge:

La vente d'un immeuble consentie par celui qui l'occupe sans en être le propriétaire légal, est, pour l'acheteur, un titre au sens de l'art. 412 C.C. Par suite, sa possession en vertu de ce titre peut être de bonne foi, lui assurer, quant à ses améliorations, les droits prévus à l'article 417 C.C. et rendre siens les fruits qu'il perçoit, sans compensation avec remboursement des améliorations, art. 411 C.C.

L'on trouve également sur cette même question un jugement de la Cour Suprême du Canada, rédigé par l'honorable Juge Mignault, parlant au nom de la Cour, qui était unanime (1). Le jugé se lit comme suit:

The purchaser of a thing lost or stolen is in "good faith" within the meaning of art. 1489 C.C., if he honestly believes that the vendor is the owner of the thing lost or stolen. It is not necessary that his good faith be "une bonne foi éclatante", or that his error be an invincible one.

Au cours des raisons du jugement, l'on trouve le paragraphe suivant:

With great respect, I cannot help thinking that the learned trial judge placed the duty of a purchaser of a second hand car on much too high a plane. Good faith does not need to be "une bonne foi éclatante", it suffices that it be an honest belief that the vendor is the owner of the thing sold. Nor if there be an error on the part of the purchaser is it necessary that the error be an invincible one. I do not think the authorities cited by the learned judge should be given that effect, for it would not be justified by the language of the code.

L'article 412 C.C. édicte:

Le possesseur est de bonne foi lorsqu'il possède en vertu d'un titre dont il ignore les vices, ou l'avènement de la cause résolutoire qui y met fin. Cette bonne foi ne cesse néanmoins que du moment où ces vices ou cette cause lui sont dénoncés par interpellation judiciaire.

Et la doctrine est à l'effet que la mauvaise foi ne se présume pas; elle doit être prouvée contre celui dont la possession est établie. La présomption de bonne foi cesse après la demande en revendication. (2 Baudry-Lacantinerie et Chauveau, n. 311; 9 Demolombe, n. 615, 630; 2 Aubry et Rau, 273, paragraphe 206.)

Peu importe que le titre translatif soit nul en la forme ou nul quant au fond même du droit qu'il confère. Ce principe s'entend d'une nullité de droit comme d'une nullité relative par suite de laquelle l'acte serait seulement annulable ou rescindable. (Voir 9 Demolombe, n. 609 et s.; 3 Aubry et Rau, 271, paragraphe 206; 6 Laurent, 218 et s.).

(1) [1926] S.C.R. 129.

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Celui qui possède en vertu d'un titre translatif de propriété, dont il ignore les vices, fait les fruits siens, et ce, sans qu'il y ait à distinguer si sa bonne foi provient d'une erreur de droit, ou d'une erreur de fait. L'erreur de droit peut, aussi bien que l'erreur de fait, n'être pas exclusive de la bonne foi. (Baudry-Lacantinerie et Chauveau, n. 310; 4 Huc, n. 120; Demolombe, loc. cit.; Aubry et Rau, loc. cit.).

Et la question de savoir si une personne est de bonne foi est généralement parlant une question de fait. Or, ici, le juge de première instance a décidé ce fait en faveur de l'appelant. Il dit dans son jugement:

> Le demandeur était évidemment de bonne foi. Rodrigue était en possession de la terre où il coupait du bois et le demandeur n'eut aucun doute que Rodrigue était propriétaire.
>
> D'ailleurs si on réfère au titre il avait une promesse de vente et possession actuelle, ce qui équivaut à vente.
>
> Si Rodrigue était propriétaire, le demandeur ayant acheté de bonne foi et ayant payé est devenu propriétaire de la bâtisse.

On remarque que, d'après l'article 412 C.C., sa bonne foi ne pouvait disparaître "que du moment où ces vices (i.e. les vices de son titre) lui sont dénoncés par interpellation judiciaire."

L'intimé a cherché à faire état du fait qu'il serait allé voir l'appelant au cours des travaux que ce dernier faisait sur la maison après qu'il l'eût transportée chez lui. Mais, tout d'abord, la preuve établit que, lors de cette visite, l'intimé n'a pas vu l'appelant; il n'a parlé qu'à une petite fille qui se trouvait à la maison. Plus tard, l'appelant lui-même s'est rendu chez l'intimé pour le rencontrer et de nouveau ils ne se sont pas vus. L'intimé a fait envoyer à l'appelant une lettre ou deux.

L'on peut voir par l'article 412 C.C. que ces démarches ou lettres ne pouvaient avoir pour effet de faire cesser la bonne foi de l'appelant puisque, à cette fin, il ne fallait non moins qu'une dénonciation par interpellation judiciaire.

Cette interpellation judiciaire de la part de l'intimé n'a jamais eu lieu. Il s'est contenté de faire enregistrer un avis dans lequel il prétendait informer que la maison lui appartenait. Cet enregistrement était manifestement inefficace à raison de l'article 412 C.C.

De toute façon, je suis d'avis que l'intimé, en droit, n'a aucun recours contre l'appelant. Son recours est contre Rodrigue qui continue de lui devoir les paiements stipulés dans la promesse de vente qu'il a consentie à Rodrigue, ou, peut-être, une action en dommages contre Rodrigue. Mais l'appelant a justifié son droit d'être déclaré propriétaire, à l'encontre de Nadeau, de la maison que Rodrigue lui a vendue. Il en résulte qu'il avait parfaitement raison en concluant à se faire confirmer ce titre de propriété et de demander que l'intimé fut contraint de faire radier l'avis qu'il avait illégalement fait enregistrer.

Ce sont là toutes les conclusions de l'action de l'appelant. Il n'est pas question de la part de l'intimé, pour le moment du moins, de revendiquer la maison en litige. Par les conclusions de sa défense écrite, il se contente de demander le rejet de l'action de l'appelant.

Mais, il ne saurait être hors d'ordre de considérer quel remède l'intimé pourrait avoir, s'il s'avisait de réclamer la maison—ce qu'il n'a pas fait jusqu'ici.

La preuve démontre que la maison que l'intimé prétend lui appartenir était "complètement pourrie". Après l'avoir transportée sur son terrain, l'appelant a remplacé les fondations et le châssis; il a été obligé d'ôter une grosse moitié des montants; de réparer la couverture complètement à nouveau, c'est-à-dire, d'enlever celle qu'il y avait et d'en mettre une nouvelle; de changer les fenêtres qui ne pouvaient pas être réparées.

Suivant la décision du juge de première instance, après avoir transporté cette maison et l'avoir réparée, il l'avait "incorporée à une autre". Et le juge ajoute: "Il serait impossible à l'heure actuelle de diviser les bâtisses et de donner au défendeur la partie qui lui appartient d'après lui". Cette décision de fait est parfaitement justifiée par la preuve fournie absolument sans contradiction.

Cette preuve établit que les deux maisons, au moment de l'action, étaient "collées ensemble" et que les deux n'en faisaient plus qu'une seule.

Cette maison en litige, au moment de l'achat par l'appelant, était restée inhabitée depuis au moins un an. Elle avait même été endommagée par le feu et tout l'arrière de la couverture avait été brûlé. Les ouvriers qui ont travaillé à la réfection de la maison sont venus rendre des

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témoignages qui confirment les faits ci-dessus. Ils jurent qu'il était nécessaire de tout remplacer pour la rendre habitable. Ils ajoutent qu'à la suite des travaux qu'ils y ont faits, elle est devenue une seule maison, un seul tout, et c'est ce qui fait dire au juge de première instance, dans son jugement, qu'il "serait impossible à l'heure actuelle de diviser les bâtisses et de donner au défendeur la partie qui lui appartient d'après lui".

Cette situation fait penser à la livre de chair du "Marchand de Venise", de Shakespeare, et même au jugement de Salomon dans l'affaire où deux femmes réclamaient le même enfant.

On est donc en droit de se demander, pour le cas où l'intimé voudrait se faire remettre sa maison, de quelle façon il pourrait obtenir, à cet égard, un jugement exécutoire. Pour commencer, il lui serait impossible, à l'heure qu'il est, de reprendre possession de la maison dans l'état où elle était sur sa terre. Il ne pourrait pas retrouver la maison pourrie qu'il avait promis de vendre à Rodrigue. Cette maison n'existe plus. Elle a été complètement remplacée par les travaux de l'appelant. En plus, elle est maintenant incorporée à une autre maison dont l'appelant a fait un seul tout.

Il y a donc lieu de se demander de quelle façon opéreraient les prescriptions des articles 413 et suivants du Code Civil.

L'article 413 décrète:

Tout ce qui s'unit et s'incorpore à la chose appartient au propriétaire...

L'article 414:

La propriété du sol emporte la propriété du dessus et du dessous.

L'article 416:

Le propriétaire du sol qui a fait des constructions et ouvrages avec des matériaux qui ne lui appartiennent pas, doit en payer la valeur; il peut aussi être condamné à des dommages-intérêts, s'il y a lieu; mais le propriétaire des matériaux n'a pas droit de les enlever.

L'intimé veut se soustraire à l'effet de l'article qui précède en disant qu'il ne s'agit pas de matériaux, mais d'une maison qui est un immeuble par nature. Il serait intéressant de se demander jusqu'à quel point cette maison pourrie et qui ne tenait plus debout ne pourrait pas être

assimilée à une maison qu'on a démolie; car il est indiscutable qu'une maison démolie cesse d'être immeuble et que les parties en sont devenues meubles.

Mais poursuivons: Si l'on applique l'article 417 C.C., il est clair que les améliorations sur la maison de l'intimé ont été faites par l'appelant avec ses matériaux et que le droit que peut prétendre l'intimé dépend de la nature de ces améliorations ainsi que de la bonne ou mauvaise foi de celui qui les a faites.

Ici, nous avons la décision du juge de première instance que l'appelant était de bonne foi. Nous avons la preuve que les améliorations étaient nécessaires. Donc, toujours d'après l'article 417 C.C., l'intimé ne peut les faire enlever; il doit dans tous les cas en payer le coût, lors même qu'elles n'existeraient plus et sans aucune compensation pour les fruits perçus, s'il y en a eus. Allons plus loin: Si l'appelant eut été de mauvaise foi, tout ce que l'intimé pouvait faire était, à son choix, de retenir les améliorations en payant ce ce qu'elles ont coûté, ou leur valeur actuelle, ou permettre à l'appelant de les enlever à ses frais, si elles peuvent l'être avec avantage sans détériorer le reste de la maison.

Mais, là encore, l'article 418 C.C. entre en cause. La preuve démontre clairement que les améliorations faites par l'appelant furent tellement considérables et dépassaient à tel point la valeur de la maison de l'intimé (qui fut généralement évaluée à environ deux cents dollars), que l'appelant est parfaitement en droit d'exiger, avant de remettre la maison (si cela est possible), le paiement de la somme de $3,500 qu'il a dépensée pour la refaire.

Enfin, dans cette dernière alternative, en vertu de l'article 419 C.C., au cas où l'appelant serait tenu de restituer l'immeuble sur lequel il a fait les améliorations, il aurait le droit de le retenir jusqu'à ce que le remboursement lui en soit effectué.

De toute façon, ce que revendiquerait l'intimé ce n'est plus sa maison, mais un immeuble qui a été transformé, incorporé à celui que l'appelant possédait et qui est devenu un autre immeuble complètement.

On voit donc que, si l'intimé a fait enregistrer son avis dans le but de protéger son prétendu droit de reprendre possession de ce qui fut autrefois sa maison, cet avis est absolument inefficace et illégal. Il ne peut prétendre maintenir cet enregistrement.

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S'il a maintenant un recours, à mon humble point de vue, ce n'est pas contre l'appelant, mais contre Rodrigue, soit, je le répète, pour réclamer de Rodrigue les versements du prix de vente que ce dernier s'était engagé à faire, ou en dommages contre Rodrigue pour avoir fait disparaître de sur sa terre la maison sur laquelle Nadeau aurait pu prétendre posséder une garantie pour son prix de vente. Sans compter que ce qui est disparu est seulement la maison elle-même, mais que la terre, en autant que nous le sachions, est restée en la possession de Rodrigue. Je ne vois pas que Nadeau ait le moindre recours contre l'appelant, mais si, toutefois, ce recours existe, ce n'est certainement pas celui de revendiquer la maison, car ce recours est régi par les articles 413 et suivants du Code Civil qui sont analysés plus haut.

Pour ma part, ce n'est pas sur l'application des articles 413, 414, 416 et 417 C.C. que je m'appuierais pour repousser la prétention de l'intimé. Je veux bien envisager la maison de l'intimé comme ayant conservé son caractère d'immeuble par nature sans me croire obligé de discuter l'avis du juge de première instance "qu'il serait impossible, à l'heure actuelle, de diviser les bâtisses et de donner au défendeur la partie qui lui appartient d'après lui"; mais il m'est impossible de voir quelle réponse satisfaisante l'intimé peut faire à l'application des articles 418 et 419 C.C. Admettant sa prétention que, en dépit de sa transformation, sa maison peut encore être considérée comme un immeuble par nature, ce qu'il ne peut éviter c'est que l'appelant a de toute évidence fait sur cette maison des améliorations dont la valeur s'élève à $3,500.

D'après l'article 418, même si l'appelant, possesseur de la maison, était de mauvaise foi, il est prouvé que "les améliorations qu'il a faites sur cette maison sont tellement considérables et dispendieuses" qu'elles dépassent dans la proportion de dix-sept fois la valeur de la maison réclamée par l'intimé, suivant l'estimation qui en a été faite sans contradiction au cours de l'enquête. Dans ce cas, le tribunal pouvait forcer l'appelant (considéré comme tiers) de retenir l'immeuble auquel l'intimé émet des prétentions en payant la valeur de cet immeuble à l'intimé. Ici, il n'est pas nécessaire pour le tribunal de forcer l'appelant à retenir la maison puisque c'est lui-même qui demande de la retenir.

Enfin, par application de l'article 419, même si l'appelant était tenu de restituer l'immeuble sur lequel il a fait ses améliorations, dont il a droit à tout événement d'être remboursé, il lui serait permis de retenir cet immeuble "jusqu'à ce que le remboursement soit effectué".

Je répète que, d'après la façon dont le litige a été soumis à la Cour, nous ne sommes pas appelés à nous prononcer là-dessus, mais, d'autre part, comme il est bien dans l'ordre de chercher de quelle façon l'intimé pourrait procéder pour donner suite à la prétention qu'il est encore propriétaire de la maison, il me paraît qu'il est nécessaire de se demander quelles seraient les conséquences d'un jugement qui le déclarerait propriétaire.

L'article 418 s'opposerait à cette déclaration. En plus, en vertu de l'article 419, cette déclaration ne pourrait prendre un caractère absolu, car, il faudrait bien y insérer que, dans l'état de la cause, l'intimé ne pourrait reprendre possession de la maison qu'en payant la somme de $3,500 et que l'appelant aurait le droit de retenir la maison jusqu'à ce que cette somme lui fût payée.

En tenant compte de la situation et de la valeur de la maison au moment où elle a été transportée sur le terrain de l'appelant, en se rappelant que le prix stipulé dans la promesse de vente par Nadeau à Rodrigue pour tout le terrain, y compris la maison en litige, a été de $1,095, il serait inconcevable que Nadeau se décidât à payer à l'appelant la somme de $3,500. La conséquence est que l'appelant garderait la maison même si nous ne pouvions pas en venir à la conclusion que la vente que lui en a consentie Rodrigue l'a véritablement constitué propriétaire.

Passant à un autre point de vue, je ne puis m'empêcher de formuler l'avis que cette sitpulation dans des contrats du genre de celui que Nadeau a consenti à Rodrigue, à l'effet que, à défaut par Rodrigue de se conformer aux conditions de la promesse de vente, "cette promesse deviendra nulle... sans aucun remboursement, sans procédures judiciaires, de plein droit", est véritablement inexacte et contradictoire puisque le même contrat comporte expressément que Nadeau a l'option de se prévaloir de la clause de nullité ou de ne pas s'en prévaloir. Je sais bien que c'est une clause qu'on rencontre fréquemment dans les contrats notariés de la province de Québec. A mon avis, elle

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constitue un contresens et c'est bien ce qui ressort du jugement de notre Cour dans la cause de *Gagnon* v. *Lemay*, à laquelle je réfère au commencement de mes notes. En effet, il est inadmissible que la promesse de vente devienne nulle "de plein droit" si Nadeau, au contraire, conserve la faculté de la tenir pour toujours en vigueur nonobstant que Rodrigue ait failli "de se conformer à toutes les conditions stipulées aux présentes". On ne peut concevoir un contrat qui serait devenu nul et qui, néanmoins, permettrait à Nadeau de forcer Rodrigue à en observer les conditions. Il s'ensuit que cette phrase: "Cette promesse deviendra nulle... sans aucun remboursement, sans procédures judiciaires, de plein droit" doit nécessairement s'entendre (en vue du contexte du contrat) comme voulant dire que, à son gré, Nadeau ne sera pas tenu de l'observer pour l'avenir, si Rodrigue fait défaut d'acquitter ses propres obligations; mais évdemment, dans ce cas, l'on ne peut considérer la promesse comme étant nulle, si Nadeau, comme il s'en est réservé le droit, fait option pour le maintien de cette promesse de vente.

La conséquence de ce qui précède c'est que, d'après le texte même de la promesse de vente, elle ne devient pas nulle de plein droit et elle ne pourra être considérée comme nulle que du moment que Nadeau aura manifesté, à l'encontre de Rodrigue, sa décision de la tenir pour nulle à l'avenir.

Nadeau ne pouvait donc, à mon avis, et comme il a prétendu le faire en faisant enregistrer son avis sur la propriété de Dulac, s'approprier le titre de propriétaire de la maison que Rodrigue a vendue à Dulac. Il lui incombait nécessairement de commencer par faire établir son titre de propriétaire contradictoirement avec Rodrigue. Cette Cour n'a pas le droit de lui attribuer le titre de propriétaire qu'il invoque sans connaître l'attitude de Rodrigue à cet égard. En autant que le fait voir le dossier Rodrigue est bien loin d'admettre que Nadeau est redevenu propriétaire de la maison en litige puisque, dans une lettre qui est produite comme exhibit P-4, et qui porte la date du 24 août 1949, il émet la prétention "qu'il y a eu une entente de prise entre M. Odilon Nadeau et Pierre Rodrigue en vertu de laquelle M. Odilon Nadeau aurait consenti à laisser partir la maison à la condition d'avoir d'autre garantie". Cette lettre est adressée à l'appelant par le

notaire L.-P. Turgeon et elle ajoute: "Ce qui a été fait", ou, en d'autres termes, que cette autre garantie a été donnée.

Mais je viens de faire remarquer que le litige qui nous est soumis ne concerne que la maison qui se trouvait sur la terre faisant l'objet du contrat entre Nadeau et Rodrigue. Le prix de vente par Nadeau à Rodrigue a été fixé à $1,095. Il s'ensuit que la maison ne représente qu'une très minime partie de l'objet de la vente.

Conformément à la jurisprudence de cette Cour établie dans la cause de *Gagnon* v. *Lemay* (*supra*), et d'ailleurs, en vertu des termes mêmes du contrat entre Nadeau et Rodrigue (ainsi qu'il a été observé plus haut), le lien contractuel entre Nadeau et Rodrigue n'a pas été éteint automatiquement. Au contraire, Nadeau s'y réservait le droit de ne pas se prévaloir de la clause de nullité et, par conséquent, de tenir Rodrigue aux obligations que le contrat comportait pour lui.

Ce contrat est donc toujours en vigueur et il n'appartenait pas à Nadeau de se proclamer unilatéralement propriétaire de la maison, comme il l'a fait dans l'avis qu'il a fait enregistrer et dont l'appelant demande la radiation.

Indépendamment des autres raisons qui militent contre le jugement dont est appel, il reste cet argument péremptoire que les tribunaux ne peuvent pas tenir pour annulé: le contrat entre Nadeau et Rodrigue. Sûrement ils ne peuvent le tenir comme annulé seulement à raison de la maison, dont l'appelant a pris possession, tout en laissant subsister le contrat quant à la terre qui est d'emblée la partie la plus importante de la transaction entre Nadeau et Rodrigue.

Nadeau ne peut demander de prendre pour acquis que la promesse de vente a cessé d'exister à l'égard de la maison sans aucunement tenir compte des effets de cette promesse de vente relativement à la terre.

Il est vrai que, sur réception de la défense de l'intimé Nadeau, Dulac a institué une action en garantie contre Rodrigue pour lui dénoncer cette défense et porter à son attention que Nadeau prétendait être propriétaire de la maison. Rodrigue n'a pas jugé à propos d'intervenir; il a fait défaut sur cette action en garantie et il n'a pas contesté la prétention de Nadeau sur ce point. Cette abstention de

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sa part peut parfaitement s'expliquer par le fait qu'il pouvait considérer la maison en litige comme étant une partie insignifiante de l'objet de la promesse de vente entre Nadeau et lui. Toute la preuve démontre que cette maison ne valait certainement pas la peine de s'engager dans le litige dispendieux qui est maintenant soumis à la Cour Suprême du Canada. A mon humble avis, il eut été beaucoup plus simple pour Nadeau d'exiger de Rodrigue les paiements que comportait la promesse de vente que de faire enregistrer un avis pour affirmer son titre de propriétaire à cette maison.

Mais, puisque litige il y a, il faut bien que cette Cour tranche la question, et, pour ma part, je me déclare incapable dans l'état actuel du dossier d'arriver à la conclusion que Nadeau pouvait, comme il l'a fait, ignorer à la fois Rodrigue et la promesse de vente qu'il lui a consentie et se proclamer propriétaire de la maison sans que nous sachions ce qui est advenu de la promesse de vente. L'action en garantie (sur laquelle d'ailleurs on n'avait nullement attiré notre attention lors de l'audition) engageait un litige entre Dulac et Rodrigue seulement et uniquement à l'égard de la maison. Je ne vois pas comment nous pourrions déclarer que Nadeau est maintenant propriétaire de cette maison sans le faire contradictoirement avec Rodrigue.

Nous n'avons pas à citer ici la jurisprudence constante, et en particulier de la Cour Suprême, à l'effet que l'on ne peut annuler ou déclarer nul un contrat lorsque toutes les parties à ce contrat ne sont pas en cause. Il y a lieu de se demander si, entre Dulac et Nadeau seulement, nous décidions que ce dernier a automatiquement repris le titre de propriété à la maison, quelle serait la situation qui subsisterait entre Nadeau et Rodrigue, principalement à l'égard de la terre.

Tout d'abord, on ne saurait demander aux tribunaux de mettre partiellement de côté un contrat entre deux parties. Il doit être annulé pour le tout ou pas du tout. Mais, en plus, nous le répétons, il ne peut être mis de côté ou tenu pour avoir cessé automatiquement lorsque l'une des parties à ce contrat n'est pas devant la Cour.

A mon humble avis, ce raisonnement est fatal à la cause de l'intimé. Je ne me demande même pas s'il y aurait lieu encore, à l'heure actuelle, d'ordonner la mise-en-cause de

Rodrigue devant la Cour Suprême. Il est évident qu'il faudrait d'abord entendre les objections de Rodrigue à l'encontre d'un ordre de ce genre; mais, ici, je ne vois pas comment Rodrigue ne serait pas en droit de demander, qu'à cette fin, la cause retourne en Cour Supérieure. Il est difficile de croire qu'une procédure de ce genre n'entraînerait pas toute une enquête sur les faits. La Cour Suprême n'a pas été instituée dans ce but.

En plus, il s'ensuivrait, à tout événement, que l'enregistrement de l'avis par Nadeau était pour le moins prématuré. Il ne pouvait, comme il l'a tenté, s'arroger à lui-même sans contradiction avec Rodrigue un titre de propriété à la maison; et, au surplus, les autres motifs qui militent contre l'intimé seraient quand même suffisants pour faire rejeter l'attitude qu'il a prise.

J'infirmerais donc le jugement de la Cour du Banc du Roi et je rétablirais le jugement de la Cour Supérieure, avec dépens, tant dans cette Cour que dans la Cour d'appel.

TASCHEREAU, J. (dissenting):—Pour les raisons données par mon collègue, M. le Juge Fauteux, je suis d'opinion que cet appel doit être rejeté. Je désire cependant souligner brièvement les motifs qui m'amènent à cette conclusion.

Rodrigue détenait de Nadeau une promesse de vente, subordonnée à certaines conditions que d'ailleurs, il n'a jamais remplies. En supposant que quand il a vendu à Dulac les termes ne fussent pas échus, il n'est jamais devenu propriétaire, car la promesse, comme dans le cas qui nous occupe, peut n'être que conditionnée comme la vente elle-même. Alors, s'il y a tradition de la chose, la promesse de vente n'équivaut pas à vente. Il en résulte que Rodrigue a vendu la chose d'autrui, et qu'aucun effet juridique n'a résulté de cette transaction, que je m'exempte de qualifier, entre Rodrigue et Dulac, qui puisse affecter les droits de Nadeau (1487 C.C.).

De plus, l'article 416 C.C. n'a aucune application. A part quelques cas exceptionnels qui ne se rencontrent pas ici, un bâtiment est toujours un immeuble par nature (C.C. 376). Même si la maison de Nadeau a été transportée sur la terre

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de Dulac, elle n'a pas perdu ce caractère immobilier que la loi lui donne. Vide (*Chaloult* v. *Bégin* (1); *McAskill* v. *Richmond* (2); *Laprise* v. *Morin* (3).

On peut peut-être avoir en droit anglais une conception différente de la loi, mais sûrement pas en droit français. Il me semble élémentaire que, quand l'article 416 C.C. stipule que le propriétaire du sol qui construit avec les matériaux d'autrui, en acquiert la propriété, sujet à certaines conditions, cette règle ne s'applique qu'à l'incorporation de matériaux qui sont des biens meubles et non pas à un autre immeuble. C'est la jurisprudence de la province de Québec et l'opinion unanime de tous les commentateurs.

Enfin, il me semble complètement inutile d'ordonner que Rodrigue soit mis en cause. Il a reçu de la part de Dulac une action en garantie formelle, lui enjoignant de défendre le titre qu'il avait consenti, et il n'a pas jugé à propos de comparaître. Ce n'est pas le rôle de cette Cour d'intervenir pour protéger ceux qui, par leur propre négligence, permettent que leurs droits soient mis en péril.

Je confirmerais avec dépens de toutes les cours.

RAND, J.:—The undisputed facts in this appeal establish the incorporation of the structure taken by the appellant from the lands claimed by the respondent in such manner that it could not be removed intact or without substantial damage and a disruption of the entirety in which it is now embodied. On the assumption that ownership had not passed to Rodrigue, the purchaser from the respondent, what, then, is the legal result of the incorporation, and has the respondent a property interest in the appellant's land which may be protected by registration.

The general law of France dealing with such an incorporation of one thing with another is derived from that of the Romans and has been settled since the law of the Twelve Tables. As formulated by Pothier, T. 9, 3rd Ed., cap. 2, sec. 3, art. 3, para. 169 at p. 156,

> Lorsque, par mon fait, ou par celui d'une autre personne, une ou plusieurs choses ont été unies à la mienne, de manière qu'elles n'en fassent qu'une seule et même chose, et un seul et même tout, dont ma chose soit la partie principale, et dont les autres ne soient que les parties accessoires, j'acquiers par droit d'accession *vi ac potestate rei meae,* le domaine des choses qui en sont les accessoires...

(1) (1879) 5 Q.L.R. 119. (2) Q.R. (1903) 23 S.C. 381.
(3) Q.R. (1916) 50 S.C. 11.

What is effected is a transfer by law of the propriété in the accessory to the owner of the principal thing or property, a transfer based upon the fact that the two things, by the unity, constitute a new whole.

It is equally well established that in the incorporation of movable property, with the primary and natural immovable, land, the latter is principal and the thing incorporated accessory.

Art. 416 of the Civil Code embodies the general rule:—

> The proprietor of the soil who has constructed buildings or works with materials which do not belong to him, must pay the value thereof; he may also be condemned, to pay damages, if there be any, but the proprietor of the materials has no right to take them away.

but there is no implication that this provision exhauts the subject matter of accession to land. The proposition is stated by Caius thus:—

> Quum aliquis in suo loco alienâ materiâ aedificaverit, ipse dominus intelligitur aedificii; eâd. L. 7, s. 10.

(Pothier, p. 157, *supra.*)

Under the old law, (Pothier, *supra*), if the accessory was severable, an action *ad exhibendum* lay by which the owner of the principal could be forced to permit its detachment:—

> Demma inclusa auro alieno vel sigillum candelabro, vindicari non potest; sed ut excludatur ad exhibendum agi potest; L. 6, ff. ad exhib.

But to this, by the law of the Twelve Tables, there was excepted the case of erections on land with materials of another. The law in that case did not permit an enforced detachment:— "Tignum alienum aedibus junctum ne solvito:" (Pothier, *supra*). Instead, the owner of the entirety became liable for double the price of the materials; but if, before restitution, the structure was demolished, the owner could recover such of his materials as had resumed their separateness. The early French law followed that of the Roman except, (Pothier, p. 161, *supra*), the double penalty, which, as is seen, is excluded by art. 416.

The same view is expressed by Demolombe, Traité de la distinction des Biens, T. 2, paras. 96 et seq; by Aubry & Rau, Droit Civil Français, T. 2, arts. 164 and 204, in which the authors say:—

> Le propriétaire d'un fond devient, par droit d'accession, propriétaire des plantations, constructions et ouvrages qu'il y a faits, même avec les matériaux d'autrui, *et bien qu'il les ait employés de mauvaise foi.*

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by Laurent, Droit Civil Français, T. 6, art. 259: Baudry-Lacantinerie & Chauveau, Droit Civil, T. 6, art. 351: Planiol-Ripert, Traité Élémentaire de Droit Civil, T. 1, art. 2722: and Fuzier-Herman, Répertoire du Droit Français, T. 1, cap. 3, p. 333, articles 112, 113, 114. This last author, agreeing with Aubry & Rau that art. 554, Code Napoléon, makes no distinction between good or bad faith, adds:—

> Cette distinction n'a d'intérêt que pour la fixation du chiffre des dommages-intérêts.

and the only bad faith suggested here is based on the failure to examine the title to the land before removing the structure. To the same effect is the general law stated by Dalloz in Jurisprudence Générale, T. 38, p. 267, para. 407, in Nouveau Répertoire, T. 3, p. 621, arts. 135 and 136, and finally in Codes Annotés, art. 581, Code Napoléon, p. 849.

Against this uniform exposition, to which there are special exceptions not relevant here, two objections are urged: first, that the word "materials" in art. 416 is to be construed as embracing only what are at the time movables; and that as the building in this case belonged to the soil of the respondent, its unauthorized severance and re-attachment did not affect its immovable character or its ownership.

The interpretation of the word "materials" must be made in the light of the background of the rule of accession and the consideration which has lain behind it from the beginning, which was and is that, since the person who had been deprived of ordinary property could be fully indemnified in damages, the destruction involved in severance was against public interest. What the word signifies is the substance out of which the artificial addition to the natural immovable of land is made. The word used in the Roman law was "tignum" and it is interesting to observe that Gaius furnishes us with an interpretation of that term:—

> Appellatione autem tigni omnes materia esignificantur ex quibus aedificia fiunt, ...

(Pothier, *supra*, p. 161).

In that sense, everything is *material* which forms part of the resulting whole or entirety, and it makes no difference in what form it may have been at the moment of annexation. Here there was a *de facto* movable, although in

other aspects and for other purposes, such as, for instance, succession, and before reincorporation though after severance, its nature as an immovable might be held to continue.

The second objection appears to be equally unfounded. It is rejected both by the Roman law and by the law of France in relation to plants or trees which, more so than artificial structures, are part of the soil by nature:—

> Lorsque la chose qui, par son union avec la mienne sans soudure, en est devenue l'accessoire, y est tellement unie qu'elle n'en est pas séparable, le domaine que j'en acquiers par droit d'accession, vi ac potestate rei meae, est un domaine véritable et perpétuel. Tel est celui que j'acquiers de la vigne ou des arbres qui ont été plantés dans mon champ; de la semence dont il a été ensemencé; de ce qui y a été bâti, etc.

The only doubt raised by the commentators is whether the rule of succession operates on the vines and trees before they have taken root. The view of Pothier that it does not is rejected by Demolombe and others. That difference is not material here; but the fact that, constituting as they do, immovables by nature, they become by accession immovable in the soil and ownership of one who has wrongfully taken them from the land of their true owner, renders the case of an artificial structure a fortiori one of accession.

Applying these considerations to this case, they but reinforce the common sense view that, in this seeming conflict between the rules governing immovables and that of accession to the soil, it would violate a basic legal conception to hold that the framework so incorporated in the permanent structure of the appellant retained its character as an immovable related to its original situs and its ownership in the respondent: immovables by nature are bound up with certain fixed space and the attribution of that character to what fills the space when by severance it has been made in fact movable is a constructive predication of law which like every other rule is based on legal policy and becomes modified in circumstances dictating, on the ground of policy, another rule. Any right to damages which, depending upon the proper interpretation of the contract between the respondent and Rodrigue, the former may have against the appellant, is adequate to every requirement of equity and justice.

Conceivably the law might, with propriety, create in favour of the respondent what is known to the English law as a charge—equivalent to a lien—against the land of the

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appellant which would be of the nature of a security for the damages suffered: but that is derived from a jurisdiction in and principles of equity which are not recognized by the French law. In any event, it has not been claimed.

Apart from damages, by what remedy is this real right to be enforced? Is it to recover his property physically, even though that involves the partial destruction of the property of both parties? Is it a right of preferential participation in proceeds as in *Chaloult* v. *Bégin* (1)? Can there be an enforced sale by the court? If the preference arises only when the building may, at the will of the appellant, be sold, would it be affected by its loss or destruction? Would the preference extend to the proceeds of the sale of the land alone? These questions indicate what, to me, is an insuperable objection to the conclusion of the court below.

I would allow the appeal and restore the judgment at trial with costs in this Court and in the Court of Queen's Bench.

ESTEY, J.:—The appellant Dulac in this action asks that he be declared the owner of the property hereinafter described and that the notice filed against the said property by the respondent Nadeau be removed; in the alternative, that the respondent Nadeau be condemned to pay to the appellant Dulac the sum of $3,500.00 and remove the said buildings from his land.

The respondent Nadeau, on July 24, 1947, sold to Pierre Rodrigue a certain eighty acres with the buildings thereon under an agreement containing such terms that, notwithstanding Rodrigue went immediately into possession, in my view, do not permit of its being classified as a sale within the meaning of Art. 1478 C.C. *Grange* v. *McLennan* (2).

On May 24, 1948, Rodrigue purported to sell a house and shed of the buildings thereon for $500.00 to appellant Dulac, which amount the latter paid. It was specifically provided that Dulac would remove the house from the land. This he did by moving it to his own premises. There he united it with a second building which he had purchased

(1) (1879) 5 Q.L.R. 119. (2) (1885) 9 Can. S.C.R. 385.

from Morin and made such alterations and improvements as to construct a new building distinct from either of the two which had formed the basis therefor.

Rodrigue made no payment under the agreement dated July 24, 1947, and when the respondent Nadeau learned of the removal to, and the incorporation of the house and shed into another building upon Dulac's premises he registered, on October 27, 1949, a notice against the property of the appellant Dulac, claiming that he was still the owner of the buildings Rodrigue purported to sell to Dulac.

Rodrigue, having obtained no title from Nadeau, could not, under his purported sale, convey any title to Dulac. Rodrigue did, however, purport to sell and, in fact, was paid $500 for the house and shed and, as a consequence, Dulac was permitted to and did take possession. It would appear that Dulac, in utilizing Nadeau's house and shed in the construction of his building as aforesaid, became, by virtue of the law of accession, the owner thereof.

The general principle is stated by Pothier in his Works, Vol. 9, 1st Part, C. 11, S. 111, para. 169:—

> Lorsque, par mon fait, ou par celui d'une autre personne, une ou plusieurs choses ont été unies à la mienne, de manière qu'elles n'en fassent qu'une seule et même chose, et un seul et même tout, dont ma chose soit la partie principale, et dont les autres ne soient que les parties accessoires, j'acquiers par droit d'accession, vi ac potestate rei meae, le domaine des choses qui en sont les accessoires.

Then, under the rules for determining principal and accessory, he gives as part of his first example:—

> Lorsque je construis sur mon terrain un bâtiment avec des matériaux qui ne m'appartiennent pas, le domaine de mon terrain me fait acquérir par droit d'accession, vi ac potestate rei meae, celui de tous les matériaux que j'y ai employés, comme choses qui en sont accessoires.

Mignault, Vol. 2, p. 494, states:—

> Le propriétaire des matériaux employés (ou des arbres plantés) a cessé d'en avoir la propriété. Leur incorporation au sol constitue, en effet, une accession, et l'accession est un mode d'acquérir; c'est donc au propriétaire du sol qu'ils appartiennent désormais. Ils n'existent plus, d'ailleurs, à l'état de matériaux; leur substance est civilement détruite; elle a disparu dans le bâtiment, qui lui-même n'est qu'une partie du sol.

See also Langelier, Cours de Droit Civil, Vol. 2, p. 148.

In Montpetit and Taillefer, Traité de Droit Civil du Québec, Vol. 3, at p. 152, it is stated:—

> Cette solution fait échec au droit de propriété, mais le législateur l'a adoptée parce qu'elle était la meilleure en droit et en équité.

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In the Civil Code Art. 408 provides:—

408. Ownership in a thing whether moveable or immoveable gives the right to all it produces, and to all that is joined to it as an accessory whether naturally or artificially. This right is called the right of accession.

Under the heading "Of the Right of Accession Over What Becomes United and Incorporated With a Thing," Art. 413 provides:—

413. Whatever becomes united to or incorporated with a thing belongs to the proprietor, according to the rules hereinafter established.

Then Art. 416, under the same heading as Art. 413, and one of the rules referred to in that article, provides:—

416. The proprietor of the soil who has constructed buildings or works with materials, which do not belong to him, must pay the value thereof; he may also be condemned, to pay damages, if there be any, but the proprietor of the materials has no right to take them away.

The word "thing", as used in Arts. 408 and 413, must be given the same meaning and, therefore, as expressed in Art. 408, includes both movables and immovables. Then the word "whatever", as used in Art. 413 without limitation, would include anything movable or immovable that might be joined to another movable or immovable.

Under the general provision of Art. 413 the act of accession determines the question of ownership. If that act of accession is one of a type which comes within the terms of Art. 416, this latter provides that the owner of the materials, as Nadeau, "has no right to take them away," but may recover from Dulac "the value thereof" and, in a proper case, damages. In brief, Art. 416, once an accession of the type there described has taken place, preserves the property and directs compensation.

It is, however, contended that the foregoing Art. 416 does not apply because the house and shed, though transported by Dulac to his own land and there used in the construction of a building, remained throughout an immovable by nature in which Nadeau retained a real right and that he was, therefore, entitled to register the notice, the removal of which is requested in this action.

This contention raises a question as to the scope and meaning of Art. 416 and in particular of whether the word "materials," as there used, includes both immovables and movables, or movables only. A construction of the word "materials," that would restrict it to, and, in effect, make

it synonymous with the word "movables" would appear to be unwarranted. As ordinarily used and understood in such a context, the word "materials" includes everything movable or immovable, necessary or incidental to the completion of the buildings or works. The sections immediately preceding, in particular 408 and 413, make it clear that the law of accession is applicable to both movables and immovables. A construction of the word "materials" that would limit or restrict its meaning to movables in Art. 416 would give to one in Nadeau's position compensation under that article if the materials of his used by Dulac were movables, but, if immovables, he would have to find his redress elsewhere. In this connection it is important to note that no other article deals with his position and the detail with which the immediately succeeding articles deal with the various possibilities leads to the conclusion that, had the Legislature intended to so restrict the word "materials," it would have included a further provision specifically covering the use of immovables in the construction of a building.

That the word "materials" should include both movables and immovables is strenthened by a consideration of the principle underlying the law of accession and the prohibition and compensation provided for in Art. 416. This latter article in particular is intended to provide a fair and practical solution of the situation created by an owner who, in constructing a building on his own land, uses materials of another, by providing compensation to the owner of the materials and avoiding the destruction of the immovable. The principle applies with equal force to the use and presence of both movables and immovables.

Moreover, it may be observed that Art. 554 of the Code Napoléon applied to both movables and immovables and the word "materials," as there used, would appear to apply to both. It is significant that when the word "plantations" was omitted from Art. 416 the word "materials" remained, without any qualification whatever. The Legislature, in deleting the word "plantations" but leaving the word "materials," without qualification, evidenced an intention not to affect the meaning of the word "materials," which would then include the shed and buildings herein described upon the basis that they were, at the time of the accession, immovables.

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Moreover, this view finds some support in the remarks of certain of the authors which would indicate that in reality land is the only immovable by nature. Langelier, Cours de Droit Civil, Vol. 2, p. 101: "On pourait dire qu'il n'y a d'immeubles par nature, en réalité, que les fonds de terre," and Mignault, Droit Civil Canadien, Vol. 2, p. 400: "A proprement parler, les fonds de terre sont, parmi les biens, les seuls qui soient de véritables immeubles par leur nature:" It may be that Mr. Justice Marchand, in *Thiffault* v. *Gagnon* (1), had in mind the foregoing remarks of the learned authors where, in the circumstances of that case, he held a shop, sold with the intent of its being moved to another location, should be treated as a movable.

It would appear that having regard to the foregoing, as well as the history and principle underlying the law of accession, that the word "materials" is here used in a broad and comprehensive sense which would include the attachment or incorporation of a small building with a larger one, when the latter is attached to the land.

We were referred to the case of *Leprise* v. *Morin* (2). There the owner had moved his building attached to a parcel of his own land subject to a hypothec to another parcel of his own land and it was held that, notwithstanding the transfer of the building, it remained subject to the hypothec. That case is quite distinguishable in that it does not involve any question of accession and, therefore, no question under Art. 416.

That the authors, in the main, restrict their discussion under Art. 416 C.C. or 554 C.N. to the use of movables in the construction of a building is but to be expected. In normal circumstances movables only would be used. The case here presented is unusual. While there are statements which would indicate that only movables have been considered, with great respect I do not find any statement that goes so far as to indicate that if a case of immovables were specifically under consideration that the word "materials" would be construed to mean movables only.

Dulac used the house and shed in question and another building, along with other material, in the construction of an entirely different building upon his own land. He valued this other building at $3,500.00, an amount much in

(1) Q.R. (1934) 72 S.C. 563. (2) Q.R. (1916) 50 S.C. 11.

excess of the purchase price of the other buildings. In the course of constructing this other building he found it necessary to alter the building received from Rodrigue by providing what he described as a new chassis, a new roof and about half of the uprights, replacing the doors and windows, rebuilding the verandah and shed and finally covering the entire building with a material he described as "de l'imitation de briques".

In these circumstances there was an accession and thereby the ownership of the building claimed by Nadeau passed to Dulac. It is that act of accession which changes the ownership, as stated by Mackeld, Roman Law, p. 155: "that in virtue of this connection it is regarded as part and parcel of the thing," or, as Pothier states in the foregoing quotation: "j'acquiers par droit d'accession". It matters not who the owner may have been previous to the accession, nor, with great respect to those who hold a contrary view, does it matter that the materials may, after the accession, be identified. Moreover, whether a person in the position of Dulac has acted in good or bad faith does not affect his title to the property, but may be important in fixing compensation.

The appeal should be allowed with costs throughout.

FAUTEUX, J. (dissenting):—Les faits donnant lieu à ce litige sont les suivants:

Le 24 juillet 1947, l'intimé Nadeau devenait propriétaire d'un certain lot de terre et de toutes les bâtisses y érigées. Il en paya le prix comptant et l'acte de vente, enregistré dans les quatre jours suivants, demeurait encore, au temps du présent procès, le dernier titre en date apparaissant à l'index aux immeubles. Le même jour, l'intimé et un certain Pierre Rodrigue, faisaient, relativement aux mêmes lot et bâtisses, une convention dont il convient—pour fins de référence—de reproduire et numéroter les clauses essentielles.

> 1° Monsieur Nadeau promet vendre, avec garantie de ses faits personnels seulement, à M. Rodrigue qui s'oblige d'acheter, la terre qu'il a acquise aujourd'hui, de monsieur Lucien Desrochers, cultivateur de St-Georges de Beauce, autrefois de St-Prosper, par acte devant moi, laquelle fait partie.....avec les bâtisses y construites.....

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2° *La vente se fera* pour le prix de mille quatre vingt quinze dollars que M. Rodrigue paiera en deux versements; cent cinquante dollars le vingt-quatre juillet mil neuf cent quarante-huit et neuf cent quarante-cinq dollars, le vingt-quatre juillet mil neuf cent quarante-neuf, le tout sans intérêt.

3° Cette promesse de vente *ne devra pas être enregistrée* et *l'acte de vente se fera* sur paiement du dernier versement.

4° M. Rodrigue paiera toutes taxes et contributions publiques auxquelles pourrait être tenu ledit Odilon Nadeau; la prime d'assurance que prendra M. Nadeau pour le montant dû, et ses renouvellements s'il y a lieu; il maintiendra les bâtisses en bon état de réparations au moins telles qu'elles sont actuellement; il entretiendra la terre en état de culture comme elle est actuellement au moins.

5° A défaut par M. Rodrigue d'acquitter les versements à l'échéance, et de se conformer à toutes les conditions stipulées aux présentes, tel que convenu, cette promesse deviendra nulle et M. Nadeau disposera de la propriété comme il l'entendra sans indemnité pour les améliorations qui auront pu avoir été faites sur la propriété, sans aucun remboursement, sans procédures judiciaires, de plein droit.

6° Il est expressément convenu que si M. Nadeau se prévaut de la clause de nullité ci-dessus et revend la terre à un prix inférieur à tout ce qu'elle lui coûtera lors de la vente, il aura recours contre Pierre Rodrigue, pour toute la balance qu'il justifiera lui être due; et ledit Pierre Rodrigue s'engage à le rembourser sur demande, se tenant responsable et redevable de telle balance.

Fait à St-Prosper, etc.....
.....

Au temps de l'audition, Rodrigue n'avait encore satisfait à aucune des obligations par lui assumées. Il avait, néanmoins, coupé et pris du bois sur la terre et—fait matériel conduisant à procès—à une date assez imprécise en 1948, il disposait en faveur de l'appelant Dulac, de certaines

bâtisses situées sur ce lot et, ce, suivant les termes d'un écrit sous seing privé se lisant comme suit:

Je, soussigné, Emmanuel Dulac, de St-Prosper, achète de J.-Pierre Rodrigue commerçant de Beauceville, une maison avec chède à bois située sur le lot porté 9 rang neuf paroisse St-Prosper et l'enlever d'ici au 1er août 1948 pour le prix et somme de $500.00 cinq cents piastres payer en argent.

et nous avont signé.

témoin:

J. PIERRE RODRIGUE
FERNAND VEILLEUX
EMMANUEL DULAC.

C'est sous l'autorité de cette convention avec Rodrigue que l'appelant Dulac s'empare des bâtiments y décrits pour les transporter sur son propre terrain et adjoindre à la maison de Nadeau une autre bâtisse qu'il y transporte subséquemment et, de ce tout, qu'il répare et améliore, faire sa résidence.

L'intimé Nadeau n'apprit que plus tard ces agissements de l'appelant Dulac et de Rodrigue et, ce, à l'occasion d'une démarche faite par lui pour rencontrer son débiteur Rodrigue relativement au défaut d'icelui de satisfaire aux obligations assumées en la promesse de vente précitée. Vainement l'intimé Nadeau chercha-t-il aussi à rencontrer l'appelant Dulac pour établir et faire valoir ses droits sur ses bâtiments. Il enregistra donc, sur l'emplacement où l'appelant Dulac l'y avait transporté, un avis dénonçant à toutes fins son droit de propriété sur sa "maison d'habitation". C'est l'enregistrement de cet avis qui déclencha les procédures judiciaires.

Par son action, l'appelant, alléguant la vente de cette bâtisse à lui consentie par Rodrigue, ainsi que les réparations et améliorations ci-dessus indiquées, demande que son terrain et sa maison d'habitation "soient déclarés lui appartenir franc et quitte de tous droits quelconques en faveur" de l'intimé; que ce dernier soit condamné à radier à ses frais tous les droits lui résultant de l'enregistrement de l'avis: que l'appelant soit autorisé à suppléer au défaut de l'intimé de ce faire, par l'enregistrement, du jugement à intervenir et, enfin, qu'advenant l'impossibilité d'annuler et radier cet enregistrement, l'intimé soit condamné à lui payer la somme de $3,500.00 pour améliorations aux bâtiments, et soit, dans ce cas, condamné à les enlever du terrain de l'appelant; avec dépens dans tous les cas.

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Sur réception de l'action, l'intimé produisit une confession de jugement ainsi libellée:

> Le défendeur, n'ayant jamais prétendu et ne prétendant pas à la propriété de l'emplacement dont le demandeur se dit propriétaire, consent à ce que le demandeur obtienne jugement le déclarant propriétaire de l'emplacement, le tout sans frais.

Cette confession de jugement étant refusée par l'appelant, l'intimé plaida en substance le maintien—nonobstant la promesse de vente—de son droit de propriété sur ces bâtisses et, par suite, l'inexistence du droit de Rodrigue d'en disposer et la validité de l'avis par lui enregistré pour la protection de ses droits.

Le juge de première instance rejeta cette défense et motiva le maintien de l'action en déclarant que l'appelant Dulac avait, de bonne foi, acheté ces bâtisses de Rodrigue, que ce dernier, ayant d'ailleurs une promesse de vente accompagnée de tradition et possession, était devenu le propriétaire de ces bâtiments avec droit de les revendre à Dulac, et que l'adjonction d'iceux à une autre propriété de l'appelant en rendait la division et la remise à l'intimé impossibles. En conséquence, les bâtisses en litige furent déclarées être la propriété de l'appelant, "franc et quitte de tous droits quelconques en faveur" de l'intimé, ce dernier étant condamné à radier à ses frais tous les droits lui résultant de l'enregistrement de l'avis et l'appelant fut autorisé de suppléer au défaut de l'intimé de ce faire, par l'enregistrement du jugement; le tout avec dépens.

Nadeau appela de cette décision. La Cour d'Appel (1), lui donnant raison, déclara par jugement formel que Dulac n'avait pas établi être devenu propriétaire de la maison transportée, que Rodrigue, son auteur, n'y avait lui-même aucun droit sauf une promesse de vente assujettie à des conditions jamais remplies, que l'avis enregistré par Nadeau était valide et que Dulac ne pouvait en exiger la radiation, ni demander à être déclaré propriétaire de cette bâtisse, "franc et quitte de tous droits quelconques en faveur" de Nadeau. La confession de jugement fut donc déclarée suffisante, le jugement de la Cour Supérieure infirmé et l'action pour le surplus rejetée avec dépens. D'où le présent appel.

(1) Q.R. [1951] K.B. 405.

A l'établissement de son droit à la maison en litige, l'appelant invoque la vente qui lui en a été faite par Rodrigue. Celui-ci, cependant, ne pouvait avoir et consentir à l'appelant d'autres droits sur icelle que ceux lui résultant de la promesse de vente intervenue entre lui-même et l'intimé Nadeau. Si donc, aux termes de cette convention, Rodrigue n'est jamais devenu propriétaire de cette bâtisse, il a vendu à Dulac la chose d'autrui. Pareille vente étant, aux termes de l'article 1487 du *Code Civil,* nulle en principe et aucune des exceptions à ce principe auxquelles réfère cet article n'ayant ici d'application, Dulac ne peut, dans cette alternative, victorieusement opposer à Nadeau cette vente, ni d'ailleurs—comme nous le verrons—la bonne foi et le fait de l'adjonction de cette bâtisse à la sienne. Ainsi apparaît-il que la question fondamentale à déterminer est celle de savoir si Rodrigue a, par cette promesse de vente, acquis un droit de propriété sur cette bâtisse que Dulac a ainsi transportée sur son sol.

Pour répondre affirmativement à cette question, le savant juge de première instance s'est appuyé sur les dispositions de l'article 1478 prescrivant que "la promesse de vente avec tradition et possession équivaut à vente". On ne conteste pas le fait que la promesse de vente ait été, en l'espèce, accompagnée de tradition et possession, mais cela n'épuise pas la question. En effet, comme la vente elle-même, la promesse de vente peut bien ne pas être pure et simple et aucun principe n'empêche les parties de conditionner et suspendre, par exemple, le transfert du droit de propriété aux choses en faisant l'objet, à l'avènement d'un fait futur. La convention demeure donc la loi des parties et leur intention sur le point doit être recherchée dans ce qu'elles y ont exprimé.

La doctrine sur l'effet des dispositions de cet article est ainsi exprimée par Mignault, au Vol. 7, page 29:

> Je n'ai envisagé jusqu'ici que la promesse de vente pure et simple. Il me reste à parler de la promesse de vente conditionnelle, car, comme la vente elle-même, la promesse de vente peut être consentie sous une condition suspensive ou résolutoire. La condition que nous rencontrons le plus souvent, c'est la condition suspensive, et alors le bénéficiaire de la promesse, même lorsqu'il a eu tradition et possession actuelle de la chose, n'en devient propriétaire que lorsque la condition s'est accomplie. Ainsi le promettant a stipulé que le bénéficiair ene deviendrait propriétaire que sur paiement du prix. Dans ce cas, malgré la tradition, le promettant conserve le droit de propriété tout comme le ferait le vendeur sous une vente conditionnelle.

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J'ai cité supra, note (a), p. 6, les décisions relatives à la rétention du droit de propriété par le vendeur.

Quelle interprétation devra-t-on donner à la clause par laquelle le vendeur s'engage à donner un titre lorsque le prix sera payé? Il faudra avant tout rechercher l'intention des parties. Malgré que la promesse de vente ait été accompagnée de tradition et possession, s'il appert que les parties ont voulu réserver à un acte postérieur l'effet de transférer la propriété, on devra décider que le promettant a conservé le droit de propriété en sa personne.

La jurisprudence est d'accord avec cette doctrine. Voir, entre autres, l'arrêt de cette Cour dans *Grange* v. *McLennan* (1) et celui de la Cour du Banc du Roi (siégeant en appel) dans *Goyette* v. *Sherbrooke Trust Co. and Bradford* (2).

Référons maintenant à la promesse de vente intervenue entre l'intimé Nadeau et Rodrigue, l'auteur de l'appelant. On y voit que les parties ont expressément suspendu, ajourné et conditionné la vente,—ce fait juridique opérant le transfert de propriété—aussi bien que l'acte devant le constater, au paiement intégral du prix arrêté dans l'entente. "La vente se fera...", "l'acte de vente se fera...", a-t-on textuellement convenu et, ce, respectivement aux clauses 2 et 3 précitées. On a, de plus, inclus en cette dernière clause une prohibition absolue et définitive d'enregistrer la promesse de vente. La présence de ces dispositions en la convention ne s'expliquent pas à moins d'y voir la manifestation de l'intention et volonté de Nadeau, non seulement de suspendre le transfert du droit de propriété de ses biens à Rodrigue, mais de mettre, par cette prohibition, ce dernier dans l'impossibilité d'efficacement prétendre, vis-à-vis des tiers, en être propriétaire et en disposer avant paiement du prix. Il y a donc, en cette convention, soit dit avec déférence, une condition suspensive attachée au transfert du droit de propriété et, alors, il n'importe plus de savoir si, au moment où Rodrigue vendait à l'appelant Dulac, il était en défaut ou non de faire l'un des versements du prix puisque ce n'est qu'au complet paiement qu'il pouvait devenir propriétaire avec droit de vendre.

Enfin on a,—comme il se devait—, aux clauses 5 et 6, prévu le cas du défaut de Rodrigue de faire les paiements à l'échéance et de satisfaire aux autres conditions du contrat. On pourvoit alors à la résolution de la promesse et

(1) (1885) 9 Can. S.C.R. 385. (2) Q.R. [1943] K.B. 467.

on définit les droits des parties. Mais la présence, en ces dernières clauses, d'une condition résolutoire annulant cette convention, au défaut de Rodrigue de satisfaire à l'échéance à l'un des versements du prix, n'affecte ni l'existence ni les conséquences juridiques de la condition suspensive assujettissant au complet paiement du prix le transfert du droit de propriété. Ce sont là deux questions différentes. Nadeau peut bien, advenant le défaut de Rodrigue de satisfaire à ses obligations, être libre de prendre ou de ne pas prendre avantage de cette condition résolutoire et s'abstenir de mettre fin au lien contractuel, en ne liquidant pas l'affaire ainsi que prévu en telle éventualité. C'est là son privilège. Mais comment Rodrigue peut-il prétendre que son propre défaut,—donnant ouverture à ce privilège de Nadeau—, même accompagné de l'abstention de ce dernier de l'exercer en plénitude, pourrait avoir l'effet d'opérer un transfert du droit de propriété que, seul, l'accomplissement fidèle de ses obligations peut lui assurer, suivant la convention.

Il faut donc arriver à la conclusion que Rodrigue, n'ayant jamais satisfait à aucune obligation, n'a jamais acquis un droit de propriété sur les bâtisses de l'intimé Nadeau, et qu'en les vendant à l'appelant Dulac, il lui a vendu la chose d'autrui. Pareille vente étant nulle, dans les circonstances de cette cause,—il ne s'agit ici ni d'une affaire commerciale, ni d'un bien mobilier—, Dulac ne peut l'opposer à Nadeau.

Reste à considérer l'argument de bonne foi et celui qu'on prétend tirer du fait de l'adjonction des bâtisses de Nadeau à celle de Dulac.

L'appelant soumet qu'il ignorait que Rodrigue n'était pas propriétaire, et qu'au contraire, l'ayant vu couper et prendre du bois sur ce lot, il le tenait comme tel. En quoi ceci peut-il affecter la question? Aux termes de l'article 1487, l'acheteur de bonne foi peut recouvrer des dommages-intérêts de celui qui lui a vendu la chose d'autrui, mais cette bonne foi,—hors les cas d'exceptions, ici d'aucune application—n'a pas la vertu de valider cette vente déclarée nulle. D'ailleurs, l'appelant peut-il même ici prétendre à cette bonne foi? L'intimé Nadeau apparaissait au bureau d'enregistrement comme propriétaire et Rodrigue n'y avait lui-même aucun titre enregistré. Ces

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faits—ainsi publiés—Dulac ne les a pas vérifiés. En droit, il était censé les connaître, et ne peut légalement prétendre les avoir ignorés. Il y a ici une présomption *juris et de jure*. Il ne peut donc plaider bonne foi (*Bulmer et al* v. *Dufresne et al*), (1); *Meloche* v. *Simpson* (2); *Groulx* v. *Bricault* (3). La doctrine exposée dans ces décisions a été, encore tout récemment, reconnue et appliquée par la Cour d'Appel dans *Baril* v. *Bolduc et Cornellier* (4). Ajoutons que Dulac n'a même exigé de Rodrigue aucun titre justifiant d'un droit à ces bâtisses. Il a été imprudent. Comment peut-il valablement invoquer cette imprudence contre Nadeau?

Enfin et pour se faire reconnaître un droit de propriété sur les bâtisses de Nadeau, l'appelant se prévaut, en fait, de l'adjonction d'icelles à la sienne sur son sol et, en droit, des dispositions de l'article 416 du *Code civil*:

> Le propriétaire du sol qui a fait des constructions et ouvrages avec des matériaux qui ne lui appartiennent pas doit en payer la valeur; il peut aussi être condamné à des dommages-intérêts, s'il y a lieu; mais le propriétaire des matériaux n'a pas le droit de les enlever.

Cet article fait sans doute échec au droit du propriétaire des matériaux utilisés par le propriétaire du sol dans ses constructions et ouvrages. Mais comment l'appelant peut-il prétendre être dans le cadre de ces dispositions et avoir fait des constructions et ouvrages avec les *matériaux* de Nadeau quand c'est le *bâtiment* lui-même qu'il a transporté pour y adjoindre, et non y incorporer, une autre bâtisse subséquemment également transportée sur son sol.

En fait:—A la vérité et comme résultat de ces opérations de Dulac,—déplacement et adjonction—, ce bâtiment n'a jamais été démoli. Il a sans doute été l'objet de grosses réparations mais il a conservé son identité et c'est précisément parce qu'il a été reconnu par le secrétaire-trésorier de la municipalité que Nadeau apprit de ce dernier l'endroit où Dulac l'avait transporté. Nadeau a reconnu sa maison. Desrochers, qui l'avait habitée et la lui avait vendue, l'a reconnue également. Dulac lui-même admet ces faits. Voyons son propre témoignage, page 15:

> Q. A l'heure actuelle, vous avez deux maisons?—R. Oui, collées ensemble.
>
> Q. Où avez-vous pris l'autre maison?—R. Dans le rang St-Denis.
>
> Q. De qui?—R. De M. Morin.

(1) (1883) 3 D.C.A. (Dorion) 90.
(2) (1898) 29 Can. S.C.R. 375 at 394.
(3) (1921-22) 63 Can. S.C.R. 32 at 43.
(4) Q.R. [1952] K.B. 611.

page 19:

Q. Alors, ces deux maisons ont été mises bout à bout?—R. Par rapport qu'elles sont collées ensemble.

Q. C'est comme une rallonge?—R. C'est entendu que je l'ai rallongée.

Q. Alors, c'est comme une rallonge, une cuisine d'été, par exemple?—R. Oui.

Q. Alors, ces deux maisons qui sont côte à côte conservant leur identité?—A. C'est pas une maison...

Q. Comme une cuisine d'été qui fait partie d'une maison?—R. Oui.

En droit:—De toute évidence, ces "matériaux" dont parle l'article 416 sont des *meubles* alors que, d'autre part, le bâtiment, auquel l'article prévoit l'incorporation des matériaux, est lui-même, suivant l'article 376 C.C., un *immeuble par nature*. L'appelant n'a jamais contesté cette proposition de droit.

Cependant on soutient de sa part, pour le maintien de son appel, que le mot "matériaux" a, dans la disposition de l'article 416, un sens différent de son sens usuel, soit, suivant Larousse: "Matières qui entrent dans la construction d'un bâtiment, comme la pierre, le bois, la tuile, etc.". que, de plus, le mot "matériaux" comprend les biens immeubles aussi bien que les meubles et que, dans le cas actuel, où l'on a joint deux maisons l'une à l'autre, ces maisons sont des "matériaux", et que les dispositions de l'article 416 sont applicables à l'espèce.

Avec déférence, je ne puis me rendre à ces vues et me vois dans la nécessité de rappeler que, non seulement les autorités ne supportent pas cette interprétation nouvelle du mot "matériaux", mais qu'elles établissent et affirment que depuis le jour où la loi romaine créa cette exception au droit de propriété, dont le principe est maintenu en l'article 554 du Code Napoléon et en notre article 416, jamais le mot n'a eu d'autre sens que son sens usuel, qu'il ne comprend pas les immeubles, mais seulement les meubles, et encore, seulement ces biens meubles se qualifiant comme matériaux.

Des dispositions de l'article 416 font, comme déjà indiqué, échec au droit du propriétaire des matériaux puisqu'elles annulent, dès leur incorporation au bâtiment, son droit de propriété et qu'elles l'empêchent de revendiquer ce qui lui appartient. Cette exception au droit de propriété remonte à une disposition de la Loi des Douze Tables dont

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le texte original et la traduction apparaissent au vol. 5, 143, des Pandectes Françaises (1804). Voici la disposition:

Si le bois (tignum) d'autrui a été employé et joint à un autre édifice ou à une vigne, qu'il n'en soit point séparé mais que celui qui l'a employé soit condamné au double: si le bois n'est encore que façonné ou lorsque l'édifice sera détruit, que le propriétaire ait le droit de le revendiquer.

Et on ajoute, au bas de la page 144:

Enfin, les jurisconsultes Ulpien, Caius, et l'Empereur Justinien nous apprennent que, par la suite, on a compris sous le mot tignum (bois), tous les matériaux quelconques employés dans un édifice ou dans les vignes: non seulement les bois, mais aussi les pierres, les moellons, le ciment, la chaux et ce qui sert à couvrir les maisons, comme la tuile, l'ardoise et autres matières.

Le motif de cette exception au droit de propriété, tel qu'énoncé à la page 146,

fut d'empêcher que les ruines des maisons abattues ne rendissent désagréable l'aspect de la ville et que l'on ne troublât la culture de la vigne.

Chavot (1739). Traité de la Propriété Mobilière. Tome 2, 263, N° 529:

Les matériaux assemblés pour construire un édifice sont meubles (art. 532) et ils restent meubles jusqu'à ce qu'ils aient été employés par l'ouvrier dans la construction. Mais alors, et dès l'instant de leur union, les matériaux ne font plus qu'un seul et même corps avec la construction, ils appartiennent au même propriétaire, soit que la matière soit à d'autres que le constructeur, soit qu'elle appartienne au constructeur lui-même, mais que l'édifice ne lui appartienne pas en vertu de ce principe: *Id quod solo inaedificatum est, solo cedit.* Il importe peu, quant à la propriété de l'édifice, qu'il ait été construit par le propriétaire du sol avec les matières d'autrui (art. 554), ou que le maître de la matière l'ait construit sur le sol d'autrui (art. 555); dans l'un et l'autre cas, il appartient au propriétaire du sol, sauf indemnités.

Il ne s'agit pas ici d'exposer comment un immeuble (l'édifice) devient l'accessoire d'un autre immeuble (le sol), mais bien comment des objets meubles (les matériaux) deviennent l'accessoire d'un immeuble (l'édifice).

A. Valette (1879) De la Propriété et de la Distinction des Biens, 148:

On y suppose que le propriétaire du terrain a fait entrer dans sa construction *tignum alienum,* mots qui s'entendent de toute espèce de matériaux appartenant à autrui, qui ont pu servir à bâtir: *appellatione autem tigni omnis materia significatur, ex qua oedificia finit.* En ce cas, d'après les règles ordinaires du droit romain, le propriétaire des matériaux aurait dû pouvoir exercer une action dite *ad exhibendum,* pour faire détacher et représenter les matériaux englobés dans le corps de l'édifice, et les revendiquer ensuite. Mais la Loi des Douze Tables avait interdit, en pareil cas, l'emploi de ces moyens juridiques, au moins à l'égard du constructeur de bonne foi, et cela dans l'intérêt de la conservation des édifices, *ne oedificia rescindi necesse sit.*

Œuvres de Pothier, Bugnet, 3e édition, tome 9, 161:

La Loi des Douze Tables avait apporté dans un cas une exception au droit qu'a celui à qui appartient la chose unie à la mienne d'en demander la séparation; c'est dans le cas auquel j'aurais employé dans mon bâtiment quelques matériaux qui ne m'appartenaient pas..... Dans notre droit français, nous suivons cette décision de la Loi des Douze Tables, sauf la peine du double qui n'y est pas en usage. On se contente, dans notre droit de condamner celui qui a employé *dans son bâtiment* des *matériaux* qui ne lui appartenaient pas, à rendre à celui à qui ils appartenaient le prix qu'ils valent suivant l'estimation qui en doit être faite par des experts.

Analyse Raisonnée de la Discussion du Code Civil (1822) 3e édition, tome 2, 32. Jacques de Maleville, l'un des rédacteurs du Code Civil Français, fait le commentaire suivant sur l'article 554 du Code Napoléon:

Je crois que cette décision est juste en général et pour ce qu'on entend *communément par matériaux.*

Toulier. Droit civil français (1824) 4e édition, tome 3, 82, N° 126:

Mais remarquez que le Code ne parle que des matériaux; c'est aussi pour les matériaux proprement dits que la disposition fut anciennement introduite.

Zachariae. Cours de droit civil français (1850) 2e édition, tome 1, 203, annotation N° 1:

L'article 554 ne parle que de *matériaux proprement dits.*

Dalloz. Répertoire de Jurisprudence (1857) tome 38, 267, N° 407:

Les motifs juridiques pour lesquels le propriétaire des matériaux ne peut plus les revendiquer sont manifestes; et, en effet, du moment qu'il y a eu incorporation au sol, les matériaux n'existent plus comme matériaux; ils ont perdu leur individualité et leur substance a péri; il n'y a plus désormais des pierres, des bois ou des arbres, etc.: il y a une maison, un sol planté, etc.: c'est donc le cas pour le propriétaire de ces matériaux dont l'individualité a péri de subir l'application de la règle *res-extincte vindicari non possunt.*

Code Civil (1873) 7e édition, tome 2, 419. Marcadé, commentant sur les dispositions de l'article 554 et sur la nécessité pour celui qui se prétend propriétaire de matériaux de faire une preuve repoussant la présomption établie au bénéfice du propriétaire du sol, dit:

Si vous faites cette preuve, les ouvrages ne m'appartiendront pas moins car *accessio cedit principali*: ces objets mobiliers, ces matériaux qui vous appartiennent n'existent plus comme tels et ne peuvent plus être revendiqués.

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Droit civil français (1878) 3e édition, tome 6, 339 N° 260. Laurent note que l'article 554 déroge aux principes généraux et ajoute:

Quel en est le motif? Il est très simple: C'est qu'il n'y a plus d'*objets mobiliers* que le propriétaire puisse revendiquer. Ils sont devenus immeubles par incorporation. Ils n'existent donc plus dans leur nature première, tels qu'ils appartenaient à leur ancien maître, ce qui exclut la revendication.

A. Demante: Cours Analytique de Code Civil (1881) 2e édition, 427, N° 390:

Mais à quel moment les matériaux, arbres ou plantes, perdent-ils leur existence propre pour faire partie intégrante du sol ou de l'édifice? Pour les matériaux, il n'y a pas de difficulté, c'est du moment où ils sont employés dans la construction et bien entendu qu'il n'est pas nécessaire que l'édifice soit achevé.

De Molombe: Traité de la Distinction des Biens (1881) tome 1, 582, N° 664:

L'expression *matériaux* n'est pas, de son côté, moins vaste; pierre, bois, fer, sable tuiles, plantes, vignes, etc. Tout ce qui peut être employé, enfin, dans des ouvrages de ce genre y est compris. Et il importerait peu que les *meubles* d'autrui employés par le propriétaire du sol fussent préparés et façonnés; ils n'en seraient pas moins compris dans l'expression de *matériaux* et l'art. 554 serait applicable dès qu'ils seraient une fois immobilisés par leur incorporation avec le sol.

Pandectes Françaises, tome 1, Nouveau Répertoire (1886) 319, N° 61:

L'article 554 déroge aux principes généraux en enlevant au propriétaire des matériaux la faculté de les revendiquer. Cette disposition qui semble porter une atteinte sérieuse au droit de propriété, se justifie cependant par l'incorporation des matériaux *qui les a rendus immeubles et leur a enlevé leur nature première.*

N° 65:

L'incorporation des matériaux au sol est nécessaire car l'article 554 s'appuie précisément, comme nous l'avons fait remarquer, sur le fait que ces matéraiux ont *changé de nature* et n'existent plus dans leur ancienne individualité. Il faut donc, pour déterminer l'application de cet article 554, que ces matériaux *soient devenus immeubles par nature* et non pas qu'ils aient simplement revêtu le caractère d'immeubles par destination.

Aubry et Rau: Cours de droit civil français (1935) 6e édition, tome 2, 363:

La disposition de l'article 554 *ne s'applique qu'aux objets mobiliers* qui, par leur incorporation dans le sol ou dans un bâtiment, sont devenus immeubles par nature, et non à ceux qui ont simplement revêtu le caractère d'immeubles par destination.

Fizier-Herman: Code Civil Annoté (1935) tome 1, 755:

L'article 554 suppose que le propriétaire du sol n'était pas devenu propriétaire des matériaux par la simple possession en vertu de l'article 2279. Cet article 2279 du *Code Napoléon* établit une présomption relativement aux meubles exclusivement et la référence à cet article implique la reconnaissance du caractère mobilier des matériaux.

Planiol et Ripert:—Traité Pratique de Droit Civil Français, (1926) 2e édition, Tome 3, N° 264:

Les questions qui vont être examinées par ces deux hypothèses supposent toutes qu'il y a eu *incorporation matérielle,* c'est-à-dire qu'il s'agit de matériaux de construction employés dans un bâtiment et *devenus immeubles par nature.* C'est donc dans ce cas-là seulement que l'accession fonctionne pour faire acquérir la propriété.

Colin et Capitant:—Droit Civil Français (1947) tome 1, 931, N° 1143:

1° Il faut qu'il y ait eu incorporation matérielle des objets mobiliers au sol.

Girard: Droit romain (1924) 7e édition, 344. En traitant de l'acquisition de la propriété par le rapprochement de deux choses, c'est sous le troisième sous-titre "Rapprochement de meubles et d'immeubles", que l'auteur traite de l'exception créée par la Loi des Douze Tables.

A tout cela, faut-il ajouter que, légiférant sur la distinction des biens, le *Code Civil* de la province de Québec, reproduisant en cela l'article 532 du *Code Napoléon,* édicte à l'article 386 que:—

Les matériaux provenant de la démolition d'un édifice, ou d'un mur ou autre clôture, *ceux assemblés pour en construire de nouveaux,* sont meubles tant qu'ils ne sont pas employés.

Je crois que ces références suffisent pour établir que le mot "matériaux", dans l'article 416, doit être pris dans son sens usuel, qu'il ne comprend pas les immeubles, qu'il ne s'applique qu'aux meubles, et à ces meubles se qualifiant, suivant le sens usuel, comme matériaux et que ce n'est que par le fait de l'incorporation au bâtiment que ces matériaux perdent leur nature mobilière pour acquérir alors celle du bâtiment et devenir la propriété du propriétaire de ce dernier. Après transport sur la propriété de Dulac, ni la maison de Nadeau ni celle de Morin ne constituaient des matéraiux et ceci est une raison plus que suffisante pour empêcher l'application des dispositions de l'article 416 à cette cause.

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Mais il y a plus. En effet, et quant au bâtiment de Nadeau,—et on pourrait ajouter, celui de Morin—, il s'agit clairement d'immeubles par nature suivant les dispositions de l'article 376 C.C. Sans doute, on peut bien, ainsi qu'on le fait remarquer dans Colin et Capitant, Cours Élémentaire de Droit Civil Français, XI[e] édition, tome 1, N° 922, ou dans les termes de Planiol et Ripert, Traité Pratique de Droit Civil Français (1926) Tome 3, 75, rappeler que "les constructions volantes établies à la surface du sol pour quelques jours et réédifiées ailleurs, de place en place, telles que les baraques de foire, ne sont pas des immeubles parce que ces édifices légers n'ont pas de place fixe". Mais les deux auteurs reconnaissent, aux mêmes pages, le principe que "pour qu'une construction soit immeuble, il n'est pas nécessaire qu'elle soit élevée à perpétuité, que les bâtiments construits pour une exposition sont immeubles quoiqu'ils soient destinés à être démolis". Ou encore, pour citer Langelier, Cours de Droit Civil, Tome 2, 115, doit-on reconnaître qu'en toute exactitude, "la loi considère comme mobilières, non pas précisément les choses qu'on peut transporter d'un lieu à un autre, parce qu'on peut transporter des maisons, mais celles qui, *dans l'usage ordinaire,* sont destinées à changer de place". Tel n'est pas, cependant, le cas du bâtiment qui nous occupe. Ce bâtiment était—et personne ne le conteste—un immeuble par nature lorsque, sans droit, on s'est apprêté à le déplacer du sol de Nadeau. Immeuble par nature, lorsque reposant sur le sol de Nadeau, ce bâtiment, après déplacement, était encore assurément immeuble par nature lorsque reposant sur la fondation, à ces fins préparée par Dulac sur son sol. L'immeuble acheté de Morin y fut transporté subséquemment. Et dans la séquence naturelle de tous les faits conduisant à l'adjonction de ce bâtiment à celui de Morin, le fait de l'immobilisation physique et l'immobilisation juridique du bâtiment de Nadeau au sol de Dulac, devait nécessairement précéder celui de son adjonction à la maison de Morin. Conséquemment et dès lors—à tout le moins—, faut-il admettre que c'était deux immeubles par nature qu'on procédait à adjoindre et que cette immobilisation du bâtiment de Nadeau était non seulement antérieure à son adjonction, mais existait indépendamment d'icelle. Déjà en 1869, la

Cour de Revision de Québec (*Chaloult* v. *Bégin*) (1), décidait "que, quoique le propriétaire de bâtisses ne soit pas celui du fond sur lequel elles sont assises, elles n'en conservent pas moins leur qualité d'immeubles tant qu'elles ne sont pas démolies et qu'elles continuent à être assujetties aux hypothèques dont elles ont été affectées quand elles ne formaient avec le fond qu'une seule et même propriété". Et plus récemment, dans *Laprise* v. *Morin* (2), on réitérait que seule la démolition d'un bâtiment lui fait perdre sa qualité d'immeuble et que, si une maison hypothéquée est, à l'insu et sans le consentement du créancier hypothécaire, enlevée de son fond de terre et transportée, sans être démolie, sur un autre immeuble, la vente judiciaire de ce dernier n'enlevait pas au créancier le droit d'être colloqué par préférence pour son capital et ses intérêts. Le considérant suivant de ce jugement reçoit, en l'espèce, une application:

> Considérant qu'un tel *déplacement* n'a pas eu pour effet de faire perdre à cette maison son caractère d'immeuble, ni à l'opposant son droit d'hypothèque sur cette maison.

et on réfère à cette décision de *Chaloult* v. *Bégin* et à celle de *McAskill* v. *Richmond Industrial Co.* (3), cette dernière confirmée en Revision.

On pourrait ajouter qu'il n'a été cité, de la part de l'appelant, aucune disposition légale ou autorité pouvant établir qu'en matière purement immobilière, en un cas semblable à l'espèce, l'adjonction, comme en matière purement mobilière,—suivant l'article 430—, fait perdre, au bénéfice du propriétaire de la chose principale, le droit de propriété du propriétaire de la chose qui y a été adjointe. Cet argument qu'on prétend tirer des dispositions de l'article 416, ne peut donc aider l'appelant. Les dispositions de l'article 416, les autorités ci-dessus l'établissent, font échec au droit de propriété et, comme telles, sont des dispositions d'exception. Dans le motif inspirant cette exception, le Législateur pourrait trouver une justification d'en étendre la portée. Mais depuis le jour où elle a été créée, sous la loi romaine, ni sous cette loi, ni sous le droit français, ni sous le droit de Québec, a-t-elle perdu son caractère limitatif pour augmenter l'accroc fait au droit de

(1) (1879) 5 Q.L.R. 119. (2) Q.R. (1916) 50 S.C. 11.
(3) Q.R. (1903) 23 S.C. 381.

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propriété. Il n'appartient pas aux tribunaux de faire ce que le Législateur n'a pas fait et, de toute évidence, n'a pas voulu faire.

Reste la question de savoir si le droit de propriété qu'avait l'intimé sur ce bâtiment pouvait, nonobstant son transport sur le sol de l'appelant, être dénoncé par l'enregistrement de l'avis précité, enregistrement dont l'appelant, par son action, recherche la radiation. Dans *Lower St. Lawrence* v. *L'Immeuble Landry Ltée* (1), cette Cour a reconnu que rien ne s'oppose à ce qu'un privilège ou une hypothèque n'affecte que la construction sans affecter le sol sur lequel elle est édifiée, et a conclu à la validité de l'enregistrement du privilège du vendeur d'un réseau de distribution électrique sur ce réseau couvrant des emplacements dont l'acheteur du réseau n'avait pas la propriété. Cette décision supporte la validité de l'enregistrement de l'avis donné par l'intimé Nadeau pour publiquement dénoncer son droit de propriété sur ses bâtisses.

Quant aux questions qu'on se pose sur les droits et recours futurs de Nadeau pour liquider cette affaire, il n'y a, sur le point, aucune difficulté. En toute déférence, cependant, il faut ajouter que ce sont là des questions étrangères à la disposition du présent litige et, en outre du fait qu'il serait inopportun de le faire, il n'appartient pas aux tribunaux d'exprimer prématurément des opinions.

Il reste un mot à dire sur l'opportunité d'entendre Rodrigue avant de prononcer sur l'interprétation—mais non sur l'annulation—de la promesse de vente intervenue entre Nadeau et lui-même. Le dossier révèle qu'après avoir poursuivi Nadeau en la présente cause pour faire radier l'enregistrement de l'avis donné par ce dernier pour dénoncer ses droits, Dulac a pris une action en garantie formelle contre Rodrigue, concluant à ce qu'il soit tenu d'intervenir dans l'action principale, contester et faire rejeter les prétentions de Nadeau, et à ce que Rodrigue soit condamné d'acquitter, indemniser Dulac de toute condamnation qui pourrait être portée contre lui en principal, intérêt et frais, etc. Cette action a été signifiée personnellement à Rodrigue. Il ne s'en est pas soucié. Il n'est pas intervenu. Il

(1) [1926] S.C.R. 655.

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n'a même pas comparu sur cette action. Il y a là, je crois, plus qu'une justification pour disposer de la présente cause sans plus amples frais ou délais.

Pour ces motifs, qui sont, en substance, ceux du jugement formel et unanime de la Cour d'Appel, je rejetterais l'appel avec dépens.

Appeal allowed with costs.

Solicitor for the appellant: *Rosaire Beaudoin.*

Solicitor for the respondent: *Guy Hudon.*

CLIFFORD WALLACE BROCK and FRANK PETTY (DEFENDANTS) .... APPELLANTS;

AND

LOUIS GRONBACH, DINAH ELIZABETH GRONBACH and FREDERICK KARL GRONBACH (PLAINTIFFS) ..... RESPONDENTS.

1952

*Nov. 19, 20, 21

1953

*Jan 27

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Fraud—Undue Influence—Agreement for sale—Excessive price demanded by Purchaser to release Vendor—Unconscionable Bargain—Relationship of Parties.

Barristers and Solicitors—Solicitor acting for both parties—Where neither connivance nor negligence shown, not subject to strictures.

An elderly couple entered into an agreement to sell a property at a price satisfactory to them at the time. Subsequently to secure a release therefrom they paid a large amount demanded by the purchaser, to the solicitor, who in the drawing of the agreement and the release acted for both parties. In an action to cancel the release, set aside the agreement, and recover damages from the purchaser and the solicitor jointly.

Held: 1. In the light of the evidence since no relationship was established to make it the duty of the purchaser to take care of the vendors, a claim to set aside the release and recover payment failed. *Tufton* v. *Sperni* [1952] 2 T.L.R. 516 at 519.

2. The trial judge rightly held that the solicitor neither by himself nor by connivance with the purchaser had imposed the bargain on the vendors.

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*PRESENT: Kerwin, Taschereau, Estey, Locke and Fauteux JJ.

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3. The release was not an unconscionable bargain in the sense in which the term is used in the cases but, if the Court had been able to arrive at the opposite conclusion, it would agree with the trial judge that the vendors could not secure any relief so long as they claimed they were entitled to set aside the original agreement.

Appeal allowed and judgment at trial [1951-52] 4 W.W.R. (N.S.) 49, restored.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) allowing an appeal from the judgment of Montague J. (2) dismissing plaintiff's action against both defendants.

W. P. Fillmore, Q.C. for the appellant Brock.

R. D. Guy, Q.C. for the appellant Petty.

L. St. G. Stubbs and *H. P. Beahan* for the respondents.

The judgment of the Court was delivered by

KERWIN J.:—The respondents Louis Gronbach and his wife, Dinah Elizabeth Gronbach, signed the document of January 13, 1949, fully understanding its nature and effect, and there is no doubt that, at the time, the agreement was entirely satisfactory to them. It was said in the Court of Appeal that the agreement was impossible of performance by Mrs. Gronbach because she was not the owner of the stock in trade. An inventory was to be taken of it on the evening of January 31, 1949, and Petty was to pay for it in cash at wholesale prices. Accepting the position that Mrs. Gronbach alone was the "vendor" under the agreement, there would have been nothing to prevent the Court ordering specific performance thereof against her to the extent to which that was possible. She had agreed to the sale of the lands and premises, which would include any fixtures owned by her, for $35,000 and the money to be paid for the stock in trade was in addition to that sum. In our view the evidence discloses that Louis Gronbach, the owner of the stock in trade, had agreed to its sale, but, in any event, even if that be not so, the situation as between Mrs. Gronbach and Petty would not be affected. The agreement could, therefore have been performed by Mrs. Gronbach in the manner indicated.

(1) (1952) 5 W.W.R. (N.S.) 68. (2) (1951-52) 4 W.W.R. (N.S.) 49.

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Leaving aside for the moment the question of *The Dower Act*, R.S.M. 1940, c. 55, there was therefore no reason why Mr. and Mrs. Gronbach and Petty could not agree to the cancellation of the agreement. The suggestion that this should be done came from the Gronbachs and, while the sum of $8,000 demanded by Petty for the release of January 21, 1949, is large, we cannot find that any relationship existed between Petty, on the one hand, and the Gronbachs, on the other, to make it the duty of the former to take care of the latter. As stated by Sir Raymond Evershed M.R. in *Tufton* v. *Sperni* (1): "Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief." Therefore, the claim to set aside the release and recover the $8,000 from Petty fails.

The trial judge has dealt satisfactorily in most respects with the position of the appellant Brock and we are of opinion that he came to the right conclusion that the solicitor, neither by himself nor by connivance with Petty, imposed on the Gronbachs the bargain demanded by Petty. We also agree that it has not been shown that the solicitor was negligent. For these reasons we must with respect express our disagreement with any of the strictures passed by the Court of Appeal upon the solicitor and, therefore, the decisions referred to in their reasons for judgment on that aspect of the matter are not applicable.

Under the circumstances as shown in the evidence, the release cannot be held to be an unconscionable bargain in the sense in which that term is used in the cases but, if we had been able to arrive at the opposite conclusion, we would then agree with the trial judge that the Gronbachs cannot secure any relief when they persist in their attitude that they are entitled to set aside the original document of January 13, 1949. The Court has no jurisdiction to reopen the cancellation agreement and decree what ought to be paid by the Gronbachs to Petty.

The Dower Act was never referred to in the pleadings or at the trial and it was only after the hearing before the Court of Appeal that that Court requested argument upon the point. Mr. Fillmore pointed out that if it had been raised, evidence might have been led to show of what, if anything, the homestead consisted. The Manitoba Dower

(1) [1952] 2 T.L.R. 516 at 519.

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Act is not the same as the Alberta Statute considered recently by this Court in *McColl-Frontenac Oil Co. Ltd.* v. *Hamilton* (1), but even if the proper conclusion would be that the agreement of January 13, 1949, so far as any homestead of Mrs. Gronbach is concerned, was absolutely null and void for all purposes, and assuming that the point is open on the pleadings and should be dealt with by an Appellate Court, the money paid under the release of January 21, 1949, was paid under a mistake in law.

The option of January 21, 1949, (exhibit 7), was not binding on Mrs. Gronbach but no order need now be made as the two years from February 1, 1949, referred to in that document have already expired. We also agree that the agreement of January 13, 1949, was not binding upon the respondent Frederick Gronbach. The fact that no order as to costs was made by the trial judge sufficiently takes care of both these matters as the main dispute was as to the position of Louis and Dinah Elizabeth Gronbach under the agreement of January 13, 1949, and under the release. The appeals are allowed with costs here and in the Court of Appeal and the judgment at the trial restored. The cross-appeal is dismissed without costs.

Appeal allowed with costs.

Solicitors for the appellant, Petty: *Fillmore, Riley & Watson.*

Solicitors for the appellant, Brock: *Guy, Chappell, Wilson & Hall.*

Solicitors for the respondents: *Stubbs, Stubbs & Stubbs.*

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(1) [1953] S.C.R. 127.

HENRY GOLDMAN ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

1953

*Jan. 30
*Feb. 23

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Whether payment received was gift or remuneration—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1), (4) as amended.

The appellant was chairman of a committee formed to protect the interest of a certain class of shareholders in the reorganization of a company which was in receivership, and had one B appointed counsel for the committee. Under the scheme of arrangement subsequently adopted, the company was to pay the costs and expenses, including counsel fees, of the several committees; there was to be no remuneration to the members of the committees as such, but it was understood that if the fees allowed would reasonably permit it, counsel would make some allowance to the committees for the work they did. B assigned to the appellant the amount by which his taxed fees exceeded a specified amount. In his income tax return for 1947, the appellant took the position that the amount was a gift from B and therefore not taxable. The Minister's assessment was upheld on appeal to the Income Tax Appeal Board and subsequently to the Exchequer Court.

Held: The appeal should be dismissed. It is clear that both the appellant and B intended that the money paid to the appellant was to be in remuneration for the services rendered as chairman of the committee.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), affirming the decision of the Income Tax Appeal Board and upholding the assessment made against the appellant for income tax by the Minister of National Revenue.

H. H. Stikeman Q.C. and A. L. Bissonnette for the appellant.

W. R. Jackett Q.C. and F. J. Cross for the respondent.

The judgment of the Chief Justice, Kellock, Locke and Fauteux, JJ. was delivered by:—

KELLOCK J.—The facts found by the learned trial judge (1) are essentially as follows. The appellant was active with two others in the formation of a committee of shareholders of a company then in receivership, and became its

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

(1) [1951] Ex. C.R. 274.

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chairman. Shareholders of other classes, as well as bondholders, had also formed other committees. The reorganization of the company was, at this time, being attempted through the instrumentality of a negotiating committee appointed by the provincial government, and, ultimately, a scheme of arrangement was agreed upon.

The appellant had nominated a Mr. Black to be counsel for the shareholders' committee of which he was chairman, and the former was duly appointed and acted in that capacity throughout.

When the negotiation of the plan of reorganization was nearing its final stage, at a meeting of all the committees with the government committee, the appellant raised the question of remuneration for committee members. According to the evidence of Mr. Black, the chairman of the negotiating committee said that it had been understood throughout that there would be no remuneration for committee members "as such" but that counsel fees should be on a scale that the committees "could get something". After this meeting Mr. Black said to the appellant that while he did not like this arrangement, he was prepared to follow it out and see that, in that way, the appellant's committee did get something. Nothing was then said as to amount.

The scheme of arrangement provided that the company should pay the "costs and expenses" of the committees, but "not including any remuneration to the members of the said committees *as such*". It also provided that

> The amount of the foregoing . . . costs and expenses in each case shall be as agreed upon by the Bondholders' Protective Committee and the person entitled thereto or, in default of such agreement, as may be determined by The Supreme Court of Ontario.

In a conversation between the solicitor for another shareholders' committee and Mr. Black, the subject of fees came up. The latter said he would be satisfied with $5,000 for himself, whereupon the other solicitor said that he would recommend that the bondholders' committee approve of $10,000, so as to provide $5,000 for the appellant's committee. According to Black, the appellant, on learning of this, was critical of Black for mentioning what the appellant regarded as a small amount, and Black was instructed to ask for $50,000.

The bondholders' committee refused to go beyond $8,000, which would have left $3,000 only for the appellant's committee and this was not acceptable to the appellant. At the appellant's insistence, Black then prepared a bill of costs for $75,000 for the purposes of taxation under the scheme. The appellant attended with Black on the taxation, on which occasion Black explained that the bill was not only for legal fees but also remuneration for the committee. In view of the terms of the scheme, however, the taxing officer could not and did not allow anything beyond legal fees. The bill was taxed at $20,000 plus some small disbursements. The appellant, pleased with the result, told Black he was going to tell his committee that Black's fee should be $6,000 instead of $5,000, and this was done.

Subsequently, it was arranged, with the approval of the department, that the amount taxed should be paid in three annual instalments, as the reorganization had occupied some three years. Upon the appellant stating to Black that he wanted his money assigned to him, Black assigned to the appellant the last two annual instalments amounting to $7,000 each. It is the first of these which is in question here. The appellant has taken the position that the amount was a gift to him and not taxable.

The appellant later demanded from Black $3,500 out of the $6,000 which Black had retained, claiming that Black had agreed to split his fees with him. This was refused, whereupon the appellant complained to the Law Society, stating that Black had agreed that everything over the $6,000 was to go to the appellant "for the committee efforts" and that, in addition, the legal fees were to be split. Black has taken the position throughout that the $6,000 was for himself exclusively and all that he was interested in, and that he had agreed to pay over to the appellant everything over and above that amount as remuneration for the committee.

The appellant made various explanations below with respect to the $14,000, including a claim that it was a gift connected in some way with various mining claims which the appellant had and upon which he had spent, he says, some moneys. He proposed, he said, if they should turn out well, to transfer them to a company in which he and

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Black were or would be shareholders. All of these explanations were denied by Black and rejected by the learned trial judge.

On the facts as found by the learned trial judge (1) the inferences I think are plain. The appellant throughout his activity on the committee intended to be paid for his services if he could succeed in so doing. It has been already noted that the scheme of arrangement did not completely eliminate the possibility of the members of the committees being remunerated, but excludes direct payment to them for remuneration "as such". It was solely at the insistence of the appellant and for his benefit, that the taxation proceeded, and on the basis of the agreement between Black and the appellant that Black was to have no interest in any moneys beyond the $6,000 which he had agreed to take.

The appellant having succeeded in obtaining the remuneration he set out to obtain, and which he has kept for himself, I do not consider that the form by which that result was brought about is important nor that if there be any illegality attaching to the agreement to divide the taxed costs, this can avail the appellant. What the appellant received, he received as remuneration as he intended. Mr. Stikeman admits that had the offer of the bondholders to approve payment of $8,000 been accepted, the $3,000 which would thereby have found its way to the appellant would have been taxable in the hands of the latter as remuneration. In my view the mere interposition of the certificate of taxation does not change the character of that which the appellant actually received.

"Income" is defined by section 3(1) of the statute to mean, inter alia,

> . . . the annual net profit or gain or gratuity, whether ascertained and capable of computation as being . . . salary . . .

Subsection (4) provides that

> Any payment made to any person in connection with any duty, office or employment . . . shall be salary of such person and taxable as income for the purposes of this Act.

In *Herbert* v. *McQuade* (2), the question for consideration arose under Schedule E., of the *Income Tax Act*, 1842, which imposed tax on "the persons respectively having,

(1) [1951] Ex. C.R. 274. (2) [1902] 2 K.B. 631.

using or exercising the offices or employments of profit" in Schedule E for "all . . . . . profits whatsoever accruing by reason of such offices, (or) employments . . . . .". Collins M.R., at p. 649, referring to an earlier decision said that,

> a payment may be liable to income tax although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it.

In my view this reasoning is equally applicable to payments made to a person "in connection with" an office or employment. In the case at bar it is perfectly clear that the payment in question was made in connection with the appellant's office as chairman and as remuneration therefor.

In *Seymour* v. *Reed* (1), Viscount Cave L.C., at 559, stated the principle to be that the language of Schedule E. rendered taxable

> all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or a present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services.

In *Cowan* v. *Seymour* (2), it was held that a sum paid to the secretary of a company who had acted as liquidator in the voluntary winding-up without remuneration was not taxable income, the amount in question having been paid to him by the shareholders after the winding-up as a tribute or testimonial and not as payment for services.

In my opinion these authorities make it plain on which side of the line the amount received by the appellant in the case at bar falls. This was not received by him as a testimonial nor as anything but remuneration for the services which he had performed. That the services had been completed when payment was made or that there was no assurance from the beginning that the services would be remunerated do not prevent the amount in question being taxable income. Lord Sterndale, M.R., in the case last cited, said at p. 508:

> It seems to me that there may very well be a payment in respect of an office which has been gratuitous up to its end, which still may be a payment for the services of that office, and therefore a profit accruing by reason of the office.

(1) [1927] A.C. 554. (2) [1920] 1 K.B. 500.

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At page 511, Atkin L.J., as he then was, said:

> I agree also that it is not conclusive against a profit accruing to the holder by reason of his office that the office has terminated at the time he in fact received the alleged profit.

And at 512:

> So I should say the question here is whether if a sum of money is given to the secretary or liquidator substantially in respect of his services as secretary or liquidator, it accrues to him by reason of his office.

I would be, in any event, of the opinion that the payment here in question, being paid and received as remuneration, also falls within the words "the annual profit or gain from any other source" in section 3, subsection (1), of the statute.

It is not without interest to observe that the appellant himself testified that prior to the formation of the committee, the matter of fees was one of the first things he discussed with Black. The appellant deposed that he then told Black that there was no assurance that anybody would get anything and that the latter had said that while there might not be anything for the committees, nevertheless, in organizations of that character "they generally arranged for payment of the solicitor's fees or counsel fees and in big companies the fees are generally large", and Black "was willing to offer me to split his fee" for the purpose of developing the mining claims to which I have already referred. Mr. Stikeman admits that under such arrangement, any moneys received by the appellant would be taxable.

It is true that Black denied this story and that the learned trial judge has accepted his evidence, but the significance of the evidence is that it demonstrates that from the outset the appellant intended to be paid for his services if he could succeed in so doing. In my opinion the means he ultimately took to secure that result do not, any the less, render the moneys he did receive, liable to taxation, although events did not actually take the course which, from this evidence of his, he had intended them to take.

I would dismiss the appeal with costs.

RAND J.:—The findings made by the President of the Exchequer Court (1) on conflicting evidence were not challenged before us. Their effect is that both the solicitor to the committee representing the 7 per cent preferred shareholders and its chairman, the appellant Goldman, as well as the chairmen of the reorganization committee and of the 6 per cent preferred shareholders' committee, understood that while no remuneration as such was to be paid to the members of the several committees by the company, the solicitors were to consider whether they could not, out of their agreed or taxed fees, make them some allowance. Goldman had argued strongly for direct remuneration, but without success.

The solicitor, at the meeting at which these matters were discussed, stated that he would be willing to accept $5,000 for his own services and to hand any excess over that amount allowed him to Goldman. The reorganization committee offered $8,000 but, on the objections of Goldman, it was declined. The fees were then taxed at approximately $20,000. Goldman thereupon agreed that the solicitor should retain an additional $1,000. The money was made payable in three annual instalments, the first of $6,000 to go to the solicitor and two of $7,000 to Goldman. The solicitor viewed the arrangement as equivalent to a recognition by him of a trust of all over $6,000 in favour of Goldman. Some time later, at the latter's insistence, he executed an assignment of the instalments which were, in due course, received.

In his income return for 1947, Goldman showed the first instalment of $7,000 as a gift from the solicitor with a note that the donor was to pay the gift tax. This was disallowed by the Department and the amount added to his income, the tax on which is the matter of this appeal.

That both parties intended the money to be paid and received as remuneration for services rendered by Goldman as committee chairman is not open to doubt. The solicitor became in fact a conduit between the company and Goldman. It was urged that the payment was voluntary. Apart from the question of a declared trust, it can be assumed

(1) [1951] Ex. C.R. 274

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that the solicitor was not legally bound to make the payment; but that he was bound by the common understanding, whatever it may be called or whatever its nature, is equally beyond doubt. He voluntarily undertook the obligation at least of his word given in an economic relation; but voluntariness of his consequent action is not to be confused with that present in gift.

The question is, therefore, whether the money so paid is within the provisions of the *Income Tax Act*. Sec. 3 provides:—

> (1) . . . 'Income' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments . . . directly or indirectly received by a person from any office or employment . . . and also the annual profit or gain from any other source including . . .

The money was paid in respect of services performed in a business context; strictly speaking the 7 per cent preferred shareholders were the beneficiaries of and the persons for whom the work was done, even though indirectly the resulting arrangement was of the company's capital structure; is it necessary that the payment be made by the person for whom the services are rendered? The language of the section is,

> Directly or indirectly received by a person from any office or employment;

What is indirect if not something other than the normal direct course between employer and employee or its equivalent? I should say that the present case is a good example of indirect payment. Certainly, where the person paying is involved in relations that connect him with the object of the services, as here, it would be cutting down the language of sec. 3 unwarrantably to treat the payment as not within it.

Mr. Stikeman's basic objection was that we are not permitted to go behind objective facts and admit subjective understandings to give a payment its character. I find it a bit difficult to appreciate the force of that contention. To show that work has been done for or in the expectation of remuneration or that money is paid for certain work, necessarily involves the intention of the parties concerned; intention is material to the nature of

acts in almost all relations; it is part of them, and certainly it is so in those here, whether of service or payment or receipt.

In *Cowan* v. *Seymour* (1), the Court of Appeal held that a sum voted by the individual shareholders of a company, after its liquidation, to the former secretary who had served without remuneration was, in the circumstances, a voluntary gift and not a sum that accrued to him "in respect of an office or employment of profit". It was argued there, as it has been here, that if the office does not carry profit there never can be income paid in respect of it. In the view of the Master of the Rolls, once a profit accrued to a person by virtue of an office, that fact itself made it an office of profit. In this aspect the difference in the language of the two statutes obviates the difficulty of that reasoning for the case here. Nor was the fact that the office was at an end conclusive; it is a circumstance of weight but not more. The Master of the Rolls adopted what was said by Lord Loreburn in *Cooper* v. *Blakiston* (2):

> In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office.

Contrasted with such a payment is a benefaction of an exceptional kind such as a testimonial or other personal tribute, the antecedent instigation of which has been an office or employment. There the essential elements of gift are present; and though it may be related to the fact of services, it is not as remuneration for them that the gift is attributed.

In *Herbert* v. *McQuade* (3), it is said that the payment must be looked at from the standpoint of the person who receives it. While that aspect is no doubt relevant, the purpose of the donor or payer can be no less so. It is the latter's mind which determines that the payment be made at all and the object to which it is referred. That, at the same time, we should have, on the part of the receiver,

(1) [1920] 1 K.B. 500. (2) (1903-11) 5 T.C. 343 at 347.
(3) [1902] 2 K.B. 631 at 649.

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an acceptance in the same understanding furnishes a complementary circumstance which would seem to me to put the matter beyond controversy.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Stikeman & Elliott.*

Solicitor for the respondent: *F. J. Cross.*

1953

*Feb. 18, 19
*Mar. 16

JAMES ALFRED KELSEY .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Murder—Extra-judicial admissions—Whether jury need be warned of danger of convicting solely on confession—Sufficiency of charge—Whether defence theory adequately put to the jury.

On the strength of his three self incriminating declarations, the appellant was charged with a murder which had remained unsolved for more than two years. Two of his admissions were made verbally to friends of his and the third was contained in a statement to the police in his own handwriting and accepted by the Courts as having been given freely and voluntarily. The appellant did not give evidence before the jury and the theory of the defence was that although he had in fact made the statements they were untrue. His conviction was affirmed by the Court of Appeal for Ontario. Two questions of law were submitted on appeal to this Court, namely, whether the jury had been adequately instructed as to the theory of the defence and whether they should have been warned as to the danger of convicting when the only evidence connecting the accused with the crime was his unsworn extra-judicial admissions.

Held (Cartwright J. dissenting), that the appeal should be dismissed.

Per Rinfret C.J., Rand, Kellock, Estey, Locke and Fauteux JJ.: There was no legal duty for the trial judge to warn the jury of the danger of convicting the appellant of murder even if, in their view, the only evidence to connect him with the crime consisted of his unsworn extra-judicial admissions.

There was in fact independent evidence tending to support the accused's admissions of having participated in the commission of the murder; the jury were adequately instructed as to the theory of the defence, namely, that the admissions were untrue, and of the numerous points which, in the appellant's submission, should have been brought to their attention, some were actually submitted to them by the trial judge and those which were not had either no foundation on the

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

evidence or if they had, were denuded of any real significance in the test of the truthfulness of the material admission. The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance.

Per Cartwright J. (dissenting): The authorities cited by the appellant do not formulate a rule of law that, in cases in which the only evidence to connect one accused of murder with the crime consists of his unsworn extra-judicial admissions, the trial judge must warn the jury that it is dangerous to convict.

It was however the duty of the trial judge to impress upon the jury the necessity of testing the truth of the admissions made by the accused by an examination of the other facts proved, and to call their attention to the circumstances mainly relied upon by the defence as tending to cast doubt upon the truth of the admissions, and this duty he failed to perform.

APPEAL from the oral judgment delivered by the Court of Appeal for Ontario, affirming the appellant's conviction for murder.

A. E. Maloney for the appellant.

W. B. Common Q.C. for the respondent.

The judgment of the Chief Justice, Rand, Kellock, Estey, Locke and Fauteux, JJ. was delivered by:—

FAUTEUX J.—On the 18th of September 1952, a jury of the Supreme Court of Ontario found that the appellant, "on or about the 9th day of December 1949, at the Township of Thorold, in the County of Welland, did unlawfully murder Sam Delibasich".

An appeal against this verdict was unanimously dismissed; the oral reasons delivered by the Chief Justice of the Province, at the conclusion of the argument, being:—

We see no reason for disturbing the verdict of the jury in this case. We think that statements of the accused admitted in evidence were voluntary statements and properly admitted. We consider the charge of the learned trial judge to the jury was adequate. The appeal must be dismissed.

The appellant then obtained leave to appeal to this Court on two questions of law, namely:—

(*a*) Did the learned judge err in failing to instruct the jury adequately as to the theory of the defence?

(*b*) Did the learned trial judge err in failing to instruct the jury as to the danger of convicting the accused of murder where the only evidence to connect him with the crime consists of his unsworn extra-judicial admissions?

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For a proper consideration of these questions, the main features of the case may, at first, be related.

Sam Delibasich, a taxi operator of the city of Welland, was last seen alive in that city at 6.30 p.m. on Friday, the 9th of December 1949. In the late afternoon of the following day, Saturday the 10th, his cab was observed in the west-end of the city of Toronto, in a parked position in front of a building, number 2111 Bloor Street West, by a resident of these premises, one Mrs. Bell who, a few days after, reported to the police the fact of its continued presence. A week later, on Saturday the 17th, the body of Delibasich was discovered, by a hunter, in the middle of a ploughed field off of the Hurricane East Road, at some 4 or 5 miles from the city of Welland. The Provincial Police were immediately alerted; a call went out for the cab which the Toronto police—already apprised of its presence on Bloor Street—towed into custody.

From the investigation, particularly of the body, of the place and surroundings where it was found and of the cab itself, no clues connecting any one with the murder could be found. However, and as the evidence before the jury indicates, the following facts were then ascertained. The body of the victim was lying some 300 feet from the road, face down, with the arms extended and frozen stiff. The clothing was intact and mud-stained. No footprints and no indication of a scuffle were found in the field. The autopsy revealed on the front of the body depressions leading to the opinion that, while warm, it had lain on an irregular surface, the imprint of which was left during the freezing process. There were several wounds, the fatal ones having been inflicted on the head by a blunt instrument and six others—three before and three after death—caused by a rigid, round and pointed instrument. Death was attributed to fracture of the skull and injury of the brain.

The victim was known to usually carry on his person, in a wallet, substantial sums of money, but an amount of $13 only, mostly in silver, and loose in his pocket, was found. The operator's badge and operating permits usually attached to the sun-visor of the cab, and any other identification papers were missing. Whether there was in the cab any indication of a struggle or any blood is not shown in the evidence.

This crime had remained unsolved for more than two years when the Crown acquired direct evidence, in the form of three self-incriminating declarations made by the appellant—each of them at different times and to different persons—on the strength of which the latter was prosecuted for murder. Two of these admissions were made verbally by the appellant to friends of his, the first, in September, 1951, to one Aubrey Leslie Merritt, whom he had known since childhood, and who, after long hesitation, i.e., in January, 1952, apprised the police of the same; the second, to Blanche Lucy Benner, of the city of Welland, with whom he had intimate relations and who reluctantly related these admissions to the police after his arrest. The third appears in a statement to the police made by the appellant in his own handwriting and accepted by the two Courts below as having been given freely and voluntarily.

The substance of the facts related by the appellant on these three occasions is:—On the night of the disappearance of Sam Delibasich, the appellant and his brother Lloyd met at the Reeta Hotel in Welland where they consumed a small quantity of beer. They there and then agreed "to make some quick money" and to hire Delibasich's cab, drive out of town, "knock him out" and take his cab to Toronto to sell it.—Incidentally, it may be noted that the appellant, his brother and their mother were also of the city of Welland, and knew the taxi operator very well.—In furtherance of this plot, they called Delibasich, hired his cab and drove with him to St. Catharines when, nearing Port Robinson Road, they required him to stop. Their victim was then struck, at first with a hammer and then with an ice-pick, the latter instrument being used "to finish him", according to what the appellant said to Merritt, or "to make sure", according to what he wrote himself in his statement to the police. Having abandoned the body in a field, they proceeded to Toronto, stopping, en route, at Toronto Bay to throw into Lake Ontario the hammer, the ice-pick and some of the belongings of the victim. Attempts to sell the cab at used car lots in Toronto being vain, it was left on the street. They spent the night in the city and then returned to Welland.

The evidence also shows that a few days after having confessed to police officers, the appellant freely consented to accompany them to Toronto in order to indicate, in the

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course of the journey, the various points having any bearing on the case. He thus pointed out the road leading to the field where the body had been found, the route followed to reach the point of the Bay from where he and his brother threw the hammer, the ice-pick, the operator's badge and the various papers of the victim into the lake. Though definitely unfamiliar with the city of Toronto, he also indicated one of the used car lots at which they vainly attempted to sell the cab and also the place where the latter had been abandoned on Bloor Street. The latter point was not more than 200 feet away from the place where the cab had, more than two years before, been observed by Mrs. Bell the day after the murder. The appellant was unable to locate, in the same district, the hotel where they were alleged by him to have registered under fictitious names, nor did the police subsequently succeed in doing so: it appears however from the evidence that hotel registration records were rather poorly kept if at all in the hotels of this particular district of the city.

This, in substance, was the evidence in the record at the close of the case for the prosecution.

In defence, the subject matter of the evidence adduced was limited to the character of the appellant. In this respect, the record shows the absence of any previous convictions, that his past conduct rendered unlikely his connection with the crime of murder and established the particular frankness of the appellant. Though testifying on the *voir dire,* in an unsuccessful attempt to prevent the production of his statement to the police, the appellant did not however give any evidence before the jury, leaving thus unchallenged by him the fact and the truth of his various declarations. With the addition that nothing could be shown or found in the record which would indicate or suggest any reason or motive prompting the appellant to falsely charge himself and his own brother with the murder of a person they both very well knew, this summary relates the main features of the case.

Turning now to the points of law raised in this appeal and dealing with the first one, i.e. whether the trial Judge erred in failing to instruct the jury adequately as to the theory of the defence.

The defence did not deny the fact but only the truthfulness of the appellant's admissions. This was the theory of the defence at trial and the sole one suggested at the hearing before this Court. More than once it was stated to the jury by the trial Judge in his charge. It is contended however that this was not done adequately because the trial Judge failed to direct the attention of the jury to some 19 or 20 alleged arguments purported to be related to the theory of the defence. Whether all these arguments, which a subsequent and minute examination of the record suggested to counsel for the appellant, were actually formulated or even thought of before the jury by counsel then acting for the accused, could not be asserted to us and is very doubtful if one is to rely on the less numerous objections made at trial immediately after the address of the judge. Be that as it may and as to the merits of the contention itself, I must say that, after having carefully considered each of the points on which it rests, I fail, in the light of the particular features of this case, to see any real substance in it. In brief, some of these points were actually submitted to the jury by the trial Judge and those which were not are either without foundation on the evidence or, if they have, are denuded of any real significance in the test of the truthfulness of the material admission. This is all, I think, it is necessary to say on the matter except as to two of these twenty points, which themselves illustrate the nature of the others. Some comments may be found expedient in view of the importance given to them by counsel for the appellant.

It is suggested that the trial Judge should have commented on:—

(*e*) The failure of the police and the appellant to locate the hotel at which he and his brother were supposed to have registered and the inability of the police to find any such hotel notwithstanding their intensive efforts to do so.

(*h*) The lack of any evidence of blood or signs of a struggle in the victim's taxi which serves strongly to contradict the appellant's statement to the police.

On (*e*):—As already indicated, the evidence shows that registration records in hotels located in that particular district were very poorly if at all kept. Moreover, at least two years had elapsed since such registration was alleged to have been made and the moment that verification of

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the fact was attempted. Under such circumstances, I fail to see what real significance such evidence could have on the question of the truthfulness of the appellant's admissions.

As to (*h*):—It was conceded that the presence or absence of blood in the cab was not even dealt with in the evidence nor was either the absence or presence of signs of a struggle in the victim's taxi.

The allotment of any substance to an argument or of any value to a grievance resting on the omission of the trial Judge from mentioning such argument must be conditioned on the existence in the record of some evidence or matter apt to convey a sense of reality in the argument and in the grievance. Had the autopsy, for instance, revealed poisoning instead of fracture of the skull as the cause of death, this undoubtedly would have, in this case, been a point of substance relevant to the theory of the defence. Far from conflicting with the appellant's admissions, independent proof of certain facts in the case tends to support his material admission, i.e. his participation in the commission of the murder. These facts are:—The indication by the appellant of the place he and his brother abandoned the cab corresponding to the one at which it was found; the statement of the appellant that the ice-pick was used once the victim had been struck with the hammer "to finish him" or "to make sure" tallying with the opinion of the medico-legal expert that six wounds had been made by a rigid, round and pointed instrument, three before and three after death; the fact of the immediate disappearance of his brother from Welland after the murder; the fact that nothing can be found or was shown on the evidence in the nature of a reason or a motive moving the appellant to make false admissions charging himself and his own brother with the murder of a person they both knew very well.

In law, the general rule as again stated recently in *Azoulay* v. *The Queen* (1), is that the trial Judge in the course of his charge should review the *substantial* part of the evidence and give the jury the theory of the defence so that they may appreciate the value and effect of that evidence and how the law is to be applied to the facts as

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

they find them. It is, of course, unnecessary that the jury's attention be directed to all of the evidence, and how far a trial Judge should go in discussing it must depend in each case upon the nature and character of the evidence in relation to the charge, the issues raised and the conduct of the trial. In the words of Goddard, L.C.J. in *Derek Clayton-Wright* (1):

> The duty of the Judge . . . is adequately and properly performed . . . if he puts before the jury clearly and fairly the contentions on either side, omitting nothing from his charge, so far as the defence is concerned, *of the real matters* upon which the defence is based. He must give . . . a fair picture of the defence, but that does not mean to say that he is to paint in the details or to comment on every argument which has been used or to remind them of the whole of the evidence which has been given by experts or anyone else.

The rule is simple and implements the fundamental principle that an accused is entitled to a fair trial, to make a full answer and defence to the charge, and to these ends, the jury must be adequately instructed as to what his defence is by the trial Judge. Whether the rule has in any given case been complied with may at times be difficult to determine. In the present matter and for the reasons above given, I agree with the members of the Court of Appeal for Ontario that the charge was sufficient.

The second ground of appeal is that the trial judge erred "in failing to instruct the jury as to the danger of convicting the accused of murder where the only evidence to connect him with the crime consists of his extra-judicial admissions."

This ground rests on the assumption of the fact that the record discloses a complete lack of independent evidence tending to support the truthfulness of the material admission made by the appellant. That such an assumption does not flow from a consideration of the evidence and of all the circumstances of this case I have endeavoured already to demonstrate. However, and on the basis of a different view being held in the matter, the question of law must be considered.

That the appellant could be legally convicted of murder by a jury solely on his extra-judicial admissions, i.e. without any corroborating evidence, is not disputed. What is suggested and what for the success of the appeal on this

(1) 33 Cr. App. R. 22 at 29.

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point must be accepted, is that there was in this case a legal duty for the trial judge to warn the jury of the danger of doing so. No authorities or precedents in point were quoted on behalf of the appellant, nor was it possible to find anyone to support this contention.

The only two cases to which our attention was directed did not state or recognize such a rule of law. The first one is *Rex* v. *Sykes* (1). The question there considered by the Court of Appeal was "how far the jury can rely on these confessions," i.e. the confessions made in that particular case. Nothing in what was then stated by Ridley J., on behalf of the Court, purported to be tantamount to a statement of a rule of law such as the one here contended for, but was indeed only an approval of the impeached instructions given to the jury by the Commissioner in that particular case. The question of warning was not dealt with. In the second case, *Rex* v. *Rubletz* (2), the *ratio decidendi* is that the trial judge, having determined that the confession made by the accused was free and voluntary, so instructed the jury, but in a manner confusing the two issues, i.e. the one related to the free and voluntary character of the confession and the other in respect to its veracity. On the latter point Turgeon C.J., speaking for the Court, stated at page 252:—

> If this confession was not free and voluntary, it would not be before the jury at all. Being there, it is the jury's duty to find whether or not it is true. This issue is different from the issue of admissibility which was before the Judge, and necessitates an inquiry going much further afield. Unfortunately, the instruction given to the jury on this all-important subject seems to me to have fallen short of what was required and to have tended to make the jury think that, if the statement was free and voluntary, it was true.

Nowhere in the case does the Court suggest that a warning should have been given to the jury. Reference may be made to what the Chief Justice said at page 251:—

> It does not follow, because a person comes forward freely and voluntarily and declares that he has committed a crime, declares, for instance, that another person supposed to have died a natural death, was in reality murdered by him, that his declaration must be accepted as true and that he must be convicted of murder. A jury may convict him: *Rex v. Falkner & Bond* 168 E.R. 908; *R.* v. *Tippet* 168 E.R. 923; but before doing so they ought to be instructed by the Judge in such a manner as to call their attention to all the circumstances surrounding the case and which may affect the truth or falsity of the confession.

(1) 8 Cr. App. R. 233.

(2) 75 Can. C.C. 239.

In my opinion, the learned trial judge in the present case having complied with the rule above considered in relation to the first ground of appeal, nothing more, on the matter, was required in his address to the jury.

The appeal should be dismissed.

CARTWRIGHT J. (dissenting):—The facts out of which this appeal arises are stated in the reasons of my brother Fauteux. I shall not repeat them but wish to mention the following additional details which appear to me to be of some importance. The witnesses, Merritt and Mrs. Benner, each of whom testified that the accused had confessed to taking part in killing Delibasich also testified that they did not believe his confession. After the accused had been arrested on a charge of murder his first statement to the police amounted to an assertion of his innocence. Shortly afterwards, following a question and an admonition, the accused, in the presence of the police officers, wrote out the confession which was admitted as Exhibit 8 at the trial.

The accused did not give evidence before the jury, but it is not, I think, open to question that both the fact of the three statements having been made and their truthfulness, if made, were put in issue by the plea of "not guilty." The theory of the defence was that although the accused had in fact made the statements they were untrue and he had had nothing to do with the killing of Delibasich.

Leave was granted to appeal to this Court on the following points:—

(*a*) Did the learned trial judge err in failing to instruct the jury adequately as to the theory of the defence?

(*b*) Did the learned trial judge err in failing to instruct the jury as to the danger of convicting the accused of murder where the only evidence to connect him with the crime consists of his unsworn extra-judicial admissions?

As to the second of these points counsel for the appellant relied on certain observations in the unanimous judgment of the Court of Criminal Appeal in *R.* v. *Walter Sykes* (1). In that case there was ample evidence, as in the case at bar, that a murder had been committed. The accused had made statements to two witnesses, one of whom was a police inspector, to the effect that he was the murderer. Later he had retracted these statements.

(1) 8 Cr. App. R. 233.

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The following passages in the judgment at pages 236 and 237 are relevant:—

It would have been unsatisfactory to convict on the evidence had it not been assisted by the confession, and probably it would have been unsatisfactory if the conviction rested on the confessions only, without the circumstances which make it probable that the confessions were true.

The main point, however, is one independent of all these details, the question how far the jury could rely on these confessions. I think the Commissioner put it correctly; he said:

> A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it. But seldom, if ever, the necessity arises, because confessions can always be tested and examined, first by the police, and then by you and us in Court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show that it was true? is it corroborated? are the statements made in it of fact so far as we can test them true? was the prisoner a man who had the opportunity of committing the murder? is his confession possible? is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?

It was said that the murder was the talk of the countryside, and it might well be that a man under the influence of insanity or a morbid desire for notoriety would accuse himself of such a crime. I agree that this is so, but it was a question for the jury, and they ought to see whether it was properly corroborated by facts, and so they were directed. We think that this part of the case was quite sufficiently left to the jury, and the Court thinks that there is no reason for giving leave to appeal.

This case was cited with approval by Turgeon C.J.S. giving the unanimous judgment of the Court of Appeal for Saskatchewan in *Rex* v. *Rubletz* (1), also relied upon by counsel for the appellant. The learned Chief Justice said in part:—

It does not follow, because a person comes forward freely and voluntarily and declares that he has committed a crime, declares, for instance, that another person supposed to have died a natural death, was in reality murdered by him, that his declaration must be accepted as true and that he must be convicted of murder. A jury may convict him: *R. v. Falkner & Bond,* 168 E.R. 908; *R.* v. *Tippet,* 168 E.R. 923; but before doing so they ought to be instructed by the Judge in such a manner as to call their attention to all the circumstances surrounding the case and which may affect the truth or the falsity of the confession.

The learned judge decided that the statement was nevertheless a free and voluntary one, and I think he was right in so deciding. But a free and voluntary statement may, nevertheless, be false. Men have been known to accuse themselves falsely of the most heinous offences, fully conscious, sometimes, of the falsity of their avowal, and imagining at other times, that their souls were in fact charged with crime. If this confession was not free and voluntary, it would not be before the jury

(1) 75 Can. C.C. 239.

at all. Being there, it is the jury's duty to find whether or not it is true. This issue is different from the issue of admissibility which was before the judge, and necessitates an inquiry going much further afield.

I do not read these judgments as formulating a rule of law that, in cases in which the only evidence to connect one accused of murder with the crime consists of his unsworn extra-judicial admissions, the trial judge must warn the jury that it is dangerous to convict; but I think that they furnish a guide as to the way in which, in such cases, the judge should perform the duty which always rests upon him of laying the theory of the defence adequately and fairly before the jury.

In such cases, and especially when the accused has not given evidence, I think it incumbent upon the trial judge, (i) to impress upon the jury the necessity of testing the truthfulness of the admissions by an examination of the other facts and circumstances proved, and (ii) to call their attention, not necessarily to all the circumstances, but to those mainly relied upon by the defence as tending to cast doubt upon the truthfulness of the confession. In the case at bar I have reached the conclusion that neither of these duties was adequately performed.

In the argument before us and in his factum, counsel for the appellant referred to nineteen matters which, in his submission, might well cause the jury to doubt the truth of the confession, of which only two were specifically mentioned by the learned trial judge in his charge. I do not propose to examine each of the items in this list. Several of them appear to me to be unimportant but I wish to refer to three of them. (i) It is apparent from the evidence of Inspector Wood that the accused had told him that after abandoning Delibasich's taxi-cab in Toronto, he and his brother walked to a hotel at which they registered and spent the night of December 9, 1949; but a most careful and extensive search by the police had failed to locate any record of registration or other evidence to substantiate this. (ii) If the confession was true, the motive for the murder was robbery but some $13 was found on the person of the deceased. (iii) If the confession was true, it would seem probable that there would have been some blood-stains in the taxi-cab but there was no evidence as to whether any such stains were found by the police. None

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of these three matters was referred to by the learned trial judge in his charge. Counsel for the accused specifically requested that the attention of the jury be called to the item thirdly mentioned. I am respectfully of the opinion that they should have been put before the jury and further, since the theory of the defence was that the accused had fabricated the confession, the learned trial judge should have pointed out that there was no detail in the confession verified by any evidence extraneous to it which might not have come to the accused's knowledge through reading of the crime in the press. The learned trial judge in another connection mentioned to the jury that he remembered reading about the occurrence in the newspapers. No doubt, as in the Sykes case, "the murder was the talk of the countryside." I do not intend to suggest that had any or all of these matters been mentioned to the jury their verdict would necessarily, or probably, have been different, but I can not satisfy myself it might not have been.

How then did the learned trial judge present the theory of the defence to the jury? The following passages in the charge appear to me to be the only ones which deal with it:—

> While I am on this subject, I want to say to you that that is the way you may interpret the evidence of the statement, this very important statement which has been put in and which was given by the accused. It will be before you in evidence. It is true that this is not sworn evidence but, gentlemen, it is evidence in the case. You may interpret that statement like any other evidence. You may believe all of it; you may think that statement is true. There may be parts that you may think are not true, or you may think as the defence asks you to, that it is not true at all.
>
> . . . . .
>
> But in this case most of the evidence is direct. It is direct evidence of the accused himself if you believe it. He has signed a statement telling what happened. There is the evidence of two witnesses who say he told them what happened. That, gentlemen, is direct evidence, and it is a question of whether you believe it or not.
>
> Gentlemen, in this case I have concluded that I do not need to charge you upon the question of manslaughter, and for this reason. I have not heard any evidence upon which a jury could find a verdict of manslaughter. Believe me, if there was any such evidence it would be my duty to draw it to your attention, and I would be most happy to do so, but I cannot on this evidence, on the evidence I have heard, find any evidence that would justifiy a verdict of manslaughter. Indeed, and I ask Mr. Martin, who has so ably defended this young man, to see if I state it correctly, the whole theory of the defence is that this accused had nothing to do with this crime; that these stories were not true, and if that theory is accepted by you, or if you have an honest doubt whether that is the correct theory or not, the verdict will be a complete acquittal.
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> . . . . .

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The theory of the defence, and you must consider it, gentlemen, because it is always important, is that that statement which was signed by the accused is not true at all; that having told the story once, he went right along with the thing. You must give consideration and thought as to that, gentlemen. But I suggest to you that you must also consider, and it is entirely for you to say, would a person sign a statement like that after being warned that he was charged with murder and was not required to say anything; would he do that if it were not true? You may think so. You are the judges of the facts, and it is entirely for you to say.

With the deepest respect for the learned trial judge, I find myself in agreement with the submission of counsel for the appellant that the theory of the defence was mentioned only to be brushed aside. Conceding that the theory was not a strong one, it was nonetheless necessary that it be adequately presented to the jury and for the reasons I have set out above I think this was not done.

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

Appeal dismissed.

Solicitors for the Appellant: *Edmonds & Maloney.*

Solicitor for the Respondent: *C. P. Hope.*

WILLIAM LANDON HARVEY (DEFENDANT) ..... APPELLANT;

1952

*Nov. 5, 6, 7

AND

1953

ARTHUR CYRIL PERRY (PLAINTIFF) ...RESPONDENT.

*Mar. 30

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Specific performance—Sale of oil leases—Correspondence—Interviews—Whether agreement reached.

In an action taken by the respondent for specific performance of a contract to sell and assign certain oil leases, the trial judge and the Court of Appeal for Alberta found that the parties had come to an agreement and that the *Statute of Frauds* had been complied with.

Held (allowing the appeal and dismissing the action), that the respondent had failed to establish that a contract had been concluded between the parties. The whole of the correspondence, interviews and conduct of the parties showed that they had not agreed upon the terms of a contract and that the respondent, up to the conclusion of the negotiations, was still trying to obtain terms more satisfactory to himself.

*PRESENT: Kerwin, Taschereau, Estey, Locke and Cartwright JJ.

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HARVEY v. PERRY

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming the judgment at trial and ordering specific performance of a contract to sell oil leases.

J. J. Robinette Q.C. for the appellant.

G. H. Steer Q.C. and *G. A. C. Steer* for the respondent.

The judgment of the Court was delivered by:—

ESTEY, J.:—This is an appeal from a judgment in the Appellate Division of the Supreme Court of Alberta (1), affirming a judgment after trial declaring a contract had been made between the respondent, as purchaser, and the appellant, as vendor, of eight oil leases the latter had obtained from the Government of the Province of Alberta, and directing specific performance thereof.

The appellant (def.) resides at Saginaw, Michigan, and the respondent (pl.) is a member of the firm of Perry & Buchta of Edmonton who "specialize in putting deals together" relative to oil leases and the production of oil. The correspondence commences by a letter of January 31, 1950, from that firm to appellant enclosing a list of royalties and also a few leases they had available at that time. Correspondence follows relative to these and on April 2 the appellant puts a postscript on his letter reading as follows:

> I have 8½ sections between Wetaskiwin & Montrose, which I will take $20 an acre for same or will sell ½ undivided interest in this piece, and I will pay half of drilling well. If you are interested let me hear from you.

On April 5 the firm wrote appellant intimating that they might arrange a drilling agreement with respect to his 8½ sections and concluded the letter: "We will do everything in our power to assist you."

Some correspondence then passed between the parties, in which respondent's firm requested appellant's lowest cash price, as the firm had clients who might be interested. On April 26, 1950, appellant replied, in part:

> I will take $32,000 cash in U.S. funds and 1/8 of the gross oil. Well also must be started within sixty days from date deal is consummated.

(1) [1952] 2 D.L.R. 148; 4 W.W.R. (N.S.) 660.

The learned trial judge stated:

The basis of the arrangement between the parties was contained in the letters of May 2nd and May 8th and, notwithstanding other previous and subsequent correspondence, the offer and acceptance as contained in those two letters was unequivocally accepted and confirmed by the plaintiff in the letter of August 24th from the plaintiff's solicitor to the defendant's solicitors in Saginaw, and further by the defendant then forwarding his leases to the plaintiff's solicitors. This, I think, disposes of the defendant's plea that there was no sufficient memoranda to satisfy the Statute of Frauds.

Mr. Justice Clinton Ford, on behalf of the learned judges in the Appellate Division, affirming the judgment at trial, stated:

The contract, as found by the trial judge, is contained in the letters of May 2nd, May 8th, May 15th and the 24th of August, 1950.

The letter of May 2 is written by respondent in the name of his firm and points out that appellant's terms, as submitted on April 26 (above quoted), are so high "we cannot handle it at all," but then continues:

However, you might consider the following and if you feel that you could accept these terms, I am sure we could put a deal over for you:

$20,000 cash bonus, direct assignment of the lease to lessee, eighteen month drilling commitment if the well is not started within the terms of the drilling commitment, an additional bonus of $2 per acre will be paid to yourself, 2½ per cent gross override to you, making a total gross override of 15 per cent, including the Crown 12½ per cent or 1/8. We feel it is utterly impossible to negotiate a deal on your lease with a 25 per cent gross override as suggested in your letter. It might be possible for us to get an additional consideration for you out of net production, however, this is an item that would have to be held in reservation.

On May 8 appellant wrote:

I will accept your proposition of Twenty Thousand and No/100 Dollars ($20,000) cash and 2½ per cent Gross Over-riding Royalty. The $20,000 has to be in American funds.

The respondent, in his letter of May 2, submits terms upon which "I am sure we can put a deal over for you." The appellant's reply of May 8, when read and construed in relation thereto, discloses that the terms are submitted as a basis for respondent's negotiating a deal. In fact respondent's letter of May 15 makes it clear that the terms were so regarded:

We will proceed immediately to try and consummate a deal for you at the earliest possible moment. There will, in all probability, be a counter proposal or two from our clients, and if such is the case, we will submit them to you at once.

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In the correspondence that follows respondent continues to write in the name of the firm, explaining delays but always hopeful of concluding an agreement.

Up to about August 24 there does not appear to be any doubt but that the firm of Perry & Buchta were acting as agents on behalf of the appellant in an endeavour to effect a sale of the eight leases here in question.

On August 24 the respondent's solicitors enter into the correspondence and write the letter which the learned trial judge and their Lordships in the Appellate Division particularly refer to as constituting an acceptance of an offer made by the appellant. The material part of the solicitors' letter of August 24 reads as follows:

> Re: P. & N.G. Leases Nos. 76411 to 76418 both inclusive in Alberta.
>
> This letter is written at the request of and under the instructions of Mr. A. G. Perry of this city, who advises that he is in a position to take these leases under the terms and conditions contained in his letter to you of the 2nd May last and your letter to his firm dated May 8, 1950.
>
> Mr. Perry has asked us to prepare the Assignment and other necessary papers, but in order to do that it will be necessary that we have access to the above leases now in your possession.
>
> If you will forward these leases to us we hereby give our undertaking to hold them under our control until we are in a position to remit to you the compensation you are entitled to receive.

This, with great respect, is not the language of an acceptance, but rather that of an agent informing his principal that he himself "is in a position to take these leases under the terms and conditions contained in his letter to you of the 2nd May last and your letter to his firm dated May 8, 1950." That it was not intended to conclude a contract appears from respondent's solicitors' further letter of August 26, in which they state "some discussion between you will be necessary before adequate instructions can be given to draw such an Agreement." On the same date, August 26, respondent indicates that he is not accepting an offer and thereby making a contract when he writes to the appellant, in part, as follows:

> Mr. Howatt of Howatt and Howatt, my solicitor, is sending through a copy of the proposed agreement. However you and I will get together and complete the terms.

While the letters of May 2 and 8 were intended as a basis for negotiations, as already stated, it is fair to conclude that a sale upon the terms thereof would have been agreeable to appellant. Even if, however, they be construed to

be an offer, the letter of August 24 is not an acceptance because of both its own language and that of the letters of August 26, which discloses that the respondent was not accepting an offer, as he contemplated "you and I will get together and complete the terms."

The respondent, however, contends that the appellant's conduct in forwarding the leases, as requested in the letter of August 24, discloses an intention on his part that the letter was an acceptance. It must be observed that these leases were sent in order that an assignment might be prepared as requested by the respondent. That such an assignment could only be and was intended by the respondent to be but a proposed assignment is clear upon a reading of the above quotations from the letter of August 24 and the two of August 26. There were then, as respondent himself stated, terms to be completed. In these circumstances the sending of the leases goes no further than to indicate a willingness that negotiations might continue, rather than that an agreement had been concluded. The position is quite distinguishable from that in *Canadian Dyers Association Limited* v. *Burton* (1), cited on behalf of respondent. There the defendant-vendor contended no contract had been made. His solicitor, however, after the offer and acceptance had been made, sent a draft deed and said he would be ready to close on the first. It was held: "His actions show that he regarded his letter as an offer and the letter of the 23rd as making a contract." The sending of the leases falls far short of any such conduct pointing specifically to the existence of a concluded contract.

With great respect to the learned judges who hold a contrary opinion, there does not appear to be here present either in the letter of August 24 or in the conduct of the appellant that absolute and unequivocal acceptance of terms required by the authorities to conclude a contract. *McIntyre* v. *Hood* (2); *District of North Vancouver* v. *Tracy* (3); *Harvey* v. *Facey* (4); *Fulton Bros.* v. *Upper Canada Furniture Company* (5). Moreover, when the whole of the correspondence and conversations are considered it is clear that the parties had not agreed upon the terms of a contract.

(1) (1920) 47 O.L.R. 259.
(2) (1884) 9 Can. S.C.R. 556.
(3) (1903) 34 Can. S.C.R. 132.
(4) [1893] A.C. 552.
(5) (1883) 9 O.A.R. 211.

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However, negotiations continued. The "get together" contemplated by respondent's letter of August 26 (above quoted) took place at Saginaw on September 1. Respondent says that the parties hereto did there "complete the terms" of the contract and then went to the appellant's solicitor's office where they were detailed to him. It is common ground that these terms were not reduced to writing upon that date and, therefore, at that time there was no compliance with the requirements of the *Statute of Frauds*.

Inasmuch as the learned trial judge accepted the respondent's evidence "where there is any conflict" between his and that of the appellant, the foregoing, as to what took place at Saginaw, must be accepted, even though the appellant's evidence may be somewhat to the contrary.

The respondent deposes that just before leaving appellant at Saginaw "I then said to Mr. Harvey, we had made a deal and we will rush it through as quickly as we can; and we shook hands on that deal right there and then in front of the hotel: and I went to my hotel room and immediately phoned Mr. Howatt's office." In that telephone conversation he gave instructions relative to the contents of the agreement. As a result, when he arrived at Edmonton and went straight to Mr. Howatt's office, the agreement which was enclosed in the letter of September 2 to appellant was in the course of preparation. The parties hereto had agreed at Saginaw that the assignment of leases, properly executed, would be deposited in the Royal Bank of Canada, Main Branch, Edmonton, and surrendered to respondent upon payment of $20,000 within a period of fifteen days. Notwithstanding that agreement, the proposed agreement, as prepared at Edmonton, signed by the respondent and enclosed with the letter of September 2, included no such provision. On the contrary, it provided:

> The Assignee shall pay to the Assignor in cash the sum of Twenty Thousand American ($20,000) Dollars or its equivalent in Canadian dollars forthwith after the assignments of the said leases have been filed with and accepted by the Department of Mines and Minerals of the Province of Alberta.

The appellant's solicitors replied under date of September 7, acknowledging the "purported agreement of sale" and "purported assignment" and, after pointing out that he would require the drilling obligation and the overriding

royalty to be set forth in both the agreement for sale and the assignment, continued:

> Be that as it may, the arrangement which we discussed with Mr. Perry during his recent visit to Saginaw was as follows:
>
> (*a*) Mr. Perry would engage you as his attorneys to prepare the assignment or assignments necessary to effect transfer of the leases from Mr. Harvey to Mr. Perry, or his nominee; and
>
> (*b*) Such assignments would be executed by Mr. Harvey, and thereupon forwarded to any Canadian bank designated by Mr. Perry, said bank to be authorized by Mr. Harvey to deliver said assignments to Mr. Perry, or his nominee, at any time within the period of fifteen (15) days upon payment to said bank as the agent for Mr. Harvey of the agreed consideration of Twenty Thousand ($20,000) Dollars in American currency or the equivalent thereof.
>
> The procedure contemplated by your letter is considerably at variance with that discussed with Mr. Perry. We have no objection to the agreement of sale, but it and the assignments must all be escrowed and delivered together upon payment of the consideration, and each assignment should expressly reserve to Mr. Harvey the overriding royalty that has been agreed upon, although it will suffice if the drilling obligation is embodied solely in the agreement of sale.
>
> If Mr. Perry is unwilling to consummate the transaction in the manner above outlined then we assume there is no cause for further negotiations, unless you can suggest a substituted procedure which will afford Mr. Harvey the same protection.
>
> In the interim, the documents enclosed with your said letter dated the 2nd instant are herewith returned.

On September 9 respondent's solicitor replied, in part: "We have your favour of the 7th instant and the terms are acceptable." He therein submitted a redraft of the consideration in the assignment with respect to which the letter stated: "We trust this will meet with your approval."

The record does not suggest that the insertion of a provision as to the payment of $20,000 so completely different from that agreed upon at Saginaw was an error, but rather that respondent did so in order that he might obtain terms more satisfactory to himself. This view is supported, not only by his conduct throughout, but by his statement, when referring to the twenty-four-month drilling period, "I never give up until the contract is signed."

Notwithstanding the express admission in the letter of September 9 that the provision relative to the payment of the $20,000 ought to have been as stated in appellant's solicitors' letter of September 7, the respondent, under date of September 13, forwarded a second agreement

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executed by himself, in which he retained the provision relative to the $20,000 in identical terms to that enclosed in his letter of September 2.

This agreement enclosed in the letter of September 13 contained another important variation. Throughout, respondent had sought a twenty-four-month period for the commencement of drilling. Appellant had insisted upon eighteen and, in fact, as respondent deposes, they had agreed at Saginaw upon an eighteen-month period and a provision to that effect was included in the proposed agreement enclosed in the letter of September 2. Some time between the 4th and 7th of September respondent deposes that he had a long-distance telephone conversation with appellant, in the course of which he again urged that the period be extended to twenty-four months. Upon his own evidence, the appellant did not agree. Because, however, he did not again specifically refuse, respondent, with the hope that it would not be struck out, included a proviso to the effect that if the Department of Mines and Minerals of the Province of Alberta would consent and approve a postponement of six months for the commencement of drilling then the respondent would commence drilling operations within twenty-four months from the aforesaid date, that is from the date of the acceptance by the Department of Mines and Minerals of the assignment of the leases.

Neither the appellant nor his solicitors made any further communication after the letter of September 7. The respondent's correspondence received thereafter remained unanswered. The position of the parties, therefore, remained as above described until about the middle of September, when appellant went to Edmonton and advised the respondent that he would himself undertake the drilling operations which, of course, concluded the negotiations.

The learned trial judge found a contract in the letters of May 2, May 8, May 15 and August 24, and the conduct of the appellant in immediately thereafter sending the leases. Portions of these letters have been quoted and already dealt with. In the formal judgment after trial it was stated:

1. THIS COURT DOTH DECLARE that the agreement referred to in paragraph 3 of the Statement of Claim, as more particularly set out in the document entered as Exhibit 4 at the trial of this action, ought to be specifically performed and carried into execution and doth order and adjudge the same accordingly.

The document described as Exhibit 4 in that judgment is that enclosed in the respondent's solicitors' letter dated September 2. That agreement, though executed by the respondent, did not embody the terms agreed upon at Saginaw. The appellant rejected it and the respondent himself expressly admitted by his solicitors' letter of September 9 that it did not express the terms agreed upon, in particular in relation to the $20,000.

Counsel for the respondent contended that the words "We have no objection to the agreement of sale," which appear in appellant's solicitors' letter of September 7, supported a view that the appellant was accepting the terms in the agreement enclosed in the letter of September 2. The letter of September 7 refers to the conversation at Saginaw, where respondent admits that only the assignment of the leases and the necessary documents, as required by law, were discussed. The preparation of such a proposed agreement as that contained in respondent's solicitors' letter of May 2 was in that letter mentioned for the first time. These words "We have no objection to the agreement of sale," when read and construed in the light of the context and the surrounding circumstances, make it clear that all the appellant's solicitors were saying was that they did not object to the preparation of the written agreement rather than to the terms thereof. Indeed this is abundantly clear from the letter of September 7 itself in which they are taking exception to the terms relative to the paying of the $20,000. It would, therefore, appear that a conclusion favourable to the contention of the respondent cannot be drawn from this sentence.

In cases of this type the respondent (pl.) must establish a contract concluded between the parties and a note or memorandum sufficient to satisfy the requirements of the *Statute of Frauds*. *Hussey* v. *Horne-Payne* (1). The parties here negotiated, in part, at Saginaw, but mainly through correspondence. It is, therefore, essential to examine the evidence and the entire correspondence, both to ascertain whether the parties had agreed and, if so, whether there is a sufficient memorandum to meet the *Statute of Frauds*.

(1) (1879) 4 App. Cas. 311 at 316.

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The letter of September 2, the proposed agreement enclosed therewith and respondent's solicitors' letter of September 9, might support a conclusion that the parties had agreed, but, when read, as they must be, with respondent's solicitors' letter of September 13 and the proposed agreement enclosed therewith, it is clear that the respondent had not agreed. The minds of the parties had not met. There was no consensus ad idem because the respondent was still negotiating for better terms.

The position of the respondent is analogous to that of the plaintiff in *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs* (1). There, after an agreement, as evidenced by two letters, had been arrived at, the vendor's (defendant's) solicitors submitted an agreement for approval and the purchaser's (plaintiff's) solicitors inserted a new clause which the vendor refused to agree to. Thereafter the purchaser sought to accept the original offer and to enforce the contract. Kay J. stated at p. 624:

> Their position, therefore, is, that they were not satisfied with the terms of the two letters, but themselves reopened the matter by negotiating for another most important advantage; and having thus treated the two letters as part of an incomplete bargain, it would be most inequitable to allow them to say, "Although we thus treated the matter as incomplete and a negotiation only, yet the Defendant had no right to do so, but was bound by a completed contract."
>
> In my opinion, the decision of *Hussey* v. *Horne-Payne* (*supra*) completely covers this case. I understand it to mean, that if two letters standing alone would be evidence of a sufficient contract, yet a negotiation for an important term of the purchase and sale carried on afterwards is enough to shew that the contract was not complete; and, so far as my own judgment is concerned, I entirely agree in the justice and equity of such a rule.

Re Cowan and Boyd (2), is quite distinguishable. There the landlord, on March 24, offered to renew his tenant's lease at $75 per month. On March 31 the tenant replied, stating that he would renew at the former rent. On April 5 the landlord wrote that he would call upon the tenant between April 26 and May 1. This letter, written after the tenant's letter of March 31, the Court construed as leaving open the offer of March 24. On April 19 the tenant accepted the terms of $75 per month. In that case there was an unequivocal acceptance of an offer that remained

(1) (1890) 44 Ch. Div. 616. (2) (1921) 49 O.L.R. 335.

open, whereas in the present case there never has been an unequivocal acceptance on the part of the respondent that could be enforced in law.

This case is distinguishable upon its facts from that of *Perry* v. *Suffields, Limited* (1). There the vendor was granted specific performance of a contract contained in two letters of February 23 and March 3, 1915. The defendant's solicitors sent a draft agreement in a letter in which they stated, in part: "We do not know whether it incorporates quite all the terms agreed, as Mr. Perry has not seen it and we have not had very full instructions from him." The draft contract contained clauses at variance with that agreed upon and when it was contended that this amounted to a reopening of the arrangement between the parties Lord Cozens-Hardy dismissed that contention and stated at p. 193:

> The solicitor frankly said he was not sure that he was fully instructed, and his attempt to alter the contract contained in those letters by making a new contract containing different terms as to price, as to fixing a date for completion, and as to the postponement of completion until after the completion of another contract for the purchase of a portion of the property by the Rugby Urban District Council seems to me to be entirely outside the question.

The letter of September 2 and the agreement enclosed therewith, signed by the respondent, were admittedly prepared upon his instructions. The position is, therefore, quite different from that in *Perry* v. *Suffields, Limited,* in that here the respondent is not submitting a proposed contract, with a request that errors and omissions be corrected, but rather does so for the purpose of obtaining terms more satisfactory from his point of view than those already agreed upon.

The correspondence and the conversations, when considered as a whole, do not establish a contract between the parties. The appeal should, therefore, be allowed and the action dismissed. On his counter-claim the appellant is entitled to an order (*a*) directing the respondent to forthwith deliver up to him copies of the leases here in question and referred to in the statement of claim; (*b*) directing the Registrar of the North Alberta Land Registration District to discharge the caveats filed by respondent against the titles to the lands here in question.

(1) [1916] 2 Ch. 187.

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The appellant is entitled to his costs throughout, both in respect to the action and the counter-claim.

Appeal allowed with costs.

Solicitors for the Appellant: *Lindsay, Emery, Ford, Massie & Jamieson.*

Solicitors for the Respondent: *Howatt & Howatt.*

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*Oct. 7, 8

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*Mar. 18

ALAN T. PROCTOR and FRANK L. FURMINGER, Executors of the last Will of HARRY W. STEWART, deceased, (PLAINTIFFS) ..... APPELLANTS;

AND

JOHN DYCK, WILLIAM DUNCAN and JAMES DUNCAN (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Damages—Fatal Accidents—Basis of entitlement—Reasonable expectation of deriving pecuniary benefits from deceased's remaining alive—Remedy not barred because amount of loss incapable of precise ascertainment—The Fatal Accidents Act, R.S.O. 1950, c. 132.

In an action before a judge and jury, two motorists were found liable under *The Fatal Accidents Act*, R.S.O. 1950, c. 132, for causing the death at the age of 55 years of a prosperous farmer and dairy operator. By consent of the parties the damages were assessed by the trial judge. The evidence was that at the date of death the deceased was in good health and that his life expectancy was 22.30 years and for the period of his life expectancy the present value of his annual savings was some $58,000, and of his average annual increase in net worth some $81,000. The deceased's will conferred substantial benefits out of the residue on the children hereinafter mentioned but the net estate, although substantial, was exhausted by specific devises and bequests so that they received nothing. The trial judge assessed the damages under the Act at $28,250 which he apportioned as follows: funeral expenses $250; to the widow $9,000; to a married daughter aged 30, $2,000; to two sons aged 28 and 22 respectively, $4,000 each, and to a third son aged 20, $6,000. The first two items were not questioned by the Court of Appeal but it varied the judgment at trial by reducing the damages awarded the youngest son to $2,000 and setting aside *in toto* the awards to the other children.

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*PRESENT: Rinfret C.J. and Taschereau, Estey, Locke and Cartwright JJ.

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Held: 1. To entitle a claimant to damages under *The Fatal Accidents Act*, it is sufficient if it is shown that the claimant had a reasonable expectation of deriving pecuniary advantage from the deceased's remaining alive which has been disappointed by his death. In the case at bar the chance of the claimants receiving benefits from their father's estate was not as a matter of law too remote to be regarded as a reasonable expectation. *Pym* v. *Great Northern Ry. Co.*, 2 B. & S. 759; *Goodwin* v. *Michigan Central Ry. Co.*, 29 O.L.R. 422, followed.

2. The trial judge was right in deciding that the claimants had a reasonable expectation of receiving substantial benefits from their father's estate had he lived and should not be denied a remedy because the amount of their loss was incapable of precise ascertainment.

3. There was nothing to indicate that the trial judge in fixing the amounts to be awarded the claimants had applied any wrong principle of law, or that the amounts he awarded were so inordinately high as to be wholly erroneous estimates of the damage, and they should therefore stand. *Nance* v. *B.C. Electric Ry. Co.* [1951] A.C. 601, applied.

Decision of The Court of Appeal [1952] O.R. 95 reversed and judgment of the trial judge restored.

APPEAL by the (plaintiffs) appellants from an Order of the Court of Appeal for Ontario (1), which varied the judgment of the trial judge, Treleaven J., by reducing the damages awarded to the appellants.

H. E. Harris, Q.C. for the appellants.

J. L. G. Keogh, Q.C. for the respondents, Duncan.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—The late Harry W. Stewart, hereinafter referred to as the deceased, died on the 20th of December, 1949 as a result of injuries received on the 17th of December, 1949. This action was brought by his executors claiming damages under the provisions of *The Trustee Act* (R.S.O. 1950, c. 400) and of *The Fatal Accidents Act* (R.S.O. 1950, c. 132). The action was tried before Treleaven J. with a jury. It was agreed at the trial that all questions as to liability should be determined by the jury but that the damages should be assessed by the learned trial judge. All of the defendants have been found liable and such liability is not questioned on this appeal.

(1) [1952] O.R. 95.

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The learned trial judge assessed the damages as follows:

Damages under the provisions of *The Trustee Act*	$ 1,213.05
Damages under the provisions of *The Fatal Accidents Act*	25,250.00

apportioned as follows:—

To the plaintiffs for funeral expenses	250.00
To Elizabeth Stewart, widow of the deceased	9,000.00
To Frank William Stewart, a son of the deceased	4,000.00
To Robert George Stewart, a son of the deceased	4,000.00
To William Charles Stewart, a son of the deceased	6,000.00
To Margery Proctor, a daughter of the deceased	2,000.00

On appeal to the Court of Appeal the $1,213.05 damages under *The Trustee Act,* the $250 for funeral expenses and the $9,000 awarded to the widow were not interfered with but the judgment was varied by reducing the damages awarded to the son, William Charles Stewart, from $6,000 to $2,000 and setting aside *in toto* the awards to Frank William Stewart, Robert George Stewart and Margery Proctor. A cross-appeal, seeking to increase the damages, was dismissed.

In this court counsel for the appellants asks that the trial judgment be restored and does not ask any increase over the amounts awarded at the trial. Counsel for the respondents supports the judgment of the Court of Appeal and does not ask for any further reduction. In the result the questions which we have to determine are as to what damages, if any, should be allowed to Frank William Stewart, Robert George Stewart and Margery Proctor, not exceeding in any case the amounts awarded to them at trial, and whether the amount awarded to William Charles Stewart should be increased and, if so, to what amount not exceeding $6,000.

The facts relevant to these questions may be summarized as follows.

At the time of his death the deceased was fifty-five years of age and his widow was the same age. They had one daughter and five sons whose ages at the date of the deceased's death were, Margery Proctor, thirty, Frank, twenty-eight, Fred, twenty-six, James, twenty-four, Robert, twenty-two, and William Charles, twenty.

The deceased was married in 1916 and at that time neither he nor his wife owned any property. The wife received about $4,000 from her father which was used in acquiring some of the assets which the deceased owned. It does not appear whether she received this $4,000 at the time of her marriage or later. Apart from this all the assets of the deceased were acquired by his own efforts with the assistance of his wife and children.

No detailed inventory of the assets owned by the deceased at the time of his death was put in evidence nor was there any detailed statement of his liabilities. Certain summarized statements were filed indicating that the gross assets of the estate amounted to $119,897.18 (including $2,510.07 life insurance) and that the liabilities totalled $60,329.36.

The assets included seven farms. A statement, Exhibit 11, indicates that the total value of six of these farms, which were specifically devised, was $72,700 and that they were subject to mortgages totalling $30,841.85. It is not clear whether these mortgages are included in the liabilities of $60,329.36, mentioned above.

The witness Proctor, who is one of the appellants and is a chartered accountant, explained that the values of all the assets which are given in the statements filed are those placed thereon by the officials of the Succession Duty Department and he expressed the opinion that if the assets were sold they might well realize fifty per cent more than these values. If this fifty per cent were applied only to the values stated for the six farms it would increase the value of the gross assets by $36,350 and indicate that in the thirty-three years between the date of his marriage and the date of his death the deceased had increased his fortune from the $4,000 contributed by the wife to a figure in the neighbourhood of $100,000.

The deceased left a will dated 6th December, 1949. By it he devised one farm to his widow, two farms to his son

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James, and three farms to his son Fred. The seventh farm, which is said to consist of eighty acres and as to the value of which there is no evidence, fell into the residue. The farms devised to James and Fred were charged with an annuity in favour of the widow and with paying off the mortgage on the farm devised to her. An automobile and all household goods and furniture were bequeathed to the wife, certain cattle to James, certain other cattle and all the deceased's interest in the "Avondale Dairy" to Fred. A legacy of one thousand dollars was bequeathed to an employee of the deceased. All the residue was left to James and Fred, charged with the payment of debts "excepting mortgages and debts owing with respect to the Dairy business", with the payment of $20,000 to Robert, $20,000 to Frank, $10,000 to Margery Proctor and $5,000 to William, such payments to be made over a period of five years from the date of the testator's death at the rate of twenty per cent each year, and with the payment of any succession duties payable in respect of these payments to Margery, Robert, Frank and William.

It was common ground that the residue is insufficient to pay the debts of the deceased, that the deficiency must be made up out of the assets specifically devised and bequeathed, and that consequently Margery, Frank, Robert and William receive nothing from their father's estate.

There is evidence that all of the sons had grown up at home and had worked with the deceased and that he had expressed the intention of giving all of them a start in life, that he was on excellent terms with all his children, and that Margery Proctor had lived at home until her marriage and had done the book-keeping and worked in the dairy, receiving only board, clothes and spending money.

There was evidence that the deceased was astute in business matters and had a specialized knowledge of cattle breeding.

An actuary testified that the life expectancy of the deceased was 22.30 years. He was in good health. Mr. Proctor testified that he had prepared the deceased's income tax returns for the years 1946 and 1949 inclusive and filed a statement showing for those four years, average annual net taxable income of $7,120.84, average annual savings from income of $3,786.26 and average annual increase in

net worth resulting from savings plus capital profits of $5,250.76. There was evidence that the present value at the date of the deceased's death of the average annual savings for the period of his life expectancy was $58,459.85 and of the average annual increase in net worth was $81,071.73.

With the exception of William the children with whose claims we are concerned were not dependent upon the deceased. William was living at home and receiving spending money and money for his clothing from the deceased. As I understand the reasons of the Court of Appeal, the sum of $2,000 awarded to him by that court was to cover the pecuniary benefits which, in their opinion, it was reasonably probable William would have received from his father in the latter's lifetime. As has been mentioned this award is not now challenged. The argument of the appellants is that the additional $4,000 awarded to William and the sums awarded to Margery, Frank and Robert by the learned trial judge are reasonable, and indeed, conservative, estimates of the amounts which, but for his untimely death, they would in all reasonable probability have received from their father's estate.

To entitle a claimant to damages under *The Fatal Accidents Act* it is not essential that he should have been financially dependent upon the deceased or that the deceased should have been under any legal liability to provide for him or that he should have enjoyed any benefits from the deceased in his lifetime. It is sufficient if it is shewn that the claimant had a reasonable expectation of deriving pecuniary advantage from the deceased's remaining alive which has been disappointed by his death.

It is argued for the respondents that the chance of these claimants receiving benefit from their father's estate is as a matter of law too remote to be regarded as a reasonable expectation. I am unable to agree with this submission. I think that the contrary was decided in *Pym* v. *Great Northern Ry. Co.* (1). At page 768 Cockburn J., with the concurrence of Crompton, Blackburn and Mellor J.J. said:

> A fortiori, the loss of a pecuniary provision, which fails to be made owing to the premature death of a person by whom such provision would have been made had he lived, is clearly a pecuniary loss for which compensation may be claimed.

(1) (1862) 2 B. & S. 759.

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> It is true that it must always remain matter of uncertainty whether the deceased person would have applied the necessary portion of income in securing to his family the social and domestic advantages of which they are said to have been deprived by his death; still more, whether he would have laid by any and what portion of his income to make provision for them at his death. But, as it has been established by the cases decided upon this statute, that, if there be a reasonable expectation of pecuniary advantage, the extinction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action, it is for a jury to say, under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages in such an action.

It is true that when this judgment was affirmed in the Exchequer Chamber (1), the passage just quoted was not expressly approved but nothing was said to indicate that it was wrong and, in my opinion, it correctly states the law.

The unanimous judgment of the Court of Appeal of Ontario in *Goodwin* v. *Michigan Central Railway* (2), is to the same effect. We have not been referred to any authority in which it has been dissented from and it should, I think, be followed. In coming to this conclusion I do not regard the decision of the Judicial Committee in *Nance* v. *B.C. Electric Railway* (3), as having decided the question as it appears from the report at page 614, that the case was argued on the assumption common to both parties that it was proper to award damages under this head.

There remains the question whether in the case at bar the evidence justified the finding of fact that the claimants had a reasonable expectation of pecuniary advantage from the continuance of their father's life to the extent of the amounts awarded by the learned trial judge.

The difference of opinion between the Court of Appeal and the learned trial judge does not appear to be as to the applicable rules of law but as to the effect of the evidence. I agree with the submission of counsel for the respondent that the findings of the learned trial judge do not depend on his view of the credibility of the witnesses. The primary facts are not in dispute. The learned trial judge was of the view that the proper inference to be drawn from these

(1) 4 B. & S. 396. (2) (1913) 29 O.L.R. 422.
(3) [1951] A.C. 601.

facts was that the claimants had a reasonable expectation of receiving substantial benefits from their father's estate, had he lived, while the Court of Appeal concluded that such facts indicated nothing more than a speculative possibility of such benefits.

The evidence of the statements made by the deceased and the terms of his will established that it was his desire and intention to benefit the claimants substantially upon his death. There was nothing to suggest that he was likely to change his mind in this regard. The record of his financial progress since his marriage, his average annual savings and average annual increase in net worth in recent years shewed, in my opinion, a reasonable probability that his fortune would increase with the years, with the corresponding probability that the claimants would, as he intended, receive benefits from his estate. His death has destroyed this probability. I think that the learned trial judge was right in deciding that the claimants had lost a reasonable expectation of substantial pecuniary benefit and that they should not be denied a remedy because the amount of their loss is incapable of precise ascertainment.

It remains to be considered whether the amounts fixed by the learned trial judge should stand. In my opinion they should. The Court of Appeal, being of opinion that no loss was established, did not discuss the quantum of damages. The principles by which I think we should be guided in approaching this question of quantum are laid down by the Judicial Committee in *Nance* v. *B.C. Electric* (*supra*) at pages 613 and 614 in the following words:—

> Two distinct questions arise: (1) What principles should be observed by an appellate court in deciding whether it is justified in disturbing the finding of the court of first instance as to the quantum of damages; more particularly when that finding is that of a jury, as in the present case.
>
> * * *
>
> (1) The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low

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Cartwright J.

or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint* v. *Lovell* (1)), approved by the House of Lords in *Davies* v. *Powell Duffryn Associated, Ld.* (2).

I find nothing in the reasons of the learned trial judge to indicate that he applied any wrong principle of law, and I find myself quite unable to say that the amounts which he has awarded to the claimants are so inordinately high that they must be wholly erroneous estimates of the damage.

For the above reasons I would allow the appeal and restore the judgment of the learned trial judge. The appellants should have their costs of the appeal to this court. The order of the Court of Appeal as to the costs of the appeal and cross-appeal to that court should stand.

Appeal allowed with costs and judgment at trial restored.

Solicitors for the appellants: *Fleming, Harris, Kerwin & Barr.*

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

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*Nov. 3, 4.

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*Mar. 30

JACK SINGER AND ABRAHAM BELZBERG (DEFENDANTS) ..... APPELLANTS;

AND

THE J. H. ASHDOWN HARDWARE COMPANY LIMITED (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Judgments—Merger—Sale of goods—Prior action against three partners—Joint liability—Default judgment against one—Discontinuance as to other two—New action against the two and another—Order setting default judgment aside—Whether merger—Rule 113 of the Supreme Court of Alberta.

The respondent had brought an action against the appellants and one Barker, former members of a partnership and whose liability was joint, for the price of goods sold and delivered. Judgment in default of defence was obtained against Barker and the action against the appellants discontinued.

*PRESENT: Kerwin, Taschereau, Estey, Locke and Cartwright JJ.

(1) [1935] 1 K.B. 354. (2) [1942] A.C. 601.

The respondent then commenced this action for the same debt against the appellants and another. After the joinder of issue but before the action had come to trial, the judgment in the first action against Barker was, upon his application, set aside. The appellants pleaded, inter alia, the recovery of the judgment against Barker and that the indebtedness had been merged in that judgment. The action was maintained by the trial judge and by the Appellate Division of the Supreme Court of Alberta.

Held (Locke J. dissenting), that the appeal should be dismissed and the action maintained.

Per Kerwin, Taschereau and Estey JJ.: Where a judgment has been set aside properly and without consent, as was done in the present case, there is an exception to the general rule that a judgment against one of several persons who are jointly liable on a contract effects a merger of the original cause of action.

Per Kerwin, Taschereau, Estey and Cartwright JJ.: As long as the judgment was set aside before the adjudication, it matters not that it was done after the issue of the writ in the second action.

Per Cartwright J.: The rule in *King* v. *Hoare* (1844) 13 M. & W. 494, does not apply when the judgment against one of several co-contractors who are jointly liable on the same contract has been, as in the present case, validly set aside. Having been set aside, the judgment against Barker ceased to operate as a bar to the action against the other co-contractors; it ceased to exist and therefore to have any effect thereafter, except possibly as a justification for an act done in reliance upon it during its existence. *Semble,* that the same result would obtain even where the order setting such judgment aside had been made on consent and no grounds had existed for setting it aside against the opposition of the plaintiff.

Per Locke J. (dissenting): The rule at common law that a cause of action against several joint debtors is merged if judgment is taken against one of them whose liability is admitted has been altered in Alberta only to the extent provided by Rule 113 of the Supreme Court and upon the discontinuance of the action after judgment had been signed against Barker the cause of action was extinguished: *King* v. *Hoare* (1844) 13 M. & W. 494; *Kendall* v. *Hamilton* [1879] 4 A.C. 504; *Odell* v. *Cormack* (1887) 19 Q.B.D. 223; *Hammond* v. *Schofield* [1891] 1 Q.B. 453; *Price* v. *Moulton* (1851) 10 C.B. 561; *Cross* v. *Matthews* (1904) 91 L.T.R. 500, followed. *Re Harper and Township of East Flamborough* (1914) 32 O.L.R. 490 and *Partington* v. *Hawthorne* (1888) 52 J.P. 807, distinguished. While upon the evidence it should have been found that the judgment against Barker was set aside by consent, whether or not this was the case was not decisive, since Barker's liability for the debt for which judgment had been signed was expressly admitted and the cause of action having merged, could not be revived.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming the judgment of the trial judge.

(1) [1951] 3 W.W.R. (N.S.) 145.

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SINGER AND BELZBERG v. J. H. ASHDOWN HARDWARE CO. LTD.

C. F. H. Carson Q.C. and *A. L. Barron Q.C.* for the appellants.

H. W. Riley Q.C. and *D. R. Fisher* for the respondent.

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

KERWIN J.:—The appellants Jack Singer and Abraham Belzberg are, together with William Kluner, the defendants in an action brought by the respondent to recover the price of goods alleged to have been sold and delivered by it to a partnership known as Atlas Plumbing and Heating which is said to consist of the defendants and one John Barker. So far as appears Kluner was never served with the writ of summons. The judgment at the trial in favour of the respondent against the appellants was affirmed by the Appellate Division of the Supreme Court of Alberta (1). In the Courts below it was alleged that the respondent had failed to prove that the goods had actually been sold and delivered but such contention was abandoned before us. I agree with the Appellate Division that the unsigned memorandum, Exhibit 2, was not a release or an estoppel. The only remaining question therefore is whether the respondent's claim was defeated under the circumstances now narrated.

On November 28, 1949, an earlier action had been commenced by the respondent against Barker and the appellants for the same sum of money and based on the same cause of action. On December 16, 1949, default judgment was entered against Barker only. On January 26, 1950, that action was discontinued as against the appellants and, on the same day, the present action was commenced. On February 23, 1950, judgment by default was entered against the appellants but on March 6, 1950, this was set aside. By their statement of defence, dated March 8, 1950, the appellants pleaded the default judgment against Barker in the former action and alleged that any indebtedness of the appellants was merged in that judgment. The joinder of issue and reply denied that there was any merger. Upon the application of Barker the default judgment against him in the previous action was set aside by an order of Mr. Justice Egbert on March 21, 1950. The trial of the present action did not take place until April, 1951.

(1) [1951] 3 W.W.R. (N.S.) 145.

Even if it could be said that, in the absence of an allegation by the respondent that the previous judgment had been set aside, the trial judge should not have permitted to be produced the Court records, including the order of Egbert J., nevertheless he did so, and the Court of Appeal affirmed his ruling. The solicitors for the appellants were not taken by surprise as they had known for some time that the order had been made and, therefore, if the respondent had applied to set up in its pleadings the order of Egbert J. in order to show that the allegation of the appellants that there was an existing prior judgment against Barker was not correct, leave would undoubtedly have been given.

It is not the law, as was argued on behalf of the appellants that a judgment against one of several persons who are jointly liable on a contract effects a merger of the original cause of action which remains in force under all circumstances that may arise in the future. In Halsbury, 2nd ed. Vol. 13, 416, after referring to the principle that where there is but one cause of action the damages must be assessed once for all, it is stated:—

> 471. On this principle a judgment recovered (though unsatisfied) against some one of a number of persons who are jointly (not jointly and severally) liable on the same contract or are liable for the same tort with others, is, until set aside (*d*), a bar to an action.

The words "until set aside" are significant and in general the rule is subject to that condition. In principle I would think that must be so and it has been held that if such a judgment is properly set aside, it is as if it had never existed,—*Goodrich* v. *Bodurtha* (1) referred to by Riddell J. in *Re Harper and Township of East Flamborough* (2), and *Partington* v. *Hawthorne* (3) cited in note (*d*) in Halsbury. We are not here concerned with the qualification contained in the note:—

> but a consent judgment regularly obtained, and not objectionable on the merits, cannot be set aside by consent of parties, so as to prejudice a third person in whose favour it is a bar (*Hammond* v. *Schofield* (1891) 1 Q.B. 453; 21 Digest 219; *Cross & Co.* v. *Matthews and Wallace* (1904) 91 L.T. 500; 21 Digest 223,575).

because I agree with the Appellate Division, that it must be taken that the trial judge had decided that the order of

(1) (1856) 72 Mass. (6 Gray) 323. (2) (1914) 32 O.L.R. 490.
(3) (1888) 52 J.P. 807.

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Egbert J. had not been granted with the consent of the respondent, and that on the evidence this was a proper conclusion.

The judgment in *Hammond* v. *Schofield* (1) proceeded upon the fact that there a consent had been given by the plaintiff to set aside a default judgment but some expressions in the reasons of Wills J. were relied upon by the present appellants. At page 455, referring to the effect of the signing of a default judgment, he says:—

> If a judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as never having existed. I am inclined to think (though it is not necessary to decide the question), that if it be regularly obtained, but through a slip on the part of the defendant, so that on an affidavit of merits it might be set aside, and it ultimately turns out that the defendant never was liable, it may equally be regarded as a judgment which never ought to have been signed, and would in such a case be properly treated as a nullity. If, being regularly obtained, though through a slip on the part of the defendant, and set aside upon an affidavit of merits, it ultimately turns out that the original defendant was liable, I do not think it could be treated, so far as the rights of other persons are concerned, as a nullity. Still less, when there is no pretence for saying that there is any ground for setting it aside upon the merits as between the plaintiff and the defendant, and when as between them it could only be set aside by consent.

Although not so expressed, the third sentence is in my opinion *obiter* but whether that be so or not, I am, with respect, unable to agree with it. In the first sentence, although stating it was unnecessary so to decide, Wills J. thought that if a judgment had been improperly obtained, if it is set aside, it ought to be treated as never having existed. However, if the effect of a merger be absolute, the original cause of action could never be resuscitated. In *Parr* v. *Snell* (2), Scrutton L.J. referred to what he has said in *Moore* v. *Flanagan* (3), where he adopted as correct what Vaughan Williams J. had stated in *Hammond* v. *Schofield*, at p. 457:—

> The basis of this defence (i.e. based on *Rice* v. *Shute* and *Kendall* v. *Hamilton*) is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract.

(1) [1891] 1 Q.B. 453. (2) [1923] 1 K.B. 1.
(3) [1920] 1 K.B. 919 at 925.

If a judgment be set aside properly and without consent, as I hold to have occurred in the present case, there is an exception to the general rule which although binding by precedent was founded upon a fiction and should be restricted and not enlarged. The judgment having been set aside, there is not more than one judgment on one entire contract.

It was objected that the order of Egbert J. was made after the issue of the writ in the present action and that therefore the respondent had no cause of action at the date of the writ. Whether the default judgment against Barker be put forward as estoppel or merger cannot, I think, make any difference. The decision of the Appellate Division of Ontario in *Cornish* v. *Boles* (1), was cited on behalf of the appellants and it may be added that in that case there is a reference to *Northern Electric and Manufacturing Co. Limited* v. *Cordova Mines Limited* (2). Mr. Justice Riddell, who took part in both these decisions, subsequently decided the *Harper* case referred to above. I agree with the decision in *Harper* and in the *Massachusetts* case and conclude that the objection cannot be sustained.

The appeal should be dismissed with costs.

LOCKE J. (dissenting):—On November 29, 1949, the respondent commenced an action in which the appellants and one Barker described in the Statement of Claim as "carrying on business under the firm name of Atlas Plumbing and Heating", and these three persons individually were named as defendants. The claim made was for the purchase price of goods sold and delivered to the alleged partnership. Barker was served with the Statement of Claim and on December 16, 1949, in default of defence, judgment was entered against him for the sum of $10,898.95, the amount claimed, and costs. Whether the appellants were served with the Statement of Claim in the action does not appear. On January 6, 1950, the respondent discontinued the said action as against the present appellants and on that date commenced the present action against the appellants and one William Kluner, the Statement of Claim alleging that during the years 1948 and 1949 the defendants had been partners with Barker in the business known as

(1) (1914) 31 O.L.R. 505. (2) (1914) 31 O.L.R. 221.

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Atlas Plumbing and Heating, and claiming the same amount as in the first action for goods sold and delivered to such partnership. In the second action the defendants were served with the Statement of Claim and on March 8, 1950, filed a Statement of Defence in which it was alleged, inter alia, that the respondent had recovered judgment in the amount claimed against Barker in the first action, that, if there was a debt, the liability of the partners was joint and not joint and several and that the appellants had accordingly been released from any liability. On March 21, 1950, upon the application of Barker, Egbert J. made an order setting aside the judgment in the first action and gave Barker leave to defend.

The main question to be determined upon this appeal is as to whether the cause of action which the respondent asserted against the appellants and Barker in the first action was extinguished by the action of the respondent in signing a final judgment against Barker for the amount of its claim and thereafter discontinuing the action as against the other defendants.

Except to the extent that the matter is affected by Rule 113 of the Supreme Court of Alberta, it is the law that, where action is brought against one or more persons liable jointly for a liquidated amount upon a contract and final judgment is entered against one of them, the cause of action merges in the judgment and the liability of the others is extinguished. The rule in *King* v. *Hoare* (1), that a judgment even without satisfaction recovered against one of two joint debtors is a bar to an action against another, was expressly approved by the House of Lords in *Kendall* v. *Hamilton* (2).

Rule 113, while not in identical terms, appears to have been taken from the rule which is now Rule 3 of Order 27 of the Rules of the Supreme Court 1883. In so far as it touches the present matter, the Alberta Rule reads:—

> When a Statement of Claim includes a claim for a debt or liquidated demand with or without interest . . . and any defendant, fails to deliver a Statement of Defence . . . the plaintiff may as against such defendant enter final judgment for any sum in respect of which no defence is delivered . . . and may proceed with the action against any other defendants and in respect of any other claims.

(1) (1844) 13 M. & W. 494. (2) (1879) 4 App. Cas. 504.

In the present matter the respondent might thus after signing judgment against Barker have proceeded in that action with its claim against the appellants but, for reasons which are not explained, elected to discontinue the action as against them and to start afresh, adding a third person as defendant. It is to be noted that when these proceedings were commenced the judgment against Barker in the first action had not been set aside and, as an additional argument to that upon the main point, the appellants contend that in any event the existence of this judgment was a bar to the proceedings as of the date they were instituted.

In *King* v. *Hoare,* Baron Parke, after saying that the question of substance to be decided was whether a judgment recovered against one of two joint contractors is a bar in an action against another, said (p. 504):—

> If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, "transit in rem judicatam,"—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two.

And later (p. 505):—

> We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case.

In *Kendall* v. *Hamilton* (1), the action was against one of three members of a partnership. A previous action had been brought and judgment recovered against two members of the firm and nothing was realized under the judgment. At the time the first action had been brought the plaintiff was unaware that the defendant in the second action had been a partner of the firm. The judgment was held to be a bar to the claim. Earl Cairns L.C. said in part (p. 515):—

> In the present case I think that when the appellants sued Wilson & McLay, and obtained judgment against them, they adopted a course which was clearly within their power, and to which Wilson & McLay could have made no opposition, and that, having taken this course, they

(1) (1879) 4 App. Cas. 504.

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exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person.

These remarks were made on the footing that Wilson and McLay, against whom judgment had been recovered, were the agents, and that Wilson, McLay and Hamilton, the partnership, was the undisclosed principal. The Lord Chancellor then proceeded to discuss the matter on the basis that Wilson, McLay and Hamilton were in the position of co-contractors and, considering *King* v. *Hoare* to have been correctly decided, was of the opinion that the recovery of the judgment against two of the three was fatal to the claim. Lord Selborne (p. 539) said that the judgment had the effect of extinguishing the legal liability of Hamilton as a partner on the debt previously due from the partnership of which he was a member. Lord Blackburn, who agreed with the other Law Lords that *King* v. *Hoare* had been rightly decided and that it did not depend on any such principle as that by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, said that the plaintiffs had a right of recourse against Hamilton for which they had never bargained and that they had destroyed that remedy by taking a judgment against persons who turned out to be insolvent.

In *Odell* v. *Cormack* (1), where a former member of a partnership was sued upon a bill of exchange accepted in her name without authority by one Carter who had been employed to realize the assets of the firm of which the defendant had been a member, judgment had been recovered in another action against Carter. Hawkins J., after finding that the action failed, since the defendant's acceptance had been given without her authority, said that this view rendered it unnecessary to discuss the effect of the judgment obtained. He then said that he was very strongly disposed to think that if a joint liability could have been established against Cormack and Carter, the fact that that action was abandoned against Cormack and judgment afterwards signed against Carter alone would have afforded her a good defence to the action on the authority of *King*

(1) (1887) 19 Q.B.D. 223.

v. *Hoare* and *Kendall* v. *Hamilton*, and that he did not think the effect of that judgment, so far as Cormack was interested, could have been altered to his prejudice by the plaintiff obtaining, with Carter's consent, a Master's order to set it aside.

In *Hammond* v. *Schofield* (1), the plaintiffs, a firm of printers, sued the defendant for the cost of printing for him a certain newspaper of which they supposed him to be the sole proprietor and the defendant consented to final judgment being signed against him. After judgment had been signed, the plaintiffs received information that at the time the work was done one T. was a partner of the defendant and joint proprietor with him of the newspaper. Accordingly, with the consent of the defendant, they applied for an order that the judgment should be set aside and the writ amended by adding T. as a defendant in the action. It was held that the consent of the defendant to the setting aside of the judgment could not enable the plaintiff to evade the rule that judgment recovered against one of two joint contractors is a bar to an action against the other, and that there was consequently no jurisdiction to make the order. The facts differ from those in the present case in an important particular since T. was not a party to the action at the time the judgment was signed against the defendant, and so the joint debt had merged in the judgment obtained before it was set aside. Wills J., speaking of the effect of the judgment, said (p. 455):—

> The effect of the judgment was undoubtedly to destroy the right of action against a co-contractor with the defendant—*King* v. *Hoare*—even though the plaintiff did not know when he signed judgment that he had a remedy against him.

and again (p. 456):—

> I cannot see upon what principle the consent of the plaintiff and defendant can be allowed to create a new right, or (which is the same thing), to resuscitate an extinguished right in favour of the plaintiff against a third person, or to create on the part of a third person a new liability.

In this matter no reasons for judgment were delivered by the learned trial judge. In delivering the judgment of the Appellate Division (2), Clinton J. Ford J.A. considered that since the judgment obtained against Barker had been set aside (though after this action had been commenced) it was not a bar to the action. He was further of the

(1) [1891] 1 Q.B. 453. (2) [1951] 3 W.W.R. (N.S.) 145.

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opinion that it should be presumed that the trial judge found that it was not set aside by the consent, either express or tacit, of the plaintiff and that a statement made in Vol. 13 of Halsbury, p. 416, was authority for the view that if the judgment were set aside otherwise than by consent any objection to the merger of the cause of action was overcome.

If the question were as to whether or not the judgment had been set aside with the tacit, if not the express, consent of the solicitor for the respondent, I would have difficulty in coming to the conclusion that by his conduct before Egbert J. he had not tacitly consented to the judgment being set aside. At the trial the respondent put in as part of its case the order setting aside the judgment which had been signed against Barker, but tendered no evidence as to how it had been obtained. The order setting aside the judgment and the court file in the matter disclose that there was no affidavit made by Barker explaining the reason why he had not defended the action or denying his liability to the plaintiff in the action, or explaining the delay of something more than three months in making the application to set the judgment aside. The appellants, however, at the trial called the solicitor who had appeared for Barker on the application who said that he had discussed with the solicitor for the respondent "the project of opening up the judgment" in advance of the making of the application and that, when the latter appeared before Mr. Justice Egbert and the judge had asked him what position he took towards the application, he had said that "he was neither opposing nor consenting to the order" or words to that effect. The solicitor acting for Barker said that he had mentioned to the judge that, in his opinion, there might be some question of contribution as between Barker and Belzberg and Singer but that he made no suggestion that his client did not owe the money. On being cross-examined he said that it was not a consent order and, in answer to a question: "There is no doubt that it was granted on the merits?", said that that was correct and that in making the application he was considering the welfare of Barker and that he had had no arrangements with the respondent or its solicitor. He, however, repeated that his client did not dispute liability on his part for the amount of the judgment.

I have difficulty in understanding how any question of contribution as between these partners could have arisen since as the evidence showed Barker, Belzberg and Singer had on April 1, 1949, almost a year prior to the date of the application to Egbert J., entered into an agreement dissolving the partnership in which Barker convenanted, inter alia, to indemnify Belzberg, Singer and Kluner against all debts and liabilities of the partnership and all claims and demands in respect thereof. Furthermore, even had there been no outstanding covenant at the time, the signing of the judgment against Barker would not have affected any claim to contribution he might conceivably have had against his former partners. The solicitor for Barker expressed the view that this judgment was not set aside with the consent of the solicitor for the respondent, but this does not appear to me to be the proper conclusion from these facts. I think it is quite clear that the solicitor for the respondent who had charge of the proceedings in these two actions considered that it was in his client's interests that the judgment against Barker should be set aside and, while he did not expressly consent, it appears to me that by his conduct he tacitly consented to the making of such an order. That it had been regularly obtained and that the debt was due and owing is conceded and it cannot be seriously suggested that if the solicitor for the respondent had said that he opposed the application the Chamber Judge would not have refused it.

The passage from 13 Halsbury, p. 416, relied upon in the judgment of the Appellate Division, reads:—

> On this principle, a judgment recovered (though unsatisfied) against some one of a number of persons who are jointly (not jointly and severally) liable on the same contract, or are liable for the same tort, with others is, until set aside, a bar to an action.

This statement follows Article 470 in which the effect of the rule in *King* v. *Hoare* and other cases touching the same matter is discussed and which concludes with the sentence:

> The principle is that where there is but one cause of action, the damages must be assessed once for all.

I think this statement in Halsbury, if it is to be construed as meaning that, apart from the rule of Court, it is only until a judgment recovered against one of several joint

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debtors is set aside that it is a bar to an action against the others, is inaccurate. I am unable, with respect, to agree in the conclusion of Mr. Justice Clinton J. Ford that the judgment against Barker was not set aside by consent but, if I were, I do not think that that fact and the further fact that the judgment itself was signed in default of defence and was not a consent judgment are decisive of the matter.

This subject is discussed by Wills J. in *Hammond* v. *Schofield* at p. 455 where, speaking of the effect of the signing of a judgment in such cases, he said in part:—

> If a judgment be improperly obtained, so that it never ought to have been signed, there can be no doubt when set aside it ought to be treated as never having existed. I am inclined to think (though it is not necessary to decide the question), that if it be regularly obtained, but through a slip on the part of the defendant, so that on an affidavit of merits it might be set aside, and it ultimately turns out that the defendant never was liable, it may equally be regarded as a judgment which never ought to have been signed, and would in such a case be properly treated as a nullity. If, being regularly obtained, though through a slip on the part of the defendant, and set aside upon an affidavit of merits, it ultimately turns out that the original defendant was liable, I do not think it could be treated, so far as the rights of other persons are concerned, as a nullity. Still less, when there is no pretence for saying that there is any ground for setting it aside upon the merits as between the plaintiff and the defendant, and when as between them it could only be set aside by consent. I cannot see upon what principle the consent of the plaintiff and defendant can be allowed to create a new right, or (which is the same thing), to resuscitate an extinguished right in favour of the plaintiff against a third person, or to create on the part of a third person a new liability.

In the present case there is no pretence for saying that there was any ground for setting aside the judgment against Barker upon the merits.

An opinion apparently inconsistent with that of Wills J. was expressed by Riddell J. in *Re Harper and Township of East Flamborough* (1), upon an application by a ratepayer of the Township for an order quashing a by-law passed by the Municipal Council. Prior to the time when the proceedings were launched, the by-law had been approved by the Ontario Railway and Municipal Board and by a section of the Municipal Act it was provided that, after such approval, the validity of the by-law "shall not thereafter be open to question in any court." After the motion had been launched the Board set aside its certificate

(1) (1914) 32 O.L.R. 490.

of approval. It was objected that the by-law could not be quashed since at the time the motion was launched it was not "open to question in any court." Riddell J. held that the objection failed and construed the section of the statute as meaning that the Court could not question the validity of the by-law which had been approved by the Court, if such approval was in existence when the Court was called upon to decide the point. He then said in part (p. 492):—

> Were this a case of estoppel, difficult questions might arise: but, even then, there is respectable authority for the proposition that an action begun which can be met by a plea of estoppel, will lie if the estoppel be removed before the matter comes to adjudication.

In support of this statement Riddell J. referred to *Goodrich* v. *Bodurtha* (1), a decision of Thomas J. of the Supreme Judicial Court of that State. In that case the plaintiff brought his action upon a judgment recovered in the Court of Common Pleas upon a joint and several promissory note. While the action was pending, the judgment upon which it was based was reversed on the ground of want of jurisdiction in the Court. After the reversal the plaintiff obtained leave to amend his declaration in order to claim upon the original note and the defendant pleaded that the right of action had merged in the judgment. As to this claim, Thomas J. said (p. 324):—

> To this amended declaration the defendant answered the merger of the note in the judgment. To this the obvious reply was and is that, upon the reversal of the judgment, the merger ceased. It was as if no judgment had been rendered.

With respect, the learned judge might have said with greater force that since the judgment had been awarded by a court which was without jurisdiction it was itself a nullity and could not either effect a merger or have any other legal consequence. What was meant by the expression "the merger ceased" I do not understand. The statement, that upon the reversal of the judgment it was as if no judgment had been rendered, was directed to the judgment he was then considering and was not, I think, intended as having universal application. If it was, it was *obiter* and, I think, inaccurate.

(1) (1856) 72 Mass. (6 Gray) 323.

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Riddell J., while noting that the judgment had been set aside by reason of lack of jurisdiction in the *Goderich* case, appears to have relied upon it as authority for the statement that when "the obstruction by way of merger" was removed and the judgment set aside there was no estoppel. It is to be noted that no question of merger affected the decision in *Harper's* case. There was no such question to be determined as the effect of the signing of a judgment upon further proceedings upon a cause of action, in respect of which it was awarded, and anything said by Mr. Justice Riddell on the subject of merger was simply *obiter*.

Some support for the view that the signing of the judgment did not extinguish the cause of action and that it might be pursued, if the judgment is set aside, might appear to be found in the case of *Partington* v. *Hawthorne* (1). In that case the action was brought for goods sold and delivered by the plaintiff to the defendant at the Princess's Theatre. The order for the goods had been given by a person named Kelly, who the plaintiff afterwards discovered to be the agent of Hawthorne. The plaintiff brought an action against Kelly and recovered judgment in default of defence and thereafter sued Hawthorne. At the time the latter action was commenced, the judgment against Kelly was still in effect. Hawthorne applied to the Master and obtained unconditional leave to defend. On the plaintiff appealing from this order, Sir James Hannen, in Chambers, varied it by giving the defendant leave to defend only on paying the sum in dispute into Court. Hawthorne appealed from the latter order to a court consisting of Pollock B. and Manisty J. Two days before the appeal came on for hearing, the judgment against Kelly was set aside on an order of the Divisional Court, presumably on Kelly's application though the report does not say so. On the appeal, counsel for Hawthorne contended that since Partington had taken judgment against Kelly he could not proceed against Hawthorne for the same subject matter since the question was res judicata and that, having chosen to proceed first against the agent, he could not now proceed against the principal, referring in support of this contention, inter alia, to *Kendall* v. *Hamilton*. It was further contended that Hawthorne should at least have unconditional

(1) (1888) 52 J.P. 807.

leave to defend. Baron Pollock said that the action against Kelly, in which the judgment had been obtained, was "obviously a mistaken proceeding" and should have been directed against Hawthorne. He said further:—

> That judgment, however, has been set aside. It is not now existing and there is nothing to show that the second action is frivolous or vexatious.

Manisty J. said in part:—

> The judgment therein obtained has gone and is as if it never had been. The matter is now just as if Miss Hawthorne had been sued originally; besides, she does not deny receipt of the goods.

It is unfortunate that the statement of facts in the report is so meagre. The case is not reported elsewhere, however. I think the decision does not touch the present question. Kelly, ordering the goods in the name and on behalf of Princess's Theatre, in which name apparently Hawthorne carried on business, was not liable to Partington for the purchase price. The judgment against him was set aside presumably on this ground. Taking the judgment against him did not merge the only cause of action that existed, which was as against Hawthorne for goods sold and delivered.

I have been unable to find that the decision in *Partington's* case has been considered in any case in England. It was, however, explained and distinguished in a judgment of the Appellate Division of Ontario in *Brennen* v. *Thompson* (1), the judgment of the Court being written by Riddell J. In that case, the plaintiff sued three defendants T., L. and C. in the County Court for the price of goods sold and delivered. All three were sued as if liable in the same way. T. did not appear and judgment was entered against him upon default; the defendants L. and C. however, appeared and the plaintiff then delivered a statement of claim which, in substance, stated that T. had bought the goods as agent of L. and C., that the plaintiff had recovered judgment against T. and asked that if it should appear that L. and C. were liable as principals, the judgment taken by default should be set aside. On a motion by L. and C. to strike out the statement of claim and dismiss the action against them, the County Court Judge made an order setting aside the judgment which had been signed

(1) (1915) 33 O.L.R. 465.

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against T. and allowing the plaintiff to amend the statement of claim as it might be advised. L. and C. appealed and their appeal was heard by a Court consisting of Falconbridge, C.J.K.B., Riddell, Latchford and Kelly JJ. The judgment of the Court was that the case presented by the statement of claim was that the two defendants were undisclosed principals of the defendant against whom judgment had been signed by default and that that judgment was a bar to the prosecution of an action against the principals, the cause of action having passed into a judgment which could not be set aside without their consent.

Counsel for the respondent on the appeal had relied upon the decision in *Partington* v. *Hawthorne,* apparently to support a contention that the judgment against T. having been set aside it was, as had been said by Manisty J., "as if it never had been." Dealing with this contention, Riddell J. pointed out that in *Partington's* case Kelly, representing himself as acting for the Princess's Theatre, had ordered goods for the theater from the plaintiff and that they were sold, delivered to and debited against the Princess's Theatre. Further, they were sold on the credit of the theatre and Hawthorne did not deny receipt of them. As to the judgment which had been recovered against Kelly, he was of the opinion that it had been obtained necessarily on the hypothesis that Kelly had not the authority to act for Hawthorne. If, indeed, this was the ground upon which Partington proceeded against Kelly, the latter's liability would be in damages for breach of warranty of authority. Whether the action proceeded on this basis or on the ground that Kelly had contracted personally, though also on behalf of his principal, cannot be determined from the report. The statement in the judgment of Baron Pollock that the action against Kelly was obviously a mistaken proceeding can only mean that Kelly was not personally liable on either ground. Riddell J. pointed out that the cause of action against Hawthorne had accordingly not merged and, referring to his judgment in *Re Harper and Township of East Flamborough,* he said that once the judgment against Kelly was out of the way the action against Hawthorne could proceed. Mr. Justice Riddell's opinion as to the effect in law of the merger of a cause of action is made apparent by a further passage in his judgment dealing

with a supposititious case where A. goes to C. and buys goods ostensibly for himself and on his own credit. C. thereafter discovering that B. is the real purchaser and A. only an agent for his undisclosed principal may sue A. and will succeed if he proves the sale only, or may sue B. when he will succeed if he proves agency. He then said (p. 471):

> In either case the action is the same, for "goods bargained and sold, and sold and delivered;" there is only one cause of action, the one contract: a contract to which C. is one party and either B. or A. (at C.'s option) the other. If he takes judgment against either, the contract transit in rem judicatam and is merged, gone. He cannot thereafter say that the contract is in existence. Nor can he, having taken a judgment against one, revive against the other the dead contract; it stays dead.

While expressing these views as to the consequences of the merger of a cause of action, the judgment of the Court in *Brennen's* case does not appear to have been based on this ground. Upon the evidence the Court were of the opinion that the agent and the principals were all personally liable, that there was but one cause of action and that signing the judgment against the agent was conclusive evidence of an election not to proceed against the others.

In the passage from the judgment of Riddell J. in *Harper's* case, above quoted, that learned judge said that if it was a case of estoppel there was respectable authority for the proposition that an action begun, which can be met by a plea of estoppel, will lie if the estoppel be removed before the matter comes to adjudication. However, as pointed out in the passage from Vol. 13 of Halsbury which has been relied upon in the present matter, the question in a case such as this is not that the plaintiff is estopped by having taken judgment against one of several joint debtors, but rather that the cause of action has been extinguished. While the judgment of the Appellate Division in *Brennen's* case, delivered by Riddell J. where all three defendants were liable, proceeded upon the ground that the plaintiffs had by taking judgment against the agent elected not to proceed against the others, the Court must have arrived at the same result, though on different grounds, had the liability of the three defendants been joint. If Riddell J. was of the opinion, when he delivered judgment in *Harper's* case, that where judgment had been taken against one of several who were alternatively liable or against one of several joint debtors, setting aside the judgment would

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revive the cause of action against the others, it would appear that he had changed his mind by the following year when he delivered the judgment of the Court in *Brennen's* case.

Partington v. *Hawthorne* is the authority referred to in Note D to the passage from 13 Halsbury, above mentioned, for the statement that a judgment recovered against one of a number of persons jointly liable is *until set aside* a bar to an action. In that case, the defendant against whom the judgment had been signed had not been liable for the debt, the only cause of action being that against Hawthorne. The remarks of Baron Pollock and Manisty J. as to the effect of setting aside that judgment were presumably directed and accordingly must be limited in their application to the situation with which they were dealing. No question as to the effect of a merger of the cause of action could arise, either in that case or, as I have already pointed out, in the case of *Harper* or that of *Goodrich*. *Partington's* case was not one where there was joint liability and it does not support the proposition that where, as in the present case, judgment has been signed against one of several joint debtors, the setting aside of the judgment revives the cause of action as against third persons.

There is a statement in the 13th edition of Odgers on Pleadings, p. 207, where, dealing with the subject of estoppel by record, that is by judgment of a court of record, it is said that so long as a judgment stands *no one who was a party to it* can reopen that litigation, the matter having become *res judicata*. But this does not touch the question here. The appellants were not parties to the judgment which was signed. Estoppel is not a cause of action, rather is it a rule of evidence. In the case of estoppels arising from a judgment of a court of record, it is as between the parties and their privies that the record is conclusive so as to estop the parties from again litigating a fact once tried and found (Everest and Strode on Estoppel, 3rd Ed. p. 52). Odgers' statement, as is apparent from its terms, relates, and indeed could only relate, to the situation as between the parties to the judgment.

In *The Bellcairn* (1), the question was as to the effect of a judgment entered between the owners of two vessels upon a subsequent dispute between them arising out of the same incident. The remarks of Lord Esher M.R., to which our attention has been drawn, amounted only to this, that if the first judgment was still in existence the matter as between the parties was *res judicata*. The case does not appear to me to bear upon the issue in the present matter.

The respondent's contention is, as I understand it, that where judgment has been signed against one of several defendants whose liability to the plaintiff is joint and the proceedings are thereafter abandoned against the others, the original cause of action which has been merged in the judgment may be revived and the legal consequences of having taken the judgment avoided by the simple expedient of obtaining an order of the court setting it aside, even though this be done without the knowledge or consent of the parties defendant who have been released of liability. If the mere setting aside of the judgment in this manner were effective to revive rights which have been lost as against those who were formerly joint debtors, I can see no sound reason why the same rule should not apply to rights which have been lost by election. By way of illustration, in *Morel* v. *Westmorland* (2), a claim was advanced against a husband and wife for necessaries supplied on the orders of the latter. The plaintiff, under the provisions of Order 14 of the Rules of the Supreme Court, obtained leave to sign judgment against the wife and proposed to proceed with the action against the husband. Holding that the liability of the husband and wife was alternative and not joint, and there being no rule permitting the plaintiff to proceed against the husband in these circumstances, the Court of Appeal decided that signing judgment against the wife was a conclusive election on the part of the plaintiff to hold her liable, to the exclusion of the liability of the husband (Collins M.R. p. 77). The judgment was upheld in the House of Lords, the Law Lords being unanimously of the opinion that the doctrine of election as stated in *Scarf* v. *Jardine* (3), applied. The legal consequence of

(1) (1885) 10 P.D. 161. (2) [1903] 1 K.B. 64; [1904] A.C. 11.
(3) (1882) 7 App. Cas. 345.

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the election was the release of the husband. If the respondent's contention in the present case be sound, then, notwithstanding such release, by obtaining an order setting aside the judgment entered against the wife, the liability of the husband would be revived. If there is any authority for any such proposition in English law, we have not been referred to it and I have been unable to discover any such.

There is but one cause of action against persons jointly liable in contract. Merger is effected by mere operation of law, independently of any intention of the parties that the inferior remedy should be discharged (*Price* v. *Moulton* (1)). As pointed out by Baron Parke in *King* v. *Hoare,* the judgment of a court of record changes the nature of the cause of action which is the subject matter of the suit and prevents it being the subject of another suit. In *Kendall* v. *Hamilton,* Cairns L.C., speaking of the effect of the judgment taken against Wilson and McLay, said that the plaintiffs by doing so had exhausted their right of action. Lord Selborne and Lord Blackburn, as above stated, were in agreement that its effect was that the legal liability of the respondent was extinguished. In *Hammond* v. *Schofield* (p. 545), Wills J. said that the effect of the judgment was undoubtedly to destroy the right of action against a co-contractor with the defendant. The opinion expressed by Hawkins J. in *Odell's* case and that of Wills J. at p. 455 of the report of *Hammond* v. *Schofield* were no doubt *obiter.* The accuracy of the statement of the law by Wills J., however, appears to me to receive strong support from the judgment of Lord Alverstone C.J. in *Cross v. Matthews* (2), in which Kennedy J. concurred. Wills J. was the third member of the court hearing this appeal and his concurrence in the judgment of the Chief Justice shows that he remained of the same opinion as that which he had expressed thirteen years earlier. Other than general statements as to the effect of the setting aside of judgments in cases where the liability was neither joint nor alternative, I am unaware of any authority which suggests the contrary, other than the judgment in the present case. If the cause of action is extinguished by the taking of judgment against one of two joint debtors and the proceedings are regularly conducted and the debt justly due

(1) (1851) 10 C.B. 561.

(2) (1904) 91 L.T.R. 500.

at the time the judgment is signed, I am quite unable to understand how the setting aside of the judgment, either by the consent of the parties to that judgment or otherwise, resuscitates the obligations of those who, by operation of law, were discharged when the judgment was signed.

The English counterpart of Rule 113 of the Supreme Court of Alberta first appeared in the Rules of the Supreme Court 1883, which came into operation in that year. I am unable to find that the exact point to be determined here has been decided in any reported English case. The rule in *King* v. *Hoare* was firmly embedded in the common law of England when the rule of court was first adopted. The principle of statutory construction to be applied appears to me to be accurately stated in Maxwell on the Interpretation of Statutes, 9th Ed. p. 85, where the learned author, in dealing with the presumption against implicit alteration of the law, has said:—

> One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act.

The rule was first enacted in England four years after the judgment of the House of Lords in *Kendall* v. *Hamilton* and it appears to me that its purpose is clear on the face of it. That purpose was to permit the plaintiff, in any action for a debt or liquidated demand where the act of signing judgment against one of several defendants might extinguish the right of action against others, to sign judgment against one or more and pursue the claim in that action against the other or others, a course which was not legally possible prior to the adoption of the rule of court. I think only to that extent was the common law rule changed.

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I think support for this view is to be found in the judgment of Lord Sterndale M.R. in *Parr* v. *Snell* (1). In that action, which was against three joint contractors for damages for breach of an agreement, the plaintiff obtained an interlocutory judgment for damages to be assessed against two of the defendants in default of defence. He then procured an assessment of damages and signed final judgment for the assessed amount against the two defendants who were in default and attempted to proceed against the remaining defendant. Rule 5 of Order 27 of the Rules of the Supreme Court 1883 permitted a plaintiff in such an action, which was for pecuniary damages only, to enter an interlocutory judgment against a defendant in default but did not permit the signing of a final judgment, as was permitted by Rule 3 in the cases to which the latter rule applied. In holding that the plaintiff could not proceed further with the action, the Master of the Rolls said in part (p. 6):—

> Apart from any rules of Court or any statutory provisions to the contrary, it is quite clear that a judgment against one joint contractor or tortfeasor is a bar to proceeding against the others. It is not necessary to read the cases upon that point. It is clearly established in *Kendall* v. *Hamilton; King* v. *Hoare;* and *Brinsmead* v. *Harrison* with regard to both joint contractors and joint tortfeasors. Therefore, apart from any special provision by statute or rule, it seems to me quite clear that this judgment is a bar to proceeding against the other defendant. There are a certain number of rules contained in Order XXVII which have been framed to mitigate the hardship occasioned by the application of the doctrine in *Kendall* v. *Hamilton; King* v. *Hoard;* and *Brinsmead* v. *Harrison,* and unless the plaintiff can bring himself within one of these rules, the general doctrine must apply.

The rule, as originally enacted and as continued in Rule 113 of the Supreme Court of Alberta, does not say that the right of action does not merge upon signing judgment in respect of such a claim against one or more of the others; rather does it simply permit the action to be pursued after signing such a judgment. The true situation, therefore, in the present matter, when the judgment was signed against Barker, was, in my opinion, that the merger of the cause of action was conditional and not absolute, being subject to the right of the respondent to carry the proceedings to judgment against the present appellants in the action. That right the respondent appears to me to have abandoned

(1) [1923] 1 K.B. 1 at 10.

when the action was discontinued against the appellants and it could not be enforced in a separate action. To hold otherwise would be to construe the rule as transforming a liability which was admittedly joint into one that was joint and several.

I would allow this appeal with costs throughout.

CARTWRIGHT J.:—The facts out of which this appeal arises are stated in the reasons of my brother Kerwin. Several defences were raised at the trial but I find it necessary to deal with only one of them, as, in my opinion, the others were rightly rejected in the courts below.

The defence to which I refer is that based on the default judgment signed against one Barker who had been a partner of the appellants. The facts so far as relevant to this defence are as follows. The appellants and Barker were indebted to the respondent for the price of goods sold and delivered. Their liability was joint, not joint and several. The respondent therefore had but one cause of action against Barker, Singer and Belzberg. On 28 November, 1949, the respondent commenced an action against Barker, Singer and Belzberg, based on the cause of action aforesaid, claiming $10,898.95. On 16 December 1949 judgment in default of defence was signed and entered for this amount against Barker. On 26 January 1950 the respondent filed a notice wholly discontinuing the action against Singer and Belzberg and on the same day commenced the action in which this appeal is brought. In the Statement of Claim in the present action the same amount is claimed as that for which judgment had been signed against Barker. On 8 March 1950 the appellants delivered their Statement of Defence pleading *inter alia* the recovery of the judgment against Barker and that the indebtedness was joint and was merged in such judgment. On 14 March 1950, the respondent delivered a reply which, insofar as it relates to the defence mentioned, reads as follows:—

> In reply to paragraph Nine (9) of the said Defendants' Statement of Defence the Plaintiff denies that the said debt was a joint debt, and not a joint and several debt. He further denies that the indebtedness was merged in the judgment recovered by the plaintiff against John Barker, and he further denies that the defendants were released from liability for such indebtedness.

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No further pleadings were delivered.

On 21 March 1950 Egbert J. sitting in Court made an order in the earlier action setting aside the judgment against Barker. This order recites that it was made upon the application of Barker and upon hearing counsel for him and for the respondent. It will be necessary to refer later to the evidence as to the circumstances in which this order was made. It appears that in August 1950 the solicitors for the respondent served upon the solicitors for the appellants a notice that at the trial of the action they would ask leave to amend their reply by pleading the order of Egbert J. which order was set out verbatim in the notice. The solicitors for the appellants thereupon wrote to the solicitors for the respondent stating that they would have no objection to leave being granted if this were applied for promptly but that they would object to its being granted at the trial. Their reason for taking this position was stated to be that they would require production and discovery in regard to the making of the order of Egbert J. The solicitors for the respondent did nothing further. At the opening of the trial counsel for the appellants referred to the notice of motion and asked the position of counsel for the respondent in regard to it. The latter said: "When the trial is over you will perhaps know my position on that amendment. I doubt if it will become necessary." During the trial when counsel for the respondent sought to introduce the order of Egbert J. in evidence counsel for the appellants objected on the ground that it was not pleaded. The learned trial judge overruled the objection and permitted the order to be introduced. Following this counsel for the appellants called as a witness, Mr. McLaws, who had acted as counsel for Barker on the application to Egbert J. and examined him as to the circumstances under which the order of that learned judge was made. Towards the end of the trial counsel for the appellants again referred to the motion to amend and asked whether it had been abandoned and counsel for the respondent said to the Court:—"I never made any application my Lord."

In my view the position taken by counsel for the appellants was correct. I think that it was necessary for the respondent to plead the order of Egbert J. and that when it appeared that counsel had deliberately decided not to

ask for the amendment to his pleadings he ought not to have been allowed to give evidence of the order. I think, however, that if the learned trial judge had so ruled counsel for the respondent would then have asked for leave to amend and that it would have been granted. I am unable to say that the appellants were prejudiced by what was, in my respectful opinion, an erroneous ruling and as such ruling appears to me to have been in regard to a matter of procedure I do not think that we should interfere with the judgments below on this ground.

From the above recital of facts it appears that when the present action was commenced in the Supreme Court of Alberta, and indeed when issue was joined, there was in existence a judgment of that Court against Barker for the same cause of action. Had the last mentioned judgment continued in existence I think it clear that, under the rule stated in *King* v. *Hoare* (1) and approved by the House of Lords in *Kendall* v. *Hamilton* (2), such judgment would (although unsatisfied) have been a bar to the plaintiff's claim against the appellants.

It is argued for the respondent that the rule does not apply in the case at bar for two reasons. The first is that the rule is abrogated, in the circumstances of this case, by the provisions of rule 113 of the Alberta Rules of Court, quoted in the reasons of my brother Locke. As to this, if the judgment against Barker had not been set aside I would have been of opinion that rule 113 did not assist the respondent. The effect of that rule is to modify the rule in *King* v. *Hoare* (*supra*) only to the extent of permitting a plaintiff who has sued, in one action, two or more persons who are jointly liable to proceed to judgment in that action against the other defendants notwithstanding that he has signed judgment against one or more of them in default of defence. I do not think that rule 113 assists a plaintiff who has taken judgment against one joint contractor and then seeks in a different action to obtain judgment against the co-contractors who were jointly liable with him. The reasons of Byrne J. in *McLeod* v. *Power* (3) and those of the Court of Appeal in *Parr* v. *Snell* (4) indicate that a rule of this nature is to be strictly construed.

(1) (1844) 13 M. & W. 494.
(2) (1879) 4 App. Cas. 504.
(3) [1898] 2 ch. 295.
(4) [1923] 1 K.B. 1.

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The second and main reason urged by the respondent is that the setting aside of the judgment against Barker prevents the application of the rule in *King* v. *Hoare*. As to this if the matter were devoid of authority I would have thought that upon the judgment against one of several co-contractors being set aside it would cease to operate as a bar to an action against the others, that upon being set aside it ceases to exist and therefore to have any effect thereafter, although it would in some circumstances provide a justification for an act done in reliance upon it between the time of its being given and being set aside, as for example in the case of *Williams* v. *Smith* (1). This view of the matter finds some support in the way in which the rule is stated, and particularly in the words which I have italicized, in the following passages: Halsbury 2nd Edition, Vol. 13, page 416:—

> On this principle, a judgment recovered (though unsatisfied) against some one of a number of persons who are jointly (not jointly and severally) liable on the same contract, or are liable for the same tort, with others is, *until set aside,* a bar to an action against the others (although the plaintiff may not have been aware of their liability), not on any ground of estoppel, but because there was but one cause of action, and that has merged in the judgment—*transit in rem judicatam;* and because in the case of contract the others are deprived by the act of the plaintiff of the right to have their liability determined in the same judgment with their co-contractors.

Odgers on Pleading, 3rd Edition, page 207:—

> Estoppel by record, e.g., by a judgment of a Court of Record. The matter becomes *res judicata. So long as that judgment stands,* no one who was a party to it can re-open that litigation.

Reference may also be made to the words of Lord Mansfield in *Moses* v. *Macferlan* (2):

> It is most clear, "that the merits of a judgment can never be overhaled by an original suit, either at law or in equity." *Till the judgment is set aside, or reversed,* it is conclusive, as to the subject matter of it, to all intents and purposes.

It is, however, argued for the appellants that it has been held in cases which we ought to follow that once a judgment has been entered against one of several co-contractors the right of action against the others is irrevocably lost and that the setting aside of such judgment (except, perhaps in cases where it was irregularly entered or for some other reason ought never to have been pronounced) is immaterial. The cases relied on in support of this proposition are

(1) (1863) 14 C.B.N.S. 596. (2) (1760) 2 Burr. 1005 at 1009.

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Hammond v. *Schofield* (1), *Odell* v. *Cormack* (2), *The Bellcairn* (3), *Cross and Co.* v. *Matthews and Wallace* (4), *M. Brennen and Sons* v. *Thompson* (5); and it is necessary to examine each of them.

Hammond v. *Schofield* is distinguishable on the facts. In that case the plaintiffs, a firm of printers, sued the defendant for the cost of printing a newspaper of which they supposed him to be the sole proprietor. There being no defence the defendant consented to final judgment being signed against him. After judgment had been so signed the plaintiffs received information that at the time the work was done one Thomas was a partner of the defendant and jointly liable with him. With the consent of the defendant they obtained an order in the Birmingham District Registry ordering that the default judgment be set aside and that the writ be amended by adding Thomas as a defendant in the action. That order was confirmed on appeal by Pollock, B. Thomas appealed to the Divisional Court consisting of Wills and Vaughan Williams, JJ. and the appeal was allowed. From the above summary of the facts it is clear that in the final result the default judgment was not set aside as the order setting it aside was reversed by the Divisional Court. In the case at bar, on the other hand, the default judgment against Barker had been set aside by the order of Egbert J. and no appeal has been taken from that order. It would appear that under rule 446 of the Alberta Rules of Court, the appellants, upon the order of Egbert J. coming to their notice, might have moved to rescind it but they did not do this. Egbert J. clearly had jurisdiction to make it under the provisions of rule 127 of the Alberta Rules of Court. If it is contended that an order made by a judge of the Supreme Court of Alberta, who clearly had jurisdiction to make it, setting aside a default judgment entered in that Court ought not to have been made the proper course would seem to be to attack such order directly either by way of appeal or by motion to rescind. The Court cannot, in another action, simply ignore it or treat it as being ineffective. It appears to me that anything said in the judgments in *Hammond* v.

(1) [1891] 1 Q.B. 453.
(2) (1887) 19 Q.B.D. 223.
(3) (1885) 10 P.D. 161.
(4) (1904) 91 L.T.R. 500.
(5) (1915) 33 O.L.R. 465.

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Schofield as to what would be the effect on the liability of persons jointly liable with one against whom judgment had been taken of that judgment having been validly set aside is *obiter*. Wills J. relied on *Odell* v. *Cormack* (*supra*) and *The Bellcairn* (*supra*).

In *Odell* v. *Cormack* at page 228 Hawkins J. expresses an opinion similar to that expressed by Wills J. but states that such opinion is unnecessary to the decision of the case and it is clearly *obiter*.

The Bellcairn was not a case involving joint liability. The facts are accurately summarized in the head-note which reads as follows:

> In an action for damages by collision between the owners of the A. and the B., the Court, by consent of the parties, made a decree dismissing the action. Subsequently another action was brought by the owners of the cargo on the A. against the B. in respect of the same collision, and the Court found both vessels to blame. The owners of the B. then commenced an action against the owners of cargo on the A. for the purpose of limiting their liability in respect of all claims arising out of this collision, and paid the amount of their statutory liability into court. Subsequently, again by consent of the owners of the A. and the B., the assistant registrar rescinded the decree by consent in the first action, and the owners of the A. then brought in a claim in the limitation action against the fund in court. The registrar held such claim to be inadmissible. On motion to confirm the report:—
>
> Held, that the report should be confirmed, as the owners of the A. and B. could not by consent rescind the decree of the Court, and that the decree by consent was a bar to a claim against the fund in court, as it estopped the owners of the A. from bringing any further action against the B.

It would seem clear that so long as the judgment in the action first mentioned in the head-note was in existence it would estop the owners of the A. from bringing any further action against the B. and the case, therefore, appears, at a first reading, to raise directly the question of the effect of the consent order setting aside that judgment. When, however, the reasons of the Court of Appeal are examined it appears that the Court dealt with the matter as if the judgment had not been set aside at all. Lord Esher M.R. said at pages 165 and 166:—

> It is clear that if the judgment of the 7th of November, 1884, be valid and standing, the owner of the *Britannia* can have no claim against the *Bellcairn*. *The sole question therefore is whether this judgment has been set aside.* I agree with Butt, J., that when at a trial the Court gives a judgment by the consent of the parties it is a binding judgment of the Court and cannot be set aside by a subsequent agreement between the solicitors, or the parties, even though it be placed in the form of an

order by consent on a summons and taken to a registrar or master, and by him made as a matter of course. It is only the Court, with full knowledge of the facts on which it is called on to act, which can set aside the first judgment, and I doubt whether, unless some fraud in regard to such judgment is shewn, even the Court would have jurisdiction to set aside its first judgment. It is clear then that the second consent order was absolutely void, and would have been of no validity in an action between the *Britannia* and the *Bellcairn*, in which the judgment of the 7th of November was relied on as a bar.

Cotton, L.J. says, in part, at page 166:—

I am of the same opinion. The judgment of the 7th of November was a bar to any action by the owners of the *Britannia* against the *Bellcairn*, and if such judgment could have been set aside at all, it could only have been done by the Court with all the facts before it.

These passages would seem to indicate that in the view of Lord Esher and of Cotton L.J. the consent order was made without jurisdiction and was absolutely void. The words used by Lord Esher, which I have italicized, are open to the interpretation that if the first judgment had been validly set aside the bar to the later action would have been removed. I have already indicated my view that in the case at bar it cannot be said that the order of Egbert J. was void or was made without jurisdiction.

Cross and Co. v. *Matthews and Wallace* (*supra*) is a decision of the Divisional Court delivered by Lord Alverstone C.J. with the concurrence of Wills and Kennedy JJ. The head-note reads as follows:—

Two defendants, M. and W., having been sued in the High Court for goods sold and delivered, judgment was entered against M., and the action as against W. was remitted for trial to the County Court. At the trial it was found that the debt was contracted by W. alone, and that M. had merely acted as his agent.

Judgment was postponed, and the judgment against M. was set aside. The learned County Court Judge then entered judgment against W.

Held, that the judgment against W. was wrong, as the plaintiffs had conclusively elected to enforce their remedy against M.

It will be observed that Matthews and Wallace were alternatively and not jointly liable. The concluding sentence of Lord Alverstone's judgment is as follows:

I am of opinion that the County Court judge ought to have given judgment for the defendant on the ground that the plaintiffs had conclusively elected to enforce their remedy against Matthews. The appeal must, therefore, be allowed.

It would appear that the signing of judgment against Matthews was treated as conclusive evidence of an election to look to him for payment instead of to Wallace and that

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this was the real *ratio decidendi* of the case, but there is no doubt that Lord Alverstone used language approving of the observations of Wills J. in *Hammond* v. *Schofield.*

M. Brennen and Sons v. *Thompson* (*supra*) was a case of principal and agent. The plaintiffs sued T., the agent, and L. and C., the undisclosed principals, in one action in the County Court. They signed judgment by default against T. but then moved in the same action asking to set aside the judgment against T. The County Court Judge made an order setting aside the default judgment and giving the plaintiffs leave to amend the statement of claim. From this order L. and C. appealed. As in *Cross and Co.* v. *Matthews and Wallace,* this was a case not of joint but of alternative liability and, as in *Hammond* v. *Schofield,* the appeal was from the order setting aside the default judgment. The Court was not called upon to consider what would have been the result had the default judgment been validly set aside by an order from which no appeal was taken.

In my view, in none of the five cases mentioned was it determined as part of the *ratio decidendi* that where a judgment is recovered against some one of a number of persons who are jointly liable on the same contract but is set aside by a valid order such judgment nonetheless continues to constitute a bar to an action against the others. It is my present view that even where the order setting such judgment aside was made on consent and no grounds existed for setting it aside against the opposition of the plaintiff, the effect of the judgment as a bar to a subsequent action is destroyed by the order setting it aside and, to use the words of Manisty J. in *Partington* v. *Hawthorne* (1), it "has gone, and is as if it never had been made." Once it has been decided that the order of Egbert J. was made with jurisdiction its merits cannot be inquired into in this action and, so long as it remains unreversed, to borrow the words of Lord Mansfield, in *Moses* v. *Macferlan,* quoted above, "It is conclusive as to the subject matter of it to all intents and purposes."

I find nothing in the judgment of Parke B. in *King* v. *Hoare* (or in those of the Law Lords in *Kendall* v. *Hamilton* where it is discussed and approved) to support the view

(1) (1888) 52 J.P. 807.

that had the judgment against Smith been set aside it would still have availed as a plea in bar to the subsequent action against Hoare. It will be observed that the plea there under consideration stated:

> . . . that the contract in the declaration was made by the plaintiff with the defendant and one N. T. Smith jointly, and not with the defendant alone; and that, in 1843, the plaintiff recovered a judgment against Smith for the same debt, with costs, "as appears by the record remaining in the Court of Queen's Bench, *which judgment still remains in full force and unreversed,*" concluding with the common verification.

I am at a loss to understand how any matter can be held to be *res judicata* by virtue of a judgment which once existed but has since been validly set aside.

I am unable to accept the view expressed by Wills J. in *Hammond* v. *Schofield* in the following passage:—

> I cannot see upon what principle the consent of the plaintiff and defendant can be allowed to create a new right, or (which is the same thing), to resuscitate an extinguished right in favour of the plaintiff against a third person, or to create on the part of a third person a new liability.

The consent of the plaintiff and the defendants there referred to did not, I respectfully think, purport to create a new right in the plaintiff but only to remove an obstacle in the way of the enforcement of a right theretofore existing.

If, contrary to the view that I have expressed, it is material to decide whether the order of Egbert J. must necessarily have been made with the consent of the respondent I think that such question should be answered in the negative for the following reasons. It appears to me that Barker had at least an arguable legal right to have the default judgment against him set aside. At common law, before the *Judicature Act,* Barker, being jointly liable to the plaintiff with his co-contractors was entitled to be sued in the same action with them and if he had been sued alone he would have had the right to plead in abatement. The *Judicature Act* abolished pleas in abatement but it did not change the rights of the parties, and, since the *Judicature Act,* if a party jointly liable with others is sued alone his remedy appears to be to move the Court to stay the action unless and until the plaintiff adds his co-contractors as defendants. No such remedy was open to Barker in the action brought against him because his co-contractors

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Singer and Belzberg were made defendants in that action. Having no defence on the merits against the plaintiff's claim Barker could not be criticized for failing to file a defence and he could not object to judgment being signed against him by default although it was not signed at the same time against his co-defendants because such a course was expressly permitted by rule 113. He had therefore no right to complain until the plaintiff discontinued the action as against the other two defendants. When this happened I think that Barker had a right to object that the procedure which the plaintiff had adopted of suing the three co-contractors, signing judgment against him and then discontinuing as against the other two had the effect of depriving Barker of his right to have his liability and that of his co-contractors determined in one action. This right is referred to in *Kendall* v. *Hamilton* and it is made clear that it was not taken away by the *Judicature Act*. See for example the statement of Lord Blackburn at page 544:—

> . . . I cannot agree in what seems to be the opinion of the noble and learned Lord on my left (Lord Penzance) that the Judicature Act has taken away the right of the joint contractor to have the other joint contractors joined as Defendants, or made it a mere matter of discretion in the Court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed.

What course then was open to Barker to enforce this right? It was, I think, to move the Court for whatever relief was appropriate to require the liabilities of the three defendants to be determined in one action and it would seem that the first step in obtaining such relief would be to ask to have the judgment against him set aside. It may well be that it was on this ground that Egbert J. set the judgment aside. Some support is found for this view in the following evidence of Mr. McLaws, as to what was said by counsel on the application before Egbert J.:—

> A. . . . I mentioned to the judge that it was my opinion, acting for my client Barker, that there may be some question of contribution of Messrs. Belzberg and Singer with my client with respect to this debt and other facts which I knew about at that time.
>
> Q. And you say it was on account of the matter of contribution that . . .
>
> A. Or joint liability, if you wish to put it that way.

I do not think that it is an answer to this to say that it appears from the contract of 1 April 1949 filed as Exhibit 3 that as between Barker, Singer and Belzberg, Barker was

liable to pay the whole of their joint indebtedness to the plaintiff. The existence of such an agreement would not destroy Barker's right to insist that the liability of himself and of his co-contractors to the plaintiff should be determined in one action instead of being settled piece-meal.

It remains to consider the argument of the appellants that at the date of the commencement of this action the plaintiff had no cause of action. I think this argument must be rejected. The default judgment against Barker was available to the defendants as a plea in bar but I think it was rightly held in *Partington* v. *Hawthorne* and in *Harper* v. *Township of East Flamborough*, cited by my brother Kerwin, that it is sufficient to enable the plaintiff to succeed that such a bar was removed before the trial, even although it existed at the commencement of the action.

For the above reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the Appellants: *Barron & Barron.*

Solicitors for the Respondent: *Fisher, McDonald & Fisher.*

ALBERTA C. PEW .....APPELLANT;

1952
*June 23, 24, 25, 26

AND

HARRY L. ZINCK (PLAINTIFF) and LOBSTER POINT REALTY CORPORATION, LYTTLETON B. P. GOULD and THE EASTERN TRUST COMPANY (DEFENDANTS) RESPONDENTS.

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*Feb. 23

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Mortgagor and Mortgagee—Foreclosure and Sale—Following sale, equity of redemption extinguished and Purchaser entitled to Court's approbation as matter of right—R.S.N.S. 1923, c. 140, ss. 14 and 15—The Judicature Act, S. of N.S., 1919, c. 32, o. 51, r. 8.

Under the law of Nova Scotia the Court has no jurisdiction to allow a mortgagor of lands to redeem after a sale under a decree but before conveyance and before a report has been made to the Court and approved. *Dicta* in *Stubbings* v. *Umlah* 40 N.S.R. 269 at 271; *Ritchie* v. *Pyke* 40 N.S.R. 476 at 478, disapproved.

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

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Per: Locke J. While r. 8 of o. 51, *The Judicature Act*, R.S.N.S. 1919, c. 32, requires either the plaintiff in a foreclosure action or the sheriff after the sale to secure the approval of the Court, the Appellant in the present case was entitled as a matter of right to such approval since the sale had been conducted in the manner directed by the Court and the regularity of the proceedings was not impeached. The equity of redemption was extinguished by the sale.

APPEAL from a judgment of the Supreme Court of Nova Scotia *in Banco* (Illsley C.J. and MacQuarrie J. dissenting) (1), affirming the decision of Hall J. (2) permitting the respondent Lobster Point Realty Corporation, the owner of the equity of redemption in mortgaged lands, to redeem after foreclosure and sale by the Sheriff.

W. P. Potter, Q.C. for the appellant.

Donald McInnes, Q.C. for Lobster Point Realty Corp., and L. B. P. Gould, respondents.

The judgment of Rand, Kellock, Estey and Cartwright, JJ. was delivered by:—

RAND J.:—The question on which this appeal hinges is whether or not under the law of Nova Scotia the court has jurisdiction to allow a mortgagor of lands to redeem after a sale under decree but before conveyance and before a report has been made to the court and approved.

Several special features of that law should first perhaps be mentioned. The rule, as far back as 1833, authorized and since then followed, is that long ago adopted in Ireland under which, instead of foreclosure as in England, the realization of a mortgage is by way of sale. The order formally forecloses the equity of redemption and directs a sale, but reserves a further right of redemption until the day of the sale. By c. 140, R.S.N.S. 1923, continuing, in this respect, the provision of preceding enactments, the sale, unless otherwise ordered by the court, shall be made by the sheriff of the county in which the lands lie, who is authorized to execute a deed which "when delivered to the purchaser shall convey the land ordered to be sold." The purchaser can pay the price and the sheriff execute the deed immediately upon acceptance of the bid. The sheriff renders a report of the proceedings to the court, but whether

(1) (1951) 29 M.P.R. 208; [1952] 2 D.L.R. 359.

(2) (1951) 29 M.P.R. 201; [1951] 3 D.L.R. 73.

that report must be confirmed is disputed. Rule 8 of Order 51 of the Supreme Court practice provides that where an order is made directing any property to be sold,

> the same shall, unless otherwise ordered, be sold, with the approbation of the court or a judge, to the best purchaser that can be got, the same to be allowed by the judge, and all proper parties shall join in the sale and conveyance as the judge directs.

This, with an immaterial change, reproduces Order 51 of the Rules of the Supreme Court, 1883. This latter was, in turn, taken from Rule 13 of Order 35 adopted by the Court of Chancery in 1852 under the Chancery Procedure Act, c. 86, 15 & 16 Vict. For the purposes of the matter before us, it is, in my opinion, of no significance that the rule applies, but on the assumption that it does, I examine the main question.

Both the general practice in the Court of Chancery and the statute here speak of a "sale" of land, and the decisions make it clear that the transaction is not confined to a mere voluntary payment of money in exchange for the conveyance.

In *Ex parte Minor* (1), 32 E.R. 1206, in which the question was the point of time at which the equitable ownership became attributed to the purchaser, Lord Eldon had this to say:—

> The question (whether the purchaser must bear a loss by fire before confirmation of the sale) must depend upon the point, what is the date and time of the contract, at which it can be said to have been complete. Is the bidding in the Master's office the contract between the Court and the bidder; or only an authority to the Master to tell the Court, that if the Court approves, the Court may make a contract with him upon the terms proposed . . . In some of the cases that have been cited, the change of property is said to be from the date of the Report: in others from the time of the conveyance: so, that, though confirmed as the best purchaser, if he had not got the conveyance, he would have been entitled to say, the estate was not his. That cannot be according to the principle. Suppose, this person had insured the premises, while in the Master's office, from fire: would he according to the cases in late times have had an insurable interest? His interest is not near so thin as many, that have been considered insureable.

The decree was that the loss must fall upon the vendor and that there be deducted from the purchase price the amount of deterioration in value found by the master.

(1) (1805) 32 E.R. 1206; 11 Ves. Jr. 559.

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But any inference that until the order of confirmation either the purchaser or the court could withdraw is clearly unwarranted. In *Anon* (1), after the report had been confirmed *nisi*, a motion made that the best bidder should complete his purchase and pay the money on or before a specified day was refused. In Lord Chancellor Loughborough's view, until confirmation the purchaser was always "liable to have the biddings opened; until that *non constat* that he is the purchaser": in other words, the purchaser could not be compelled to pay before confirmation of the report as the time fixed for performance, but with the implication that there is a continuing obligation and that he can be so ordered thereafter. In *Else* v. *Barnard* (2), property ordered to be sold by the court was bought in, but before the auctioneer had left the rostrum the unsuccessful bidder signed a contract to purchase it at the reserved price, improperly disclosed to him, slightly higher than the bid. Before confirmation, the purchaser repudiated and the question was whether he could do so. The Master of the Rolls, Sir John Romilly, holding that he could not, says:—

> I do not, at this present time, go into the question or consider whether that is a sale by auction or not, but I think it is impossible for Mr. Courtauld to say that it is not to be treated as a sale by auction, for he signs a bidding paper, by which he agrees that it shall be so treated; it is impossible for him afterwards to say that he is not bound by it . . . I am of opinion that this amounts to a contract, by which he agrees that it shall be treated as a sale by auction; that he must be treated as the highest bidder at the sum of £2,500; that he cannot repudiate his contract, but must be held to be the purchaser.

In *Anson v. Towgood* (3), where the question was when the purchase should be deemed to become effective to determine the right to receive interest on consols, Lord Eldon observed:—

> Can anything turn upon the report not being confirmed? There was a case about a house being burned down before the confirmation of the report (*ex parte Minor* (4)). But if the tenant for life had died the same night, must not the purchase money have been paid? The report I think, when confirmed, must have relation back to the purchase; and the contract, I apprehend, was made the moment that the purchaser's

(1) (1790) 30 E.R. 660; 2 Ves. Jr. 336.
(2) (1860) 54 E.R. 353; 28 Beav. 228.
(3) (1820) 37 E.R. 511; 1 Jac. & W. 637.
(4) 11 Ves. 559.

name was entered in the Master's book. If the purchaser had lived till the 6th of July, and then died, he would have had nothing if he is not entitled to these dividends.

It is settled, too, that obedience to the contract can be enforced either by ordering a resale subject to the payment of all costs and any deficiency by the first purchaser or by attaching the latter to compel him to carry the bargain out: *Lansdown* v. *Elderton* (1); *Gray* v. *Gray* (2).

The conclusion from this is that on the acceptance of a bid either a contract is entered into by the purchaser with the court in its own capacity or as representing the parties in interest, or in the case of Nova Scotia, conceivably with the sheriff, that the one will buy and the other sell the land, subject only to the approval of the report; or the purchaser submits to the jurisdiction of the court on those contractual terms. The obligations are reciprocal and from them neither the court nor the purchaser can withdraw except upon the failure of the condition; but, apart from consent, only by its operation, which is determined by rules of law, can the obligation and correlative right of the purchaser be destroyed.

On what grounds, then, may the court refuse to confirm? Although it would be impossible to enumerate them all, fraud, mistake, misconduct by the purchaser, error or default in the proceedings are well established. But the controlling fact to which these grounds give emphasis, is that the purchase can be defeated only by juridical action. To hold, on the other hand, that the court, acting otherwise than in setting aside the sale, can destroy such a right would be to attribute to it the repudiation of its own contract without proper cause.

But it is said that so long as the court retains the power of approval, the original jurisdiction to permit redemption is preserved and that this is a further condition to which the purchaser submits himself. Redemption in that case would be an act intercepting the approval, not a ground for refusing approval: and allowing it would, on the theory advanced, wipe out all steps following the order for sale. Since no case has been cited in which that has been done, we have no indication of how the resulting matters would

(1) (1808) 33 E.R. 617; 14 Ves. Jr. 512.

(2) (1811) 48 E.R. 916; 1 Beav. 199.

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be dealt with, such as the purchaser's discharge, the costs and expenses, the deposit, the reconveyance where the deed has been given before redemption. In the last situation, it would be extraordinary that the court should permit the instrument to remain outstanding.

If such a condition has, for the past century, been annexed to sales under decree, we surely would have some reference to it in the cases or in the standard works on equity practice; but the researches of counsel have failed to discover one instance in which such a power has been exercised in any jurisdiction within the British Commonwealth. There are a number of authorities directly in point from the United States: *Brown* v. *Frost* (1), holding that there was no power to redeem after a sale, although the mortgagee was the purchaser: *Pennsylvania Company* v. *Broad St. Hospital* (2), declaring that the mortgagor's right of redemption "must be exercised before the sheriff's hammer falls"; *Parker* v. *Dacres* (3), in which the United States Supreme Court, speaking through Harlan J. at p. 47 said:—

> In the view we take of this case it is unnecessary to express an opinion whether the provision relating to sales under execution, properly interpreted, give a right of redemption after sale under a decree of foreclosure. If it did not, the decree below must be affirmed, for a right to redeem, after sale, does not exist unless given by a statute.

Young's Appeal (4), in which Ross J. on appeal used this language:—

> The bona fide purchaser, at a public sale of land, the moment it is knocked off to him, if he complies in all respects with the conditions of sale, instantly acquires a vested right to the property sold.

and

Gibson v. *Winslow* (5), in which it is stated:—

> The moment the land was struck down, the interest of the purchaser attached.

In *Gordon Grant & Co.* v. *Boos* (6), action had been brought to enforce a mortgage of lands in Trinidad and for sale in default of payment. The property was sold by auction, purchased by the mortgagees and later disposed of for a much larger price. Thereafter the mortgagees sued

(1) (1843) 10 Paige Ch. (N.Y.) 243.
(2) (1946-47) Atl. R. 2d. 281.
(3) (1888) 130 U.S. 43.
(4) (1831) 2 Penrose & Watts (Pa.) 380.
(5) (1860) 38 Pa. State 49.
(6) [1926] A.C. 781.

in New York to recover on the personal covenant the mortgage debt less the amount realized on the sale under the decree. The mortgagor thereupon sought a declaration that his right to redeem had been revived and for an injunction, and the West Indian courts granted the latter relief. The Judicial Committee, speaking through Lord Phillimore, in reversing the judgment, had this to say on the nature of judicial sale:—

> No doubt the sale realized very little, and the mortgagee, who had leave to bid, apparently bought a valuable property for a small sum; and their Lordships can understand that the Courts in the West Indies may have felt some aversion to granting the mortgagee further advantages. But it was a judicial sale *which is not impeached,* and the mortgagor, who could have made a bid or procured a bid, must take the consequences.

There remains the question whether the existence of such a condition must be gathered from a uniform practice of the court in Nova Scotia, the disturbance of which might adversely affect existing rights or titles. The most diligent search by counsel has uncovered no case in which it has been directly decided. What is relied upon is *Stubbings* v. *Umlah* (1), decided in 1900, in which Meagher J. in an *obiter dictum* expressed himself as follows:—

> An absolute right of redemption exists in this Province, up to the completion of the sale, at least, if not, as I am inclined to think it does, up to the granting of the final order of confirmation.
>
> Even after that, especially where the plaintiff is the purchaser, and retains the title, the court, it seems to me, possesses a discretionary power to decree redemption, just as the court in England possesses such a power after a foreclosure order absolute has been made.
>
> There is, therefore, at least, this distinction between our decree and the English final order: that, under the former, the right of redemption exists absolutely, pending the sale and final confirmation thereof; while under the latter, no such absolute right exists.

Again by the same judge when speaking for the court consisting of MacDonald C.J., Weatherbe and Meagher JJ. in *Ritchie* v. *Pyke* (2), but likewise *obiter*:—

> Under our practice which has prevailed for nearly half a century at least, no time for redemption is fixed where a sale is ordered, but the right to redeem, of course, endures until the proceedings have been finally confirmed by order of the court, after the sale, payment of the price, and conveyance to the purchaser have been completed.

In *Wallace* v. *Gray* (3), on the other hand, Graham E.J. at p. 288 said:—

> In this province, where there is no intervening step between the sale and the deed, no confirmation of sale, payment into court, inquiry as to

(1) 40 N.S.R. 269 at 271. (2) (1904) 40 N.S.R. 476 at 478.
(3) (1892) 25 N.S.R. 279.

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title, settling and execution of the deed by the proper parties, etc., before the deed is given, all causing delay, the amount of deposit required is not important. The deed, upon the name being inserted, may be executed by the sheriff directly the hammer falls.

and in *Power* v. *Foster* (1), at pp. 487 and 488, he speaks to the same effect:—

> The sale more resembling a sale of land under execution followed by a deed executed by the sheriff, and not by the party, there has grown up a practice differing from that prevailing in other places. The deed is given by virtue of a statute; and the provisions applicable to this case would be the Act of 1890, Ch. 14, secs. 5, 6 and 10.

I take this language to imply that the execution of the deed under statutory authority would end the matter; but if, contrary to his apparent understanding of the practice, confirmation should be necessary, then the contract would be subject only to the setting aside, on proper grounds, of the proceedings themselves.

The question seems to have been raised still earlier. In *Slayter* v. *Johnston* (2), a suit for redemption, Young C.J. at pp. 508-9 said:—

> We are told that the foreclosure might be opened, which would be a strange thing, at the instance of the mortgagee, and a very startling thing if it could be done at the instance of the mortgagor in this country after a sale.

and Wilkins J. at pp. 522 and 523:—

> If there had been, and there has not been, so far as we are informed, an instance in this Province, of opening a decree of foreclosure *after sale*, where there was no fraud or illegality, and if an authority were adduced, as there has not been, warranting us to take that judicial course in a case where a mortgagee elected to purchase at the sale; still, it would be our duty to proceed further, and, considering the origin of the doctrine contended for to inquire, how far it would consist with adjudicated cases, or (in the absence of these) with equitable principles, to apply it to such a case as this.

In *Bigelow* v. *Blaiklock* (undated but between July, 1873 and December, 1877) Russell's *Equity Decisions of Ritchie E.J.*, the mortgagor claimed a re-sale on the ground of a misunderstanding at the sale because the properties were described differently in the advertisement and in the mortgage and writ. He was held entitled to a re-sale notwithstanding that the mortgagee, after having purchased at the sale, had agreed to sell one of the lots, since he had obtained

(1) (1901) 34 N.S.R. 479. (2) (1864) 5 N.S.R. (Oldright) 502.

no deed and the sale had not been confirmed. Ritchie E.J. at p. 25 said:—

> Though I have in this case ordered a resale on the grounds I have stated, the plaintiff being the purchaser, and under similar circumstances the result might have been the same *if a stranger, possessed of the same knowledge, had been the purchaser, yet there is a manifest distinction between the plaintiff in a suit and a stranger;* and I do not wish it to be inferred from what I have said, that in a case where the plaintiff himself has bid on the mortgaged property, and the amount of principal, interest and costs is tendered to him before the deed is given and the sale confirmed, he would not be required to take it and give up the purchase. This point, however, is not before me at present.

In *Diocesan Synod N.S.* v. *O'Brien* (1879) *Russell's Equity Decisions,* 352, a purchaser at a foreclosure sale who had made a deposit of 10 per cent as required by the terms of the sale refused to complete on the ground that a good title in fee simple could not be given. The Court declined to enforce specific performance, but ordered the payment of the deposit to the mortgagee. Ritchie E.J. at p. 354 remarked:—

> Inasmuch as the terms of sale are clear and unambiguous, and the purchaser by paying the balance of the purchase money could have got all that he bid for and agreed to buy, he cannot recover back the deposit, the vendor being willing to convey to him all that was offered for sale.

It would seem to be an astonishing proposition that the sale under such a power and *a fortiori,* the title, before confirmation, should still carry with it an inverted equitable clog of a right to redeem. Between the conveyance and the confirmation, the property might have passed through the hands of several bona fide purchasers; what would their position be? Would they, through their notice of the title at sale, be bound by that equity? The judicial statements brought to our attention pertinent to this are those first of Jessel M.R. in *Campbell* v. *Holyland* (1):—

> Under what circumstances that discretion should be exercised is quite another matter. The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it; but he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, *and everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the Court of Equity which had made the order.*

and of Meredith, C.J.C.P., to the same effect, in *Dovercourt Land Building & Savings Co.* v. *Dunevegan Heights Land Co.* (2).

(1) (1877) 7 Ch. D. 166.

(2) (1920) 47 O.L.R. 105.

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But proceedings in foreclosure and those for sale under statutory authority are essentially different: the one deals with an equitable creation of the court, the equity of redemption, the other with a statutory power to convey both the legal and beneficial interests of the mortgagor in the land. I am quite unable to accept the view that the statutory sale is burdened with a discretionary right of redemption in the absence of an express term in the conditions of sale, or an undisputed practice or rule of court; whether such a term, practice or rule could be annexed to the power where the intention that it should be so could not be inferred from the legislation, it is unnecessary to consider: nothing of the sort is present here. A sale under a power in the mortgage or given to the mortgagee by statute means what the term implies, a power to make an out-and-out transfer of ownership: *Waring (Lord)* v. *London & Manchester Assurance Co.* (1); *Saltman* v. *McColl* (2), on what ground, then, should we attach to a like statutory power given the court a collateral condition that can nullify its exercise?

That no disturbance of titles could result from its rejection in this case admits of no doubt. If a purchaser has acquiesced in a redemption notwithstanding his contract, it would mean that he had abandoned it or that it had with his consent been rescinded or otherwise terminated. If there had been a conveyance, the contract had become fully executed and he must have re-conveyed or acquiesced in an order setting it aside, which he would now be estopped from questioning: in either case, if acting under a mistake, it would have been as to his rights in law.

The question of the right to raise before us the point of the discretionary jurisdiction to permit redemption, which had been decided in an earlier appeal to the Court *en banc,* was challenged. The issue here is between the mortgagor and the purchaser in which the mortgagee is not interested, and although the action was brought in 1948, that issue arose only in 1950. By s. 41 of the *Supreme Court Act* this Court has jurisdiction to grant leave to appeal from the first ruling, and in the circumstances, but without touching the question of our right, in this appeal,

(1) [1935] 1 Ch. 310.

(2) (1910) 19 Man. R. 405.

to deal with the first judgment without it, leave is given and all necessary ancillary orders made, to enable the question now to be dealt with.

I would, therefore, allow the appeal and direct the conveyance of the lands in accordance with the contract made at sale. The appellant will have her costs in this Court and in the Court *en banc* on the second motion: there will be no costs of the first motion to the Court *en banc* or on either application in chambers.

LOCKE J.:—This is an appeal by Alberta C. Pew, a purchaser of lands at a mortgage sale, from a judgment of the Supreme Court of Nova Scotia *in banco* by which an appeal of the present appellant from a judgment of Hall J., whereby the respondent corporation was declared to be entitled to redeem the lands in question and in respect of which an order for foreclosure and sale had been made upon the application of the respondent Zinck was dismissed.

The facts, in so far as they appear to me to be relevant, are as follows: On September 30, 1929, the respondent Zinck conveyed to the respondent Gould, Sr. the lands in question, in consideration of the payment of a sum in cash and the granting of a mortgage dated October 23, 1929, to the said Zinck in the sum of $25,000, the balance of the purchase price, such sum to be repaid in instalments over a period of eight years. In the year 1931 Gould conveyed the lands, subject to the mortgage, to the respondent corporation. During the interval between this conveyance and February 26, 1948, when the writ in the present action was issued, there were various defaults in payment under the mortgage: in the year 1934 mortgage foreclosure proceedings were instituted by Zinck and an order for foreclosure and sale made but these proceedings were not carried to a conclusion, the parties entering into an agreement extending the time for payment of the mortgage moneys: this was followed by other agreements the last of which was made on October 1, 1938, which substituted new terms and times for payment for those provided by the mortgage. In the present action the plaintiff alleged a series of defaults on the part of the mortgagor and the respondent corporation in respect of instalments and interest and principal and interest due under the terms of the mortgage, as amended

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by the said agreement, and in payment of various taxes and claimed payment of the principal amount due with accumulated interest.

and in default of payment foreclosure of the said mortgage as altered or modified by the said agreement of the 1st of October 1938 and/or rescission of the said Agreement, sale of the mortgaged premises and possession of the same; and if the purchase money is insufficient to pay what is found to be due to the plaintiff for principal, interest, insurance premium, taxes, rates, charges and interest and costs of this action the plaintiff further claims an order for judgment for the payment of the deficiency against the defendant, Lyttleton B. P. Gould, mortgagor as aforesaid.

While the defendant corporation and Gould entered a statement of defence to the action, they did not appear when the action was set down for trial and on November 25, 1949, Parker J., after hearing evidence for the plaintiff proving the various defaults and the amount of the sum due, found that the amount due on the mortgage and on the agreement was the sum of $15,266.10 as of October 2, 1949, with interest on the principal sum secured at the rate of six per cent from that date and directed that the interest of the respondent corporation in the lands and premises be foreclosed and that the property be sold. The formal judgment was entered on December 16, 1949, and included the following terms:—

AND IT IS FURTHER ORDERED that the estate, interest and equity of redemption of the Defendant, Lobster Point Realty Corporation, and of all parties claiming or entitled by, through or under the Defendant, Lobster Point Realty Corporation, in the lands and premises described in the Mortgage be forever BARRED AND FORECLOSED and that a sale of the mortgaged property described in the statement of Claim herein be made by the Sheriff of the County of Lunenburg after four notices in the *"Chronicle-Herald"* and in the *"Mail-Star"* newspapers published at Halifax in the County of Halifax alternatively by two notices in each of the said newspapers for at least thirty days prior to the day appointed for such sale and by one notice in the *"Progress-Enterprise"* newspaper published at Lunenburg, in the County of Lunenburg for at least 30 days prior to the day appointed for such sale and by handbills posted in the municipality of Chester in the County of Lunenburg for at least twenty days before the day appointed for such sale.

This was followed by a direction that unless before the day appointed for the sale the amount found due, together with the costs and disbursements thereafter referred to, should be paid to the plaintiff:—

the said Sheriff shall proceed to sell and execute to the purchaser or purchasers thereof at such sale a Deed or Deeds conveying and which shall convey to him or them all the estate, right, title, interest, claim,

property and demand of the Mortgagor, Lyttleton B. Gould and of the defendant, Lobster Point Realty Corporation, owner of the equity of redemption, and of each of them at the time of the making of the Mortgage and at the time of the making of the Agreement foreclosed in this action, or at any time since, and of all parties claiming or entitled by, from or under the original Mortgagors or either of them of, in and to the lands purchased at such sale.

This was followed by a term providing for the disposition by the sheriff of the proceeds of the sale, for paying the arrears of taxes upon the lands, the costs of the proceedings, the amount found due as the mortgage debt and interest, the amount paid by the plaintiff for fire insurance premiums on the property and the balance, if any, to the Accountant General of the Supreme Court to abide further order.

The property was duly advertised for sale by the sheriff in accordance with the directions of the judgment and on March 25, 1950, bids were asked at public auction and on behalf of the appellant Edmund Fader offered the sum of $18,000, a bid which was accepted by the sheriff. The plaintiff's agent, Edmund Fader, thereupon paid to the sheriff a sum of $2,300 on account of the purchase money and, at the sheriff's request, signed a memorandum endorsed on the back of one of the posters advertising the sale which read as follows:—

Lunenburg, N.S.
March 25, 1950.

I acknowledge purchasing at foreclosure sale this day the property as within described for the sum of $18,000.

Edmund Fader
Agent for Mrs. Alberta C. Pew of
Ardmore, Penn.
Married Woman.

Fader then inquired from the solicitor for the plaintiff as to when he could expect to receive a deed of the property, saying that he would be prepared to pay the balance of the purchase price whenever it was ready and was referred by the solicitor to the sheriff. On April 21, 1950, Fader, accompanied by the solicitor for Mrs. Pew, attended upon the sheriff and paid the balance of the purchase price of $18,000 and asked for a deed. On May 22, 1950, the solicitors for the plaintiff moved before Hall, J. for an order to confirm the sale and on this application the respondent corporation and the respondent Gould were represented by counsel and asked that an order be made declaring that the

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respondent corporation was entitled to redeem the property. Mrs. Pew was also represented by counsel on this application. After argument, Hall J. made an order to the effect that the respondent corporation was entitled to redeem the property sold, by paying to the plaintiff the sums specified in the order for foreclosure and sale and certain sums for costs on or before May 8, 1950, and redirecting that if such redemption took place the sheriff should refund to Mrs. Pew the amounts paid on her behalf to the sheriff.

By order of the Supreme Court *in banco,* Mrs. Pew was granted leave to appeal from this order and, on this appeal, the order of Hall J. was set aside and the matter remitted to him to permit the respondent Zinck to renew his motion to confirm the sale, the respondent corporation, the respondent Gould and the present appellant to be at liberty to file further affidavits upon the renewal of the hearing. All of the members of the Court were of the opinion that, despite the sale, the Court was not in the circumstances without power to permit redemption. On April 10, 1951, Hall J., after again hearing the matter and considering the further material, found that the respondent corporation should be permitted to redeem upon the terms set out in his previous order. The present appellant appealed from this order and by the decision of the majority of the members of the Court the appeal was dismissed. Ilsley C.J. and MacQuarrie J. who dissented, were of the opinion that the material filed did not disclose a proper case for such relief and would accordingly have set aside the order of Hall J.

No objection of any kind is made to the regularity of the proceedings taken by the plaintiff in the action up to the time of the holding of the sheriff's sale. While in asking for an extension of time for redemption the respondent Corporation and Gould filed some evidence in the form of affidavits, in an endeavour to show that the sale had been made at an undervalue, it is not suggested that this was a ground for impeaching the regularity of the sale. The present appellant was an entire stranger to the proceedings up to the time the sale was held. It is said on her part that it was unnecessary that any application should have been made by the plaintiff in the action to confirm the sale. The question to be determined on this appeal is as

to the nature of the rights of a purchaser at such a sale which, assuming confirmation to be necessary, has not been confirmed.

The appellant who had been permitted to intervene in the litigation by a rule of the Court did not appeal from the first judgment of the Court *in banco*. The question as to whether the first judgment of that Court in which it was decided that the Supreme Court of Nova Scotia might in a proper case extend the time for redemption after a sale has been held, pursuant to the judgment of the Court, was a final judgment and whether, accordingly there having been no appeal, the matter was to this extent *res judicata,* has been argued before us. The appellant, while contending that that judgment was interlocutory in its nature, asks leave to appeal if we should be of a contrary opinion. Since the issues raised on the appeal arise entirely from matters occurring after the 1949 amendment to s. 41 of the *Supreme Court Act,* this Court has, in my opinion, jurisdiction to grant such leave and, without expressing a decided opinion as to it being necessary, I would, in the circumstances of this case, grant leave to the present appellant to appeal from the first judgment.

In deciding that in a proper case the Court might permit redemption on the application of the mortgagor after the premises had been sold by the sheriff pursuant to a judgment of the Court, the majority of the learned Judges of the Supreme Court *in banco* expressed the view that a statement of the law made by Sir George Jessel M.R. in *Campbell* v. *Holyland* (1), might properly be applied. In that case, after saying that an order for foreclosure, according to the practice of the old Court of Chancery, was never really absolute and that the principle applied has always been that, though a mortgage is in form an absolute conveyance when the condition is broken in equity it is always security, and that courts of equity interfered with the actual contract to this extent by permitting redemption after foreclosure in a proper case where the mortgagee retained title or control of the property, the Master of the Rolls said in part (p. 172):—

> Under what circumstances that discretion should be exercised is quite another matter. The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it; but

(1) (1877) 7 Ch. D. 166.

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he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, *and everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the Court of Equity which had made the order.*

Reliance was also placed upon a passage from the judgment of Meredith C.J.C.P. in *Dovercourt Land Building and Savings Co.* v. *Dunvegan Heights Land Co.* (1), which reads (p. 108):—

> It is accurately said that a Court of Equity is always ready to hear a meritorious application for relief against a foreclosure, and will open it whenever good and substantial reasons for such a course are shown to it . . . the true equitable principle has always been that the mortgagor may be permitted to redeem when the equities in favour of it undoubtedly outweigh all that are against it.

This statement of the learned Chief Justice was founded primarily on what had been said by the Master of the Rolls in *Campbell* v. *Holyland* (*supra*).

The accuracy of that portion of the judgment of Sir George Jessel which is above italicized has not as yet been considered in this Court. Since the present case is as to the status of a purchaser at a judicial sale, it is not necessary for the disposition of this matter to consider it. It may be noted, however, in passing, that the purchaser whose rights were considered in that case had not purchased the property from the mortgagee after foreclosure, rather had he purchased the mortgagee's interest after the decree *nisi* but before the granting of the decree absolute. While it was Campbell, the mortgagee, who applied for the decree absolute, he did so on behalf of the purchaser Ford. At the time of the transaction between these persons, therefore, Campbell had not acquired title to the mortgaged property and could sell merely his interest as mortgagee. These being the facts, the portion of the quotation to which I refer was clearly *obiter*.

In considering the position of the appellant after her bid for the property was accepted by the sheriff and she had, through her agent, paid part of the purchase money and bound herself to pay the balance, the question as to the necessity of thereafter obtaining an order approving the sale while not, in my opinion, decisive, should be considered. The order for the sale of the property in this

(1) (1920) 47 O.L.R. 105.

matter was made under the powers vested in the Court by An Act relating to the Law and Transfer of Real Property (c. 140, R.S.N.S. 1923), by *The Judicature Act* (c. 32, Statutes of N.S. 1919) and by Rules of Court made under powers conferred on the Judges of the Supreme Court by statute and having legislative approval. Rule 8 of Order 51 of the Supreme Court of Nova Scotia provides that where a judgment or order is given or made directing any property to be sold:—

> the same shall, unless otherwise ordered, be sold, with the approbation of the court or a judge, to the best purchaser that can be got, *the same to be allowed by the judge,* and all proper parties shall join in the sale and conveyance as the judge directs.

The text of this rule, with a slight change which does not alter its meaning, is taken from Rule 3 of Order 51 of the Rules of the Supreme Court 1883, adopted in England in that year. The English Rule 3, in turn, was in the same terms as Rule 13 of Order 35 adopted in the Court of Chancery on October 16, 1852, under powers conferred upon the Judges by s. 48 of the Chancery Procedure Act (c. 86, 15 & 16 Vict.). Prior to the Chancery Procedure Act there was no statutory authority in England for a sale of property in proceedings upon a mortgage and the practice, unlike that in Ireland, was to order a foreclosure. The Rules of Court made under the Chancery Procedure Act adopted the practice which had theretofore been followed in regard to sales of land in administration and other like actions. That practice is described in the first edition of Daniel's Chancery Practice, Vol. 2, p. 92, published in 1837. If, at the sale, a sufficient bid was obtained, the bidder was required to sign a memorandum whereby he agreed to become the purchaser of the property, and, thereafter, to procure a report of the Master showing the result of the sale and then apply to the Court by motion for its confirmation.

While Rule 13 of Order 35 of the Court of Chancery was supplemented by other rules defining the procedure to be followed, which was in effect simply an adoption of the previous practice, in my opinion, the language of the rule itself made it clear that, after the holding of the sale directed by the order, the approval of the Court was to be obtained. The sale was to be made, with the approbation

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of the Judge, "to the best purchaser that can be got, the same to be allowed by the Judge." Clearly, "the same" refers to a sale that had been held. There are further rules supplementing Rule 3 of Order 51 and the form prescribed in the conditions of sale (Form 15, Appendix L), requires in terms that the approval of the Court be obtained after the sale. While there are no such rules supplementing Rule 8 of Order 51 and the only conditions of sale were, in the present matter, those contained in the judgment entered pursuant to the order of Parker J. on December 16, 1949, Rule 8 is, in my opinion, to be construed in the same manner as the English Rules and, after the sale has been held, the approval of the Judge must be obtained.

For the appellant it is, however, contended that Order 8 does not apply to sales which are ordered in foreclosure proceedings. This argument is based upon the fact that the twelve rules which form part of Order 51 are grouped under sub-headings, namely "Lunatics and Infants' Estates" under which Rules 1 to 5 appear, "Sales in Other Cases" under which appear Rules 6 to 9 and "Foreclosure Sale" under which Rules 10 to 12 are to be found. The contention is that Rule 8 accordingly applies to sales other than those ordered in proceedings under a mortgage. I think this argument fails. Order 8 of Rule 51 first appeared in the Rules of the Supreme Court of Nova Scotia as Rule 3 of Order 42 in c. 25 of the Statutes of 1884. Rule 3 was one of four rules in Order 42, all of which appeared under a sole heading "Sales by the Court." In the revision of the statutes in that year, c. 25 became c. 104 and Order 42 became Order 51. Instead of the general heading "Sales by the Court," sub-headings, namely, "Lunatics and Infants' Estates" containing Rules 1 to 5, "Generally" under which Rules 6 to 9 were grouped and "Foreclosure" under which Rules 10 to 12 appeared. In 1900 the statutes were again revised and the Judicature Act re-enacted as c. 155. In this revision, the sub-title "Generally" in Order 51 was changed to read as at present "Sales in Other Cases" and the sub-heading "Foreclosure" changed to "Foreclosure Sale." When the statutes were revised in 1923 these sub-headings remained unchanged.

The revision of the statutes in the year 1900 was authorized by c. 44 of the statutes of that year. Section 12(3) of that Act reads:—

> The marginal notes and headings in the body of the said Revised Statutes and references to former statutes or provisions shall be held to form no part of the said statutes, but to be inserted for convenience or reference only.

A like provision appears in s. 12(3) of c. 12 of the Statutes of 1921, which authorized the revision which was carried out in 1923. While Orders 10, 10A, 11 and 12 deal with certain matters applicable only to mortgage sale proceedings, their subject matter is different from that of Rule 8 providing, as they do, for cases where in any action for foreclosure or sale a sale is sought by a subsequent mortgagee or encumbrancer, directing that where a sale is ordered in default of payment it shall be conducted by the sheriff of the county in which the lands lie, providing for a judgment for any deficiency after the sale and the distribution of the surplus, if any such results, requiring the mortgagee to convey the mortgaged premises if the amount found due is paid before the sale, and dealing with sales where the lands to be sold are situate partly in two counties. Only in Rule 8 is to be found the provision that where a sale is ordered it shall, unless otherwise ordered, be sold, with the approbation of the Court or a Judge, to the best purchaser that can be got, the same to be allowed by the Judge, and providing that all proper parties shall join in the sale and conveyance as the Judge directs. The subheading "Sales in Other Cases" is, I think, misleading: the scope of the rule was more accurately described by the word "Generally" under which it appeared in the revision of 1884.

Rule 3 of Order 51 of the English Rule has been applied in mortgage sale proceedings in England since 1883 and, in my opinion, the Nova Scotia Rule 8 was directed towards such proceedings from the time it was enacted in 1884. This view, I think, finds further support in the provisions of c. 136, R.S.N.S. 1900 and in c. 140, R.S.N.S. 1923. Section 14 of each of these statutes authorized the Supreme Court or any judge thereof to order the sale of real property in all cases in which any court or a judge in England has power to order such a sale. Section 15 provides that where

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an order of sale has been made the property shall be sold, unless the court or a judge otherwise orders, by the sheriff of the county in which the land or part of the land lies. Section 16 provides that the deed shall be executed by the person authorized to make the sale and that, when delivered to the purchaser, it shall convey the land ordered to be sold. Section 17 provides that all sales theretofore made by any person authorized by the court or a judge shall be deemed to be good and effective to vest the title of the land in the purchaser, although such deeds were not confirmed by the court or a judge. Order 8 prescribes the manner in which the powers vested in the court by s. 14 shall be exercised and deals with matters not dealt with elsewhere.

Upon this aspect of the matter, I am of the opinion that the rule of court and the established practice required either the mortgagee plaintiff or the sheriff to apply to the Court for its approval of the sale to the appellant. If I correctly appreciate the contention of the respondent Corporation, it is that, this being so, it cannot be said that the equity of redemption has been extinguished by the sale and that the matter still being under the control of the Court an order extending the time for redemption might properly be made.

The question is one of great importance, not only in Nova Scotia but in other provinces where Rule 3 of Order 51 of the Rules of the Supreme Court 1883 has been adopted verbatim. I can perceive no logical reason why the position of a purchaser at a sale regularly held under the direction of the court in proceedings upon a mortgage is to be distinguished from that of a purchaser at mortgage sale proceedings regularly conducted by a mortgagee out of court. While vast numbers of such sales have been held in various parts of Canada, I am not aware of any case in which a sale regularly made by a mortgagee upon default by the mortgagor has been set aside on the sole ground that the mortgagor is able and desires to redeem, nor have we been referred to any case in which the principle enunciated by Sir George Jessel in *Campbell* v. *Holyland* has been applied after a mortgage sale regularly held.

The only case which I have been able to find in which such a contention was made, other than the present, is *Saltman* v. *McColl* (1). In that case, after sale proceedings regularly taken by a mortgagee of land under the Real Property Act of Manitoba, whereby the property was sold to a bona fide purchaser who made the first payment called for by the terms of sale and bound himself to complete the purchase, the mortgagor brought an action for redemption. It was contended for the mortgagor that the property had been disposed of at a gross undervalue, that the purchaser had made default in payment of the second instalment of the purchase price and, therefore, was not entitled to as great consideration by a court of equity as was the mortgagor, as the equities being equal the first in point of time should prevail and that since the sale had not been completed by conveyance the mortgagor was entitled to redeem. There was no allegation of fraud or irregularity in the conduct of the sale other than that the property had been sold for much less than it was worth and Macdonald J. dismissed the action. The plaintiff appealed and the report of the argument shows that *Campbell* v. *Holyland* (*supra*) and *Trinity College* v. *Hill* (2), in which *Campbell's* case had been applied, and *Stubbings* v. *Umlah* (3), were cited on behalf of the appellant. The Court dismissed the appeal without calling on counsel for the respondent—unfortunately no written reasons were given.

Prior to 1867 there was a practice in England described as opening the biddings under which, after property had been sold at a judicial sale, if a better offer was made before confirmation of the sale it might be accepted. In discussing the position of a purchaser whose bid had been accepted at a sale, Loughborough L.C. in 1794, in a case reported as *Anon* (4), where a motion was made that a person reported to be the best bidder should complete his purchase and pay in the money at a time when the report had been confirmed *nisi* but not absolutely, said that he felt a difficulty as, until confirmation, the purchaser was always liable to have the biddings opened and until that *non constat* that he is the purchaser. The practice of opening biddings was abolished by the Sale of Lands by Auction Act 1867 (30-31

(1) (1910) 19 Man. R. 456.
(2) (1884) 10 O.A.R. 107.
(3) (1900) 40 N.S.R. 269, at 271.
(4) 30 E.R. 660; 2 Ves. Jr. 336.

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Vict. c. 48, s. 7) which provided that in sales held thereafter in the Court of Chancery the highest bona fide bidder at the sale, provided he shall have bid a sum equal to or higher than the reserved bidder, shall be declared the purchaser, unless the Court or Judge should on the ground of fraud or improper conduct in the management of the sale either open the biddings, hold the bidder bound by his bidding or discharge him from being the purchaser and order the land to be resold.

It was, I think, for the reason that the sales conducted under orders of the Court in England were thus not absolute prior to 1867 that in the first edition of Daniel's Chancery Practice published in 1837, Vol. 2, pages 909 and 910, it was said that, while in ordinary sales by auction or by private agreement a contract is complete when the agreement is signed, a different rule prevails in sales before a Master where the purchaser is not considered as entitled to the benefit of his contract until the Master's report of the purchaser's bidding is absolutely confirmed. This is explained in the judgment of Sugden, L.C. in *Vesey and Elwood* (1). Daniel's further statement that the bidder not being considered as the purchaser until the report is confirmed is not liable to any loss by fire or otherwise which may happen to the estate in the interim, is based upon a decision of Eldon L.C. in *Ex parte Minor* (2).

The judgment ordering the sale in the present matter directed that a sale of the mortgaged property be made by the sheriff of the County of Lunenburg after such sale had been advertised in the manner provided by the judgment and that the sheriff should execute to the purchaser a deed conveying all the estate or interest of the respondent Gould and the respondent Corporation in the said lands. This was the subject matter of the sale and purchase. The sale was made in exercise of a statutory power which authorized an outright sale of the interest of these respondents in the property. The respondent's contention is that, conceding this to be so, none the less the purchase was subject to the condition that if the mortgagor should find the money before the time when the judge's approval of the sale was given he might still be permitted to redeem.

(1) (1842) 3 Dr. & War. 74 at 79. (2) (1805) 11 Ves. 559.

The respondent relies mainly upon two decisions in the courts of Nova Scotia to support this position. In *Stubbings* v. *Umlah supra,* Meagher J. said in part (p. 271):—

> A plea of foreclosure in England is not good, unless the foreclosure has been made absolute by the granting of a final order. *Senhouse* v. *Earl* (1).
>
> The same principle should, it seems to me, apply with us, at least, until the sale has taken place, and, more than likely, until the order confirming it passed.

In a later case, *Ritchie* v. *Pyke* (2), Meagher J., delivering the judgment of a court consisting of McDonald C.J. and Weatherbe J. in addition to himself, said (p. 478):—

> Under our practice, which has prevailed for nearly half a century, at least, no time for redemption is fixed where a sale is ordered; but the right to redeem, of course, endures until the proceedings have been finally confirmed by order of the court, after the sale, payment of the price, and conveyance to the purchaser have been completed.

No authorities were cited by Meagher J. for either of these statements. The statement in the later case, it will be noted, is more positive than that made in the earlier. These statements of the law, as has been pointed out in the judgments of the learned judges of the Supreme Court *in banco* were *obiter* and, with respect, they do not appear to me to be supported by authority, unless such is to be found in the judgment of Ritchie C.J. in *Bigelow* v. *Blaiklock,* Russell's Equity Decisions, p. 23. In that case, at a sheriff's sale of property directed in proceedings upon a mortgage, the property to be sold was misdescribed. The mortgagee had purchased the property at the sale and thereafter had agreed to sell part of the property to a third person. Ritchie C.J. said that he took no account of the fact that the plaintiff had agreed to sell one of the lots; that he had no right to do so as he had obtained no deed and the sale had not been confirmed by the court, as required by its practice, and directed a resale. He then proceeded to say that, though he had ordered a resale, the plaintiff being the purchaser, and that under similar circumstances the result might have been the same if a stranger possessed of the same knowledge had been the purchaser, yet there was a manifest distinction between the plaintiff in a suit and a stranger. The learned judge did not refer to any authority in support of any of these statements and the

(1) 2 Ves. Sr. 450.

(2) (1904) 40 N.S.R. 476.

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exact nature of the difference which he considered to exist between the position of a stranger and that of a mortgagee plaintiff is not made clear.

As opposed to this, in *Slayter* v. *Johnston* (1), a suit in equity for the redemption of a mortgage, Young C.J., referring to an argument that the plaintiff should be permitted to redeem, said (p. 508):—

> We were told that the foreclosure might be opened, which would be a strange thing, at the instance of the mortgagee, and a very startling thing if it could be done at the instance of the mortgagor in this country after a sale.

Wilkins J. (p. 522) said that there had not been, so far as the Court was informed, any instance in the Province of vacating a decree of foreclosure after sale where there was no fraud or illegality.

In *Wallace* v. *Gray* (2), the action was brought to set aside a sale directed in what were apparently proceedings for partition upon the ground of certain irregularities in the proceedings. Townshend J., referring to the fact that the plaintiff had been well aware of the alleged irregularities, said in part (p. 282):—

> Now the authorities are clear that it was his duty at the earliest moment to apply to a judge, before the sale was made, and that it is too late after the property has been knocked down and sold, as in this case, to an innocent purchaser. It would be most unjust if he were permitted to do so, and hurtful to the confidence placed in sales made under the authority of the court.

Whatever may have been the practice prior to 1884, this case was decided after Rule 8 of Order 51 was enacted and, accordingly, the approval of the judge to the sale, after it has been held, was necessary.

I think a sharp distinction is to be drawn between the position of a purchaser, such as the present appellant, and that of a mortgagee who has acquired title to the property by foreclosure and who retains it in his possession. Whether there is any distinction between the position of the appellant and one who equally in good faith, though aware that the title of a mortgagee had been acquired by foreclosure, purchases the property from the latter, it is unnecessary to decide. There is no evidence before us that there was ever at any time a practice of opening the biddings in Nova Scotia such as existed in England prior to 1867. Doull J. says in his judgment on the first appeal that the practice

(1) (1864) 5 N.S.R. 502. (2) (1892) 25 N.S.R. 279.

does not seem to have existed, at any rate in that form, in Nova Scotia, then, however, proceeding to say that such sales were not made "subject to the approbation of the court" if the order for sale is followed. While there is no statute in Nova Scotia containing provisions similar to those of s. 7 of the Sale of Land by Auction Act 1867 in England, in my opinion, the decided cases do not support the view that a judicial sale of land in mortgage sale proceedings regularly conducted in accordance with the judgment of the court, as in the present case, may be set aside merely on the ground that the mortgagor has, after the event, succeeded in raising the mortgage money.

In *Bennett* v. *Hamill* (1), where the proceedings were to set aside a judicial sale on the ground of irregularities in the proceedings, Lord Redesdale L.C. said (p. 577) that the purchaser had a right to presume that the court had taken the steps necessary to investigate the rights of the parties and properly decreed a sale and that, if he gets a proper conveyance of the estate, his title ought not to be invalidated and that if the court went beyond this it would be to introduce doubts on sales made under the authority of the court, which would be highly mischievous.

In *Matthie* v. *Edwards* (2), Knight Bruce V.C., where the action was to set aside a sale made under the powers given by a mortgage, set aside the sale on the ground that it had been harsh, oppressive and inequitable. The action had been contested by the purchaser at the sale as well as by the mortgagee and, as to the former, the learned Judge said that there were facts in evidence more than sufficient to prevent his case from standing better than that of his vendor. On appeal, this judgment was reversed: 11 Jur. 504. Cottenham L.C., dealing with the ground upon which the judgment appealed from had proceeded, said (p. 505):—

> Such a power as this may no doubt be used for purposes of oppression, but when conferred, it must be remembered that it is so by a bargain between one party and the other, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing. If the power is exercised for fraudulent purposes, this Court will interfere, and, as in other cases, if the party actually deposits in court the amount due, it will not allow the power to be exercised at all. The interests, however, of society require that these powers should not be interfered with, and there is no reason why they should be.

(1) (1806) 2 Sch. & Lef. 566. (2) (1846) 10 Jur. 347.

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The only fact alleged which might have affected the purchaser was apparently that his solicitor was also the solicitor for the mortgagee who conducted the sale proceedings on behalf of the latter, but Lord Cottenham found no evidence of impropriety in this. He considered that to confirm the judgment of the Vice Chancellor would be to lay down a new rule for the interference of courts of equity.

In *Adam* v. *Scott* (1), where a sale by a mortgagee under a power of sale contained in the instrument was attacked on the ground that it had been made at an undervalue and that the mortgagor desired to redeem, Wood V.C. said that, assuming the allegations made for the plaintiff were all true, the plaintiff was bound to have shown that the power, the existence of which was stated in his bill, had been exercised improperly or contrary to its terms, that there had been some fraud attending the sale and that the purchasers had notice of such fraud. As nothing of this nature was alleged, the defendant's demurrer was allowed and the action dismissed.

In *Shaw* v. *Bunny* (2), a mortgagee, in exercise of a power of sale given by a mortgage, had sold part of the mortgaged property to the defendant who held a second mortgage on the property. The default was not denied or that the sale had been made in accordance with the power granted but it was objected that such a sale to a second mortgagee could not be supported. The Master of the Rolls had dismissed the action. On appeal, Knight Bruce L.J. said (p. 471):—

> The Master of the Rolls has held . . . that the second mortgagee has, under his purchase, in the absence of special circumstances, the same absolute and irredeemable title as a stranger purchasing would have had. And there being, I think, not any special circumstance in the present instance to prejudice or affect the purchaser's right, his title against the mortgagor to the benefit of the purchase seems to me also, as absolute as that of a mere stranger purchasing would have been.

The Court of Chancery was first vested with power to direct a sale of property in proceedings upon mortgages by the Chancery Procedure Act of 1852. We have not been referred to any such proceedings between the passage of that Act and of the statute of 1867 which abolished the practice of opening biddings, in which any such question

(1) (1859) 7 W.R. 213.

(2) (1864) 2 De G.J. & S. 468.

as arises here, as to the rights of a purchaser at such a sale, was considered. Cases decided since that time must be considered, bearing in mind the provisions of s. 7 which has been referred to above. Its effect was considered by Peterson J. in *re Joseph Clayton* (1).

Some of the cases decided after 1867 in mortgage sale proceedings out of court are of assistance, though s. 7 does not apply to them. In *Warner* v. *Jacob* (2), after a sale by a mortgagee in proceedings out of court, the mortgagor brought an action against the mortgagee and the purchaser for redemption, alleging that the sale had been made at an undervalue and for the purpose of embarrassing him. Kay J. referred to what had been said by Lord Cottenham in *Jones* v. *Matthie* (3) and by Vice-Chancellor Wood in *Adams* v. *Scott* (4) and said that if the mortgagee exercised the power of sale *bona fide* for the purpose of realizing the debt without corruption or collusion with the purchaser, the Court would not interfere even though the sale be very disadvantageous, unless indeed the price was so low as in itself to be evidence of fraud.

In *Gentles* v. *Canada Permanent* (5), the defendant mortgagee had advertised a sale of mortgaged premises and the property was knocked down to the plaintiff, who was declared to be the purchaser. The mortgagor who had made arrangements to pay the amount in default but, through mischance, had not tendered the amount before the sale, wished to redeem and the mortgagee thereupon informed the purchaser that it would not carry out the sale unless forced to do so by the Court. As the regularity of the proceedings was not impeached, Street J. directed specific performance.

In *Huson* v. *Haddington* (6), where a sale under proceedings by the mortgagee taken out of court was attacked on the ground that it had been made without due regard to the interests of the mortgagor and that the property had been sold at a great undervalue, the Court of Appeal set the sale aside. On appeal to the Judicial Committee, this judgment was reversed: (7). The pleadings had not

(1) [1920] 1 Ch. 257 at 264.
(2) (1882) 20 Ch. D. 220.
(3) 11 Jur. 504.
(4) 7 W.R. 213.
(5) (1900) 32 O.R. 428.
(6) (1911) 16 B.C.R. 98.
(7) [1911] A.C. 722.

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contained any charge of fraud or collusion or bad faith against the defendant purchasers and there had been no notice before trial that inadequacy of price would be relied upon as evidence thereof and the purchasers had accordingly given no counter-evidence of its sufficiency. Lord De Villiers, in delivering the judgment, made it clear that, in the absence of any allegation of fraud or collusion or bad faith or knowledge of the existence of facts which would invalidate the sale on the part of the purchasers, or any evidence of such, the action failed.

In *Gordon Grant & Co.* v. *Boos* (1), the lands had been sold at a sale directed in proceedings upon a mortgage in the Supreme Court of Trinidad. The appellants, the mortgagees of the property, having obtained leave to bid, purchased the property and subsequently sold it at a much larger price. Thereafter they sued the respondent in New York on his personal covenant for the balance found due on the mortgage, less the sum realized at the sale, whereupon the respondent brought an action for redemption. Lord Phillimore, in delivering the judgment of the Judicial Committee, pointed out that, while the judicial sale had realized a very small amount, the regularity of the proceedings was not impeached and the mortgagor who could have made a bid or procured a bid must take the consequences.

In *Waring (Lord)* v. *London and Manchester Assurance Co.* (2), a mortgagor brought an action and moved for an injunction to restrain a mortgagee from giving a conveyance of the mortgaged property to a purchaser to whom it had been sold, in the exercise of the power of sale conferred by s. 101 of the Law of Property Act, 1925. An agreement for the sale of the property between the mortgagee and the purchaser had been completed but the conveyance had not yet been made. The report of the argument shows that it was contended by counsel for the plaintiff that the mere entering into of a contract for sale of the property comprised in a mortgage does not exclude the mortgagor's right of redemption. A further contention was that the sale was at a gross undervalue. Crossman J., in delivering judgment dismissing the motion, pointed out that the contract for the sale of the property entered into by the

(3) [1926] A.C. 781. (2) [1935] 1 Ch. 310.

mortgagee was not conditional in any way. As to the argument that the plaintiff's equity of redemption had not been extinguished as there had been no completion by conveyance and the plaintiff was, accordingly, still entitled to redeem, he said that s. 101 of the Act, which gave to the mortgagee power to sell the mortgaged property, was perfectly clear and meant that the mortgagee had power to sell out and out by private contract or by auction and, subsequently, to complete by conveyance, and that the power to sell was a power by selling to bind the mortgagor. After saying that if that were not so the extraordinary result would follow that every purchaser from a mortgagee would, in effect, be getting a conditional contract liable at any time to be set aside by the mortgagor coming in and paying the principal, interest and costs, he said that it seemed to him impossible seriously to suggest that the mortgagor's equity of redemption remained in force pending completion of the sale by conveyance. Dealing with the argument as to the sale at an undervalue, he referred to what had been said by Kay J. in *Warner* v. *Jacob* and said that on the facts of the case before him it was impossible to conclude that the price was so low as to be evidence of fraud.

In the cases above referred to, other than that of *Gordon Grant & Co.* v. *Boos,* the sale proceedings were carried out either under powers of sale contained in the mortgage itself or under a statutory power of sale and were made out of court. In none of them, other than the Manitoba case, was the mortgagor's claim for relief based upon the grounds upon which the judgments in the present matter have proceeded. While, for the reasons which I have given, I think Rule 8 of Order 51 requires either the plaintiff in the action or the sheriff to ask the approval of the Court of the sale which had been made, in my opinion, the plaintiff and the present appellant were entitled, as of right, to such approval, since it is conceded that the sale had been conducted in the manner directed by the judgment.

It was the entire interest of the respondent Corporation and of the respondent Gould which was offered for sale under the judgment of Mr. Justice Parker and which the plaintiff purchased and, in my opinion, the regularity of

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the sale proceedings being conceded, the appellant's legal position following the sale and payment of part of the agreed purchase price and the execution on her behalf of an agreement binding her to pay the balance, did not differ from the position of the purchaser in *Waring's* case. In my opinion, the equity of redemption of the mortgagor was extinguished by the sale (Waldock on Mortgages, 2nd Ed. 377 and cases cited Note 279). Had the appellant refused to complete the purchase, a decree of specific performance might have been made against her (*Else* v. *Barnard* (1); *Power* v. *Foster* (2)). Upon application to the Court, she was, in my opinion, entitled to an order that the sheriff do deliver to her the deed of the property, as had been directed by the judgment of Parker J.

For these reasons, it is my opinion that this appeal should be allowed and the conveyance of the interest sold to the appellant directed. I agree with the order as to costs proposed by my brother Rand.

Appeal allowed.

Solicitor for the appellant: *W. P. Potter.*

Solicitor for the respondents, Lobster Point Realty Corp. and L. B. P. Gould: *Donald McInnes.*

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FAIRBANKS SOAP COMPANY LIMITED (PLAINTIFF) ..... APPELLANT;

AND

MEL SHEPPARD (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Agreement to construct machine—Work not completed—Abandonment of Contract—Right to recover.

The defendant, a mechanical engineer, contracted with the plaintiff, a manufacturer of soap, to construct in the plaintiff's plant a machine for making and drying soap chips for a price of $9,800, payable $4,000 in cash on completion and the balance to be secured by promissory notes. When the work was nearly completed the defendant, who had been paid $1,000 on account, refused to do anything more until paid a further $3,000.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Locke and Cartwright JJ.

(1) (1860) 28 Beav. 228.

(2) (1901) 34 N.S.R. 479.

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Held: On the view of the evidence most favourable to the defendant, he deliberately abandoned the contract at a stage when the machine would not perform the work for which it had been ordered and when what remained to be done required the exercise of engineering skill and knowledge. Under such circumstances it could not be said that he had substantially completed his contract. *Appelby* v. *Myers* L.R. 2 C.P. 651; *Sumpter* v. *Hedges* [1898] 1 Q.B. 673 at 674; *Dakin* v. *Lee* [1916] 1 K.B. 566, applied.

Decision of the Court of Appeal for Ontario [1951] O.R. 860, reversed.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Genest J. at the trial dismissing the plaintiff's action and awarding judgment to the defendant on his counterclaim.

W. B. Williston for the appellant.

J. D. Arnup, Q.C. and *J. S. Boeckh* for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—The appellant is a manufacturer of soap and the respondent is a mechanical engineer. This action arises out of an agreement between the parties for the construction by the respondent in the plant of the appellant of a machine for making and drying soap chips. There is also a claim made by the respondent for $1,000 for the "installation" of the machine in question and of certain pulleys, hangers and shafting to be supplied by the appellant which requires consideration but it will be convenient first to dispose of the questions relating to the contract for the construction of the machine itself. It was a term of the contract that the type of design of the machine and the products produced by it should be "of the standard generally used and produced by all the large soap producers on this continent." It is now common ground that this was an entire contract to construct the machine for a price of $9,800 payable $4,000 in cash on completion and the balance to be secured by promissory notes. For the reasons given by Roach J.A. I agree with his conclusion, which was also that of the learned trial judge, that the contract was not one for the sale of goods but for work to be done and materials supplied.

The contract was made in September 1945. No date for completion was fixed. For reasons with which we are not now concerned there were numerous and lengthy delays

(1) [1951] O.R. 860.

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in building the machine. By March 1, 1949, according to the evidence of the respondent, the work had progressed to a point where the supplying of a small number of parts and the performance of a few days work would have resulted in the completion of the machine. At this point the respondent took the position that he would do nothing more unless and until he was paid $3,000, which, added to $1,000 which had been paid to him in November 1946, would make up the payment of $4,000 which was due on completion. The explanation of this given by the respondent at the trial was that he was afraid that if he completed the machine so that the appellant no longer required his services in connection with it he would not be paid. The appellant offered to deposit the sum mentioned in escrow to be paid to the respondent on completion of the machine but the respondent refused to proceed unless payment was made to him. By letter dated March 25, 1949 the appellant required the respondent to complete his contract by April 30, 1949 stating in part that unless he did so:—

> . . . we shall cancel the contract and require you to remove this machine from our premises, and request you to return the $1,000 paid to you, and further reimburse us for the time our employees worked on this machine with your employees, at your request, and for materials supplied at your request.

The letter concluded with the following paragraph:—

> If for any reason the time limit fixed by us for completion of the machine is unreasonable or insufficient, we would ask you to kindly advise us at once, otherwise we shall presume that we have given you reasonable time for so doing, and will act accordingly.

Counsel for the respondent does not suggest that the date fixed by this letter for completion was unreasonable. His submission is that the contract was already substantially completed. The respondent did nothing further and on May 11, 1949 the appellant commenced this action. The Statement of Claim recites the contract, alleges that the machine had never been constructed or completed and claims:—

(*a*) A declaration of this court that the contract between the parties hereto and dated the 21st of September, 1945, has been cancelled.

(*b*) The sum of $1,000 paid to the defendant.

(*c*) The sum of $700, value of floor space in the plaintiff's factory, used by the defendant.

(*d*) The sum of $137.11 the value of materials supplied by the plaintiff to the defendant at his request.

(e) The sum of $355.77 being value of materials purchased by the plaintiff as aforesaid less their salvage values and wasted by reason of the failure of the defendant to complete such machine.

At the opening of the trial the following claim was added by amendment, (e) (1) the sum of $1,191.80 the cost of labour referred to in paragraph 9 of the Statement of Claim. The relevant sentence in paragraph 9 is as follows:

The plaintiff further supplied labour at the request of the defendant in the construction of such machine, such labour costing the plaintiff the sum of $1,191.80.

There was an alternative claim for $15,000 damages, presumably to cover the contingency of its being held that the appellant had to accept and pay for the machine.

Paragraph 5 of the Statement of Defence reads as follows:—

The defendant says and the fact is that he has manufactured upon the premises of the plaintiff a machine as specified in the said agreement referred to in paragraph 3 of the statement of claim and that the plaintiff is now obliged to accept and pay for the same.

The respondent asked that the action be dismissed and counterclaimed (a) $9,584 being the contract price of $9,800 plus $784 sales tax less $1,000 paid on account, (b) $1,000 for "installation" as mentioned above and (c) $500 paid by the respondent for labour which he claimed should have been supplied by the appellant.

The learned trial judge held that "there was a substantial compliance with the contract" by the respondent, that there was no abandonment of the work by him, and no total failure of consideration, and that the respondent was entitled to be paid the contract price "less the cost of completing the machine, etc. and putting it in working order," which last mentioned cost he fixed at $600. He allowed the respondent's claim on the separate contract at $1,000 and on his claim of $500 he allowed him $200. Judgment was accordingly given for the respondent on his counterclaim for these amounts totalling $10,184, with costs, and the action was dismissed with costs. This judgment was affirmed by the Court of Appeal and the plaintiff now appeals to this Court.

I did not understand counsel to differ as to the present state of the law in Ontario but rather as to its application to the facts of the case at bar. In *Appleby* v. *Myers* (1),

(1) (1867) L.R. 2 C.P. 651.

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a decision of the Exchequer Chamber in which the unanimous judgment of the Court, Martin B., Blackburn J., Bramwell B., Shee and Lush JJ., was delivered by Blackburn J., that learned judge stated the general rule at page 661, as follows:—

> . . . the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

The judgment in *Appleby* v. *Myers* was approved and acted upon by the Judicial Committee in *Forman & Co. Proprietary Ltd.* v. *The Ship "Liddesdale"* (1), particularly at page 202. In *Sumpter* v. *Hedges* (2), A. L. Smith L.J. said:—

> The law is that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered.

This rule was recognized by the Court of Appeal in *H. Dakin and Co. Ltd.* v. *Lee* (3), but it was pointed out that the word "completed" as used in the rule is, in certain circumstances, equivalent to "substantially completed". The judgments in *Dakin* v. *Lee* have been repeatedly approved and followed in Ontario, *vide* e.g. *Taylor Hardware Co.* v. *Hunt* (4), and in my respectful opinion they correctly state the law.

The real question on this appeal is whether the respondent substantially completed his contract to construct the machine. With the greatest respect for the contrary view held by the learned trial judge and the Court of Appeal, I have reached the conclusion that he did not. From a perusal of the written record I would have inclined to the view that the evidence of the appellant's expert witness Mitchell, who was of opinion that the machine when completed would not be capable of producing soap chips of commercial quality should be preferred to that of the experts called by the respondent not only because of his admittedly high qualifications but because he appeared to have based his opinion on a much more thorough examination of the machine than was made by the other witnesses; but I do not rest my judgment on this view. In my opinion

(1) [1900] A.C. 190.
(2) [1898] 1 Q.B. 673 at 674.
(3) [1916] 1 K.B. 566.
(4) (1917) 39 O.L.R. 85 at 88.

on the evidence of the respondent himself and of the witnesses called on his behalf there was no substantial completion of the contract. At the time when the respondent definitely refused to proceed further with the construction of the machine it was incomplete in the following respects: the "knife" and "flange" were missing, baffles were required for the canvas apron screening of the dryer, further work was required on the fans and the speed of the machine had to be changed, being about six times as fast as was proper. It is urged on behalf of the respondent that these are comparatively unimportant details and that the allowance of $600 for the completion of the machine made by the learned trial judge is a generous one. But it appears from the evidence of the respondent and his witnesses that what remained to be done required engineering skill and knowledge. The record is silent as to whether the services of an engineer other than the respondent possessing the necessary skills were available to the appellant. The situation was, I think, accurately summed up in the following answer made in re-examination by the expert witness Stokes called for the respondent:—

> I think I know what both you gentlemen are trying to get at, and let me put it this way, it may not be legal or it may not be orthodox, but I am going to say this, if Fairbanks and Sheppard do not get together that machine will never run, it has to depend on the co-operation of two individuals just the same as ours at Guelph. If we had sat on the sidelines looking at it, it would never run. We had to co-operate with Sheppard and he had to co-operate with us. Everyone has to co-operate to operate the machine.

The respondent in his own evidence makes it clear that he decided to desist from further construction at a time when the machine was not capable of producing soap chips and to refuse to bring it to the state where it would produce them unless and until he was paid moneys to which under the contract he was not then entitled. He says in effect that he had intentionally put in sprockets of the wrong size so that the appellant could not use the machine to produce chips. After stating that one reason for putting in a small sprocket was to "run the machine in" he added that he had another reason. He was questioned as to this by the learned trial judge as follows:—

> His Lordship: You asked him what reason and he is not finished his answer. A. Will I give the other reason?
>
> Q. Yes.

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A. Because of the fact if I had gone and put the proper speeds on that dryer and I had put the knife on the dryer and operated that dryer producing chips, from my previous experience about the loan on the machine, with my dealings with Mr. Fairbanks with the machine, I had come to the firm conclusion I would have been locked out of the plant the same as Arneil, I would have been locked out and I would have had to sue him for my money. He could have fooled around for years and been making soap chips at my expense. I have $6,000 tied up in the machine and I think I have a right to get something out of it before I operate it and he could go on and operate it for years.

I can find nothing in *Dakin* v. *Lee* (*supra*) or in the numerous other authorities referred to by counsel to indicate that under all these circumstances it could be said that the respondent had substantially completed his contract. The contract was to construct a machine to produce soap chips of a certain standard. The respondent refused to do anything further at a time when on his own evidence the partially constructed machine would not produce soap chips at all. In my opinion on the view of the evidence most favourable to the respondent he abandoned the work and left it unfinished. The difference between the facts of the case at bar and those in *Dakin* v. *Lee* (*supra*) are apparent on reading all the judgments in the last mentioned case, and it will be sufficient to refer to the following passage from the judgment of Lord Cozens-Hardy M.R. at pages 578 and 579:—

> In these circumstances it has been argued before us that, in a contract of this kind to do work for a lump sum, the defect in some of the items in the specification, or the failure to do every item contained in the specification, puts an end to the whole contract, and prevents the builders from making any claim upon it; and therefore, where there is no ground for presuming any fresh contract, he cannot obtain any payment. The matter has been treated in the argument as though the omission to do every item perfectly was an abandonment of the contract. That seems to me, with great respect, to be absolutely and entirely wrong. An illustration of the abandonment of a contract which was given from one of the authorities was that of a builder who, when he had half finished his work, said to the employer "I cannot finish it, because I have no money," and left the job undone at that stage. That is an abandonment of the contract, and prevents the builder, therefore, from making any claim, unless there be some other circumstances leading to a different conclusion. But to say that a builder cannot recover from a building owner merely because some item of the work has been done negligently or inefficiently or improperly is a proposition which I should not listen to unless compelled by a decision of the House of Lords. Take a contract for a lump sum to decorate a house; the contract provides that there shall be three coats of oil paint, but in one of the rooms only two coats of paint are put on. Can anybody seriously say that under these circumstances the building owner could go and occupy the house and take the benefit of all the decorations which had been done in the other

rooms without paying a penny for all the work done by the builder, just because only two coats of paint had been put on in one room where there ought to have been three?

I regard the present case as one of negligence and bad workmanship, and not as a case where there has been an omission of any one of the items in the specification. The builders thought apparently, or so they have sworn, that they had done all that was intended to be done in reference to the contract; and I suppose the defects are due to carelessness on the part of some of the workmen or of the foreman: but the existence of these defects does not amount to a refusal by them to perform part of the contract; it simply shows negligence in the way in which they have done the work.

In the case at bar when the respondent knew the machine was not capable of producing soap chips he said to the appellant: "I will not finish it unless you pay me $3,000." In my opinion the conduct of the respondent falls within the illustration of an abandonment of a contract given by the Master of the Rolls in the above quoted passage.

Counsel for the respondent did not seek to base any claim in regard to this contract on a *quantum meruit* and I think it clear that, if, as I have held to be the case, there was no substantial completion of the contract, there was no evidence from which any new contract to accept and pay for the work done could be inferred. From the evidence it seems probable that the machine in its present state has become part of the realty which belongs to the appellant. Assuming this to be so it is clear from the reasons in *Sumpter* v. *Hedges* (1) that the mere fact of the appellant remaining in possession of his land is no evidence upon which an inference of a new contract can be founded. At page 676 Collins L.J. puts the matter as follows:—

There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a *quantum meruit* from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only where the circumstances are such as to give that option that there is any evidence on which to ground the inference of a new contract.

In the case at bar the appellant has never elected to take any benefit available to him from the unfinished work and Mr. Williston stated that he was willing that, in the event of his appeal succeeding, a term should be inserted in the judgment permitting the respondent to remove the machine within a reasonable time.

(1) [1898] 1 Q.B. 673.

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Cartwright J.

For the above reasons I am of opinion that the respondent's claim based on the contract to construct the machine fails and that the appellant is entitled to a declaration that the contract was cancelled and to the return of the $1,000 paid to the respondent in November 1946.

It is next necessary to consider the appellant's claim for damages. The amount to which the appellant should be held entitled was not argued before us and the best course might be to direct a reference but in the hope of bringing the litigation to an end I have examined the evidence and have concluded that substantial justice would be done by awarding the appellant the total of items (*d*), (*e*) and (*e*) (1) claimed in the Statement of Claim amounting to $1,684.68, but as this branch of the matter was not fully argued before us, either party dissatisfied with this amount may have a reference at his own risk as to costs to the Master at Toronto to determine the amount.

It remains to consider the item of $1,000, claimed by the respondent for "installation", referred to in the opening paragraph of these reasons. This item is claimed in paragraph 2 of the counterclaim which reads as follows:—

> The defendant further says that the installation of the said machine and accessories thereto was on the basis of a separate order from the plaintiff to the defendant for which the defendant was to be separately paid and in respect of which the defendant is entitled to the sum of $1,000. The plaintiff further agreed to supply labour to assist the defendant in the installation of the said machine and failed to do so, as a result whereof the defendant had to hire extra labour and incurred expenditures in the sum of approximately $500.

In so far as these claims are for the installation of the machine they must fail. Having refused to complete the construction of the machine I can find no basis for a claim to be paid for the installation of an incomplete machine which must now be removed. There was however a separate agreement to be found in the letters marked as Exhibits 27, 28, 29, 30, 31 and 32 to install a motor and certain pulleys and hangers to be used on the ceiling counter shafts for driving the dryer. Exhibit 32, a letter from the respondent to the appellant, reads as follows:—

> We acknowledge your letter of September 26th, authorizing us to proceed with the erection of pulleys, hangers and motor for the driving members to the various sections of the dryer.
>
> We as arranged are to supply the labour and engineering in connection with the same but not materials, and for the sake of record and invoicing wish to point out that this is a separate order from the dryer proper and will be billed to you on that basis.

There is no evidence of any bill having been rendered by the respondent shewing what part of the $1,000 claimed in paragraph 2 of the counterclaim is attributable to the installation of these items and I am unable to find much assistance in the evidence. It does appear however that the work was done and the exhibits referred to indicate the amount of material installed. While I feel it is little better than a guess, I would, once more in the hope of bringing the litigation to an end, assess the amount to which the respondent is entitled for installing the equipment in question at $200 with a similar right to either party, if dissatisfied with this figure, to have a reference to the Master at Toronto.

In the result the appeal should be allowed and judgment should be entered (*a*) declaring that the contract between the parties dated the 21st of September 1945 has been cancelled, (*b*) providing that the appellant recover from the respondent the sum of $2,684.68, (*c*) providing that the respondent shall have the right to remove the incomplete machine from the premises of the appellant within sixty days from the date of the delivery of this judgment, (*d*) providing that the respondent recover from the appellant on his counterclaim the sum of $200; provided however that if either party so elects within fifteen days of the date of the delivery of this judgment in respect of either or both of items (*b*) and (*d*) above, instead of judgment being entered for the amount above set out it shall be referred to the Master at Toronto to determine the amount of damages in respect of the item or items as to which such election is made.

As the appellant has succeeded substantially both on the claim and counterclaim it should have its costs of the action and counterclaim and of the appeals to the Court of Appeal and to this Court.

Appeal allowed.

Solicitors for the appellant: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitors for the respondent: *Mason, Foulds, Arnup, Walter & Weir.*

1952
*Nov. 10
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*Mar. 18

DONALD A. DESHARNAIS and THE PACIFIC CARTAGE & STORAGE COMPANY LIMITED (*Defendants*) APPELLANTS;

AND

MURIEL JOHNSON (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Negligence—Motor Vehicle—Pedestrian run down in intersection—Driver's vision obscured by frosted windshield—Whether if pedestrian not in pedestrian crossing, onus on driver discharged—The Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, ss. 59 (2), (4), 94(1).

In an action for damages against the appellants for injuries suffered by the respondent, who was knocked down at a street intersection and run over by a motor truck driven by the appellant driver and owned by the appellant company, the defences pleaded were negligence by the respondent in crossing the intersection diagonally and her failure, contrary to s. 59(4) of *The Vehicles and Highway Traffic Act,* R.S.A. 1942, c. 275, to yield the right-of-way to the vehicle, and in the alternative, contributory negligence. The evidence was that the driver's vision was obscured by frost on the windshield which prevented his seeing the respondent. No one saw the collision but from the evidence adduced the trial judge considered that it had occurred, either while the respondent was crossing from the northeast to the northwest corner of the intersection and while she was in the pedestrian right-of-way or, after she angled off that right-of-way slightly in a southwesterly direction. He found the latter to be the case but that that was not a contributing cause of the accident, and that the entire fault was the negligence of the truck driver. The judgment was affirmed by Supreme Court of Alberta, Appellate Division, Frank Ford J.A. dissenting.

Held: (Locke J. dissenting), that the appeal should be dismissed. Upon the evidence the accident was caused by the negligence of the driver of the truck and there was no negligence on the part of the rspondent contributing to the accident.

Per: Rinfret C.J. and Kerwin J.:—It made no difference whether the respondent followed the unmarked crossing, or whether she deviated "very slightly" therefrom as the trial judge found, or even if she crossed at a point further to the south and near the centre of the intersection, as the majority of the Court of Appeal thought, in any event, the position of the respondent had nothing to do with the accident.

The respondent stated she looked to her left, where the traffic nearest her would be expected. As a result of the accident she remembered nothing further but that did not necessarily mean that she did not thereafter look to her right, and there was nothing to indicate that the truck would have been seen at any relevant period in sufficient time for the respondent to avoid the accident. *Nance* v. *British Columbia Electric Ry. Ld.* [1951] A.C. 601 at 609.

*PRESENT: Rinfret C.J. and Kerwin, Estey, Locke and Fauteux JJ.

In view of the finding that the position of the respondent was not a contributory cause of the accident, the onus section, s. 94(1), need not be considered.

Per: Estey and Fauteux JJ.:—There was no evidence accepted by the trial judge that justified a finding that the respondent was not upon the pedestrian lane when struck by the appellants' truck. Therefore, the case fell within s. 59(2) by virtue of which the operator of the vehicle shall yield the right-of-way to the pedestrian. There was no evidence as to the manner in which the respondent conducted herself and, therefore, no evidence that she failed to exercise due care.

Per: Locke J. (dissenting):—The evidence disclosed that the respondent proceeded across the intersection diagonally from the northeast corner toward the southwest corner and was to the west of the centre of the intersection when struck by the truck. In failing to concede the right-of-way given to the oncoming vehicle by s. 59(4), and in failing to take any precautions for her own safety, her negligence contributed to the accident. *Swartz* v. *Wills* [1935] S.C.R. 628. The statement in the reasons for judgment of the majority of the Court of Appeal that the evidence must prove beyond a doubt to the satisfaction of the jury that the pedestrian did by negligence contribute to the accident was error. The evidence in the case discharged the onus placed upon the appellants by s. 94(1). Both the driver and the respondent were guilty of negligence contributing to the accident, as found by Frank Ford J.A., and the liability should have been apportioned equally. *The Volute* [1922] A.C. 129, 144. *The Contributory Negligence Act,* R.S.A. 1942, c. 116, s. 2.

APPEAL and, cross-appeal as to costs only, from a judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing (Frank Ford J.A. dissenting), the defendants' appeal from a judgment of Howson C.J.T.D., holding them liable for the damages sustained by the plaintiff.

R. L. Fenerty, Q.C. for the appellants.

M. Millard, Q.C. for the respondent.

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

KERWIN J.:—Several errors were pointed out in the reasons for judgment of the trial judge and in the reasons in the Court of Appeal but, irrespective of any onus under s. 94(1) of *The Vehicles and Highway Traffic Act* of Alberta, R.S.A. 1942, c. 275, the evidence satisfies me, as it did the trial judge and the majority of the Court of Appeal, that the accident was caused by the negligence of the driver of the truck and that there was no negligence on the part of the respondent contributing to the accident. In my opinion

(1) (1952) 6 W.W.R. (N.S.) 261.

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it makes no difference whether she followed the unmarked crossing, or whether she deviated "very slightly" therefrom as the trial judge found, or even if she crossed at a point further to the south and nearer the centre of the intersection as the majority of the Court of Appeal thought. On this point I am inclined to agree with the trial judge but, in any event, the position of the respondent had nothing to do with the accident. The truck driver was driving a truck in which his vision to the left was obscured by reason of frost on the windshield; he proceeded at the same rate of speed down the street and across a busy intersection, failed to see the respondent, and his truck struck her.

Centre Street in the City of Calgary runs north and south, and 20th Avenue runs east and west. The respondent had in her hands letters for mailing and she intended to cross from the northeast to the northwest corner of the intersection of these highways in order to deposit the letters in a mail box situated on the northwest corner. Neither highway is a stop street and there are no traffic lights. The respondent stated that before starting to cross, she looked to her left, that is, to the south where the traffic nearest her would be expeced. As a result of the accident she remembers nothing further but that does not necessarily mean that she did not thereafter look to her right. In *Nance* v. *British Columbia Electric Railway Ld.* (1), a pedestrian had been instantly killed by a street car and in the British Columbia Court of Appeal, Chief Justice Sloan had said:—"Had he taken the precaution of a momentary glance, he would not have walked into a position of imminent peril." Viscount Simon, speaking for the Judicial Committee, stated at page 609 with reference to this statement:—"On this, their Lordships would respectfully observe that in their opinion there was no evidence that the deceased did not look, and that if he looked, it may be that he saw that the car was stationary." Furthermore, in view of the down grade of Centre Street to the north at some point north of the intersection, and accepting the truck driver's evidence as to his rate of speed, fifteen to twenty miles per hour, there is nothing to indicate that

(1) [1951] A.C. 601.

the truck would have been seen at any relevant period in sufficient time for the respondent to avoid the collision.

On my view of the matter, s. 6 of *The Contributory Negligence Act*, R.S.A. 1942, c. 116, and the question of ultimate negligence need not be considered. Section 6 provides:—

> Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless he is satisfied by the evidence that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.

I might add that in my opinion the Court of Appeal were in error in attaching as much importance as they did to the positions occupied after the collision by the various articles that had been in the respondent's hands. In view of the tendency of these articles to be scattered after an event such as that with which we are concerned, nothing may be inferred from where they were found as to where the accident occurred. The evidence of the witness Craven has not been overlooked but in view of the findings of the trial judge it must not have been accepted by him, and a reading of the transcript appears to justify his disregard of it.

The appellants relied upon s. 59(4) of *The Vehicles and Highway Traffic Act*:—

> Every pedestrian crossing a roadway at any point other than within a marked or unmarked crossing shall yield the right-of-way to vehicles and street railway cars upon the roadway, provided that this provision shall not relieve the driver of a vehicle or street railway car from the duty of exercising due care for the safety of pedestrians.

It was argued that if it be shown that the respondent was off the pedestrian crossing, she must yield the right-of-way to vehicular traffic; that her failure to do so contributed to the accident; and that this satisfies the onus resting on the truck driver of proving that the accident was not *entirely* or *solely* due to his fault as provided by s. 94(1):—

> When any loss or damage is sustained or incurred by any person by reason of a motor vehicle in motion, the onus of proof that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

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Even if the respondent had not been on the pedestrian crossing, I agree with Mr. Justice Clinton J. Ford, speaking for the majority of the Court of Appeal, that this has nothing to do with the matter unless it be found that it was a contributory cause of the accident.

For the reasons already indicated, I think the onus section, s. 94(1), need not be considered but our attention was called to an extract from the judgment of Mr. Justice Clinton J. Ford where, after disposing of the appellants' contention now under consideration, he continues:—

> The answer might also be stated in this way: The evidence, including any fair inference therefrom, must prove *beyond a doubt* to the satisfaction of the jury that the pedestrian did by negligence contribute to the accident, and until this has been done the onus still remains on the driver. *Geel* v. *Winnipeg Electric Co.* (1).

Objection was raised, and I think properly so, to the words "beyond a doubt" but I venture to think that their insertion was inadvertent. The *Geel* case was concerned with a section of the Manitoba Motor Vehicles Act which as it then stood may be taken for present purposes to be the same as s. 94(1) of the Alberta Vehicles and Highway Traffic Act except that the words "entirely or solely" did not appear. In the judgment of Lord Wright delivered on behalf of the Judicial Committee it was stated:—"if, however, the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus" and in concluding he put it thus:—"No doubt the question of onus need not be considered, if at the end of the case the tribunal can come to a clear conclusion one way or the other, but it must remain to the end the determining factor unless the issue of negligence is cleared up beyond doubt to the satisfaction of the jury". The meaning of "doubt" in these two extracts is clear. Lord Wright was not dealing with doubt or reasonable doubt as used in criminal cases and I am quite sure that Mr. Justice Clinton J. Ford meant nothing more than Lord Wright although unfortunately in the former's reasons in this case the letter "a" was inserted between "beyond" and "doubt". The matter is mentioned merely because of the significance attached to it by counsel for the appellants.

(1) (1932) 3 W.W.R. 49.

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The trial judge directed that the respondent should have costs "on triple column 5" but the Court of Appeal could find no reason to increase the usual scale allowable under the rules. A litigant has no more right to cross-appeal than to enter a substantive appeal on a question of costs only and, in any event, I would not interfere with the order made by the Court of Appeal.

The appellants did not question the amount of the damages awarded and the appeal should, therefore, be dismissed with costs and the cross-appeal without costs.

The judgment of Estey and Fauteux, JJ. was delivered by:—

ESTEY J.:—At trial the respondent was awarded damages for injuries suffered when struck by appellant company's one-and-one-half ton truck driven by its employee, appellant Desharnais, at the intersection of Centre Street and 20th Avenue in the City of Calgary on Monday, October 25, 1948, at 7:30 a.m. The majority of the learned judges in the Appellate Division affirmed this judgment at trial. Mr. Justice Frank Ford, dissenting in part, would have held the negligence of both parties contributed, and apportioned the fault two-thirds against the appellant and one-third against the respondent.

It was a clear, cold, frosty morning. Appellant Desharnais had left the truck outdoors all night and the windshield was covered with frost. He removed some, but an examination of the windshield disclosed that sufficient had not been removed to make driving reasonably safe. Moreover, Desharnais deposed that as he approached the intersection the sun blinded him. Notwithstanding these two factors, he continued driving at his speed of fifteen to twenty miles per hour as he entered the intersection.

When about one-quarter of a block north from the intersection he deposed that he saw a young lady crossing the intersection at an angle toward the southwest corner. As he noticed her she was not quite half way across. He "kind of watched her" and "figured she was all of the way across the street." He then "lost vision of her." When he realized that his truck had struck a young lady, he thought it was the same one, who had turned around and was walking back toward the northeast corner. No

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evidence was adduced to support this surmise and, on the contrary, Miss Halpin, who worked for the same company as the respondent, had just crossed from the northeast corner and had reached Campbell's car at the southwest corner when she heard a noise and, turning, she saw the respondent under the truck. I am in agreement with the majority of the learned judges in the Appellate Court that Desharnais had seen Miss Halpin and, as he admits that he had seen no other young lady, he never did see the appellant. This conclusion is in accord with the remarks which he made immediately following the collision when he asked: "Where did she come from?"

The learned trial judge and all of the judges in the Appellate Division have, upon the evidence, held that the appellant Desharnais was negligent in a manner that contributed to the collision and the record amply supports that conclusion.

The appellants submit that the respondent, by her own negligence, contributed to her injury. The learned trial judge stated:

> On the evidence produced, I find that the plaintiff did angle very slightly from the pedestrian right-of-way between the northeast and northwest corners, but I cannot find that that was a contributing cause of the accident.

The Vehicles and Highway Traffic Act (R.S.A. 1942, c. 275) contains two relevant provisions, s. 59(2) and 59(4). These provide that at an intersection such as that here in question the operator of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway upon or within any crossing at an intersection, while a pedestrian crossing at any point other than within the marked or unmarked crossing shall yield the right-of-way to the operator of the vehicle. In neither case is the driver or the pedestrian excused from a duty to exercise due care. In view of these statutory provisions it is material to determine, if possible, where the respondent was at the moment of impact.

Craven, who was walking across 20th Avenue from the southwest toward the northwest corner, while he did not see the collision, did see the respondent who, as he deposed, was angling across the intersection toward a point that would be about one-quarter of the distance from the south-

west to the northwest corner on the west side of Centre Street. I am in agreement with the learned judges of the Appellate Division that the learned trial judge, in finding "the plaintiff (resp.) did angle very slightly," either discounted or disbelieved the evidence of Craven.

Campbell, who worked for the same company as respondent and Miss Halpin, conveyed them in his automobile, along with others, to their work each morning. Respondent and Miss Halpin met him at the southwest corner of this intersection. Miss Halpin, upon this occasion, when at the northeast corner saw respondent coming down Centre Street on the east side, but, observing that respondent was carrying some letters that presumably she would mail at the northwest corner, did not wait for her, but proceeded toward Campbell's car then approaching the southwest corner from the west on 20th Avenue.

The respondent deposed that she had come down Centre Street on the east side with letters she intended to mail at the northwest corner; that at the northeast corner she turned and started across to mail the letters at the northwest corner, looking to the south for oncoming traffic. She remembers nothing as to the events that followed, except "yelling, 'My arm hurts, take me home,' " but she cannot say where she was at that time. The next thing she remembers is waking up in the hospital some hours later. The doctor said "she was responding a little from 24 to 36 hours." If her evidence is accepted it is a fair conclusion that she was walking on the pedestrian lane on the north side of 20th Avenue crossing Centre Street.

The letters, respondent's purse and the contents thereof were found scattered in, or near, the southwest quarter of the intersection. No person states precisely where these were found, except Miss Halpin does say that the broken glasses were picked up "in the cross-walk from the north to the south side of 20th Avenue on the west side of Centre Street" about half way.

No person saw the collision, nor did anyone see the truck at any time touch her body. Four saw her upon the street immediately after the accident. One deposed she was rolling under the front part of the truck, another between the front and the back wheels, a third that she was lying between the wheels of the truck and the fourth that she

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was behind the truck, which was still proceeding, however, within the intersection. All agreed that the truck passed over her. It is important to observe that she suffered severe injury about her head, arms and legs, including a fractured skull and forearm. Her clothes were torn and sand and gravel impressed both in her lacerations and her clothes. These facts make it clear that those who saw the respondent under the truck did not see the manner in which she must have been thrown about, if, indeed, not dragged some distance, in order that such injuries might be inflicted.

The appellant Desharnais deposed as follows:

> I kind of shielded my eyes from the glare of the sun, and the next thing I knew there was a big thump like a bump and I looked back in the rear view window or mirror and I could not see anything, in the rear view window, and I went a few feet further and I looked again and I seen a young lady laying on the road. I immediately stopped and got out and went over to her.

Then he deposed:

> Q. The sun did not bother you at any other point along Centre Street except when you got to the intersection of 20th Avenue?
> A. That is right, sir.
> Q. That is the only place it bothered you?
> A. That is right, sir.

He was of the opinion that the respondent had somehow come in contact with the side of the truck and that the right rear dual wheel passed over her when he was about the middle of the intersection. Although no other witness saw the wheels pass over her, some such occurrence may well have happened. The front of the truck was carefully examined. There was no mark that would indicate a point of impact. This, of course, having regard to the manner in which the front of the truck was constructed, is not significant. The learned judges of the Appellate Division were of the opinion, with which I respectfully agree, that, having regard to all the circumstances, the probability is that she was struck by the front of the truck.

Centre Street and 20th Avenue are each 42 feet wide between the curb lines. The truck was being driven at from 15 to 20 miles per hour, or approximately 22½ to 30 feet per second. Appellant Desharnais would, therefore, proceed straight through the intersection, as he said he did, in less than 1½ to 2 seconds. There is no suggestion

that he applied his brakes until after he had passed over the respondent and stopped his truck about 40 to 50 feet south of the intersection.

It is often difficult to determine just how such collisions occur and in what manner the injuries are inflicted. This is no exception. Moreover, experience indicates that conclusions based upon the position of articles scattered about, that were in the possession of an injured party, are often unreliable. The significant factors are that no person saw the truck strike respondent, or, indeed, at any time touch her. Her injuries were extensive and the major portion must have been suffered before anyone saw her under the truck and, therefore, further north in the intersection than where the witnesses first saw her under the truck. Then, having regard to the width of the intersection (42 feet) and the speed of the truck, together with the fact that the appellant never saw the respondent until he had looked the second time, after realizing something had happened, supports a conclusion that this collision occurred at least well to the north of the intersection.

The learned trial judge stated:

> The plaintiff then attempted to cross Centre Street to reach Campbell's car and it was then she was struck by the defendant's car and injured. In attempting to reach Campbell's car, she probably did one of two things, either she went towards the northwest corner on the pedestrian right-of-way until she was struck or she angled off that right-of-way very slightly in a southwesterly direction and was there struck.

The learned judge would appear not to have given sufficient weight to the positive evidence of the respondent that she was then crossing Centre Street on her way to mail the letters and thereafter would proceed to Campbell's car.

When Craven's evidence is discounted or disbelieved, there is no direct evidence as to respondent's position, except her own, which would place her within the pedestrian lane. With great respect to those who have concluded otherwise, I am of the opinion that there is no evidence accepted by the learned trial judge that justifies a finding that the respondent was not upon the pedestrian lane when struck by the appellant's truck. Therefore, the case falls within s. 59(2), by virtue of which the operator of a vehicle shall yield the right-of-way to a pedestrian.

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Respondent was, quite apart from any statutory provision, required to exercise due care as she proceeded to cross the intersection. There is, however, no evidence as to the manner in which she conducted herself and, therefore, no evidence that she had failed to exercise due care.

The evidence here adduced supports the conclusion that it was the negligence of the appellant Desharnais driving the appellant company's truck that was the sole direct cause of the respondent's injuries.

I agree with the majority of the learned judges in the Appellate Division that no basis is disclosed which would support the exercise of a judicial discretion to increase the usual scale of costs and I, therefore, agree that the costs at trial should be taxed under Column 5 on the old scale in effect when the action was tried.

In my opinion the appeal should be dismissed with costs and the cross-appeal without costs.

LOCKE, J. (dissenting):—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta dismissing the appeal of the present appellants from a judgment for damages, for personal injuries awarded against them at the trial by the late Chief Justice Howson of the Supreme Court of Alberta. Frank Ford J.A. disagreed with the judgment of the majority of the Appellate Division and would have apportioned the damages between the parties under the provisions of *The Contributory Negligence Act* (R.S.A. 1942, c. 116).

The respondent is a stenographer in the employ of the Consolidated Mining and Smelting Company Limited at Calgary and was at about 7.30 o'clock on the morning of October 25, 1948, crossing the intersection of 20th Avenue and Centre Street in that city when she was knocked down and seriously injured by a truck, the property of the appellant company, and driven by the appellant Desharnais in the course of his employment. Miss Johnson who lived not far distant left her home on the morning in question to proceed to work, walking south along the east side of Centre Street. Centre Street runs north and south and is intersected at right angles by 20th Avenue and it was her intention to proceed to the southwest corner of this intersection to meet Mr. J. M. Campbell, a fellow employee,

who was in the custom of driving Miss Johnson and other employees to their work at the plant some ten miles distant. There was at the time a letter box on the north-west corner of the intersection and, according to Miss Johnson, she intended to mail some letters which she was carrying in her hand in this box. A Miss Halpin, a friend employed by the same employer, had preceded her along Centre Street and crossed the intersection ahead of her. Owing to the severity of the injuries sustained in the accident, the respondent unfortunately did not remember anything that occurred after she commenced to cross. However, she recollected what she had done up to that moment and gave the following answers to questions directed to her on her direct examination at the trial:—

Q. Now, we would like to know what you remember of that accident, what happened that day, what you remember happened that day?

A. I remember starting to cross the street, to cross from the northeast corner of Centre Street and 20th Avenue, to go across to the west side.

Q. Why were you going over to the west side?

A. Because I was going to mail some letters, and then I had to go across 20th Avenue to get my ride to work.

* * *

Q. Where did you come from to get to the corner?

A. Straight up Centre Street from the north.

Q. You came from the north along Centre Street?

A. From 27th Avenue south to 20th Avenue.

Q. You walked down from 27th Avenue to 20th Avenue?

A. Yes.

* * *

Q. And did you see Miss Halpin that morning?

A. I remember seeing Viola before I got to the corner, but she did not wait for me.

Q. Viola Halpin?

A. Viola Halpin, yes.

Q. And you remember seeing her ahead of you at the corner?

A. She came to the corner before I did, but she did not stop and wait for me to cross over.

* * *

Q. Do you remember seeing her on that corner?

A. Yes, I remember seeing her there.

* * *

Q. What did she do?

A. She went on across the street.

Q. What did you do?

A. I came on up to the corner and then I crossed, started to cross.

Q. You started to cross?

A. Yes.

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Q. Do you know whether you looked for traffic before you started to cross?

A. I would say I did.

Q. Well, what did you do before you started to cross?

A. Before I started to cross the corner, I looked towards 16th Avenue, which is south.

Q. Yes? Because traffic would be going north on the side of the street?

A. That is right.

Q. You remember doing that?

A. Yes, sir, I remember that.

Q. And how far did you proceed, as far as your memory carries you?

A. I don't know, sir.

Q. You don't know?

A. No. I remember starting across Centre Street but I don't know how far I ever got.

Campbell's car was approaching the intersection from the west on 20th Avenue as Miss Johnson reached or was about to reach the northeast corner of the intersection, he intending to stop to pick up his passengers. In cross-examination, further answers were made by the respondent relating to this:—

Q. Now, as to the accident itself. I think you have told us here today that you recall stepping off the northeast corner with the intention of going directly across to the northwest corner?

A. Yes, sir.

Q. You have told us, I believe, that you have no recollection of what you actually did after stepping off, is that right?

A. No, I haven't.

Q. And you have told us that you have actually no recollection as to whether you saw Mr. Campbell's car there or not, you don't know?

A. No, sir, I don't remember seeing it.

Q. And you don't know whether you carried out your intention of going straight across, or whether something happened to change your mind, or not, that is a blank, is that right?

A. Yes, sir.

Q. You have also told us that you were in the habit, when you did see Mr. Campbell waiting to hurry to his car, is that right?

A. Yes.

Q. You don't know whether you hurried on this occasion or not?

A. No, sir.

Q. You don't even know whether his car was there or not?

A. No, I don't.

Following these answers, the respondent was asked by the learned trial judge whether she remembered what she had done on other occasions prior to this accident at that corner and said that her practice was to go straight across

to the northwest corner and then from that corner to the southwest corner, and, in answer to the question:—

"You never cut through the middle of the street?"

said:—

No sir, I made a practice of crossing in my own pathway, always had.

With respect, I think this evidence was inadmissible. This was, however, followed by the admission that she did not remember what she had done on the morning in question.

Desharnais was driving south on Centre Street approaching the intersection. The weather was clear and bright but there had been a hoarfrost during the night and the windshield of the respondent company's truck, which had been standing out overnight, had become coated with frost. According to Desharnais, he had scraped the frost off the windshield on the driver's side and to some extent from the right side of the windshield and he was driving with the window on the left door of the truck lowered. Despite this, he did not see Miss Johnson though, according to him, he saw another young woman cross the intersection from the east side of Centre Street. The speed of the truck is not in dispute; it was proceeding at between 20 and 25 miles an hour when it entered the intersection and struck Miss Johnson.

In spite of the fact that Campbell, Miss Halpin and the witness Callbeck who was in Campbell's car at the time the accident took place were so close to the scene, none of them saw Miss Johnson as she proceeded across the intersection, the only witness who was able to give evidence as to this being George H. Craven, who lived nearby and who was proceeding from the southwest to the northwest corner of the intersection as the truck approached from the north and Miss Johnson was crossing the street. According to Craven, the respondent was not walking towards the northwest corner of the intersection but appeared to be heading towards the car which was parked on 20th Avenue close to the southwest corner. As Craven was about half way across 20th Avenue, he said that Miss Johnson was almost directly opposite him and the truck was then about to enter the intersection, so that it is apparent that he observed her immediately before the moment of impact. Upon a plan of the intersection this witness indicated the course followed by Miss Johnson as being on a line running slightly

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west of due southwest from the centre of the curve of the curb at the northeast corner. Craven had apparently not kept his eyes fixed upon the respondent and did not see the actual impact but placed her position as being slightly to the north of the centre line of 20th Avenue and in the traffic lane. In answer to a question directed to him by the learned trial judge, he described her course across the intersection as cutting the corner. The only other evidence as to the point of impact is that to be inferred from the place where her personal belongings were found on the pavement after she had been struck, and as to this I respectfully agree with Mr. Justice Frank Ford that it supports Craven's account as to Miss Johnson's position at the time of impact.

Desharnais' excuse for not having seen the respondent crossing in full view from his left is that he was dazzled by the rays of the sun. He contends that he had removed sufficient of the hoarfrost from the windshield to enable him to see clearly objects ahead and to his left. In addition, the open window on the left door of the truck gave him added vision to his left. However, it is clear that whether his failure to see Miss Johnson was due to the glare of the sun, or to his vision through the windshield being obscured, or to his failure to look to his left, he was guilty of negligence which contributed to the occurrence of the accident. If his vision was obscured for either of these reasons, it was a negligent act to have approached the crossing at a speed of from 20 to 25 miles an hour. The only question to be determined is whether upon this evidence the respondent should not have been found to have been guilty of negligence contributing to the accident and the damages accordingly apportioned.

In determining this question, certain statutory provisions must be considered. Ss. 2 of s. 59 of *The Vehicles and Highway Traffic Act* (c. 275, R.S.A. 1942), in so far as relevant, reads:—

> The operator of a vehicle . . . shall yield the right-of-way to a pedestrian crossing the roadway upon or within any crossing at an intersection except at intersections where the movement of traffic is regulated by a police officer or traffic control signal . . . This provision shall not relieve the pedestrian from the duty of exercising due care for his safety.

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S-s. 4 of that section provides that:—

> Every pedestrian crossing a roadway at any point other than within a marked or unmarked crossing shall yield the right-of-way to vehicles and street railway cars upon the roadway, provided that this provision shall not relieve the driver of a vehicle or street railway car from the duty of exercising due care for the safety of pedestrians.

S-s. 1 of s. 94 of the same Act deals with the question of onus of proof in these terms:—

> When any loss or damage is sustained or incurred by any person by reason of a motor vehicle in motion, the onus of proof that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

There is a concrete sidewalk on either side of Centre Street and a boulevard between the roadway and the sidewalk enclosed by concrete curbing. On each of the four corners of the intersection there is a rounded curb which connects the curbing on Centre Street with that along both sides of 20th Avenue. At the northeast corner the sidewalk extends westerly to connect with the street curb at that point. The sidewalk on the east side of Centre Street appears from the photographs filed to be connected with the street curbing in the same manner as that at the northeast corner. Both avenue and street are forty-two feet in width from curb to curb. There is no marked crossing between the northeast and the northwest corners of the intersection and there was no traffic light.

In the reasons for judgment of the learned trial judge he said in part:—

> In attempting to reach Campbell's car she probably did one of two things, either she went toward the northwest corner on the pedestrian right-of-way until she was struck or she angled off that right-of-way very slightly in a southwesterly direction and was there struck. No witness produced can say, because no witness actually saw the collision . . . On the evidence produced, I find that the plaintiff did angle very slightly from the pedestrian right-of-way between the northeast and northwest corners, but I cannot find that that was a contributing cause of the accident.

While it is true that Craven did not see the actual impact, it was only an instant before it occurred that he had seen the respondent walking directly into the path of the oncoming truck. Howson C.J. does not mention the evidence of Craven. He was an independent witness who did not know any of the parties to this litigation. There is no reflection on his veracity and there is nothing to contradict

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his evidence as to the manner in which the respondent crossed the intersection and that the impact took place in the traffic lane of the westerly half of the intersection at or slightly to the north of the centre line of 20th Avenue. It is, I think, not without significance that while this action was tried at Calgary on September 6, 1950, judgment was not given until March 1, 1952 and, with great respect, I think what appears to me to be the failure of the learned trial judge to give effect to the evidence of Craven, supported as it was by the evidence as to the place on the pavement where the personal belongings of the respondent were picked up or if he disbelieved it to so state, may not be unconnected with the delay of nearly a year and a half in delivering his judgment. Unless the evidence of Craven and the other evidence is to be rejected, the respondent did not angle off the direct line from the northeast corner to the northwest corner "very slightly": rather did she walk almost directly in a south westerly direction from the northeast corner of the intersection where she was seen by both Callbeck and Craven in the direction of the car which was about to stop or had stopped close to the curb at the southwest corner.

The finding of the learned trial judge that the course followed by the respondent across the intersection was not a contributing cause of the accident must be weighed in the light of his conclusion that she deviated very slightly from the direct cross-walk from the northeast to the northwest corner of the intersection. Clinton J. Ford J.A. by whom the reasons for judgment of the majority of the Court were delivered considered that the evidence of Miss Halpin placed the point of impact at approximately the centre of the west lane of vehicular traffic on Centre Street and near the centre of 20th Avenue, which would agree with the evidence of Craven as to this. This conclusion cannot be reconciled with the opinion of the learned trial judge that she had deviated very slightly from the pedestrian right-of-way. However, after saying that if she was a few feet farther to the south than her position as estimated by the learned trial judge it could not:—

> be safely inferred or held that any different situation would be created from a practical point of view than that which the learned trial judge had in mind as the driver, not seeing her, principally because of the condition of his windshield, drove straight across the intersection without any lessening of speed.

the learned Justice of Appeal said:—

> But, weighing the evidence, including that of the plaintiff, who said that she distinctly remembered looking for north-bound traffic as she started to cross, but could not remember anything more, I cannot reach the conclusion with assurance that what she did amounted to negligence contributing to the accident.

These portions of the reasons for judgment of the majority of the Court followed a passage in which the following appears:—

> The evidence, including any fair inference therefrom must prove beyond a doubt to the satisfaction of the jury that the pedestrian did by negligence contribute to the accident, and until this has been done the onus still remains on the driver. (*Geel* v. *Winnipeg Electric Company* (1)).

In *Geel's* case the Judicial Committee on an appeal from this Court (2) considered the effect of s. 62 of the *Motor Vehicle Act* of Manitoba, which dealt with the onus of proof in an action for damages for personal injury caused by the operation of a motor vehicle and provided that the onus of proving that the damage did not arise through the negligence of the owner or driver of the motor vehicle lay upon them. The Manitoba section, as it then read, being passed before the enactment of *The Tortfeasors and Contributory Negligence Act* of that province in 1939, differed from s. 94(1) of the Alberta statute, in that the words "entirely or solely" did not appear. These words, it may be noted, now form part of s. 81(1) of *The Highway Traffic Act* of Manitoba (c. 93, R.S.M. 1940). Dealing with the effect of this section the Judicial Committee, after saying that the burden remained on the defendant until the very end of the case, expressly approved the following statement of the effect of a like section in the Saskatchewan Act made by Turgeon, J.A. in *Stanley* v. *National Fruit Company* (3):—

> Section 43 of the Act places the onus of proof upon the defendants. This means that the defendants must lose if no evidence of the circumstances of the accident is given at all, or if the evidence leaves the Court in a state of real doubt as to negligence or no negligence, or is so evenly balanced that the Court can come to no sure conclusion as to which of the parties to the accident is to blame. But if evidence for and against is given upon the points in question, the rule in favour of the preponderance of evidence should be applied as in ordinary civil cases, and the statutory onus will cease to be a factor in the case if the Court

(1) [1932] 3 W.W.R. 49. (2) [1931] S.C.R. 443.
(3) (1929) 24 S.L.R. 137 at 141.

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can come to a definite conclusion one way or the other, after hearing and weighing the whole of the testimony. Nor does this statutory onus increase the degree of diligence required in the owner or driver of a motor vehicle. His duty to others remains the same, notwithstanding the shifting of the burden of proof. He must exercise at all times the same measure of caution as might be expected, in like circumstances, of a reasonably prudent man. He must take proper precautions to guard against risks that might reasonably be anticipated to arise from time to time as he proceeds on his way. This degree of care, and nothing more, is required of him except in cases specially provided for, with which we are not concerned here.

With respect, I am unable to find anything in this decision to support the view that the onus is upon the defendant in the present case to prove beyond a doubt that the negligence of the respondent contributed to the accident.

I am of the opinion that the onus placed upon the appellants by s. 94(1) has been discharged. Frank Ford J.A. concluded from the evidence that the respondent at the time of the accident had proceeded from the northeast corner of the intersection to a point approximately in the middle of 20th Avenue and approximately in the middle of the westerly half of Centre Street. I do not take it from the reasons for judgment of the majority that they disagreed with this view and, indeed, it seems to me the only conclusion consistent with the evidence. It cannot be seriously contended that she looked to her right for oncoming traffic as she walked in a southwesterly direction across the intersection. If I correctly understand that portion of the reasons for judgment delivered by Clinton J. Ford J.A., he was of the opinion that the fact that she failed to do so and failed to concede the right-of-way to the approaching truck, as required by s-s. 4 of s. 59 of *The Vehicles and Highway Traffic Act,* was not negligence contributing to the accident. While not so stated, I must assume that by this it is meant that the accident would have happened in any event, even had the respondent crossed the intersection upon the cross-walk. This may or may not be so but that is not the point. This conclusion overlooks the fact that in deciding where the fault lay, not only are the actions of the driver of the truck to be considered but also those of the respondent. To say that the accident would have happened any way and to treat this as decisive is merely to consider the question of the liability of the truck driver. He was undoubtedly guilty of negligence contributing to

the accident. But the respondent's actions must also be considered. The statement of the law contained in the judgment of Sir Lyman Duff C.J. in *Swartz* v. *Wills* (1), is constantly quoted in street crossing accidents of this kind but, unfortunately, not consistently followed. Dealing there with s. 21 of *The Highway Act* of British Columbia which in its effect is indistinguishable from s-s. 4 of s. 59 of the Alberta Statute, he said (p. 629):—

> I can perceive no ambiguity or obscurity in this language. The driver approaching an intercommunicating highway is to keep a lookout for drivers approaching upon the right upon that highway and to make way for them. If everybody does this a collision is not only improbable, it is hardly possible. The respondent failed in this plain duty. This neglect of duty was the direct cause of the collision.

This was the duty of the respondent in the present matter as she walked diagonally across the intersection in question. The morning was clear and bright and the approaching truck was plainly visible and, failing in that duty, she walked without looking directly in the path of the truck. To say that such conduct was not a contributing cause of this accident is, in my opinion, to say that the right-of-way provisions of the statute may be ignored with impunity.

Whether she would have been struck had she proceeded across the cross-walk, in which situation she would have had the benefit of s-s. 2 of s. 59 of the statute, is a debatable matter but, in my opinion, it is aside from the point. In *Toronto Railway* v. *King* (2), Lord Atkinson, delivering the judgment of the Judicial Committee, said:—

> It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.

Had the respondent been crossing on the cross-walk and had she seen the truck approaching as it was at a moderate rate from her right, she might assume that it would slow down and permit her to cross and might not realize until too late that the driver had not seen her. Had that been the situation, the fault might well have been found to be entirely that of the truck driver, but that is not this case.

(1) [1935] S.C.R. 628. (2) [1908] A.C. 260 at 269.

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Mr. Justice Frank Ford in his reasons for judgment has said that the conclusion is inescapable that the plaintiff was guilty of contributory negligence and with this I am in complete agreement. He was of the opinion that the damages should be apportioned two-thirds as against the present appellants and one-third as against the respondent. The respondent was at the time she was struck some twenty feet to the south of the cross-walk and I am unable to find any more excuse for her conduct than I am for that of the driver Desharnais. The negligence of each of them, in my opinion, continued up to the moment of the collision and the rule stated by Viscount Birkenhead in *The Volute* (1), applies. S. 2 of *The Contributory Negligence Act* (c. 116 R.S.A. 1942) provides that, 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. S. 2(*a*) provides that 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. In this matter I find myself quite unable to distinguish any difference in the degree of fault of the driver Desharnais and that of the unfortunate respondent and I would accordingly apportion the blame equally between them and find the appellant liable for fifty per cent of the damages awarded by the learned trial judge.

While the damages awarded appear to me to be very high, I do not think a case has been made out to warrant any reduction in the amount.

The appeal should be allowed with costs here and in the Court of Appeal. The respondent should recover her costs of the action up to the conclusion of the trial under Column 5 on the old scale in effect when the action was tried.

I would dismiss the cross-appeal without costs.

Appeal dismissed with costs and cross-appeal without costs.

Solicitors for the appellants: *Fenerty, Fenerty, McGillivray & Robertson.*

Solicitors for the respondent: *Millard & Woolliams.*

(1) [1922] 1 A.C. 129 at 144.

WESTERN MINERALS LTD. AND WESTERN LEASEHOLDS LTD. (PLAINTIFFS) ..... APPELLANTS; *June 13, 16, 17 1952

AND

JOSEPH ALBERT GAUMONT AND THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (DEFENDANTS) ..... RESPONDENTS. *Mar 18 1953

AND

FARMERS UNION OF ALBERTA .....INTERVENANT,

WESTERN MINERALS LTD. AND WESTERN LEASEHOLDS LTD. (PLAINTIFFS) ..... APPELLANTS;

AND

JAMES WARREN BROWN AND THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (DEFENDANTS) ..... RESPONDENTS.

AND

BEAVER SAND & GRAVEL LTD. .....(DEFENDANT);

AND

FARMERS UNION OF ALBERTA .....INTERVENANT.

Real Property—Ownership of Sand and Gravel—Whether reservation in Certificate of Title of mines, minerals and valuable stone, includes sand and gravel—The Land Titles Act, R.S.A., 1942, c. 205, s. 62.

Constitutional Law—Validity of The Sand and Gravel Act, S. of A., 1951, c. 77—Applicability to pending action.

The appellant, Western Minerals Limited, held a certificate of title as the registered owner in fee simple under *The Land Titles Act*, R.S.A., 1942, c. 205, and amendments thereto, of all mines, minerals, petroleum, gas, coal and valuable stone in or under two certain quarter sections of land of which the respondents Gaumont and Brown were the respective owners under the Act of the surface rights. The appellant, Western Leaseholds Limited, was lessee from its co-appellant. Both appellants sued for a declaration that they were the registered and equitable owners of all minerals and/or valuable stone including the

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

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sand and gravel within, upon or under the said lands and for certain other relief. The actions were consolidated and tried together and judgment was given in favour of the appellants. Following the filing of notice of appeal by the respondents, *The Sand and Gravel Act*, S. of A., 1951, c. 77, came into force providing that as to all lands in the Province the owner of the surface of land is and shall be deemed at all times to have been the owner of and entitled to all sand and gravel on the surface of that land and obtained or otherwise recovered by surface operations. By order of the Appellate Division, Gaumont and Brown were permitted to raise the terms of the Statute as a further ground of appeal. The Appeal Court allowed the appeal and dismissed the plaintiffs' action. On appeal to this Court.

Held: 1.—That the appeal should be dismissed.

Per Kerwin, Taschereau, Rand, Kellock, Estey and Cartwright, JJ.:— The appellants failed to establish that "mines, minerals, petroleum, gas, coal and valuable stone" in their Certificate of Title should be construed as including sand and gravel.

Per Locke, J.—Apart from the provisions of *The Sand and Gravel Act*, the only question to be determined was the meaning of the language employed in the certificate of title by reason of s. 62 of *The Land Titles Act* (R.S.A. 1942, c. 205) and on the proper construction of that instrument, sand and gravel were included. The appellants should, therefore, have their costs of the trial.

2. *Per Curiam*—That *The Sand and Gravel Act* is *intra vires* of the Provincial Legislature and is declaratory of what is and has always been the law of Alberta, and so applied to the present litigation and is fatal to the appellants' claim.

APPEALS from the judgments of the Appellate Division of the Supreme Court of Alberta (1) which allowed the Defendants' appeals from the judgments of Egbert J. (2) in favour of the Plaintiffs. The two actions were brought by the Plaintiffs for a declaration that they were the registered and equitable owners of all minerals and/or valuable stone including sand and gravel, upon or under certain lands the title to the surface of which was vested in the Defendants and for certain other relief. The two actions were consolidated and tried together. The Defendant, Beaver Sand & Gravel Ltd., took no part in the action. By leave of the Court, the Farmers Union of Alberta was permitted to intervene. Following the delivery of judgment by the trial judge *The Sand and Gravel Act*, 1951, S. of A., c. 77, came into force and the Defendants who, in the meantime had filed notice of appeal, applied for and were granted leave to amend and plead the Act as a further ground of appeal. The Plaintiffs then served the Attorney General for the Province of Alberta

(1) (1951) 3 W.W.R. (N.S.) 434. (2) (1951) 1 W.W.R. (N.S.) 369.

with notice that they intended to bring into question the constitutional validity of the Act and thereafter, by order of the Appellate Division, the Attorney General was added as a party Defendant.

H. W. Riley Q.C. and *H. Patterson* for the appellants.

W. G. Morrow for the respondents.

J. J. Frawley, Q.C. for the Attorney General of Alberta.

J. A. Ross for the Farmers Union of Alberta, Intervenant.

KERWIN J.:—On the argument the Court decided that *The Sand and Gravel Act,* c. 77 of the 1951 Statutes of Alberta was *intra vires.* That Act applies to the present litigation and on this point I agree with the reasons of my brother Cartwright. However, the statute was enacted after the judgment at the trial and if at the date of that decision the appellants were entitled to judgment in their favour as the trial judge held, they should have, at least, the very considerable costs of the action, including the trial.

I have come to the conclusion that the appellants were not so entitled. At the outset it should be emphasized that the plaintiff, Western Minerals Limited, was registered as owner pursuant to *The Land Titles Act* of the Province of Alberta of an estate in fee simple of and in all mines, minerals, petroleum, gas, coal and valuable stone in or under the lands in question in the two actions and the right to enter upon or occupy such portions of the lands as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone. On the other hand, the respondent Gaumont has a certificate of title that he is the owner of an estate in fee simple in his lands "reserving thereout all mines and minerals. Subject to the exceptions, reservations and conditions contained in transfer of record as 6489 B.D." The reservation in this transfer, dated April 5, 1915, from a former owner, Western Canada Land Co. Limited, to one Bolster, reads:—"reserving to the transferor, its successors and assigns, all mines, minerals, petroleum, gas, coal and valuable stone in or under the said land and the right to enter upon and occupy such portions of the said lands as may be necessary or convenient for the purpose of working, mining, removing,

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and obtaining the benefit of the said mines, minerals, petroleum, gas, coal, and valuable stone." Similarly, the respondent Brown has a certificate of title dated November 16, 1945, as owner of an estate in fee simple in his lands "reserving thereout all mines and minerals and the right to work the same as set forth in transfer of record as 5755 F.V." This transfer from a prior owner to Brown is dated August 1, 1945, and the reservation is the same as that in the transfer of Gaumont's lands from Western Canada Land Co. Limited to Bolster.

While there is no evidence as to when the certificate of title was granted by which the appellant, Western Minerals Limited, is declared to be the owner of the mines, minerals, etc. its date is of no importance. The question for determination is whether under the terms of the three certificates of title the sand and gravel in the lands are owned by the respondents Brown and Gaumont respectively or by Western Minerals Limited. In *Attorney General for the Isle of Man* v. *Moore* (1), Lord Wright, speaking for the Judicial Committee, at page 267, states (referring to a statute): "The principles to be applied in determining such a question have now been established by decisions of the House of Lords dealing with words of reservation in the Railway Clauses Act and similar Acts." In the earlier case of *Attorney General for the Isle of Man* v. *Mylchreest* (2), the Judicial Committee had arrived at the same conclusion as the House of Lords, and it might be noted that in *Re McAllister* v. *Toronto Suburban R.W. Co.* (3), the Ontario Court of Appeal considered these decisions applicable in an expropriation under s. 133 of the then Ontario Railway Act. All of these decisions were as to the meaning of certain statutes and the effect of the decision of the Privy Council in the *Moore* case is that the same principles are to be applied to the construction of statutory provisions of an entirely different type. I see no reason that they should not also be applied to the construction of certificates of title under *The Land Titles Act* (R.S.A. 1942, c. 205). S. 62 of that Act provides that "every certificate of title . . . shall . . . be conclusive evidence . . . that the person named therein is entitled to the land included in the same

(1) [1938] 3 All E.R. 263. (2) (1879) 4 App. Cas. 294.
(3) (1917) 40 O.L.R. 252.

for the estate or interest therein specified." The point is whether the estate or interest of the parties includes the sand and gravel.

It was not contended that they fell within the term "mines" but it was urged that they were "minerals". The enumeration of "petroleum, gas, coal and valuable stone" affords a context to show that the word is not used in its widest sense: *Attorney General for the Isle of Man* v. *Mylchreest* (*supra*); *Barnard-Argue-Roth-Stearns Oil and Gas Co. Ltd.* v. *Farquharson* (1). Furthermore, I am quite sure that Gaumont and Brown, as holders of certificates of title, or any other purchasers of lands in Alberta would never imagine that sand and gravel were excluded from their estate or interest under "minerals": *Lord Provost* v. *Farie* (2). My brother Kellock has detailed the evidence adduced on behalf of the appellants and I therefore do not repeat it. It is quite apparent that that evidence falls far short of showing that in the mining and commercial world, and by land owners, sand and gravel were considered to be minerals. There can be really no question that, as held by the trial judge, sand and gravel do not come within the term "stone".

The appeals should be dismissed with costs payable by the appellants to the respondents Gaumont and Brown. There should be no order as to the costs of the Attorney General of Alberta or of the intervenant.

RAND J.:—Two questions are raised in this appeal: whether a reservation of "all mines, minerals, petroleum, gas, coal and valuable stone" contained in two conveyances of land in Alberta, includes sand and gravel, both of which will be embraced within the treatment of the latter; and whether a statute passed after judgment at trial, effects retroactively the exclusion of gravel from the scope of the reservation.

Evidence was adduced to show the place of gravel in the scientific and engineering classifications of minerals, which was undoubtedly pertinent to the issue; but as the question arises out of the sale and purchase of land, the understanding of persons who deal in land or its constituents is of primary importance; and in the circumstances here there are factors of special significance to that understanding.

(1) [1912] A.C. 864. (2) (1888) 13 App. Cas. 657.

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In Crown grants of lands in the colonies the reservation of mines and minerals was exceptional, but in western Canada from the early stages of its organization that was not the case. The uninhabited territory of what was later called the Northwest Territories, then little better than a wilderness, was transferred to the Dominion by an Imperial Order-in-Council in 1870. In the course of the subsequent administration, including a comprehensive immigration program, the Dominion Government in 1889 by an order authorized by the Dominion Lands Act, provided for the reservation of mines and minerals in grants made under that Act. There is not readily accessible the extent of land patented between that date and 1905; but the reports of the Commissions on Western Lands and Subsidies submitted to Parliament in 1935 show that between 1905, when Alberta and Saskatchewan were formed, and 1930, when the remaining public lands were transferred to them, approximately fifty million acres had been disposed of, the individual applications for which approached three hundred thousand in number. This was in addition to at least nine million acres granted after 1905 on commitments made before that time. From this uniform practice, the reservation became notorious throughout the West, and a matter of common knowledge in land dealings. Large areas had, it is true, been conveyed to the Hudson's Bay Company and to railway companies without reservation, but these were widely known as exceptions to the generality of titles.

Since 1931 the same policy has been continued by statutory provisions in all three provinces, Manitoba, Revised Statutes (1940) c. 48; Saskatchewan, Revised Statutes (1940) c. 37; and Alberta, statutes of 1949, c. 81; in all of them the expression "mines and minerals" is found.

From the commencement, also, of the Dominion administration, a form of the so-called Torrens system of land titles has been in force. By its effect the ownership of land is conclusively evidenced by an official Certificate of Title, and this system has, likewise, been continued by the provinces since their formation.

In this background of uniformity of public administration and of phraseology in relation to mines and minerals, and the formal establishment of title by certificate, it would,

I think, be difficult to attribute to that collocation of words any other than the same meaning throughout that western territory, certainly, on the record here, throughout Alberta; and, apart from questions, as between the immediate parties to a transfer, of rectifying the certificate, it would be a rare case in which an enquiry into the actual or presumed intentions of parties to a grant or transfer, where the same expression is alone in question, would be justified. What is to be sought, then, is the general sense of those words in the vernacular of engineers, business men and land owners, the latter of whom constitute a substantial fraction of the population in the prairie section. The recent decision of the Judicial Committee in *Borys* v. *Canadian Pacific Railway Company* (1), dealing with the word "petroleum", adopted that use as the determinant of its scope.

The vernacular is, in turn, a fact itself to be ascertained. There are varying degrees of appreciation of the meaning of words, and, apart from the opinions of individuals, positive data evidencing the common acceptation are not always at hand; but one of reliability is that of neutral conduct which indicates the assumption of such an acceptation.

It is, therefore, of some significance, that although gravel in general building and railway construction has long been used as material, and during the past thirty years, most extensively in road building, no case has been cited in which the question here has been directly raised before a Canadian court. That seems to be particularly noteworthy in relation to railways. By The Railway Act, 1903, as well as its revision of today, the sections which authorize expropriation of land do not entitle the company to the mines or minerals unless expressly purchased. On the other hand, the statute provides, as in s. 202 of the present Act, that "any stone, gravel, earth, sand, water or other material" required for the construction, maintenance or operation of the railway may, for any such purpose, be taken. The inclusion of the word "gravel" in this context points, at least in the understanding of Parliament, to a genus of materials forming part of land which embraces gravel but excludes minerals. In the first twenty years of

(1) [1953] 7 W.W.R. (N.S.) 546.

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this century, a vast network of railways was built in the West for which immense quantities of gravel were required for ballasting, a great deal of which must have been obtained from lands in which the minerals were reserved to the Crown; but nothing has been disclosed to suggest a claim for compensation ever asserted by the Dominion.

Geologically, the soil was formed by the disintegration of hard surface minerals plus the later ingestion of vegetable matter. Gravel is produced in the course of that disintegration by the attrition of rock fragments and contains all sizes from a grain of sand to stones of several inches in diameter. The difference, then, between the ordinary soil and gravel is a matter largely of gradation in physical refinement of a common substance, and that fact may explain the absence of previous controversy through the natural tendency to treat the latter as ordinary roughage of the soil rather than discrete mineral substance.

Viewing the evidential matters and opinions placed before the Court in the light of these considerations, I take the vernacular sense of the words "mines and minerals" not to extend to gravel.

But the reservation before us, by the additional words "valuable stone", itself evidences that exclusion. Stone, lacking any real use qua land, has, from the earliest times, been used for building all manner of structures, and so far has acquired a higher degree of distinctiveness from the soil than gravel: it was and is that utility that gives it special character and value. It is not seriously contended that "valuable stone" includes gravel, but its presence in the reservation implies that other stone is excluded, which, *a fortiori*, excludes material produced by a fragmentation of stone that basically changes its useful character.

Then is the legislation to be interpreted as a prospective alteration of the previous law or a retroactive declaration of what the law was prior to the judgment at trial? Here is a case in which the boundary between property rights, depending upon the scope to be given general words in common parlance, is somewhat vague and uncertain, and in which the determination by the legislature can safely be taken to express the general understanding of the language being interpreted. That in such a situation and by way of precaution the legislature should resort to a

declaration of pre-existing law arises from an apprehension of widespread disruption of what are thought to be settled interests. For that purpose the legislature has access to sources of relevative considerations not effectively available to a court of justice. The word "shall" in the context implies a conclusive effect to the words "be deemed" and, that, considering the recitals in the preamble, the expression was intended to operate upon the subject matter of these proceedings, I entertain no doubt. The Appeal Division was consequently concluded by it.

I would, therefore, dismiss the appeal with costs.

KELLOCK, J.:—These appeals raise the same question, namely, the proper construction of a reservation in certain certificates of title to lands in the province of Alberta of the following reservation: "all mines, minerals, petroleum, gas, coal and valuable stone in or under the said land and the right to enter upon and occupy such portion of the said land as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone."

In the case of the respondent Gaumont the certificate is dated July 11, 1928, while that of the respondent Brown is dated August 1, 1945. These certificates are to be read in conjunction with s. 62 of *The Land Titles Act,* R.S.A. 1942, c. 205.

The appellants are entitled to the benefit of these reservations and claim title thereunder to the sand and gravel in, upon or under the lands. They contend that sand and gravel are "minerals" within the meaning of that term as used in the reservations. This contention was given effect to by the learned trial judge, but was rejected by the Appellate Division which also held that the respondents were, in any event, protected by *The Sand and Gravel Act* of Alberta, 15 Geo. VI, c. 77, passed on April 7, 1951, after delivery of the judgment at trial.

The word "minerals", standing alone, and considered in contradistinction to animal or vegetable substances, would no doubt include such materials as sand and gravel. In

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Darvill v. *Roper*, (1), Kindersley V. C. said at p. 299, in reference to a similar contention, that

> Every portion of the soil, not merely the limestone rock, but the gravel, the pebbles, all, even to the very substance of the loam or mould which forms the soil, would be included.

In *Attorney-General for the Isle of Man* v. *Mylchreest*, (2), Sir Montague Smith pointed out, in the Judicial Committee, considerations which enter into the question as to the sense in which the word may, in any particular case, have been used, as follows:—

> It was contended for the Crown that the word "minerals" used in the clause comprehended clay and sand. Doubtless, the word in its scientific and widest sense may include substances of this nature, and, when unexplained by the context or by the nature and circumstances of the transaction, or by usage (where evidence of usage is admissible), would, in most cases, do so. But the word has also a more limited and popular meaning, which would not embrace such substances, and it may be shewn by any of the above-mentioned modes of explanation that in the particular instrument to be construed, it was employed in this narrower sense.

It seems plain from the context in the case at bar that the word is not used in its widest sense. At page 308 of *Mylchreest's* case, Sir Montague Smith said with respect to the language there in question,

> If the word "minerals" were intended to be used in its widest signification, it was obviously unnecessary to make specific mention of flagg, slate and stone.

Similarly, in the case at bar there is an enumeration of substances which would be quite unnecessary if "minerals" were employed in the broad sense.

In *Barnard-Argue-Roth-Stearns Oil and Gas Co., Ltd.* v. *Farquharson*, (3), the Judicial Committee had to consider a conveyance which reserved to the grantor "all mines and quarries of metals and minerals and all springs of oil . . ." Lord Atkinson, delivering the opinion of the Board, expressed the same idea at p. 869 as follows:

> It is obvious, however, for several reasons, that in this clause of the grant the word "minerals" is not used in this wide and general sense. First, because two substances are expressly mentioned in the clause which would be certainly covered by the word "minerals" used in its widest sense, namely, "metals" and "springs of oil in or under the said land . . ."

(1) [1855] 3 Dr. 294. (2) [1879] 4 App. Cas. 294.
(3) [1912] A.C. 864.

Lord Gorell in *Budhill's* case, (1), put the matter as follows at p. 134:—

> The enumeration of certain specified matters tends to show that its object was to except exceptional matters.

If the broad meaning is not to be given to the word in the reservation here in question, the onus would appear to be on those who assert, in doubtful cases at least, that the word is inclusive of the substance in controversy: *Savill* v. *Bethell*, (2). It may very well be that such a substance as "lead" would obviously fall within the scope of such a reservation, but where, as here, "coal and valuable stone" are specifically mentioned, it is incumbent, in my opinion, upon those who assert that such ordinary materials as sand and gravel were intended to be included, to establish this.

In *Attorney-General for Isle of Man* v. *Moore*, (3), Lord Wright, delivering the opinion of the Privy Council, reaffirmed the principles to be applied as follows:—

> The principles to be applied in determining such a question have now been established by decisions of the House of Lords . . . that this type of question is an issue of fact to be decided according to the particular circumstances of the case, the duty of the court being to determine what the words meant in the vernacular of mining men, commercial men and land owners at the relevant time. Such an issue is necessarily an issue of fact because it must depend on evidence of the actual user of the words—that is, the way in which they were in practice used by the classes of persons enumerated.

The learned trial judge was of opinion that the sand and gravel question in the case at bar were "not separable either commercially or geologically" and dealt with them as forming one deposit. He referred to them throughout his judgment as gravel only. In his view, the deposit did not come within the word "mines" as used in the conveyances, as he was of opinion that it had been authoritatively determined by the decisions that a "mine" was limited to underground workings and that there was nothing in the evidence before him to indicate that the word should have any other meaning in the present instance. It is not necessary to consider this particular aspect of the matter as the appellants do not rely on the word "mines" but on

(1) [1910] A.C. 116. (2) [1902] 2 Ch. 523 at 537.
(3) [1938] 3 All E.R. 263.

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the word "minerals". The learned judge was also of opinion on the evidence that the words "valuable stone" in the conveyances in the case at bar were limited to cut stone and that they did not include "gravel".

With respect to the meaning of the word "minerals" in the present certificates, the learned judge concluded that the appellants had established on the evidence that it included gravel, although he expressed "a strong suspicion" that that was not the intention of the parties to the transactions but that if sand and gravel had been mentioned at the date of the original conveyances, they would have been excluded from the reservations. It is necessary to examine the evidence.

The appellants rely in the first place upon the testimony of a member of the engineering faculty of a university who, in addition to his academic duties, carries on a consulting practice in connection with the construction industry. This witness testified as follows:—

Q. In the phraseology or popular language of a mining man, is a commercial deposit of gravel surface or soil or minerals or what?

A. Well, in my opinion, it is a mineral. The reason for that is that in the general definition a mineral is anything that is not plant or animal.

Q. Yes?

A. The use of the "commercial" though, restricts it so that your mineral material as contained in a conveyance has to have some commercial value. Well, a gravel deposit that is being worked for profit obviously has commercial value, and by fundamental definition it is a mineral, and therefore it is a mineral substance.

This evidence is, of course, completely worthless in that it is pure argument and does not answer at all the relevant question as to the meaning of the word "minerals" in the vernacular of mining men. The witness made a similar attempt to include gravel within the meaning of "valuable stone." He said:—

Well, on the question of the definition of valuable stone as it is most commonly used or as it has most commonly been used, it probably has meant stone that was quarried; in other words, building blocks that were taken out or blocks of stone that were taken out and then faced off and so on and turned into building stone. On the other hand, you don't have to extend the definition any appreciable amount to include gravel as a valuable stone. It definitely is valuable and it is stone.

The appellants also rely on the evidence of a chemical engineer who is an officer of the appellant Western Minerals Limited. When asked the following question in chief:

Q. Now, sir, you and your companies are in the mining game in its various branches. In the phraseology, or, if you like, the popular language of the mining world, what is gravel? Mineral or surface?

he answered,

A. I would say it was a mineral.

It is not too clear what was intended by the question itself. The contrast is between "mineral" on the one hand and "surface" on the other, and in the case of a transfer of surface rights exclusively it may be that, in certain circumstances, gravel would not pass to the grantee. But such a question is not the relevant question. It is whether or not, when used in its ordinary sense by mining men, the word "minerals" would be understood as inclusive of gravel. That question was neither put nor answered. The following additional testimony of the same witness does not clarify matters:—

Q. If that sand could be sold today, would it be considered as a mineral?

A. If it was handled commercially at commercial rates I would say so.

Q. Is that your standard?

A. I believe that is what makes it commercial.

. . .

Q. Well, in a chemical sense there is no doubt that sand would be a mineral, is there? I am speaking in the commercial sense. If you could sell that sand today would it be a mineral?

A. Yes, it has value.

Q. And if you can't sell it then today, it isn't a mineral in the commercial sense? Correct?

A. Yes, I will answer that yes.

I do not think, therefore, that there is any evidence in the record at all on this aspect of the matter.

With respect to the understanding of land owners, the appellants called an employee of the Hudson's Bay Company who had been employed by that company since 1931. He described himself as a "land department representative" or "inspector". What the duties of this witness are, does not appear. He testified that the Hudson's Bay Company had originally owned two and a quarter million acres of land in the province of Alberta, of which there remained unsold approximately sixty thousand acres.

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Whether or not the witness had anything to do with the land sold or any part of it, or what sales were made since 1931, he did not say. The following evidence of the witness is relied on by the appellants:—

Q. Now, the Hudson's Bay Company granted a number of commercial gravel permits on lands from which they have parted with the surface?

A. Yes, sir.

. . .

Q. In these various gravel permit transactions which you have spoken about with the Hudson's Bay Company, are they all cases in which the Hudson's Bay Company owned minerals and valuable stone?

A. Yes, sir.

Q. All right, sir. In the understanding of land representatives is gravel a mineral or part of the surface?

A. I would say mineral.

The same infirmity appears in this evidence as in that of the previous witness to which I have just referred, the attention of the witness being directed to the contrast between "mineral" and "surface" and not to the real question. Moreover, his evidence is presumably based upon the dispositions of lands made by the Hudson's Bay Company, but his knowledge of such transactions or of the language of the conveyances does not appear. In my opinion, his evidence does not touch the question as to the meaning of "minerals" as ordinarily used by owners of land.

It was for the appellants to establish that the word "minerals" is here used in the sense of including either sand or gravel. I think they have failed to do so.

It is not without relevance to observe that the lands in question were sold on the one hand and bought on the other for agricultural purposes. So far as any vendor or purchaser knew at the time of the grants, it might have developed that the whole or the greater part of the lands were underlaid with gravel, to get at which would have destroyed the lands for the purposes for which they were purchased, in which event the grant would have been swallowed up by the reservation. In my view, as pointed out by Lord Gorell in *Budhill's* case, *supra,* the enumeration of the specific substances indicates that the intention was to reserve exceptional substances only. Sand and gravel deposits are no doubt less frequent in the Edmonton area than apparently they are in the neighbourhood of Calgary, but the specific exception of "valuable stone", in

my opinion, indicates that the parties intended that apart from building stone, other stone or allied substances such as sand or gravel were not reserved.

I would therefore dismiss the appeals with costs.

ESTEY, J.:—I agree that the appeal should be dismissed on the basis both, as the learned judges in the Appellate Division held, that the word "minerals," as used in the reservations, did not include sand and gravel and that, upon the principle underlying *Boulevard Heights* v. *Veilleux* (1), the provisions of *The Sand and Gravel Act* are applicable to this litigation.

LOCKE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta setting aside the judgment delivered at the trial by Egbert J. in favour of the present appellants in these consolidated actions.

The issues concern the ownership of deposits of sand and gravel in the northeast quarter of Section 21 in Township 55 and Range 22 west of the 4th Meridian in the Province of Alberta and the southwest quarter of Section 21 in Township 57 and Range 21 west of the said Meridian, of which lands the respondents Gaumont and Brown are respectively the registered owners of what have been referred to in these proceedings, for the purpose of convenience, as the surface rights.

As against the respondent Gaumont the appellants claimed, in addition to a declaration of right, an injunction restraining him from removing either sand or gravel from the land and damages for trespass in respect of quantities of these materials theretofore taken from the land by this respondent. The respondent Brown had entered into an agreement with the respondent Beaver Sand and Gravel Limited, under which that company had removed and was continuing to remove gravel and sand from the property, and, as against them, the appellants claimed, in addition to a declaration of right, an injunction to restrain the removal of further material, an accounting and damages.

(1) (1916) 52 Can. S.C.R. 185.

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At the outset of the trial a written admission made by the solicitor for the respondents Gaumont and Brown was read into the record, this being that the plaintiff Western Minerals Limited was:—

> registered as owner pursuant to *The Land Titles Act* of the Province of Alberta of an estate in fee simple of and in all mines, minerals, petroleum, gas, coal and valuable stone in or under
>
> the said lands
>
> and the right to enter upon or occupy such portions of the lands as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone.

Various transfers and agreements of sale evidencing dealing with these lands by the parties and others and the predecessors in title of the appellant Western Minerals Limited and the respondents Gaumont and Brown were filed and, in the reasons for judgment of the learned Chief Justice of Alberta delivering the unanimous opinion of the Appellate Division, various of these instruments have been referred to as an aid to the interpretation of the expressions "mines and minerals" in these several documents. From these it appears that in the year 1915 the Western Canada Land Company Limited transferred the northeast quarter of Section 21 of the surface rights of which the respondent Gaumont is now the registered owner to one Bolster, with a reservation of the mines and minerals and other named mineral substances and the right to enter and work the same, and thereafter a certificate of title for the said lands issued to Gaumont excepting the mines and mineral substances reserved in the transfer to Bolster. The respondent Brown had agreed to purchase the said southwest quarter of Section 21 from one of the predecessors in title of the appellant Western Minerals Limited by an agreement made in the year 1940, by which the vendor reserved the mines and mineral rights in similar, though not identical, terms to those expressed in the transfer to Bolster and it was shown that, as far back as 1919, the respondent Brown's father had agreed to purchase the land from the then registered owner in an agreement containing a like reservation and had thereafter entered into an agreement in similar terms for the purchase of the land in 1928. In the case of the respondent Brown, a certificate of title

under the provisions of *The Land Titles Act* had been issued in the year 1945, with an exception as to mines and minerals and the right to work the same in similar terms.

In addition to these documents, evidence was given which made it quite clear that both Gaumont and Brown purchased these lands for agricultural purposes and that they have lived there and farmed the lands for a long period of years prior to the commencement of these actions and to show that the gravel, and such sand as is intermingled with it, cannot be removed without destroying the surface and rendering that portion of the land thereafter worthless for farming purposes.

With respect for contrary opinions, I think none of this evidence was relevant to the issue raised by the pleadings and decided by Mr. Justice Egbert. That question was as to the interpretation to be placed upon the language of the certificate of title of the appellant Western Minerals Limited which is above referred to. It is so restricted, in my opinion, by the provisions of s. 62 of *The Land Titles Act* (c. 205, R.S.A. 1942) which, so far as relevant, reads as follows:

> Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded) so long as the same remains in force and uncancelled under this Act be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in section 61, except so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land.

The reservations mentioned in s. 61, other than those which are irrelevant to the present considerations, are merely any subsisting reservations or exceptions contained in the original grant of the land from the Crown. These lands formed part of the lands originally granted by the Government of Canada to the Canadian Pacific Railway Company and there is no evidence that the grant contained any exceptions and there were none such in the conveyance of the said lands to the Western Canada Land Company Limited, one of the predecessors in title of the appellant Western Minerals Limited. There is no evidence that

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there was any prior certificate of title relating to the interest of the appellant Western Minerals Limited declared by the certificate of title in question in existence. The title of the said appellant to the mines, minerals and other mineral substances described in it is not in any way impeached.

S. 62 of *The Land Titles Act,* with a change which does not affect the matter to be considered, re-enacted s. 57 of *The Land Titles Act* (57-58 Vict. c. 28) enacted by the Parliament of Canada, dealing with titles to land in the Northwest Territories and the manner of its disposition. The system of landholding adopted by the Federal Act and by the Province of Alberta in 1905 was that which has come to be known as the Torrens system, the object of which was to provide a system of landholding where the root of the title was a certificate granted under governmental authority, which would declare an absolute and indefeasible title to realty or to some interest therein and to simplify its transfer. The first of the Acts providing for such a system was enacted by the South Australian Legislature, at the instance of Sir Robert Torrens, in 1858, and it was thereafter adopted in all of the States of the Commonwealth of Australia, the declared purpose of such statutes being as above stated (Hogg's Australian Torrens System, p. 1). It would, in my opinion, be directly contrary to the true intent and meaning of *The Land Titles Act* to allow the estate declared by the certificate of title to be cut down or limited in any manner by evidence as to the intention of the parties to earlier dealings with the land in question to be inferred from the language of agreements made between them or conveyances made pursuant to such agreements such as have been admitted in the present case. The extent of the rights of the appellant Western Minerals Limited is declared by the certificate of title and the first matter to be determined is the meaning of the language employed in that document as of the date from which the judgment at the trial was delivered.

The certificate of title declares Western Minerals Limited to be the owner of all mines, minerals, petroleum, gas, coal and valuable stone in or under the said lands. Grammatically, this means all mines, all minerals, all petroleum, all gas, all coal and all valuable stone, as is pointed out by Lord Russell of Killowen in delivering the judgment of the

Judicial Committee in *Knight Sugar Co.* v. *Alberta Ry. & Irrigation Co.* (1). In *Attorney General of Ontario* v. *Mercer* (2), in considering the interpretation to be placed upon the 109th section of the *British North America Act*, the Earl of Selborne, L.C. in dealing with the contention that the natural meaning to be assigned to the word "royalties" should be restricted, said (p. 778):—

> It is a sound maxim of law, that every word ought, primâ facie, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context.

It is this principle that should be applied in construing the language of this certificate of title.

The material, the ownership of which is in dispute, consists of deposits which lay a short distance beneath the surface upon the lands in question. On Gaumont's land it was some 35 acres in extent and on Brown's some 8 acres. The expert witnesses called who dealt with the point agreed that these were glacial deposits and it is common ground that such material did not constitute the subsoil of the remaining portions of either quarter section or any material part of it. Mr. R. M. Hardy, the Dean of the Faculty of Engineering of the University of Alberta, speaking generally of the substance which is designated as gravel, said that it is largely composed of various types of rock and in this area of limestone rocks and contains felspar, silica and in some cases mica. The gravel on the Gaumont pit was estimated by the witness John E. Prothroe, a graduate engineer, to run about 40 per cent gravel and 60 per cent fines (without defining the latter term). The deposits on Brown's land were estimated at about 60 per cent gravel and 40 per cent fines. Sand was mingled with the gravel to some extent in both deposits. A sample taken from the pit on Gaumont's land and which is said to be representative shows the material to contain quantities of small stones, the largest of which is not more than an inch in diameter, quantities of much smaller stones and particles of stone as well as sand. A witness, D. S. Harvie, a chemical engineer who had examined the material in both pits, said that the quality was better than in other pits in the area and that in the Brown pit the stones or pebbles were very uniform in size which was uncommon

(1) [1938] 1 W.W.R. 234 at 237. (2) (1883) 8 App. Cas. 767.

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and made it what he described as a "premium" gravel. During the course of the examination-in-chief of Dean Hardy at a time when the learned trial judge was directing questions to the witness, counsel for the present appellants said that he did not think that the defendants challenged the "scientific fact that the gravel itself was a mineral" and counsel for the respondents then said: "From the straight geological standpoint we are not opposing that proposition" and later that the defendants did not suggest that it was not a mineral.

The date upon which the certificate of title in question was issued was not proven. The appellant Western Minerals Limited was, however, incorporated on April 18, 1944, and it is, in my opinion, a proper inference from the documents filed that the certificate was issued later in that year. I am unable to find in the record, whether in the evidence tendered on behalf of the present appellants or the present respondents, anything to support a contention that the word "minerals" or the expression "all minerals" conveyed at that time or thereafter any meaning other than their ordinary or natural meaning. The material in question is admittedly a mineral substance and was contained in deposits situate beneath the surface of the land differing entirely in their nature from the surrounding lands. The enumeration of petroleum, gas, coal and valuable stone following the word "minerals" in the certificate cannot restrict, in my opinion, the meaning to be assigned to the word. If the language was that of an agreement or conveyance, inferences as to the intention of the parties might restrict the meaning of the term. I think also if the word was contained in an Act of the Legislature the meaning of the term might be affected by circumstances from which it might be inferred that the intention of the Legislature was to give it other than its natural meaning. No such consideration, however, can affect the construction of the language of a certificate of title issued pursuant to the provisions of *The Land Titles Act*. Applying the principle stated in *Attorney General of Ontario* v. *Mercer*, which is not of course limited in its application to statutes, I can find nothing in the context in which the word is used, or in the nature of the subject matter, which requires the word to be construed in other than its primary and natural sense.

This, in my opinion, was the state of the law as of the date of the commencement of this action and as of the date of the judgment at the trial. The situation, however, appears to me to be materially altered by the enactment of *The Sand and Gravel Act* by the Legislature of Alberta following the judgment at the trial and before the appeal of the present respondents came on for hearing before the Appellate Division.

While the validity of this legislation was questioned, in consequence of which the Attorney General of the Province intervened in the litigation, this Court decided during the course of the hearing that the statute lay within the powers of the Provincial Legislature under head 13 of section 92 of the British North America Act. The preamble to the statute refers to the judgment given following the trial of the present action, and by section three it is declared that the owner of the surface of land is and shall be deemed to be and at all times to have been the owner of and entitled to all sand and gravel obtained by stripping off the overburden, excavating from the surface or otherwise recovered by surface operations. I am unable to construe this language, when read with the context, in any other way than as a declaration that this has always been the law. Accordingly, the word "minerals" in the certificate of title should have been construed as excluding the material in question and effect must be given to this direction of the Legislature.

In my opinion, this appeal should be dismissed with costs. As I think the present appellants were entitled to succeed at the trial and have lost the benefit of that judgment only by reason of the enactment of *The Sand and Gravel Act* I would allow them the costs of the trial. I think there should be no costs in the Court of Appeal.

CARTWRIGHT, J. (concurred in by Taschereau, J.):—The issue in these appeals is as to the ownership of certain sand and gravel situate in or under the lands of the respondents Gaumont and Brown. These respondents are the owners of what was, as a matter of convenience, referred to on the arguments as "the surface" of the lands in question. They appear to be the owners in fee simple of such lands subject to a reservation in favour of the appellant Western Minerals Limited and those claiming under it. It is

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admitted that, as a result of such reservation having been made, the said appellant is "the owner of an estate in fee simple in all mines, minerals, petroleum, gas, coal and valuable stone in or under such lands, together with the right to enter upon or occupy such portions of the said lands as may be necessary or convenient for the purpose of working, mining, removing and obtaining the benefit of the said mines, minerals, petroleum, gas, coal and valuable stone."

In or about the year 1942 the respondent Gaumont opened a gravel pit on his lands and has been disposing of gravel therefrom since that time. In 1948 the respondent Brown made an agreement with the respondent Beaver Sand and Gravel Limited pursuant to which that company had been taking gravel from his land. There are concurrent findings of fact, and I did not understand it to be questioned before us, that the gravel in both pits is covered by a black top soil about one inch in depth followed by from five to seven inches of light brown soil which is in turn followed by sand and gravel to a depth not exceeding eight feet and that it is not possible to remove sand or gravel from the pits without destroying the surface. It seems clear that any gravel or sand which has been taken or is proposed to be taken from the lands in question has been or will be recovered by surface operations.

The action against Gaumont was commenced in August 1949 and that against Brown in July 1950. In each action the plaintiffs claimed a declaration that they are "the registered and equitable owners of all minerals and/or valuable stone including the sand and gravel within, upon or under the said lands", an injunction, an accounting, and damages for trespass. The actions were consolidated for the purposes of trial and were tried before Egbert J. on October 11 and 12, 1950. That learned judge gave judgment on February 9, 1951 in favour of the plaintiffs. Judgment was entered on February 28, 1951. A notice of appeal was given on behalf of the defendants in each action on March 8, 1951. On April 7, 1951, *The Sand and Gravel Act* being Chapter 77 of the Statutes of Alberta, 1951, was assented to and came into force. By order of the Appellate Division of the Supreme Court of Alberta

the defendants were permitted to amend the notices of appeal by including the terms of the last-mentioned Statute as a further ground of appeal. On August 16, 1951, notice was given on behalf of the plaintiffs that they intended to question the constitutional validity of *The Sand and Gravel Act*. On September 24, 1951 by order of the Appellate Division the Attorney-General of the Province of Alberta was added as a party defendant.

The appeals were heard on September 24 and 25, 1951. Judgment was delivered on October 19, 1951, allowing the appeals, dismissing the actions, declaring the defendants to be the owners of the sand and gravel in or under the lands in question, declaring *The Sand and Gravel Act intra vires* of the Legislature of Alberta, and declaring that such Act "is and was retroactive and applicable to the issues between the present parties". On November 26, 1951, the Appellate Division granted special leave to appeal to this Court.

The unanimous judgment of the Apellate Division was delivered by the learned Chief Justice of Alberta, who first examined the matter without regard to *The Sand and Gravel Act* and reached the conclusion that on the evidence and the authorities, apart altogether from the provisions of the last-mentioned Statute, the judgment at trial should be reversed. The learned Chief Justice then considered the Statute and held that it was decisive in favour of the defendants.

I am in respectful agreement with the Appellate Division as to the effect of the Statute. In my opinion, *The Sand and Gravel Act* is declaratory of the law. A consideration of all its provisions indicates an intention not to alter the law but to declare what, in the view of the Legislature, it is and always has been. In Blackstone's Commentaries, Volume 1, on page 86, that learned author says:—

> Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory, where the old custom of the Kingdom is almost fallen into disuse, or become disputable; in which case the Parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever has been.

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In Craies on Statute Law, 4th Edition at pages 60 and 61 it is said:—

> For modern purposes a declaratory act may be defined as an act passed to remove doubts existing as to the common law, or the meaning or effect of any statute. Such acts are usually held to be retrospective. The usual reason for passing a declaratory act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes.

It is true that the word "declared" is not found in the statute, but there are many other *indicia* of the intention of the Legislature. In the preamble there is a recital of the judgment of the learned trial judge, of the doubts and uncertainties as to the ownership of sand and gravel in the Province resulting therefrom and of the desirability of resolving these doubts and uncertainties. Then it is enacted (by ss. 2 and 3) in regard to all lands in the Province that "the owner of the surface of land is and shall be deemed at all times to have been the owner of and entitled to all sand and gravel on the surface of that land and all sand and gravel obtained by stripping off the overburden, excavating from the surface, or otherwise recovered by surface operations".

S. 4(1) of the Act may not be strictly necessary. It is the corollary of s. 3 and reads:—

> The sand and gravel referred to in section 3 shall not be deemed to be a mine, mineral or valuable stone but shall be deemed to be and to have been a part of the surface of land and to belong to the owner thereof.

The words in s. 3:—"is and shall be deemed at all times to have been" and those in s. 4(1):—"shall be deemed to be and to have been" appear to me, in the words of Blackstone quoted above, to declare what the law "is and ever has been".

With all respect to Mr. Riley's argument on this point, I think it clear that the word "deemed" as used in this Statute means "conclusively presumed". To construe it as meaning "deemed, *prima facie*, until the contrary is shewn" would be to revive those doubts and uncertainties which it was the expressed intention of the Legislature to remove.

There is, of course, no doubt of the general rule that unless the intention of the Legislature collected from the words of the Statute is clear and unequivocal we are to presume that an act is prospective and not retrospective. As it is put in the well-known maxim:—*"Omnis nova constitutio futuris formam imponere debet non praeteritis"*. But it has often been held that where an act is in its nature declaratory the presumption against construing it retrospectively is inapplicable. (*vide* Craies on Statute Law op. cit. p. 341 and cases there cited).

Having concluded that the Act is declaratory of what is and has always been the law of Alberta in this regard, I do not find it necessary to decide whether, under the applicable Statutes and rules of Alberta, an appeal to the Appellate Division is—to use the words of Duff J., as he then was, in *Boulevard Heights* v. *Veilleux* (1)—"an appeal strictly so-called, not an appeal by way of re-hearing"; for even assuming it to be so, I think it clear that the Appellate Division would be bound to give effect to a Statute, passed after the judgment from which the appeal is taken but before the hearing or decision of the appeal, declaring what the law is and always has been and so, of necessity, declaring what it was at the time of the trial. This proposition appears to me to be so obvious as not to require authority to support it but if authority is needed it is, I think, to be found in the following passages in the judgments in *Boulevard Heights* v. *Veilleux* (*supra*):—

per Duff J. (as he then was) at pages 191 and 192:—

> There can be no doubt, I think, that if these amendments had been enacted before the hearing of the appeal by the Appellate Division of Alberta, that court would have been governed by them in the disposition of the appeal. The question we have to consider is another question. The Legislature of Alberta has no authority to prescribe rules governing this court in the disposition of appeals from Alberta; and the enactments invoked by Mr. Clarke, which do not profess to declare the state of the law at the time the action was brought, or at the time the judgment of the Appellate Division was given, can only affect the rights of the parties on this appeal to the extent to which the statutes and rules by which this court is governed permit them so to operate.

per Anglin J. (as he then was) at pages 193 and 194:—

> It is impossible to say that the provincial appellate court should have given effect to an amendment of the statute law which was not in force when it rendered judgment. Nor can an amendment not declaratory

(1) [1915] 52 Can. S.C.R. 185 at 192.

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in its nature, such as was that dealt with in *Corporation of Quebec v. Dunbar,* (1) cited by Mr. Clarke, enable us to say that the law was at the date of the judgment appealed from what the subsequent amendment has made it.

per Brodeur J. at page 196:—

If it was a declaratory law that had been passed by the provincial legislature, of course we would be bound by it.

In *K.V.P.* v. *McKie et al* (2). This Court, applying the principles stated in *Boulevard Heights* v. *Veilleux* (*supra*), declined to give effect to an Ontario statute passed after the date of the judgment of the Court of Appeal for Ontario from which the appeal was brought. Kerwin J., who delivered the unanimous judgment of the Court said, at page 701:—

The 1949 Act is not an enactment declaratory of what the law was deemed to be.

The case of *Eyre* v. *Wynn-Mackenzie* (3), relied upon by counsel for the appellants is distinguishable. In that case judgment had been given, and the time for appealing had expired before the passing of the Act there in question. An application was made to extend the time for appealing so as to enable the appellant to have the benefit of the provisions of such Act. In refusing leave Lindley L. J., speaking for the Court of Appeal, said:—

If we give leave to appeal in this case, we should be re-opening all judgments of a similar kind which had been given prior to the passing of the Act. We cannot do that.

In my opinion the law is correctly stated in the following passage in Craies on Statute Law (op. cit.) at page 341, provided the words "cases pending" are understood as including actions in which, while judgment has been given, an appeal from such judgment is pending at the date of the declaratory act coming into force:—

Acts of this kind, (i.e., declaratory acts), like judgments, decide like cases pending when the judgments are given, but do not re-open decided cases.

For the appellants reliance was placed on the judgment of the Court of Appeal for Ontario in *Beauharnois Light, Heat and Power Co. Ltd.* v. *The Hydro-Electric Power Commission of Ontario et al* (4), and particularly the

(1) 17 L.C.R. 6.
(2) [1949] S.C.R. 698.
(3) [1896] 1 Ch. 135.
(4) [1937] O.R. 796.

following passages in the judgment of Middleton J. A. who delivered the unanimous judgment of the Court of Appeal:—

> The rights of the parties had already passed into judgment, and the legislation has no effect upon this action. It is true the legislation was passed and was in effect when the appeal was heard in this Court, but the duty of an appellate Court is to reconsider the case and to correct any error made, in its opinion, by the trial Judge, and to pronounce the judgment that, in its opinion, the trial Judge ought to have pronounced: see Ontario Judicature Act, R.S.O. 1927, ch. 88, sec. 26.
>
> . . .
>
> The intention of the Legislature is embodied in the formal Act of Parliament and can only be gathered from the words used in that enactment. The Legislature, in matters within its competence, is unquestionably supreme, but it falls to the Courts to determine the meaning of the language used. If the Courts do not determine in accordance with the true intention of the Legislature, the Legislature cannot arrogate to itself the jurisdiction of a further appellate Court and enact that the language used in its earlier enactment means something other than the Court has determined. It can, if it so pleases, use other language expressing its meaning more clearly. It transcends its true function when it undertakes to say that the language used has a different meaning and effect to that given it by the Courts, and that it always has meant something other than the Courts have declared it to mean. Very plainly is this so when, as in this case, the declaratory Act was not passed until after the original Act had been construed, and judgment pronounced.

To understand what was before the Court in the *Beauharnois* case it is necessary to refer shortly to the facts. In 1935 the Ontario Legislature had passed an Act (c. 53) providing that a number of contracts to which The Hydro-Electric Power Commission of Ontario was a party "are hereby declared to be and always to have been illegal, void and unenforceable as against the Hydro-Electric Power Commission of Ontario" and further providing that:—

> No action or other proceeding shall be brought, maintained or proceeded with against the said Commission founded upon any contract by this Act declared to be void and unenforceable, or arising out of the performance or non-performance of any of the terms of the said contracts;

S. 6(4) of *The Power Commission Act* of Ontario, R.S.O. 1927, c. 57, read as follows:—

> Without the consent of the Attorney-General, no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office.

In the earlier case of *Ottawa Valley Power Co.* v. *The Hydro-Electric Power Commission* (1), which arose under the same statute, the Court of Appeal had held that the

(1) [1937] O.R. 265.

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substantive enactment declaring void the contracts in question in that action was *ultra vires* of the Legislature because it assumed to destroy civil rights outside the Province and that the Legislature could not, by enactment of adjectival law, preclude the courts of Ontario from so declaring.

In the *Beauharnois* case Rose C. J. H. C. delivered judgment on January 13, 1937, following the *Ottawa Valley Power Co.* case. An appeal was heard in April, 1937. In the meantime on January 29, 1937, c. 58 of the Ontario Statutes of 1937, I Geo. VI was enacted as follows:—

> The meaning and effect of subsec. 4 of sec. 6 of *The Power Commission Act* is and always has been that without the consent of the Attorney-General no action of any kind whatsoever shall be brought against The Hydro-Electric Power Commission of Ontario, and that without the consent of the Attorney-General no action of any kind whatsoever shall be brought against any member of The Hydro-Electric Power Commission of Ontario for anything done or omitted by him in the exercise of his office.

It was to this enactment that the passages quoted above from the judgment of Middleton J. A. were directed.

With the greatest respect, it seems to me that this enactment was merely a further attempt by enacting adjectival law to preclude the Courts from declaring that a substantive enactment of the Legislature was beyond its powers and was therefore rightly held ineffectual. If and insofar as the judgment in the *Beauharnois* case negatives the power of the Legislature to declare the law, retrospectively or otherwise, in regard to matters entirely within the ambit of its constitutional powers it ought not to be followed. The question of the constitutional validity of *The Sand and Gravel Act* was disposed of adversely to the appellants at the hearing of the appeal, and consequently I do not think that they are assisted by the judgment in the *Beauharnois* case.

I would dismiss the appeals for the reasons given above and would not have found it necessary to examine the other ground upon which the judgment of the Appellate Division proceeds if it were not for Mr. Riley's submission that if the appeals should be decided against his clients solely on the basis of *The Sand and Gravel Act* the costs in the courts below should be borne by the respondents.

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In view of this submission I have considered the matter without regard to the provisions of the last-mentioned Statute and find myself in agreement with the reasons of my brother Kellock on this aspect of the case. I therefore do not think that the order as to costs made by the Appellate Division should be varied.

In the result the appeals should be dismissed. The respondents are entitled to their costs in this Court. While we are indebted to Mr. Ross, who appeared for the intervenant, for a most helpful argument, I do not think that the appellants should be ordered to pay costs to his client. There will therefore be no order as to the costs of the intervenant.

Appeals dismissed with costs.

Solicitors for the appellants: *Macleod, Riley, McDermid, Bessemer & Dixon.*

Solicitors for the respondents: *Morrow & Morrow.*

Solicitor for the Attorney General of Alberta: *R. J. Wilson.*

Solicitors for the Intervenant: *Lavell and Ross.*

1953

*Mar. 6
*April 15

LLOYD BRUSCH .....APPELLANT;

AND

THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal Law—Habitual Criminal—Whether an offence within meaning of the Criminal Code—Whether right of election extends to such an allegation—Criminal Code ss. 575B, 575C, Part X (A).

An accused charged with breaking and entering elected for speedy trial under Part XVIII of the *Criminal Code*. Thereafter the Crown served notice under s. 575C (4) (*b*) that at the trial he would "be charged with being a habitual criminal." Following his conviction on the 1st charge the trial judge without giving him a further opportunity to elect, proceeded to inquire and found him to be a habitual criminal and sentenced him to a term of five years on the 1st charge, and directed that as a habitual criminal he be detained in prison, as provided by s. 575B, for an indefinite period. The accused appealed from the sentence imposed on the charge of being a habitual criminal,

PRESENT: Rinfret C.J. and Estey, Locke, Cartwright and Fauteux JJ.

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on the ground that it was a charge of a criminal offence on which he had a right of election which had not been granted him and in the alternative, that if such a charge was not a charge of a criminal offence it so materially affected the punishment which might be imposed that he was entitled to notice of the habitual criminal proceedings before being called upon to elect as to the mode of trial on the substantive offence. The appeal was dismissed by the Court of Appeal, O'Halloran J.A. dissenting.

Held: 1. By the majority of the Court (Locke and Cartwright JJ. expressing no opinion) that the allegation of being a habitual criminal is not an offence within the meaning of the *Criminal Code*. *Rex* v. *Hunter* [1921] 1 K.B. 555, followed.

2. (Cartwright J. dissenting): That the right of election restricted by Part XVIII to certain indictable offences, does not extend to such an allegation.

Per: Estey J. Part XVIII restricts the right to an election to certain indictable offences. The addition of a charge of being a habitual criminal, after the required notice, does not become a part of the offence or crime charged in the indictment. There is, therefore, no right within the meaning of the provisions of the said Part, to a further election upon the crime as charged, when a charge of being a habitual criminal is added to the indictment. *Rex* v. *Robinson* [1951] S.C.R. 522, distinguished.

Per: Locke J.—Whether the charge laid under Part X(A) is of a criminal offence or merely the first step in an enquiry as to the accused's status or condition, as suggested in *Hunter's* case, no question of right of election arises. The very terms of Part X(A) exclude the provisions relating to election contained in Part XVIII.

Per: Fauteux J.—*Rex* v. *Robinson* has no application. The whole matter being one of sentence, as was decided in *Hunter's* case, is one beyond the field of election which is strictly related to the trial of an indictable offence as to which the right of election is given and has nothing to do with sentence.

Per: Cartwright J., dissenting—It is not necessary to determine whether a charge of being a habitual criminal under Part X(A) is a charge of a criminal offence. On the hypothesis that it is not, its addition to the charge sheet had the effect of changing the charge upon which the accused made his election to one different in substance, with the result that the appellant never elected to be tried on the charge on which he was tried. *Rex* v. *Armitage* [1939] O.R. 417, applied. No notice was conveyed to the appellant that if he elected trial by a judge on the first charge he would at the same time be giving up his right to have a jury determine the question whether or not he was a habitual criminal.

APPEAL from a judgment of the Court of Appeal of British Columbia (O'Halloran J.A. dissenting) (1), which dismissed an appeal from a conviction on a speedy trial by Grimmett J., County Court Judge, on a charge of being a habitual criminal.

(1) (1953) W.W.R. (N.S.) 587.

J. L. Farris, Q.C. for the appellant.

L. H. Jackson for the respondent.

THE CHIEF JUSTICE:—It is submitted on behalf of the appellant that the Court of Appeal erred in failing to quash the conviction, because the accused should have been given an opportunity of electing as to how he wished to be tried on the charge of being an habitual criminal.

On February 5, 1952, the appellant was tried in County Court Judge's Criminal Court, New Westminster, B.C., on the original charge of breaking and entering and convicted and sentenced to five years imprisonment. Immediately thereafter the appellant was proceeded against as an habitual criminal and witnesses were heard, whereupon the learned trial judge found the accused to be an habitual criminal and ordered that he be detained for an indeterminate period in prison.

The wording of the various sub-sections of s. 575 of *The Criminal Code* of Canada are copied almost verbatim from the English Statute (*Prevention of Crime Act, 1908*, c. 59) whereunder proceedings against habitual criminals have been in effect for a number of years in England. The Court of Appeal followed the English decision in *Rex* v. *Hunter* (1), wherein the matter raised by the present appellant is fully discussed. In that case the judgment of the Court was delivered by the Earl of Reading C.J. and at p. 559 he said, *inter alia*:—

> In my judgment the whole question depends upon whether the charge against the appellant was a charge of an offence or crime or whether it merely asserted a status or condition in him which would enable the court if it were established to deal with him in a certain manner. We are of opinion that Mr. Oliver's argument on his behalf is sound, and that there is nothing in the Act which would justify us in saying that the charge of being a habitual criminal is a charge of a crime or offence.

And again at p. 560:—

> If one turns to s. 10, the object of the Legislature is shown by reference to sub-s. 1—namely, to enable the court to pass a further sentence if the accused is found to be a habitual criminal. That seems to me to be the key to the question, and to show that the Act intended to empower the Court, not to convict of another offence, but to pass a further sentence. That shows that Parliament was not creating a new offence.

(1) [1921] 1 K.B. 555.

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The majority of the Court appealed from relied on that decision, O'Halloran J.A. dissenting.

The wording of the sections in question (575 (*a*) to 575 (*g*)) are all indicative of their meaning. Section 575 (*b*) is as follows:—

> Where a person is convicted of an indictable offence committed after the commencement of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

There can be no question that an enactment of that kind was within the competency of the Canadian Parliament, since the criminal law in its widest sense is reserved for its exclusive authority (*A.G. for Ontario* v. *Hamilton Street Ry.* (1); *Proprietary Articles Trade Association* v. *A.G. for Canada* (2).

Adopting the language of the Earl of Reading, the sections of *The Criminal Code* referred to were "not creating a new offence", but just enabling the court to pass a further sentence if the accused was found to be a habitual criminal.

The appeal should be dismissed.

ESTEY, J.:—The appellant contends that an accused who, following his election, has been tried and found guilty of an indictable offence before a judge presiding under Part XVIII (Speedy Trials of Indictable Offences) of *The Criminal Code* has the right, before being charged as a habitual criminal under Part X(A), to make an election as to whether he will be tried upon that charge before a judge or a judge with a jury.

The appellant and two others were committed for trial upon a charge that they jointly did break, enter and steal (hereinafter referred to as the crime). They elected for a speedy trial before a judge under Part XVIII. Thereafter on December 19, 1951, the Crown served a notice under s. 575C(4) (*b*) that at the trial the appellant would "be charged with being a habitual criminal." The learned

(1) [1903] A.C. 524. (2) [1931] A.C. 310.

trial judge, on February 5, 1952, found all three guilty of the crime and forthwith, without giving appellant a further opportunity to elect, proceeded to inquire and find him to be a habitual criminal. He accordingly directed that the appellant be detained in prison for an indeterminate period as provided under s. 575B.

If being a habitual criminal is an indictable offence it would seem that the provisions of s. 834 would be applicable and, though the charge of an offence other than that upon which the accused had been committed may be included in the indictment under the proviso of that section (834), the prisoner should not be tried thereon without his consent or, in other words, without an election to be so tried.

The question, therefore, arises is being a habitual criminal an offence? The provisions with respect to habitual criminals were first enacted and made a part of our Criminal Code in 1947. Parliament then enacted, as part X(A) of the Criminal Code, provisions respecting habitual criminals and in doing so adopted the principle underlying and much of the language of Part II of the English *Prevention of Crime Act, 1908* (8 Edw. VII, c. 59). Section 575B reads as follows:

575B. Where a person is convicted of an indictable offence committed after the commencement of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

Section 575C reads as follows:

575C. (1) A person shall not be found to be a habitual criminal unless the judge or jury as the case may be, finds on evidence,

(*a*) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part, and that he is leading persistently a criminal life; or

(*b*) that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

(2) In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal.

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Parliament does not in these which may be referred to as the substantive sections of Part X(A) describe being a habitual criminal as an offence. This in itself is most significant and, with respect, I think the other language used supports the view that Parliament did not intend being a habitual criminal should be an offence.

It will be observed that under s. 575B one who is found to be a habitual criminal will be detained as such only when the court "is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public" that he should be detained. If Parliament had intended that being a habitual criminal was an offence it would, in all probability, have treated it the same as all other offences and directed that sentence be passed and detention ordered or suspended as the court might determine upon the offence being established.

Then again under s. 575C an accused must first be found guilty of an indictable offence. If, then, he admits, or evidence is adduced, that he has been three times previously convicted of indictable offences for which a penalty of at least five years might have been imposed and he is "leading persistently a criminal life," he may be found to be a habitual criminal and a further sentence may then be passed if, as provided in s. 575B, the court is of the opinion that for the protection of the public an indeterminate period of preventive detention should be directed. It is not penal servitude that Parliament has in mind, but rather, as expressed, preventive detention. Penal servitude has for its object both punishment and example. Punishment, so far as the habitual criminal is concerned, has failed. Parliament now provides for his preventive detention.

The significance of the phrase "preventive detention," as used in s. 575B, is further emphasized by s. 575G (2) under which he may be confined in a prison or that part of a prison set apart for the purpose. The intent and purpose of Parliament in passing Part X(A) was to protect the public by placing in preventive detention one who was found to be a habitual criminal and, while so detained, that he be subject "to such disciplinary and reformative treatment as may be prescribed by prison regulations"

(575G(3)). Parliament, during the period of his detention, places upon the Minister of Justice the responsibility, once at least in every three years, to review his condition, history and circumstances with a view to determining whether he should be placed out on licence and, if so, in what conditions (575H).

It was necessary that Parliament should provide a procedure whereby a person may be found a habitual criminal and it was but to be expected that in the circumstances it would be substantially the same as that in respect of indictable offences. It directs that one accused of being a habitual criminal shall be tried on a charge (575C(4)). The indictment shall first set forth the crime and it will be sufficient if there be added thereto a statement that the offender is a habitual criminal (575C(2)). He will first be "arraigned only on so much of the indictment as charges the crime" (575C(3)). If he be found not guilty of the crime that is an end to the proceeding. If he be found guilty of the crime then the court will direct its attention to determining whether he is a habitual criminal. This finding shall be upon evidence (575C(1)). If he be convicted of being a habitual criminal and sentenced to preventive detention he may appeal. If being a habitual criminal was an indictable offence the following words of s. 575E "the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto" would be unnecessary. It is true that throughout Part X(A) the words "charge," "arraignment," "sentence" and "conviction" are used, but it will be noted that these are all in relation to the procedure and are not, therefore, indicative of a conclusion leading to the designation of being a habitual criminal as an offence.

Counsel for the appellant seeks to draw some analogy between the position of a habitual criminal and one charged with vagrancy. Vagrancy is described as an offence and is in all respects treated as other offences. There does, however, appear to be some analogy between the treatment in the court of a habitual criminal and one who, charged with an offence, has been found to be insane either at the time the offence was committed or at the time of his trial. In both cases the provisions are to the effect that such person is not permitted at large, but is detained in a mental

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hospital or other institution to await the pleasure of the Lieutenant-Governor. It would be contrary to public interest to permit such a person to be at large until at least that is deemed safe by competent authority. In like manner it is deemed unsafe, from the point of view of the public, that one who is a habitual criminal should be at large and, therefore, he should be detained subject to the direction of the Minister of Justice.

In *Rex* v. *Hunter* (1), a decision under the English statute, it was held that being a habitual criminal is not an offence. Counsel for the appellant submitted that decision was either distinguishable or ought not to be applied to the provisions of Part X(A) because of the difference in our legislation. He points out that in England the inquiry can only be before a jury and, therefore, no election ever takes place. That, however, is a matter of procedure or mode of trial and does not affect the substantive provisions. Parliament, in defining the term "judge" in Part X(A), expressly contemplated that the inquiry as to whether a person is a habitual criminal would be made both by a judge presiding under Part XVIII and any judge having criminal jurisdiction in the province.

Counsel also emphasized the difference in language between s. 11 of the English Act and the corresponding s. 575E of the Canadian Act dealing with the matter of an appeal. In the former the language is "a person sentenced to preventive detention may . . ." while in the Canadian Act it reads "a person convicted and sentenced to preventive detention may . . ." The word "convicted" in s. 575E does not add anything and is, as already stated, in relation to procedure and in any event it does not override the general intention of Parliament.

Section 13 of the English Act and s. 575G of the Canadian Act are different in this sense that under the English Act the sentence of preventive detention takes effect immediately on the termination of the sentence of penal servitude, while under the Canadian Act it takes effect immediately on the conviction of a person on a charge that he is a habitual criminal. Here again this does not assist in determining whether being a habitual criminal is an offence within the meaning of the *Criminal Code*.

(1) [1921] 1 K.B. 555.

Counsel for the Crown adopts the language of Mr. Justice O'Halloran that even if being a habitual criminal is not an offence "nevertheless Parliament has mandatorily stipulated it shall be dealt with by the courts in the same manner (with one or two exceptions) as if it were an indictable offence." The learned judge, therefore, concludes that "Whether being a habitual criminal is a criminal offence or not the right to elect for trial still remains an essential statutory requirement."

It must be conceded that, as already stated, the words "charge," "arraignment," "sentence" and "conviction" appear throughout the part and under s. 575E, if an appeal is taken, the procedure therein will be that applicable to an indictable offence. These are all relative to procedure and as such do not affect or indicate the substantive nature of being a habitual criminal as an offence. In fact, as already pointed out, the provision relative to an appeal would be unnecessry if it were an indictable offence.

What is more significant is that even in the indictment it is sufficient "to state that the offender is a habitual criminal" (575C(2)) and this statement can be added only after "not less than seven days' notice" (575C(4)(*b*)). Parliament, in the same Part X(A), in s. 575A, provides that the word "judge" means a judge acting under Part XVIII of this Act and any judge having criminal jurisdiction in the province. It is, therefore, clear that Parliament had in mind an election and the procedure in reference thereto and it must follow that, in providing for seven days' notice, had it intended being a habitual criminal was an additional offence, it would, not having so described it, have directed that s. 834 would apply.

Moreover, ss. 825, 826 and 834 make it clear that Parliament intended the provisions for an election should only apply in certain indictable offences. Being a habitual criminal is not an offence. A charge that an accused is a habitual criminal is added to an indictment for an offence. Though Parliament in this sense contemplated that it should be a part of the indictment, it does not thereby become a part of the offence charged in the indictment. This is made clear by the provisions which require that the accused shall first be arraigned and tried for the offence. Then only if he be guilty of that offence will the court

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direct its attention to the issue as to his being a habitual criminal and, if so, should there be directed an indeterminate period of preventive detention. Throughout the proceeding the offence or crime charged is treated in every respect, even as to punishment, as separate and distinct from being a habitual criminal. With great respect to those who entertain a contrary opinion, Part XVIII restricts the right to an election to certain indictable offences. The addition of a charge of being a habitual criminal, after the required notice, does not become a part of the offence or crime charged in the indictment. There is, therefore, no right, within the meaning of the provisions of Part XVIII, to a further election upon the crime as charged, when a charge of being a habitual criminal is added to the indictment.

Counsel for the appellant referred particularly to the word "offence" as used in two of the reasons for judgment in *Rex* v. *Robinson* (1). In that case this Court had to construe the words "at least" where they appear in s. 575C (1) (*a*) and, therefore, quite a different issue from that here to be considered, and the word there used must be read and construed in relation to that issue. When so read it does not assist counsel for the appellant in his contention.

Section 575B of our Act is based upon and adopts much of the language of s. 10(1) of the English Act, in respect of which the Earl of Reading C.J., in *Rex* v. *Hunter, supra,* stated:

> If one turns to s. 10, the object of the Legislature is shown by reference to sub-s. 1—namely, to enable the Court to pass a further sentence if the accused is found to be a habitual criminal. That seems to me to be the key to the question, and to show that the Act intended to empower the Court, not to convict of another offence, but to pass a further sentence. That shows that Parliament was not creating a new offence.

These are the substantive sections and it would seem that the learned Earl has appropriately described the intent and purpose of the Parliament both of Great Britain and Canada.

The appeal should be dismissed.

(1) [1951] S.C.R. 522.

LOCKE J.:—The appellant Brusch was arrested on February 26, 1951, with two persons by name Paton and Abbott, on a charge of having broken and entered certain store premises in Haney, B.C. on that date, and on this charge the accused persons were committed for trial by a magistrate. On March 19, 1951, the appellant appeared before His Honour Judge Sullivan in the County Court Judges' Criminal Court for the County of Westminster and elected to be tried by a judge, without the intervention of a jury, on such charge. While the record is silent on the point, apparently Paton and Abbott also elected to be so tried.

On December 19, 1951, something more than a month before the date fixed for the trial of these three persons by a judge of the County Court of New Westminster, the Crown caused to be served a notice on the present appellant, informing him that at the trial then fixed for January 23, 1952, and on any adjournment thereof he would, if convicted on the said charge,

"be charged with being a habitual criminal and be tried upon such charge"

on the grounds that on three previous occasions since attaining the age of eighteen years he had been convicted of criminal offences on each of which he was liable to be sentenced to at least five years' imprisonment, and further:

that since the year 1940 you have been leading a persistently criminal life in that you have been an associate of criminals, prostitutes, drug addicts and have had no regular employment or occupation.

On the charge of breaking and entering, the appellant, together with Paton and Abbott, was tried before His Honour Judge Grimmett in the County Court Judges' Criminal Court at New Westminster on February 7, 1952 and was found guilty.

Upon the charge sheet, following that portion which charged the three accused persons of the offence of breaking and entering, there appeared the following:

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The transcript of the proceeding shows that at the conclusion of the trial on the charge of breaking and entering the further charge was read by the Registrar to the accused, who was represented by counsel, that he pleaded not guilty and that the trial proceeded forthwith. At its conclusion the learned County Court Judge reserved his judgment. On February 13, 1952 he found the appellant guilty on what was referred to as "the habitual criminal charge." On the charge of breaking and entering, he sentenced the appellant to a term of five years and, finding him to be a habitual criminal, further directed that he be detained for an indefinite period in prison.

The appellant moved before the Court of Appeal for leave to appeal from his conviction and on the same date gave notice of his intention to appeal and both applications were dismissed by the Court of Appeal, O'Halloran J.A. dissenting, and it is from this judgment that the present appeal is taken.

Section 575B of the *Criminal Code* provides that where a person is convicted of an indictable offence committed after the commencement of Part X(A) and subsequently:—

> the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period . . . and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

Section 575C provides that a person shall not be found to be a habitual criminal unless the judge or jury, as the case may be, finds on evidence that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, and *that he is leading persistently a criminal life,* or that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention. The language of s-s. 3 of this section is of importance in determining the present matter. It reads:—

> In the proceedings on the indictment the offender shall in the first instance be arraigned only on so much of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the

judge or jury, as the case may be, unless he thereafter pleads guilty to being a habitual criminal, the judge or jury shall be charged to enquiry whether or not he is a habitual criminal and in that case it shall not be necessary to swear the jury again.

Of the three grounds upon which Mr. Justice O'Halloran dissented, two only were argued before us, these being that the charge of being a habitual criminal being a charge of a criminal offence the accused had a right of election, which was not granted to him, and, alternatively, if such a charge was not a charge of a criminal offence, it so materially affects the punishment that might be imposed that the accused was entitled to notice of the habitual criminal proceedings before being called upon to decide as to the mode of trial on the substantive offence.

The sections of the *Criminal Code* dealing with habitual criminals were introduced into the statute in 1947 and form Part X(A) of the *Code*. While not identical in terms, sections 575B and 575C follow very closely the language of s. 10 of *The Prevention of Crime Act, 1908* (Imp.).

Since under the English statute the question as to whether an accused person is a habitual criminal must be determined by the jury which tries him upon what may be called the substantive offence, no question can arise there as to a right of election.

The decision of the Court of Criminal Appeal in *Rex* v. *Hunter* (1), however, deals with the question as to the nature of the proceedings. The Earl of Reading C.J. there said that the charge under s. 10 of being a habitual criminal was not a charge of an offence or crime, but rather, merely the first step in ascertaining "a status or condition in him" which would enable the Court, if it were established, to deal with him in a certain manner. This question was considered by the Court of Appeal in British Columbia in *R.* v. *Robinson* (2), in proceedings under Part X(A) and Robertson J.A., who delivered the judgment of the Court, followed what had been said by the Earl of Reading in *Hunter's* case on the question as to whether the charge of being a habitual criminal was of a substantive offence and said that:—

> The question was not one of guilt but whether under the circumstances a further sentence should be imposed.

(1) [1921] 1 K.B. 555.
(2) (1952) 102 Can. C.C. 333.

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It may, however, be noted that the exact point to be decided in *Robinson's* case was as to whether the trial judge who presided at the hearing had the right to take judicial notice of the conviction of the prisoner for an offence against the *Opium and Narcotic Drug Act, 1929*, which was the substantive offence charged and of which he had pleaded guilty, and to tell the jury that was empanelled to hear the habitual criminal charge that he had been so convicted. In the present appeal, the learned Chief Justice of British Columbia, in delivering the judgment of the majority of the Court, expressed the view that the sections related to sentence only and that the Court's decision in *Robinson's* case should be followed.

There is much to be said for the contrary view, in my opinion. Sub-s. 4 of s. 575C refers to the statement on the indictment that the offender is a habitual criminal as a charge upon which no person shall be tried, unless the Attorney-General of the Province consents and not less than seven days' notice has been given to the offender specifying the grounds upon which it is intended to found the charge. Sub-s. (*a*) provides that a person shall not be found to be a habitual criminal unless the judge or jury, as the case may be, finds on evidence that, in addition to having been three times previously, since attaining the age of eighteen years, convicted of an indictable offence for which he was liable to at least five years' imprisonment, he is leading persistently a criminal life. This was the charge that the learned County Court Judge was required to consider in the present matter. Upon evidence which he considered to be sufficient, he found Brusch to be a habitual criminal and so, if he considered it to be expedient for the protection of the public, liable to be detained in prison for an indeterminate period. O'Halloran J.A. points out in his dissenting judgment that s. 238 of *The Criminal Code* defines a course of conduct rendering a person liable to conviction and sentence for the offence of vagrancy. Part X(A) defines the course of conduct which renders a person liable to conviction as a habitual criminal. If one is properly described as a criminal offence, why not the other?

I have, however, come to the conclusion that whether the charge laid under Part X(A) is of a criminal offence or merely the first step in an enquiry as to the accused person's status or condition, as suggested in *Hunter's* case, no question of a right of election arises and that this appeal should fail.

In my opinion, Part X(A) defines in its entirety the procedure to be followed in disposing of charges of this nature. Under s. 575(3) the offender is first arraigned on so much of the indictment as charges the crime, in this case that of breaking and entering. If he is tried on that offence by a judge alone, as in the present case, it is the judge who, having found the accused guilty and passed sentence upon him, is "charged to enquire" whether or not he was a habitual criminal. Had he been tried on the offence of breaking and entering by a jury and found guilty, that jury would have been charged with the duty of determining the habitual criminal charge. In the present case, since Part X(A) named the tribunal which was to hear and determine the habitual criminal charge, there was no option to offer the prisoner as to the manner in which he would be tried. The very terms of Part X(A) exclude, in my opinion, the provisions relating to election contained in Part XVIII of the *Code*.

It has been said during the argument of the present matter that it is a hardship upon an accused person to be deprived of the right to elect the tribunal before which a charge of this grave nature is to be heard, on which he may be found liable to be imprisoned for life. That, however, is a matter for Parliament and not for the courts. The question, moreover, as to whether this works a hardship upon such an accused person is debatable. At the time the present appellant elected to take a speedy trial on the charge of breaking and entering, he must be held to have been aware that since he had been convicted three times since he was eighteen years of age of offences of the character described in Part X(A) and had been leading persistently a criminal life, he might be charged under the provisions of that Part with being a habitual criminal and to have considered this in electing for a speedy trial.

I would dismiss the appeal.

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CARTWRIGHT J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for British Columbia pronounced on December 19, 1952, whereby according to the formal order of that Court, "the appeal . . . of the above-named Appellant from the finding of His Honour Judge J. K. Grimmett, a judge of the County Court Judge's Criminal Court for the County of Westminster, holden at New Westminster, B.C., in the said County of Westminster, on the 13th day of February, A.D. 1952, that he, the said Lloyd Brusch, is an habitual criminal" was dismissed.

The appeal is based, pursuant to section 1023(1) of *The Criminal Code,* on the following questions of law, upon which O'Halloran J.A. dissented:—

(1) the charge of being an habitual criminal is a charge of a criminal offence on which the accused has a right of election which was not granted to the Appellant herein;

(2) alternatively the charge of being an habitual criminal, if it is not a charge of a criminal offence, so materially affects the punishment that may be imposed that the accused is entitled to notice of the habitual criminal proceedings before being called upon to elect as to the mode of trial on the substantive offence;

(3) in the further alternative if the charge of being an habitual criminal is not a charge of a criminal offence but a matter in respect of status, then it is legislation in respect to a non-criminal matter and the Parliament of Canada has no jurisdiction to legislate with respect thereto.

No argument was addressed to us in regard to the third ground of dissent, and I therefore propose to deal only with the first two questions above set out.

The facts are as follows. The appellant was arrested on February 26, 1951 and was charged jointly with two others with breaking and entering a store with intent to steal. The three were committed for trial. On March 19, 1951, the three accused elected a speedy trial pursuant to the provisions of Part XVIII of the *Criminal Code* and the trial was set for the 28th of May. On that date and on several subsequent dates the three accused appeared and the trial was further adjourned and finally commenced on February 5, 1952.

No objection is taken to the form of the statement in writing, prepared pursuant to section 827(3) of the *Code,* insofar as it relates to the charge of breaking and entering.

This statement is signed "R. G. Kell", Clerk of the Peace. Below this signature appears the following:—

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For that the said Lloyd Brusch, having been convicted of the above mentioned offence of breaking, entering and theft at Haney in the County of Westminster and Province of British Columbia, on the 26th day of February A.D. 1951, is a habitual criminal.

R. G. KELL,
Clerk of the Peace

Code Sec. 575 C (2)

The record is silent as to when the last mentioned addition was placed on the charge sheet but it is clear that it was not mentioned or in any way brought to the notice of the accused or his counsel at the time he elected to be tried before a judge without the intervention of a jury. On December 19, 1951 an undated notice addressed to the appellant was served upon him, stating that if convicted on the breaking and entering charge he would "be charged with being an habitual criminal and be tried upon such charge on the following grounds, namely . . .". The notice sufficiently sets out the grounds upon which it was intended to found the charge.

The trial on the charge of breaking and entering was held on the 5th and 7th days of February 1952. At the conclusion of the trial the appellant and the other two accused were found guilty and immediately thereafter counsel for the Crown asked the Clerk of the Court to read the charge against the appellant of being a habitual criminal. The Clerk of the Court read the charge. The appellant, who was represented by counsel, was called upon to plead. He pleaded "not guilty" and the hearing proceeded. At the conclusion of the hearing the learned trial judge reserved his judgment until February 13 to which date he remanded the accused. On February 13 he delivered judgment orally, saying in part:—"On the habitual criminal trial charge I have come to the conclusion that you are guilty as charged . . . therefore I sentence you to be detained for an indeterminate period in prison." On the charge of breaking and entering the learned trial judge sentenced the appellant to five years imprisonment. No appeal was taken from the last mentioned conviction and sentence.

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From the above recital of facts it is clear that the appellant was given no opportunity of electing as to how the question whether he was a habitual criminal should be determined, that is to say, whether it should be by a judge under Part XVIII of *The Criminal Code* or by a jury. The contention of counsel for the respondent is that in any case in which an accused has been charged with an indictable offence falling with section 825(1) of the Code and has properly elected to be tried on such charge by a judge under Part XVIII, it is open to the prosecuting officer to make an addition to the charge sheet stating, pursuant to section 575C(2), that the accused is a habitual criminal, and that, without any further election by the accused, the judge trying the indictable offence has jurisdiction to try the further question whether or not the accused is a habitual criminal.

The Crown relies on the case of *Rex* v. *Hunter* (1), a decision of the Court of Criminal Appeal. In that case the appellant "was indicted at the London Sessions for office breaking and larceny and also for being a habitual criminal." The jury convicted him on the charge of office breaking and larceny. Before the charge of being a habitual criminal, which the appellant denied, was gone into he asked for an adjournment to enable him to call a witness who was not present. After discussion the Deputy Chairman adjourned the trial of the question whether the accused was a habitual criminal to the following sessions and in the meanwhile sentenced the accused to three years penal servitude on the charge of office breaking. The sole ground of appeal appears to have been that on a proper interpretation of *The Prevention of Crime Act, 1908* 8 Edw. VII, c. 59, which is in its wording similar to, although by no means identical with, Part X(A) of the *Criminal Code,* where in addition to a substantive charge a charge is made that the accused is a habitual criminal the last mentioned charge must be tried by the same jury that tries the substantive charge.

That point had already been dealt with by the Court of Criminal Appeal in *Rex* v. *Jennings* (2) and in delivering the judgment of the Court in *Rex* v. *Hunter* (*supra*) the Earl of Reading C.J. said, in part:—"The only ques-

(1) [1921] 1 K.B. 555. (2) (1910) 4 Cr. App. R. 120.

tion remaining is whether Parliament has altered the law since the decision in *Rex* v. *Jennings*." I do not read *Rex* v. *Jennings* as necessarily deciding that the charge of being a habitual criminal is not a charge of a crime or offence but there is no doubt that in *Rex* v. *Hunter* the Court did so decide, and, while it was not necessary to the decision, a court of thirteen judges, presided over by Hewart L.C.J. in *Rex* v. *Norman* (1), appears to approve the decision in *Hunter's* case. It would seem, therefore, that it must be taken to be established in England that the charge of being a habitual criminal is not a charge of an offence or crime but is merely an assertion of the existence of a status or condition in the accused which would enable the Court, if it were established, to deal with him in a certain manner.

I am much impressed by the reasons given by O'Halloran J.A. in his dissenting judgment in the case at bar for reaching a result on the construction of Part X(A) of the *Code* different from that which was reached on the construction of the Act under consideration in the *Hunter* case but I do not think it is necessary, in this appeal, to finally determine whether a charge of being a habitual criminal under Part X(A) of the *Code* is a charge of a crime or of an offence. If it is, as O'Halloran J.A. considers it to be, then clearly the learned trial judge had no jurisdiction to deal with the charge as the appellant had not elected to be tried by him. If, however, the alternative view is accepted, i.e. that the statement added to the indictment or charge sheet, pursuant to s. 575C(2), is not a charge of an offence, then I respectfully agree with O'Halloran J.A. that an election by the appellant was nonetheless an essential condition precedent to the judge acquiring jurisdiction to determine, without the intervention of a jury, the question, whether the accused was or was not a habitual criminal.

On the hypothesis that the statement added to the charge sheet stating the appellant to be a habitual criminal was not the charge of an offence, in my opinion that addition had the effect of changing the charge upon which the appellant had made his election to one different in substance, with the result that the appellant never elected to be tried by the learned judge on the charge on which he

(1) (1924) 18 Cr. App. R. 81.

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was tried. In *Rex* v. *Armitage* (1), the circumstances dealt with were different from those in the case at bar but I think that case rightly decides that a change in an indictment which makes it possible to impose a longer term of imprisonment in the event of conviction cannot be regarded as an amendment in matter of form only. When, pursuant to s. 827 of the *Code,* the judge stated to the appellant that he was charged with an offence, he described only the offence of breaking and entering and no notice of any sort was conveyed to the appellant that if he elected trial by a judge on that charge he would at the same time be giving up his right to have a jury determine the question whether or not he was a habitual criminal.

It is obvious that an accused might be moved to elect trial by a judge on a substantive charge by considerations different from those which would weigh with him in deciding what tribunal should decide whether he was a habitual criminal. He might know that he was guilty of the substantive charge but be convinced, in his own mind, that he was not a habitual criminal. He might be willing to be tried without a jury for an offence as to which he knew the maximum penalty, but desire a jury to pass upon a question the adverse determination of which could result in his being deprived of his liberty for the rest of his life.

I can find no provision in the *Code* giving jurisdiction to a judge to determine without the intervention of a jury whether an accused is a habitual criminal, without the accused's consent, given after being informed that the question, or one of the questions, to be determined is whether he is a habitual criminal.

I can derive little assistance from the sections of the *Code* dealing with the method of specifying in an indictment or charge sheet that an accused who is charged with a substantive offence has been previously convicted. The only questions in such a case, in regard to the previous conviction, are those of historical fact and identity. The question whether or not a person is a habitual criminal involves an inquiry going much further afield, the nature of which is fully discussed in the judgment of the Lord Chief Justice in *Rex* v. *Norman* (*supra*).

(1) [1939] O.R. 417.

In my view the charge or statement that a person is a habitual criminal must be regarded as either (i) a substantive charge of an offence, or (ii) the allegation of the existence of a condition in a person accused of an indictable offence (conveniently referred to as a substantive offence) by reason of which such person if found guilty of the substantive offence may suffer detention for an indeterminate period in addition to any punishment imposed for the substantive offence, and therefore a substantial ingredient of the indictment charging the substantive offence. If the former is the right view, the question raised in this appeal presents no difficulty; but if the latter view is preferred then for the reasons given above I am of opinion that there was no proper election by the accused to be tried under Part XVIII.

If the construction of the relevant sections of the *Code* were difficult or doubtful the Court should adopt that construction which does not deprive an accused of the right to have tried by a jury a question which may involve his losing his liberty for the rest of his life. The power of Parliament to take away the right to trial by jury is not questioned but the intention to do so should not lightly be assumed.

It remains to consider the question, raised during the argument before us that the appellant can not now be heard to allege lack of jurisdiction because he pleaded to the charge before the learned trial judge without objection and did not raise the question of jurisdiction at the trial. On this point reference was made to *Sayers* v. *The King* (1). In my opinion that case is distinguishable from the case at bar. In *Sayers'* case the appellants were convicted after trial by a jury. It was held that their right to elect trial and to be tried without a jury under Part XVIII of the *Code,* if it existed, was a privilege which could be waived and which was waived by pleading, without objection, to the arraignment before the jury. In the case at bar, in my respectful view, the consent of the accused obtained pursuant to the provisions of s. 827 of the *Code* was a condition precedent to the existence of jurisdiction in the learned trial judge and such consent was not obtained.

(1) [1941] S.C.R. 362.

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Cartwright J.

For the above reasons I would allow the appeal and quash the finding that the appellant is a habitual criminal and the sentence passed upon that finding.

FAUTEUX J.:—This is an appeal under s. 1023 of the *Criminal Code*. Of the three grounds of law, upon which there was a dissent, only the first two have to be considered, for the third one—related to the constitutionality of Part XA—has been abandoned by the appellant and the Attorney General for Canada was not represented at the hearing.

In brief, the whole matter raises a question of procedure but, as will be seen, one of substance, i.e. one of jurisdiction.

Originally charged with the offence of "breaking and entering a store with intent to steal," the appellant, after being committed to trial for this offence, elected to be tried on the same, by a judge alone, under Part XVIII of the *Criminal Code*. A plea of not guilty was entered and several adjournments of the case ensued. Some two months before trial, i.e. on the 19th of December 1951, the appellant received notice that the Crown intended to proceed with a charge of being a habitual criminal and at some time before the trial, an addition, implementing this intention, was made to the formal statement in writing provided under s. 827 s-s. 3. Without a new election nor any objection being made in the matter, the trial proceeded; the appellant was found guilty of the substantive offence as to which he had elected; immediately thereafter, the secondary issue was inquired into and he was found to be a habitual criminal and sentenced as such.

As formulated, the first ground of law is:—

> The charge of being a habitual criminal is a charge of a criminal offence on which the accused has a right of election which was not granted to the appellant.

This point rests on two legal assumptions:—(*a*) That to be a habitual criminal is a criminal offence; (*b*) That this offence is indictable and one for the trial of which a right to elect for a speedy trial is given.

Dealing with (*a*):—This point never came before this Court. Our decision in *Rex* v. *Robinson* (1), relied on by counsel for the appellant, has no application. It is true

(1) [1951] S.C.R. 522

that some of the members of the Court, incidentally, said that by the enactment of Part X(A), Parliament created a new offence. But besides the fact that such a dictum was not expressed by a majority of the Court, it was foreign to the issue and its determination. The question, however, came squarely before the English Criminal Court of Appeal in *Hunter* (1) where, having to determine the object of the *Prevention of Crime Act, 1908*—from which Part X(A) of the *Criminal Code* is inspired—Reading L.C.J., rendering the judgment for the Court, said at page 74:—

> . . . that to be a habitual criminal within the meaning of the statute is not a substantive offence, but is a state of circumstances affecting the prisoner which enables the court to pass a further or additional sentence to that which has been already imposed; . . .

At page 73, the Lord Chief Justice says:—

> Turning to s. 10 we think that the object of the legislature is clearly shown by reference to sub-s. (1). It empowers the Court to pass a further sentence if the prisoner is found to be a habitual criminal. That seems really the key of the question so much discussed today, and indicates that the Act was not intended to enable the Court to convict of another offence, but was intended to enable the Court, when the prisoner has been convicted of the substantive offence for which he is indicted and has been sentenced to at least three years' penal servitude, to pass "a further sentence, ordering that on the determination of the sentence of penal servitude," he be detained for a further period.
>
> It is plain, looking at the language of this statute, that the intention of Parliament was, that if the man is found to be a habitual criminal, then, in addition to the sentence of three years' penal servitude for the substantive offence, he may be sentenced to preventive detention.

The object of our own legislation is manifested in the provisions of s. 575(*b*) which, and so far as the object of Part X(A) is concerned, are couched in terms similar to those of s. 10 s-s. 1 of the English Act. If anything, I think that the provisions of the former are more apt than those of the latter to support, with respect to Part X(A), a conclusion similar to the one reached by the English Criminal Court of Appeal for, at the end of s. 10, s-s. 1, it is said:—

> . . . and *a person* on whom such a sentence is passed *shall,* whilst undergoing both the sentence of penal servitude and the sentence of preventive detention, *be deemed* for the purposes of the Forfeiture Act, 1870, and *for all other purposes,* to be a person *convicted of felony.*

(1) [1921] 1 K.B. 555; 15 Cr. App. R. 69.

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The corresponding wording of s. 575(*b*) is:—

> . . . and *the person* on whom such a sentence is passed *shall be deemed* for the purpose of this Part *to be a habitual criminal.*

Nowhere in enacting Part X(A) did Parliament use the word "offence" to characterize the conditions which must be met before one may be deemed to be a habitual criminal. Part X(A) does not define a habitual criminal but it does give in s. 575(*b*) and s. 575(*c*), the circumstances which must co-exist before a person may be deemed for the purpose of this new part, to be a habitual criminal. These circumstances are:—

1. A fresh, precedent and contemporaneous conviction of an indictable offence after the commencement of the part;

2. An admission of the convicted offender or a finding by a jury or a Judge that he is a habitual criminal within the meaning of either (*a*) or (*b*) of s. 575 (*c*);

3. A formed opinion of the Judge, before whom the conviction for the substantive offence took place, that, by reason of the criminal habits and mode of life of the convicted offender, it is expedient for the protection of the public that a further sentence, ordering his detention in a prison for an indeterminate period be passed;

4. An actual passing of such an additional sentence.

As it appears, a mere admission or finding under s. 575(*c*), though a condition precedent, is not sufficient for, under s. 575(*b*), the judge must also be of opinion that, for reasons therein stated, it is expedient for the protection of the public to pass, in addition to the one given as to the substantive offence, a sentence for an indeterminate period, and must actually pronounce such additional sentence.

Part X(A) does not authorize a charge for being a habitual criminal to obtain independently. And, moreover, the Part has no effective application unless the substantive charge for the criminal offence is prosecuted and found.

In brief, the object of the Part is not to *create a new crime* but, to use the relevant terms of the title of the English Act, "To make better provision for the *prevention of crime* and for that purpose to provide for . . . the prolonged detention of habitual criminals . . ."

Dealing with (*b*):—As indicated by the title "Speedy trials of *Indictable Offences*", as well as clearly stated in s. 825 and s. 582, the provisions of Part XVIII—including the right to elect to have an offence tried before a judge

alone—have no application except in the case of certain indictable offences. And as speedy trials are a marked departure from the common law, and as the provisions related thereto establish a special statutory jurisdiction which cannot be extended beyond the terms of the statute, not only would it be necessary for the appellant to show successfully that to be a habitual criminal is a criminal offence, but that this criminal offence is indictable. In the general pattern followed by Parliament, when a new offence is created, the nature of the offence is always and must of necessity be given, for it is the ascribed nature of the offence that determines the course of proceedings for its prosecution. This Parliament does—for an indictable offence—in stating either that the offence is indictable or that the offender may be prosecuted by indictment and—in the case of an offence which is not indictable—by describing it purely and simply as an "offence" or by stating that the offender is punishable on summary conviction. In this respect, and for the obvious reason that Parliament did not purport to create an offence, Part X(A) is denuded of any indication. It is true that s. 575(*c*) s-s. 2 provides:

> In any indictment under this section it shall be sufficient, after changing the crime, to state that the offender is a habitual criminal.

But the indictment to which this sub-section refers is manifestly the one reciting the substantive offence; and while a conviction on such indictment is a condition precedent to the substantial operation of Part X(A), an acquittal on the same brings the whole matter to an end.

If, as the appellant must contend to succeed, to be a habitual criminal is effectively an indictable offence, there was no need for Parliament to enact, in positive language, the provisions of the opening section of Part X(A), i.e., s. 575(*a*), to empower a judge acting under Part XVIII to apply the provisions of Part X(A), for such jurisdiction was already given to him by s. 825 and s. 582. But, and because Parliament did not mean to create an indictable offence coming within the jurisdiction *ratione materiae* of a judge acting under Part XVIII, it was necessary to enact s. 575(*a*) to enable him to apply the provisions of Part X(A).

In my respectful view, this first ground cannot be entertained.

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Fauteux J.

The second point of dissent is:—

> Alternatively the charge of being a habitual criminal, if it is not a charge of a criminal offence, so materially affects the punishment that may be imposed that the accused is entitled to notice of the habitual criminal proceedings before being called upon to elect as to the mode of trial on the substantive offence.

If, as above concluded, to be a habitual criminal is not an offence and there is no jurisdiction *ratione materiae* under Part XVIII but simply a power given by s. 575(*a*) of the new part to a judge acting under Part XVIII to apply the provisions of Part X(A), then there is no text of law to justify this second contention. To accept it would effectively be tantamount to amend the speedy trial provisions, in making them applicable to the charge of being a habitual criminal, and in conditioning the election of the substantive charge for an indictable offence to the addition of a formality unprovided for in s. 827 to cover a case never contemplated when Part XVIII was first enacted, i.e. at a time when neither Part X(A) nor even the Prevention of Crime Act were law.

Furthermore, the reason underlying this second proposition is not consonant but inconsistent with the economy of the *Criminal Code*. It is said that the charge of being a habitual criminal so materially affects the punishment that may be imposed, that the accused is entitled to notice of the habitual criminal proceedings before being called upon to elect as to the mode of trial on the substantive charge; and in support of this proposition, reference is made to *Rex* v. *Armitage* (1). At the time of this decision, there were in Canada, as to the advisability to refer to previous conviction or convictions in a charge for an offence for which a greater punishment may be inflicted by reason of such previous conviction or convictions, two schools of thought amongst the members of the judiciary. One view was that it was unfair to the accused to have, at the very outset of the procedure, no notice of the intention of the Crown to ask for the greater punishment provided in such cases. The other view was that a reference, on the charge, to such previous convictions was unfair because prejudicing the case as to the offence charged. These two views led to conflicting jurisprudence and, in 1943, by 7 George VI

(1) [1939] O.R. 417.

c. 23, the *Code* was amended and Parliament, adopting the latter view, prohibited any reference to such previous conviction or convictions in all proceedings under Parts XV, XVI and XVIII before conviction on the substantive offence. It was then clearly enacted that no information or no charge for an offence for which greater punishment may be inflicted by reason of previous conviction or convicitions, shall contain any reference to such previous conviction or convictions. The *Armitage* case, consistent with the first view, was decided before such amendment.

Furthermore, the whole matter, being one of sentence—as was decided in the *Hunter* case—is one beyond the field of election which is strictly related to the trial of the offence as to which the right of election is given and has nothing to do with the sentence.

With deference for those who entertain on the whole matter a contrary opinion, I must, for the above reasons, conclude that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Farris, Stultz, Bull & Farris.*

Solicitor for the respondent: *L. H. Jackson.*

ANNA PINSKY AND WILLIAM PINSKY (PLAINTIFFS) ..... } APPELLANTS;

AND

ELLA WASS AND THOMAS WASS (DEFENDANTS) ..... } RESPONDENTS.

1952
*Nov. 5
1953
*Mar. 30

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Vendor and Purchaser—Agreement for sale and exchange of property—Escape clause—No time mentioned—Possession exchanged—Whether withdrawal from agreement permitted—Homesteads—Dower Act, S. of A. 1948, c. 7—Whether requirements complied with—Whether agreement void—Estoppel.

In September 1949, the male respondent, as owner of a farm, and the male appellant, as owner of a property in Edmonton, agreed in writing to exchange their respective properties, each being a homestead

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

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within the meaning of the *Dower Act* (S. of A. 1948, c. 7). The difference in values was to be paid in cash by the respondent who was also to loan to the appellant $800 to be secured by an agreement for sale of the farm payable November 1, 1950. The transfer of the farm was to take place when the loan was paid and the transfer of the city property, when the agreement to secure the loan was signed. By an escape clause, each party was to deposit $500 and "forfeit the same in case he changes his mind or for other reason cannot complete contemplated deal". The agreement was also signed by the wives of the parties.

Soon after the parties had exchanged possession and before the deal was completed, the male appellant gave notice of repudiation and commenced action to have the agreement declared void for misrepresentation or, alternatively, voidable under the escape clause. The respondent counterclaimed for specific performance. A second action was brought by both appellants against both respondents on the ground that the agreement was void for non-compliance with the *Dower Act*. Both actions were tried together.

Held: The appellants were entitled to withdraw from the agreement under the escape clause.

Per Kerwin and Estey JJ.: The appellants were also entitled to succeed by virtue of the provisions of the *Dower Act*. The requirements of that *Act* were not complied with and the male appellant was not estopped from asserting his rights under it.

Per Kellock and Locke JJ.: No question of dower rights was involved. The male appellant undertook to put himself into a position to convey and his wife must be taken to have undertaken to do whatever was necessary on her part to enable the husband to convey.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment at trial and holding that the agreement for sale and exchange of property was enforceable.

N. D. Maclean Q.C. for the appellants.

G. H. Steer Q.C. and *G. A. C. Steer* for the respondents.

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

ESTEY, J.:—Under date of September 22, 1949, Thomas Wass and William Pinsky entered into the following agreement:

Thomas Wass is the owner of E½ 20 and S.E. 28 both in Twp. 48, Rge 13-4 and agrees to sell the same Wm. Pinsky for $5,000 clear of encumbrances and taxes.

Wm. Pinsky is the owner of dwelling and lots in the City of Edmonton described as follows: Lots 10 and 11, in Block 106, King Edward Subdivision Plan 1.1 and agrees to sell the same to Thos. Wass for $7,500 clear of encumbrances and taxes.

(1) [1951] 3 D.L.R. 455; 2 W.W.R. (N.S.) 49.

Thos. Wass will pay Wm. Pinsky the difference between $7,500 and $5,000, namely $2,500, in cash and will in addition lend Wm. Pinsky the sum of $800 (so that Wm. Pinsky will have enough cash to pay off encumbrances or agreement for sale against the above described lots). For this reason an agreement for sale will be given by Thos. Wass to Wm. Pinsky covering above described farm lands under which the balance owing will be set out as being the sum of $800 with interest at 5 per cent and the whole payable Nov. 1, 1950. Transfer to be given when the said balance under said agreement is paid.

Wm. Pinsky to give transfer of above lots at time Thos. Wass gives said agreement for sale.

Each party to deposit the sum of five hundred ($500) dollars in accepted bank cheque on the signing hereof and to forfeit the same in case he changes his mind or for other reason cannot complete contemplated deal.

Wm. Pinsky
His Wife Anna Pinsky

T. Wass
His Wife Ella Wass

On October 19 the parties exchanged possession of the aforementioned properties. On October 25 the appellant William Pinsky notified the respondent Thomas Wass that he was withdrawing from the agreement. Wass then took the position which he has maintained throughout that once the respective parties took possession the provisions of the last clause (hereinafter called the escape clause) could not be invoked.

The appellant William Pinsky thereafter brought an action alleging fraudulent misrepresentation and asking that the agreement be declared null and void and, in the alternative, that he had a right to withdraw under the escape clause and consequential relief. The respondent counterclaimed for specific performance.

When it was later discovered that the appellant Anna Pinsky had been, at all times material hereto, owner of lots 10 and 11 a second action was brought by both appellants against both respondents in which, inter alia, it was alleged that the appellant Anna Pinsky was at all times the owner of lots 10 and 11 referred to in the agreement and that the *Dower Act* (1948 S. of A., c. 7) had not been complied with and, therefore, the agreement was null and void. These actions were tried together.

The learned trial judge found that there had been no fraudulent misrepresentation. This was affirmed in the Appellate Division (1) and is not an issue in this appeal.

(1) [1951] 3 D.L.R. 455; 2 W.W.R. (N.S.) 49.

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Estey J.

The appellants here contend that under the escape clause they were entitled to withdraw from the agreement and further that in any event the agreement is null and void because of non-compliance with the *Dower Act*.

As to the escape clause the learned trial judge stated:

> I have come to the conclusion that the clause must be given literal recognition, that the Pinskys before completion changed their minds as the agreement permitted them to do, and that their demand for the house property should have been acceded to.

Chief Justice O'Connor agreed. The other learned judges of the Appellate Division, upon the construction of this clause, agreed with Mr. Justice W. A. Macdonald who, after stating that the agreement would not be completed until November 1, 1950, continued:

> I am unable to conclude that the agreement as a whole means that each party may go on diligently fulfilling his obligations under its terms, only to find in the end that the whole deal has collapsed by virtue of the withdrawal clause. The agreement must be read as a whole, and this clause must be reconciled insofar as reconciliation is possible with the other provisions of the agreement. It is conceded that on the date of the agreement and thereafter so long as matters remained in statu quo either party was free to withdraw and to put an end to the deal. But I do not think this clause enables either party to continue to affirm the agreement and to take benefits under it and still to retain the right to repudiate it. Once a definite step is taken by the parties in part performance of its terms and the continued existence of the agreement is recognized in this manner, then and thereafter the withdrawal clause ceases to have any effect. Such a step took place when the parties exchanged possession and in so doing each elected to be bound by the agreement. The validity of the withdrawal clause and of the agreement as a whole will be dealt with later.

This agreement must be read and construed in relation to the position in which the parties found themselves at the time of its execution and in this regard the evidence is not contradictory. An important circumstance was that Thomas Wass would not be in a position to pay the $2,500 and the loan of $800 until he had sold his grain and cattle. The date of this sale being uncertain, by common consent of the parties a date for the completion of this agreement was not inserted.

The agreement contemplates that it would be completed by the loan of $800, the removal of the encumbrances from lots 10 and 11, the payment of $2,500, the transfer of lots 10 and 11 and an agreement for sale in respect of the farm

for the sum of $800 to be paid November 1, 1950. When all this was done the contract was completed.

I am in agreement with the learned judges who state that this escape clause must be read and construed with the agreement as a whole, but, with great respect, I cannot agree that November 1, 1950, is the date fixed for completion of the contract. On the contrary, the terms of this contract, in the fall of 1949, after Wass had raised the necessary money and the items therein specified had been completed, would be carried out. These items would include an agreement relative to the $800 to be paid on November 1, 1950. This latter agreement, however, while arising out of the contract here in question, would itself constitute another and different contract. The parties had provided that withdrawal might take place under the escape clause at any time up to the date for the completion of the aforesaid items. It would, therefore, appear that the appellants exercised their right to withdraw well within the prescribed time.

It is contended that the exchanges of possession on October 19 and the transfer of the gas, water, light and telephone accounts in Edmonton from appellants to respondents constituted an election, or created an estoppel which prevented either party having recourse to the escape clause. Counsel for the respondents contends that the election is here similar to that of an infant upon becoming of age or a defrauded party upon attaining knowledge of the fraud. The essential difference is, however, that the law places a duty upon such an infant and the party defrauded to make an election upon the happening of the events mentioned, while in this case the contract gave to each party a right to withdraw prior to the completion of the agreement. In the exchanges of possession they were acting in accord with their intention to carry out the contract, indeed the same intention with which they entered into the agreement on September 22 and transferred the post office box at Viking from respondents to appellants. This is not a case where an obligation rested upon either party to do anything in furtherance of their intention to carry out the contract, but whatever they might do they knew was subject to the terms of their contract, including the right to withdraw.

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There is no misrepresentation here present upon which an estoppel might be founded. Each party went into possession on October 19 before Wass had completed his sale and, therefore, before the contract was completed. They did so apparently for their own convenience and with full knowledge of their contractual rights to withdraw. It is in principle similar to that of *Toronto Electric Light Company* v. *Toronto Corporation* (1), where the issues raised concerned the right of the city to remove poles of the Electric Light Company, including those erected by it with the implied consent of the city. The contention that the city, having impliedly consented to the erection of certain poles, could not remove them was dismissed, with the statement at p. 99:

> No estoppel arises in this case, as there is no evidence whatever that both the contracting parties were not fully aware of their respective legal rights.

I am equally of the opinion that the appellants succeed by virtue of the provisions of the *Dower Act 1948* (1948 S. of A., c. 7). The Legislature of Alberta in 1917 enacted the first *Dower Act*. It is unnecessary to review the history of that *Act* and subsequent legislation, as in 1948 the then dower legislation (1942 R.S.A., c. 206) was repealed and the Legislature, in enacting a new *Dower Act* (1948 S. of A., c. 7), adopted a somewhat different and more comprehensive approach. While the prevention of the disposition of a homestead by a married person without the consent of that married person's spouse remains the intent and purpose of this dower legislation, the statute of 1948 contains many new features. Dower rights are now given to the husband as well as the wife and for the first time these are specifically defined.

The material part of the definition of dower rights reads as follows:

> 2. In this Act, unless the context otherwise requires,—
>
> (b) "Dower rights" means all rights given by this Act to the spouse of a married person in respect of the homestead and property of such married person, and without restricting the generality of the foregoing includes,—
>
> (i) the right to prevent disposition of the homestead by withholding consent;

(1) [1917] A.C. 84.

This definition of dower rights, by including the words "without restricting the generality of the foregoing," discloses an intention not to restrict the spouse to the remedies therein specified. It was never the intention of the Legislature that, though withholding consent in writing and filing a caveat under s. 9, the spouse must then await developments. The creation of a present interest, while the position of the parties remains as in this case, supports an action, such as here brought, for a declaration that the agreement is unenforceable and for an order that possession be restored.

Section 3 expressly prohibits the married person making a disposition of the homestead without the consent in writing of the spouse.

> 3. (1) No married person shall make any disposition by act inter vivos of the homestead of the married person whereby any interest of the married person shall or may vest in any other person at any time during the life of the married person or during the life of the spouse of such married person living at the date of the disposition, unless the spouse consents thereto in writing or unless a judge has made an order dispensing with the consent of the spouse as hereinafter provided for.
>
> (2) Every married person who makes any such disposition of a homestead without the consent in writing of the spouse of such married person or without an order dispensing with the consent of the spouse shall be guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding two years.

The opening words of this s. 3 specifically prohibit "any disposition by act inter vivos of the homestead of the married person . . . unless the spouse consents thereto in writing . . ." Then in s.-s. (2) provision is made for the imposition of a penalty when any married person violates the provisions of s.-s. (1). This direct prohibition, together with the provision for a penalty, makes the agreement legally unenforceable at the instance of the married person. Indeed, under the general rule, the contract would be void. That, however, is a matter of construction, as stated by Viscount Haldane in *Cornelius* v. *Phillips* (1):

> These words do not appear to be ambiguous . . . So standing they are clear, and they prohibit, and therefore make void, any contract which contravenes them . . . There might have been inserted in the statute a special context which would have modified the application of the general rule, but there is nothing in the actual context to exclude the ordinary result which follows in law when a statutory prohibition is disregarded.

(1) [1918] A.C. 199 at 211.

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There is here present, in the actual context, a clear intention that the agreement shall not be void but contemplates that the agreement may be carried out and a transfer pursuant thereto registered in the Land Titles Office; that upon such registration the land shall be no longer a homestead (s. 4(2) (1)) and thereafter the married person shall be liable to the spouse in damages (s. 12(1)) which, when not recovered, may be satisfied from the assurance fund (s. 2(*b*) (iii)). These sections indicate that the Legislature intended the agreement should be voidable rather than void and emphasize that the position of the spouse prior to registration is quite different from that after registration.

In the more usual case the spouse would not be a party to the disposition. In this case William Pinsky, under the belief that he was the owner of lots 10 and 11, was a party to the agreement. Throughout he acted only after consultation with his wife and, once it was ascertained that she was the owner, it has been, quite properly I think, accepted throughout this litigation that whatever he did was as her agent. In the result, however, I do not think that alters the position in law. The statute requires (s. 6) that the spouse, in this case William Pinsky, must evidence his consent in writing and acknowledge, apart from his wife, that he was aware of the nature of the disposition; that he had a life estate in the homestead and the right to prevent its disposition; that he consented for the purpose of giving up his life estate and other dower rights and that he did so freely and voluntarily, without any compulsion on the part of the married person. This requirement of the statute was not complied with, nor does the evidence establish any basis for holding that he is estopped from asserting his dower rights. There is no evidence that he was aware of his dower rights; in fact, throughout they were never mentioned. In these circumstances William Pinsky, as spouse, is not estopped from the insistence upon his dower rights.

Mrs. Pinsky deposes that the premises described herein as lots 10 and 11 were her home and that the basement and rooms in the upstairs had been rented "off and on." This evidence is not sufficient to justify a conclusion that these premises are not her homestead. The evidence discloses that William Pinsky owned a farm, but he states positively that he had lived at these Edmonton premises

four or five years. Under these circumstances the contention that this is not the homestead of Anna Pinsky and that William Pinsky is not entitled to dower rights therein cannot be maintained.

The agreement in writing specifically provided that both agreed to sell their respective properties. While Pinsky agreed to transfer his property, Wass undertook to transfer his property and pay an amount of money. With great respect to the learned judge who expressed a contrary view, this writing would appear to constitute an "agreement for sale" and, therefore, a disposition within the meaning of s. 2(*a*).

The appeals should be allowed with costs here and in the Appellate Division. No question was raised as to the learned trial judge's direction that the respondents might retain the $500 and his judgment should be restored, with para. 5 thereof varied to read as follows:

AND IT IS FURTHER ORDERED AND ADJUDGED that the claim of the plaintiffs based upon misrepresentation be dismissed.

TASCHEREAU J.—I do not think that for the determination of these appeals, it is necessary to consider the question raised as to the application of the *Dower Act*.

For the reasons given by my brothers Kellock and Estey on the effect of the "Escape Clause", I would allow the appeals, and restore the judgment of the trial judge with costs here and in the court below.

The judgment of Kellock and Locke, JJ. was delivered by:—

KELLOCK, J.:—Two points arise in this appeal. In the first place, it is said on behalf of the appellants that as the Edmonton premises were in fact the property of the appellant, Anna Pinsky, the appellant William Pinsky was entitled to dower rights, and that as the agreement of September 22, 1949, did not comply with the provisions of the relevant statute, 1948, c. 7, the respondents must fail.

In my opinion this statute does not afford any assistance to the appellants. Under the agreement in question, William Pinsky contracted as "owner". As at that time the title was in his wife, he was in fact contracting to put himself into a position to convey. The appellant Anna Pinsky, by her execution of the document, must be taken

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to have been undertaking with the respondents to do whatever would be necessary to enable her husband, at the proper time, effectively to convey. Accordingly, in my opinion, no question of dower rights on the part of the male appellant is involved. This is the only point taken with respect to the statute.

The remaining question arises under the so-called "escape clause", which reads as follows:

> Each party to deposit the sum of five hundred ($500) dollars in accepted bank cheque on the signing hereof and to forfeit the same in case he changes his mind or for other reason cannot complete contemplated deal.

Under the earlier terms of the agreement, the respondent Thomas Wass agreed (1) to pay to appellant William Pinsky $3,300 (of which $800 was to be a loan), and (2) to enter into an agreement of sale of the Wass farm to the male appellant for $800, payable November 1, 1950, with interest at 8 per cent. Concurrently with the execution and delivery of this agreement of sale, Pinsky was to execute and deliver to Wass a transfer of the Edmonton property. Pinsky, however, was not to receive a transfer of the farm until the monies called for by the agreement of sale should be paid.

No time was fixed by the written agreement for the payment of the $3,300 and the execution and delivery of the documents, but it is common ground that this was to occur only after the respondent Wass had been able to sell his farm, stock and implements. Thus, the "contemplated deal" would be completed. The evidence of the male respondent is perfectly clear on this point. He deposed also that he was depending upon the sale for the money to enable him to complete. It is, therefore, to the period between the execution of the agreement of September 22, 1949, and the date of completion to which the escape clause relates. At any time within this period either party might, according to the express term of the contract, withdraw.

Before the sale of the farm stock and implements occurred, the respondent Ella Wass and her son, on October 19, moved into the Edmonton house, and the Pinskys, with their son-in-law, moved out to the farm, but the respondent Thomas Wass continued to live there also. The day following the execution of the agreement of September 22,

the Pinskys, who had spent the night on the Wass farm, changed over the rural mail box from the respondents to the appellants and when the respondent Ella Wass and her son moved into the city house, the city gas and water services were changed over to Wass.

It appears that the Pinskys had intended that the farm should be operated by their son-in-law, a veteran, who, following upon the execution of the agreement of September 22, applied to a department of the provincial government for a loan upon the farm under certain legislation pertaining to veterans. The loan, however, was refused by the government official in charge on the ground of the poorness in quality of the land. On learning this, the Pinskys, on October 25, the day preceding the sale, advised the male respondent that they declined to go on with the transaction and their reason for so doing. On the 27th of October, the day after the sale of the stock and implements, they and their son-in-law left the farm.

It is argued on behalf of the respondents that it was then too late for the Pinskys to attempt to avail themselves of the escape clause. Before considering this contention, it may be observed that had there been no change of possession at all, but had Wass nonetheless sold his stock and implements, the appellants might still, under the term of the agreement, have declined to complete. In such case, the only recourse of Wass would have been to retain the appellants' deposit of $500. Such a situation would have been much more prejudicial to Wass than was the actual situation when the appellants advised him of their change of intention. At that time he had not carried out his proposed sale and, had he seen fit, could have cancelled it.

Had the sale, when it did occur, failed to produce the necessary monies to enable Wass to carry out the transaction, it is difficult to see how the express right given him by the contract to decline to go on "in case he . . . for other reason *cannot* complete" would no longer have availed merely because, in the expectation that no such difficulty would arise, he had allowed the Pinskys on to the farm and had placed his wife and son in the city house. If that be so in the case of the respondents, there would seem to be no more reason why the same result should not

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follow in the case of the appellants when a situation arose which they had not expected. All this, it seems to me, is covered by the express term of the agreement between the parties. In my opinion the clause must be given its literal effect, and should be construed as a provision designed to meet all eventualities, the only consequence of failure to complete being the loss of $500.

The problem which arises in the case at bar is not without analogy to that arising under the implied condition that a vendor in the absence of something to the contrary must make out a good title. In the present case the time within which to comply with that condition would be at any time prior to the date of closing.

As stated in the 8th edition of Dart, p. 443: "Possession, if taken . . . with the consent of the vendor is not in itself, as a general rule, any waiver of the purchaser's right to a good title. Spragge, V.C., in *Mitcheltree* v. *Irwin* (1), puts the matter thus at 542:

> The mere taking of possession by a purchaser is not necessarily a waiver of the right to an inquiry as to title. The Court will not hold it to be so unless satisfied that it was the intention of the purchaser to take the land without such inquiry; . . .

In my opinion, it is at least equally the case that under a clause such as that here in question the mere taking of possession is not sufficient to establish that the respondent Wass intended to preclude himself from the right to refuse to complete if it should turn out that he did not receive sufficient monies from the sale of his stock and implements to enable him to do so. If that be so, the appellants equally are not precluded from relying upon a "change of mind" which the agreement expressly provides could occur at any time up to the actual exchange of documents.

The appeal should be allowed and the appellants should have judgment for the relief granted by the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Maclean & Dunne.*

Solicitors for the respondent: *Milner, Steer, Dyde, Poirier, Martland & Layton.*

(1) (1869) 13 Gr. 537.

ROGER LIZOTTE .....APPELLANT; 1953

AND *Mar. 30, 31 *Apr. 15

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Murder—Charge of trial judge—Whether defence theory adequately put to jury—Reduction from murder to manslaughter—Criminal Code, s. 1024(1).

At his second trial for murder, ordered by this Court ([1951] S.C.R. 115), the appellant was again found guilty. The crime was committed in June 1947. The deceased was returning home from the City of Quebec in a taxicab driven by the appellant. He was in the back seat with two other passengers, one Vallières and one Légaré. Another passenger was in the front seat. There was some beer drinking during the ride and at one time the deceased, who had become noisy and quarrelsome, threatened to strike Légaré with a bottle. The car was stopped; the appellant and the three rear passengers got out; the deceased was then hit with a bottle by both Vallières and Légaré and when he was on the ground and unconscious, the appellant struck him with his fists and feet. He was then put on the floor of the car where he remained without making a sound, except for one prolonged sigh, until the appellant, with or without the help of Vallières and Légaré, is alleged to have thrown him in a river. The theory of the Crown was that the deceased died as a result of the blows struck during the fighting and not by drowning. The appellant's conviction was affirmed by a majority in the Court of Appeal for Quebec.

Held: The trial judge, by omitting to review that part of the evidence which showed that the deceased could have died before he was thrown in the river, left the jury with the impression that the deceased died by drowning rather than as the result of the blows. The theory of the defence was, therefore, not adequately put to the jury, and the conviction should be quashed.

Held further: Under the exceptional circumstances of this case, and specially in view of the theory on which the case for the Crown was based, a verdict of manslaughter should be substituted for the jury's verdict.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Pratte and Hyde JJ.A. dissenting, the appellant's conviction upon a charge of murder. Vallières and Légaré, who were alleged to have participated with the appellant in the commission of the crime, pleaded guilty to a charge of manslaughter after a verdict of murder, pronounced against Légaré, had been quashed by the Court of Appeal for Quebec.

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

(1) Q.R. [1952] K.B. 326.

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A. Chevalier Q.C. for the appellant.

N. Dorion Q.C. and P. Flynn for the respondent.

The judgment of the Court was delivered by

TASCHEREAU, J.:—L'appelant Roger Lizotte a été accusé d'avoir assassiné Gérard Beaumont dans la nuit du 14 au 15 juin 1947. Le crime aurait été commis au cours d'un voyage entre Québec et St. Gérard de Magella, conjointement avec Maurice Légaré et Auguste Vallières. Des plaidoyers de "coupables de manslaughter" de la part de Légaré et Vallières ont été acceptés par la Couronne après qu'un verdict de meurtre, prononcé contre Légaré, eût été cassé par la Cour du Banc de la Reine. Tous deux ont été respectivement condamnés à huit années de pénitencier. Quant à l'appelant, qui a été également une première fois trouvé coupable de meurtre, il a aussi obtenu un nouveau procès par jugement de cette Cour (1), puis condamné une seconde fois. Il appelle maintenant du jugement de la Cour du Banc de la Reine (2) qui a refusé son pourvoi, MM. les Juges Pratte et Hyde dissidents.

Le soir du 14 juin 1947, l'appelant, domicilié à Val St-Michel, et qui est conducteur de taxi, est descendu à Québec en compagnie de Maurice Légaré, Auguste Vallières et Armand Demers, trois bûcherons employés à la Rivière aux Pins, près du Lac St-Joseph. Après qu'ils eussent bu chacun quelques bouteilles de bière dans une taverne locale, les compagnons se sont séparés, pour se retrouver vers 11 heures P.M. à un endroit convenu sur la rue St-Roch. A ce lieu de rendez-vous, il y avait cependant une cinquième personne, Gérard Beaumont, qui devait être la victime de cette malheureuse tragédie. La preuve ne révèle pas clairement si Beaumont est monté volontairement dans la voiture de Lizotte, ou s'il a été contraint par force de le faire. Mais à tout événement, les cinq voyageurs sont repartis vers 11 heures P.M. se dirigeant vers le chemin de Valcartier, pour apparemment gagner leurs domiciles respectifs.

En route, il y eut de nouvelles consommations de bière, et Beaumont, sans doute excité par les liqueurs alcooliques, était tapageur et chantait. Au lieu de se calmer à la demande des autres passagers, il menaça de frapper Légaré

(1) [1951] S.C.R. 115. (2) Q.R. [1952] K.B. 326.

d'une bouteille, et ce n'est que grâce à l'intervention de Vallières qu'il ne donna pas suite à son projet. Il semble que d'un commun accord, Lizotte, Légaré et Vallières ont voulu faire un mauvais parti à Beaumont, car Lizotte a arrêté sa voiture, il en est descendu, de même que Légaré et Vallières. On en fit sortir Beaumont, et là sur le bord du chemin conduisant à St-Gérard, Vallières et Légaré ont tous deux frappé Beaumont d'un coup de bouteille sur la tête. Alors qu'il gisait à terre, sans connaissance, Lizotte lui appliqua des coups de poing dans le visage ainsi que des coups de pied sur le corps et dans la région de la gorge. On le plaça ensuite sur le plancher dans la partie arrière de la voiture, où il demeura immobile, et sans murmurer une seule parole. Lizotte se rendit à St-Gérard prendre de l'essence. En arrivant sur une route boisée de chaque côté, Lizotte arrêta la voiture, et avec l'aide de Légaré et Vallières, descendit Beaumont, lui enleva une partie de ses vêtements, et on lui enleva la somme de $38 qu'il portait sur lui. Les vêtements furent jetés dans le fossé, et retrouvés plus tard. Quelque temps avant d'arriver à St-Gérard, Beaumont, qui dans le fond de la voiture était toujours demeuré immobile, rendit un soupir prolongé.

On revint ensuite dans la direction de Québec, et à un endroit du côté Nord de la Rivière St-Charles, non loin de la ville, "Le Remous des Hirondelles", Lizotte arrêta de nouveau, et seul, ou avec l'aide de Légaré et Vallières, (la preuve est contradictoire sur ce point) et sous prétexte de "laver" Beaumont, le transporta vers le bord escarpé de la rivière, et en revint sans la victime environ dix minutes plus tard. Il recommanda aux autres "de ne pas parler", et que "l'affaire finirait là". Huit jours plus tard, on retrouva le corps de Beaumont dans les eaux de la Rivière, près de la ville de Québec. Ce n'est qu'un an plus tard, quand les vêtements de Beaumont furent retrouvés dans le bois, que l'on commença l'enquête sur cette mort mystérieuse, qu'à l'origine on avait crue accidentelle.

J'ai cru nécessaire de faire ce résumé des faits, afin de bien faire saisir la conclusion à laquelle je suis arrivé.

Les principaux griefs d'appel de Lizotte sont les suivants:

1) Dans son adresse aux jurés, le juge présidant au procès aurait omis de leur signaler, comme il aurait dû le faire, certains éléments de preuve tendant à démontrer le moment où Beaumont est mort.

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2) Ce n'est pas le paragraphe D de l'article 259 (Code Cr.) qui s'applique, mais bien le paragraphe B, sur lequel les jurés n'ont pas été légalement instruits.

3) A défaut d'acquittement, seul un verdict de "manslaughter" pouvait être rendu par un jury correctement informé.

Le premier grief, s'il est fondé, est celui qui à notre sens doit déterminer le sort de cet appel. En effet, si Beaumont est mort parce qu'il aurait été jeté dans la rivière par Lizotte, ce dernier serait indiscutablement coupable de meurtre. Au cours de sa charge aux jurés, le juge présidant au procès, après avoir récité certains faits saillants de cette triste aventure, semble avoir omis quelques éléments de preuve, essentiels pour arriver à une juste conclusion. Sans doute, il n'est pas impératif que le juge décrive en détail toutes et chacune des circonstances qui ont entouré un crime, mais encore faut-il qu'il place devant le jury tout ce qui est révélé par les témoignages, soit de la Couronne ou de la défense, qui peut être un moyen sérieux de disculper l'accusé. (*Le Roi* v. *Azoulay* (1)); (*Le Roi* v. *Kelsey* (2)); (Vide Lord Goddard in *Dereck Clayton-Wright* (3)).

Avec déférence, nous ne croyons pas que ces exigences de la loi aient été observées, et que la théorie de la défense ait été soumise aux jurés, comme elle aurait dû l'être. Il semble incontestable que la prépondérance de la preuve démontre que Beaumont est mort bien avant qu'il ne soit jeté dans la Rivière St-Charles. Légaré, Vallières, Demers, témoignent tous que Beaumont, après les coups qui lui furent portés, gisait immobile dans le fond de la voiture et qu'il ne prononçait aucune parole. On n'entendait pas sa respiration, sauf le long soupir qu'il rendit en arrivant à St-Gérard, et qui fut probablemet son dernier. Aucune apparence de vie ne s'est manifestée, lorsque le corps inerte a été replacé dans la voiture après l'assaut dont il fut la victime, pas plus que quand on l'a sorti de nouveau pour le dévaliser, ou pour plus tard le jeter dans la rivière. C'est bien Lizotte qui, réalisant ce qui était arrivé à Beaumont, dit à Demers, avant de se diriger vers la Rivière St-Charles, "Tu vas nous aider Ti-blond, ou bien tu vas mourir *toi aussi.*"

(1) [1952] 2 S.C.R. 495. (2) [1953] 1 S.C.R. 220.
(3) (1948) 33 C.A.R. 22 at 29.

La preuve médicale semble être au même effet. Le Docteur Fontaine qui a examiné la victime, n'a pas constaté de fracture du crâne comme résultat des coups de bouteille, mais paraît être d'opinion qu'il est possible que la mort soit la conséquence d'une hémorragie interne, qui aurait provoqué un étouffement. D'ailleurs, la Couronne n'a pas prétendu que Beaumont était mort noyé. Au contraire, elle a prétendu qu'il était mort des coups qu'il avait reçus, et que ce n'est qu'un cadavre qui a été jeté à la rivière.

Ce point de vue n'a pas été soumis aux jurés. A sa lecture, l'ensemble de la charge ignore entièrement le témoignage du Docteur Fontaine, et ne met pas en relief le fait de la mort probable avant que Beaumont ne soit jeté dans la rivière. L'impression laissée aux jurés a sans doute été que la victime est morte noyée par l'acte *volontaire et prémédité de Lizotte, et non comme résultat de la querelle qui a* originé dans le taxi sur la route de St-Gérard. Nous croyons que cette insuffisance d'instruction aux jurés, a contribué dans une large mesure à la sévérité du verdict qui a été prononcé.

Il ne nous paraît pas nécessaire de déterminer si, comme les parties l'ont contradictoirement prétendu, c'est le paragraphe (B) sur lequel les jurés n'ont pas été instruits, ou le paragraphe (D) de l'article 259 (C. Cr.), qui doit trouver son application. Que ce soit l'une ou l'autre de ces dispositions qui régisse le présent cas, nous croyons que le verdict ne peut être maintenu et doit être cassé.

Nous sommes d'avis, en tenant compte des faits particuliers de ce procès, et spécialement de la théorie sur laquelle la Couronne a basé sa cause, que les fins de la justice seront bien servies, si cette Cour, en vertu de l'autorité qui lui est conférée par l'article 1024(1) du *Code Criminel,* rend une ordonnance substituant un verdict de "manslaughter" à celui de meurtre qui a été prononcé. (Vide: *Manchuk* v. *Le Roi* (1)); (*Lizotte et Savard* v. *Le Roi* (2)).

L'appelant, Légaré et Vallières ont été arrêtés au mois d'août 1948, et détenus en prison. Légaré et Vallières ont été tous deux condamnés pour "manslaughter" à 8 ans de pénitencier au mois de mars 1952. Il s'ensuit que l'appelant est incarcéré depuis près de 5 ans, et nous croyons en conséquence, étant donné les diverses circonstances de cette

(1) [1938] S.C.R. 341. (2) [1946] S.C.R. 20.

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cause, et vu le sort qui a été réservé aux autres qui ont participé à ce crime, qu'une sentence de 8 années de pénitencier, à compter du présent jugement, serait juste et adéquate.

Nous sommes d'opinion de maintenir l'appel, de casser le verdict de meurtre qui a été rendu, d'y substituer celui de "manslaughter", et de condamner l'appelant à huit années de pénitencier, à compter de la date du présent jugement.

Appeal allowed; judgment of the Court of Appeal set aside; direction that the verdict of murder be quashed and a verdict of manslaughter entered; appellant sentenced to imprisonment for eight years from the date of the present judgment.

Solicitor for the appellant: *Alexandre Chevalier.*

Solicitor for the respondent: *Noël Dorion.*

HER MAJESTY THE QUEEN (RESPONDENT) ..... APPELLANT;

1952

*Oct. 22, 23, 24

1953

*April 15

AND

THE HONOURABLE THE SECRETARY OF STATE OF CANADA, acting in his capacity as Custodian under the Revised Regulations Respecting Trading with the Enemy (1943) (PETITIONER) ..... RESPONDENT;

AND

ALUMINUM COMPANY OF CANADA LIMITED (RESPONDENT) .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patents—Reasonable compensation for use of invention—Relevancy of agreement re use of improvements to patents and extension of term of licence—The Patent Act, 1935, S. of C. 1935, c. 32, s. 19—Orders in Council P.C. 6982 of 1940, P.C. 11081 of 1942 and P.C. 449 of 1944. Evidence—Jurisdiction of Exchequer Court to admit new evidence when sitting as a Court of Appeal—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 87(c), 88 (2), (3), Exchequer Court Rule 30.

The respondent, Aluminum Company of Canada Ltd. (Alcan) entered into an agreement in 1937 with Det Norske Aktieselskab for Elektrokemisk Industri, a Norwegian corporation, for the use until 1953, under a non-exclusive licence subject to royalty payments, of the latter's Canadian patents covering the Soderberg system for manufacturing aluminum. After the outbreak of war in 1939, due to the great increase in production, negotiations were carried on for a reduction in the royalty payments and in 1941 it was agreed that the licence should be changed from a non-exclusive to an exclusive one and that the royalty rate be reduced by one third where annual production exceeded 40,000 metric tons up to an excess of 30,000 tons and be further reduced by one half if production exceeded that amount. Near the end of 1942 further negotiations were begun seeking a ceiling on the amount of royalties but no agreement had been reached when in March 1943 the Deputy Minister of Munitions & Supply (acting under the powers contained in Orders in Council P.C. 6982 of 1940 and 11081 of 1942) notified Alcan no further royalty payments were to be made on orders placed with it by or on behalf of the Crown but that (as provided by the said Orders) the Crown would indemnify Alcan as to any claim made against it for non-payment of royalties under the terms of any licensing agreement. On the occupation of Norway by the enemy the respondent, The Secretary of State of Canada, as Custodian under the Revised Regulations respecting Trading with the Enemy, became vested with the patents in question and, as provided by s. 19 of the *Patent Act, 1935*

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

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and the above cited Orders and P.C. 449 of 1944, petitioned the Commissioner of Patents to name a reasonable compensation for the use of the patents by the Crown. The Commissioner found that such compensation was one-fortieth of a cent for each pound of aluminum produced under the process with a limit of $100,000 for any one year. On appeal to the Exchequer Court the President, after hearing evidence of a witness who had not been available at the time of the hearing before the Commissioner, set aside that award and fixed compensation at the rate agreed upon between the parties in 1941, subject to a ceiling of $215,000 in any twelve-month period.

Held: that further evidence was properly admitted under the power vested in the Court by r. 40 of the Exchequer Court rules.

Held: also, that the evidence disclosed that there had been no agreement between the parties that the maximum total annual payment should be $215,000 and that while this amount had been finally proposed by Elektrokemisk the amount suggested was in payment of rights which included the right to use any improvements made or acquired by the patentee during the terms of the agreement without further payment and the right to the extension of the term of the licence during the life of any such patents. The value of this right was not relevant to the inquiry which concerned only the use of the five patents.

Held: further, that the principle applicable in settling compensation under the Orders in Council is the same as in proceedings under s. 19 of the *Patent Act, 1935,* and a fair and reasonable compensation for such user should be such an amount as would be agreed upon between a willing licensor and a willing licensee bargaining on equal terms, but the fact that the country was at war and that accordingly practically the sole customer was the Crown was a matter to be considered in estimating what amount would be so agreed upon. Such an amount here would be one-twentieth of a cent per pound of aluminum produced by the Soderberg system, subject to a ceiling of $175,000 in any one year. *The King* v. *Irving Air Chute Inc.* [1949] S.C.R. 613 referred to.

Judgment of the Exchequer Court [1950] Ex. C.R. 33 reversed in part.

APPEAL from a judgment of the Exchequer Court, Thorson P., (1) allowing an appeal of Respondent, the Secretary of State of Canada, from the decision of the Commissioner of Patents.

E. G. Gowling, Q.C. and *G. F. Henderson* for the appellant.

H. Gérin-Lajoie, Q.C. for the Secretary of State of Canada, respondent.

G. Geoffrion for the Aluminum Company of Canada Limited, respondent.

(1) [1950] Ex. C.R. 33.

The judgment of the Chief Justice, Kerwin, Taschereau, Locke, Cartwright and Fauteux, JJ. was delivered by:—

LOCKE J.:—It is common ground that the claim advanced by the Secretary of State on behalf of Det Norske Aktieselskab for Elektrokemisk Industri (herein referred to as Elektrokemisk) is in respect of the use of five only of the Canadian patents mentioned in the licensing agreement entered into between Elektrokemisk and the Aluminum Company of Canada (to be called Alcan hereinafter). These are No. 264997 dated October 12, 1926, and granted to Elektrokemisk as the assignee of Carl Wilhelm Soderberg; No. 287700 dated March 5, 1929, and granted to it as the assignee of Jens Westley; No. 341667 dated May 15, 1934, granted to it as assignee of Pierre Torchet; No. 346868 dated February 18, 1934, relating to a further invention of Torchet, which patent by assignment is vested in Elektrokemisk and No. 383238 dated August 8, 1939, and granted to it as the assignee of Jean-Louis Legeron. The nature of the inventions described in these letters patent and the manner of their use in the manufacture of aluminum have been described in the judgment appealed from and it is unnecessary to restate them.

Long prior to the date when the first of these patents was obtained in Canada, Soderberg, a Norwegian, together with Dr. Mathias O. Sem, had carried on experiments with a view to developing a satisfactory self-baking electrode for use in electric furnaces. Dr. Sem, who gave evidence on the hearing of the appeal before the learned President of the Exchequer Court but who was not available at the time of the hearing before the Commissioner of Patents, was in the year 1914 in the employ of Elektrokemisk as assistant to Soderberg, the Chief Metallurgist of the Company. It was in that year, owing to war conditions, very difficult to obtain pre-baked carbon electrodes and, in an endeavour to develop a self-baking electrode, Soderberg, apparently with the assistance of Sem, developed a method which later became the subject of Canadian Patent No. 215697, the application for which was filed on February 14, 1918, and which was granted on February 7, 1922 to Elektrokemisk as assignee of Soderberg. The method described in the specification was to make a self-baking carbon

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Locke J.

electrode by inserting in the electrode paste, which consisted of crushed coke and calcined anthracite together with a binder, an iron rod through which the electric current was carried into the mass. These efforts, according to Sem, were not directed to the recovery of aluminum but for the purpose of using the electrodes in a smelting furnace, as used for the production of calcium carbide, ferro-alloys and the like, and the invention was not tried for the production of aluminum anywhere. The method was a failure and apparently would not work for any purpose.

The efforts to develop a satisfactory self-baking electrode were, however, continued and on September 23, 1919, an application was made for a Canadian patent for an improved method by enclosing the paste within an iron mantel having ribs or fins of iron which projected into the paste and conveyed the electric current to the electrode, and for which Patent No. 216092 issued on February 21, 1922. Electrodes so made proved successful in smelting furnaces but when tried for the production of aluminum were, according to Dr. Sem, found to be of no value since the use of the iron casing introduced too much impurity into the aluminum. In addition to the inventions described in these two patents, Elektrokemisk had on May 31, 1921, obtained Canadian Patent No. 212181 for a clamping device which pressed on the iron casing of the electrode and enabled the electrode to be lowered as it was consumed but which had no function in the baking of the paste.

On July 22, 1924, Elektrokemisk applied as assignee of Soderberg for a further Canadian patent, for a new method of preparing the electrode mass or paste in which the proportion of the binder content was sufficiently high to render the mass liquid and Patent No. 264997 issued in respect of the invention claimed on October 12, 1926.

There was evidence, notably that of Dr. Sem, establishing that these inventions controlled by Elektrokemisk were not effective in the production of aluminum and that this was demonstrated by tests made in the plant of the Aluminum Company of America at Baden in North Carolina in 1924. According to Sem, the equipment and the methods used embodied all the knowledge that Elektrokemisk had of the production of aluminum up to that time, but too much power was consumed, there were impurities

in the aluminum produced and the product could not successfully compete with that produced by the employment of pre-baked electrodes and the trial was abandoned.

Stress has been laid in the argument of the appellant upon the fact that it was possible to produce aluminum by the use of methods protected by Patents Nos. 215697, 216092 and 264997 and the Commissioner of Patents, in determining what was reasonable compensation for the use of the five patents in question, materially reduced the amount awarded by reason of this fact. I am, however, of the opinion that, in the circumstances of the present case, undue weight was attached to this fact.

It was not until the discoveries made by Westley in respect of which Patent No. 287700 was granted and those of Torchet for which Patents Nos. 341667 and 346868 were granted that what may be described as the Soderberg system, for the manufacture and use of self-baked electrodes, became successful in the production of aluminum. Throughout the period during which these various discoveries were made, Elektrokemisk was endeavouring to obtain the acceptance of the methods described in the patents it controlled from time to time by the Aluminum Company of America (referred to in the proceedings as Alcoa), then the largest of all the producers of aluminum on this continent. After the failure of the experiments at Baden in 1924, according to Sem, a further installation was made by Alcoa, after Westley's discovery, and which made use of the invention disclosed in Patent No. 287700, in one of its plants in Tennessee, and in the following four years the method was extensively used but in 1932 Alcoa advised Elektrokemisk that its method could not compete with what were described as European type furnaces which employed pre-baked electrodes. Manufacture was, however, continued for a time on Elektrokemisk agreeing to waive any claim for royalties.

The situation changed, however, completely after Torchet's discoveries which were made in France in the summer of 1932, and for which patents were obtained in that country. According to Dr. Sem, the effect of the employment of the methods described in Canadian Patents Nos. 341667 and 346868 was enormous. The patent rights were acquired by Elektrokemisk and according to Sem, the

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accuracy of whose statement was accepted by the learned President, the successful introduction of the Soderberg system into the aluminum industry started from that time. Thereafter that system, including the methods described in Patents Nos. 264997, 287700 and in the two Torchet's patents, were installed by Alcoa, together with the invention of Legeron referred to in Patent No. 383238, in some, though not all, of their plants. The evidence supports the finding in the judgment appealed from that the employment of these five inventions resulted in the adoption of the Soderberg method throughout by far the greater part of the aluminum industry and that this condition continued up to the time of the hearing.

In determining what is reasonable compensation, it is necessary to examine the terms of the two licensing agreements made between Elektrokemisk and Alcan. The first of these is dated July 14, 1937, and recites that Elektrokemisk had the sole control of eight patents relating to self-baking electrodes and the manufacture thereof (referred to in the agreement as the Soderberg electrode system) and, in addition, some twenty-two patents relating to improvements on Soderberg electrodes. The first patents referred to included Nos. 212181, 215697, 216092 and 264997. In the latter group were Nos. 287700, 341667 and 346868. For the term of the licence which was until June 18, 1953, unless terminated earlier at the option of the licensee, the licensor granted to the latter a non-exclusive licence to make and to use for the production, treatment and manufacture of aluminum only the said patents, together with any patents for improvements which might be acquired by Elektrokemisk, without any addition to the royalty. It was by reason of this provision that Alcan became entitled to the benefit of the invention described in the Legeron Patent No. 383238. The stipulated royalty was 1/10 cent U.S. currency per pound of aluminum, with the proviso that, if the price of gold in New York should during the term exceed the then price of $35 an ounce, Elektrokemisk had the option, by giving written notice at the end of each quarter, to claim as royalty for the next quarter either 1/10 cent per pound or delivery of 11 pounds of aluminum per metric ton of aluminum produced under the licence.

Due to the outbreak of the World War in September, 1939, the demand for aluminum increased tremendously and practically the entire output resulting from Alcan's operations was required for war purposes. Negotiations were carried on between Alcan and Elektrokemisk for a reduction of the agreed royalty and a change agreed upon which was embodied in a letter dated January 27, 1941, addressed to Alcan on behalf of the licensors. This letter stated that, of the patents listed in the preamble to the agreement of July 14, 1937, Patents Nos. 215697, 216092 and 212191 had expired but that four other Canadian patents obtained by Elektrokemisk, including one covering the Elektrokemisk absorption system, had been obtained since the date of the first agreement and were subject to its terms. The non-exclusive licence was changed to an exclusive licence and the rate of royalty was changed. For annual production of 40,000 metric tons the rate was that provided in the original agreement but, for production in excess of that amount up to 30,000 metric tons, the royalty was at the rate of two-thirds of that amount, and for any further annual increase the royalty was reduced by fifty per cent.

On March 23, 1943, the Deputy Minister of Munitions and Supply wrote Alcan informing them that, effective immediately, it was to make no payments by way of royalty or licence fees under the licence agreement, for the purpose of carrying out any contract or order placed with the company by that Department or by any of the Crown Companies, without the approval in writing of the Department. After referring to the Orders-in-Council in pursuance of which the notices were given, the Deputy Administrator said that it was the view of the Department that in many cases the rate of royalty, although perhaps not unreasonable under normal conditions, was altogether excessive having regard to the very substantially increased volume of production resulting from wartime requirements and the purposes for which the patent rights were being used, and gave further detailed instructions as to the manner in which the requirements of the Crown were to be complied with, and agreed on behalf of His Majesty in the right of Canada to indemnify the company against any claim

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which might be made against it in respect of the non-payment of any royalties payable under any licence agreement.

Production of aluminum had continued to increase tremendously and, before the Deputy Minister had intervened, negotiations had been carried on between the parties for a further amendment of the licensing agreement. Near the end of 1942 Alcan had asked Elektrokemisk to consider placing a ceiling on the amount of the royalties and Georg Hagerup-Larssen, who had managed to escape from Norway and was representing Elektrokemisk in North America, after consultation with the representatives of the Norwegian Government, said that his employers were agreeable to fixing such a ceiling and offered to accept $250,000 as such, as the maximum amount to be paid per annum for royalties for the duration of the war. Alcan made a counteroffer of $175,000 but this was not accepted. On May 7, 1943, Hagerup-Larssen, on behalf of his employers, wrote to Alcan from New York offering to fix a maximum annual payment for any calendar year at $215,000, provided that such agreement should be approved by the Alien Property Custodian of Canada. The letter further stated that there were some minor points which would have to be dealt with in any amending agreement. As, however, Alcan had already received the order of the Deputy Minister of Munitions and Supply of March 23, 1943, nothing further was done with the matter. It may be noted that in the reply filed on behalf of the Crown to the petition it was admitted that the schedule of royalties provided by the agreement had been amended by providing a maximum figure of $215,000 but that in the reply filed by Alcan this was denied. The admission on behalf of the Crown was apparently made in error. The evidence showed that no such agreement had been made.

The obligation imposed upon the Crown by Orders-in-Council P.C. 6982 and 11081 is to pay to the owners of these patents such compensation as the Commissioner of Patents reports to be reasonable for their use during the period in question. The decision of the Commissioner is declared to be subject to appeal to the Exchequer Court.

The Commissioner in conducting his inquiry is given all of the powers that are or may be given to a commissioner appointed under Part 1 of the *Inquiries Act*.

The petition addressed to the Commissioner by the Honourable the Secretary of State was filed on June 8, 1944, at a time when the Second World War was still in progress and Norway occupied by the enemy. At the time the inquiry was opened in March 1945 the case for the patent owner was presented without the evidence of Dr. Sem, whose knowledge of the inventions covered by the various patents was very much more extensive than that of any of the available witnesses, owing to his long association with Elektrokemisk. The case for the petitioner was supported by the evidence of Alan N. Mann, a member of the Bar of New York specializing in patent matters, Dr. Bruno Luzatto, an Italian engineer who had had a lengthy experience in the production of aluminum in Europe, and Georg Hagerup-Larssen, an electrical engineer who had been in the employ of Elektrokemisk since the year 1935.

By his report the Commissioner of Patents found that the obligation of the Crown was to pay compensation to the petitioner from October 1, 1941, and that fair and reasonable compensation was 1/40 of a cent for each pound of aluminum produced by the Soderberg process, with a limit of $100,000 for any one year, this to be payable in Canadian currency. The Commissioner, in his carefully reasoned report, noted that Patents Nos. 212181, 215697 and 216092 had expired prior to January 27, 1941, when the amended agreement was made between Elektrokemisk and Alcan and, accordingly, that the inventions disclosed by them might be freely used and expressed the opinion that the five patents in respect of which the proceedings were taken, while being of material value, were less valuable than these three patents which had expired. As between the three expired patents and the other patents to the use of which the licensee was entitled under the two licensing agreements and the five patents, he assigned 75 per cent of the value to the former and 25 per cent to the latter.

Upon the appeal to the Exchequer Court, leave was granted on the application of the petitioner to call Dr. Sem as a witness and his evidence was taken and considered by

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the learned President, together with that taken before the Commissioner of Patents in dealing with the matter. While the matter was contested before the President and has been argued before us, in my opinion the evidence of Dr. Sem was properly admitted under the powers vested in the Court by Rule 30 of the Exchequer Court Rules.

By the judgment delivered in the Exchequer Court from which the present appeal is taken, the decision of the Commissioner was set aside and the compensation awarded on the basis of the amending agreement of January 27, 1941, subject to a ceiling of $215,000 for each of the years 1942, 1943 and 1944 less, in the latter year, 1 per cent for the aluminum produced for civilian purposes. The learned President was apparently of the opinion that the maximum amount which had been proposed on behalf of Elektrokemisk in the letter of May 7, 1943, had been agreed to by Alcan.

In *The King* v. *Irving Air Chute, Inc.* (1), three of the members of the Court considered the principle to be applied in fixing the compensation to be awarded to the owners of a patented invention by the Government of Canada under the provisions of s. 19 of the *Patent Act,* 1935. That section provides that the Government may at any time use any patented invention, paying to the patentee such sum as the Commissioner reports to be reasonable compensation for the use thereof. The principle applicable in settling the compensation under the Orders-in-Council in question in the present matter is, in my opinion, the same as in proceedings under s. 19. Two of the five members composing the Court expressed the opinion that, in fixing the amount, the Commissioner of Patents might properly adopt the rule recommended by the Royal Commission appointed in England to determine the nature of the awards to be made to inventors of whose inventions the Crown had made use during the period of hostilities, that a fair and reasonable consideration for such user should be such an amount of money as would be arrived at between a willing licensor and a willing licensee bargaining on equal terms. In my opinion, where the product manufactured under the licence is, as was the case with aluminum in the

(1) [1949] S.C.R. 613.

recent war, required almost exclusively for war purposes, the licensor should not be permitted to exploit the necessity of the nation by exacting an excessive royalty. On the other hand, he should not be required to accept less than a fair remuneration by reason of the fact that he is dealing with the Crown and may, accordingly, by the exercise of legislative power be required to take such amount as Parliament may see fit to allow, or indeed be paid nothing. I consider, however, the fact that the country was at war and that, accordingly, practically the sole customer for aluminum was the Government, is a matter to be considered in estimating what, under such circumstances, a willing licensor and a willing licensee who had only one customer for his product, would agree upon.

It is evident from the negotiations which were carried on at the end of 1942 and the early part of 1943 that Elektrokemisk realized that the rates provided by the amending agreement of January 27, 1941 would require payment of an amount in excess of what was reasonable under the circumstances and that this opinion was shared by Alcan, since the latter asked and the former was agreeable to restricting the total annual payment by a ceiling. It would appear from statements made by the witness Mann and by counsel for Alcan during the course of the hearing that, apart from the necessity of obtaining the approval of the Crown, the only obstacle to an agreement for fixing the ceiling at $215,000 was the question as to the liability for any increase in the then existing fifteen per cent tax on payments to non-residents, a stipulation which Elektrokemisk then offered to waive. I do not consider, however, that this amount can be accepted as a reasonable maximum annual payment.

I am, with respect, unable to agree with the Commissioner of Patents as to the value to be assigned to the patents other than the five in respect of which the claim is made. There were twenty-five patents owned or controlled by Elektrokemisk which were referred to by number in the licence agreement of July 14, 1937. Evidence as to each of these patents was given by the witness Mann and there was no contradiction of his statements. The first of these, in order of date, was Canadian Patent No. 212181 and was for a sliding clamp which was used successfully

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with a metallurgical furnace but which, if ever of use in the production of aluminum, was entirely replaced by the mechanism described in the Torchet patents. Patent No. 215697, which was Soderberg's first attempt to make a self-baking carbon electrode by inserting an iron rod in the mass, was not directed to the recovery of aluminum and was not tried for that purpose anywhere and did not work for any purpose. The invention disclosed by Patent No. 216092 was, according to the evidence of Dr. Sem, found to be of no value in the production of aluminum. The Commissioner attached importance to the fact that in giving evidence Mann said that this patent No. 216092 could be said to be the foundation of the Soderberg system but, when his evidence is read together with that of Dr. Sem, it would appear that it might more properly be said that the method disclosed by this patent, like that described in Patent No. 215697, represented ineffective and unworkable attempts to produce a self-baking electrode. It was not until Westley discovered the method of introducing electricity into the mass by the employment of studs and Torchet's two patents changing the shape of the electrode and disclosing an effective method of successfully suspending it that a commercially feasible method of producing aluminum by the use of self-baked electrodes was found. The remaining patents enumerated, other than the five in question, disclosed inventions which were either less effective and accordingly were superseded by the Westley or Torchet methods, or were for use in smelting furnaces and not designed for use in the production of aluminum, or were not discovered to be of any value in the production of aluminum by Alcan. This appears to be demonstrated conclusively by the fact that none of them had been utilized between the time of the granting of the first licence agreement in 1937 up to the time of the hearing before the Commissioner in 1945.

At the time when Elektrokemisk agreed to the reduction in the rate of royalty for production in excess of 40,000 metric tons in January of 1941, Patents Nos. 212181, 215697 and 216092 had expired. This circumstance, however, had apparently nothing to do with the reduction of the royalty which was sought and granted only by reason of the great increase in the annual production of Alcan, due to the war.

For the year 1939 the production of aluminum by the employment of the Soderberg system was something in excess of 68,000,000 lbs., which was increased in the following year to an amount in excess of 92,000,000 lbs. and was steadily increasing. While I think it is clearly shown by uncontradicted evidence that the three expired patents had not been of any value to Alcan since the contract of 1937 was made and that, accordingly, the fact that they had expired was a matter of no moment, the willingness of Alcan to pay the 1937 rate for the first 40,000 metric tons of its production shows that the company placed no value on these expired patents. As to the other patents mentioned in the original agreement, while conceivably the right to the use of some of them was of some value to Alcan, to consider that, at the time the amendment to the licence agreement was made in January 1941, they represented any substantial value in the eyes of the contracting parties is, in my opinion, error.

The production of Alcan by the employment of the Soderberg system was in the calendar year 1941 almost exactly double that of the year 1939. In 1942 it was in excess of 353,000,000 lbs., in 1943 in excess of 666,000,000 lbs. and in 1944 something more than 663,000,000 lbs. As indicated by the conduct of Elektrokemisk and Alcan, they were in agreement that a royalty calculated according to the amended rate provided in the agreement of January 27, 1941, resulted in the payment of an amount in excess of what was fair and reasonable. The learned President, considering that the ceiling of $215,000 had been agreed upon by the licensor and the licensee, concluded that compensation from October 1, 1941, should be computed at the royalty rate provided by the January 1941 agreement and the ceiling applied in any year when the royalty so computed exceeded $215,000.

While, as I have pointed out, there was no agreement between Elektrokemisk and Alcan on a maximum payment of $215,000, it would appear that, apart from the necessity of obtaining the approval of the Minister, the only substantial difference between the parties themselves was as to the liability for taxation if the rate imposed on payments to non-residents exceeded 15 per cent. It must, however, be recognized that the royalty rate agreed to by

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Alcan was not merely for the right to use the five patents but the right to the use of any improvement made or acquired by Elektrokemisk during the term of the agreement which were to be communicated to Alcan as soon as the same were perfected and which might be made use of by it without payment of any additional royalties and the right to the extension of the term of the licence during the life of any such patents. In addition, the royalty payment agreed upon in January 1941 entitled Alcan to an exclusive licence for the employment of the Soderberg system in Canada. The right to the use of such improvement patents might well be of the greatest value to Alcan but this consideration, no doubt most material in the estimation of that company, is not relevant to the present inquiry. I am, therefore, with respect, unable to agree in the conclusion of the learned President of the Exchequer Court that the maximum annual payment should be fixed at an amount as high as $215,000.

In my opinion, it is in the interest of the due administration of justice that we should now determine the amount of the compensation to be paid. It is now nearly nine years since the petition was filed by the Secretary of State on behalf of Elektrokemisk. Witnesses have been brought from Europe and elsewhere to give evidence on the two hearings which have been held and, unless the parties should agree that the matter be determined by the Commissioner of Patents on the evidence taken before him in 1945 and the evidence of Dr. Sem subsequently taken in the Exchequer Court, heavy further expense will be necessarily incurred in again giving this evidence at Ottawa. It is not suggested by either party that there is any other evidence which would be of assistance in determining the amount of a reasonable compensation than that which is now before us.

The agreement of January 27, 1941, is evidence of the fact that both the licensor and the licensee were in agreement that the royalty should be at a lesser rate as production was increased. The negotiations which resulted in the letter of May 7, 1943, show that both parties considered that a maximum annual figure should be agreed upon. At the 1937 contract rate of 1/10 of a cent per pound, the royalty paid by Alcan to Elektrokemisk in 1940

was $92,192.59. The January 27, 1941, amendment provided for the payment of a royalty of 1/20 of a cent per pound for all production in excess of 70,000 metric tons, or roughly 154,350,000 lbs. Production for the year 1942 exceeded that amount by roughly 77,000,000 lbs. and in each of the years 1943 and 1944 by over 230,000,000 lbs. After giving all of the evidence tendered in this matter the most careful consideration, it is my opinion that a fair and reasonable royalty rate to be paid for the use of the patents in question from October 1, 1941 until the end of the year 1944 would be 1/20 of a cent per pound of aluminum produced by the Soderberg system, subject to a ceiling of $175,000 in any one year. I would to this extent allow the appeal with costs. As I think the Commissioner of Patents erred in principle in fixing the amount of his award, I would allow to the petitioner the costs in the Exchequer Court. There should be no costs for or against Alcan. If the parties are unable to agree as to the amount of the production for the period October 1 to December 31, 1941, the matter may be spoken to.

ESTEY J.:—This is an appeal from a judgment of the learned President of the Exchequer Court setting aside the report of the Commissioner of Patents fixing the compensation to be paid by the Government for the use of certain patents, as provided by Orders-in-Council P.C. 6982 of December 4, 1940, and P.C. 11081 of December 8, 1942, passed under and by virtue of the provisions of the War Measures Act. The learned President himself fixed the compensation and this appeal therefrom asks that the report of the Commissioner be restored.

Under date of July 14, 1937, Det Norske Aktieselskab for Elektrokemisk Industri (hereinafter referred to as Elektrokemisk) granted a licence to the Aluminum Company of Canada Limited (hereinafter referred to as Alcan) to use, in the production of aluminum, some thirty of its patents and such improvements as may be made in relation to those patents during the life of the agreement and two years thereafter. This licence or agreement was to continue until June 18, 1953, unless otherwise terminated as therein provided.

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The head office of Elektrokemisk is in Oslo, Norway, which country was occupied by the enemy on April 9, 1940, and the patents under the foregoing agreement thereafter became the property of the Secretary of State of Canada, acting in his capacity as Custodian of Enemy Property. On March 23, 1943, the Deputy Minister of Munitions and Supply, acting under authority of the above-mentioned Orders-in-Council, advised Alcan to make no further payment of royalties or licence fees under the above-mentioned licence agreement.

Alcan, at the time this notice was received, had not paid royalties from and after October 1, 1941, and we are here concerned with fixing reasonable compensation from that date.

It is not the first step, by which aluminum oxide (Al_2O_3), or alumina, is taken from bauxite, but rather the electrode that is used in the process of breaking up aluminum oxide, or alumina, into its component parts of aluminum and oxygen, with which we are here concerned.

About 1886, and almost simultaneously, Charles M. Hall in the United States and Paul T. Héroult in France discovered that by mixing the mineral creolyte, a fluorine compound, with alumina, and passing through this mixture an electric current of low voltage and high amperage, this mixture could be raised to a temperature of approximately 960 degrees centigrade and the molecule of aluminum oxide broken into its constituent elements, the aluminum going to one pole and the oxygen to the other. All this is usually done in what is variously styled a tank, a furnace, but more properly described as an electrolytic cell. One pole, or cathode, is at the bottom and the other pole, or anode, enters at or near the top. The electric current is, by an iron conveyor in the electrode, taken down into the mixture of creolyte and aluminum oxide, which is styled electrolyte. When the oxygen becomes separated from the aluminum it burns or consumes the carbon electrode at the lower end and forms carbon monoxide and carbon dioxide.

It will be observed that the electricity serves a double purpose—it generates the heat and provides the action of electrolysis. The creolyte, in this process, is a catalyst and, therefore, though necessary, remains unchanged.

This electrode is made of carbonaceous material, usually coke and pitch. In the method discovered by Hall and Héroult it is baked separate and apart from the electrolytic cell and is, therefore, styled prebaked. In the electrolytic cell they use a number of these electrodes, which, because of the burning and consumption at the lower end, have to be, from time to time, lowered and eventually removed. Because of the necessity of maintaining a continuous process they cannot all be removed at the same time. Therefore, these electrodes are of varying lengths and their proper adjustment from time to time is a matter of difficulty. This process of prebaking, the constant adjustment and replacement, involves a substantial expense.

Soderberg sought to find an electrode which could be baked in the same process and thereby avoid the substantial disadvantages and expense incident to prebaking and constant changing. He first succeeded in developing an electrode which could be baked in the same electrolytic cell and would be replenished at the top as it was burned or consumed at the bottom. This was called a self-baking continuous electrode. His discovery was about 1917 and it was patented in Canada as No. 215,697 (applied for February 18, 1918). In this process new carbonaceous material was added at the top of the electrode to compensate for that which was burned or used at the bottom. The amount burned in a day is relatively small and the baking process is effected as the electrode is lowered into the heat. One or more iron rods run down through the carbonaceous material to support the electrode and carry the electric current into the molten electrolyte. The expansion of the iron rod, or rods, when heated, made this patent impracticable for commercial purposes.

Soderberg, however, continued his study and soon improved his earlier process, which he patented under No. 216,092 (applied for September 19, 1919). In this patent he eliminated the iron rods and introduced a cylindrical iron mantle or casing having ribs extending inwardly therefrom. He thereby provided a casing or container to hold the carbonaceous substance or paste and the ribs carried the electric current into the molten electrolyte. Under this process aluminum may be produced, but because the iron

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melts and falls into the aluminum the latter becomes contaminated. Mr. Mann described this patent as "the foundation of the Soderberg system."

The third Soderberg patent, No. 212,181 (applied for February 2, 1921) provided greater efficiency in holding the electrode in place and lowering it. It was regarded as an improvement of the process.

Soderberg's fourth patent, No. 264,997, eliminated the tamping of the paste in the casing by the introduction of sufficient binder to render it liquid.

Then followed the Westly patent No. 287,700, which removed the projecting iron ribs and introduced removable iron studs inserted through holes in the casing. There are several rows of these studs which point inward and downward toward the molten electrolyte. The electric current is passed through the lower rows of these studs which are removed before they reach a point where the iron might drop into the aluminum pot. Furthermore, these studs projected outside of the casing and made possible the carriage of the current directly into the electrode.

In all of the foregoing patents the electrode is cylindrical in shape. Torchet's patent No. 346,868 introduced an electrode rectangular in shape, of a width not more than 43 inches, while in length no limit was specified. This patent provided a shorter path for the escape of the gases and thereby eliminated possibilities of disturbance in the aluminum that tended to lower the efficiency of the process.

Torchet introduced, by patent No. 341,667, iron beams placed along each side of the electrode under the rows of studs in a manner that forms a frame around the electrode and the side beam and studs carry the weight of the electrode. This patent prevented the electrode from bulging and improved the method for lowering the electrode. It is referred to as a device for suspending continuous electrodes.

Legeron, by patent No. 383,238, improved the Torchet suspension patent by providing, instead of a beam under the row of studs, a continuous wall of beams around the electrode. This provided greater strength around the electrode and made possible the use of a thin aluminum casing or mantle instead of the iron mantle.

The first seven of the foregoing patents were included under the agreement of July 14, 1937, and the last, or Legeron, patent was added in accordance with the terms thereof. The parties in that agreement, in effect, classified these patents under two headings. In the first recital it is stated as follows:

> Whereas Elektrokemisk is the sole owner and/or has sole control of the following letters patent of Canada relating to self-baking electrodes and manufacture thereof hereinafter called the Soderberg Electrode System.

The numbers of certain patents follow, including the Soderberg patents, or the first four of the eight patents which appellant says were used under the licence. These are Nos. 215,697, 216,092, 212,181 and 264,997. It is further stated:

> Whereas Elektrokemisk is also the sole owner and/or has control of the following letters patent relating to improvements on Soderberg Electrodes.

Then follow the numbers of certain patents, including three of the eight. These are Nos. 287,700 (Westly), 341,667 (Torchet) and 346,868 (Torchet). The remaining patent, or Legeron, No. 383,238, is mentioned in the letter of January 27, 1941 (amending royalties) as one of the patents added to the list since the agreement of July 14, 1937.

The parties to the agreement treated the first four as among the basic patents in the Soderberg electrode system and the latter three as improvements thereon which had been incorporated into that system. When the agreement of July 14, 1937, was made seven of these patents were outstanding. At all times material hereto the first three had expired and we are, therefore, only concerned with the compensation for the use of the last-mentioned five patents.

The Government, under the authority of the Orders-in-Council, directed the use of the foregoing patented inventions for war purposes; agreed to indemnify or protect Alcan against any proceedings for non-payment of the royalty under the agreement and became obligated to pay Elektrokemisk reasonable compensation for the use of these inventions. The Government was, therefore, not bound by the terms of the agreement of July 14, 1937. On

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the contrary, the record would indicate that the Government felt that in many agreements the royalties were, having regard to the increased production to meet war requirements, excessive; that all royalties upon patent inventions so used should be reviewed and some uniformity in respect of the basis of payment should be arrived at. In any event, it is the compensation under the Orders-in-Council, notwithstanding such an agreement may exist, that the Commissioner has to determine. The relevant provisions of the Orders-in-Council are identical and read as follows:

> His Majesty shall pay to the owner or licensor of any such patent or registered industrial design which is valid such compensation as the Commissioner of Patents reports to be reasonable for the use aforesaid of the invention or design covered by such patent or registered industrial design * * * *

These provisions in respect to compensation are to the same effect as that in s. 19 of the Patent Act.

> 19. The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof, . . . R.S., c. 150, s. 48.

It will be observed that s. 19 applies at all times, while the foregoing Orders-in-Council constitute an extension of s. 19 restricted to the conditions of war.

Though the agreement was not binding upon the Government, its terms may be and were, in fact, considered by both the Commissioner and the learned President. Alcan therein promised to pay in United States currency a royalty of one-tenth of a cent per pound of aluminum produced. This term was amended when Alcan, enlarging its production facilities, requested and, under date of January 27, 1941, was granted a reduction. The above rate of one-tenth of a cent remained in effect in respect of each annual production up to 40,000 metric tons; over 40,000 and up to 70,000 tons the royalty was fixed at a rate of 66 2/3 per cent of the said one-tenth of a cent and for a production over 70,000 tons the royalty to be at 50 per cent of the one-tenth of a cent.

In the latter part of 1942 Alcan sought a further reduction. Elektrokemisk then suggested a ceiling in any year of $250,000 and later of $215,000, while Alcan suggested $175,000. No amount was agreed upon, no doubt because

of the letter from the Deputy Minister dated March 23, 1943, requesting that no further royalties be paid under the agreement. The ceiling then proposed would have applied to both war and civilian production. In 1941, 1942 and 1943 the entire production of Alcan was for war purposes and in 1944 1 per cent of the production was devoted to civilian needs.

The Commissioner adopted two methods of computing what he thought would at least approximate reasonable compensation. First, he considered that the thirty patents and those later added had each a value; that all of the patents other than the five here in question represented 75 per cent of the total royalty value and the five represented 25 per cent thereof. While, therefore, he fixed no specific value to any particular patent, the result was that he allowed 25 per cent of the royalty fixed by the parties on July 14, 1937, or a rate of one-fortieth of a cent per pound of aluminum produced. This he applied to the average production during the six-year period 1939-1944 and arrived at a figure of $82,500 per year.

In his second method, the Commissioner based his finding upon the evidence of Mr. Russell of Alcan, who deposed that the company had saved about .11 cents per pound at the company's Arvida plant in 1944. The Commissioner, therefore, concluded that 25 per cent of the saving based on the average production per year from 1939 to 1944 would be reasonable compensation for the use of these patents. Under this method he arrived at a sum of $90,500 per year.

The Commissioner then averaged the two amounts of $82,500 and $90,500 and arrived at a figure of $86,500 per year, which he determined as reasonable compensation, subject to a ceiling of $100,000 for any one year.

In *His Majesty The King* v. *Irving Air Chute*, (1), a judgment rendered subsequent to the Commissioner's report, this Court applied the test adopted as a general rule in Great Britain that the Government should pay as reasonable compensation that sum "arrived at between a willing licensor and a willing licensee bargaining on equal terms." This rule contemplates bargaining in what is

(1) [1949] S.C.R. 613.

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usually referred to as an open market and as applied to this case it eliminates the inclusion of any amount in the compensation that might be exacted because of the necessity of the Government under the circumstances of war. While in the determination of such an amount the information and computations before the Commissioner may be of assistance, it cannot be concluded that upon the evidence the Commissioner applied that principle. I am, therefore, in agreement with the learned President that the Commissioner, in fixing the compensation, did not apply the proper principle.

The learned President found reasonable compensation for the use of the five patents to be the schedule of royalties agreed upon and set out in the letter of January 27, 1941, subject to a ceiling or limit of $215,000 in any one year. He stated:

> Primarily, the use of the inventions was worth what the parties were willing to pay and receive for it. There can be no doubt that the revised royalty and ceiling were arrived at between a willing licensor and a willing licensee bargaining on equal terms with full knowledge of the value of the inventions that were being used.

The revised royalty referred to is that set forth in the letter of Elektrokemisk to Alcan dated January 27, 1941. This revision or reduction was granted as a result of a request from Alcan at a time when it was enlarging its productive capacity. Alcan was already obligated under the agreement of July 14, 1937. Aluminum, in the circumstances of war, was a necessity and, therefore, while Alcan might request, actually it was in the position where it had to accept whatever reduction, if any, Elektrokemisk might make. The latter did, in fact, make a substantial reduction, but, with the greatest possible respect, these parties cannot be held to have been then negotiating as willing licensors and licensees within the meaning of *Irving Air Chute, supra.*

Moreover, the learned President was apparently of the opinion that the parties had agreed on the ceiling of $215,000. With great respect, I do not think the evidence bears out that conclusion. Alcan did approach Elektrokemisk in 1943 asking the second reduction. In the course of negotiations Elektrokemisk suggested $250,000 and subsequently a ceiling of $215,000. Alcan, on its part, sug-

gested $175,000, but no agreement was arrived at, apparently because the Government had served notice that no further royalties should be paid.

It cannot be overlooked that Alcan and Elektrokemisk entered into the agreement of July 14, 1937, appreciating that an improvement patent ought not to be used without a licence or permission being obtained for the use of the basic patent. *Lynch and Henry Wilson & Company Ld.* v. *John Phillips & Company* (1). As already pointed out, they, in effect, classified as improvement patents four of the five here in question. The fact that the basic patents may have, as here, expired and thereby become public property does not alter or affect the value of the improvement patents. While it may be conceded that the inventions under the improvement patents may have been the major factors in making the self-baking continuous electrode commercially successful, it is difficult to attribute to them the entire value of the system. Mr. Mann, called on behalf of the respondent, stated:

> This patent No. 216,092 can be said to be the foundation of the Soderberg system.

Doctor Sem, in the course of his evidence, stated:

> The basic invention of Mr. Soderberg is the foundation of the self-baking electrode as developed by us.

Moreover, Doctor Sem, in 1938, in an article entitled "Soderberg Electrodes in the Production of Aluminum," wrote:

> The first commercial plant dates back as far as 1925 but only lately has the equipment been fully developed to all the requirements of the aluminum industry.

These statements indicate that the basic patents were of value and support the view that the entire value of the system cannot be attributed to the five patents in question.

Moreover, the original agreement of July 14, 1937 had to do with some thirty patents, together with any improvements effected thereon. While the evidence shows that only eight were used, it does disclose that in certain contingencies others might have been used. What, however, is of greater significance is that Alcan was, under that agreement, purchasing the right to use, in the production of aluminum, over a period of fifteen years, all of these patents

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

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and the improvements that might be effected in relation thereto. The same right was preserved to Alcan for a period of about twelve years when, on January 27, 1941, the royalty was revised. Alcan no doubt entered into the agreement of July 14, 1937, with the intent of forthwith using certain of these patents, but it also intended to protect itself by the inclusion of the others and the acquisition of the right to use the improvements that, during the currency of the agreement, might be effected in relation to all of these patents. The basis upon which the consideration would be determined would, in such an agreement, be quite different from that of ascertaining reasonable compensation for the use of five of these patents over a period of a few years.

The evidence justifies the conclusion that there is a relation between the savings effected by the patented inventions and the amount of the royalty. Mr. Russell of Alcan made a computation which would indicate that the amount determined by the learned President could not be accepted as reasonable. Counsel for respondent pressed the comparisons with royalties paid and savings effected by the Aluminum Company of America. These, of course, may well be considered, but it must be conceded that circumstances in the two countries are not identical. With the greatest possible respect, it would appear that the compensation has not been arrived at in accord with the principle underlying *Irving Air Chute, supra,* and must be set aside.

At the hearing of this appeal a question was raised as to the jurisdiction of the learned President to admit, upon the hearing of the appeal before him, the evidence of Doctor Sem. The recital of the first of the foregoing Orders-in-Council refers to s. 19 of the *Patent Act* and, as already stated, may be regarded as an extension of or, in effect, an amendment to s. 16.

It would, therefore, appear that it was intended that under the Orders-in-Council, as under s. 19, the provisions of s. 17 of the *Patent Act* would apply. S. 17 reads as follows:

> 17. In all cases where an appeal is provided from the decision of the Commissioner to the Exchequer Court under this Act, such appeal shall be had and taken pursuant to the provisions of the *Exchequer Court Act* and the rules and practice of that Court.

Rule 30 of the Exchequer Court Rules, under which the learned President admitted the evidence, reads as follows:

> The Court in any appeal shall have full discretionary power to receive and hear further evidence.

That the Exchequer Court had authority to enact such a rule is apparent from s. 87(c) of the *Exchequer Court Act*. Section 87(c) reads:

> 87. The President of the Exchequer Court may, from time to time, make general rules and orders,
>
> * * *
>
> (c) For the effectual execution and working in respect to proceedings in such Court or before such judge, of any Act giving jurisdiction to such Court or judge and the attainment of the intention and objects of any such Act;

Moreover, s. 88(2) provides that copies of all rules and orders made by the President of the Exchequer Court shall be laid before both Houses of Parliament within ten days of the opening of the session next after the making thereof. Rule 30 was included in the rules of April 21, 1931, and, therefore, comes within the provisions of s. 88(3) which reads as follows:

> 88(3) All such rules and orders and every portion of the same not inconsistent with the express provisions of any Act shall have and continue to have force and effect as if herein enacted, unless during such session an address of either the Senate or House of Commons shall be passed for the repeal of the same or any portion thereof, in which case the same or such portion shall be and become repealed: . . .

Rule 30 is not inconsistent with the express provisions of any Act and is, therefore, by virtue of s. 88(3), entitled to full force and effect as if enacted as part of the *Exchequer Court Act*. It would, therefore, appear that Rule 30 was competently made.

The learned President, who had dealt with and reviewed a similar application in the *Irving Air Chute Case, supra,* in the present case found that circumstances were disclosed which, in the exercise of his discretion, justified the admission of the evidence.

The practice of this Court would require that this matter be referred back for the purpose of determining the compensation as directed by the Orders-in-Council. The circumstances here are, however, quite exceptional and justify this Court in fixing the compensation. I therefore, adopt the computation thereof as set out in the reasons of my brother Locke.

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The appeal should be allowed. The appeal before the learned President was justified and I would not disturb his order for costs in the Exchequer Court. The appellant should have its costs in this Court. There should be no costs for or against Alcan.

Appeal allowed with costs.

Solicitor for the appellant: *F. P. Varcoe.*

Solicitor for the Secretary of State of Canada, respondent: *Lajoie, Gélinas & Lajoie.*

Solicitor for the Aluminum Company of Canada Ltd., respondent: *Geoffrion & Prud'homme.*

1952

*Nov. 13, 14, 17

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*April 15

STANLEY MUTUAL FIRE INSURANCE COMPANY (RESPONDENT).. APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE (APPELLANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Revenue—Income—Mutual Insurance Company—Surplus arising from transactions with members transferred to reserve fund—Whether assessable—Income War Tax Act, R.S.C. 1927, c. 94, ss. 3(1), 6(1) (d) —New Brunswick Companies Act, R.S.N.B., 1927, c. 88, Part II,— Insurance Act, 1937 (N.B.), c. 44, ss. 2(40), (48), 249, The Winding-Up Act, R.S.N.B., 1927, c. 97.

The appellant was incorporated as a provincial mutual company under *The New Brunswick Companies Act,* R.S.N.B., 1927, c. 88, as amended by S. of N.B., 1937, c. 19, to undertake contracts of insurance against loss by fire etc., upon farm and other non-harzardous property upon the premium note plan subject to the provisions of Part II of the Act and of *The Insurance Act, 1937,* c. 44. Insurance was issued upon premium notes upon which a cash payment was secured prior to the issuance of the policy and the notes were subject to further assessments to meet losses and expenses incurred during the term of the policy. Where the amount collected in cash exceeded the current year's losses and expenses the surplus became part of the reserve fund. In 1947 the appellant transferred, as provided by s. 249 of the *Insurance Act,* a surplus of $6,103.69 to its reserve fund. This amount was assessed under s. 3(1) of *The Income War Tax Act,* R.S.C., 1927, c. 97, as amended, as taxable income, constituting an annual net profit or gain.

*PRESENT: Rinfret C.J., and Taschereau, Estey, Locke and Cartwright JJ.

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Held: The surplus was accumulated as directed by *The Insurance Act, 1937* not in pursuance of a profit making enterprise but in furtherance of a mutual insurance plan carried on by the appellant in the interest of its members and the fund could not be applied, except on the order of the Governor in Council, to any purpose other than the settlement of claims or other liabilities. On a winding-up the surplus, if any, under the provisions of *The Winding-Up Act* (R.S.N.B. 1927, c. 97) and *The Insurance Act, 1937* read together, would be returned to the members of the Company. The moneys so accumulated were not income within the meaning of s. 3(1) of *The Income War Tax Act. Jones* v. *South West Lancashire Coal Owners Association* [1927] 1 K.B. 33 and *Ayrshire Employees Mutual Association Ltd.* v. *Commissioners of Inland Revenue* [1946] 1 All E.R. 637.

Decision of the Exchequer Court 1951 Ex. C.R. 341, reversed.

APPEAL from a judgment of the Exchequer Court of Canada, Hyndman Deputy Judge (1), allowing an appeal from a decision of the Income Tax Appeal Board (2) which allowed taxpayer's appeal from assessment for income tax for 1947.

W. B. Francis, Q.C. and *D. E. Gauley,* for appellant.

D. W. Mundell, Q.C. and *F. J. Cross,* for respondent.

The judgment of the Chief Justice, Estey, Locke and Cartwright, JJ. was delivered by:

LOCKE J.:—This is an appeal from a judgment of Hyndman D.J. delivered in the Exchequer Court (1) allowing the appeal of the Minister from a decision of the Income Tax Appeal Board, which had allowed the appeal of the taxpayer from an assessment to income tax for the year 1947.

The appellant is incorporated by letters patent under the provisions of Part II of *The New Brunswick Companies Act* (R.S.N.B. 1927, c. 88, as amended) issued in the year 1937. By these letters patent the applicants, all of whom were farmers living in that province, were created a body corporate and politic with all the rights and powers given by Part II of the said Act and *The Insurance Act, 1937* (c. 44: S. of N.B., 1937). The purposes of the company are stated to be:

> To undertake contracts of insurance against loss by fire, lightning or explosion upon farm and other non-hazardous property upon the premium note plan, subject to the provisions of Part II of the "New Brunswick Companies Act and the Insurance Act 1937."

(1) [1951] Ex. C.R. 341. (2) (1950) 3 Tax A.B.C. 96.

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The company has no capital stock.

The Companies Act of the Province, as enacted in the Revised Statutes of 1927, was amended by the addition of Part II by c. 19 of the Statutes of 1937. Ss. 129 to 153 of the amendment under the heading "Provincial Mutual Insurance Companies" provide for the incorporation of such companies. Companies incorporated under this Part have no shares but each person, partnership or corporation insured under a policy is declared to be a member thereof. Any five or more persons residents of and owning real estate in any county in the province may apply to the Superintendent of Insurance appointed under the provisions of *The Insurance Act, 1937,* for his approval to promote the organization of such a company and, with his approval, organization may be undertaken. After insurance has been subscribed by fifty or more subscribers to an amount not less than $100,000, the promoters may call an organization meeting and, if so authorized, petition the Provincial Secretary Treasurer for incorporation under a name which must include the words "Mutual Fire Insurance Company." Each subscriber to the subscription book for the organization of the company is required, within three weeks from the date of the incorporation or such further period as may be allowed by the Superintendent, to apply for a contract of insurance in an amount not less than the amount subscribed for by him, and is subject to a penalty for failure to do so. Each member not being in default for any dues, fees or assessments is entitled to one vote at all meetings which he attends. The directors must be members of the company in good standing and insured by it for at least $1,000 or be an accredited representative of a partnership or corporation, being a member in good standing insured for at least that amount. Companies so incorporated are empowered to make by-laws not inconsistent with the Act or *The Insurance Act, 1937* or the Regulations, for the management of its business, regarding the regulation of the tariff of fees, the levying of assessments and the forms, terms and conditions of its insurance policies, and generally for all matters incident to its incorporation or necessary for carrying out its purposes, but no such by-law is of any force or effect until the same is approved by the Superintendent. His approval is likewise required to the

alteration, repeal or re-enactment of any of the by-laws. By-laws passed by the Board of Directors may also be enacted but become effective only with approval of the Superintendent. S. 142 provides that any member may, with the consent of the directors, withdraw from the company upon such terms as the directors may lawfully prescribe, and upon such withdrawal his policy shall be cancelled but he shall nevertheless be liable to be assessed for and pay his proportion of "losses, expenses and reserve" to the time of cancelling the policy.

The Insurance Act of 1937 deals with the subject of insurance in all its branches within the province and Part XII under the heading "Provincial Mutual Insurance Companies" by ss. 226 to 249, both inclusive, deals particularly with the operation of such companies. S. 129 of Part II of the Companies Act provides that the word "company" in that part shall mean a "provincial mutual company" as defined in s. 2 of the Insurance Act, which defines such a company as meaning a mutual insurance corporation incorporated by or under an Act of the Legislature. S-s. 40 of s. 2 of the Insurance Act reads:—

MUTUAL INSURANCE

Mutual insurance means a contract of insurance, in which the consideration is not fixed or certain at the time the contract is made but is to be determined at the termination of the contract or at fixed periods during the term of the contract according to the experience of the insurer in respect of all similar contracts whether or not the maximum amount of such consideration is predetermined.

The word "member" where used in Part XII is defined as meaning a person holding a contract of insurance from a provincial mutual insurance company. Such companies are prohibited from undertaking any risk in respect of any one property or risk subject to the hazard of a single fire, for an amount greater than $3,000 unless it be reinsured to an amount sufficient to reduce the net liability of the insurer to that amount. However, with permission of the Governor in Council, risks not exceeding $5,000 may be undertaken. The form, terms and conditions of the applications and policies of insurance are to be determined by the Board of Directors but are subject to the approval of the Superintendent. Each application and policy is required to bear the words

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Mutual company—subject to pro rata distribution of assets and losses.

together with a statement of the company's total reserves as of the preceding 31st of December. The Board may, subject to the provisions of the Act and with the approval of the Superintendent, adopt a "tariff of rates for premium notes" and vary the same from time to time. A company may accept premium notes for insurance and may issue policies thereon and such notes must be assessed for the losses and expenses of the insurer in the manner provided by the Act. The form of such notes must be approved by the Superintendent. The Board is required to demand and collect a cash payment on the note at the time of the application for the insurance of such amount as may be fixed by by-law and if the amount so collected in cash is more than sufficient to pay any losses and expenses during the maintenance of the policy, any surplus becomes part of the reserve fund. The Board is further authorized to make assessments upon premium notes before losses have happened or expenses been incurred and any surplus from any such assessment becomes part of the reserve fund. All assessments on premium notes are required to be made by the Board with the approval of the Superintendent, such assessments to be made at such intervals and of such sums as the Board determines and the Superintendent approves to be necessary to meet losses, expenses and reserve of the insurer during the currency of the policies on which the notes were given. If any assessment in respect of a policy be not paid within thirty days after the mailing of the notice of assessment, the policy becomes null and void as against the insured as to any claim for losses occurring during the time the policy holder is in default. If the policy be cancelled or avoided by the company, the liability of the insured on his premium note ceases from the date of such cancellation or avoidance in respect of any loss that occurs thereafter, but the insured shall nevertheless be liable to pay his proportion of the losses and expenses of the insurer up to that time and, upon payment of his proportion of all assessments then payable or to become payable in respect of losses and expenses sustained up to that time, he shall be entitled to a return of his premium note. The limit of the liability of the member under the premium note plan is the face amount of the note.

Under the sub-heading "Reserve and Guarantee Fund" s. 249 provides:—

249. (1) The insurer shall form a reserve fund to consist of all money which remains on hand at the end of each year after payment of expenses and losses; and in addition shall levy an annual assessment, not exceeding twenty-five per centum, and not less than five per centum, on the premium notes held by the insurer until such reserve reaches the sum of five hundred dollars for every one hundred thousand dollars of the first one million dollars insurance in force, and three thousand dollars for each additional one million dollars or part thereof in force, up to which minimum level it shall be maintained, and for such purpose the insurer shall thereafter levy annually such adequate assessment as the Superintendent approves.

(2) Such reserve fund may, from time to time, be applied by the board to pay off such liabilities of the insurer as are not provided for out of the ordinary receipts for the same or any succeeding year.

(3) The reserve fund shall be the property of the insurer as a whole and no member shall have a right to claim any share or interest therein in respect of any payment contributed by him towards it; nor shall such fund be applied or dealt with by the insurer or the board other than in paying its creditors, except on the order of the Governor in Council.

S. 61 of the Act permits an insurer to invest its reserve in securities in which trustees are by law permitted to invest trust funds, with a limitation as to the amount permitted to be invested in mortgages on land and requires that uninvested funds shall be kept on deposit in the name of the insurer in a post office, provincial savings bank or chartered bank of Canada.

The by-laws adopted by the company state that:—

The object of the company is a mutual association of the members thereof for the relief of each other in case of loss by fire or lightning.

They provide that the company may insure against loss or damage by fire or lightning isolated dwelling houses, farm buildings, churches and school houses and any other useful isolated non-hazardous buildings and the ordinary contents of such buildings when situate within the Province of New Brunswick, but shall not insure mercantile risks. No property may be insured for more than two-thirds of its value. Each person insuring for the first time is required to pay a Membership Fee of $1. Schedules of rates on all isolated buildings 100 feet distant from all others not part of the premises, with their contents, are fixed at a premium note of 2 per cent of the amount of the policy for three years with a cash payment thereon of one-half of the amount after discount, if any, has been

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allowed. On public halls with their contents and rented buildings of the first class 100 feet distant from all others not part of the premises, the rates are fixed at a premium note of 2½ per cent with a cash payment of one-half of that amount, less any discount.

The balance sheet of the appellant company for the year ending December 31, 1947, shows its assets to consist of bonds to the value of $37,000, accrued bond interest $319.98, cash to the amount of $4,936.01 and stirrup pumps valued at $220. As against this, liabilities in respect of unearned premiums are shown as being $19,824.51, an amount classified as Reserve Fund $6,103.69 and a further amount as Surplus in the sum of $16,557.79.

The profit and loss account for the year shows income totalling $16,050.27 made up of premiums earned, membership fees, interest and an item designated "Special Permits". The expenses totalled $9,946.50, this including fire losses of $6,838 agents' fees and commissions $1,671.87, the balance being made up of salaries, directors' fees, printing and stationery and other incidental expenses. The excess of receipts, including premiums earned, over the disbursements was $6,103.69, which amount was transferred to the Reserve Fund pursuant to the provisions of s. 249 of the Provincial Insurance Act.

No question arises regarding the interest earned upon the company's investment of its reserve fund which is conceded to be taxable. The dispute is as to the balance on hand at the end of the year's operations resulting from the fact that the cash premium receipts and the amounts assessed upon the premium notes exceeded the outgoings for losses and other necessary expenses.

The appellant was assessed to income tax upon $6,103.69, the amount transferred to the reserve fund, and on the taxpayer filing a notice of objection the Minister affirmed the assessment. The appeal to the Income Tax Appeal Board was allowed. Mr. Justice Graham, with whom Mr. Fabio Monet, Q.C. agreed, considered that the operations of the company did not result in any profit and that the surplus resulting from the year's operations was not income, within the meaning of that term as defined by s-s. 1 of s. 3

of the *Income War Tax Act,* as amended, other than the amount received from bond interest. Mr. W. S. Fisher, Q.C., the third member of the Board, dissented.

The appeal of the Minister to the Exchequer Court was allowed. Mr. Justice Hyndman considered that the company was not in essence a genuine mutual company, as defined by the authorities, being of the opinion that the essential feature of such concerns was that the contributors to the funds must also be participators in the surplus, and that this was excluded in the present matter by s-s. 3 of s. 249 of the Insurance Act. The learned trial Judge concluded that there was no real distinction between the appellant company and any ordinary fire insurance company and that the surplus must be regarded as a profit or gain to it and not to the members.

S-s. 1 of s. 3 of the *Income War Tax Act,* in so far as it affects the present matter, reads:—

> For the purposes of this Act "income" means the annual net profit or gain . . . being profits from a trade or commercial or financial or other business or calling . . . and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security or from stocks or from any other investment, and whether such gains or profits are divided or distributed or not.

The question is whether the surplus resulting from the amounts received from premiums paid in cash at the time the insurance is effected and from assessments being in excess of that required for the company's operations is a profit or gain. For the Minister the contention is that accepted by Mr. Justice Hyndman that by the very terms of the Insurance Act the reserve fund is the property of the company and not of its members: accordingly since its receipts for the year have exceeded its expenditures the balance remaining is, of necessity, a profit or gain to the company since its assets have been increased to that extent.

The question of the liability to income tax of the surplus funds of mutual insurance companies has been considered in several cases in England. In *New York Life Insurance Company* v. *Styles* (1), the question of the liability of such a fund resulting from payments of premiums by the participating shareholders of the company was considered. The company had no shares or shareholders, the only

(1) (1889) 14 App. Cas. 381.

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members being the holders of participating policies, each of whom was entitled to a share of the assets and liable to all losses. A calculation was made by the company of the probable death rate among the members and of probable expenses and other liabilities and the premiums charged were commensurate therewith. Annually an account was taken and the greater part of the surplus of such premiums over expenditures was returned to the policy holders as bonuses, either by addition to the sums insured or in reduction of future premiums and the remainder of the surplus was carried forward as funds in hand to the credit of the general body of the members. It was conceded that the income derived by the company from investments and from transactions with persons not members was assessable. It was held that no part of the premium income received under participating policies was liable to be assessed to income tax. The case, on the face of it, is distinguishable from the present in that the entire surplus resulting annually from the transactions of the company with participating shareholders was either returned to them, utilized for their benefit by increasing the amount of the insurance, or held for their benefit, to be accounted for thereafter. That an operation of this nature was mutual insurance could not be questioned. Lord Watson, speaking of the plan, said (pp. 393-4):—

> The individuals insured and those associated for the purpose of receiving their dividends, and meeting policies when they fall in, are identical; and I do not think that their complete identity can be destroyed, or even impaired, by their incorporation. The corporation is merely a legal entity which represents the aggregate of its members; and the members of the appellant company are its participating policy-holders.
>
> When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits . . . In my opinion, a member of the appellant company, when he pays a premium, makes a rateable contribution to a common fund, in which he and his co-partners are jointly interested, and which is divisible among them, at the times and under the conditions specified in their policies.

Lord Bramwell, who was of the same opinion, said in part (pp. 394-5):—

> The appellants do not carry on a profession, trade, employment, or vocation from which profits or gains arise or accrue within the meaning of the Income Tax Act . . . I speak, of course, of the mutual insurance business. They are a corporation, but the case may be, as is admitted, dealt with as though they were an unincorporated association of individuals. Take it that they were; take it that half-a-dozen persons so associated themselves at the beginning of the year; they each put into a common purse £10, to be given to the executors of any one who dies, or divided, if more than one dies, among the executors of those having died. In fact, no one dies, and the money is returned, or carried on for the next year. Is it possible to say that this is an association for the purpose of profit, or that it has made any profit?

Lord Herschell, after referring to the fact that the Attorney-General had conceded that the fact that the persons thus associating themselves together for the purpose of mutual insurance had been incorporated was immaterial and that the case might be treated as though it were an association of individuals unincorporated, said that persons who agree to contribute to a common fund for mutual insurance would not in ordinary parlance be regarded as carrying on a trade or vocation for the purpose of earning profit, and continuing (pp. 409-10):—

> Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith. This may result either from the contributions having, owing to an erroneous estimate or overcaution, been originally fixed at a higher rate than was necessary, or from the death rate being lower than was anticipated. Can it be properly said that, under these circumstances, the association of mutual insurers had earned a profit? The members contribute for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore more than ought to have been contributed by them, for this object, and accordingly their next contribution is reduced by an amount equal to their proportion of this excess. I am at a loss to see how this can be considered as a "profit" arising or accruing to them from a trade or vocation which they carry on.

Lord Macnaghten who agreed that the surplus was not taxable was also of the opinion that the fact that the insured who were also the insurers carried on their business through the medium of a company had been properly treated as immaterial.

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In *Jones* v. *South West Lancashire Coal Owners' Association* (1), the manner of operation of the Association, whose liability to taxation was considered, more closely resembled those of the present appellant. A colliery company was a member of an Association, a company limited by guarantee, the sole activity of which was the indemnity of its members against compensation in respect of fatal accidents to their workmen. The Association was a mutual concern, every person indemnified by it being a member, and calls were made by it and paid by the members for insurance, and nothing more. Out of these calls a general fund was built up to meet claims for indemnity and a reserve fund was also created the interest earned upon which might be applied in diminution of the calls upon members. It is of importance to note that if a member retired from the Association he was entitled to receive back a proportion only of what was called his share of the reserve fund, the balance being retained. Rowlatt J., by whom the case was tried, held that the principle stated in the *New York Life* case was applicable. As to the reserve fund, he said (p. 47):—

> No doubt, as the money is not distributed year by year, and calls are not limited to actual losses, but to enable a fund to be built up, it may in a sense be said that the Association has a fund which it holds as a company and which it does not divide among all the people who have built it up, inasmuch as members may come in when the fund has been largely built up, and so there is a fund which does not go back to those people who subscribed it individually.

and, after saying that, in his opinion, this did not distinguish the case from the *New York Life* case, said (p. 48):—

> The broad principle was there laid down that, if the interest in the money does not go beyond the people or the class of people who subscribed it, then, just as there is no profit earned by the people subscribing, if they do the thing for themselves, so there is none if they get a company to do it for them.

This decision was upheld by the Court of Appeal and by the House of Lords. Two questions had been decided by Rowlatt J., the first being as to whether the colliery company was entitled to charge the amount of the levies made by the Association as an expense of its business and as to this he had decided that such payments were properly

(1) [1927] 1 K.B. 33.

deductible. In the reasons for his judgment on the appeal, Lord Hanworth M.R. said in part (p. 58):—

It is said that once the first case is decided in the way it has been, that these moneys were absolutely paid over by the insured to the Association for the purpose of obtaining insurance, then the moneys that have been so paid over become the property of the Association, and that the Association ought then in its turn to be liable to income tax in respect of the excess that they have received. It appears to me that there is no inconsistency in saying that both judgments of Rowlatt J. are right. True, in the first case the sum is deducted because it represents the cost of obtaining the insurance by the assured, but it does not necessarily follow that the money received by the Association is as to a part of it the reaping of a reward or gain by the Association. *It must still be looked at from the point of view of mutual insurance. Regarded as such, the Association does not make a profit or gain which is of the nature or character which subjects it to income tax.*

Scrutton L.J., after referring to the fact that if a member withdrew he only got back part of his share of the reserve fund, the balance being retained by the Association, considered this did not affect the matter and that no part of the accumulations added to the reserve fund from year to year were subject to taxation.

The report of the proceedings in the House of Lords (1), shows that the same arguments now made on behalf of the Minister were made by the Attorney-General and there rejected. It was contended that since the company was carrying on a trade or business, within the meaning of the Income Tax Act, 1918, the surplus of the receipts over the expenditures was profit and that it was immaterial how that profit was applied, that the company owned the contributions of the members in response to calls and the reserve fund belonged to the company and was available to creditors and that no individual member had an interest in it. Viscount Cave considered that the decision of the House in the *New York Life* case (*supra*) completely covered the case. The accumulated reserve fund of the Coal Owners' Association exceeded £150,000. A passage from the Lord Chancellor's judgment reads (p. 832):—

In this case, as in the *New York Life Insurance Co.'s* case, (2), there are no shareholders interested, and the whole of the yearly surplus remains to the credit of the members, and must either be applied to meeting their future claims or be returned to them on retirement. Sooner or later, in meal or in malt, the whole of the company's receipts must go back to the policy holders as a class, though not precisely in the proportions in which they have contributed to them; and the association does not in any true sense make a profit out of their contributions.

(1) [1927] A.C. 827. (2) 14 App. Cas. 369.

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While the first sentence of the above quotation would indicate that Lord Cave thought that the entire amount contributed to the reserve fund was refunded, the concluding sentence makes it clear, I think, that he had not failed to note that the contrary was the case and that less might be returned than had been paid in. The important point was that the whole of the fund must go back to the members as a class. By this, I assume he meant that this would occur on a winding-up or in the event of the discontinuance of business by the Association.

In *Ayrshire Employers Mutual Insurance Association, Ltd.* v. *Commissioners of Inland Revenue* (1), the Association had as its principal object the insuring of its members on the mutual principle against claims arising out of accidents to their workmen. By levies upon the members for premiums in excess of the amounts required, a reserve fund had been accumulated a proportion of the revenue from which was credited to each member. Members' accounts were cleared annually and when an account showed a surplus, part was returned to the member as a bonus the balance being retained by the Association. The articles provided that a retiring member, unless he was giving up his business, forfeited half of his contribution to the surplus assets. Where, however, he was giving up business, or if his membership was terminated by the Association, he was entitled to recover his whole contribution. The decision in *Jones* v. *South West Lancashire Coal Owners' Association* (2) was applied, the Court of Session deciding that the transactions between the Association and its members did not give rise to a profit subject to income tax. It is to be noted that in the course of the judgment of Lord Fleming (p. 427) he referred to a passage from a judgment of Lord Macmillan in *Municipal Mutual Insurance* v. *Hills* (3), where, after referring to the principle on which the surpluses arising in the conduct of a mutual insurance scheme are not taxable as profits, he said in part:—

> The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words there must be complete identity between the contributors and the participators. If this requirement is satisfied the particular form which the association takes is immaterial.

(1) [1944] S.C. 421. (2) [1927] 1 K.B. 33.
(3) (1932) 147 L.T.R. 62 at 68.

Lord Fleming did not appear to construe this as meaning that it was essential that the contributors to the reserve fund should be entitled to have refunded to them the full amount of their contributions, in view of the term of the by-laws referred to above. That portion of the argument directed to s. 31(1) of the Finance Act, 1933 does not touch the present matter.

The appeal to the House of Lords was dismissed (1). Lord Thankerton who, alone of the Law Lords, referred to what had been said by Lord Macmillan in the *Municipal Mutual Insurance* case and did not mention the provision in the by-laws whereby a member withdrawing received back only one-half of his contributions to the surplus, considered that the appeal failed.

Lord Macmillan, after referring to an argument advanced on behalf of the commissioners that a surplus arising from transactions of the company with non-members was taxable, said (p. 640):

> The hypothesis is that a surplus arising on the transactions of a mutual insurance company with non-members is taxable as profits or gains of the company. But unfortunately for the Inland Revenue the hypothesis is wrong. It is not membership or non-membership which determines immunity from or liability to tax; it is the nature of the transactions. If the transactions are of the nature of mutual insurance, the resultant surplus is not taxable whether the transactions are with members or with non-members.

In my opinion, the business carried on by the appellant company in the taxation year 1947 is properly described as that of mutual insurance. The purpose of the company, as declared by the letters patent, is that of insuring on the premium note plan, subject to the provisions of Part II of the Companies Act and of *The Insurance Act, 1937*. A premium note is defined by s-s. 48 of s. 2 of the latter statute to mean:—

> An instrument given as consideration for insurance whereby the maker undertakes to pay such sum or sums as are legally demanded by the insurer, the aggregate of such sums not to exceed an amount specified in the instrument and includes any undertaking to pay such sums regardless of the form thereof and whether or not accompanied by a deposit of money or security.

(1) [1946] 1 All. E.R. 637.

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The premium notes taken by the appellant company conform to the first part of this definition. It is of the essence of such a plan that each member insuring with the company will to a maximum figure (being the principal amount of the note) and, from time to time during its currency, to the extent of the balance which may become payable under it, share the risk of loss by fire or lightning by any of the members with all the members of the company. Such a plan falls within the definition of "Mutual Insurance" in s-s. 40 of s. 2 of the Act and, in addition, within the generally accepted meaning of the term.

I think it is true that the question does not differ from that which would arise had those persons who were members of the appellant company for the year 1947 entered into an agreement among themselves each to contribute his proportionate share of the loss by fire suffered by any of them to an agreed amount, the members' liability being limited to, say, the sum of $20, each member to contribute part of this sum in cash in order to pay expected losses and the expenses of carrying out the plan, assessments to be made upon the notes for further amounts when required by a committee of the members, any surplus resulting from the cash payments and such assessments to be placed at the end of the year in a reserve fund to the credit of the members, any member withdrawing from the plan during the year to forfeit any interest he might have in the amount so accumulated. Had this plan been followed it would be quite impossible, in my opinion, to sustain a contention that such a fund represented a profit or was taxable income if distributed among the members, except perhaps to the extent that they might individually participate or be entitled to participate in the portion of such surplus contributed by members who had withdrawn. That would be a truly mutual plan of insurance and I think the situation is not changed when the members, availing themselves of the provisions of the Companies Act and *The Insurance Act, 1937,* carry out such a plan through the medium of an incorporated company.

The plan provided by the terms of Part II of the Companies Act and the relevant sections of the Insurance Act enables persons wishing to associate with others in such

an enterprise to substitute the covenant of a separate legal entity for the individual covenant of the proposed members. It is clear that in enacting this legislation it was contemplated that the persons who would take advantage of its provisions would be unlikely to be skilled in insurance matters and perhaps in financial matters involving the undertaking of considerable financial obligations. Accordingly, after organization in the manner required by the Companies Act, the operations were made subject to the supervision of the Superintendent of Insurance and, *inter alia,* the forms to be used and the extent of the assessments to be made upon the premium notes made subject to his approval. While such a company could, no doubt, operate by assessing its members upon their premium notes from time to time as losses occurred, the Legislature apparently considered it prudent to require the establishment of a reserve fund to the amount provided in s. 249 of the Insurance Act, to be available to pay the liabilities of the company to the extent that the ordinary receipts were insufficient. Much importance has been attached in argument to the fact that by s-s. 3 of that section the reserve fund is declared to be the property of the insurer. Since it is the company that incurs the obligation to the members by issuing policies of insurance, of necessity the reserve fund must be its property, since the whole purpose of the requirement is that it may be resorted to in satisfaction of the company's liabilities. The argument loses its force when it is realized that the fund is accumulated as directed by the statute, not in pursuance of a profit making enterprise but in furtherance of a mutual insurance plan carried on by the company in the interests of its members and which may not be applied, except on the order of the Governor in Council, to any purpose other than the settlement of claims or other liabilities. Counsel for the respondent argues that the case at bar is distinguished from the cases relied upon by the appellant by reason of the further provisions of ss. 3. The argument is that any surplus ultimately remaining after payment of all claims will not necessarily be returned to the members. I think it clear, however, from the provisions of the Winding-up Act (R.S.N.B. 1927, c. 97) and of the Insurance Act (S. of N.B. 1937, c. 44), read together, that on a winding-up the

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surplus, if any remaining after payment of the liabilities, would be returned to the members of the company. In the *Jones* and the *Ayrshire Employers Mutual* cases, the fact that only part of the amounts contributed by the members to the reserve fund was in certain circumstances returned to them on their withdrawal was held not to affect the matter and it was decided that the amounts thus accumulated from year to year were neither profits nor gains of the Association. In my opinion, the principle applied in these two cases is applicable to the present case.

Counsel for the Minister referred to para. (*d*) of s-s. 1 of s. 6 of the *Income War Tax Act* which provides that in computing the amount of the profits or gains to be assessed a deduction shall not be allowed in respect of amounts transferred or credited to a reserve, except such an amount for bad debts as the Minister may allow and except as otherwise provided in the Act. This, however, clearly refers to amounts received which must properly be taken into account in determining whether a profit or loss has resulted from the company's operations and cannot, in my opinion, apply to amounts such as are in question here received by the company for the purpose defined by the Insurance Act.

With all the great respect that I hold for any opinion of Mr. Justice Hyndman, my consideration of the present matter leads me to a different conclusion. This appeal should be allowed with costs here and in the Exchequer Court.

TASCHEREAU J.:—For the reasons given by my brother Locke I would allow this appeal with costs here and in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: *Francis, Woods, Gauley & Blair.*

Solicitor for the respondent: *F. J. Cross.*

W. A. GRANDEL, KEN REINE, C. J. APPENHEIMER, CHRIS NEILSON AND F. PONTO (DEFENDANTS) } APPELLANTS;

1952
*Nov. 11, 12, 13

1953
*April 28

AND

G. W. MASON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE PROVINCE OF SASKATCHEWAN

Nuisance—Negligence—Highway construction near mink farm—Loss of pregnant mink due to noise of construction equipment—Duty to use reasonable care even where nuisance authorized by Statute.

The respondent, on learning extensive construction work was about to be undertaken on a provincial highway contiguous to his mink farm, notified responsible officials of the Highway Department that the whelping season had just begun and the noise from such operations would endanger the lives of the female mink and their offspring. In consequence orders were given by the engineer in charge to leave a sufficient gap in the road by carrying on the work at a distance that would prevent disturbance of the mink. Contrary to orders the appellants operated bull dozers and tractors within the prohibited area and the noise from the equipment resulted in the loss of a number of female mink and their young.

Held: 1. (Taschereau and Lockk JJ. dissenting)—That in an action for damages, the plea that the raising of mink, particularly during the whelping season, was a delicate and sensitive business, did not necessarily conclude the matter. A defendant seeking to avoid liability for a nuisance on the basis that he had pursued but the ordinary and normal course of conduct incident to that locality must establish that he acted with reasonable care, even where statutory authority may have authorized the creation of a nuisance. *L. & N.W. Ry. Co. v. Bradley* 3 Mac. & G. 336 at 341; *Geddis v. Proprietors of Bann Reservoir* 3 App. Cas. 430; *Dufferin Paving & Crushed Stone Ltd. v. Anger* [1940] S.C.R. 174 at 177.

2. That though the respondent's pleadings based the cause of action upon nuisance, it appeared that at the trial the basis of negligence was also considered. It was raised in the Notice of Appeal to the Appeal Court and that Court in its judgment appeared to have founded liability upon negligence. The contention that at this stage respondent's recovery must be restricted to a claim for nuisance, could not be maintained.

3. That a reasonable man in the position of the appellants would have known of the presence of the respondent's mink, forseen the possibility of damage, and taken reasonable care to avoid it. Failure to do so constituted a breach owing by them to the respondent.

Per: Taschereau and Locke JJ., dissenting.—The case should be disposed of upon the only issue raised by the pleadings, which was that of nuisance. The appellants were acting as servants of the Crown and no such action lay against them. Had the appellants been acting as servants of the Municipality rather than of the Crown the action

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

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likewise should fail: *Hammerton v. Dysart* [1916] 1 A.C. 57; *Gaunt v. Fynney* L.R. 8 Ch. 8; *Eastern & South African Telegraph Co. v. Cape Town Tramways* [1902] A.C. 381; *Kine v. Jolly* [1905] 1 Ch. 480. As the appellants did not give evidence at the trial as they would presumably have done had the statement of claim contained a count of negligence, the question of their liability on that basis should not be considered.

APPEAL by defendants from a judgment of the Court of Appeal of Saskatchewan (1) allowing an appeal from the judgment of Taylor J. (2) which dismissed plaintiff's action.

F. A. Brewin Q.C. and *R. Scott* for the appellants.

A. W. Embury for the respondent.

TASCHEREAU, J.—(dissenting)—For the reasons given by my brother Locke, I would allow the appeal, dismiss the action with costs here and in the court below.

The judgment of Estey, Cartwright and Fauteux, J.J. was delivered by:—

ESTEY J.:—The respondent (pl.) claims that the appellants (defs.), in operating bulldozers, road graders and other road construction and maintenance equipment upon that portion of Highway No. 35 in the Province of Saskatchewan contiguous to his mink farm, on or about the 9th day of May, 1949, caused the death of valuable mink and their offspring. His action was dismissed at trial, but allowed as against the appellants in the Court of Appeal.

Highway No. 35 is owned and maintained by Her Majesty The Queen in the right of the Province of Saskatchewan. At all times material hereto the Minister of Highways was reconstructing and repairing the road in front of or contiguous to the respondent's farm and the appellants Neilson and Appenheimer were grade foremen and Grandel, Reine and Ponto operators of caterpillar tractors.

The respondent operates a mink farm on the eastern side of Highway No. 35 on lots 1-20, block 59, in the townsite of Qu'Appelle. When, on the 5th day of May, he observed that equipment for reconstruction and repair of the highway was being assembled about 2,000 feet south of his mink farm he realized, because this was the whelping

(1) (1951) 3. W.W.R. (N.S.) 536; [1952] 1 D.L.R. 516.

(2) (1951) 3. W.W.R. (N.S.) 169.

season, the possibility of damage. Immediately he interviewed one who to him appeared to be in charge of the equipment and was advised to go to Regina. This he did, where he interviewed Hartwell, Superintendent of Fur Farms in the Department of Natural Resources. As a consequence, on the morning of May 6, 1949, he received from Hartwell a telegram reading:

> CHIEF ENGINEER WILL CONTACT CONSTRUCTION CREW TO COMMENCE CONSTRUCTION FURTHER UP ROAD IF POSSIBLE

The surveyors, at the outset, placed stakes, hereinafter referred to as stations, at each 100 feet, commencing with zero in the centre of Highway No. 1, from which Highway 35 extends northward. The actual work of reconstruction and repair commenced on May 6, at station 20, about 2,000 feet from Highway No. 1. That morning, as a consequence of instructions from his superiors at Regina, Swenson, the engineer in charge, instructed Olson to leave a gap of 1,200 feet between stations 28 and 40 in order "to prevent disturbing the mink" and to particularly inform those in charge of the bulldozers and road graders. When this order was given about noon the crew were working near station 24.

The respondent's mink pens were about 3,350 to 3,400 feet north of the junction of Highways Nos. 1 and 35. Stations 28 and 40 would be respectively 2,800 and 4,000 feet north of that junction. The evidence justifies a conclusion that the gap of 1,200 feet was fixed at or near stations 28 and 40 and, therefore, the mink pens would be about the centre thereof, or 600 feet from each station. That the equipment was moved from some point south of station 28 northward is clear, but the evidence is conflicting as to where the equipment was working on the morning of the 9th when the damage was suffered. The appellants' evidence is to the effect that the work was commenced north of station 40, while that of the respondent and his witnesses indicates that the work was actually being done at the northwest corner of respondent's property.

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The learned trial judge found:

> "I find the fact to be that on the early morning of the 9th, May 1949, the construction work with its accompanying noise, vibration and commotion sufficiently near to the mink, and in entering upon the plaintiff's land to turn the machines, did panic the female mink and caused damage to these female mink and their kittens."

The learned judges of the Appellate Court accepted this finding and stated:

> The finding of the learned trial Judge that construction work was actually carried on on the morning of May 9th close to his property and even on the corner of his property is supported by the evidence and should not be disturbed.

We have, therefore, concurrent findings of fact as to where the noise was created that caused the damage and such findings ought to be disturbed only in exceptional circumstances which are not here present.

The respondent did not object to the noise, except in so far as it caused the death of his mink, nor is it otherwise suggested the noise interfered with the comfort or convenience of the residents of that locality or adversely affected their property. In these circumstances the appellants submit that, though the noise caused the unfortunate loss suffered by the respondent, they are not liable because of the peculiarly delicate and sensitive business of raising mink. That such a business, particularly during the whelping season, may well be styled a delicate and sensitive business is established upon the evidence. The learned trial judge, while dismissing the action upon other grounds, stated:

> Where, therefore, a fur farm with these female mink at times so susceptible to noise is located on a much travelled highway, the owner must in so locating do so at his own peril, and his industry can claim no special privileges as of right, nor object to the noises incidental to the use, repair, reconstruction and maintenance of the highway by the Highway authorities.

The principle underlying the foregoing submission is illustrated by *Eastern and South African Telegraph Co. v. Cape Town Tramways* (1). The appellant (pl.) maintained a submarine cable into Cape Town where the respondents operated a system of electric tramways. Electricity leaked from the rails and affected the working of the appellant's submarine telegraph cable. In dealing with

(1) [1902] A.C. 381.

the common law liability their Lordships of the Judicial Committee pointed out that the apparatus of the telegraph company (appellant) consisted of a delicate instrument at the time the injury complained of was suffered which "to insure its immunity from disturbance is a somewhat serious liability to cast on neighbours."

Their Lordships stated at p. 393:—

> The true comparison is with things used in the ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to be affected by even minute currents of electricity . . . A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure.

In *Robinson v. Kilvert* (1), the landlord occupied the basement and generated heat to the point that it caused damage to the tenant's brown paper stored on the ground floor of the building. It was held that the excessive heat was not something noxious in itself and did not interfere with the ordinary use and enjoyment of the premises. The tenant's application for an injunction was refused. In the course of his judgment Lopes L. J. stated at p. 97:

> A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade.

The learned author of *Salmond on Torts*, 10th Ed., states at p. 226:

> No action will lie for a nuisance in respect of damage which, even though substantial, is due solely to the fact that the plaintiff is abnormally sensitive to deleterious influences, or uses his land for some purpose which requires exceptional freedom from any such influences . . . Extraordinary and special requirements are not protected by the law of nuisance.

That, however, in the circumstances of this case, does not necessarily conclude the matter. The point at which the work was done and the noise caused which disturbed the mink and caused the damage was, under the concurrent findings, at the northwest corner of respondent's property and, therefore, well within the gap and some 300 or 400 feet closer to the mink than had the work been done, according to instructions, north of the gap. The grade foremen Neilson and Appenheimer and the operators of the machines were not only acting contrary to instructions given to avoid damage to the mink, but were in a place

(1) [1889] 41 Ch. D. 88.

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where, as hereinafter described, reasonable men would have foreseen damage would probably result and taken those precautions which, under the circumstances were possible to avoid it. It was their failure to take this reasonable care that created the noise from which the damage resulted.

A defendant who seeks to avoid liability for a nuisance on the basis that he has pursued but the ordinary and normal course of conduct incident to that locality must establish that he acted with reasonable care.

> Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual and conducted with proper care and skill are under a specific duty, if they wish to make good that defence, to use that reasonable and proper care and skill. (Sir Wilfrid Greene M.R. in *Andreae v. Selfridge & Co.* (1).)

Even where statutory authority may authorize the creation of a nuisance, parties must, in order to obtain that immunity, act with reasonable care.

> But in order to secure this immunity the powers conferred by the Legislature must be exercised without negligence, or, as it is perhaps better expressed, with judgment and caution (per Lord Truro, *L. & N.W.R. Co. v. Bradley.* (2).) For damage which could not have been avoided by any reasonably practicable care on the part of those who are authorised to exercise the power, there is no right of action. But they must not do needless harm; and if they do, it is a wrong against which the ordinary remedies are available. Pollock on Torts, 15th Ed., p. 94.
>
> . . . it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of this powers. Geddis *v. Proprietors of Bann Reservoir.* (3)

In *Groat v. City of Edmonton* (4), the plaintiffs, riparian owners, recovered damages against the City of Edmonton for pollution of a stream. Duff J. (later C.J.) stated at p. 526;

> The existence of a state of affairs constituting a nuisance in fact, is found, and is, I think, established as resulting from the construction and use of the large sewer extending through the northeast arm; and this was in law a nuisance chargeable to the municipality, unless sufficient justification or excuse has also been established.

(1) [1938] 1 Ch. 1 at 9.
(2) (1851) 3 Mac. & G. 336 at 341.
(3) [1878] 3 App. Cas. 430 at 455.
(4) [1928] S.C.R. 522.

Rinfret J. (later C.J.) with whom Anglin C.J.C. concurred, stated at p. 534:

> The city therefore has inflicted and still inflicts unnecessary injury upon the appellant.

In *Dufferin Paving & Crushed Stone Ltd. v. Anger,* (1) Davis J., with whom Duff C.J. and Hudson J. concurred, stated:

> It may with advantage, however, be pointed out that the authority to use the street was not obligatory but only permissive, and that even where there is a statutory obligation upon a person, that does not entitle him to invade the rights of others unless he can show that in practical feasibility the obligation could be performed in no way save one which involves damage to other persons.

It would seem in principle that a similar rule should apply where, as here, the appellants seek to avoid liability on the basis that, though they created the noise which caused the damage, recovery should be denied because of the delicate and sensitive nature of respondent's business—a business well known throughout the Province. In fact, respondent operated his mink farm under a licence issued by the Provincial Government.

In *Andreae v. Selfridge & Co.,* (*supra*), Selfridge & Co. appealed from a judgment at trial holding that it had created a nuisance in demolishing and constructing certain buildings. In the Court of Appeal, Sir Wilfrid Greene M.R., with whom Romer L.J. and Scott L.J. agreed, stated at p. 6:

> I am unable to take the view that any of these operations was of such an abnormal character as to justify treating the disturbance created by it, and the whole of the disturbance created by it, as constituting a nuisance. That applies to both the first and the second operations.

The Master of the Rolls, however, went on to hold that Selfridge & Co. was liable for noise caused at unreasonable hours in respect of the first operation and then, as to the second, that it had not satisfied the burden upon it to establish that all reasonable and proper precautions had been taken to reduce the quantity of dust and grit which he described as "insufferable." Lord Green stated at p. 10:

> The use of reasonable care and skill in connection with matters of this kind may take various forms. It may take the form of restricting the hours during which the work is to be done; it may take the form of limiting the amount of a particular type of work which is being done simultaneously within a particular area; it may take the form of using

(1) [1940] S.C.R. 174 at 177.

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proper scientific means of avoiding inconvenience. Whatever form it takes, it has to be done, and those who do not do it must not be surprised if they have to pay the penalty for disregarding their neighbours' rights.

The officials in the Department of Highways, apprized of the possible damage that might result, did what reasonable men, foreseeing the possibility of damage, would have done and instructed the engineer in charge "to commence construction further up road if possible." That such was possible is established by the fact that a gap of 1,200 feet was directed and if proper care had been exercised the equipment would have been moved to the north of that and, as the respondent states, if work had been done a similar distance from his mink pens on the north as on the south damage would not have resulted.

It would, therefore, appear that the appellants were negligent in creating the noise within the gap and in such proximity to the mink and, therefore, cannot avail themselves of the defence based upon the delicate and sensitive nature of respondent's business of raising mink.

Moreover, quite apart from any question of nuisance, it would appear that the appellants are liable on the basis of their own negligence. The maxim *sic utere tuo ut alienum non laedas* is applicable to both nuisance and negligence. Broom's Legal Maxims, 10th Ed., 238, 248, 252. Though the respondent, in his pleadings, bases his cause of action upon nuisance, it would rather appear that it has also been treated on the basis of negligence. The learned trial judge so considered it. It was raised in the notice of appeal to the Court of Appeal and the learned Chief Justice, writing on behalf of the learned judges of that Court, would appear to have founded liability upon the negligent conduct of the appellants. The contention of counsel for the appellants that at this stage the respondent's recovery must be restricted to a claim for nuisance cannot be maintained.

The respondent's mink pens were within approximately 250 feet of the northwest corner of his property. These, as well as two signs reading "Mink, no trespassing," were within the view of persons using or working upon the highway. The respondent had spoken to someone at the equipment on Thursday, the 5th. The instructions relative to

the gap and the moving northward were received and communicated on the 6th. Swenson, the engineer in charge, deposed that when he told Olson, in the presence of Thomson and Boivin, to leave a gap of 1,200 feet, one of them inquired why and he explained "to prevent disturbing the mink" and went on to tell Olson to give the instructions "To whoever was in charge of the machines at the time." Olson corroborates this and states: "Well, my instructions were to tell the construction crew not to build past station 28, that there would be a gap left of twelve hundred feet." It was, as Olson explained, not "an ordinary order, it was something different." Barker and Hanson both admitted they knew of the presence of the mink and the reason for the gap. Neilson deposes that he did not know of the mink farm and, in fact, was not told why the gap of 1,200 feet was made. On the other hand a witness whom the learned trial judge evidently believed deposed that Neilson had told him they "had to move on account of the mink farm." The damage was not suffered until Monday, May 9. In the interval between the 5th and the 9th, as the learned Chief Justice, speaking on behalf of the Court of Appeal, observed, "There is much evidence to the effect that it was common knowledge that the gap was left to protect the plaintiff's mink."

A reasonable man in the position of the grade foremen and the operators of these large machines would have known of the presence of the respondent's mink, foreseen the possibility of damage and taken reasonable care to avoid it. Their failure to do so constituted a breach of duty owing by them to the respondent.

> In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double rôle. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to compensation. Lord Russell of Killowen in *Hay or Bourhill v. Young*. (1)

There is here present evidence of markings and conversations which, in the exercise of reasonable care, would have brought home to the appellants the presence of the

(1) [1943] A.C. 92 at 101.

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mink and the damage that might result from the noise. Those factors essential to liability absent in *Nova Mink Ltd. v. T.C.A.*, (1), are here present.

In *MacGibbon v. Robinson*, (2), the plaintiff operated a mink farm. The trial judge found that the defendant, with knowledge both that this was the whelping season and that during that season noise and disturbance might cause damage, discharged two blasting shots upon land which he was clearing and which did, in fact, cause serious damage to the plaintiff's mink. It was also held that the defendant had been advised by certain government employees that they had discontinued land clearing operations until after the whelping season. It was also found that these shots were unnecessary. In these circumstances the defendant was held liable for the damage caused.

Counsel for the appellant submits that the evidence does not specify which of the defendants caused the damage and, therefore, the action should be dismissed. Neilson and Appenheimer were grade foremen who, upon the morning in question, were directing the operators of the machines. The learned trial judge found the damage was done in the early morning of the 9th. Appenheimer deposed "We both directed where it was necessary" and to a suggestion that they might at times become separated over a space of 1,000 feet and, referring particularly to the morning in question, he said "Well, we would be very close together, just starting up." It was stressed that one witness deposed but two machines were operating at the point in question. Another witness, however, deposed that he saw four or six. In view of this conflict it is significant that neither Neilson nor Appenheimer, the grade foremen, suggests that the usual number were not operating.

These men were all employed in the construction and repair of this highway and, upon the morning in question, in the course of their work created the noise. The learned judges in the Court of Appeal have found them to be joint tortfeasors and they may be, particularly if the provisions of s. 3 of the Contributory Negligence Act (S. of Sask. 1944, c. 23) are applicable. On the other hand, they may be "several concurrent tortfeasors," as that phrase is used

(1) [1951] 2 D.L.R. 241. (2) (1952) 6 W.W.R. (N.S.) 241.

in Williams—Joint Tortfeasors and Contributory Negligence, p. 5 *et seq.* The point is often one difficult to determine and here, as the case was presented, it is unnecessary to determine under which heading these men must be placed. *Sewell v. B.C. Towing & Transportation Co. Ltd.*, (1) *Sault Ste. Marie Pulp and Paper Co. v. Myers,* (2); *Till v. Town of Oakville* (3), (reversed on other grounds, 33 O.L.R. 120).

Judgment was not directed against Barker and Hanson in the Court of Appeal and they are not before this Court. The learned trial judge did not accept the evidence of those who deposed that the work was done north of the gap and it, therefore, follows that the work on the morning in question was done within the gap and at a point near the northeast quarter of the respondent's property. The appellants before this Court all participated in that work and in the creation of the noise.

The appeal should be dismissed with costs.

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal of Saskatchewan (4) which allowed the appeal of the present appellant from a judgment of Taylor J. (5) by which the action was dismissed. In view of the nature of the claim advanced in the pleadings and the manner in which the action has been dealt with in the judgment appealed from, it is necessary to examine closely the evidence adduced at the trial.

The respondent, in the spring of 1949, established what is described as a fur farm on the outskirts of the Town of Qu'Appelle and there carried on the occupation of raising mink. Prior to this time, he had engaged in operations of this nature on a farm near Grenfell, Sask. At Qu'Appelle he acquired a property described as Block 59, comprising an area 500 feet in length and 300 feet in width, the western boundary of which fronted upon Provincial Highway No. 35. On this property, he constructed pens and other buildings required for carrying on his operations. To this site he brought some 49 female mink and 12 males which were maintained there within an enclosure. According to

(1) [1883] 9 Can. S.C.R. 527.
(2) (1902) 33 Can. S.C.R. 23.
(3) (1914) 31 O.L.R. 405.
(4) (1951) 3 W.W.R. (N.S.) 536; [1952] 1 D.L.R. 516.
(5) (1951) 3 W.W.R. (N.S.) 169.

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a rough sketch of the premises put in by the respondent at the trial, the nearest of these pens was distant approximately 250 feet from the easterly limit of the highway which ran due north and south.

It was established in evidence that at the time female mink are about to whelp, and for some two weeks thereafter, they are extremely sensitive to unusual noises and, when disturbed by such a cause, are liable to kill their young and frequently themselves suffer death. The time of the year when this condition is present is apparently during the last days of April and the early days of May.

Highway No. 35 is a provincial highway, a term defined by s-s. 2 of s. 8 of *The Highways and Transportation Act,* 1949, as being a public highway designated as such by the Lieutenant-Governor in Council. Public highway is defined by s-s. 9 of s. 2 of the Act as meaning a road allowance or a road, street or lane vested in His Majesty or set aside for such purpose under the provisions of *The Northwest Territories Act* or any Act of Saskatchewan and includes any bridge, culvert, drain or other public improvement erected upon or in connection with such public highway. It was admitted on behalf of the defendants for the purpose of the trial that Highway No. 35 was a provincial highway and:— "as such is the responsibility of the Government of Saskatchewan for maintenance and repairs." It was further admitted that the appellants were between the 5th and the 10th days of May, 1949, engaged as members of a work crew doing maintenance and repair work on the said highway in the area adjoining, but not contiguous to, the lands of the respondent.

On May 5, 1949, the respondent saw the work crew, of which the appellants were members, on Highway 35 to the south of his property. They had with them a caterpillar tractor for use in connection with the work and, believing that the noise made by such machines on the road maintenance work might cause damage to the mink, he spoke to a member of the crew and told him about the danger. He could not identify the person to whom he had spoken. He then went and spoke to some other unidentified persons who referred him to the Department of Highways at Regina. He, thereupon, went to Regina and spoke to a

Mr. Hartwell, who was the Supervisor of Game in the Department of Natural Resources. It was admitted on behalf of the appellants that Hartwell brought to the notice of the Department of Highways that Mason was concerned about the effect of the highway operations on the mink, and on May 6th Hartwell wired the respondent from Regina, saying that the Chief Engineer would instruct the crew to commence construction further up the road, if possible.

On May 6th, the crew commenced operations on the highway to the south of the respondent's property. According to Orville Swenson, a graduate engineer employed by the Department of Highways, he was the resident engineer in charge of the work to be performed upon Highway No. 35 and directed the work of the survey gang who were establishing the lines for the proposed work and driving stakes for the guidance of those who were to do the work, which involved widening the right-of-way by some 17 feet, starting at a point a mile north of Qu'Appelle. Stations were established at every 100 feet and stakes driven. Gordon Olson was the construction foreman in charge of the work. On the morning of May 6th, a construction engineer of the Department gave instructions that no work was to be carried on upon the highway for a distance of 1,000 feet opposite the respondent's property, the centre of the gap to be in line with the mink pens. Swenson instructed Olson as to this, who, in turn, communicated the order to the appellant Neilson, who was sub-foreman on the work. E. W. Boivin was the foreman in charge of the construction work and, working under him, in addition to Neilson, was the appellant Appenheimer. Boivin received the same instructions as to the gap to be left opposite the respondent's place directly from Swenson.

On May 7th, the crew carried on the work of construction to the south of the respondent's property and it appears to be common ground that no ill result followed from their operations on that day. May 8th was a Sunday and no work was done but operations were continued on Monday, May 9th, and it was upon this date that the damage was caused. There is a conflict between the evidence of the respondent and of two witnesses called by him and of the

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witnesses for the appellant, as to the exact area in which work was done on that day. According to the respondent, the crew discontinued work on the 7th, 600 feet south of the southern limit of his property and, having removed their equipment, they recommenced their operations on the road allowance at the northwest corner of his land "right up from my mink pens", on Monday. On the same day the respondent says that the crew excavated a small portion of a borrow pit which was thereafter greatly extended so that, according to the respondent, it was ultimately some 210 feet in length and encroached approximately 25 feet along the western boundary of his property. That part excavated, however, on May 9th was only a small portion at the northwest corner of his property. The respondent, however, contends that in digging this part of the pit on May 9th the crew trespassed upon his property. According to Donald Leslie, a labourer who was a member of the crew and who was called by the respondent, there were two machines engaged in moving earth opposite the northwest corner of the property in question. He said that the tracks of the caterpillar tractors and the buckets and the cables which moved them made a lot of noise. The respondent did not attempt to describe the noise made by the operation of the machinery but it resulted, he said, in the mink becoming very excited, apparently through fright. In addition to saying that a small portion of the borrow pit was excavated on his land on May 9th, he said that during part of the time the operators of the machinery turned it around on his property, but the evidence as to this is extremely vague. The necessity for doing so when the highway was available for this purpose does not appear. After working at the location mentioned for a period which the respondent described as "a matter of a few hours", they moved to the north, away from his property.

A further witness called by the respondent, Alex Haughian, who was engaged by the Department of Highways for cutting brush on the road allowance, said that Neilson had told him on May 7th that the work they were doing was causing trouble with the respondent's mink and that they were to work to the north. It will be noted, however, that the respondent himself said that there was no trouble with the animals at that time. On May 9th,

Haughian said that he was working near the northwest corner of the respondent's property and that the machines moving the earth were working to the south of him and that there were from 4 to 6 of them and that Neilson was directing the work.

As opposed to this evidence, Boivin, the foreman who said that there were 5 caterpillar tractors in operation on the work between the 5th and the 10th of May and that two of the operators were the appellants Grandel and Reine, said that a gap of over 1,200 feet had been left, on instructions, opposite the respondent's land and that no work was done along this part of the road, or on the borrow pit, between the 7th and the 19th of May and that no work was done at any time within 600 feet of the mink pens. Olson said that the centre of the gap was very close to opposite the mink pens. Swenson, the resident engineer, was at the scene on the morning of May 9th and said that the crew were then working about 400 feet to the north of the north end of the gap and that no work was done in the gap up to the time he left the work on May 19th. L. O. Thompson, the resident engineer employed by the Government at Qu'Appelle, said that no work was done in the gap between the 6th and the 19th of May and that the borrow pit was not commenced until May 19th. Barker and Hanson, both of whom were named as defendants in the action and were engaged in operating tractors on the work on the day in question, say that no work was done in the gap on that day, the operations being carried on to the north of it. The appellant Appenheimer said that he had not ordered any of the machines to operate in the gap after May 6th and that none of the drivers had done any work on that section of road between May 6th and 19th.

Taylor J. by whom the case was tried, after saying that this was a Government project and that there was no evidence that any of the defendants did anything other than in pursuance of the orders given to them, which they were employed and paid to perform, said:—

> It may be, and I strongly suspect, there was negligence in the supervision of the work and carrying it out by the head foreman and the resident engineer, but they are not parties to the action.

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I find the fact to be that on the early morning of May 9, 1949, the construction work with its accompanying noise, vibration and commotion sufficiently near to the mink, and in entering upon the plaintiff's land to turn the machines, did panic the female mink and caused damage to these female mink and their kittens.

and further, after saying that, in his opinion, none of the defendants were liable, the learned Judge said:—

As stated, I am satisfied that an error was made in proceeding with the project at the place in question on the 9th May. The resident engineer and head foreman had gone off the job over the weekend, and instructions to pass that place and work elsewhere may have been given to the engineer and were disregarded.

This, I think, must be taken as a finding of fact that work was carried on by the construction crew at or near the northwest corner of the respondent's property and that some of the machines had entered on the property to turn around. The action was framed in nuisance but the learned trial judge appeared to be of the opinion that it might properly be treated as including a claim for damages for negligence and as the defendant workmen owed no duty to the plaintiff, whether statutory or otherwise, in his opinion, he considered the action failed. For this reason, he found it unnecessary to examine the evidence to ascertain which, if any, of the defendants were actually engaged in the particular work that caused the damage. Taylor J. further considered that the operator of a fur farm locating close to a much travelled highway must be deemed to have done so at his own peril and to be without any right to object to the consequences of noises incidental to the use, repair, reconstruction and maintenance of the highway. This, I think, was directed to the claim for nuisance.

The present respondent's appeal to the Court of Appeal was allowed, the unanimous judgment of the Court being given by the Chief Justice of Saskatchewan. In the reasons for his judgment the learned Chief Justice said in part:—

The finding of the learned trial Judge that construction work was actually carried on on the morning of May 9 close to his property and even on the corner of his property is supported by the evidence and should not be disturbed.

Without mentioning the fact that the action was framed in nuisance, he said further that a public employee must be subject to the common law relating to negligence, to the

same extent as any other individual, and is personally responsible if he fails to take that reasonable care to avoid injury to anyone to whom he owes a duty in the circumstances and, after commenting on the fact that while the appellants Grandel, Reine and Ponto had filed defences but had not given evidence at the trial (a fact which is considered to be significant), expressed the view that the evidence warranted a conclusion that a prima facie case was made against these three operators of the machinery, there being evidence that the workmen of the crew knew of the mink and knew that the gap was being left to protect them, and accordingly:—

> owed a duty to the plaintiff to take care not to operate within the limits of the gap—there was a forseeable risk—and in my opinion they are liable for the damages caused by carrying on the operations within the gap and so close to the plaintiff's premises and the mink pens.

He was further of the opinion that the appellants Neilson and Appenheimer, together with the three machine operators, were joint tortfeasors, and jointly and severally liable for the entire damage suffered by the plaintiff.

I am unable to construe the allegations made by the Statement of Claim in this action, other than as a claim for damages for nuisance. The pleading contains no allegations of negligence. Had this been the cause of action, particulars of the negligence relied upon must have been pleaded or furnished on the defendant's demand. Such particulars would presumably have differed in respect of the claim against the defendants such as Neilson and Appenheimer who, as sub-foremen, were in a position of authority on the work and Grandel, Reine and Ponto, who merely operated the road building equipment, under their direction. I am, with respect, unable to attach importance to the fact that Grandel, Reine and Ponto did not give evidence at the trial. The only claim pleaded against them was that, as operators of the machinery, they were parties to the commission of a nuisance. The nuisance, if such there was, was committed on the instructions and on behalf of the Crown. It was presumably by reason of the plaintiff being advised that an action for damages for nuisance would not lie against the Crown in the right of the Province that the plaintiff decided to proceed against

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the servants of the Crown, rather than initiating proceedings by a Petition of Right under the provisions of c. 73, R.S.S. 1940. If these three defendants were advised (as I would assume they were) that a claim founded in nuisance did not, in these circumstances, lie against them, their failure to give evidence at the trial appears to me to be without significance.

The nature of the acts alleged to constitute a nuisance was causing "offensive and pestilential noises to be created on and about the plaintiff's lands and premises." If it be assumed, for the purpose of argument, that an action for damages for nuisance would lie against the Crown in respect of road making operations carried on by it upon Crown property in the manner in which such operations are customarily conducted, as it might against a municipal corporation, the question to be determined at the outset is whether the respondent has any such right of action in the circumstances disclosed by the evidence. Assuming this and since the claim is in nuisance, any right of the respondent against the servants of the Crown cannot be any higher than they would be against their employer if it was liable to an action for such a tort.

Much evidence was adduced on behalf of the respondent as to the particular sensitivity of female mink to disturbance from unusual noise or other causes shortly before whelping and for some two weeks thereafter. According to the respondent, the mink were not, even at this period, affected by the ordinary noise of traffic and the other noises to which they are accustomed. Thus, he said, they were not affected by the noise from the operation of his own farm machinery. A. K. McNeill, who had had some nine years' experience with raising mink in Saskatchewan, said that, from approximately the 1st of May until the 1st of June, noise caused by an aeroplane and even strange human voices would disturb them and might cause damage. Noise from highway traffic to which they have become accustomed was not, in his experience, likely to cause any disturbance. Walter Lefurgey, an experienced mink rancher and the President of the Saskatchewan Provincial Fur Breeders' Association called by the plaintiff, said that the

mink at such time did not appear to mind noises they were used to but, if there was any very great noise, they were liable to kill their young. He considered the month of May to be the danger period.

There is no suggestion in the present matter that such noise as was caused by the road making machinery at the time in question was more than that usually attendant upon like operations, or that it would have caused any inconvenience or discomfort to the owners or occupants of the adjoining property other than the respondent. The respondent's case, therefore, is that by carrying on his operations in a location, chosen by himself, closely adjoining a public highway, he has imposed upon the owners or occupants of adjoining property a liability that would otherwise not exist.

The differences between cases of nuisance and cases of negligence must never be lost sight of (*Latham v. Johnson*, (1)). Negligence is not necessarily an element of nuisance. The principle underlying the action for damages for nuisance is the same as the maxim *sic utere tuo ut alienum non laedas*. As pointed out by Lord Parker in *Hammerton v. Dysart*, (2), nuisance involves damage but damage alone is not sufficient to give rise to a right of action. There must be some right in the person damaged to immunity from the damage complained of. The nature and extent of that right is the matter to be determined.

In *Gaunt v. Fynney* (3), where the action was to restrain a nuisance, by noise, Lord Selborne L.C. said that a nuisance by noise was emphatically a question of degree and that (p. 12):—

> If my neighbour builds a house against a party-wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music-room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable.

In *Cook v. Forbes* (4), a manufacturer of fabrics which were sensitive to injury by sulphuretted hydrogen claimed damages for nuisance against the defendant, a manufacturer whose operations resulted in large quantities of that

(1) [1913] 1 K.B. 398 at 413.
(2) [1916] 1 A.C. 57 at 84.
(3) (1872) L.R. 8, Ch. 8 at 12.
(4) (1867) L.R. 5 Eq. 166.

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gas being discharged into the air. Page-Wood V.C. held that it was not an answer to the claim that the product manufactured was of great delicacy and thus liable to injury from a substance which would not otherwise cause damage. In that case, however, as pointed out by Lindley L.J. in *Robinson v. Kilvert* (1), the gas poured into the air from the defendant's works was in itself of an offensive and noxious character, and this was to be distinguished from doing something not in itself noxious which makes the neighbouring property no worse for any of the ordinary purposes of trade.

In *Eastern and South African Telegraph Company v. Cape Town Tramways* (2), dealing with the liability of the Tramway Company for damages caused to the submarine cable of the appellants by the escape of electricity stored by the respondents for the due working of their tramway system, Lord Robertson said in part (p. 393):—

> Now, having regard to the assumptions of the appellant's argument, it seems necessary to point out that the appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operation of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure.

In *Kine v. Jolly* (3), Vaughan Williams L.J. said in part (p. 489):—

> I think we must bear in mind that in these cases, which are conveniently grouped together as cases in which the proper form of action is an action of nuisance, citizens are not to be allowed to enforce rights which limit the user by others of property, unless the facts relied upon as constituting a nuisance are such as interfere with the ordinary rights which according to the ordinary notions of mankind they are entitled to exercise in relation to one another and in relation to their property.

(1) (1889) 41 Ch. D. 88 at 96. (2) [1902] A.C. 381.
(3) [1905] 1 Ch. 480.

The authorities upon this aspect of the law of nuisance appear to me to be accurately summarized in Pearce and Meston on the Law of Nuisance at pages 39, 50 and 51. In my opinion, a person establishing an industry of any nature upon a public highway such as the Provincial Highway in question here, or upon highways the ownership of which is vested in municipalities, upon which, of necessity, maintenance and construction work must be done from time to time in the ordinary course of events, has no right in law to complain of the noise attendant upon the performance of such work on the ground that it is a nuisance and, accordingly, the claim advanced in the present matter must fail.

I do not interpret the Statement of Claim as advancing a claim in trespass. If there was, indeed, some entry upon the respondent's property near the northwest corner, this appears to have been justified under the provisions of s-s. (*d*) of s. 30 of *the Highways and Transportation Act, 1949*. The evidence as to any entry upon the respondent's land for the purpose of turning around is very slight and there is nothing to suggest that any damage flowed from this, as distinct from that resulting from the noise of the operations upon the right-of-way.

There is no suggestion in the evidence that the road making machinery was operated in a negligent manner so that it made more noise than that which ordinarily resulted from its operation. The negligence suggested is that of having operated in that area at the time in question, contrary to their instructions. In these circumstances, and as I think it to be the case that the activities carried on at the time in question were not an infringement by the Crown (and would not have been an infringement on the part of a Municipality) of any right of the respondent, I have difficulty in understanding upon what footing the servants of the Crown might be held liable for performing or directing the performance of the work. I am satisfied that if the plaintiff's claim had been framed in negligence further evidence would have been tendered on behalf of the appellants. As no such case was made against them, I decline to speculate as to the particulars of the negligence which might have been asserted against the appellants, or

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the nature of the defence which would have been raised by them against such a claim, or the evidence that would have been given to support it. I think this case should be disposed of upon the issues raised in the pleadings.

I would allow this appeal with costs in this Court and in the Court of Appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *W. G. Currie.*

Solicitor for the respondent: *A. W. Embury.*

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*Feb. 2, 3
*Apr. 28

HER MAJESTY THE QUEEN *(Defendant)* ..... APPELLANT;

AND

NISBET SHIPPING COMPANY LIMITED *(Suppliant)* ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Collision at sea between foreign merchant ship and Canadian warship—Negligence in navigation—Application of s. 19(c) of the Exchequer Court Act, R.S.C. 1927, c. 34—Governing law—Whether effective in circumstances—Whether Crown entitled to limitation of damages under s. 649 of the Canada Shipping Act, 1934.

Action for damages resulting from a collision in the Irish Sea in February, 1945, between a foreign merchant ship and a Canadian warship on her way to take over escort duty for a convoy. The vessels were on crossing courses and the merchant ship was struck on her port bow. For the purpose of this case counsel for the appellant admitted that s. 19(c) of the *Exchequer Court Act* was not restricted to claims based on negligence occurring within Canada.

Held: That the warship was solely to blame for the collision and for the loss of the merchant ship.

Held: That at the time of the collision the warship was not engaged in warlike operations in a theatre of war so as to take it out of the operation of ss. 19(c) and 50A of the Exchequer Court Act.

Held (Locke J. dissenting): That notwithstanding s. 712 of the Canada Shipping Act, 1934, the Crown is entitled to limit its liability under s. 649 of that Act if it is able to show that the damage or loss occurred without its actual fault or privity.

Per Rinfret C.J. and Rand J.: The sources of law imposing regulations upon a merchant vessel and a naval ship are different; but the rules, originating in the uniform practices of navigators for centuries, have since their enactment been universally followed. They have become

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

the de facto international or maritime rules on the high seas, and the duties raised on the two vessels were therefore rules of law proceeding from a recognized paramount source.

Per Kerwin and Estey JJ.: The International Rules of the Road, as established by Canadian Order in Council P.C. 259, dated February 9, 1897, and those contained in the King's Regulations and Admiralty Instructions (as amended to November 1943) and incorporated in the Naval Service Act, R.S.C. 1927, c. 139, were the governing rules to be applied under ss. 19(*c*) and 50A of the Exchequer Court Act in the present case.

Per Locke J.: The International Rules of the Road, not being by their terms made applicable to the Crown, did not apply. The fact, however that that portion of the rules governing the conduct of vessels proceeding on crossing courses had been almost universally adopted by ships of seafaring nations and that an identical rule forms part of the King's Regulations and Admiralty Instructions affords evidence from which the inference may properly be drawn that failing to comply with it is negligent conduct. In addition there was evidence justifying the finding that there had been no proper lookout kept on the naval vessel.

Per Locke J. (dissenting in part): The Crown is not entitled to limit the amount of its liability under s. 649 of the Canada Shipping Act of 1934, since such limitation of the liability of His Majesty qua owner is excluded by s. 712 of that Act. Furthermore, the principle that the Crown may invoke the benefit of any statute, though not named in it, has no application where as here the matter has been dealt with by Parliament.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), holding, in an action brought under s. 19(*c*) of the *Exchequer Court Act*, that the respondent was entitled to recover the full amount of its damages from the appellant for the total loss of its vessel, the S.S. *Blairnevis*, when she collided on February 13, 1945, with the Canadian frigate, H.M.C.S. *Orkney*, in the Irish Sea.

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

C. R. McKenzie Q.C. and *L. A. Sherwood* for the respondent.

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

RAND J.:—This litigation arises out of a collision between H.M.C.S. *Orkney* and the ship *Blairnevis* on the morning of February 13, 1945 in the Irish Sea, a few miles north of The Skerries. Besides that of negligence in the navigation of the *Orkney*, questions were raised at trial of the applica-

(1) [1951] Ex. C.R. 225.

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tion of s. 19(*c*) of the *Exchequer Court Act*, which gives a right of action against the Crown for negligence, to acts causing damage on the high seas; of the governing law and whether it could be said to be effective in the special circumstances of the collision; and whether the Crown was entitled to invoke s. 649 of the *Canada Shipping Act* in limitation of damages.

On the argument before this Court, Mr. Varcoe stated that, for the purposes of the appeal, he would not contest the application of s. 19(*c*), and we are not then concerned with that issue.

On the second point, the controlling fact is that the Crown, not liable for the tortious acts of its servant, has by statute accepted liability. The legislation by which that has been done must be taken as impliedly envisaging the law according to which the liability of both the servant and master, in any case, arises. The courts in applying s. 19(*c*) have uniformly held that within Canada that law is the law of the province in which the act takes place, and as of the time of the enactment of the statute; but as to acts on the high seas, the situation is somewhat complicated.

In 1943 by c. 25 of the Dominion Statutes, enacting s. 50A of the *Exchequer Court Act*, the members of the naval, military or air services of His Majesty were declared as from June 24, 1938 to be deemed servants of the Crown for the purposes of s. 19(*c*). To what law, then, applicable to a collision on the high seas between a Canadian naval vessel and a merchant ship registered in Scotland must we relate the accepted liability, the law creating liability of the persons actually to blame for it and vicariously of the Crown, as an employer, for whom they were acting. If Parliament itself has legislated in relation to either or both of these matters, that would seem to me necessarily to be the law to which that liability must be related.

Under the *Imperial Shipping Act of 1894*, regulations governing navigation were in 1910 promulgated by Order in Council. The Act by s. 424 provided that with the consent of foreign countries the regulations could, by Order in Council, be extended to apply to their ships when either within or beyond British jurisdiction as if they were British ships; and by the same order they were so applied, with unimportant exceptions, to all maritime European countries,

to most of the countries of North and South America, including the United States, and to a number in Asia.

These regulations affected only merchant vessels but in the same year the Admiralty issued Instructions identical with them to govern the ships of the navy. By the *Naval Service Act,* (1910) c. 139, R.S.C. 1927, these Instructions, so far as applicable, were adopted for the Canadian naval service, and they were in effect at the time of the collision. It was found by the President (1), and not challenged before us, that the particular rules governing the situation here were the same as those prescribed by the Imperial orders.

The sources of law imposing the regulation on the merchant vessel and on the naval ship here are seen to be different: but the rules, first codified in 1863 under the *Merchants' Shipping Amendment Act* of that year and assented to by the maritime nations, originating in the uniform practices of navigators for centuries, have since their enactment been universally followed. They have become the *de facto* international or maritime rules on the high seas, and it would be to disregard realities to deal with the duties raised on the two vessels otherwise than as rules of law proceeding from a recognized paramount source: *The Scotia* (2).

Their adoption by the statute for the governance of Canadian naval vessels is in fact the recognition of their international character. It was the statutory enactment by Congress in 1864 of identical rules, that was treated by the British government as the "consent" of the United States under the *Act* of 1863. The principle that the maritime or international law applicable in any country is that interpretation of it given by that country can here be accorded its full effect, and its result is simply the submission of the naval forces to that broader but identical law. The observance of the rules by Canadian vessels, not only towards other ships of Canadian registry but towards all vessels bound by them, as the law of the sea, is inherent in the language of the statute. Within the western seas, certainly, they create the duties on the part of those in

(1) [1951] Ex. C.R. 225.
(2) 14 Wall (U.S.) 170.

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charge of Canadian naval ships out of which their liability for negligence must arise: Vaughan-Williams L.J. in *H.M.S. Sans Pareil* (1).

The scope of that liability at common and maritime law has been modified by statute. The *Canada Shipping Act* in ss. 640 et seq., deals with negligence on the part of two or more vessels in collision and attributes responsibility according to the degree of fault. These provisions constitute likewise part of the general law of negligence applicable to the liability of the servant, on which, in turn, the Crown's liability is founded.

The same principle attracts finally those provisions of Dominion law which deal directly with the imputed responsibility of owners. By ss. 649 to 655 inclusive, provision is made for the limitation of the damages issuing from that liability. It was argued that, because of s. 712, these sections had no application to the Crown. By force of the statute alone, that is so, but being part of the general law from which the liability of a master arises, they are within the contemplation of s. 19(*c*). What is sought is the law governing the collision: Parliament has enacted its own laws of negligence; and the liability, in all its aspects, of the owner in the case of private persons, for the negligence of servants, so arising, is that adopted by 19(*c*).

The President of the Exchequer Court (2), after a careful examination of the facts, found the *Orkney* solely to blame for the collision and rejected the contention that the *Blairnevis* had aggravated the damages by unreasonable delay in seeking assistance. On the argument I was satisfied that the President's findings had not been successfully challenged, and further consideration has confirmed that view.

The substantial point against the applicability of the law was as follows. The *Orkney* at the time was, under Admiralty orders, moving southeasterly to take up escort duty into Liverpool of a portion of a convoy that was to divide near The Skerries, off Anglesey, the other portion proceeding north to Glasgow; the *Blairnevis* had in the meantime detached herself from the convoy and was proceeding northerly to Workington; in February, 1945, the allies were still at war with Germany and its associates; we must assume, as the facts indicate, that the hazards

(1) [1900] P. 267 at 285. (2) [1951] Ex. C.R. 225.

from submarine and air bombing were at all times, in the Irish Sea, to be anticipated; and that in this situation the civil law of negligence is not to be taken as operative.

Three authorities bear upon this proposition. There is, first, the case of *H.M.S. Hydra* (1) in which a steamship was damaged by a collision with a destroyer. The action was heard in camera and we do not know all the facts; but as the collision took place in the English Channel in February, 1917, the destroyer was undoubtedly engaged in at least equal warlike activities and in an area that was surcharged with war dangers. In the judgment as reported no reference is made to the supersession of the law of negligence, the controversy was decided solely upon the ordinary rules of seamanship, and the destroyer held alone to blame. In *H.M.S. Drake* (2), a naval vessel having been torpedoed and heading southeasterly from Rathlin Island in a damaged condition collided with a steamship. This took place in October, 1917 in Rathlin Sound, and again it is necessary to assume that the same warlike operations and war perils were present as in the previous case; but the judgments of Roche J. and of the Court of Appeal deal with the case only in relation to the rules of good seamanship. The action was, in fact, dismissed but there is no hint of any suspension of the ordinary law.

The last examination of the question arose in the High Court of Australia. In *Shaw Savill & Albion Company Limited* v. *The Commonwealth* (3), the action was brought against the Crown for negligence by a naval vessel. A special defence was pleaded to the effect that the naval vessel was proceeding on its course pursuant to Admiralty instructions during a state of war, and that at the time of the collision it was engaged in active naval operations against the enemy. In reply, the plaintiff both denied the facts and pleaded a demurrer; and it was on the latter that the case went to appeal. The court, consisting of Rich, A.C.J., Starke J., Dixon J. (now C.J.), McTiernan J. and Williams J. agreed in the general proposition that in the circumstances of actual hostile engagement the civil laws are in effect supplanted and no act of persons participating in it can give rise to liability in negligence. On the other

(1) [1918] P. 78. (2) [1919] P. 362.
(3) (1940) 66 C.L.R. 344.

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hand it was agreed that not all warlike activity can be said to be active operations against the enemy; that, as the two authorities already mentioned show, there may be activity which, though warlike, is nevertheless accompanied by the duty of care towards civilian interests, to be judged, as in all other cases, in the light of the existing conditions. No theory by which the point at which the liability ceases is attempted. The substance of the opinions is stated in these words of Dixon J.:—

> A real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war. For instance, a warship proceeding to her anchorage or manoeuvring among other ships in a harbour, or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances . . . It may not be easy under conditions of modern warfare to say in a given case upon which side of the line it falls.

The court agreed that the question of the existence of the state of things excluding liability was one for the civil tribunals.

The facts here do not, in any conception of the principle, bring the case within those overriding operations in which by their nature the civil law is superseded, conditions in which the responsibility rather is cast upon the civilian to extricate himself as best he can both for his own interest and to avoid interference with them. Although the *Orkney* in her passage to join the convoy was under a primary duty of alertness to enemy presence of any kind, yet the movement was not what, by any reasonable interpretation, could be called actual operations against the enemy. It was a period not of encounter but anterior to possible encounter, a period of apprehension, of lookout, of watchfulness with a view to detection; but, at the same time, a period in which duties to civilian interests were, in fact, intended to be continued. In such circumstances, unless the exercise of care is, at the moment, incompatible with that paramount vigilance, I can see no ground for excusing the failure to exercise it. It has not been suggested that any feature or requirement of that duty operated to the slightest degree in the faulty navigation: it was, by the facts themselves, demonstrated that the observance of the rules would have been as indifferent to the fulfilment of the naval duty as was their disregard. In that character of action, there is

no public interest to exempt the individual from the consequences of his delinquency; and in view of the role that goods of every conceivable kind now play in war, practical considerations would be clearly against it. That was the view of the President in the court below, and I think he was right.

There remains the claim for limitation of damages, on which the President held against the Crown. The latter, by its defence, sought the benefit of s. 649 of the *Canada Shipping Act*:—

> 649. (1) The owners of a ship, whether registered in Canada or not, shall not in cases where all or any of the following events occur without their actual fault or privity
>
> * * *
>
> (iii) Where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel . . .

be liable beyond an amount based on the vessel's tonnage. Mr. Mackenzie challenges the right of the Crown both to avail itself of this provision and to raise the question by the plea. He argues that the matter is controlled by s. 650 which, "where any liability is alleged to have been incurred by the owner of a British or foreign ship" permits the owner to apply to a judge of the Exchequer Court to determine the limited amount for which he is liable and to distribute that amount ratably among whoever may be claimants. The section contemplates two or more claims made or apprehended: other proceedings in the same or other courts may be stayed; provision is made for bringing in persons interested, and for the exclusion of those who do not claim within a specified time.

It seems to be settled in England that where there is only one claimant, the matter can be raised by a defence and determined in the action: *Wahlberg* v. *Young* (1), where the claim was for damage to a tow by stranding; *Beauchamp* v. *Turrell* (2), a claim by a widow of a member of a crew who had, through a defective rope, fallen into the sea and drowned. The same procedure was followed in *Waldie* v. *Fullum* (3). But it is obvious that if other claimants are apprehended, the issue cannot be conclusively adjudicated in an action limited to one alone; in that case a counterclaim directed to the plaintiff and all other claimants can be resorted to: *The Clutha* (4). The purpose of

(1) 45 L.J.C.L. 783.
(2) [1952] 1 Ll. L.R. 266.
(3) 12 Ex. C.R. 325.
(4) 35 L.T.R. 36.

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s. 650 is to determine, once for all, whether limitation is in order or not and to conclude the question against all interests. Since the vessel and her cargo were, here, a total loss, the question of other claimants should be cleared up, and it would seem to me to be improper to enter upon that question as the action now stands in this Court.

Mr. Varcoe argued his right to limitation on another ground. It is a recognized rule that the Sovereign "may avail himself of the provisions of any Act of Parliament": Chitty's Prerogatives, p. 382. Where liability, then, on the same footing as that of a subject, is established, giving a right to damages, I can think of no more appropriate enactment to which that basic rule of the prerogative could be applied than to a statutory limitation of those damages.

If it should appeal that there are no other or apprehended claims, then the preliminary condition of actual fault or privity of the Crown will be determined by a judge of the court and the tonnage at the same time ascertained. It may be that, prima facie at least, the circumstances of a collision themselves exclude the existence of fault or privity, and I do not at the moment see how, on the facts shown here, there can be any doubt upon it. If other claims appear, the matter will be dealt with according to the procedure of the Court.

I would, therefore, dismiss the appeal subject to a variation in the judgment at trial by adding thereto a declaration that the Crown is entitled to avail itself, under the conditions prescribed, of s. 649 of the *Canada Shipping Act*, 1934, limiting liability. The Crown will be at liberty to take such steps toward the determination of the question of limitation as it may be advised. There will be no costs in this Court.

The judgment of Kerwin and Estey, JJ. was delivered by:—

KERWIN J.:—On February 13, 1945, a collision occurred on the high seas between His Majesty's Canadian frigate *Orkney* and the respondent's ship *Blairnevis*. In its petition of right filed in the Exchequer Court of Canada, the respondent claimed from His Majesty the King damages suffered by it as a result of the loss of its ship. The President (1), found that negligence on the part of the

(1) [1951] Ex. C.R. 225.

Commander and officers of the frigate alone had caused such damages, declared that His Majesty should pay the amount thereof, and directed a reference to the Registrar to determine the proper sum. Her Majesty the Queen now appeals.

The claim of the respondent is based upon s. 19(*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34) which, as amended in 1938, reads as follows:—

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(*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.

With this must be read s. 50A of the *Exchequer Court Act* as enacted in 1943:—

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

In the Court below it was argued that s. 19(*c*) must be restricted to claims based on negligence occurring within Canada. Such a contention was abandoned before us but in view of at least one other question that requires consideration, I deem it advisable to state that I concur in the opinion of the President. To the reasons given by him, I would add a reference to the wording in s. 50A: "a member of the naval, military or air forces of His Majesty in right of Canada", which contemplates that such a servant of the Crown may perform a negligent act within the scope of his duties or employment outside the limits of Canada. Furthermore, in *The Diana* (1), the Court was concerned with the *Admiralty Court Act*, 1861 (24 Vict. c. 10) "An Act to extend the jurisdiction and improve the practice of the High Court of Admiralty", s. 7 of which enacted:—

The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

This was held to confer jurisdiction over a cause instituted as a result of a collision between foreign vessels in foreign waters. Similarly upon a consideration of s. 19(*c*) the conclusion is reached that the Exchequer Court has jurisdiction in the present proceedings.

(1) 1 Lush. 539.

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It has always been held that s. 19(*c*) imposed liability upon the Crown as well as conferred jurisdiction upon the Exchequer Court. This, it should be noted, is the Exchequer Court proper and not on its Admiralty side. Where the events complained of arise in a province, the law that applies is the provincial law as between subject and subject as of the date of the enactment of the relevant provisions imposing such liability, unless, of course, Parliament has chosen to establish the standard of care of its own officers or servants. The question here is as to the law to be applied where a collision occurred on the high seas between one of His Majesty's Canadian warships and a private merchant ship registered in Scotland.

The words that formerly appeared at the end of s. 19(*c*) "upon any public work" were omitted in 1938 and it was by s. 1 of c. 25 of the Statutes of 1943-44 that s. 50A was enacted. From that time until the date of the collision, February 13, 1945, the applicable law remained the same. The Canadian Order in Council establishing collision regulations under the authority of the *Canada Shipping Act*, 1934, c. 44, was not promulgated until April 8, 1948, so that, if any regulations relating to collisions at sea be relevant, the proper ones would be those established by P.C. 259 of February 9, 1897 (Canada). The *Naval Service Act, 1944*, c. 23, although assented to July 24 of that year was not brought into force by proclamation until October 15, 1945. The previous *Naval Service Act* (R.S.C. 1927, c. 139) therefore applied, and subsection 1 of s. 45 thereof provided:—

> 45. The Naval Discipline Act, 1866, and the Acts in amendment thereof passed by the Parliament of the United Kingdom for the time being in force, and the King's Regulations and Admiralty Instructions, in so far as the said Acts, regulations and instructions are applicable, and except in so far as they may be inconsistent with this Act or with any regulations made under this Act, shall apply to the Naval Service and shall have the same force in law as if they formed part of this Act.

The King's Regulations and Admiralty Instructions (as amended to November, 1943) referred to in this subsection contain, in chapter 16, regulations for preventing collisions at sea. Paragraph 660 states:—

> The following regulations are to be observed in order to prevent collisions at sea and all executive officers are to make themselves thoroughly acquainted therewith.

Then follow regulations identical for present purposes with the Collision Regulations under the *Imperial Merchant Shipping Act of 1894* and with those established by Canada, P.C. 259 of February 9, 1897, including article 19:—

> When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Therefore the rule to be followed by His Majesty's Canadian naval ships on the high seas where the proper circumstances existed were set by the authority of the same Parliament which by s. 19(*c*) of the *Exchequer Court Act* imposed liability on the Crown.

The *Orkney* had the *Blairnevis* on her own starboard side. The President found that the Commander and officers of the frigate failed to obey the injunction contained in article 19 and failed to observe the standard of care demanded under the circumstances. I am satisfied on the evidence that this was the correct conclusion and Mr. Varcoe has not persuaded me that the President was in error in finding that there was no negligence on the part of those on board the *Blairnevis*. However, it was contended that even if the officers of the *Orkney* were negligent and caused damages, those damages did not include the loss of the *Blairnevis* because, it was said, that loss resulted from the negligence of the latter's Master and officers in not applying for a tug to take their ship to Liverpool sooner than they did. When such a contention is raised, all the circumstances must be investigated. They are not at all similar to those that existed in *The King* v. *Hochelega Shipping and Towing Co. Ltd.* (1), and the evidence set forth in the reasons for judgment in this case in the Court below satisfied me that there is no basis for the contention now under consideration.

It was next argued that at the time of collision the *Orkney* was engaged in warlike operations in a theatre of war and that, therefore, ss. 19(*c*) and 50A of the *Exchequer Court Act* did not apply. Reference has been made to several cases but the only one I need mention is *Shaw, Seville and Albion Co. Limited* v. *The Commonwealth* (2). That was a decision of the High Court of Australia on a demurrer where, of course, the allegations in the statement

(1) [1940] S.C.R. 153. (2) (1940) 66 C.L.R. 344.

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of claim were taken as being true. The judgment of Sir Owen Dixon is a carefully reasoned one and I think that he put the position correctly when he stated that the principle that civil liability did not arise for supposedly negligent acts or omissions in the course of an actual engagement with the enemy extended to all active operations against the enemy but that a real distinction existed between the latter and other activities of the combatant services in times of war. In each instance the precise circumstances must be considered and in the present case, in my view, the *Orkney* was not engaged in a warlike operation against an enemy but in something anterior and preparatory, and the point must therefore be decided against the appellant.

The final point raised by the appellant is that in any event it is entitled to a limitation of liability under s. 649 of the *Canada Shipping Act*. As the owner of the *Orkney*, the Crown would ordinarily be entitled to take advantage of this provision but it is said that s. 712 of the *Act* prevents this result. That section provides:—

> This Act shall not except where specially provided apply to ships belonging to His Majesty.

In my opinion this section has no reference to a claim for limitation for liability under s. 649, which can only be put forward by an owner. The President considered that in *The King* v. *St. John Tug Boat Co. Ltd.* (1), I had expressed a larger view of the operation of s. 712 but, there, I was considering s. 640 of the *Act* which deals with the fault of two or more vessels causing damage or loss to one or more of them, their cargoes or freight, or any property on board.

The question therefore remains, what order should now be made? The respondent is justified in its contention that the onus is on the appellant to show that the damage or loss happened without its fault or privity: *Patterson Steamship Ltd.* v. *Canadian Co-Operative Wheat Producers Ltd.* (2). While in the statement of defence the appellant asked:—

> (*b*) For a declaration that if His Majesty the King is liable in the premises he had the right to limit his liability to the sum of $38.92 for each ton of H.M.C.S. *Orkney's* tonnage, the said tonnage to be determined in conformity with Sections 649 and 654

(1) [1946] S.C.R. 466. (2) [1935] S.C.R. 617.

of the Canada Shipping Act; that he is liable only for the damage resulting from the collision and not for the subsequent loss of the S.S. *Blairnevis*, and that he is not liable for interest;

and while s. 650 of the *Canada Shipping Act* provides that "The President or the Puisne Judge of the Exchequer Court may" determine the amount of the owners liability, the usual practice is that an action for limitation of liability would be brought against the present respondent and every person or persons whomsoever claiming or being entitled to claim in respect of the damage or loss alleged to have been occasioned in any way by the collision between the *Orkney* and *Blairnevis* on or about February 13, 1945. It is quite probable that little difficulty will be encountered in ascertaining the tonnage of the *Orkney* but all interested parties should have an opportunity of disputing the claim of the Crown that it is able to bring itself within s. 649 by showing that the damage or loss happened without its actual fault or privity. The judgment appealed from with its order that the respondent recover its costs of the action might well stand. The appeal to this Court should be dismissed subject to an addition to the trial judgment of a declaration that the Crown is entitled to limit its liability in accordance with s. 649 of the *Canada Shipping Act* 24-25 Geo. V. 1934. c. 44, if it is able to show that the damage or loss occurred without its actual fault or privity. The respondent has won in this Court on all issues except that of limitation of liability. In view of the expense entailed in connection with the preparation and presentation of this appeal on the other points, there should be no costs in this Court.

The judgment of Kellock and Cartwright, JJ. was delivered by:

KELLOCK J.:—I agree with my brothers Kerwin and Rand that the appeal fails on all grounds except as to the right of the appellant to limit liability under s. 649 of the *Canada Shipping Act*. With respect to the excepted point, I desire to express my own view.

In *The City of Quebec* v. *The Queen* (1), Strong, C.J., with whom Fournier J. concurred, in considering the provisions of s. 16(*d*) of the *Exchequer Court Act* (now s. 19(*d*)), said at p. 429:

Proceeding upon this principle, we should, I think, be required to say that it was not intended merely to give a new remedy in respect of some

(1) (1894) 24 Can. S.C.R. 420.

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pre-existing liability of the Crown, but that it was intended to impose a liability and confer a jurisdiction by which a remedy for such new liability might be administered in every case in which a claim was made against the Crown which, according to the existing general law, *applicable as between subject and subject,* would be cognizable by the courts.

Gwynne J., with whom King J., concurred, expressed a similar view at p. 449 with respect to paragraph (*c*) of s. 16 (now s. 19(*c*)):

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals.

In *Filion* v. *The Queen* (1), Burbidge J., said at p. 144:

> It was the intention of Parliament that the Crown should within the limitations prescribed in section 16 of the Exchequer Court Act be liable in any case *in which a subject* would in like circumstances be liable.

On appeal (2), Strong C.J., expressly agreed with the reasons of the trial judge, considering that the question of jurisdiction was precluded by the decision in the Quebec case. Gwynne J. is, I think, to be taken as affirming the view he had already expressed in the earlier case, while Sedgewick J. expressly concurred in that view, considering himself "bound by the judgment" in the Quebec appeal. King J. also concurred. That this is the settled jurisprudence of this court, which was never departed from, is, I think, fully established.

In *Gauthier* v. *The King* (3), the law was again affirmed in the same sense. The matter there in issue was governed by s. 19 of the 1906 statute (R.S.C., c. 140) to which s. 18 of the present statute corresponds. S. 20 of the 1906 statute corresponds to s. 19 of the present statute.

In Gauthier's case Fitzpatrick C.J., contrasted the situation with respect to the applicable law under the then ss. 19 and 20. At p. 182 he said:

> I agree also with Mr. Justice Anglin that section 19 of the "Exchequer Court Act" merely recognizes pre-existing liabilities; and cases falling within it must be decided not according to the law applicable to the subject matter as between subject and subject, but to the general law of province in which the cause of action arises applicable to the Crown in right of the Dominion.

(1) 4 Ex. C.R. 134. (2) (1894) 24 Can. S.C.R. 482.
(3) (1918) 56 Can. S.C.R. 176.

Anglin J., with whom Davies J. also agreed, said at p. 190:

There are, however, two fallacies in the appellant's contention—one the assumption that liability *ex contractu* of the Crown in right of the Dominion depends upon the "Exchequer Court Act"; the other, that a series of decisions, culminating in *The King* v. *Desrosiers*, (41 Can. S.C.R. 71) holding that a liability of the Crown imposed by clauses of section 20 of that Act is the same as would be that of a subject under like circumstances in the province in which the cause of action arises, applies to cases falling within section 19. This latter provision (originally found in section 58 of 38 Vict. ch. 11) does not create or impose new liabilities. Recognizing liabilities (*in posse*) of the Crown already existing, it confers exclusive jurisdiction in respect of them upon the Exchequer Court and regulates the remedy and relief to be administered. In regard to the matters dealt with by this section there is no ground for holding that the Crown thereby renounced whatever prerogative privileges it had theretofore enjoyed and submitted its rights and obligations to be determined and disposed of by the Court according to the law applicable in like cases between subject and subject. The reasons for which it was so held in regard to liabilities imposed by section 20, are stated by Strong C.J. in the earlier part of his dissenting judgment in *The City of Quebec* v. *The Queen* (24 Can. S.C.R. 420). See, too, *The Queen* v. *Filion* (24 Can. S.C.R. 482), *The King* v. *Armstrong* (40 Can. S.C.R. 229) and *The King* v. *Desrosiers* (41 Can. S.C.R. 71). No other law than that applicable between subject and subject was indicated in the "Exchequer Court Act" as that by which these newly created liabilities should be determined. Placing upon that section a "wide and liberal"—a "beneficial construction"—"the construction calculated to advance the rights of the subject by giving him an extended remedy,"—it was the view of the former learned Chief Justice, and is now the established jurisprudence of this Court, that it was thereby

> not intended merely to give a new remedy in respect of some pre-existing liability of the Crown but that it was intended to impose a liability and confer a jurisdiction by which the remedy for such new liability might be administered in every case in which a claim was made against the Crown, which, according to the existing general law, applicable as between subject and subject, would be cognizable by the Courts.

But, since section 19 merely recognizes pre-existing liabilities, while responsibility in cases falling within it must, unless otherwise provided by contract or statute, binding the Crown in right of the Dominion, be determined according to the law of the province in which the cause of action arises, it is not that law as applicable between subject and subject, but the general law relating to the subject-matter applicable to the Crown in right of the Dominion which governs. That law in the Province of Ontario is the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion.

In *Armstrong* v. *The King* (1), the statement of the law in the same sense was expressly approved on appeal to this court (2), by at least three of the members of the Court,

(1) (1907) 11 Ex. C.R. 119. (2) (1908) 40 Can. S.C.R. 229.

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Davies, Maclennan and Duff JJ., while again in *The King* v. *Desrosiers* (1), Fitzpatrick J., said at p. 76:

> All these questions were decided by this court against the appellant in the Armstrong Case (40 Can. S.C.R. 229) on the ground that the law had been settled in a long series of cases; and, on the application for leave to appeal to the Privy Council from that judgment, Lord MacNaghton said as a ground for refusing the application, referring to the decisions of this court:
>
> This seems to have been the law for eighteen years.
>
> (See report of argument in Privy Council, p. 17), (*Cf. per Girouard J. in Abbott* v. *City of St. John* (40 Can. S.C.R. 597) at p. 602).
>
> In these circumstances, we are of opinion that the judgment in the Armstrong Case is conclusively binding on this court.

Accordingly, in determining the liability of the Crown in any case under s. 19(*c*) of the *Exchequer Court Act*, if the petitioner can make out a cause of action on the basis of the law applicable as between subjects, he thereby makes out a cause of action against the Crown and is entitled to the same relief as he would be entitled to in the former case.

The question arises, therefore, as to the law applicable as between subject and subject in circumstances such as are here present. In my view the legislative subject matter with respect to navigation and shipping being exclusively a matter for the federal Parliament, the law applicable in so far as the question of negligence or no negligence on the part of those in charge of the navigation of the *Orkney* at the material time is concerned, is to be found in the King's Regulations and Admiralty Instructions made applicable by s. 45 of the *Naval Service Act*, R.S.C., 1927, c. 139. Negligence being thus established, it is then necessary, in order to determine the extent of the liability of a subject, to resort to the provisions of the *Canada Shipping Act*, which is the law applicable, and s. 649 provides the answer.

It is contended on the basis of the presence of s. 712 in the *Canada Shipping Act* that resort cannot be had to that *Act* in a case such as the present. In my view this is erroneous. The resort to that statute is not at all for the purpose of determining what that statute has to say with respect to the Crown, but as to what it has to say with respect to the liability of a subject. In that inquiry it is

(1) (1908) 41 Can. S.C.R. 71.

obvious that s. 712 is quite irrelevant. When this inquiry is thus answered, it is s. 19(*c*) of the *Exchequer Court Act* which applies that answer to the Crown.

I would therefore vary the judgment below to the extent indicated and would dismiss the appeal otherwise. In my opinion there should be no costs in this court.

LOCKE, J. (dissenting in part):—This action was commenced by a Petition of Right by the respondent company, incorporated in Great Britain, as the owner of the steamship *Blairnevis,* against the Crown as owner of H.M.C.S. *Orkney,* in respect of damages caused by a collision between these two vessels which occurred in the Irish Sea on February 13, 1945. The jurisdiction invoked is that vested in the Court by s. 18 of the *Exchequer Court Act* and the cause of action is based upon s. 19(*c*) of that *Act,* in respect of the alleged negligence of certain naval officers, while acting within the scope of their duties, who are to be deemed servants of the Crown by virtue of s. 50A.

There are three questions to be determined. The first is as to whether there was negligence on the part of the naval officers which caused the accident: the second, was there contributory negligence on the part of those in charge of the *Blairnevis*: and the third, whether, if there be liability upon the Crown, is it entitled to limit the amount of that liability under the provisions of s. 649(1) of the *Canada Shipping Act of 1934.*

I agree with the contention of counsel for the Crown that the International Rules of the Road, not being by their terms made applicable to the Crown, did not apply to H.M.C.S. *Orkney* at the time in question. While the King's Regulations and Admiralty Instructions referred to in s. 45 of the *Naval Service Act* (R.S.C. 1927, cap. 139) were not proven at the trial of this action, the matter has been contested on the footing that they were in effect at the time in question and that they are identical in their terms with the International Rules of the Road, and that this is a fact should, in my opinion, be accepted in disposing of this appeal. In *The Truculent* (1), Willmer J. expressed the view that a breach of these regulations was a breach of the duty owed by His Majesty's ships to other mariners. I do not share this view but it is unnecessary

(1) [1951] 2 T.L.R. 895.

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for the disposition of the present case to decide the matter. I respectfully agree with the learned President of the Exchequer Court (1) that the fact that the International Rules of the Road, as established by Order-in-Council P.C. 259 dated February 9, 1897, require that when two vessels are crossing so as to involve risk of collision the vessel which has the other on her starboard side shall keep out of the way of the other, that this rule has been almost universally adopted for a very long time past by ships of seafaring nations, and that an identical rule forms part of the King's Regulations and Admiralty Instructions affords evidence from which the inference may properly be drawn that the course prescribed is in accordance with good seamanship, and that failing to comply with it is negligent conduct. In addition, the failure of the naval officers to keep a proper lookout, which was found to have contributed to the accident, was a failure to take that reasonable care in the circumstances to avoid injury to the property of others, which is the duty of those at sea as well as ashore. In my opinion, the inference was properly drawn in the present matter that it was the negligent acts of the two naval officers referred to in the reasons for judgment of the learned President which were the proximate cause of the collision and the resulting damage. I am further of the opinion that the defence that at the time of the collision the *Orkney* was engaged in warlike operations to protect merchant vessels against enemy action and that the Crown cannot, therefore, be held liable for loss, fails for the reasons given by the learned President. Upon the issue of contributory negligence, I also agree with his conclusion.

The third question arises by reason of the contention that, if liable, the Crown is entitled to the benefit of the provisions of s. 649(1) of the *Canada Shipping Act of 1934*. So far as relevant to the present proceedings, that section reads:—

> The owners of a ship, whether registered in Canada or not, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say—
>
> * * *
>
> (iv) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;
>
> be liable to damages . . . to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

(1) [1951] Ex. C.R. 225.

The respondent contends that any such claim on behalf of the Crown is excluded by s. 712 of the *Act* reading:—

> This Act shall not, except where specially provided, apply to ships belonging to His Majesty.

The claim to limit the liability was advanced in paragraph 19 of the Statement of Defence and, by the prayer for relief, a declaration was asked that if His Majesty was liable in the premises he had the right to limit his liability in conformity with the provisions of ss. 649 and 654 of the *Canada Shipping Act*. The right to so limit the liability, if I appreciate correctly the argument advanced by counsel for the Crown, is that as the position of the Crown in respect of claims under s. 19(*c*) is the same as if the claim was asserted against a subject *qua* employer and as a subject would be entitled to invoke the benefit of s. 649, so may the Crown. Secondly, it is said that under the principle that the Crown may invoke the benefit of any statute, though not named in it and presumably, therefore, not being bound by its provisions, it may rely upon s. 649.

In support of the first contention, we have been referred to a passage from the dissenting judgment of Strong, C.J. in *City of Quebec* v. *The King* (1). The claim of the appellant in that case was considered by a majority of the Court to be based upon ss. (*c*) of s. 16 of the *Exchequer Court Act*, which first imposed liability upon the Crown under certain circumstances in respect of the negligence of its servants, but the learned Chief Justice considered that any right of the City must depend upon ss. (*d*) which gave jurisdiction to the Court to hear and determine:—

> Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

It was in considering this subsection that Strong C.J. said (p. 429) as to its interpretation and, after referring to a passage from the judgment of the Judicial Committee in *Attorney-General of the Straits Settlement* v. *Wemyss* (2):

> Proceeding upon this principle, we should, I think, be required to say that it was not intended merely to give a new remedy in respect of some pre-existing liability of the Crown, but it was intended to impose a liability and confer a jurisdiction by which a remedy for such new liability might be administered in every case in which a claim was made against the Crown which, according to the existing general law, applicable as between subject and subject, would be cognisable by the Courts.

(1) (1894) 24 Can. S.C.R. 420. (2) 13 App. Cas. 192.

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Gwynne, J., who disagreed with the Chief Justice as to the proper disposition to be made of the appeal, referred to ss. (*c*) of s. 16, which, in his opinion, gave to the Exchequer Court "the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals."

In *The Queen* v. *Filion* (1), Sedgwick, J. quoted the passage from the judgment of Gwynne, J. in the *City of Quebec* case, from which the above quotation is taken, as authority for finding that ss. (*c*) not only created a liability but gave jurisdiction to the Court.

In *Gauthier* v. *The King* (2), where the claim was in contract, Anglin J. (as he then was), in discussing liabilities imposed by s. 20 of the *Exchequer Court Act* (the former s. 16), said that no other law than that applicable between subject and subject was indicated in the *Exchequer Court Act* as that by which these newly created liabilities should be determined and, following this, quoted from the judgment of Strong, C.J. in the *City of Quebec* case the passage above cited.

These statements, in so far as they are applicable to the construction of ss. (*c*) of s. 19 of the *Exchequer Court Act,* are, in my opinion, authority only for this, that the same events which, upon the application of the maxim *respondiat superior,* impose liability upon a subject *qua* employer, apply in determining the liability of the Crown in that capacity. That question is entirely distinct from the matter in question here, which is whether the liability so imposed upon the Crown may be limited in its extent by a statute which, by its terms, is declared to be inapplicable to the Crown. Nothing said by the learned members of this Court in the above mentioned cases or in any others to which we have been referred was directed to any such question.

In England the liability of the owners of vessels in respect of harm caused without their actual fault or privity has been restricted by various statutory enactments since 1733 (Mayers Admiralty Law, p. 161). S. 503 of the *Merchant Shipping Act of 1894* limited the damage to £8 for each ton of the ship's tonnage. That section, with changes which do not alter its meaning, was incorporated as s. 921 in

(1) (1894) 24 Can. S.C.R. 482 at 485. (2) (1918) 56 Can. S.C.R. 176.

the *Canada Shipping Act* (c. 113, R.S.C. 1906) and re-enacted as s. 903 in the revision of 1927. When the new *Canada Shipping Act* was enacted in 1934 and the previous *Act* repealed as well as the Merchant Shipping Acts of 1894 to 1898, in so far as they were part of the law of Canada, the section was enacted in its present form.

S. 4 of the *Merchant Shipping Act of 1854* provided that the *Act* should not, except as provided, apply to ships belonging to His Majesty. As section 741 the provision formed part of the *Merchant Shipping Act of 1894*. When the *Canada Shipping Act of 1906* was enacted, however, while by a number of sections (of which s. 4 was an example) particular parts of the statute were declared to be inapplicable to ships belonging to His Majesty, there was no such provision in Part XIV of which s. 921 formed a part, nor was there any such section in that part of the *Canada Shipping Act* as it appeared in the Revised Statutes of 1927 of which s. 903 formed a part. When, however, the new *Act* was passed in 1934 and the Merchant Shipping Acts of England, in so far as they formed part of the law of Canada, were repealed, s. 712 was enacted in the precise terms of s. 741 of the *Act of 1894*.

Parliament thus, discarding the manner which had been adopted in the earlier Canada Shipping Acts of exempting His Majesty's ships from the operation of defined parts of the *Act*, adopted the form of the legislation which had been in effect in England of providing generally that, except where specially provided, the *Act* should not apply to them. It is clear that, with certain exceptions provided by the terms of the statute which are irrelevant to the present consideration (such as sections 557 to 564), none of the provisions of the *Merchant Shipping Act of 1894* were ever held to apply to vessels of His Majesty's Navy. It is no doubt for this reason that when the *Crown Proceedings Act*, 1947 (c. 44), which for the first time imposed liability upon the Crown in respect of torts committed by its servants or agents, was enacted, s. 5(1) provided that:—

> The provisions of the Merchant Shipping Acts, 1894 to 1940, which limit the amount of the liability of the owners of ships shall, with any necessary modifications, apply for the purpose of limiting the liability of His Majesty in respect of His Majesty's ships; and any provision of the said Acts which relates to or is ancillary to or consequential on the provisions so applied shall have effect accordingly.

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There is no such legislation in Canada.

It is, however, to be noted that while it is the "owners of a ship" who are entitled to the benefit of the limitation of liability by s. 649(1), s. 712 says that the *Act* shall not, except where specially provided, apply to *ships* belonging to His Majesty. In my opinion, s. 712 should be construed as applying to or in respect of ships belonging to Her Majesty and that, accordingly, the limitation of the liability of His Majesty *qua* owner is excluded by s. 712. To construe that section otherwise would be, in my judgment, to fail to interpret the section in such manner as will best ensure the attainment of the object of the enactment, as required by s. 15 of the *Interpretation Act*.

The contention that the Crown may take advantage of s. 649(1) is apparently based upon a principle which is stated in Chitty on the Prerogatives of the Crown, p. 382, in the following terms:—

> The general rule clearly is that, though the King may avail himself of the provisions of any Acts of Parliament, he is not bound by such as do not particularly and expressly mention him.

When the necessity arises and, in my opinion, it does not arise in the present case, it will be necessary to consider the entire accuracy of this statement. As to this, I refer to the comments of Scrutton, L.J. in *Cayzer* v. *Board of Trade* (1). The right to invoke the statute is asserted as an exercise of the prerogative and there is no room, in my opinion, for its exercise when the matter has been dealt with by Parliament. In *Attorney-General* v. *De Keyser's Royal Hotel* (2), Lord Dunedin said in part:—

> The prerogative is defined by a learned constitutional writer as "The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

Here s. 712 provides that any provision of the *Act* may be made applicable to the Crown and the provisions of s. 649 and the following sections have not been so made applicable. Lord Atkinson said in part (p. 539):—

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach

(1) [1927] 1 K.B. 269 at 294. (2) [1920] A.C. 508 at 526.

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conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do.

There is no authority binding upon us to which we have been referred or of which I am aware where His Majesty has been held entitled to the benefit of the provisions of a statute which, by its terms, declares it to be inapplicable to the Crown.

I would dismiss this appeal with costs.

Appeal dismissed without costs subject to limitation of liability under s. 649 of the Canada Shipping Act, 1934.

Solicitor for the appellant: *Lucien Beauregard.*

Solicitor for the respondent: *C. Russell McKenzie.*

1953

*May 20
*May 22

RHEAL LEO BERTRAND.....APPLICANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeal—Leave—Criminal law—Priest allowed to hear confession of jury during trial—Whether violation of s. 945 of Criminal Code.

The prohibition imposed to the jury by s. 945 of the *Criminal Code* to hold communication with no one, is not absolute. Consequently, no appeal lies to the Supreme Court of Canada in a murder case on the ground that a priest was allowed during the trial to hear the confessions of the jurymen, if proper provision was made by the trial judge to prevent any reference to the subject of the trial. Whether the provisions taken are proper is a matter of discretion and not of law.

MOTION by the applicant before Mr. Justice Taschereau in Chambers for leave to appeal from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the applicant's conviction on a charge of murder.

P. Maltais for the motion.

N. Dorion Q.C. and *A. Labelle Q.C. contra.*

*PRESENT: Taschereau J. in Chambers.

(1) Q.R. [1953] K.B. 421.

1953

BERTRAND v. THE QUEEN

TASCHEREAU, J.:—De tous les griefs invoqués par le requérant au soutien de sa demande de permission d'appeler, il importe de retenir seulement celui relatif à l'autorisation donnée aux jurés, par le juge présidant au procès, de se confesser à un prêtre catholique.

Le procureur du requérant a prétendu que cette autorisation constituait une violation des dispositions de l'article 945 du *Code Criminel* qui veut qu'au cours d'un procès pour un crime qui, sur déclaration de culpabilité, entraîne la peine capitale, ordre soit donné que les jurés soient gardés ensemble, et que des "précautions convenables" soient prises pour empêcher les jurés de communiquer avec qui que ce soit au sujet du procès.

Le juge en effet, à la demande des jurés, a donné à ceux-ci la permission de se confesser dans l'enceinte du Palais de Justice, où ils étaient gardés ensemble, et le tout s'est fait du consentement de la Couronne et de l'accusé, représentés par leurs procureurs respectifs. Subséquemment, le requérant s'en est fait un grief devant la Cour du Banc de la Reine (1), qui l'a rejeté unanimement comme mal fondé.

Sans me prononcer sur la sagesse de cette décision prise au procès par le savant juge, je dois conclure de l'examen du dossier et de l'argument qui m'a été présenté, que rien n'indique qu'en droit, les dispositions de l'article 945 du *Code Criminel* aient été violées.

La prohibition imposée aux jurés de communiquer avec qui que ce soit n'est pas absolue. Il appartient au juge de refuser ou d'autoriser semblable communication avec l'extérieur, mais quand il l'autorise, il doit voir à ce que des "précautions convenables" soient prises pour qu'il ne soit pas question du procès.

L'ordre donné par le juge que les jurés fussent gardés ensemble a été respecté. Le prêtre qui devait recevoir les confessions a prêté serment qu'il ne parlerait pas du procès, et les jurés ont reçu instructions de garder le silence sur ce point. Sur la nature des précautions qui doivent être prises pour empêcher que les jurés s'entretiennent avec qui que ce soit de l'extérieur au sujet du procès, il me semble clair que le juge doit exercer sa discrétion, et que les prescriptions

(1) Q.R. [1953] K.B. 421.

de la loi sont remplies, s'il croit qu'aucune injustice ne sera commise et que l'indépendance du jury ne sera pas affectée par des influences du dehors.

Dans l'espèce, où se présentent des circonstances spéciales, le juge a pu apprécier si les précautions prises étaient des "précautions convenables." Cette question est une question de discrétion, et n'est pas une question de droit; et c'est dans ce dernier cas seulement que la loi confère juridiction à un juge de cette Cour, pour accorder une permission spéciale d'interjeter appel.

L'application doit être refusée.

Leave refused.

HENRY WATTS AND WILLIAM GAUNT ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

1953
*Mar. 9, 10
*Apr. 15

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Drift logs in rivers—Whether mens rea ingredient of offence under s. 394 (b) of the Criminal Code—Alleged custom or practice of paying salvage.

The appellants, acquitted by the trial judge, were convicted by a majority in the Court of Appeal under s. 394(*b*) of the *Criminal Code* for having refused to deliver up to the owners certain saw-logs which had been found adrift in a river in British Columbia.

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

Per: Taschereau, Rand and Fauteux JJ.—There was an implied understanding between the appellants and the owners of the logs salvaged whereby the former were entitled to assume that they would be paid for services upon delivery of the logs and, under such circumstances, the appellants were not within s. 394(*b*) of the *Code*.

Per: Kellock J.—Considering s. 394(*b*) with s. 990(2) of the *Code*, the appellants had lawfully taken possession of the logs on the implied basis that the owners in accordance with past practice were willing to remunerate them. Therefore no offence was disclosed.

Per: Estey and Cartwright JJ.—*Mens rea* is an essential ingredient of the offence created by s. 394(*b*) of the *Code* and, in view of the practice between the owners of these logs and the appellants, its existence was not established.

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

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Locke J. agreed with Robertson J.A. that there was at the time an outstanding offer by the owners of these logs to pay the beachcombers for the salvaged logs, that the appellants were doing what they thought they had a right to do and that therefore there was no *mens rea*.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing, Robertson J.A. dissenting, the appeal of the Crown and convicting the appellants under s. 394(*b*) of the *Criminal Code*.

G. McDonald for the appellants.

S. J. Remnant Q.C. for the respondent.

A. A. Moffat Q.C. for the A.G. of Canada.

TASCHEREAU, J.—In view of the practice that was followed for many years, I believe that the appellants thought that they were entitled with the tacit consent of the owners, to keep possession of the logs they had found afloat or resting on the shore. They were, I think, left under the honest impression, as a result of previous happenings, that they were entitled to receive forty per cent of the market value of the logs they had recovered, or sell them after ten days, remitting sixty per cent to the owners. I can find no elements of criminality attached to the act done by the appellants.

I would allow the appeal, and quash the conviction.

RAND, J.:—There is no doubt that the accused acted on the fact or the reasonable belief in the fact that they had permission from the owners to salvage logs on the understanding that they would be entitled to compensation to the extent of 40 per cent of the value which could be deducted from the sale price realized by them or paid by the owner on delivery up of the logs. On that state of facts that no offence has been committed under sec. 394(*b*) of the *Code* seems to me to be scarcely arguable. The word "fraudulently" carries through the entire section; and, regardless of that, on the language of (*b*) to import an offence from such objective acts divested of intent would be a new departure in the interpretation of criminal legislation.

I would, therefore, allow the appeal and restore the judgment of acquittal.

(1) 104 Can. C.C. 207.

KELLOCK, J.:—The appellants were convicted under the provisions of section 394(*b*) of the *Criminal Code* for, on August 20, 1951, having in their possession certain saw-logs which had been found adrift in a river in Canada and unlawfully did refuse to deliver up the said sawlogs to the proper owner thereof or to the person authorized by such owner to receive the same. The appellants had for some years followed the practice of picking up sawlogs found adrift at the mouth of the Fraser River and the adjacent waters or on the shores. Thereafter they informed the British Columbia Forest Service, asking that department to scale the logs so taken. In due course, this was done by an officer of the department, which then sent a copy of the scale to the appellants and, in the case of logs bearing a visible mark, a copy was also sent to the respective owners. It was the practice for the appellants to wait a period of ten days thereafter and at the end of that time to dispose of the logs, remitting sixty per cent to the owners and retaining forty per cent for their own services.

According to the evidence, the purchasers of such logs from the appellants would be furnished by the department or obtain from the department the original scale showing the names of the owners of marked logs. The evidence also shows, and counsel for the respondent argued the case on the basis that, as found by the trial court, the owners of the particular logs here in question had followed this practice with the appellants for some four or five years. The majority in the court below (1) were, however, of opinion that in such circumstances, the appellants, having in the present instance refused to give up the particular logs to the owners on demand, there was no defence to the charge. Section 394(*b*) reads as follows:

> 394—Everyone is guilty of an indictable offence and liable to three years' imprisonment who
>
> (*b*) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner or authorized by such owner to receive the same, any such timber . . .

It might well be said that this section contemplates that the owner or his agent who demands possession of the timber has not, qua the person to whom the demand is addressed, disentitled himself to possession. However that

(1) 104 Can. C.C. 207.

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may be, the section is to be considered, as counsel for the respondent concedes, with section 990(2), which reads:

> Possession by the accused . . . of any such timber . . . shall, in all cases, throw upon him the burden of proving that such timber . . . came lawfully into his possession . . .

In view of this provision, no offence was disclosed in the circumstances conceded to exist in the case at bar where the appellants, acting in accord with the practice as between them and the owners of the logs here in question, had taken possession of the logs with the consent of the owners on the implied basis that if they did so, the owners were willing to remunerate them for so doing.

In these circumstances, I think there was no ground upon which the acquittal could have been properly set aside. I would allow the appeal and set aside the order below.

ESTEY, J.:—The appellants were charged that on the 20th day of August, 1951, they refused to deliver up to the owners, the Vanwest Logging Co. Ltd., saw-logs in their possession and thereby committed an offence contrary to s. 394(*b*) of the *Criminal Code*. They were acquitted in the County Court Judge's Criminal Court, but in the Court of Appeal (1) the majority of the learned judges directed a conviction.

The appellants were engaged in the business, recognized in British Columbia, of collecting logs that have become separated, as those here in question, from their booms and are afloat or resting on the shore.

A few days prior to August 20, 1951, the appellants, in the course of their business, collected a number of logs, including those here in question bearing the mark 1-Q-1, the property of the Vanwest Logging Co. Ltd. The appellants notified the Forestry Service, whose employees then scaled the logs and under date of September 4 the Forestry Service notified the appellants of its charge therefor in the sum of $117.45 and added:

> Upon receipt of your CERTIFIED CHEQUE for $177.45 or cash, the original Scale and Royalty Account will be released to you which will enable you to dispose of these logs.

This amount of $117.45 was paid by the appellants.

(1) 104 Can. C.C. 207.

Either on the same date (September 4) or prior thereto the Forestry Service notified the Vanwest Logging Co. Ltd. of the existence of these logs in the possession of the appellants and, as a consequence, on September 4 the latter wrote the appellants as follows:

> We have received a letter from the Forest Service that the following logs were scaled at the Ft. Nanaimo Street, South Vancouver for your account:
>
> 2 pcs. No. 2 Fir 859 Feet Mark 1Q1
> 9 pcs. No. 3 Fir 3,213 Feet Mark 1Q1
>
> Kindly forward proceeds, from these logs after making deductions for salvage, etc.

The appellants, upon receipt of this letter, deducted the salvage and forwarded the proceeds as requested, thereby becoming owners of the logs.

The Vanwest Logging Co. Ltd. had their logs insured with the B. L. Johnson, Walton Company Limited, insurance brokers, who employed a group of men to collect the logs, afloat or on the shore, of their insured. When one of their employees, Carson, on August 20, found the logs here in question in the possession of the appellants the latter refused to deliver them to Carson, as agent for the owners, unless the salvage was settled for, which Carson was not prepared to do. He reported to his employer, the B. L. Johnson, Walton Company Limited, and the latter obtained a letter from the Vanwest Logging Co. Ltd. reading as follows:

> The undersigned, being the registered owner under the Forest Act of Timber Mark 1-Q-1 do hereby authorize you or your agent nominated in writing, to demand and secure possession on my/our behalf of any logs bearing the above mark or marks found in possession of any unauthorized person or persons whatsoever.
>
> And for so doing, this shall be your sufficient warrant and authority.
>
> Dated at Vancouver, B.C., this 20th day of August, 1951.

The phrase "any unauthorized person or persons whatsoever" in this letter is not explained. It may be that it would include those who were in the business and in the habit of dealing with the Vanwest Logging Co. Ltd., which would include the appellants. This much is significant, that the record does not suggest that Carson or another officer or agent of the B. L. Johnson, Walton Company Limited, in any conversation with any officer or agent of the Vanwest Logging Co. Ltd., mentioned when obtaining

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the letter that the logs were in the possession of the appellants. However, the B. L. Johnson, Walton Company Limited gave this letter to Carson who, with another letter from the B. L. Johnson, Walton Company Limited to himself authorizing him, on its behalf, to demand the logs from any unauthorized person, again interviewed the appellants and demanded the logs. The appellants took the same position to the effect that when the salvage was paid they would surrender the logs and Carson took the position that they were not entitled to salvage. As a consequence of this refusal criminal proceedings were taken against the appellants. The learned trial judge found as follows:

> I do not think there is any criminal intent on the part of these men whatever. They were carrying on the practice—there is always the Court of Appeal—that is why I say the custom between Vanwest and these men existed for four or five years. Every exhibit there is against you.
>
> Here the practice has gone on 29 years, according to your own witness; then all at once, they take criminal proceedings. It sounds very much like private prosecution. I am not going to say any more about it.

The learned trial judge's report made under s. 1020(2) of the *Criminal Code* reads in part:

> In this particular case I not only believe the evidence of all the Crown witnesses but also the very candid evidence of the accused Gaunt who gave evidence on behalf of himself and his partner Watts.
>
> I found the accused not guilty, my reasons being:—
>
> (*a*) There was nothing fraudulent in their action.
>
> (*b*) The accused came lawfully in possession of the logs in question.
>
> (*c*) A custom had been established between the actual owners of the logs and the accused as to the payment of salvage, both before and after the enacting of Sec. 394B of the Canadian Criminal Code. An arrangement had been made between the owners and/or their agent or agents as to the payment of the salvage.
>
> (*d*) I doubted the delegation of the authority from one agent to pass along the authority to another agent.
>
> (*e*) I doubted whether the logs were picked up in a river, as set out in the indictment.

The Court of Appeal accepted the finding of the learned trial judge, but the learned Chief Justice, with whom Mr. Justice Smith and Mr. Justice Bird agreed, was of the opinion that "fraud is not an element required to be proved in a prosecution under '(*b*)' of Sec. 394" and apparently treated the word "fraud" as equivalent to *mens rea*. Mr. Justice Robertson and Mr. Justice O'Halloran were of the opinion that *mens rea* is an essential ingredient of the offence defined in s. 394(*b*).

Section 394 reads:

394. Drift Timber.—Every one is guilty of an indictable offence and liable to three years' imprisonment who,

(*a*) without the consent of the owner thereof, (i) fraudulently takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-log, shingle bolt or other description of lumber, boom chains, chains, lines or shackles, which is found adrift in, or cast ashore, or lying upon or imbedded in the bed, bottom, or on the bank or beach of any river, stream, or lake, in Canada, or in the harbours or any of the coast waters, including the whole of Queen Charlotte Sound, the whole of the Strait of Georgia or the Canadian waters of the Strait of Juan de Fuca, of British Columbia, or (ii) wholly or partially defaces or adds or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, boom chains, chains, lines or shackles, or makes or causes or procures to be made, any false or counterfeit mark on any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, boom chains, chains, lines or shackles; or

(*b*) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or authorized by such owner to receive the same, any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, boom chains, chains, lines or shackles.

It is a general rule that *mens rea* is an essential ingredient of criminal offences. Its meaning varies in relation to different offences, but it is generally described by Cave J. as "some blameworthy condition of the mind," *Chisholm v. Doulton* (1), or by Chief Justice Robertson as "at least an intention to do a wrong or to break the law," *Rex v. Stewart* (2), Tremeear, 5th Ed., p. 18; Russell on Crime, 10th Ed. p. 25.

While an offence of which *mens rea* is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention. Parliament created or defined the indictable offences under s. 394(*a*) and (*b*) in one sentence. Although it is not necessary to decide the point, the grammatical construction of the sentence, as well as the history of the section, suggests that Parliament intended the section should be construed in a manner that the word "fraudulently" is an essential ingredient of each of the offences therein defined.

(1) (1889) 22 Q.B.D. 736. (2) [1940] O.R. 178 at 181.

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Even if it be assumed that the word "fraudulently" is not included under the offence defined in s. 394(*b*), it does not follow that *mens rea* is not an essential ingredient thereof.

In *Bank of New South Wales v. Piper* (1), in the first part of the section an offence was created of which "with a view to defraud" was an essential ingredient, while in the latter part the offence created did not include these words and their Lordships of the Privy Council found no "ground for construing the section as if the words 'with a view to defraud' had been inserted" in the latter part. Their Lordships went on to point out the distinction between a specific intent and *mens rea* as essential ingredients of an offence. In the Piper case a fraudulent intent was required in the first part, yet while that was not required in the second part it did not follow that *mens rea* was not an essential ingredient. Even if, therefore, the word "fraudulently" should not be construed to apply to all the offences under s. 394, as above suggested, it does not follow that *mens rea* would not be an essential ingredient of the offence under s. 394(*b*). At p. 389 their Lordships stated:

> It was strongly urged by the respondent's counsel that in order to the constitution of a crime, whether common law or statutory there must be *mens rea* on the part of the accused, and that he may avoid conviction by shewing that such *mens* did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations.
>
> In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent. . . . The circumstances of the present case are far from indicating that there was no *mens rea* on the part of the respondent . . . Then he knew that he had not the written consent of the mortgagee; and that knowledge was sufficient to make him aware that he was offending against the provisions of the Act, or, in other words, was sufficient to constitute what is known in law as *mens rea*.

Parliament, in s. 394(*b*), defined an indictable offence in the same sentence with one in which fraud must be found as an essential ingredient and provides the same maximum

(1) [1897] A.C. 383.

penalty of three years for each offence. That is understandable if *mens rea* is an essential ingredient under s. 394(*b*), but, if one who is acting with an honest and reasonable belief that what he is doing is right and involves no breach of the law is guilty of the offence and liable to the same punishment, it involves a consequence that, apart from express language, ought not to be attributed to Parliament. As stated by Sir Richard Couch, "absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent." Piper case, *supra,* at p. 389.

Moreover, in the main, statutory offences that have been construed not to include *mens rea* as an essential ingredient have been enacted to promote public safety, health or morality. Section 394 is placed in the *Criminal Code* under the general heading "Offences Resembling Theft" and, therefore, directed to wrong doing in respect of property.

Section 990(2) places the onus upon one charged with any one of the offences under s. 394 to prove that the saw-logs "came lawfully into his possession." It would, therefore, seem that Parliament intended that if one had saw-logs lawfully in his possession he could retain them if he had a right thereto in the nature of a lien for services performed which the business or practice here gave to the appellants.

The evidence here does not justify the conclusion that the business or practice followed by the appellants existed as far back as 1892. It does, however, establish that it has existed over a sufficiently long period to justify the conclusion that these provisions were never directed against one who engages in the business of gathering saw-logs with the intent and purpose of returning them to the owner upon payment of salvage, or of purchasing them from the owner upon a basis recognized by both owners and others in the business, and all with the assistance and co-operation of a department of government.

With great respect to the opinion of the learned judges who entertain a contrary view, it would appear that *mens*

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rea is an essential ingredient of the offence under s. 394(*b*) and the evidence here did not establish that the appellants possessed that essential ingredient.

The appeal should be allowed.

LOCKE, J.:—The relevant facts in this matter are stated in the dissenting judgment of Robertson J.A. (1) and it is unnecessary to repeat them.

Whether or not Dickenson knew at the time he wrote to the appellants on September 4, 1951, that the logs referred to in the scale and royalty account No. 92492 were those of which Carson had demanded possession on August 20, that letter and the subsequent transaction between Gaunt and his partner and the Vanwest Logging Company Limited, whereby the former paid to the latter sixty per cent of the value of the logs, support the view that there was at the time in question an outstanding offer by the owners of these logs to pay to beachcombers either forty per cent of the market value of logs of that company which had gone adrift and been recovered qua salvage, or to sell them such logs for sixty per cent of their market value.

I respectfully agree with the reasons and with the conclusion of Mr. Justice Robertson and would allow this appeal.

CARTWRIGHT, J.:—For the reasons given by my brother Estey I agree with his conclusion that *mens rea* is an essential ingredient of the offence defined in clause (*b*) of section 394 of the *Criminal Code*. The findings of fact made by the learned trial judge, as set out in his oral reasons delivered at the conclusion of the trial and in his report made pursuant to section 1020(2) of the *Code*, appear to me to indicate not merely that *mens rea* on the part of the appellant was not established but that it was expressly negatived.

I would allow the appeal and restore the judgment of the learned trial judge.

(1) 104 Can. C.C. 207.

FAUTEUX, J.:—I agree that this appeal should be allowed. In enacting sections 394 and 990 of the *Criminal Code*, Parliament intended to provide a protection of the right of ownership of things therein mentioned and assure its adequate exercise by punishing such encroachments of the same as are described in the sections. These provisions necessarily assume the existence of a right of ownership and are therefore operative in the measure in which such a right or its exercise is not otherwise affected or conditioned either by laws of a competent legislature or by the very person vested with it. It cannot be presumed, for instance, that Parliament intended, by enacting ss. (*b*) of s. 394—i.e. by making the refusal to deliver to the owner a crime—, to defeat a contract authorized in civil matters under the terms of which a right to retain the logs until payment for services rendered would be given by the party owning these logs to the party gathering them.

In the present case, no one suggested that the appellants have, in relation to the logs in question, committed the offence described in paragraph (*a*) of s. 394. As to the charge actually laid against them under paragraph (*b*) of s. 394, the trial Judge found—and this finding is supported by the evidence—in an existing custom, an implied understanding between the appellants and the owners entitling the former, at the time when the logs would have to be delivered, either to be paid by the latter for their services or to purchase the logs they collected upon a basis recognized by both. The circumstances of this case do not bring the appellants within the scope of the sub-section on which they were charged.

Appeal allowed.

Solicitor for the appellants: *G. McDonald.*

Solicitor for the respondent: *S. J. Remnant.*

Solicitor for A.G. of Canada: *A. A. Moffat.*

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TONY POJE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

ATTORNEY GENERAL FOR BRITISH COLUMBIA ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contempt of Court—Disobedience to ex parte labour injunction—Proceedings pursued by Court of own motion—Whether Criminal or Civil contempt—Whether right of appeal.

On a motion to commit the appellants for disobedience to an *ex parte* injunction obtained by a steamship company restraining a labour union and its representatives from picketing a certain vessel, the trial judge, when informed by the parties that they had settled their differences and wished to discontinue the motion, proceeded *ex mero motu* to find on the evidence that the appellants had been guilty of contempt. This finding was upheld by a majority in the Court of Appeal for British Columbia.

Held: The appeal should be dismissed. There was evidence to warrant the finding of contempt and there was no substance to the objections raised as to the granting of the injunction, the jurisdiction of the trial judge and the procedure adopted by him.

Per Rinfret C.J., Rand and Kellock JJ.: The large numbers of men involved and the public nature of the defiance of the injunction rendered the conduct in question contempt of Court criminal in character. Consequently no appeal lay to the Court of Appeal.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, O'Halloran J.A. dissenting, a committal order (2) for breach of an *ex parte* labour injunction.

R. J. McMaster and A. B. MacDonald for the appellants.

D. M. Gordon Q.C. for the respondent.

The judgment of the Chief Justice, Rand and Kellock, JJ. was delivered by:—

KELLOCK J.:—The question which lies at the threshold of this appeal is one as to the jurisdiction and practice of the court with respect to contempt in circumstances such as are here involved.

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

(1) [1952] 7 W.W.R. (N.S.) 49. (2) [1952] 6 W.W.R. (N.S.) 473.

The Court of Chancery has for centuries enforced its orders by contempt proceedings, but it is well settled that such orders, when made merely in aid of execution of process for the benefit of a party, are to be regarded as purely civil in nature. It is equally well settled that conduct which renders appropriate contempt proceedings in aid of execution may have a criminal aspect as well.

In *Wellesley* v. *The Duke of Beaufort* (1), Lord Brougham had occasion to deal with the matter in a case of the clandestine removal from the proper custody of a ward of court. In holding that the contempt there in question was criminal and not civil and that no privilege attached to a Member of Parliament in such cases, the Lord Chancellor said at page 665:

> The line, then, which I draw is this; that against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not:

There are many statements in the books that contempt proceedings for breach of an injunction are civil process, but it is obvious that conduct which is a violation of an injunction may, in addition to its civil aspect, possess all the features of criminal contempt of court. In case of a breach of a purely civil nature, the requirements of the situation from the standpoint of enforcement of the rights of the opposite party constitute the criterion upon which the court acts. But a punitive sentence is called for where the act of violation has passed beyond the realm of the purely civil.

In *Ambard* v. *Attorney-General of Trinidad* (2), not an injunction case, Lord Atkin at page 74 said:

> Everyone will recognize the importance of maintaining the authority of the Courts in restraining and punishing interferences with the administration of justice, whether they be interferences in particular civil or criminal cases or take the form of attempts to depreciate the authority of the Courts themselves. It is sufficient to say that such interferences when they amount to contempt of Court are quasi-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases, . . .

(1) (1831) 2 Russ. & My. 638. (2) (1936) 105 L.J.P.C. 72.

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In *Izuora* v. *Reginam* (1), Lord Tucker, in delivering the judgment of the Privy Council, uses the following language:

It is clear that the appellant's conduct was treated by the judge as being contempt of a criminal kind, viz:

> "any act done . . . calculated to bring a court or a judge of the court into contempt or to lower his authority"

or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the courts": see *R.* v. *Gray* (2) (1900) 2 Q.B. 40.

In *in re Armstrong* (2), Vaughan Wiliams, J., as he then was, indicated the distinction between the two classes of contempts at page 329 as follows:

> But I do not think in the present case there is any element of personal contempt, or any offence committed for which Mr. Isaacson could be sent to prison *as a punishment*. I think that any imprisonment ordered in the present case would be by way of civil process, and would determine *ex debito justitiae* as soon as the person committed yielded obedience to the order of the Court and paid the costs.

The question arises as to the characteristics of criminal contempt of court as distinguished from mere disobedience of process. Halsbury, Vol. 7, 2nd edition, page 2, treats the subject thus:

> Contempt of court is either (1) criminal contempt, consisting of words or acts obstructing, or tending to obstruct, the administration of justice, or (2) contempt in procedure, consisting of disobedience to the judgments, orders, or other process of the Court, and involving private injury.

That this division is not, in the view of the editors, a mutually exclusive one, is clear from the following appearing on page 24:

> Contempt in procedure, unaccompanied by circumstances of misconduct, . . . is a contempt in theory only, . . . In circumstances involving misconduct, contempt in procedure partakes to some extent of a criminal nature, and then bears a twofold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the State, a penal or disciplinary jurisdiction to be exercised by the Court in the public interest.

Reference is made in support of the text last quoted to the judgment of Lindley L.J. in *Seaward* v. *Patterson* (3).

(1) [1953] 1 All. E.R. 827 at 829. (2) [1892] 1 Q.B. 327.
(3) [1897] 1 Ch. 545 at 555.

The statement in the note to the text quoted from page 2 that

> The distinction between criminal contempt and contempt in procedure appears *in some cases* to be a narrow one; e.g., if a party to an action disobeys a prohibitory order, such disobedience, even though wilful, is contempt in procedure, whereas persons who aid and abet such disobedience, and are not parties to the action, are guilty of criminal contempt. . . . The true distinction seems to be that one offender is seeking, though under a mistaken view, to enforce his rights, while the other is simply obstructing the course of justice.

is, therefore, not to be read without keeping in mind that "contempt in procedure" may itself be criminal if accompanied by "circumstances involving misconduct."

It does not therefore follow from the statement in the note that, even in the view of the editors, disobedience by a party to a prohibitory order, can never be more than a civil contempt.

In *Seaward* v. *Paterson* an injunction had been granted restraining the use of certain premises in a particular manner. The appellant was not a party to the proceedings but was aware that the injunction had been granted. It was held by the Court of Appeal that although not bound by the injunction any more than any other member of the public, the appellant was, like other members of the public, bound "not to interfere with and not to obstruct, the course of justice."

In his judgment in *Scott* v. *Scott* (1), the question in that case being whether the conduct there in question amounted to criminal contempt, if so, there being no right of appeal, Lord Atkinson reiterates that mere disobedience to an order of the court, even though wilful, does not amount to criminal contempt. In his view the conduct of the appellant in question in Seaward's case was purely civil contempt. Lord Atkinson criticized the judgment of Lindley L.J., in that case at pages 555-6 with respect to disobedience to an injunction by a person not a party to the proceedings. He regards the language of Lindley L.J., which he quoted, as failing to "grapple with the absurdity"

(1) [1913] A.C. 417.

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of considering conduct on the part of a non-party as criminal while considering the same conduct by a party as civil. He said at p. 459:

> It is difficult to conceive that a judge of Lord Lindley's well-known knowledge, ability and acuteness of mind would have gone through this long analysis of the subject without ever suggesting that either or both, of the kinds of contempt of Court with which he dealt was *necessarily* criminal, if he had so regarded it.

All that Lord Atkinson is insisting on is that *mere* disobedience, whether by a party or a stranger, is not *necessarily* criminal. But it may be so, depending upon the nature and quality of the conduct involved. At p. 461 he repeats (in speaking of *In re Freston* (1), a case involving the authority of the court to discipline its officers) that

> this case, so far from being an authority that disobedience *per se* of an order of Court, irrespective of the nature of the thing ordered to be done, is a criminal offence, is an authority to the contrary.

I think, however, having regard not only to the judgments in *Seaward's* case, but to the position taken by counsel for the appellant, that both court and counsel considered they were dealing with a case of criminal contempt.

At p. 554, Lindley L.J., points out that it was argued for the appellant that

> the only course to pursue would be to proceed against him by *indictment.*

This, of course, is not language appropriate to civil contempts, although no objection to entertainment of the appeal was raised by the respondent. A similar situation had occurred in *Reg.* v. *Jordan* (2), as Lindley L.J., himself had pointed out in *O'Shea* v. *O'Shea* (3).

The judgments in *Seaward's* case are relevant to the case at bar only from the point of view that conduct in the face of an injunction, while not *necessarily* criminal, is not necessarily purely civil either. It may be either, depending upon the nature and quality of the conduct in question in any particular case.

At page 555, Lindley L.J., said:

> A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is

(1) (1883) 11 Q.B.D. 545. (2) (1888) 36 W.R. 797.
(3) (1890) 15 P.D. 59 at 64.

bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bond by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the Court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls.

While the contrast Lord Lindley draws is between contempt proceedings as mere process against a party for the purpose of compelling obedience to an order of the court in the interests of the party obtaining it and proceedings against a person not a party who has "contumaciously set at naught" the order, and while he does not indicate that in the latter case the contemp again may be either civil or criminal, I think the apparent omission is explained by the fact, already pointed out, that the court was in fact dealing with conduct which all concerned regarded as criminal. Lord Lindley, at p. 553, said that he regarded the case as "not anywhere near the line. It seems to me a plain straight forward case."

At p. 558, Rigby L.J., said:

I will only say a few words on the argument of Mr. Seward Brice with reference to the jurisdiction of the Court in matters of contempt of Court with relation to injunctions. Unless I entirely misapprehended that argument, it went so far as this, that the Court has no jurisdiction to commit for contempt *by way of punishment;* but that the jurisdiction is an ancillary or subsidiary jurisdiction in order to secure that the plaintiff in a suit shall have his rights. I do not think that that can be for a moment maintained . . . That there is jurisdiction to punish for contempt of Court is undoubted. It has been exercised for a very long time . . . and it is a punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of the Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court.

Rigby L.J., was not speaking, and did not find it necessary to speak of civil contempt. It would appear that North J., the judge of first instance, had also regarded the appellant's contempt as criminal. The actual committal

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was for a definite term. This is punishment as opposed to an order of the civil type exemplified in *Avery* v. *Andrews* (1).

The authorities make it plain that a party and a non-party are on exactly the same footing so far as contempt of court is concerned. In *Wellesley* v. *The Earl of Mornington* (2), the court refused to commit a servant of the defendant, who was not a defendant, for breach of an injunction but, as appears at page 181, on a motion to commit him for contempt the court did so. Again, as pointed out by Lord Atkinson, the view taken as to the nature of the contempt does not appear from the report and that is not important from the standpoint of the case at bar. *Avery* v. *Andrews* (1), may also be referred to.

In *re Eede* (3), the appellant had been struck off the roll of solicitors for having permitted his name to be made use of in an action by an unqualified person. The Court of Appeal held that an appeal lay as the order was not made in a criminal cause. Lord Esher referred to the pertinent section of the *Attorneys and Solicitors Act* 1843, which authorized the striking off and also authorized the unqualified person to be committed to prison. He pointed out that the section recognized that in dealing with a solicior the court was merely exercising its disciplinary powers but that

> it is easy to see that that punishment inflicted on the unqualified person must be in a criminal matter; but the Act obviously draws a clear distinction between the two cases.

In *re Freston, supra,* is an example of the first class of case.

In my opinion the statement in Oswald, the 3rd edition, at page 36, correctly distinguishes between civil and criminal contempts:

> And, generally, the distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court, or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involves a *public* injury or offence, it is criminal in its nature, and the proper remedy is committal—but where the contempt involves a private injury only it is not criminal in its nature.

(1) (1882) 30 W.R. 564. (2) (1848) 11 Beav. 180.
(3) (1890) 25 Q.B.D. 228.

It is with this distinction in mind that the judgment of Chitty J., in *Harvey* v. *Harvey* (1), is, I think, to be read. The learned judge there said:

> Interference with a ward of Court, interfering with the due administration of justice, as by intimidating witnesses, or ill-treating a process server, and breaches of an injunction, were and still are all alike treated as in the nature of offences punishable by committal.

Interference with a ward of court, *Wellesley* v. *Duke of Beaufort, supra;* intimidation of witnesses, *R.* v. *Steventon* (2); ill-treating a process server, *Lewis* v. *Owen* (3); are all criminal contempts.

It should be said that the conduct in question in *Scott* v. *Scott* involved nothing in the nature of a "public" injury if it could be considered to be contempt at all. In the view of Viscount Haldane and of Lord Shaw, the order for hearing in camera was ultra vires and therefore there could be no contempt of that order at all. Earl Loreburn considered that the publication "in good faith" of the evidence by the petitioner could not be treated as in contempt of an order she had herself obtained "for her protection". Lord Atkinson arrived at the same result as Viscount Haldane, but considered the order for hearing in camera to have been "spent when the case terminated."

In the case at bar the plaintiff's ship had arrived at the government dock in Nanaimo on the 7th of July, 1951, for the purpose of loading lumber then piled upon the dock. It appears that a strike of members of a union, known as The International Wood Workers of America, was then in progress but it was not the members of that union but longshoremen who were required for the purpose of loading the ship on its arrival. It appears, however, that the woodworkers had established a "picket line" at the entrance to the bridge leading to the government dock, by reason of which the plaintiff company was unable to have the loading continued, the longshoremen refusing to cross. So far as the evidence shows, the Woodworkers Union had no interest in the actual lumber on the dock to be loaded nor in the ship nor its crew.

(1) (1884) 26 Ch. D. 644 at 654. (2) (1802) 2 East 362.
(3) (1894) 1 Q.B. 102.

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In this situation the plaintiff applied *ex parte* to Clyne J., and obtained an injunction restraining the defendants, their servants and agents, from

(a) "watching or besetting, or causing to be watched or beset, the M.S. *Vedby* at the government assembly dock in the City of Nanaimo and the approaches thereto by land or sea;"

(b) "from preventing or interfering with the loading of the said M.S. *Vedby*;"

(c) "and from preventing access to and from the said ship by any persons seeking to embark or depart from the said ship."

This order was served upon the appellant Tony Poje on the 15th of July and a copy was posted on the bridgehead in the presence of Poje and six pickets. On the following day, July 16, the Sheriff returned at noon and found at approximately 12.25 p.m., one hundred and fifty men at or near the landward end of the bridge and another thirty at its end nearest the ship. The bridge is some forty or fifty feet wide and its landward end was completely blocked. The legend "I.W.A. is on Strike for Better Wages and Conditions" was displayed on posters being carried and was also posted on the railing of the bridgehead as well as chalked on the asphalt road.

The Sheriff informed the men at the bridgehead that longshoremen would report to load the ship at approximately 12.30 p.m., and shortly before that, when the pickets showed no sign of dispersing, he announced to the men at both ends of the bridge that he was the Sheriff of the county and read the material parts of the order of Clyne J., informing them that he considered them all to be in contempt of court but the pickets paid no attention to him. Shortly after this several cars carrying longshoremen entered the area, one driving directly to the bridge. The occupants of this car were interrogated by the appellant Tony Poje as to who they were. On being informed that they were longshoremen and being asked if they were to load, Poje replied in the negative. Matters remained in this situation until about 2.15 when the Sheriff left, the longshoremen remaining in the area outside the picket line.

On returning at 4.30 p.m., the Sheriff found the situation the same, with the longshoremen still waiting. On returning at 7 p.m. he found no longshoremen and six pickets only.

On July 18 and 19 the Sheriff went to the locality on a number of occasions and found on each occasion only six pickets patrolling the bridgehead. He found none on Sunday, July 20. On the following day he again attended on a number of occasions throughout the day and found only six pickets at the bridgehead.

On July 22, at 8.30 a.m. the situation was the same. Later in the morning the Sheriff was instructed that longshoremen would be reporting for work at 1 p.m. At 10 a.m., on going to the area, he found sixteen pickets there, and at 12.15, he found fifty men assembled at the bridgehead and along the roads leading to it with the appellant Tony Poje apparently in charge. At approximately 12.30 p.m. the number of men at the bridgehead increased to approximately seventy. The Sheriff again read the operative parts of the injunction order, told those present they must disperse, but that did not occur, there being some "snickers" at the Sheriff's statement. On this occasion all of the appellants were in the group. At this time the longshoremen were present on the other side of the street opposite the bridgehead.

On July 22 the defendants served notice of motion for an order setting aside the order of Clyne J., and on the following day the plaintiff moved to commit those concerned for disobedience to the said order. These motions were returnable on the 24th of July, but on that day the parties to the action settled their differences, it being agreed that the plaintiff would discontinue his action and the motion to commit, and that the motions would be spoken to on the 29th.

On the last mentioned day the matter came before the learned Chief Justice of British Columbia, who was informed by counsel of the position. The learned Chief Justice indicated to counsel, however, that on the material, it appeared that there might have been a contempt of which the court should take notice. He, therefore, adjourned the matter to the 8th of September, informing counsel that the Sheriff would be asked to report and that the Court might decide to initiate contempt proceedings of its own motion.

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On the 8th of September, the Sheriff was called and deposed to the facts set out above, and the learned Chief Justice then announced that he proposed to direct the issue of writs of attachment, directed to the appellants and others, under which they would be taken into custody and brought before the court on September 15, but that they would be allowed to remain in the custody of counsel for the appellant upon his undertaking that they would be brought before the court on that day, or they might be permitted to enter into their own recognizance.

Writs of attachment were accordingly issued and the matter came before court (1) again on the 15th of September. The appellants were represented by counsel, the Sheriff repeated the evidence he had given on the previous occasion. He was cross-examined and counsel for the appellants on this occasion admitted that the Sheriff's "evidence" as to the congregation of men on the various occasions was in accordance with the fact. The orders here in question were made on the following day.

It is plain, I think that so far as the learned Chief Justice was concerned, he considered that the facts before him amounted to a criminal contempt of court. So far as the immediate parties to the action were concerned, all matters in question between them had been adjusted. The plaintiff was no longer interested in enforcement of the injunction and had agreed to drop the proceedings for enforcement by way of committal. It was the court which at that point stepped in, the proceedings from then on being purely punitive. In my opinion the learned Chief Justice had jurisdiction so to deal with the matter.

It is idle to suggest that on the evidence the presence of these large numbers of men blocking the entrance to the bridge was intended merely for the purpose of communicating information. That had been very efficiently done for a considerable time by the six pickets with their signs or cards, and the notices at the bridgehead. The congregation of the large numbers of men at the times that the longshoremen were to arrive had no other object or effect than to present force.

(1) [1952] 6 W.W.R. (N.S.) 473.

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The context in which these incidents occurred, the large numbers of men involved and the *public* nature of the defiance of the order of the court transfer the conduct here in question from the realm of a mere civil contempt, such as an ordinary breach of injunction with respect to private rights in a patent or trade-mark, for example, into the realm of a public depreciation of the authority of the court tending to bring the administration of justice into scorn. It is to be observed that the nuisance created by the incidents referred to brought the appellants within the scope of s. 501 of the *Criminal Code*; *Reners* v. *The King* (1). S. 165 as well as s. 573 were also infringed. There is no doubt that the appellants and those associated with them were acting in concert. Their conduct was thus entirely criminal in character in so far as these specific offences are concerned. Over and above these offences, however, the character of the conduct involved a public injury amounting to criminal contempt.

In these circumstances, I think the order of the learned Chief Justice was properly made, and as the proceeding was a criminal proceeding, an appeal to the Court of Appeal was not competent; *Storgoff* v. *Attorney General* (2). It follows that the rules of court are inapplicable as they apply only in civil proceedings.

It is immaterial by what means the appellants were in court. The court had jurisdiction to deal with them when there; R. *v. Hughes* (3). Nor do I think the order of Clyne J., may be treated as in any sense a nullity. There is no application before us for leave to appeal directly to this court from the order of the learned judge of first instance under s. 41 of the *Supreme Court Act,* but having regard to my view as above expressed, I would not, in any event, be inclined to grant such leave.

The appeal should be dismissed.

KERWIN J.:—I am unable to discover any substance in the objections raised by the appellants to what are in my opinion mere matters of procedure so far as concerns the order of Mr. Justice Clyne granting an injunction. Furthermore, on any view of the matter, Chief Justice Farris (4)

(1) [1926] S.C.R. 499.
(2) [1945] S.C.R. 526.
(3) (1879) 4 Q.B.D. 614.
(4) [1952] 6 W.W.R. (N.S.) 473.

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had jurisdiction, sitting in a Court of record, to hear the application for attachment or committal for the alleged contempt in failing to obey that injunction, and I can find no merit in any of the objections raised to the procedure adopted by the Chief Justice. There was evidence sufficient to warrant the finding of contempt and I am unwilling to interfere with the orders made by him with respect to the various appellants. Without expressing any opinion as to the other matters argued, I would dismiss the appeal without costs.

ESTEY, J.:—I agree the appeal should be dismissed. The learned Chief Justice (1), in my opinion, upon this record had jurisdiction to hear the motion. I am in respectful agreement with the conclusions of the majority of the learned judges in the Court of Appeal (2), both with respect to the objections taken to the order as made by Mr. Justice Clyne and the findings of the learned Chief Justice. In view of the foregoing it is unnecessary to determine the nature and character of the contempt.

Appeal dismissed with costs.

Solicitor for the appellants: *A. MacDonald.*

Solicitor for the respondent: *E. Pepler.*

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(1) [1952] 6 W.W.R. (N.S.) 473. (2) [1952] 7 W.W.R. (N.S.) 49.

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IMMOVABLES— *Immovable — Removal of building and incorporation with another—Notice of ownership—Promise of sale—Conditional—Tradition and actual possession —Payment of purchase price—Whether Art. 416 C.C. applies—Meaning and scope of word "materials" in Art. 416 C.C.—Arts. 376, 415, 416, 417, 418, 419, 1478, 1487 C.C.* The respondent agreed to sell to R under promise of sale, accompanied by tradition and actual possession, a certain lot with the buildings thereon. The purchase price was to be paid in two instalments. There was an absolute prohibition to register the promise, and it was further stipulated that the deed of sale would not be signed until payment of the whole purchase price and that the respondent would not be obliged to avail himself of the clause which provided for the nullity of the promise for non-compliance of all the conditions thereof. Before the first instalment on the purchase price had become due, R sold a house and shed of the buildings thereon to the appellant who, as stipulated between the latter and R, removed them to his own land where he united the house with a second building which he had purchased, and after alterations and improvements of the whole made his residence. The respondent registered a notice of ownership of the building against the appellant's land. The latter took action to have the notice radiated. The trial judge maintained the action on the ground that, by virtue of Art. 1478 C.C., R had become the owner of the building and could, therefore, give title to the Appellant. The Court of Appeal for Quebec reversed that judgment. *Held* (Taschereau and Fauteux JJ. dissenting), that the appeal should be allowed. *Held:* The promise of sale given by the respondent, although accompanied by tradition and actual possession, was not in this case equivalent to a sale (Rinfret C.J. contra and Rand J. expressing no opinion). *Per* Rinfret C J : The promise of sale was not dependent on any conditions which prevented the application of Art. 1478 C.C. The respondent was not any more the owner at the time of the sale to the appellant. Besides the fact that the respondent was not obliged to avail himself of the clause providing for the nullity of the promise, the sale of the appellant was made before any payment had become due to the respondent. There existed, therefore, at that time no condition to be discharged and the nullity clause could not operate. There was no suspensive condition attached to the promise. What was suspended until the last payment was not the transfer of property but the signing of the deed. A finding of good faith is a question of fact

IMMOVABLES—*Continued*

and, in view of the trial judge's finding that the appellant was in good faith when he purchased from R there was no justification here to set aside such finding. In this case, the improvements made by the appellant were so extensive that they greatly exceeded the value of the building purchased from R and the respondent could not pretend that he was still the owner by application of Arts. 418 and 419 C.C. *Per* Rand J.: Assuming that ownership did not pass to the purchaser from the respondent, the inseverable incorporation of the structure in his house and land gave the appellant, by virtue of Art. 416 C.C. which embodies the general rule of accession, title thereto: the respondent has, therefore, no interest in the appellant's land which could be protected by registration. *Per* Estey J.: The terms contained in the promise of sale do not permit of its being classified as a sale within the meaning of Art. 1478 C.C. But by virtue of the law of accession, the appellant became the owner of the house and shed. The act of accession determines the question of ownership and if that act comes, as it did here, within the terms of Art. 416 C.C., the owner of the materials can only recover their value or damages. The construction of the word "materials" in Art. 416 C.C should not be restricted to the word "movables". As ordinarily used and understood in such a context, the word includes everything movable or immovable, necessary or incidental to the completion of the buildings or works. The word is used here in a broad and comprehensive sense which would include the attachment or incorporation of a small building with a larger one, when the latter is attached to the land. The question of good or bad faith does not affect the appellant's title but may be important in fixing compensation. *Per* Taschereau and Fauteux J. (dissenting): By the terms of the promise of sale, the transfer of property was suspended until all the payments on the purchase price had been made. The seller to the appellant did not have the ownership and that sale, therefore, was null as being the sale of a thing which did not belong to the seller (Art. 1487 C.C.). There is a presumption *juris et de jure* that the appellant was not in good faith, and even if it could be said that he was, his good faith could not validate his purchase as against the respondent. The appellant cannot invoke the provisions of Art. 416 C.C. The word "materials" in that article must be taken in its usual sense; it does not include immovables but only those movables which can be classified as materials. It is only by the incorporation to an immovable that the materials lose their nature of movable to acquire that of the immovable. The respondent's house, after its removal to the appellant's land, did not constitute "materials". Moreover, that building was